

# From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence

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*The years 2014 to 2016 likely will go down as a significant if not watershed period in the history of U.S. race relations. Police killing of African Americans has engendered further conversations about race and policing. Yet, in most of the discussions about these tragic deaths, little attention has been paid to a significant dimension of the police violence problem: the legalization of racial profiling in Fourth Amendment law. This legalization of racial profiling is not a sideline or peripheral feature of Fourth Amendment law. It is embedded in the analytical structure of the doctrine in ways that enable police officers to force engagements with African Americans with little or no basis. The frequency of these engagements exposes African Americans not only to the violence of ongoing police surveillance, contact, and social control but also to the violence of serious bodily injury and death. Which is to say, Fourth Amendment law facilitates the space between stopping black people and killing black people. This Article demonstrates precisely how by employing a series of hypotheticals to reveal the ways in which the extraordinary violence police officers often use against African Americans*

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*can grow out of the ordinary police interactions Fourth Amendment law empowers police officers to stage.*

Introduction: A Watershed Moment .....	127
I. The Seizure Doctrine.....	131
A. Introduction.....	131
B. The Hypotheticals .....	132
Decision 1: To Follow .....	132
Decision 2: To Approach.....	133
Decision 3: To Question Whereabouts and Identity .....	133
Decision 4: To Question on a Bus .....	135
Decision 5: To Question About Immigration Status.....	137
Decision 6: To Seek Permission to Search .....	137
Decision 7: To Infiltrate.....	138
Decision 8: To Conduct Voluntary Interviews .....	139
Decision 9: To Conduct Computer Surveillance .....	144
Decision 10: To Investigate to Verify Welfare Eligibility.....	145
Decision 11: To Conduct Surveillance of Homeless Dwelling ...	145
Decision 12: To Chase.....	146
II. The “Reasonableness” Doctrine.....	149
A. Introduction.....	149
B. The Hypotheticals .....	151
Decision 1: To Enforce the Traffic Violation .....	151
Decision 2: To Use the Traffic Infraction as Pretext .....	152
Decision 3: To Question Regarding a Drug Crime.....	156
Decision 4: To Do a Records Check.....	157
Decision 5: To Contact Immigration and Customs Enforcement.....	157
Decision 6: To Ask the Driver or the Passenger to Exit Car .....	157
Decision 7: To Search Car and Frisk Driver.....	158
Decision 8: To Use a Drug-Detection Dog.....	158
Decision 9: To Seek Permission to Search .....	159
Decision 10: To Arrest and Search .....	161
Decision 11: To Conduct a DNA Search.....	161
Decision 12: To Strip Search .....	162
Conclusion .....	163

## INTRODUCTION: A WATERSHED MOMENT

Why are African Americans so often the victims of police violence?<sup>1</sup> Why are police officers so rarely prosecuted for the acts of violence they commit?<sup>2</sup> And why, when officers are prosecuted, do judges and juries seldom hold them accountable?<sup>3</sup> These are just some of the questions that people across the United States continue to ask in what we might call “post-Ferguson America.”

But our collective engagement of the foregoing questions has elided an important dimension of the police violence problem: Fourth Amendment law. It permits police officers to force interactions with African Americans with little or no basis. This “front-end” police contact—which Fourth Amendment law enables—is often the predicate to “back-end” police violence—which Fourth Amendment law should help to prevent.

A report by the Missouri Attorney General reveals that black residents in Ferguson have had significant front-end contact with the police.<sup>4</sup> Ferguson is roughly 67 percent black and 29 percent white. Out of 611 searches that police officers in Ferguson conducted in 2013, 562 (90 percent) were of African Americans, while 47 (8 percent) were of whites.<sup>5</sup> Moreover, of the 21 searches that lasted between 16 and 30 minutes, 20 were of African Americans and 1 was of a white person.<sup>6</sup> With respect to stops, the statistics, though less stark in their racial disparity, at the very least raise a question about whether the Ferguson police were engaged in racial profiling. Of 2,489 stops, 1,983 (80 percent) were of African Americans and 469 (19 percent) were of whites.<sup>7</sup> When police officers stopped cars for investigatory purposes (i.e., for reasons other than traffic infractions), they likewise focused their attention on African Americans. Of such searches, 328 of 363 (90 percent) were of African Americans; only 27 (7 percent) were of whites.<sup>8</sup> Finally, Ferguson police arrest records reveal a similar racial pattern. Whereas 4,632 out of 5,384 (86 percent)

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1. For an excellent account of the ways in which this violence is gendered in ways that affect black women, see KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE, *SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN* (2015), [http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/55a810d7e4b058f342f55873/1437077719984/AAPF\\_SMN\\_Brief\\_full\\_singles.compressed.pdf](http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/55a810d7e4b058f342f55873/1437077719984/AAPF_SMN_Brief_full_singles.compressed.pdf) [<https://perma.cc/4DU5-7BQT>].

2. See Kimbriell Kindy, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted> [<https://perma.cc/MDA9-25RX>]; Jaeah Lee, *Exactly How Often Do Police Shoot Unarmed Black Men?*, MOTHER JONES (Aug. 15, 2014), <http://www.motherjones.com/politics/2014/08/police-shootings-michael-brown-ferguson-black-men> [<https://perma.cc/GVY3-9ADX>].

3. Kindy, *supra* note 2; Lee, *supra* note 2.

4. See MO. ATT’Y GEN., *RACIAL PROFILING DATA* (2013), <http://ago.mo.gov/vehicle-stops-report?lea=161> [<https://perma.cc/A7PY-6H8N>].

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

of the arrests were of African Americans, 686 (13 percent) were of whites.<sup>9</sup> A 2015 U.S. Department of Justice report tells the same basic story.<sup>10</sup>

Racially disproportionate policing is endemic elsewhere in the country, too, as recent litigation over police overuse of stops-and-frisks in New York City attests.<sup>11</sup> Across the United States, police officers routinely force interactions with African Americans.<sup>12</sup> Because these interactions are often the precursors to excessive force, including homicide, they should figure more prominently in our analysis of police violence.

Writing in a different context, Angela Y. Davis makes a very similar point. She observes:

We tend to think about torture as an aberrant event. Torture is extraordinary and can be clearly distinguished from other regimes of punishment. But if we consider the various forms of violence linked to the practice of imprisonment—circuits of violence linked to one another—then we begin to see that the extraordinary has some connection to the ordinary.<sup>13</sup>

Davis's point about torture applies to police killings. By and large, Americans tend to think of police killings of African Americans as aberrant and extraordinary, failing to see their connections to the routine, to the everyday, and to the ordinary. A central aim of this Article is to disrupt that tendency. I do so by highlighting the significant "circuits of violence" through which the ordinary (African Americans' vulnerability to ongoing police surveillance and contact) becomes the extraordinary (serious bodily injury and death). Informing this focus is my view that if the law more tightly restricted police officers' authority to investigate African Americans, this would both increase the social value of our lives and diminish officers' opportunities to kill us. For there is a direct relationship between the scope of ordinary police authority, on the one hand, and African American vulnerability to extraordinary police violence, on the other. This Article focuses on the former—ordinary police authority—to reveal how it can function as a predicate for the latter—extraordinary police violence.

A significant part of the problem is Fourth Amendment law. Few people understand that the Fourth Amendment is one of the most important constitutional provisions for regulating police conduct. More important than the

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9. *Id.*

10. U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4–5 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/4VEE-KV9K>].

11. *See* *Floyd v. City of New York*, 2014 WL 3765729 (S.D.N.Y. 2014); *see also* *Floyd v. City of New York*, 959 F. Supp. 2d 668, 671 (S.D.N.Y. 2013).

12. *See generally* Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57 (2014); Freddie Allen, *Police Killings Underscore Need for Reform*, SUN REP., Feb. 12, 2015, at 3.

13. ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 62 (2011).

*Miranda* warnings,<sup>14</sup> more important than the right to counsel,<sup>15</sup> more important than equal protection and due process rights,<sup>16</sup> Fourth Amendment law is ground zero for understanding the constitutional constraints on police investigation practices. It is Fourth Amendment law that determines when the police can engage us, and it is Fourth Amendment law that determines the circumstances under which those engagements are reasonable. Because every encounter police officers have with African Americans is a potential killing field, it is crucial that we understand how Fourth Amendment law effectively “pushes” police officers to target African Americans and “pulls” African Americans into contact with the police. Racial profiling is an important part of the story.

Over the past four decades, the Supreme Court has interpreted the Fourth Amendment to enable and sometimes expressly legalize racial profiling. By racial profiling I mean, borrowing from Randall Kennedy, a process in which police officers use “race as a factor in deciding who to place under suspicion and/or surveillance.”<sup>17</sup> As I will show, the Court’s legalization of racial profiling exposes African Americans not only to the violence of ongoing police surveillance and contact but also to the violence of serious bodily injury and death. Put another way, the legalization of racial profiling facilitates the precarious line between stopping black people and killing black people.

The claim that the Court enables and sometimes expressly authorizes racial profiling might sound like hyperbole, but it is not. To understand the scope of the problem, it is helpful to distinguish between the *de jure* legalization of racial profiling (or instances in which it is permissible as a matter of law under Fourth Amendment doctrine for police officers to employ race as a basis for suspicion) and the *de facto* legalization of racial profiling (or instances in which Fourth Amendment law turns a blind eye to racial profiling or makes it easy for the police to get away with the practice). Throughout this Article I will sometimes speak generally about the legalization of racial profiling. When I do so, I mean to refer to both the *de jure* and the *de facto* dimensions of the problem.<sup>18</sup>

The Supreme Court’s legalization of racial profiling is embedded in the very structure of Fourth Amendment doctrine. At the core of this doctrine is a prohibition against unreasonable searches and seizures.<sup>19</sup> The Court’s inquiry as to whether the government violates this prohibition is twofold. The first, or

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

15. *Massiah v. United States*, 377 U.S. 201 (1964).

16. *Brown v. Mississippi*, 297 U.S. 278 (1936) (establishing due process constraints on police investigation practices).

17. Randall Kennedy, *Suspect Policy*, 221 NEW REPUBLIC 30, 35 (1999).

18. I am not saying that Fourth Amendment law legalizes racial profiling in the sense of making racial profiling legal across every legal regime. I am pointing to the legality of racial profiling under Fourth Amendment law.

19. U.S. CONST. amend. IV.

what I call the “trigger question,” is: Does a police officer’s conduct constitute a search or seizure under the Fourth Amendment? The second, or what I call the “justification question,” asks: Assuming that police conduct constitutes a search or seizure, is that search or seizure reasonable, and hence justified? By persistently answering the former question negatively (the Fourth Amendment was not triggered) and the latter question affirmatively (a search or seizure was justified), the Supreme Court has legalized racial profiling. This legalization of racial profiling has left African Americans less secure in their “persons, papers, houses and effects”<sup>20</sup>—and sometimes dead. Put another way, African Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures.

This Article proceeds in two parts. Part I discusses the cases in which the Supreme Court has ruled that particular police practices fall outside the scope of the Fourth Amendment. The discussion includes immigration enforcement cases and war on terror surveillance practices. My aim is to demonstrate—with some specificity—the broad discretion police officers have to force race-based interactions with African Americans without triggering the Fourth Amendment.

Part II focuses squarely on the Fourth Amendment’s “justification” analysis, or the cases in which the Supreme Court decides whether a particular search or seizure is reasonable. My point of departure is traffic stops. That traffic infractions can be a site for racial profiling will surprise no one. Presumably, we are all by now familiar with the pithy if demoralizing expressions “Driving While Black” or “Driving While Brown.”<sup>21</sup> Part II explains that the racial profiling problem that traffic stops present transcends the stop itself. Stopping a car is one of a range of legal options Fourth Amendment law empowers the officer to pursue. The existence of these options, including the authority to arrest, renders traffic stops gateway seizures. The options open the door to more intrusive, potentially violence-producing—but constitutionally reasonable—encounters with the police.

