

# Will to Power, Will to Reality, and Racial Profiling: How the White Male Dominant Power Structure Creates Itself as Law Abiding Citizen Through the Creation of Black as Criminal

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## I. INTRODUCTION

¶1 Postmodern investigations of racism in American law follow in the tradition of tragic detective *films noir*: pursuing the culprit through a maze of smoke and mirrors in which the detective is never sure of his precise location, his destination, his suspect, or his suspect's culpability, he finally resolves the case and catches his man. His doubts remain, however. Is his suspect the guilty party? Is there a guilty party at all? If so, of what crime is he guilty? Has the detective resolved anything at all, or has he simply created a fantasy world in which he becomes the visionary, seeing things for what he believes them to be?

¶2 This dilemma between what is real and what is imagined is played out in exploring racism in American law. In her book *The Alchemy of Race and Rights*,<sup>1</sup> Patricia Williams sees her world awash in sub-surface anti-black racism and is pained to the core with this sight, only to then ask, “[h]ow can I be sure I’m right?”<sup>2</sup> She is a detective, gathering evidence of racism, breadcrumbs leading to *the racist*, the root of it all. She is predictably frustrated: just when she has the culprit in sight, he steps back, or just out of view, and she must resume pursuit. She cannot apprehend her racist through linear investigation, through following the reporter’s string. She must gather breadcrumbs from around his camp and trap him. She must find the racist as one finds a black hole<sup>3</sup>: by detecting not the racist himself, but by measuring the racist’s effects on his externalities.<sup>4</sup>

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<sup>1</sup> PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

<sup>2</sup> Reginald Leamon Robinson takes issue with the broad structural framework that Williams is trying to sense in her work. He echoes her words in suggesting that Critical Race Theory fails to ask whether one “becomes the structure by believing in it before she sees *white* structural oppression. Is she co-creating it? Or has she acquired the Shadow’s mystical ability to ‘know’ intuitively only what already exists in the heart of the Law?” Compare Reginald Leamon Robinson, *The Sacred Way of Tibetan CRT Kung Fu: Can Race Critics Teach the Shadow’s Mystical Insight and Help Law Students “Know” White Structural Oppression in the Heart of the First-Year Curriculum? A Critical Rejoinder to Dorothy A. Brown*, 10 MICH. J. RACE & L. 355, 376 (2005), with WILLIAMS, *supra* note 1, at 51. By questioning herself, however, Williams has taken a step beyond the objects of Robinson’s critique and questions the very structure that Robinson attacks.

<sup>3</sup> The idea of the astronomical phenomenon of a black hole compares well with the idea of a black man as criminal. Both in their own realm are greatly feared for the perceived threat that objects with substance and value (spaceships, planets, whites, pure and virginal women) will fall into their grasp, in the process being

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The United States Supreme Court, in passing judgment on the required standard of proof for a showing of discrimination, beyond shielding the racist from direct detection, made it nearly impossible to legally detect discrimination by measuring external effects. To have a cognizable claim of discrimination, a plaintiff must show discriminatory intent, a showing that only the racist himself can make. Discriminatory effect of the racist on externalities, in the eyes of the law, is worthless.<sup>5</sup> As a result, it has become nearly impossible to introduce a selective prosecution defense as a criminal defendant.<sup>6</sup> To do so, one would have to obtain prosecution's documents that prove selective prosecution.<sup>7</sup> In the realm of racial profiling, the problem is the same.<sup>8</sup> Although statistics show clear disparity in stops,<sup>9</sup> searches,<sup>10</sup> arrests, and use of force,<sup>11</sup> they do not show actual discriminatory intent. In fact, the Supreme Court in dicta suggested that racial profiling is constitutional as long as some pretext to stop a motorist exists.<sup>12</sup> The Court wrote: "we never held . . . that an officer's motive invalidates objectively justifiable behavior under

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destroyed by becoming what the black hole and black man are, namely, destruction and corruption themselves. Both the black hole and black man are mysterious objects—we don't know what exactly the nature is of the threat that we perceive in them, and so we avoid them, we study them from afar, we elevate them to the status of symbols: from this hole and from this man no light shall emanate, only destruction.

<sup>4</sup> See generally WILLIAMS, *supra* note 1 (Williams writes about her encounters with racism and racists, but acknowledges that she encounters them not directly or clearly, but indirectly and always with the doubt that what she is seeing is the shadow of something other than racism).

<sup>5</sup> Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1049-50 (1978) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 239-42 (1976)).

<sup>6</sup> DAVID COLE, *NO EQUAL JUSTICE* 160 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> The problem might be even worse. If we adopt Ian F. Haney López's view of "common sense racism"—which is nearly synonymous with notions of institutional racism—which does not require hatred or prejudice of individuals to distribute privileges and burdens along racial lines, then there is no "intent" to commit racist acts. John O. Calmore, *Displacing the Common Sense Intrusion of Whiteness from Within and Without: "The Chicano Fight for Justice in East L.A."*, 92 CAL. L. REV. 1517, 1518 (2004) (reviewing IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2002)). For Haney López, racism is usually not the manifest, virulent form taken under Jim Crow or the Civil Rights Movement. See *id.* Instead, it is "the product of indifference; the failure to challenge existing beliefs about what race is." *Id.* at 1524. Without persistent challenge, says Haney López, the existing racial hierarchy will be perpetuated. *Id.* Haney López's theory has influenced other thinkers, including Professor Philomena Essed, Andrew Kernahan, and Deseriee Kennedy. *Id.* at 1525-26. It also may inform Patricia Williams's ambivalence as well as answer critics of this article who argue that they know of no particular person who is a member of the admittedly vague "white male dominant power structure." Compare *id.* at 1535 ("Pointing out racism is like chasing a will-o'-the-wisp; race is retro."), with WILLIAMS, *supra* note 1. Without abandoning my belief that 1950s virulent racism still exists, Haney López offers another type of racism that exists side-by-side with the more obvious virulent form and is important to consider when speaking in terms in which this article does.

<sup>9</sup> INSTITUTE ON RACE AND JUSTICE, RACIAL PROFILING DATA RESOURCE COLLECTION CENTER, NORTHEASTERN UNIVERSITY, STOP DISPARITIES, <http://www.racialprofilinganalysis.neu.edu/reporting/tablegen.php> (select all reports, type of jurisdiction, select all, stop disparities) [hereinafter NORTHEASTERN STUDY, STOPS].