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20. *Id.*

21. See, e.g., Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1030–31 (2002); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999); Adero S. Jernigan, *Driving While Black: Racial Profiling in America*, 24 LAW & PSYCHOL. REV. 127 (2000); Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1 (2005); Katheryn K. Russell, *“Driving While Black”: Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999); Victoria Bekiempis, *Driving While Black in Ferguson*, NEWSWEEK (Aug. 14, 2014), <http://www.newsweek.com/ferguson-profiling-police-courts-shooting-264744> [perma.cc/54XC-UQSN]; Wesley Lowery, *In Ferguson, Racial Questions Have Long Hung over Police Force*, WASH. POST, Aug. 14, 2014, at A1 (“It has been ‘very hostile’ for years, said Anthony Ross . . . ‘Everybody in this city has been a victim of DWB [driving while black].’”); Andrea F. Siegel, *Victory for NAACP in Racial-Profiling Case; Maryland State Police Must Release Records on “Driving While Black,”* WASH. POST, Feb. 3, 2010, at B5; *Tell Me More: “Driving While Brown”* (NPR radio broadcast Aug. 20, 2009).

Together, Parts I and II throw into sharp relief an insufficiently acknowledged rule-of-law problem—namely, that Fourth Amendment doctrine expressly authorizes or facilitates the very social practice it ought to prevent: racial profiling. This authorization and facilitation exposes African Americans not only to the violence of frequent police contact but also to the violence of police killings and physical abuse.<sup>22</sup>

## I.

### THE SEIZURE DOCTRINE

#### A. Introduction

This Section describes the Supreme Court’s seizure and, to a lesser extent, search analysis and how they render African Americans vulnerable to repeated police interactions. The point of departure is a doctrinal exegesis of the relevant cases, though not through a case-by-case explication. Instead, I construct a series of hypotheticals to illustrate a number of decisions police officers can make without implicating the Fourth Amendment. One of the reasons I adopt this pedagogical approach pertains to accessibility. I want this Article to function both as scholarship and as a document that community organizers, legal advocates, and policymakers can employ to facilitate not only know-your-rights campaigns, including those that are being conducted as part of the Black Lives Matter movement,<sup>23</sup> but also what we might call *know-your-rightlessness* campaigns. African Americans in particular need to understand precisely how Fourth Amendment law underprotects them and overprotects the police.

The second reason I advance my arguments in the form of hypotheticals is to help law students contest the marginalization of race in criminal procedure casebooks and courses. As best I can tell, no casebook in the field foregrounds the racial dynamics my hypotheticals will present, notwithstanding that these dynamics derive directly from “black letter” Fourth Amendment doctrine.<sup>24</sup>

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22. There is significant limitation to the analysis this Article performs. It does not discuss the role stop-and-frisk plays in facilitating police violence. I take up that issue in a separate article.

23. The Black Lives Matter movement and its companion hashtag, #BlackLivesMatter, started and spread in the wake of the 2013 acquittal of George Zimmerman for the 2012 shooting death of African American teenager Trayvon Martin in Florida, which was followed by numerous other cases like those mentioned in the introduction to this Article. *See, e.g.*, Jessica Guynn, *Meet the Woman Who Coined #BlackLivesMatter*, USA TODAY (Mar. 4, 2015), <http://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-lives-matter/24341593> <https://perma.cc/45JP-W4FF>]; Khury Petersen-Smith, *Black Lives Matter: A New Movement Takes Shape*, INT’L SOCIALIST REV. (2015), <http://isreview.org/issue/96/black-lives-matter> [<https://perma.cc/AFM8-Y2ZH>]; BLACKLIVESMATTER.COM, <http://blacklivesmatter.com> [<https://perma.cc/PF7C-6NML>] (last visited Aug. 13, 2015).

24. *See* Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1549, 1614–15 (2011) (discussing the absence of race from criminal procedure casebooks). A recently published casebook, though not organized in the way I am suggesting, does meaningfully engage race. *See* CYNTHIA LEE ET AL., *CRIMINAL PROCEDURE, CASES AND MATERIALS* (2016).

The marginalization of race in criminal procedure textbooks might explain why, year after year, when I discuss criminal procedure with law students across the country, including with those who have taken the course, they are surprised to learn that Fourth Amendment law legalizes racial profiling in the ways I will describe. Moreover, in the context of these discussions, the students explain that they have difficulty persuading their professors to talk about race in class, even when the students themselves raise the topic. Indeed, students are particularly disturbed that when they muster enough courage to push forward with a discussion of race, their professors and other students send clear signals that the students' racial engagements are taking the conversation "off track." My hope is that by employing hypotheticals to show that race is a structural feature of Fourth Amendment jurisprudence, not an exceptional or sideline dimension of the doctrine, I am arming students to articulate their racial interventions in class not just as normative or policy claims but also as doctrinal arguments within the analytical framework of Fourth Amendment law.

### *B. The Hypotheticals*

The hypotheticals I present below are examples of the de facto legalization of racial profiling. This is because the Supreme Court's conclusion that *X* or *Y* police conduct does not trigger the Fourth Amendment renders the question of whether that conduct is racially motivated entirely moot. In other words, conduct that is not a search or seizure may be racially motivated, consistent with Fourth Amendment law. Essentially this means that every decision in which the Court determines that police conduct does not trigger the Fourth Amendment gives police officers discretion to racially select whom they subject to that conduct. In this respect, each time the Supreme Court concludes that the Fourth Amendment is not triggered, it allocates not merely power to police officers, but a particular form of racial power. The following examples illustrate what I mean.

#### *Decision 1: To Follow*

Assume that Tanya, an African American woman, is walking home from work at nine in the evening. Two officers observe her. They have no reason to believe that Tanya has done anything wrong. Nonetheless, they decide to follow her. Indeed, they follow her all the way home. They do so to ensure that Tanya does not commit a crime (a sex crime, let's say), and to arrest her if she does. Remember, the officers have no objective reason to believe that Tanya has done—or will do—anything wrong. There is no objective evidence, in other words, that Tanya has ever engaged in prostitution. Nevertheless, they follow her based solely on their gendered racial suspicion of black women as sex workers.

The foregoing conduct would not trigger the Fourth Amendment.<sup>25</sup> The Supreme Court would conclude that Tanya has not been seized. Indeed, the officers haven't even approached her. That the officers' decision to follow Tanya was racially motivated along the gendered lines I have suggested does not matter. The Fourth Amendment is not a bar to this form of racialized surveillance.

*Decision 2: To Approach*

Stipulate now that the police officers decide to approach Tanya. That alone would not trigger Fourth Amendment protections. In this context as well the Court would conclude that Tanya has not been seized.<sup>26</sup> Because following and approaching Tanya is not conduct that implicates the Fourth Amendment, the officer does not need a prior justification to do so. As with the previous example, the outcome of this hypothetical remains the same if race influenced the officers' decision to approach Tanya.

*Decision 3: To Question Whereabouts and Identity*

But what if in the context of approaching Tanya, the officers decide to question her? Assume, more specifically, that they ask Tanya the following questions: "Do you live around here?" "What's your name?" "Where are you going?" "Where are you coming from?" "May I see your identification?" The officers' engagement<sup>27</sup> with Tanya along the preceding lines still would not constitute a seizure.

But let's suppose that Tanya is actually seized—that the officer compels her to produce her identification. Stipulate that this violates the Fourth Amendment in the sense of constituting an unreasonable seizure because the officer has no evidence that Tanya engaged in wrongdoing. After obtaining Tanya's identification, the officer runs her name through a warrant database and discovers that Tanya has an outstanding warrant for a parking violation that she neglected (or could not afford) to pay. The officer handcuffs Tanya, arrests her, and then transports her to the stationhouse.

Assume that Tanya argues that her arrest is unconstitutional. Her claim is that but for the officer's decision illegally to seize her and demand that she produce her identification, the officer would not have discovered the warrant for her parking ticket. To put this point in the language of Fourth Amendment

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25. See *Florida v. Royer*, 460 U.S. 491, 498 (1983) (suggesting that while police officers may approach an individual without reasonable suspicion or probable cause, that individual is free to ignore the police). The Court has also addressed whether police following people in public places constitutes a search and answered that question in the negative. See, e.g., *United States v. Knotts*, 460 U.S. 276, 285 (1983).

26. *Florida v. Bostick*, 501 U.S. 429, 434 (1990) (declaring that "a seizure does not occur simply because a police officer approaches an individual").

27. *Id.*

law, the arrest was “fruit of the poisonous tree” (the illegal seizure).<sup>28</sup> Tanya could very well lose that argument, particularly if a court concludes that the officer’s unconstitutional seizure of Tanya was a reasonable mistake.<sup>29</sup> Under Fourth Amendment law, police officers not only have tremendous discretion, they have broad latitude to make mistakes.<sup>30</sup> Were a court to conclude that the officer’s unconstitutional seizure of Tanya was a reasonable mistake, it would also likely conclude that the officer’s discovery of the outstanding warrant effectively cured the unconstitutional seizure in the sense of constituting a separate “intervening act.” If you are confused by that argument, you should be. How does a warrant whose existence was discovered by an unconstitutional seizure become an intervening act—something that happened—between the unconstitutional seizure and the discovery of the warrant? The unconstitutional seizure of Tanya, not something else, led to the discovery of the warrant, and the warrant was the basis for Tanya’s arrest. To borrow from tort law, the officer’s unconstitutional seizure of Tanya was not only the but for cause of her arrest, but it was also the proximate cause. There was no intervening act.

The foundational case on what constitutes an intervening act, *Wong Sun v. United States*,<sup>31</sup> provides a more sensible way of thinking about causation and the “fruit of the poisonous tree” analysis. Simplifying the case, *Wong Sun* involved the admissibility of two confessions.<sup>32</sup> Let’s call these confessions Statement 1 and Statement 2. Without too much difficulty, the Court concluded that Statement 1 was inadmissible because it was the product of an unreasonable seizure. Not so with respect to Statement 2. The defendant had argued that Statement 2 should be excluded as the fruit of the same poisonous tree that produced Statement 1—to wit, the unreasonable seizure. The Court disagreed, pointing to, among other things, the fact that the defendant voluntarily showed up to the stationhouse two days after Statement 1 and provided Statement 2. His decision to do so, reasoned the Court, was an “intervening act” that broke the chain of causation between the initial illegal seizure that produced Statement 1 and defendant’s utterance of Statement 2. No such intervening act applies to my hypothetical. Instead, you have a line of

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28. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

29. *See Utah v. Strieff*, 136 S. Ct. 2056 (2016). In *Strieff*, an officer stopped someone without reasonable suspicion, demanded their identification, ran that information through a warrant database, and subsequently arrested the person based on the discovery that the person had an outstanding warrant. *Id.* at 2060. A search incident to arrest uncovered drugs. *Id.* The defendant moved to suppress the drugs on the ground that it was the fruit of an illegal seizure. *Id.* The Court concluded that suppression was not warranted because the officer’s mistake as to reasonable suspicion was not flagrantly unlawful and because the discovery of the warrant acted as an intervening act between the illegal seizure and the discovery of the evidence. *Id.* at 2064.

30. *See, e.g., Maryland v. Garrison*, 480 U.S. 79 (1987) (finding reasonable an officer’s mistake as to the existence of two apartments on the third floor of a building).

31. 371 U.S. at 471.

32. In fact, there were multiple defendants in the case and other evidentiary issues that we need not engage.

causation from an unconstitutional seizure (the officer's decision to stop Tanya without reasonable suspicion), to the discovery of the outstanding warrant, to Tanya's arrest. The chain of causation between the officer's illegal seizure of Tanya and her arrest is like the chain of causation between the illegal seizure in *Wong Sun* and Statement 1; her illegal seizure and arrest bear virtually no resemblance to the illegal seizure and Statement 2 in *Wong Sun*. Nevertheless, because of a recent Supreme Court case that effectively expands the meaning of an intervening act,<sup>33</sup> Tanya's argument that her arrest is unconstitutional—the “fruit of the poisonous tree” of an illegal seizure—could fall on deaf ears.

An African American's vulnerability to being subjected to a *legal* arrest that began as an *illegal* seizure is quite real given how many jurisdictions have engaged in what I have elsewhere called “predatory policing”—the utilization of policing as a mechanism to raise revenue for cities generally and police departments specifically.<sup>34</sup> Predatory policing includes issuing citations to people for minor infractions, which, when unpaid, result in the issuance of a warrant. Consider how predatory policing manifested itself in Ferguson, whose population numbers twenty-one thousand. According to a U.S. Department of Justice report, as of 2014, Ferguson had issued ninety thousand summonses and citations; and in 2013 alone, Ferguson issued 9,007 warrants.<sup>35</sup> Against that background, police officers have an incentive not only to follow people and ask them for their identification (which many people will “voluntarily” turn over on the assumption that they have to), but also to demand their identification (when people refuse to comply or assert their rights). If it turns out that the person the officer stops does not have an outstanding warrant, the officer will simply send that person on her way. At worst for the officer, that person will file a formal complaint. Chances are, she won't even do that. Certainly, she won't file a lawsuit. Would you? If the officer's license check reveals that the person has an outstanding warrant, the officer will be able not only to arrest the person, but also to subject the person to a number of additional intrusions, a matter I discuss later in the Article. The bottom line is that even though the officer had no reason to believe that Tanya did anything wrong when he approached her, he could end up with a legitimate basis on which to arrest her.

#### *Decision 4: To Question on a Bus*

Assume that officers engage Tanya not while she is walking on the street but as she boards a bus. Indeed, stipulate that the police specifically followed Tanya on the bus to question her. Again, our assumption is that the officers have no objective reason to believe that Tanya has done anything wrong. Could Tanya now successfully argue that she has been seized? No.

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33. See *Strieff*, 136 S. Ct. at 2056.

34. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1489 (2016).

35. U.S. DEP'T OF JUST., *supra* note 10, at 7, 55.

This is a good place to describe more precisely how the Supreme Court has defined what constitutes a seizure. The doctrinal standard is that a seizure does not occur if the person feels free to decline officers' requests or otherwise terminate the encounter.<sup>36</sup> The Supreme Court has repeatedly stated that the mere fact that police officers question a person does not mean that that person is seized.<sup>37</sup> Under the Court's view, suspects whom the police question are "free to leave[.]"

One of the most striking articulations of this view appears in *Florida v. Bostick*.<sup>38</sup> In that case, officers observed Bostick sitting in the back of a bus and proceeded to question him.<sup>39</sup> The government stipulated that the police officers had no reason to believe that Bostick had done anything wrong.<sup>40</sup> Thus, the government could not argue that Bostick was seized and that the seizure was reasonable. The thrust of the government's argument, therefore, was that the officers' conduct did not implicate the Fourth Amendment, for Bostick was not seized.<sup>41</sup> Thus, the officers needed no justification to approach and engage Bostick.<sup>42</sup>

While the *Bostick* Court did not definitively decide the seizure question, it made clear that "mere police questioning" does not constitute a seizure—even if it occurs in the confined space of a bus.<sup>43</sup> The Court maintained that passengers on buses are constrained, not necessarily because of what police officers do, but because of their decision to travel by bus. According to the Court, the officers merely "walked up to Bostick . . . asked him a few questions, and asked if they could search his bags."<sup>44</sup> The Court intimated that that is not enough to transform a consensual bus encounter into a seizure.<sup>45</sup> More than a decade later, in *United States v. Drayton*,<sup>46</sup> the Court made that point explicit: police officers may question people on buses without triggering the Fourth Amendment.<sup>47</sup> Particularly remarkable about the Court's conclusion in *Drayton* is that the record revealed that the officer in the case had boarded more than eight hundred buses in the past year to question passengers. Only five to seven passengers declined to have their luggage searched.<sup>48</sup>

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36. *Florida v. Bostick*, 501 U.S. 429, 436 (1990).

37. *Id.* at 434; *see also* *Florida v. Royer*, 460 U.S. 491 (1983); *INS v. Delgado*, 220 U.S. 210 (1984).

38. 501 U.S. at 434.

39. *Id.* at 446 (Marshall, J., dissenting).

40. *Id.* at 431, 433–34.

41. *Id.* at 434.

42. *Id.*

43. *Id.*

44. *Id.* at 437.

45. *Id.*

46. 536 U.S. 194 (2002).

47. *Id.* at 194.

48. *United States v. Drayton*, 231 F.3d 787, 790–91 (11th Cir. 2000).

The Court's reasoning in *Bostick* and *Drayton* would have even more traction with respect to a person who is on the street, not on a bus. Indeed, in both cases the Court noted that had *Bostick*'s encounter occurred off the bus, like the hypothetical I describe in Decision 3, it would be easy to conclude that he was not seized.<sup>49</sup> The Court's reasoning in *Bostick* and *Drayton* suggests not only that a police officer would not need to justify his decision to approach and question Tanya on the street or on a bus, but also that his decision to do so could be racially motivated because his subjective intent does not matter.

*Decision 5: To Question About Immigration Status*

Assume that the officers perceive Tanya to be a foreigner and question her about her immigration status.<sup>50</sup> One might surmise, notwithstanding what I have said so far, that some forms of questioning, like questioning about immigration status, might be so intrusive or intimidating that an officer's decision to pursue them would automatically trigger the Fourth Amendment. One would be wrong to so conclude. Stipulate that the officers have no objective reason to believe that Tanya is undocumented. Nevertheless, one of the officers approaches Tanya and asks: "Do you speak English?" "How long have you been in this country?" "Are you an illegal alien?" "May I see proof of citizenship?" Police officers may ask these and other questions of Tanya without implicating the Fourth Amendment.<sup>51</sup> Moreover, were an officer to say, "I questioned Tanya because she looked like a Nigerian immigrant in terms of her dress and appearance," that racial motivation would not violate the Fourth Amendment.

*Decision 6: To Seek Permission to Search*

What if the officers approach Tanya, again without any objective reason to believe that she has done anything wrong, and ask her for permission to search her bag? Is Tanya now seized? Does the answer turn on whether the officer informs Tanya of her right to refuse consent?

The Supreme Court has held that police officers need not inform people of their right to refuse consent.<sup>52</sup> Their failure to do so does not render the search invalid. Nor does it automatically render an encounter a seizure.<sup>53</sup> Thus, consistent with Fourth Amendment doctrine, police officers may approach individuals whom they have no reason to believe engaged in wrongdoing, and

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49. *Drayton*, 536 U.S. at 195; *Bostick*, 501 U.S. at 434.

50. These dynamics would affect Latinos who are not black. I include them here to disrupt the tendency of framing blackness outside of the Latino experience.

51. *INS v. Delgado*, 466 U.S. 210, 220 (1984) (holding that "factory sweep" questioning of workers by immigration officers with additional officers positioned at exits did not constitute seizure under the Fourth Amendment).

52. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973).

53. *Bostick*, 501 U.S. at 429.

ask those individuals for permission to search their persons or effects. Under such circumstances, people are not seized because (ostensibly) they are free to say no and go about their business. That people may not know that they have this right to refuse consent—or would not feel empowered to exercise that right—is largely irrelevant for Fourth Amendment purposes.

Adding this consent search analysis to what we have already learned: without any evidence of wrongdoing, police officers may follow and approach Tanya. They may question her, including about her immigration status. They may ask to search her person or effects, without informing her of her right to refuse consent. These investigatory practices are not subject to the constraints of the Fourth Amendment because none of them are considered seizures. This analysis does not change if the officers' decisions along any of the preceding lines are racially motivated. Racial profiling that does not constitute a search or seizure is racial profiling about which the Fourth Amendment is unconcerned.

#### *Decision 7: To Infiltrate*

Assume for the next three scenarios that Tanya is Muslim and that the government is interested in investigating whether she has engaged in terrorist activity.<sup>54</sup> Let's first explore how Tanya could be affected by the freedom with which the government may infiltrate mosques. Assume that Tanya regularly attends a neighborhood mosque. Assume further that the government enlists Mohammed (who goes by "Mo"), one of Tanya's friends, to inform on her. As before, the government has no evidence that Tanya has engaged in criminal wrongdoing. The government's view is that the fact that Tanya is Muslim and regularly attends a mosque whose leader routinely and publicly criticizes U.S. foreign policy in the Middle East is reason enough to investigate her. Imagine that Mo surreptitiously records every conversation he has with Tanya for six months. Does this violate the Fourth Amendment? No. Indeed, Mo's activity would not even trigger the Fourth Amendment.

Unsurprisingly, if Tanya were to argue that she was seized, she would not get very far. After all, Mo is Tanya's best friend (or so Tanya believes), and Tanya was not aware that Mo was cooperating with the government. Under these circumstances, it stretches credulity to argue that a reasonable person in Tanya's position would *not* feel free to leave or otherwise terminate her many interactions with Mo.

But what about the other Fourth Amendment trigger question? Has the government searched Tanya or her conversation? No. The Supreme Court would conclude that Mo's conduct does not constitute a search. More specifically, the Court would reason that Tanya assumed the risk that the

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54. As with the point about Latinos, clearly Muslims who are not black would experience the dynamics I describe. I frame the hypothetical this way to make clear that Muslim identity is one of the categories through which blackness is interpolated.

person with whom she had those interactions (Mo) was a government official.<sup>55</sup> The burden is on Tanya to choose her friends more carefully. That Mo surreptitiously recorded the conversation does not matter.<sup>56</sup> The point remains the same: the Fourth Amendment does not protect us from “misplaced confidence”<sup>57</sup> or “false friends.”<sup>58</sup> We assume the risk that the people with whom we interact will listen to, record, and transmit our conversations.<sup>59</sup>

Nor does it matter that the government’s decision to focus on Tanya was racially and/or religiously motivated. The fact that Mo’s conduct does not trigger the Fourth Amendment means that it is irrelevant, for Fourth Amendment purposes, whether that conduct was racially or religiously motivated.

The freedom with which law enforcement can use informants to investigate terrorism has become a profound problem for Muslim communities. As Amna Akbar explains, “There is reason to believe that there are informants at each and every mosque in the United States.”<sup>60</sup> The potential chilling effects of the government’s use of informants cannot be overstated. It creates an incentive for Muslims not to attend mosques, and to severely circumscribe their interactions when they do.

#### *Decision 8: To Conduct Voluntary Interviews*

Assume that law enforcement still suspects Tanya of terrorism, though they have no objective reason to believe that she is a terrorist. Here, again, race and religious affiliation motivate their suspicion. Agents show up at her house, knock on the door, and announce that they are the Federal Bureau of Investigation (FBI).<sup>61</sup> Tanya answers the door. FBI agent Nelson says, “Good afternoon, Tanya, would you mind accompanying us to the FBI’s office. We are investigating terrorist activity and just want to make sure that you are not involved.” Tanya accompanies the agents to the office, where they question her for three hours and then indicate that she is “free to leave but that we might follow up.” Embarrassed, humiliated, and concerned that the FBI might seek to question her again, Tanya relays her experience to the American Civil Liberties Union (ACLU) to ascertain whether the agency violated her Fourth

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55. See *United States v. White*, 401 U.S. 745, 753 (1971) (holding that conversations with wired government informant are not protected by the Fourth Amendment).

56. *Id.* at 752.

57. *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

58. *On Lee v. United States*, 343 U.S. 747, 757 (1952).

59. *White*, 401 U.S. at 751.

60. Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 862 (2013).

61. See Tracey Maclin, “Voluntary” *Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471, 479–510 (2003) (explaining that people perceived to be Arab, Muslim, or Middle Eastern may not experience “voluntary” interviews as consensual).

Amendment rights. She is surprised to learn that the answer is no and that the FBI regularly employs what it refers to as “voluntary interviews.”

That the FBI refers to investigatory engagements of the sort Tanya experienced as “voluntary interviews” is a window on how the Supreme Court would respond to the practice.<sup>62</sup> Likely, the Court would conclude that because Tanya voluntarily went to the FBI’s office, she was not seized. Because the FBI agents did not use a show of force or otherwise coerce Tanya into staying, she was free to leave at any time. As with prior examples, the fact that Tanya did not know her rights or may have felt disempowered to exercise them during the FBI questioning does not change this outcome. “Mere questioning,” even in the context of a police station, would not transform a voluntary encounter into a seizure. In short, the Court would conclude that Tanya went, stayed, and subjected herself to questioning at the FBI office of her own free will.