<sup>10</sup> INSTITUTE ON RACE AND JUSTICE, RACIAL PROFILING DATA RESOURCE COLLECTION CENTER, NORTHEASTERN UNIVERSITY, SEARCH DISPARITIES, <http://www.racialprofilinganalysis.neu.edu/reporting/tablegen.php> (select all reports, type of jurisdiction, select all, search disparities) [hereinafter NORTHEASTERN STUDY, SEARCHES].

<sup>11</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, NCJ 207845, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY 16 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf> [hereinafter CONTACTS BETWEEN POLICE AND THE PUBLIC].

<sup>12</sup> *Whren v. United States*, 517 U.S. 806, 812-13 (1996).

the Fourth Amendment; but we have repeatedly held and asserted the contrary.”<sup>13</sup> The Court went on to clarify its position: “a traffic-violation arrest . . . would not be rendered invalid by the fact that it was ‘a mere pretext for a narcotics search.’”<sup>14</sup> Even if Williams could name the racist, she would not be able to bring a cognizable claim against him.

¶4 Williams’s dilemma and the Supreme Court ruling illustrate the fundamental problem of postmodern legal analysis, which is one of legitimacy. Such analysis attempts to deny the traditional viewpoint that the law is a body whole and just, meaning that it is logically constructed on a foundation of fairness to the many groups that participate in it as judges, jurors, lawyers, parties, and defendants. Instead, postmodern legal analysis views the law as a disunified body, with different meanings depending on the person from whose standpoint we are observing the law. The law is, therefore, just for one group of participants, unjust for another. Therein lies the problem with postmodern legal analysis’s legitimacy. To be legitimate—to be literally *real*, in Jacques Lacan’s words—one must speak, be heard, and be believed.<sup>15</sup> When the traditional, dominant legal-political system is the only and ultimate validator of speech and its definitions explicitly exclude the postmodern approach, how does that approach gain legitimacy?

¶5 It does not. That is, it does not by the traditional modernist method of changing doctrine through the dominant legislative or judicial process.<sup>16</sup> It can gain legitimacy only by convincing people individually, showing over time that its approach is valid. One way to do this is to write, and therefore to speak, and by so doing, have readers and hearers believe in the postmodern approach.<sup>17</sup> If the reader believes in the words written, those words become real. If enough readers believe, the legal-political doctrine will follow by adopting the postmodern approach.

¶6 Gaining legitimacy is not merely an academic pursuit, since people commit fewer crimes to the extent that they view the legal system under which they live as legitimate.<sup>18</sup> When one views this legal system as legitimate, she internalizes the mores reflected in that system.<sup>19</sup> The existence of racial profiling and the Court’s and legislatures’ imprimatur on it delegitimize the system for thousands, if not millions, of black Americans.<sup>20</sup> These people are less likely to value their system of justice as a fair one, and are therefore more likely to become the criminals they are already assumed to be.<sup>21</sup>

¶7 When one segment of the population is treated unfairly, we all suffer. It is, therefore, important for us all to understand how the criminal justice system operates:

<sup>13</sup> *Id.* at 812.

<sup>14</sup> *Id.* at 813 (quoting *United States v. Robinson*, 414 U.S. 218, 221, n.1 (1973)).

<sup>15</sup> JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: BOOK I: FREUD’S PAPERS ON TECHNIQUE 1953-1954* (Jacques-Alain Miller ed., John Forrester trans., W.W. Norton & Company 1988) (1975).

<sup>16</sup> Changing doctrine in this way entails criticizing extant doctrine and proposing a new doctrine that still fits the paradigm of the status quo. From a postmodern perspective this is impossible, just as it is troubling for supporters of Critical Legal Studies to hear the question that killed the CLS movement: “What would you put in its place?” Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 *LAW & SOC. INQUIRY* 779, 780 (1992).

<sup>17</sup> See FRIGGA HAUG, *BEYOND FEMALE MASOCHISM: MEMORY-WORK AND POLITICS* (Rodney Livingstone trans., Verso 1992) (1992) on the importance and revolutionary power of writing. See also LACAN, *supra* note 15.

<sup>18</sup> COLE, *supra* note 6, at 172.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

what motivates it, what its methods are, and how it gains legitimacy in one person's eyes and loses legitimacy for many others. The traffic stop is the entry point for many people into the criminal justice system, and racial profiling serves a prominent role in selecting black Americans for entry into this system at a rate higher than that for white Americans and most often without justification. Attention must be paid, and legitimacy given, to the voice of the America that sees racial profiling for the unjustified harm that it does. We must accept the voice of the hysteric as he speaks out against the voice of the master, telling us that blacks are more prone to crime, and therefore need to be racially profiled.<sup>22</sup>

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This article is an attempt to speak, and thereby have heard and believed, a postmodern approach to the issue of the terms "Law Abiding Citizen" and "Criminal" as they are manifest in racial profiling. This essay explores why people racially profile, why it is important that this knowledge be discussed, and what effect this discussion may have on racial profiling. We can start with the terms "Law Abiding Citizen" and "Criminal." These terms are social constructs, created by the white dominant power structure,<sup>23</sup> consisting of legislatures, courts, police, prosecutors, and others within the dominant legal-political infrastructure.<sup>24</sup> They are created in order to maintain this infrastructure's power through, as the title of this article and Lacan's theories suggest, being *real*. As George Orwell stated in *1984*, power exists to perpetuate power.<sup>25</sup> Lacan finds this power in being able to speak, define the world and people in it, be heard and be believed, and thereby become *real*.<sup>26</sup> The white dominant power structure desires this, as do other structures and individuals. It gains this reality by defining itself and its individuals (whites) as Law Abiding Citizens through the definition of Others (blacks and, to a lesser

<sup>22</sup> See STUART HENRY & DRAGAN MILOVANOVIC, CONSTITUTIVE CRIMINOLOGY: BEYOND POSTMODERNISM 33 (1996) on Lacan's discourses of the master, university, and hysteric.