What if Tanya could demonstrate that, in fact, she exercised no such free will? Subjectively, she felt compelled both to accompany FBI agents to the station and to answer their questions while she was there. If you’ve recalled the doctrinal test for a seizure, you will recognize that Tanya’s subjective feelings are not dispositive.<sup>63</sup> The inquiry concerns not what Tanya subjectively felt but what a reasonable person under the circumstances would have felt.<sup>64</sup>

But that still leaves a central question: Upon what basis would the Court conclude that a reasonable person in Tanya’s position would not feel free to leave a “voluntary interview”? After all, one could argue that no one would feel free to leave the FBI office under the circumstances I have described—and few, if any, of us would have felt free to decline the officers’ invitation to accompany them in the first place. This sense of constraint would be all the more salient if Tanya is, or is perceived to be, a Muslim.

To put these points more doctrinally, even if we discounted Tanya’s subjective feelings and interpreted the “free to leave” test in more objective terms by asking the standard question—whether a reasonable person would have felt free to leave?—or a more particularized one—whether a reasonable Muslim would have felt free to leave?—a strong argument can be made that the answer in each case is no.

But I have already said that the Court could conclude that Tanya has not been seized. Two structural features of the seizure analysis help to explain why. First, the free-to-leave framework is a normative inquiry rhetorically disguised

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62. *See, e.g.*, *United States v. Ambrose*, 668 F.3d 943, 956–59 (7th Cir. 2012) (relatively restrictive security requirements at FBI building did not transform noncustodial voluntary interview into a custodial interview).

63. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

64. *See, e.g.*, *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“We conclude that a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”).

as an empirical one. When the Court asks “whether a reasonable person would feel free to leave or otherwise terminate the encounter,” it is really asking whether a reasonable person *should* feel free to leave or otherwise terminate the encounter. In every Supreme Court decision in which the question is whether a person has been seized, the Justices construct the very thing they purport empirically to locate—the reasonable person. Applying this insight to our hypothetical, the legal conclusion that a reasonable person is not seized in the context of a voluntary interview is a normative position that a reasonable person *should not* feel seized.

Consider now the second structural feature of the seizure doctrine that makes it difficult to argue that Tanya’s “voluntary interview” constitutes a seizure. After an early nod in the direction of factoring race into the seizure analysis,<sup>65</sup> the Supreme Court has never since taken race into account in determining whether a person is seized, effectively adopting a colorblind approach to the seizure analysis.<sup>66</sup> This colorblind approach is particularly striking not only because the seizure test is a “totality of the circumstances” inquiry<sup>67</sup> (why isn’t race considered a part of the “totality of the circumstances”?) but also because in a relatively recent opinion the Court concluded that age is a part of the “totality of the circumstances.” According to the Court:

In some circumstances, a child’s age “would have affected how a reasonable person” in the suspect’s position “would perceive his or her freedom to leave.” That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.<sup>68</sup>

The foregoing reasoning applies to race. To appreciate how, substitute race for age throughout the passage above, focusing specifically on black and white experiences. Under this thought experiment, the quote now reads:

In some circumstances, a person’s *race* “would have affected how a reasonable person” in the suspect’s position “would perceive his or her freedom to leave.”<sup>69</sup> That is, a reasonable *black* person subjected to police questioning will sometimes feel pressured to submit when a

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65. *But see id.* at 545 (observing that race is “not irrelevant” to whether a person has been seized).

66. Carbado, (*E*)*racing the Fourth Amendment*, *supra* note 21, at 968 (arguing that the Court applies the Fourth Amendment with an assumption of race neutrality, that neither the way police engage people nor the way people interact with the police are shaped by race, and that race only becomes doctrinally relevant when an officer is overtly racist in her actions).

67. *See, e.g., J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011) (reaffirming the Court’s traditional objective test for custody based upon totality of the circumstances, but extending it to include a child’s age among the factors).

68. *Id.* at 271–72.

69. *Id.* at 271.

reasonable *white* person would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

I should be clear to note that, in performing the race/age substitution, I do not mean to suggest that blacks are to whites what children are to adults. I am mindful of the racial infantilization of black people under both slavery and Jim Crow. My point in substituting race for age is simply to suggest that even if one thinks that age is more relevant than race in determining whether a person is seized, the claim that race is irrelevant is difficult to sustain.

The Court's elision of race should trouble us. It takes off the table an important factor that could heighten a person's sense of constraint in the context of a police encounter. Because, for example, whites and African Americans are not similarly situated with respect to how their racial identity might affect this sense of constraint, the Court's failure to consider race is not race-neutral. It creates a racial preference in the seizure doctrine for people who are not racially vulnerable to, or who do not experience a sense of racial constraint in the context of, interactions with the police. Black people, across intraracial differences, are likely to feel seized earlier in a police interaction than whites, likely to feel "more" seized in any given moment, and less likely to know or feel empowered to exercise their rights. With reference to black men, Cynthia Lee puts the point this way:

A young black male who has grown up in South Central Los Angeles knows that if he is stopped by a police officer, he should do whatever the officer says and not talk back unless he wants to kiss the ground. This young man may not feel free to leave or terminate the encounter with the officer, but if the reviewing court believes the average (white) person would have felt free to leave, then the encounter will not be considered a seizure and the young black male will not be able to complain that his Fourth Amendment rights have been violated.<sup>70</sup>

Lee's point pertains to blacks more generally. The racial asymmetry she describes is why Paul Butler describes the Fourth Amendment with more racial specificity as "the white Fourth Amendment."<sup>71</sup> His point is that the Supreme Court's colorblind interpretation of the Fourth Amendment ends up protecting whites more than it does people of color.

The Supreme Court does not take any of this into account. Its failure to do so both legitimizes and renders invisible a particular kind of precarity: racial insecurity. By racial insecurity I mean a racial sense of exposure, anxiety, and vulnerability that some people experience in the context of police encounters. Whites generally do not experience racial insecurity because whites generally are neither disproportionately targeted by the police nor burdened by the

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70. Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 *MISS. L.J.* 1133, 1152 (2012).

71. See Paul Butler, *The White Fourth Amendment*, 43 *TEX. TECH. L. REV.* 245, 250 (2010).

concern that their race exposes them to police surveillance, social control, and violence.

Certainly, incorporating race into the seizure analysis would not be a simple endeavor. Would that entail adopting a reasonable black person standard when the suspect is black, a reasonable Latino standard when the suspect is a Latino, and a reasonable Muslim standard when the suspect is Muslim? Not necessarily. Such particularized standards could get very messy very quickly. Thus, I am not advocating an identity-specific approach. It bears mentioning that when the Court included age in the custody analysis it did not adopt a sixteen-year-old standard or a fifteen-year-old standard or a thirteen-year-old standard. The Court simply noted, “[a] child’s age is far ‘more than a chronological fact.’ It is a fact that ‘generates common sense conclusions about behavior and perception.’ Such conclusions apply broadly to children as a class.”<sup>72</sup> Suffice it to say that these points can be made about race as well.<sup>73</sup>

My suggestion that the Court take race into account in determining whether a person is seized is modest given that the seizure analysis is a “totality of the circumstances” inquiry.<sup>74</sup> I am simply proposing including race as one of the contextual factors that guide the Court’s analysis. I am not the only one to advance this position. More than two decades ago, Tracey Maclin articulated a similar recommendation:

My tentative proposal is that the Court should disregard the notion that there is an average, hypothetical, reasonable person out there by which to judge the constitutionality of police encounters. When assessing the coercive nature of an encounter, the Court should consider the race of the person confronted by the police, and how that person’s race might have influenced his attitude toward the encounter.<sup>75</sup>

Maclin goes on to link his argument to the holistic nature of the seizure framework:

Currently, the Court assesses the coercive nature of a police encounter by considering *the totality of the circumstances* surrounding the confrontation. All I want the Court to do is to consider the role race might play, along with the other factors it considers, when judging the constitutionality of the encounter.<sup>76</sup>

In short, both Maclin and I are simply urging the Court to take the totality of the circumstances test seriously by incorporating race into the analysis.

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72. *J.D.B.*, 564 U.S. at 261 (internal citations omitted).

73. See generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (discussing how race creates different common-sense understandings for black and white Americans).

74. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

75. Tracey Maclin, “*Black and Blue Encounters*”—*Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991).

76. *Id.* at 268–69 (emphasis in original).

To return to my hypothetical, taking race into account might mean asking, among other things, whether widespread perceptions of Muslims as terrorists could cause someone in Tanya's position to feel compelled to acquiesce to the FBI's request for a voluntary interview. The Court might well answer that question in the negative (recall my earlier point that, as a substantive matter, the seizure analysis is normative, not empirical). But quite apart from how the Court would ultimately resolve the issue, its engagement with race would make it a matter of doctrinal concern, and this in turn would shape how, in the public arena, we discuss "voluntary interviews" and other surveillance practices the government deploys against Muslims and others. As things now stand, Tanya doesn't get the benefit of this potential discourse effect because Tanya's interaction with the FBI is not a Fourth Amendment event. As such, the interaction requires no justification and generates no juridical debates about reasonableness that could spill over into the public domain.

That the Fourth Amendment would not protect Tanya from "voluntary interviews" does not answer whether some other procedural safeguard offers protection. One might surmise that *Miranda* would be helpful in this context, particularly because the questioning occurred at the FBI's office. In fact, however, Tanya could not invoke the *Miranda* protections. For one thing, the state is not seeking to admit Tanya's statements against her—thus there is no self-incrimination issue.<sup>77</sup> For another, the Court would conclude that Tanya was not in custody, a necessary predicate for the application of *Miranda*.<sup>78</sup> The test for whether a person is in custody is whether that person is formally under arrest or experiencing its functional equivalent.<sup>79</sup> Because, arguably, Tanya wasn't even seized, it is easy to conclude that she was not in custody.

Similarly, the Sixth Amendment right to counsel would not help. Its procedural framework applies only when the state has commenced formal proceedings against a person.<sup>80</sup> Finally, because the Supreme Court would perceive "voluntary interviews" as consensual encounters, arguments against the practice that invoke due process also would fail.<sup>81</sup> The reality, then, is that Tanya is stuck with the Fourth Amendment, even as it offers her no protections from the racially motivated "voluntary interview" she experienced.

#### *Decision 9: To Conduct Computer Surveillance*

Assume now that the police, still suspecting Tanya of aiding or abetting terrorism, monitor the Internet websites she visits and track to and from whom

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77. See *Miranda v. Arizona*, 384 U.S. 436 (1966). The opinion is grounded in the Fifth Amendment prohibition against compelled self-incrimination. See *id.* at 439–42, 457–58, 467–74.

78. See *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984).

79. See *id.* at 441–42.

80. See *Massiah v. United States*, 377 U.S. 201, 204–06 (1964).

81. To bring a due process claim, Tanya would have to argue that government's conduct was "overreaching," "oppressive," and "coercive." *Colorado v. Connelly*, 479 U.S. 157, 163–64, 167 (1986).

she sends and receives email. Yet again, race and religious affiliation form the sole basis for their suspicion. Moreover, the Fourth Amendment is not implicated, because neither of these surveillance activities is legally construed as a search or seizure. Online addresses used during Internet surfing or online communication are considered public information, unlike the actual content of communications, and courts have analogized the collection of such information to the government's long-established right to monitor telephone transmission records and postal addresses/addressees appearing on the outsides of sealed envelopes.<sup>82</sup>

*Decision 10: To Investigate to Verify Welfare Eligibility*

Assume now that Tanya has applied for welfare benefits. Her county has a program requiring that all prospective welfare recipients submit to mandatory home visits by county social workers to verify the recipients' eligibility for welfare benefits. The county welfare agency notifies Tanya in advance that the inspection visit will occur at some point during the following week, between the hours of noon and five in the afternoon. When the social workers visit Tanya's home, they find a small bag of marijuana owned by Tanya's son on the floor of his bedroom. Per the terms of the county program, they report this finding to county prosecutors. Although the district attorney declines to prosecute, the county welfare agency uses the incriminating evidence as a basis to disqualify Tanya from welfare eligibility. Tanya cannot claim Fourth Amendment protection from the social workers' search, because courts, including the Supreme Court, have held either that such investigations do not constitute a Fourth Amendment "search," or else that they represent a "special needs" exception to the Fourth Amendment that is allowable so long as the primary purpose of the search is justifiable for reasons other than strictly law enforcement purposes.<sup>83</sup>

*Decision 11: To Conduct Surveillance of Homeless Dwelling*

Within months of being found ineligible for welfare benefits, Tanya is evicted from her apartment and finds herself homeless. She ultimately joins

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82. See, e.g., *United States v. Forrester*, 512 F.3d 500, 504, 505, 509–11 (9th Cir. 2008) (analogizing police Internet surveillance to telephone pen registers held not to constitute Fourth Amendment search in *Smith v. Maryland*, 442 U.S. 735 (1979)); see also *Surveillance Under the PATRIOT Act*, ACLU, <https://www.aclu.org/infographic/surveillance-under-patriot-act> [<https://perma.cc/NW9Z-WR2H>]. Moreover, in certain situations, such as border crossings, police may seize computer hard drives for forensic examination based only on reasonable suspicion. See, e.g., *United States v. Cotterman*, 709 F.3d 952, 968, 970 (9th Cir. 2013); *United States v. Saboonchi*, 990 F. Supp. 2d 536, 571 (D. Md. 2014).

83. *Griffin v. Wisconsin*, 483 U.S. 868, 872–76 (1987) (warrantless search of probationer's home comes under "special needs" exception to Fourth Amendment); *Wyman v. James*, 400 U.S. 309, 317–19 (1971) (mandatory home visit by welfare workers was not a Fourth Amendment search, and even if it were, it would have been reasonable); *Sanchez v. San Diego*, 464 F.3d 916, 920–26 (9th Cir. 2006) (applying both *Wyman* and *Griffin* to San Diego County welfare verification program).

other homeless people living in makeshift structures made from tarps and cardboard boxes in the Skid Row area of town. Like many other cities, Tanya's city has an ordinance against obstruction of municipal streets and sidewalks, but her "home," and the rest of the homeless tent city, intrudes a few feet onto a city sidewalk. Police officers appear at the tent city to investigate the theft of merchandise from a nearby business. The officers may freely look inside Tanya's dwelling, and may even pull aside a tarp flap or piece of cardboard to do so; any evidence they see within will be, constitutionally, fair game. Courts generally have held that there is no reasonable expectation of privacy in an unauthorized dwelling illegally erected on public land, so police surveillance of such dwellings does not constitute a search under the Fourth Amendment.<sup>84</sup>

*Decision 12: To Chase*

Assume that Tanya has had all the foregoing interactions with the police—and on more than one occasion. She does not want to have another encounter in which the police will presume her to be a criminal. Tanya is worried that she will be forced to compromise her rights and answer questions or consent to a search to prove that she is innocent. She believes that her failure to cooperate could ultimately lead to her arrest. While Tanya has not herself been arrested for refusing to cooperate with the police, many of her friends—men and women—in the neighborhood have been. Plus, for at least a decade, black women in the neighborhood have been complaining that police officers use the stop-and-frisk practice as a mechanism to engage in sexual harassment. Tanya thus decides that the next time she observes a police officer, she is going to avoid that officer altogether—by running away if necessary.

That is what she does one day. The police officers chase Tanya down the street, shouting, "Stop, it's the police!" as they do so. Is Tanya now seized? No. The fact that she is not formally under the control of the police in the sense of submitting to authority or being apprehended means that she is not seized.<sup>85</sup> Thus, police officers are free to chase Tanya, even under circumstances where they have no reason to think she has engaged in wrongdoing—and even if their primary reason for doing so is the fact that she is a black woman.

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84. See, e.g., *People v. Thomas*, 38 Cal. App. 4th 1331, 1335 (1995) ("[A] person who occupies a temporary shelter on public property without permission and in violation of an ordinance prohibiting sidewalk blockages is a trespasser subject to immediate ejection and, therefore, a person without a reasonable expectation that his shelter will remain undisturbed."); *United States v. Ruckman*, 806 F.2d 1471, 1472–74 (10th Cir. 1986) (no reasonable expectation of privacy in dwelling built in a cave on federal land); *State v. Tegland*, 269 Or. App. 1, 10–11 (2015) ("[W]here erecting a structure in the public space is illegal and the person has been so informed and told that the structure must be removed, there is no 'reasonable expectation of privacy' associated with the space."); *People v. Nishi*, 207 Cal. App. 4th 954, 962–63 (2012) (repeated removal by law enforcement from campsite occupied illegally tends to negate legitimate expectation of privacy in that location).

85. *California v. Hodari D.*, 499 U.S. 621 (1991).

The problem is even worse. If Tanya is running in a “high-crime area,” the officer is pretty close to having reasonable suspicion to justify stopping her. To back up: initially the officer has no reason to believe that Tanya has done anything wrong. Initially, Tanya has the right to avoid the police. To put the point doctrinally, she is “free to leave.” But if Tanya exercises that right by running away, the officer may draw an adverse inference from her decision to flee. If Tanya is running in a “high-crime area,” which several scholars have suggested is code for a predominantly black or brown neighborhood,<sup>86</sup> the officer may now have a basis to stop her, at least according to Supreme Court law.<sup>87</sup>

A very recent opinion by the highest court in Massachusetts challenges the idea that running from the police necessarily makes a person a suspect. According to the court:

[T]he finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, 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.<sup>88</sup>

The Supreme Court has not embraced the foregoing reasoning, and it remains to be seen whether other jurisdictions will. What this mean for Tanya if she runs from the police is quite demoralizing: an officer’s decision to chase her will not amount to a seizure, so the officer is free to do so even if prior to the chase, he has no reason to believe that Tanya did anything wrong. Moreover, if Tanya is subsequently seized—either because the officer apprehends her or because Tanya stops running and submits to the officer’s authority<sup>89</sup>—a court may conclude that that seizure is reasonable, particularly if Tanya is running in a “high-crime area.”

You might be thinking that the scenario is not as dire as my hypothetical suggests. After all, Tanya’s options are not limited to running away or remaining in place. There’s a third way. Tanya could avoid the police by walking. Doing so would not be considered evasive behavior.

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86. See Butler, *The White Fourth Amendment*, *supra* note 71, at 254 (“The police have more power in high-crime neighborhoods than in low-crime neighborhoods.”); see also Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas,”* 63 HASTINGS L.J. 179, 183 (2011); Margaret Raymond, *Down on the Corner, out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999).

87. *Illinois v. Wardlow*, 528 U.S. 119 (2000). Importantly, *Wardlow* does not say expressly that fleeing in a high-crime area equals reasonable suspicion, but it comes pretty close.

88. *Commonwealth v. Warren*, 475 Mass. 530, 539 (2016). An FIO is a “field interrogation observation,” in which an officer approaches a person and asks why they are in a particular area. *Id.* at 532 n.5.

89. *Hodari D.*, 499 U.S. at 621.

Let's pursue this idea. Assume that Tanya does indeed walk away upon observing the officers. The officer would be perfectly free to follow Tanya (remember, the act of following a person does not trigger the Fourth Amendment). The officers could also question Tanya as they are following her (remember, the act of questioning does not, without more, trigger the Fourth Amendment). Technically, Tanya is "free to leave." But how is she to exercise that freedom if the officer is following and questioning her? Moreover, will Tanya even know that she is "free to leave?" At some point, Tanya is likely to simply "consent" to whatever the officer requests—a search, to produce her identification, to answer his questions—ostensibly of her own free will.

\* \* \*

Part of what is remarkable about the foregoing hypotheticals is that several of the Supreme Court cases on which they are based involve black litigants, as Figure 1 reveals.

**Figure 1: Supreme Court Cases Involving Black Litigants**

Conduct ≠ Search or Seizure	Cases	Race of Defendant
Decision to Follow/Approach	United States v. Mendenhall (1980)	Black
Decision to Question Generally	United States v. Mendenhall (1980)	Black
Decision to Question on a Bus	Florida v. Bostick (1991) United States v. Drayton (2002)	Black Black
Decision to not Inform of right to not Cooperate	United States v. Drayton (2002)	Black
Decision to Verify Welfare Eligibility (via Home Inspection)	Wyman v. James (1971)	Black
Decision to Chase	California v. Hodari (1973)	Black

One might say, borrowing from Toni Morrison, that the Figure 1 reveals Supreme Court decision making "on the backs of blacks."<sup>90</sup> The point being that, in deciding whether police conduct triggers the Fourth Amendment, the Court regularly adjudicates cases that involve and impact African Americans without expressly engaging how members of that community perceive and experience the police.<sup>91</sup> The question then becomes whether the rest of Fourth

90. Toni Morrison, *On the Backs of Blacks*, TIME, Fall 1993 Special Issue.

91. This is another moment to remind the reader that I am not suggesting that blacks are the only racial group who are impacted by the Court's seizure analysis. Note, for example, that the case

Amendment law looks any better. The short answer, distressingly, is no. Part II discusses the Supreme Court’s reasonableness analysis. As with Part I, my aim in Part II is to demonstrate how Fourth Amendment law’s legalization of racial profiling across a number of investigatory contexts increases African Americans’ contact with the police and exposes them to the possibility of violence.

## II.

### THE “REASONABLENESS” DOCTRINE

#### A. Introduction

By now, you understand that a litigant who is challenging the government’s conduct under the Fourth Amendment has to do more than establish that the government engaged in a search or seizure. Recall that the Fourth Amendment protects us from unreasonable searches and seizures, not all searches and seizures per se.<sup>92</sup> That is why, for example, both stops (as seizures) and frisks (as searches) can be either reasonable—when they are supported by reasonable suspicion—or unreasonable—when they are not.<sup>93</sup> Focusing on traffic stops, this Section highlights a number of cases in which the Supreme Court’s conclusion that particular searches and seizures are reasonable facilitates or expressly authorizes racial profiling in ways that can culminate in police violence.

That an ordinary traffic stop can result in extraordinary violence became all too apparent on April 4, 2015. On that day, Michael Slager, a white police officer in North Charleston, South Carolina, shot and killed Walter Scott, an African American man.<sup>94</sup> Slager’s encounter with Scott began as a traffic stop. The officer’s alleged reason for stopping Scott was a broken taillight on Scott’s car.<sup>95</sup> After requesting Scott’s driver license, Slager returned to his patrol car to check it against police records.<sup>96</sup> Upon discovering that Scott had alighted from the car and was fleeing the scene, Slager shot Scott several times in the back, fatally wounding him.<sup>97</sup>

Commentators have rightly struck upon this case as another example of unjustified police violence. But the case also highlights the authority police

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establishing the idea that law enforcement may question a person about their immigration status without implicating the Fourth Amendment involved Latina/os litigants.

92. See U.S. CONST. amend. IV.

93. See *Terry v. Ohio*, 392 U.S. 1 (1968).

94. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [<https://perma.cc/KQX2-V4R6>].

95. *Id.*

96. David Zucchino, “Reason I Stopped You Is Your Brake Light Is Out,” L.A. TIMES (Apr. 9, 2015), <http://www.latimes.com/nation/la-na-south-carolina-dash-cam-20150409-story.html> [<https://perma.cc/J3X8-PHBS>].

97. Schmidt & Apuzzo, *supra* note 94.

officers have to conduct traffic stops. Indeed, it is precisely that authority that permitted Slager to legally stop Scott in the first place. The Supreme Court's reasonableness analysis with respect to traffic stops gives Slager and other police officers broad discretion in deciding who to subject to traffic stops and when and how to effectuate them. But for that broad discretion, Walter Scott might still be alive.