<sup>23</sup> Throughout this article, I use the term "white dominant power structure," "white male dominant power structure," and other similar variants to describe the largest congregation of power in America today. This power is not all white, nor is it all male, though white males comprise the vast majority of member slots in this power structure. I thus adopt a broad structuralist framework, something that Reginald Leamon Robinson both accepts and derides. Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U.L. REV. 1361, 1409-10 (2004). He accepts that "white society uses force, violence, and public authority to 'encourage' blacks to co-create their personal experiences and social worlds through race, racial identity, and race consciousness." *Id.* He goes on, however, to deride this focus on the structure because, for him, it robs racial minorities of their human agency, their ability to create their realities. Writes Robinson: "ordinary people [are] . . . human gods who simply play the role of victims." *Id.* at 1369. Blacks, in the face of white oppression, are "powerful reality creators, earthly gods who name and thus co-create their realities" as an oppressed minority. *Id.* at 1381. In this article, I examine one aspect of American racism, not intending to take anything away from people's ability to act. Indeed, when Robinson mentions Homer Adolphus Plessey and Rosa Parks as two examples of people who had and used their agency to be other-than-victims, *id.* at 1392, I can imagine that if all black "victims" took such agency, racism would be defeated. On the other hand, I cannot adopt Robinson's view that "whites cannot thus victimize minorities [because] . . . victimization is an attitude, and it must be self-imposed." Robinson, *supra* note 2, at 363.

<sup>24</sup> Thanks to Professor Anthony Paul Farley and many others for supporting this theory, which is everywhere and nowhere at the same time and therefore cannot be documented with modernist logic and construction.

<sup>25</sup> See GEORGE ORWELL, 1984 266 (1977), in which O'Brien explicates society's system of power to Winston: "The Party seeks power entirely for its own sake. We are not interested in the good of others; we are interested solely in power. Not wealth or luxury or long life or happiness; only power, pure power."

<sup>26</sup> See generally LACAN, *supra* note 15 (in which Lacan puts much stress on people's desire to be real, and achieving such reality through speech and others).

extent, other minorities and the poor) as Criminal.<sup>27</sup> For what purpose? For none other than to be *real* and maintain the power it already has.

¶9 As I have already noted, the Court and legislatures have declared racial profiling to be constitutional and acceptable.<sup>28</sup> This power structure, composed mainly of wealthy white males, therefore accepts a policing method that reinforces segregation and creates fear and mistrust between blacks and whites.<sup>29</sup> By establishing this racist antagonism, the power structure takes its place as a defense of one against the aggression of the other. In a society in which blackness itself has become criminalized,<sup>30</sup> the power structure will come to define whiteness as law abiding. The split is therefore complete: Black remains Criminal, and White, as a mirror to Black's constructed Criminality, becomes Law Abiding.<sup>31</sup>

¶10 To effect the construction of White as Law Abiding and Black as Criminal, the power structure has had to construct race itself. Race must be seen as biologically, not socially, determined.<sup>32</sup> The Court has served this end in a number of seminal cases. The Court in *Terry v. Ohio* set the stage for acceptance of racial profiling.<sup>33</sup> *Whren v. United States*, we have already seen, holds racial profiling to be constitutional and bars any claim of discrimination from being brought under the Fourth Amendment, instead referring the litigant to the Fourteenth Amendment and all of its problems with proving discriminatory intent.<sup>34</sup> The Court in *Schneckloth v. Bustamonte*, in holding that law enforcement officers do not have to inform people that they may refuse a request to search their bodies or automobiles, intentionally exploits the ignorance of society as to the law.<sup>35</sup> The Court in *Florida v. Bostick* gave officers the ability to target whomever they please.<sup>36</sup> The results of these cases point to one end goal: the social construction of race, the reifying of race, and the subsequent differencing of Black and White.<sup>37</sup> If racism is defined as the process of "raceing," or creating race, then these decisions are racist. In fact, racism is everywhere in the criminal justice system: in racial profiling, in jury selection,<sup>38</sup> in death

<sup>27</sup> See LACAN, *supra* note 15, at 83 on mirror relations. See also Liyah Kaprice Brown, *Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 788 ("An examination of police desegregation and subsequent operational needs case law suggests that police departments historically have connected Blacks with criminal behavior."). See generally FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Charles Lam Markmann trans., Grove Press 1967) (1952).

<sup>28</sup> David A. Harris, *The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters*, 84 MINN. L. REV. 265, 291 (1999).

<sup>29</sup> U.S. DOMESTIC HUMAN RIGHTS PROGRAM, AMNESTY INTERNATIONAL, *THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES* xiv (2004), [http://www.amnestyusa.org/racial\\_profiling/report/rp\\_report.pdf](http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf) [hereinafter *THREAT AND HUMILIATION*].

<sup>30</sup> Harris, *supra* note 28, at 292.

<sup>31</sup> See LACAN, *supra* note 15, at 83 on mirror relations.

<sup>32</sup> Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 476 (1997).

<sup>33</sup> 392 U.S. 1, 13-14 & n.9 (1968) ("Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime. . . . [Police] may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.").

<sup>34</sup> 517 U.S. 806, 812-13 (1996).

<sup>35</sup> COLE, *supra* note 6, at 29-30 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).

<sup>36</sup> *Id.* at 21 (citing *Florida v. Bostick*, 501 U.S. 429, 441 n.1 (1991) (Marshall, J., dissenting)).

<sup>37</sup> Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 965-66 (2002) ("[T]he race-constructing role the Court performs in the Fourth Amendment context . . . help[s] to highlight the Court's complicity in, and legitimation of, police practices that target people of color.").

<sup>38</sup> COLE, *supra* note 6, at 104.

sentencing,<sup>39</sup> everywhere.<sup>40</sup> The final result is a dual system of justice, two lenses through which we view the same structure. Through one lens, we see blacks as criminals and suspects. Through another lens, we see whites as law-abiding citizens and assumed-to-be-virtuous.<sup>41</sup>

¶11 This dual system of justice has existed since blacks' first existence in America and has characterized blacks as "at risk" for police antagonism and violence while whites enjoyed police service and protection.<sup>42</sup> Racial profiling is perpetuated by this dual system in which whites respond positively to a system that treats them with courtesy, professionalism, and respect, and blacks respond negatively since they are treated with hostility and sub-par and offensive policing.<sup>43</sup> These two different ways of viewing law enforcement increase the gap between White and Black, thus providing an ever greater venue in which the dominant power structure can establish its necessity. Black views of the system may also increase the incidence of black crime, thus making the power structure's speech about black criminality real. Whites, who legitimize the system, are primed to reject the voice of Black America, because it seems to be the voice of Criminal America. White and Black both become more entrenched in their beliefs, and the power structure gains more and more purchase on necessity.