A similar point can be made about lesser-known cases involving African American women. This past year, as part of a broader effort on the part of the African American Policy Forum to foreground black women's experiences with state violence, Kimberlé Crenshaw and Andrea Ritchie authored a report, *Say Her Name: Resisting Police Brutality Against Black Women*, that highlights some of the many cases of police violence against African American women. Several of the examples the report references include women whose deaths were preceded by an ordinary traffic stop.<sup>98</sup>

The arrest of Sandra Bland provides a more recent example of African American women's vulnerability to police violence incidental to traffic infraction stops. On July 10, 2015, in Prairie View, Texas, police officer Brian T. Encinia stopped Bland for failing to use her turn signal. Within minutes, Bland was arrested for allegedly assaulting Encinia and was hauled off to jail. A few days later, Bland was found dead in her cell. A medical examiner ruled her death a suicide, and publicly released documents suggest that Bland may have indicated to jail officials that she suffered depression and had tried to kill herself in the past.<sup>99</sup> Bland's family, meanwhile, insists that there is no evidence that Bland previously attempted suicide and that Bland was looking forward to starting a new job and would not have taken her own life.<sup>100</sup>

Bland's death, like Scott's, is an example of how an ordinary traffic stop can be a gateway to extraordinary police violence. I do not mean by this that police officers killed Bland while she was in jail and that her death was not a suicide. My point is rather that while we may never know what happened to Bland in jail, we should understand that, because of the Fourth Amendment's reasonableness doctrine, Bland was vulnerable to extreme forms of police violence the very moment she got into her car. I explain this point in Part II.B. As with my Fourth Amendment "trigger" analysis, and for the same reasons, I advance my arguments through a series of hypotheticals.

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98. See CRENSHAW & RITCHIE, *supra* note 1.

99. Meghan Keneally, *Sandra Bland's Death Deemed a Suicide, According to Autopsy*, ABC NEWS (July 23, 2015), <http://abcnews.go.com/US/sandra-blands-death-deemed-suicide-autopsy/story?id=32645817> [<https://perma.cc/37R6-Q7NR>].

100. Geoff Ziezulewicz et al., *Family Wary After Naperville Woman's Death in Texas Jail; Grand Jury to Inquire*, CHI. TRIB. (July 16, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-sandra-bland-texas-jail-death-met-0717-20150717-story.html> [<https://perma.cc/J28E-2Y2D>].

### B. *The Hypotheticals*

To appreciate the ways in which traffic stops function as gateways to more intrusive searches and seizures, assume that Tanya is driving her car home from work on a Friday evening.<sup>101</sup> Two officers in a patrol car observe her commit a traffic infraction—failing to use her turn signal prior to changing lanes. Stipulate that they also observe a white motorist commit the very same traffic infraction. Consider the following twelve decisions the officers might make. Each will reveal the discretion police officers have to practice racial profiling in ways that heighten black vulnerability to police surveillance and violence.

#### *Decision 1: To Enforce the Traffic Violation*

Officer A says to Officer B, “We can’t stop both cars, so let’s stop the car with the black woman.” Assume that the officers stop Tanya’s car. Is this stop constitutional?

As a preliminary matter, I should note that Fourth Amendment law is clear that traffic stops are considered seizures.<sup>102</sup> The question thus becomes whether this seizure is reasonable. Tanya would argue that it is not, because the officers’ decision to stop her was racially motivated. That argument would fail. The Supreme Court has made clear that so long as police officers have probable cause to believe that a suspect has committed a traffic infraction—any traffic infraction—the fact that the decision to stop the car was racially motivated does not render that seizure unreasonable.<sup>103</sup> The Court’s decision was unanimous.<sup>104</sup>

But what if the officer is mistaken about whether Tanya has violated a traffic code? Let’s say that the officer lacks probable cause. That would not necessarily make the traffic stop unconstitutional. To appreciate how this mistake might play out, assume that the officer stops Tanya’s car because she has a broken taillight, but it turns out that the vehicle code indicates that it is permissible to drive with one broken taillight. In the jurisdiction in which Tanya is driving, it’s only a problem when both taillights are out. The officer is mistaken as to what the vehicle code proscribes. Does that necessarily make his

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101. For two earlier efforts at describing what one might call the total effects of traffic stops, see David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 and Wayne R. LaFare, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

102. See *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (“[S]topping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth and Fourteenth] Amendments.”).

103. See *Whren v. United States*, 517 U.S. 806 (1996) (holding that officer’s racial motivations are irrelevant when officer has probable cause to stop a car for a traffic infraction).

104. See *id.*

decision to stop Tanya unconstitutional?<sup>105</sup> No. The question would be whether the officer's mistake of law was reasonable<sup>106</sup> (recall my earlier point that Fourth Amendment law tolerates numerous forms of law enforcement mistakes, including mistakes of law).<sup>107</sup> While an officer would be permitted neither to issue Tanya a ticket nor arrest her based on the foregoing mistake of law, he would, as I discuss more fully below, be permitted to ask Tanya for her identification or seek permission to search her car. Under Fourth Amendment law, Tanya is supposed to know that she has the right to refuse consent and feel empowered to exercise that right.

*Decision 2: To Use the Traffic Infraction as Pretext*

Assume again that the officers see both Tanya and a white man commit identical traffic infractions. Once more, the officers decide to stop Tanya, but this time they do so because they think she may have drugs on her person or in the car. Under this scenario, the officers are employing the traffic infraction for pretextual reasons. They are not interested in enforcing the traffic code but in investigating drug possession or distribution. Let's further assume that the police are members of a special unit that is specifically charged with ferreting out drug crimes, and that departmental regulations provide that officers in this unit should enforce only serious traffic violations, those that present an immediate risk of harm to the officers or the community. Recall that Tanya's infraction is that she failed to use her turn signal. Does this seizure violate the Fourth Amendment?

No. The Court would respond that so long as the officers have probable cause, it does not matter whether their reasons for stopping Tanya were pretextual.<sup>108</sup>

The Supreme Court case that bears most directly on Decisions 1 and 2 is *Whren v. United States*, a unanimous opinion whose formalism deserves interrogation. Central to the opinion is the view that if police officers have probable cause to believe that Tanya committed a traffic infraction, then they can stop her on the basis of race and for pretextual reasons.<sup>109</sup> If, however, the officers do not have probable cause to stop Tanya for a traffic infraction, and they stop her on the basis of race or for pretextual reasons, that stop would constitute an unreasonable seizure.

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105. *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (holding that an officer's reasonable mistake of law does not render a traffic stop seizure unconstitutional).

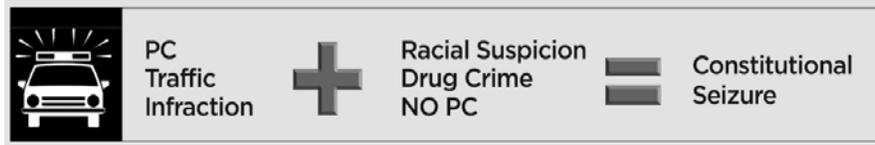
106. *See id.*

107. *See supra* notes 29–30.

108. *See Whren*, 517 U.S. at 806 (holding that when police officers have probable cause to stop vehicles for traffic infractions, it is irrelevant whether they do so for pretextual reasons).

109. Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 209 (2007) (suggesting that pretextual stops occur “when the justification offered for the detention is legally sufficient, but is not the actual reason for the stop”).

The distinction between these two scenarios is formalistic. The diagrams below reveal why that is the case. Consider first Scenario 1:



As Scenario 1 suggests, here the officer has both racial suspicions and probable cause to believe that the suspect committed a traffic infraction, but no probable cause regarding drug possession. Under these circumstances, an officer may legitimately stop the suspect to investigate whether he is in possession of drugs. In other words, that stop is a constitutional seizure.

Consider now Scenario 2:



Here, the officer has only racial suspicion that the suspect is in possession of drugs. Stopping the car to investigate that crime under these circumstances would constitute an unconstitutional seizure. There is no probable cause.

The distinction between Scenarios 1 and 2 is meaningful only if the traffic stop/probable cause “check” is a meaningful one. In fact, however, it is not. Not only is probable cause a relatively easy evidentiary standard for police officers to meet,<sup>110</sup> but traffic infractions are misdemeanors that every driver routinely commits.<sup>111</sup> It is only slightly hyperbolic to say that to drive a car is to

110. See Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 691–92 (2002) (“Unfortunately the probable cause standard is so low that proving its absence is nearly impossible.”); Michael Mello, *“Is a Puzzlement!” An Overview of the Fourth Amendment*, 44 CRIM. L. BULL. 1 (2008) (“Probable cause, as defined by the U.S. Supreme Court, is a very low threshold.”); Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 796 (2005) (“A finding of probable cause—facts and circumstances that indicate a reasonable probability that a crime has been committed; a relatively low standard that falls somewhere below a prima facie showing of guilt—by a judge or magistrate is required to issue an arrest or search warrant.”).

111. Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 708 (2000) (“We are talking about a national policy which is training police all over this country to use traffic violations, which everyone commits the minute you get into your car, as an excuse to stop and search people with dark skin.”); John Dwight Ingram, *Racial and Ethnic Profiling*, 29 T. MARSHALL L. REV. 55, 79 (2003) (“Since almost everyone commits some traffic violation some time, the police are free to

violate some provision of a vehicle code. Consider the following vehicle code violations:

- “Dazzling” lights;<sup>112</sup>
- Loud or unnecessary horn;<sup>113</sup>
- Driving too slowly;<sup>114</sup>
- Driving at a speed greater than what is “reasonable and prudent” for the conditions;<sup>115</sup>
- Following too closely;<sup>116</sup>
- Driving left of center on a grade or a curve;<sup>117</sup>
- Making a right turn without being as close to the right hand curb as possible;<sup>118</sup>
- Failure to approach a left turn nearest to the center line without interfering with the progress of any car;<sup>119</sup>
- Turn signal not given continuously during the last one hundred feet before a turn;<sup>120</sup>
- Entering an intersection or marked crosswalk without sufficient space on the other side;<sup>121</sup>
- Failure to yield in a traffic circle;<sup>122</sup> and
- Failure to yield when entering the roadway from any place other than another roadway.<sup>123</sup>

It was precisely with the foregoing sorts of vehicle code violations in mind that the defendant in *Whren* insisted that:

[I]n the unique context of civil traffic regulations’ probable cause is not enough. . . . [T]he use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. . . .

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choose the drivers they will stop, and the choice may be made partly or solely on the basis of race or ethnicity.”); Sklansky, *supra* note 101 (“Most Americans have never been arrested or had their homes searched by police, but almost everyone has been pulled over.”).

112. N.Y. VEH. & TRAF. LAW § 375(2)(b).

113. *Id.* § 375(1)(a).

114. CAL. VEH. CODE § 22400.

115. N.Y. VEH. & TRAF. LAW § 1180(a).

116. FLA. STAT. ANN. § 316.0895.

117. MICH. COMP. LAWS ANN. § 257.639.

118. ARIZ. REV. STAT. § 28-751(1).

119. MICH. COMP. LAWS ANN. § 257.647(1)(b).

120. CAL. VEH. CODE § 22108.

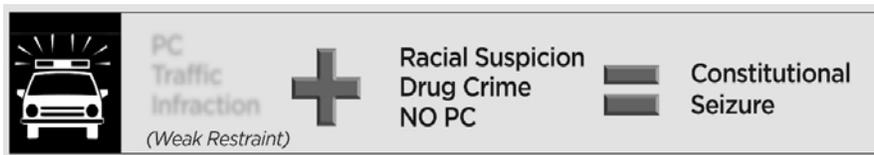
121. OHIO REV. CODE ANN. § 4511.712(a).

122. N.Y. VEH. & TRAF. LAW § 1145.

123. OHIO REV. CODE ANN. § 4511.44.

[P]olice officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger . . . the Fourth Amendment test for traffic stops should be, not the normal one . . . of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.<sup>124</sup>

The takeaway here is that the ease with which police officers can establish probable cause to stop a driver for a traffic infraction means that the traffic stop/probable cause check in Scenario 1 is a very weak restraint. Which is to say, Scenario 1 really looks like this:



The probable cause restraint almost isn't there. This renders Scenario 1 similar to (indeed, almost indistinguishable from) Scenario 2. The weakness of the probable cause/traffic infraction restraint means that police officers are effectively free to stop people on the basis of race.<sup>125</sup>

One might, at this point, query whether police officers are likely to engage in pretextual stops. The fact that *Whren* permits police officers to do so doesn't necessarily mean that they will. As it turns out, the law enforcement establishment was very much aware of the on-the-ground implications of *Whren*. As one training officer for the California Highway Patrol put it, "After

124. *Whren v. United States*, 517 U.S. 806, 810 (1996).