¶12 Williams, the detective, had to sense the black hole of racism by looking at its external effects.<sup>44</sup> We must do the same. Nowhere will we find a document stating discriminatory intent in the creation of the Law-Abiding Citizen and Criminal.<sup>45</sup> We will find, however, discriminatory effect evincing systemic racism and breakdown.<sup>46</sup> We will find this effect by examining the issue of racial profiling through the theories of four people.<sup>47</sup> First, Jacques Lacan's theories on the ego, speech, and language will provide a solid psychoanalytical base upon which we can operate.<sup>48</sup> Second, Frantz Fanon's view of relations between the European colonizer and the African colonized, as applicable today in America as ever, will bring Lacan's theories into the realm of race and society.<sup>49</sup> Third, Professor Anthony Paul Farley's thinking on race relations as a center of sadist-masochist pleasure will take us across the Atlantic and deposit us squarely in

<sup>39</sup> *Id.* at 93.

<sup>40</sup> *Id.* at 139.

<sup>41</sup> Imani Perry suggests this duality in her "sympathetic occupation" approach to literature and the law. Imani Perry, *Occupying the Universal, Embodying the Subject: African American Literary Jurisprudence*, 17 CARDOZO STUD. L. & LIT. 97, 98 (2005). In this approach, Perry speaks of "double consciousness," or the reality of the black subject as both a member of society and yet subject to lawless treatment. *Id.* at 100. In this article we speak of a split between White and Black, whereas Perry speaks of a split within Black himself. The split, however, between Law Abiding and Criminal, is the same.

<sup>42</sup> Brown, *supra* note 27, at 758-59.

<sup>43</sup> *Id.* at 793.

<sup>44</sup> See generally WILLIAMS, *supra* note 1.

<sup>45</sup> See JEAN-PAUL SARTRE & ARLETTE EL KAÏM-SARTRE, ON GENOCIDE AND A SUMMARY OF THE EVIDENCE AND THE JUDGMENTS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL 58 (1968) in which Jean-Paul Sartre claims American forces are committing genocide in the Vietnam War: "Hitler had proclaimed it his deliberate intent to exterminate the Jews. . . . The American government has avoided making such clear statements."

<sup>46</sup> Honorable Stephen J. Fortunato, Jr., *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481, 482-83 (2005).

<sup>47</sup> Thanks to Professor Anthony Paul Farley for suggesting the issue of racial profiling.

<sup>48</sup> See generally LACAN, *supra* note 15, which is most helpful in understanding his views on ego, speech, and language.

<sup>49</sup> FANON, *supra* note 27.

contemporary America with a postmodern, psychoanalytic, and bold and cutting edge view into race relations.<sup>50</sup> Throughout, I will also refer to Professor Bernard Harcourt's ideology-imagery cycle.<sup>51</sup> By invoking these writers, I hope to explore why people racially profile, why it is important that this knowledge be discussed, and what effect a discussion of these two questions might have on the existence and prevalence of racial profiling in American society. To summarize and frame these questions and their answers, I will introduce some of Michel Foucault's theories of power as they relate to the theories of the four thinkers already mentioned. Finally, I will suggest some actions that can be taken to address the problem of racial profiling. I start, however, with an introduction to the issue of racial profiling in America.

## II. RACIAL PROFILING

¶13 Racial profiling occurs when law enforcement officials—in the absence of a suspect-specific description—selectively consider race in deciding when to investigate, arrest, and prosecute.<sup>52</sup> Racial profiling is a problem because it is a pervasive practice that affects a large number of people, impacting them in both legal and psychological ways. Statistical evidence supports this view. Furthermore, the law provides little protection to the victim of racial profiling and police departments regularly fail to comply with anti-racial profiling legislation. Finally, it is possible that the problem is getting worse.

### A. *Indicators of Racial Profiling*

¶14 As of 2004, thirty-two million Americans—one out of nine people—have reported that they have been the victims of racial profiling.<sup>53</sup> Approximately eighty-seven million Americans are at a high risk of being subjected to future racial profiling during their lifetime.<sup>54</sup> Racial profiling occurs in almost every context of people's lives: while driving, while walking, while traveling through airports, while shopping, while at home, and while traveling to and from places of worship.<sup>55</sup> Statistics from a study conducted by the Bureau of Justice Statistics<sup>56</sup> show that blacks are stopped, searched, and arrested at a rate disproportionately high to their prevalence in the general population and in relation to whites. State and federal protections against racial profiling continue to be grossly inadequate,<sup>57</sup> and courts, as we have already seen, affirm the constitutionality of the practice. Where there is legislation, police departments may fail to comply with its requirements.<sup>58</sup> They actually admit that racial profiling happens: when a black school

<sup>50</sup> See generally Farley, *supra* note 32.

<sup>51</sup> See generally Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165 (1995).

<sup>52</sup> See THREAT AND HUMILIATION, *supra* note 29, at ix.

<sup>53</sup> *Id.* at xiv.

<sup>54</sup> *Id.* at vi.

<sup>55</sup> *Id.* at vi-vii.

<sup>56</sup> CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 11, at v, 7, 9-10.

<sup>57</sup> THREAT AND HUMILIATION, *supra* note 29, at vii.

<sup>58</sup> RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION, THE PERSISTENCE OF RACIAL PROFILING IN RHODE ISLAND: AN ANALYSIS AND RECOMMENDATIONS 8 (2005) [hereinafter RHODE ISLAND

teacher in San Carlos, California was racially profiled, he asked the officer if he had been pulled over because of his race. The officer answered, “We do, in fact, profile here around drugs. How do you expect . . . [us to] do our jobs?”<sup>59</sup> There is some evidence that racial profiling may be getting worse.<sup>60</sup> The recent debate in California surrounding the proposed “Classification by Race, Ethnicity, Color, or National Origin Initiative” suggests that in general white society is only in favor of addressing racial profiling through collection of data to the extent that its interests are served.<sup>61</sup>

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A Los Angeles Police Department study found that twenty-five percent of its officers believed that “racial bias (prejudice) on the part of officers toward minority citizens currently exists” and that such bias “may lead to the use of excessive force.”<sup>62</sup> Whether it consists of the use of nightsticks, fists, or overly tight handcuffs, this force is the tip of the iceberg that constitutes the psychological effect of racial profiling on its victims. In the immediate moment of racial profiling, the victim of such profiling may feel humiliated,<sup>63</sup> disparately treated,<sup>64</sup> angry, and afraid.<sup>65</sup> At a deeper level, the victim may feel as if there is nothing he can do to escape the assumption that he is a criminal.<sup>66</sup> When engaging in racial profiling, the police officer assails the black person’s very “sense of self.” Fruitless searches of body and car will often not be enough to prove to the officer that the black person is anything but Criminal.<sup>67</sup> Initially, the black person may sense the definition of inferiority that society places upon him as an external force. In the final step, racial profiling and its attendant circumstances may lead to the psychological disappearance of the black person’s self as he would define it. This is the “nobodying” of the Black of which Anthony Farley speaks.<sup>68</sup> This is, as Frantz Fanon<sup>69</sup> and Devon Carbado describe, the defining of Black only as White would define him.<sup>70</sup> This is how one race rejects the justice system and another legitimizes it. In this process, Black becomes Criminal, White becomes Law Abiding,<sup>71</sup> and the dominant power structure takes its place as the necessary wedge between the two.

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AFFILIATE]; see also NORTHEASTERN STUDY, STOPS, *supra* note 9 (reporting that Hutchinson, Kansas provided data on an unusually low number of traffic stops and was unable to explain why).

<sup>59</sup> THREAT AND HUMILIATION, *supra* note 29, at 3.

<sup>60</sup> RHODE ISLAND AFFILIATE, *supra* note 58, at 18; see also RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION, THE PERSISTENCE OF RACIAL PROFILING IN RHODE ISLAND: AN UPDATE 2 (2005) (updating the Rhode Island Affiliate’s original report, *supra* note 58).

<sup>61</sup> Richa Amar, *Unequal Protection and The Racial Privacy Initiative*, 52 UCLA L. REV. 1279, 1300 (2005).

<sup>62</sup> COLE, *supra* note 6, at 22.

<sup>63</sup> THREAT AND HUMILIATION, *supra* note 29, at 4.

<sup>64</sup> Press Release, American Civil Liberties Union, ACLU of New Jersey Sues Manalapan Police for Targeting African American Youths (Aug. 25, 2004), <http://www.aclu-nj.org/pressroom/aclunjsuesmanalapanpolicef.htm> [hereinafter ACLU Sues Manalapan Police].

<sup>65</sup> THREAT AND HUMILIATION, *supra* note 29, at 21.

<sup>66</sup> Harris, *supra* note 28, at 291.

<sup>67</sup> Carbado, *supra* note 37, at 1019-20.

<sup>68</sup> Farley, *supra* note 32, at 491.

<sup>69</sup> FANON, *supra* note 27, at 107.

<sup>70</sup> Carbado, *supra* note 37, at 948.

<sup>71</sup> Jerry Kang takes a social cognition approach to the social construction of race. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493-94 (2005). Kang discusses studies that show that “the mere image of a black face—and a subliminal one at that—could activate a Black racial schema.” *Id.* at 1505. He finds, therefore, a prejudicial bias against blacks, a false belief that “racial minorities [are] violent criminals.” *Id.* at 1491-97. Kang concludes from his empirical studies that police officers will shoot black

¶16 This nobodizing of the Black and re-creation of White as Law Abiding is not a random process. This is not a process that cannot be discerned. This is a process that is well documented and is being encouraged and enabled by our justice system.

¶17 Statistical studies performed by Northeastern University<sup>72</sup> and the Bureau of Justice Statistics<sup>73</sup> show clear racial disparities in all stages of a traffic stop. Both studies, furthermore, report that police found criminal evidence (weapons and drugs) in white-occupied and black-occupied automobiles at either an identical or a higher rate, in white automobiles than in black automobiles.<sup>74</sup> Captain Ron Davis of the Oakland Police Department has said, “[r]acial profiling . . . is one of the most ineffective strategies . . . . It’s basically saying you don’t want to learn about your community, you don’t want to learn about people’s behavior.”<sup>75</sup>

### B. Government (In)action

¶18 Given the government’s own necessary conclusion that whites are more likely to be criminals, and yet blacks are stopped more often,<sup>76</sup> one would assume that the government would take steps to defeat the practice of racial profiling once and for all. In fact, however, racial profiling is now official policy in many jurisdictions. The Police Executive Research Forum, a think tank for law enforcement agencies, advocates the use of race as one factor among others in policing when police possess credible, locally relevant information that links persons of a specific race to a specific crime.<sup>77</sup> The federal Guidelines permit racial profiling when there is evidence linking persons of a “certain race” to a “particular criminal incident.”<sup>78</sup> Michael R. Smith is the Director of the Department of Criminology at the University of South Carolina. No enemy of race-based policing, he notes that other policies and statutes “implicitly allow for the consideration of race as one factor among others by only prohibiting stops based *solely* on race. . . . [S]ome state and local law enforcement agencies have, for the first time, expressly codified the disparate treatment of citizens by race and ethnicity.”<sup>79</sup> The problem with this method of policing is that terms such as “credible, locally relevant information,” “specific crime,” “certain race,” and “particular criminal enterprise,” can be

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men faster than they will shoot white men. *Id.* at 1525. Kang also finds that socially dominant groups (whites) have implicit bias against subordinate groups (non-whites). *Id.* at 1512. Kang goes on to state that local news media’s portrayal of black-alleged criminals—disproportionate to the portrayal of white-alleged criminals and shown in a more sinister light than such white criminals—plays an important role in creating this implicit bias. *Id.* at 1495. Kang’s research therefore suggests the efficacy of racial profiling in establishing whites as law abiding and blacks as criminal.

<sup>72</sup> See generally NORTHEASTERN STUDY, STOPS, *supra* note 9.