125. For other racial critiques of traffic stop jurisprudence, see scholarship on the intersection of race and routine traffic stops. See also Lewis R. Katz, "Lonesome Road": *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413 (2013); LaFave, *supra* note 101, at 1848; Jordan Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672 (2015). See generally Carbado, *(E)racing the Fourth Amendment*, *supra* note 21; Carbado & Harris, *supra* note 24; Angela Y. Davis, *Race, Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2003); David A. Harris, "Driving While Black" and All Other Traffic Offenses: *The Supreme Court and Pretextual Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1009-45 (2010); Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305, 308 (2012); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

Elsewhere, I explore why the Fourteenth Amendment's Equal Protection Clause does little to mitigate the problem that racialized traffic stops create. Devon W. Carbado, *Regulating the Police Under the Fourteenth Amendment* (Nov. 23, 2016) (unpublished manuscript) (on file with author).

Whren the game was over. We won.”<sup>126</sup> Moreover, as Charles Epp and his colleagues note in an empirical investigation of traffic stops, “*Police Chief* magazine, the official voice of the International Association of Chiefs of Police (IACP), repeatedly and enthusiastically encouraged police departments” to engage in pretextual stops.<sup>127</sup> One concrete example of this comes from the IACP’s director of traffic enforcement:

Savvy police administrators have rediscovered the value of traffic enforcement. They see it not as simply an end in itself, but also as a valuable tool—as a means to an end and an integral part of both criminal interdiction and community policing. An alert police officer who “looks beyond the traffic ticket” and uses the motor vehicle stop to “sniff out” possible criminal behavior may be our most effective tool for interdicting criminals.<sup>128</sup>

The short of it is that *Whren* is problematic not only because it creates an incentive for police officers to engage in pretextual stops, but also because it legalizes those stops, which helps make them an institutional practice. Indeed, only four years after the Supreme Court decided *Whren*, IACP created an award—Looking Beyond the License Plate—to recognize police officers who successfully employed traffic stops to effectuate more serious criminal arrests.<sup>129</sup> As you will now learn, an officer’s ability to make these arrests turns not just on his authority to conduct the stop, but on what he can do in the course of effectuating traffic stops. This brings me to Decision 3.

### *Decision 3: To Question Regarding a Drug Crime*

Suppose that after the officers stop Tanya, Officer A asks her for her driver’s license, registration, and insurance. While Officer A is checking Tanya’s license against police records, Officer B asks her a series of questions, first about drugs—“Have you ever used or sold drugs?” “Does anyone in your family use or sell drugs?” “Do you have any drugs in the car?”—then about whereabouts and occupation—“Where are you coming from?” “Where are you going?” “What kind of work do you do?” While none of the questions Officer B asks has anything to do with the traffic infraction, Fourth Amendment law permits the officer to ask them.

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126. Gary Webb, *Driving While Black: Tracking the Unspoken Law Enforcement Racism*, *ESQUIRE* (Jan. 29, 2007), <http://www.esquire.com/news-politics/a1223/driving-while-black-0499> [<https://perma.cc/5E9R-EKUX>].

127. CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 36 (2014).

128. *Id.* (internal quotations omitted).

129. *Id.*

*Decision 4: To Do a Records Check*

Assume that in the context of effectuating the traffic stop, the officer conducts a records check, meaning he runs Tanya's license through several databases to ascertain whether she has any outstanding warrants. As Wayne LaFave observes, "This kind of checking of government records incident to a 'routine traffic stop,' which usually takes a matter of minutes, is well established as a part of the 'routine,' and has consistently been approved and upheld by both federal and state courts."<sup>130</sup> One worrisome dimension of the permissibility of record checks in the context of traffic stops is the point I made earlier about outstanding warrants. Police officers have an incentive to use traffic stops as pretext to ascertain whether drivers have outstanding warrants. Another worrisome dimension of this relates to my point about mistakes. If the officer is mistaken in his belief about the existence of probable cause because in fact there was no vehicle code violation, but Tanya "voluntarily" hands over her identification and the officer performs a records check that reveals an outstanding warrant, the officer could legally arrest Tanya. This is so even though he had no objective basis to stop Tanya in the first place, as long as the officer's mistake of law as to the vehicle code violation was reasonable.

*Decision 5: To Contact Immigration and Customs Enforcement*

Assume for this decision that the officers perceive Tanya to be an immigrant. If in the context of the traffic stop, the officers develop reasonable suspicion (an evidentiary standard that is greater than a hunch but lower than probable cause)<sup>131</sup> that Tanya is undocumented, they could prolong the encounter to contact Immigration and Customs Enforcement (ICE) to check her citizenship status. The officers' reasonable suspicion could, in part, be expressly based on whether the officer perceives Tanya to have "apparent Mexican ancestry."<sup>132</sup>

*Decision 6: To Ask the Driver or the Passenger to Exit Car*

In the context of effectuating the traffic stop, the officers are free to ask Tanya to exit the car.<sup>133</sup> They would not need any additional justification to do

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130. LaFave, *supra* note 101, at 1875.

131. *See, e.g.,* *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985) ("The 'reasonable suspicion' standard has been applied in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause."); *United States v. Cortez*, 449 U.S. 411, 417–18 (1981) ("Based upon th[e] whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007) ("[E]ven when factors considered in isolation from each other are susceptible to an innocent explanation, they may collectively amount to a reasonable suspicion.").

132. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884–87 (1975).

133. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (requiring driver to exit car is at most a de minimis intrusion on driver's personal liberty).

so. Probable cause to believe that Tanya has committed a traffic infraction is enough.

Incidental to stopping Tanya for a traffic infraction, the officers could also ask any passenger to exit the car. Here, too, the officers would not need any additional justification to do so.<sup>134</sup> That is, without any reason to believe that a particular passenger has done anything wrong, police officers who stop a driver for failing to use a turn signal can ask passengers in that car to exit. Because police need no other justification to ask passengers or the driver to exit the car, police officers can racially select the passengers and the drivers that they subject to this treatment.

*Decision 7: To Search Car and Frisk Driver*

If the officers have reasonable suspicion that Tanya is armed and dangerous, they may frisk Tanya and search the car.<sup>135</sup> Because reasonable suspicion is a low evidentiary standard, if the police stop Tanya for a traffic infraction while she is driving in a “high-crime area” in the middle of the night, the officers are a long way towards satisfying the reasonable suspicion standard (if not there already). They would thus likely have little difficulty justifying frisking Tanya and searching her car.<sup>136</sup> In the context of that frisk, Tanya would be vulnerable to being sexually violated, a violent dimension of being frisked that figures marginally if at all in our public discussions about race and policing.

The multiple ways in which racial suspicion is potentially operating in this hypothetical bears emphasis. First, and as we have already learned, so long as the officers have probable cause, they may expressly use race to justify pulling Tanya over. Second, reasonable suspicion is a low evidentiary bar for an officer to surmount. Thus, the officers will have little difficulty authorizing a frisk of the driver, passengers, and a search of the car itself. Third, the very notion of a “high-crime area” already embeds race in the equation in the sense that the term almost always refers to predominantly black or Latino neighborhoods.<sup>137</sup>

*Decision 8: To Use a Drug-Detection Dog*

Assume that after stopping Tanya, the officers contact a colleague, Officer Mathews, and ask him to bring a drug-detection dog to the scene. This

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134. *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997).

135. *Michigan v. Long*, 463 U.S. 1032, 1047–50 (1983) (finding that the *Terry* regime applies to vehicular stops and limited searches).

136. *See Adams v. Williams*, 407 U.S. 143, 144–49 (1972) (holding that an anonymous tip that a man was in a nearby car in a high-crime area with narcotics and a gun supported reasonable suspicion for search).

137. *See, e.g., Andrew Guthrie Ferguson & Damien Bernache, The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1609 (2008).

colleague arrives within five minutes, while the officers are still checking Tanya's driver's license, insurance, and registration. Upon arriving Mathews immediately walks the dog around the car, directing the dog to smell the vehicle for narcotics. No drugs are detected. The other officers then return with Tanya's license and ask, "There are no drugs in the car, right?" Tanya responds in the negative. The officers then tell Tanya that she is free to leave. None of this violates the Fourth Amendment. Notwithstanding that the officer's basis for stopping Tanya was a traffic infraction, and that the officers have no reason to believe that Tanya is in possession of drugs, the Supreme Court would conclude that it is constitutionally reasonable for police officers to employ a drug-detection dog in the way I have described.<sup>138</sup>

*Decision 9: To Seek Permission to Search*

Imagine now that the officer asks Tanya for permission to search her. Recall our earlier discussion that police officers do not seize us when they approach us and ask us for permission to search. Under those circumstances, we are supposedly "free to leave or otherwise terminate the encounter." But my hypothetical assumes that Tanya is not "free to leave or otherwise terminate the encounter"; our assumption is that Tanya has been seized. Is it permissible for officers to seek permission to search when they have seized someone? Yes. Does it matter that the officer has not informed Tanya that she has a right to refuse consent? No. In theory, Tanya could simply decline the request. Again, the fact that she may not know that she has that right, or may not feel empowered to exercise it, does not matter.

All of this might seem to flow inexorably from what I have already stated about consent searches. But it is one thing for police officers to seek permission to search in the context of an encounter that is ostensibly consensual, and quite another for them to do so when the suspect, like Tanya, has already been seized. Here, the possibility that Tanya (or a reasonable person in her position) would feel that she is bargaining in the shadow of a potential (albeit illegal) arrest would be high.<sup>139</sup> Indeed, many people might erroneously think not only that they may not bargain, but also that the right to detain a person carries with it the right to search. Here's how the Ohio Supreme Court put the matter:

The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred.

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138. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 406–08 (2005). This does not mean that there are no constraints on police officers' ability to employ drug-detection dogs. "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id.* at 407; see also *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (holding that the Fourth Amendment tolerates certain unrelated investigations that do not lengthen the roadside detentions).

139. In other words, Tanya may believe that if she refuses consent, the officer will (illegally) arrest her. See, e.g., *United States v. Freeman*, 479 F.3d 743, 749 (10th Cir. 2007) ("Refusal to consent to a search—even agitated refusal—is not grounds for reasonable suspicion.").

The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow. . . . Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him. . . .

Therefore, we are convinced that the right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.<sup>140</sup>

In the foregoing case, an officer got almost eight hundred people who he stopped for a traffic violation to consent to search of their cars.<sup>141</sup> In one study of consent searches during traffic stops, "none of the 90-95% of subjects who consented knew of the right to refuse consent, and those few who knew the law were skeptical that the officer would actually take no for an answer."<sup>142</sup> Making matters worse, there is at least some evidence that African Americans are subject to consent searches at a significantly higher rate than whites.<sup>143</sup>

That people seemed to consent to searches in the context of traffic stops because they think they have to, and that police officers seem to employ traffic stops to target African Americans for consent searches, does not matter under current Fourth Amendment doctrine. The police are free to employ consent search requests both when suspects are seized and when they are not. Under neither scenario are the police required to inform us of our right to refuse consent.

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140. *State v. Robinette*, 653 N.E.2d 695, 698–99 (Ohio 1995).

141. *Ohio v. Robinette*, 519 U.S. 33, 48 (1996) (Stevens, J., dissenting) (internal citations omitted).

142. Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 301 (2016) (citing study).

143. See, e.g., NW. UNIV. CTR. FOR PUB. SAFETY, ILLINOIS TRAFFIC STOPS STATISTICS STUDY: 2007 ANNUAL REPORT 11 (2007), <http://www.dot.state.il.us/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2007/2007%20Illinois%20Traffic%20Stop%20Summary.pdf> [https://perma.cc/594S-HVPT] (finding that, in Illinois, people of color are subject to consent searches at twice the rate of whites); see also Friedman & Stein, *supra* note 142, at 302 n.103 (discussing other studies).

*Decision 10: To Arrest and Search*

Let's now say that the officers decide to arrest Tanya for the traffic infraction. That would not be unreasonable under the Fourth Amendment.<sup>144</sup> Simply refusing to wear a seatbelt can render one vulnerable to a full custodial arrest.<sup>145</sup> Moreover, even if state law expressly prohibits police officers from arresting a suspect for violating a traffic infraction, an officer's decision to do so would not violate the Fourth Amendment, so long as the arrest is supported by probable cause.<sup>146</sup>

If the officers decide to arrest Tanya, they may also search her incident to that arrest<sup>147</sup> and potentially may search areas in the car.<sup>148</sup> Nothing in Fourth Amendment doctrine prevents police officers from consciously employing traffic infractions to trigger the search incident to arrest doctrine along the foregoing lines. Thus, if a police officer believes that a suspect has drugs on her person or in the car, but does not have probable cause to back that up, he can circumvent that drug-suspicion probable cause requirement by trading on another—the probable cause he has that the suspect committed a traffic infraction.<sup>149</sup>

*Decision 11: To Conduct a DNA Search*

Assume that upon arresting Tanya and transporting her to the station, the officers use a cheek swab to take a sample of Tanya's DNA. There is no question that this search would be constitutionally reasonable if Tanya is arrested for a "serious" crime. That much is clear from *Maryland v. King*.<sup>150</sup> What is less clear is whether the serious/nonserious crime distinction upon which *King* is based is conceptually sound and doctrinally manageable. Dissenting in *King*, Justice Scalia did not think so.<sup>151</sup> If he is right, the ultimate result will be not only that police officers may conduct ordinary searches of the person incidental to arrest but also that they may conduct bodily intrusions via

144. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 339–40, 345, 354 (2001) (discussing various reasons why custodial arrests even for very minor criminal offenses do not violate the Fourth Amendment).

145. See *id.* at 323–24.

146. See *Virginia v. Moore*, 553 U.S. 164, 177 (2008) (noting that the Fourth Amendment does not require exclusion of evidence obtained incident to an arrest that violated state law so long as the arrest was not itself unconstitutional).

147. See *United States v. Robinson*, 414 U.S. 218, 235–36 (1973) (noting that "the fact of [the] custodial arrest . . . gives rise to the authority to search" and that an arrest "being lawful, a search incident to the arrest requires no additional justification").

148. *Arizona v. Gant*, 556 U.S. 332, 346 (2012) (permitting police officers to "conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest").

149. For a discussion of why we should pay far more attention to the costs of arrests, see Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870 (2015).

150. 133 S. Ct. 1958, 1980 (2013).

151. *Id.* at 1989 (Scalia, J., dissenting) ("I cannot imagine what principle could possibly justify this [serious crime] limitation.").

DNA testing as well.<sup>152</sup> Little would prevent police officers from employing race as a basis for determining who, upon arrest, they subject to DNA testing.

*Decision 12: To Strip Search*

If subsequent to arresting Tanya, the police decide to place her in the general jailhouse population, they may perform a strip search prior to doing so.<sup>153</sup> This search requires no additional justification, and unlike with the DNA search, there isn't even the formal limitation that the predicate crime be a serious one.<sup>154</sup> Any crime for which Tanya is arrested can be the basis for a strip search if she is placed in the general population.<sup>155</sup> And, remember, the genesis for this strip search could derive from officers' race-based decision to arrest Tanya for failing to use her turn signal!

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What are we to make of what I have said thus far? The short answer: like the Supreme Court's conclusions about when the Fourth Amendment is triggered, its judgments about when searches and seizures are reasonable legalize or enable racial profiling. I focused my analysis on traffic stops because of the broad discretion the police have to effectuate them and because traffic stops are gateways to more intrusive and potentially violent searches and seizures.

Against the backdrop of Parts I and II, it is only slightly hyperbolic to say that the Supreme Court has interpreted the Fourth Amendment's prohibition against unreasonable searches and seizures to enable police officers to engage African Americans in public almost whenever they want. Instead of a reasonable expectation of privacy and security, we have a reasonable expectation of unbridled police discretion. To put all of this another way, and as I have argued elsewhere, the Supreme Court has effectively transformed the Fourth Amendment into a "Privileges and Immunities Clause for police officers."<sup>156</sup> Fourth Amendment law "confers tremendous power and discretion to police officers with respect to *when* they can engage people (the 'privilege' protection of the Fourth Amendment) and largely insulates them from criminal

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152. See, e.g., George M. Dery III, *Opening One's Mouth "For Royal Inspection": The Supreme Court Allows Collection of DNA from Felony Arrestees in Maryland v. King*, 2 VA. J. CRIM. L. 116, 155 (2014).

153. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012).

154. See *id.* at 1520.

155. See, e.g., George M. Dery III, *Florence and the Machine: The Supreme Court Upholds Suspicionless Strip Searches Resulting from Computer Error*, 40 AM. J. CRIM. L. 173, 196 (2013).

156. Carbado, *Blue-on-Black Violence*, *supra* note 34, at 1505.

and civil sanction with respect to *how* they engage people (the ‘immunities’ protection of the Fourth Amendment).”<sup>157</sup>

#### CONCLUSION

That I have focused on Fourth Amendment doctrine in this Article is not to argue that Fourth Amendment law is the most significant factor in the race and police violence problem. As I explain elsewhere, Fourth Amendment law is one of several variables that facilitate contact between African Americans and the police; and the facilitation of police contact is one of several dynamics that enables and legitimizes police violence.<sup>158</sup> I focus on Fourth Amendment law here because it figures too marginally in our discussions about race and police violence, because too few people—including law students, lawyers, and legal academics—seem to understand how Fourth Amendment law works on the ground, and because too little of our collective engagement about police violence takes seriously the relationship between ordinary police contact and extraordinary police violence.

Significantly, the police killings of Michael Brown, Walter Scott, and Eric Garner began as ordinary police interactions. Officer Wilson engaged Brown because Brown was walking in the street.<sup>159</sup> Officer Slager engaged Scott because Scott was driving with a broken taillight.<sup>160</sup> Officer Pantaleo engaged Garner because Garner was selling loose cigarettes.<sup>161</sup> One can tell a similar story about the most recent police killings of Terence Crutcher, Keith Scott, and Alfred Olango.<sup>162</sup> Each one began as an ordinary police interaction.

157. *Id.* Another way to make this point would be to argue that Fourth Amendment law operates as a police officer’s Bill of Rights. It sets forth all the “rights” police officers have with respect to when and how they can engage us. Note that many jurisdictions have passed “Bill of Rights” legislation for police officers. I am saying the Court has done something quite similar with respect to how it has interpreted the Fourth Amendment.

158. *Id.*

159. The precise facts surrounding Brown’s shooting remain disputed. *See, e.g.,* Jaeah Lee & A.J. Vicens, *5 Key Inconsistencies in What Happened During the Michael Brown Shooting*, MOTHER JONES (Nov. 26, 2014), <http://www.motherjones.com/politics/2014/11/inconsistencies-what-happened-during-michael-brown-shooting> [https://perma.cc/89SV-FL46].

160. Schmidt & Apuzzo, *supra* note 94.

161. Elliot C. McLaughlin, *After Eric Garner: What’s Point of Police Body Cameras?*, CNN (Dec. 8, 2014), <http://www.cnn.com/2014/12/04/us/eric-garner-ferguson-body-cameras-debate> [https://perma.cc/X934-4WNE].

162. *See* Richard Fausset & Alan Blinder, *What We Know About the Details of the Police Shooting in Charlotte*, N.Y. TIMES (Sept. 25, 2016), <http://www.nytimes.com/2016/09/26/us/what-we-know-about-the-details-of-the-police-shooting-in-charlotte.html> [https://perma.cc/A7HK-X5B6]; Liam Stack, *Video Released in Terence Crutcher’s Killing by Tulsa Police*, N.Y. TIMES (Sept. 19, 2016), <http://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html> [https://perma.cc/4H9B-3BV2]; Gary Warth, *Demonstrations Continue in El Cajon After Fatal Police Shooting of Unarmed Black Man*, L.A. TIMES (Oct. 1, 2016), <http://www.latimes.com/local/lanow/la-me-ln-el-cajon-demonstrations-20161001-snap-story.html> [https://perma.cc/9M54-9PES]. *See generally* *The Counted: People Killed by Police in the U.S.*, GUARDIAN (2016), <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database#> [https://perma.cc/V73D-FRLK].

And with respect to black women specifically, their deaths, too, often begin as ordinary police interactions.<sup>163</sup> Alexia Christian—killed incidental to an officer investigating a stolen pickup truck report.<sup>164</sup> She had been asleep in the pickup prior to the officer’s approach. Sheneque Proctor—died in police custody after being arrested for disorderly conduct.<sup>165</sup> Kendra James—killed subsequent to the enforcement of a traffic infraction.<sup>166</sup>

That relatively nonserious activities on the part of African Americans are so often the precursors to police violence, including killings, suggests that, in the context of police interactions, black lives *don’t* matter. While I have expressed the slogan “Black Lives Matter” so many times as to be numbed by the articulation, the hard truth of the matter is that in the political economy of race, black life is undervalued. Death—and not just social death—is increasingly becoming a constitutive feature of black life.

Fourth Amendment law plays an important role. To put it the way Robert Cover might have, Fourth Amendment doctrine deals in pain and death.<sup>167</sup> Consider again the moment preceding Eric Garner’s death. Officer Pantaleo needed no justification to approach and question Garner. Moreover, that his reason for doing so might have been racially motivated is, under Fourth Amendment law, doctrinally irrelevant.<sup>168</sup> Further, because Pantaleo developed probable cause to believe that Garner was selling loose cigarettes, the officer was legally authorized to arrest him.<sup>169</sup> Here too, any racial motivations of Pantaleo’s are doctrinally irrelevant.<sup>170</sup> Garner’s response—“Don’t touch me”<sup>171</sup>—was problematic against this Fourth Amendment backdrop. His failure to comply authorized Pantaleo to use force to effectuate the arrest.<sup>172</sup>

Am I arguing, therefore, that Pantaleo was justified in using deadly force? No. Nor am I suggesting that it was inevitable that he would do so. The point is that Fourth Amendment law helped to stage Garner’s trajectory from life to death. Which is to say, the extraordinary violence Pantaleo mobilized against Garner grew out of an ordinary police interaction whose life-and-death boundaries Fourth Amendment law helps to produce.

163. See generally CRENSHAW & RITCHIE, *supra* note 1.

164. Blau, *supra* note 1; Mandi Milligan, *Mother of Woman Killed: “I Shouldn’t Be Making Funeral Arrangements,”* CBS (Sept. 32, 2015), <http://www.cbs46.com/story/28964795/mother-of-woman-killed-i-shouldnt-be-making-funeral-arrangements> [https://perma.cc/4X87-5AXK].

165. Ed Pilkington, *Family of Black Alabama Teenager Who Died in Police Cell Still Waiting for Answers*, GUARDIAN (Jan. 9, 2015), <http://www.theguardian.com/us-news/2015/jan/09/black-alabama-teenager-died-police-cell-sheneque-proctor> [https://perma.cc/HS5S-U9R2].

166. Nick Budnick, *Anatomy of a Police Shooting: Citizens Will Now Get the Chance to Dissect Kendra James’ Death*, WILLAMETTE WEEK (June 3, 2003), [http://www.wweek.com/portland/article-2106-anatomy\\_of\\_a\\_police\\_shooting.html](http://www.wweek.com/portland/article-2106-anatomy_of_a_police_shooting.html) [https://perma.cc/W5DM-ZDYF].

167. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

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

169. See *supra* Part II.

170. See *id.*

171. See McLaughlin, *supra* note 161.

172. N.Y. PENAL LAW § 35.30 (McKinney 2014).