<sup>73</sup> CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 11, at v, 7-10, 18.

<sup>74</sup> See *id.* at 14; see generally NORTHEASTERN STUDY, STOPS, *supra* note 9.

<sup>75</sup> THREAT AND HUMILIATION, *supra* note 29, at 21.

<sup>76</sup> See CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 11, at v, 7-9, 14: The Bureau report stated that (1) blacks and Hispanics were more likely than whites to experience police threat or use of force during contact with the police, (2) blacks and Hispanics were more likely than whites to be arrested, (3) blacks were more likely than whites to be handcuffed, and (4) black drivers generally had worse outcomes from police contact than did white drivers. The Bureau also noted, ironically, that searches of black drivers or their vehicles were *less likely* to produce criminal evidence than searches of white drivers or their vehicles.

<sup>77</sup> Michael R. Smith, *Depoliticizing Racial Profiling*, 15 GEO. MASON U. CIV. RTS. L.J. 219, 229 (2005).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

manipulated to serve whatever notion of policing the law enforcement official previously had. The statistics suggest that the practice is one that accuses blacks and exonerates whites before the fact and despite the facts.

¶19 Racial profiling by law enforcement officials has been endorsed by the Supreme Court. Two decisions, *Terry v. Ohio*<sup>80</sup> and *Whren v. United States*,<sup>81</sup> are most important in this regard. *Terry* put the country on a path that led to modern-day racial profiling, and *Whren*, implicitly overturning *Terry*'s limited holding, actually established the constitutionality of racial profiling.

### C. *Terry v. Ohio*

¶20 *Terry v. Ohio*, decided in 1968, began the modern era of Fourth Amendment jurisprudence. Taking on “serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances,”<sup>82</sup> the Court wrote that these questions were “difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to the Court.”<sup>83</sup>

#### 1. Facts of *Terry*

¶21 In *Terry*, an officer observed three men apparently “casing a job, a stick-up” of a store.<sup>84</sup> While doing nothing illegal per se, the men were walking up and down the street, talking with each other and peering in the store window between five and six times apiece.<sup>85</sup> The officer approached the men, identified himself as an officer, and asked for their names.<sup>86</sup> When the men “mumbled something” in response, the officer “grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between [the officer] and the others, and patted down the outside of his clothing.”<sup>87</sup> The officer felt a pistol.<sup>88</sup> He removed Terry's overcoat and removed a thirty-eight caliber revolver.<sup>89</sup> He proceeded to search the other men, finding a gun in the outer pocket of one of the other men.<sup>90</sup> At issue was whether this search was constitutional under the Fourth Amendment prohibition against unreasonable search and seizure.

#### 2. The *Terry* Court on Racial Profiling

¶22 At first, the Court acknowledged two things that seemed to bode well for Terry as well as minorities who in the future would be racially profiled under *Terry* jurisprudence. First, the Court wrote that it “has always recognized, ‘[no] right is held more sacred, or is

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<sup>80</sup> 392 U.S. 1 (1968).

<sup>81</sup> 517 U.S. 806 (1996).

<sup>82</sup> *Terry*, 392 U.S. at 4.

<sup>83</sup> *Id.* at 9-10.

<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 6-7.

<sup>87</sup> *Id.* at 7.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>91</sup> Second, the Court acknowledged “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain.”<sup>92</sup> Further, in a footnote the Court cited the 1967 President’s Commission on Law Enforcement and Administration of Justice, which acknowledged police misuse of field interrogations simply to engage in “aggressive patrol,” and which had caused friction between police and minority groups.<sup>93</sup>

¶23 The Court took a bold step in suggesting the psychology and racism underlying such “aggressive patrolling”:

[I]t cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the “stop and frisk” of youths or minority group members is “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.”<sup>94</sup>

¶24 The Court here implicates the theories discussed in this article and discusses what would come to be called racial profiling. But this is as far as the Court went. Signaling that it would not consider such systemic racism in its decision, the Court implicitly accepted the constitutionality of a police “dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.”<sup>95</sup> By focusing law enforcement on a particular part of the city and a particular crime (gang activity), police engage in racial profiling in a way that is difficult to acknowledge in court as impermissible race-based police behavior. Finally, *Terry* being ultimately about the admissibility of the discovered gun into evidence under the Fourth Amendment, the Court wrote that the “wholesale harassment . . . of which minority groups . . . frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.”<sup>96</sup> Despite the Court writing that “[e]ver since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principle mode of discouraging lawless police conduct,”<sup>97</sup> it rejected the notion that minorities, “particularly Negroes,” could or would be helped by such constitutional protection. One can, however, imagine a regime in which unwarranted searches and seizures can lead to arrests only when weapons were found that could be used immediately to harm the police officer or others. Other contraband that does not threaten immediate harm would simply be confiscated and no arrest would be made. This regime would be in line with *Terry*’s holding, as we shall see.

<sup>91</sup> *Id.* at 9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

<sup>92</sup> *Id.* at 14.

<sup>93</sup> *Id.* at 15 n.11.

<sup>94</sup> *Id.* (quoting PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967)).

<sup>95</sup> *Id.* at 14 n.9.

<sup>96</sup> *Id.* at 14-15.

<sup>97</sup> *Id.* at 12.

### 3. Terry's Holding

¶25 Acknowledging that the “stop and frisk” is “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment,”<sup>98</sup> the Court held for the State of Ohio in an apparently limited holding. The Court held that for a search to be reasonable under the Fourth Amendment, the officer must (1) observe unusual conduct, which (2) leads him to reasonably conclude that criminal activity is afoot, and (3) that the subject of his suspicion is armed and presently dangerous.<sup>99</sup> The officer may then, “for the protection of himself and others in the area . . . conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.”<sup>100</sup> This limited holding thus is consistent with allowing searches and seizures with reason short of probable cause: the “interest of the police officer . . . to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”<sup>101</sup> While the holding seems appropriately limited, the Court’s reasoning to get to its holding provides a framework in which racial profiling is legally sanctioned.

### 4. Terry Court’s Reasoning

¶26 First, the Court sets the stage by holding that the “probable cause” standard applies only to the “Warrant Clause of the Fourth Amendment,” that is, that only searches following the obtainment of a warrant require probable cause.<sup>102</sup> “[N]ecessarily swift action predicated upon the on-the-spot observations of the officer on the beat”<sup>103</sup> is not subjected to the warrant procedure and is to be tested by “the Fourth Amendment’s general proscription against unreasonable searches and seizures.”<sup>104</sup> This is the “reasonable suspicion” standard, coined by Justice Douglas in his dissent.<sup>105</sup> The problems with this are two: first, there is arguably no “Warrant Clause” in the Fourth Amendment,<sup>106</sup> and second, *Terry* discourages the police from seeking warrants. If the police can show necessarily swift action, they need not seek a warrant and need not satisfy the probable cause standard.

### 5. Terry’s Two-Prong Test

¶27 *Terry* establishes a two-prong test to determine whether a seizure and search is unreasonable and therefore unconstitutional. First, the officer’s action must have been justified at its inception, meaning that “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts,

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<sup>98</sup> *Id.* at 17.

<sup>99</sup> *Id.* at 30.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 23.

<sup>102</sup> *Id.* at 20.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 37 (Douglas, J., dissenting).

<sup>106</sup> The Fourth Amendment reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

reasonably warrants that intrusion.”<sup>107</sup> This is an objective test that asks whether the facts would “warrant a man of reasonable caution” to take steps to seize and search. With such a porous reasonable person standard, race can easily be taken into account, particularly when statistics have been built up over years of racial profiling showing that more blacks are arrested in a particular area than are whites, or if officers have heard “rumors,” whatever those are, of a gang fight in the black part of the city. In this case, the reasonable person standard merely gives officers more discretion and does nothing to address racial profiling, if not provide a constitutional framework for it to flourish.

¶28 The second prong may have served to hinder racial profiling, though it has been shown to be ineffective. Once the official’s action in seizing and searching is justified, it then has to be reasonably related in scope to the circumstances that justified the interference in the first place. If the Court’s decision were taken seriously, then the only search an officer can constitutionally make is one for weapons that could be immediately used to harm the officer or others in the area. Thus, an officer would be unable to search a car that was pulled over because of a traffic violation or because the driver did not have her seatbelt on. Similarly, an officer could not pull over drivers of a particular type of car because that car type is statistically more likely to be used to haul drugs. Police officers could not target known drug trafficking routes more, and certainly could not target blacks believed to represent a disproportionate percentage of drug couriers, *even if it were true*.

¶29 In his dissent, Justice Douglas portended doom by describing racial profiling: “if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can ‘seize’ and ‘search’ him in their discretion, we enter a new regime.”<sup>108</sup> Unfortunately, this new regime has existed for years, decades, and centuries for people whose cut of their jib is simply their black skin.

#### D. *Whren v. United States*

¶30 *Whren v. United States*,<sup>109</sup> decided in 1996, addressed the issue of police traffic stops and suggested how the limited holding in *Terry* has been broadened to encompass a very great deal more than the *Terry* court envisaged in the realm of constitutional searches and seizures.

##### 1. Facts in *Whren*

¶31 In *Whren*, two plainclothes officers, driving an unmarked police car in a “high drug area” of the District of Columbia, witnessed the driver of a Nissan Pathfinder violate a number of traffic laws.<sup>110</sup> One of the officers, catching up to the truck, which had sped off after the officers executed a U-turn to investigate the truck, stepped up to the driver’s door.<sup>111</sup> Looking into the truck, the officer saw two large bags of what appeared to be crack cocaine. Petitioners were arrested, charged, and convicted under a number of federal drug laws.<sup>112</sup>

<sup>107</sup> *Terry*, 392 U.S. at 21.

<sup>108</sup> *Id.* at 39 (Douglas, J., dissenting).

<sup>109</sup> 517 U.S. 806 (1996).

<sup>110</sup> *Whren*, 517 U.S. at 808.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 809.

## 2. Whren Court's Ruling

¶32 Justice Scalia delivered the majority's opinion, holding that the officers had probable cause to believe petitioners had violated the traffic code.<sup>113</sup> Thus, the stop was reasonable under the Fourth Amendment, the evidence found admissible, and Petitioners' convictions affirmed.<sup>114</sup>

¶33 Petitioners contended that "the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible."<sup>115</sup> Thus, a police officer could, at his discretion, stop almost any motorist on a technical violation. This, argued Petitioners, creates a temptation to use traffic stops to investigate non-traffic violations, like gun or drug violations.<sup>116</sup> Finally, Petitioners argued that this may lead police to make traffic stops based on impermissible factors such as race.<sup>117</sup> Petitioners argued that to avoid this danger, the Fourth Amendment test for traffic stops should not be the "normal one" of probable cause, but rather "whether a police officer, acting reasonably, would have made the stop for the given reason."<sup>118</sup> Along the way to rejecting this argument and succinct description of racial profiling, the Court weakens, if not totally defeats, the ability of future defendants to allege racial profiling in their defense. The Court also tramples over *Terry's* limited holding.

## 3. Does Whren Overrule Terry?

¶34 Central to its rejection is the Court's insistence that the "reasonableness" standard is subjective,<sup>119</sup> not objective as *Terry* suggested. The Court wrote: "it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation."<sup>120</sup> This assertion of a subjective standard does a few things.

¶35 It rejects the notion that statistics regarding disparities in traffic stops have any role to play in showing unconstitutionally pretextual stops. Instead, it places all racism and pretext in the individual officer. It thus preserves the integrity of the system as a whole, finding racism, if at all, in individual aberrations.

¶36 This would be fine if a petitioner could present evidence about an individual officer's pretextual stop, but the Court forecloses that possibility as well. It writes: "we [have] never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary. . . . We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification."<sup>121</sup> In other words, it does not matter if racism motivated the stop. As long as there is a pretext—the traffic stop to which Petitioners referred—the officer's real

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<sup>113</sup> *Id.* at 819.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 810.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 814.

<sup>120</sup> *Id.* at 815

<sup>121</sup> *Id.* at 812.

intent is irrelevant. Under either an objective or subjective standard, therefore, petitioners have no recourse to challenge the stop.

¶37 *Whren* also serves to expand the *Terry* holding beyond its limited scope. The Court wrote: “a lawful postarrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches.”<sup>122</sup>

¶38 Finally, the *Whren* Court holds that the proper basis for challenging a stop on a racial profiling theory is the Equal Protection Clause, not the Fourth Amendment.<sup>123</sup> This forces victims of racial profiling to show discriminatory intent—a feat nearly impossible under today’s jurisprudence.

### *E. Some Tentative Conclusions*

¶39 A few things are clear at this point. First, racial profiling is a systemic problem. Second, the dominant power structure knows that it exists and that it is ineffective. Third, that power structure encourages and enables racial profiling through legislation, policy, and Court decisions. Fourth, the construction of race—namely, Black as Criminal and White as Law Abiding—is the foundation upon which racial profiling exists and operates. Why and how does the white dominant power structure construct race in this way? Lacan, Fanon, and Farley help to answer this question. I now consider racial profiling in light of their theories.

## III. LACAN

¶40 Williams’s racist is ever just out of reach because she cannot apprehend him until she has determined *why* he is racist, and to do that would mean that she understands primitive, fundamental motives for human action. The question “why is he racist?” is only another way of asking “why does he act?” It is, therefore, a pursuit that Williams takes on bravely, but one that has as clear an answer as asking for proof of the nature of god. With any answer comes many more questions.

### *A. Rejection of the Other to Establish the Self*

¶41 French psychoanalyst Jacques Lacan offers one answer. His answer is founded on a fundamental principle which must first be understood. Lacan, like Williams, is engaged in an existential pursuit of a human nature, which may or may not be there.<sup>124</sup> Where Williams is searching for the racist, Lacan is searching for human nature. He finds it in the individual’s ego, established through speech and language vis-à-vis the Other.<sup>125</sup> When, therefore, a law enforcement officer chooses how to police, he does so based on his perceptions of this Other, established over a foundation of racial profiling. Even if the officer is not racist, the officer “races,” in that he participates in a system that constructs race. The Court explicitly allows this perpetuation of creating the law

<sup>122</sup> *Id.* at 813.

<sup>123</sup> *Id.*

<sup>124</sup> See LACAN, *supra* note 15, at 53-63, in which Lacan describes the ego alongside such words as defense, refusal, misunderstanding, not autonomous, the seat of illusions, and the master of errors.

<sup>125</sup> See *id.* at 52; see also JACQUES LACAN, THE SEMINAR OF JACQUES LACAN: BOOK II: THE EGO IN FREUD’S THEORY AND IN THE TECHNIQUE OF PSYCHOANALYSIS 244 (Sylvana Tomaselli trans., W.W. Norton & Company 1988) (1978).

enforcement self through the criminalization of the black person. It does so by allowing the officer to use his “previous experience” in detecting illegal activity.<sup>126</sup> Where this previous experience was gained in a milieu of racial profiling, the officer will continue to define himself as law abiding in response to his observation of predominately black criminology.

¶42 The officer’s observation of this Other as Criminal is as fragile as Lacan’s search for human nature, in which Lacan refers to ego, speech, and language as illusions, misunderstandings, mistakes, and lies.<sup>127</sup> Lacan notes even that language *exists* in order to prevent understanding.<sup>128</sup> Lacan, therefore, suggests that human nature, if anything, is founded in illusion, mistake, and a positive attempt to misunderstand. The officer who defines himself as law abiding in response to the criminality he observes is a case in point. How can it be otherwise when whites tend to possess more drugs and weapons, and use more drugs, than blacks, yet blacks are more likely to be arrested for such activities?<sup>129</sup>

¶43 Seeming to sabotage his investigation from the start, Lacan actually approaches human nature and relations from a valid and useful existential perspective. Lacan rejects the notion that we are individual “selves” capable of existing outside of relations with others.<sup>130</sup> Instead, he argues that we establish ourselves—our egos, which are themselves illusory social constructs—through relations with others.<sup>131</sup> More specifically, we defend ourselves against others and reject them in order to establish ourselves.<sup>132</sup> We deride Dick’s drinking habits in order to establish ourselves as non-alcoholic. We refuse to accept Jane’s academic achievements in order to defend against the psychic impact of the fact that our own academic achievements are poor.

¶44 Supporters of racial profiling argue that law enforcement officials are generally trustworthy, non-racist, and do not abuse their discretion.<sup>133</sup> By racially profiling, these law-abiding officers actually tend to advance Fourth Amendment interests by rationally limiting the intrusion on the general driving population.<sup>134</sup> Non-white drivers must therefore suffer racial profiling so that assumedly white drivers can be free from traffic stops and free from the label of Criminal. The power structure justifies its actions by making Criminals out of blacks, with the result that whites become Law Abiding Citizens. Blacks become seen by police as “a community of savages” in which the police

<sup>126</sup> Honorable Charles F. Baird & Holly L. Black, *Criminal Procedure—Fourth Amendment*, 37 TEX. TECH. L. REV. 729, 755 (2004-2005) (quoting *U.S. v. Neufeld-Nuefeld*, 338 F.3d 374, 379-80 (5th Cir. 2003), listing the factors the Court uses to analyze whether reasonable suspicion was present for a border patrol stop).

<sup>127</sup> See LACAN, *supra* note 15, at 53-63, in which Lacan describes the ego alongside such words as defense, refusal, misunderstanding, not autonomous, the seat of illusions, and the master of errors.

<sup>128</sup> See LACAN, *supra* note 125, at 244.

<sup>129</sup> See THREAT AND HUMILIATION, *supra* note 29, at 22; see generally CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 11.

<sup>130</sup> See LACAN, *supra* note 15, at 62-63.

<sup>131</sup> See HENRY & MILOVANOVIC, *supra* note 22, at 27 (“affirmative postmodernists offer the notion of a *decentered subject*. This indicates that the human subject is not a unified entity or even a coherent social whole but is one or more ideological constructions, mere illusion.”).

<sup>132</sup> See LACAN, *supra* note 15, at 53.

<sup>133</sup> See *United States v. Cortez-Rocha*, 394 F.3d 1115, 1122 (9th Cir.), *cert. denied*, 126 S. Ct. 105 (2005), in which border guards and “most government employees” are characterized as “exercis[ing] informed judgment . . . not wast[ing] time on dead-end adventures . . . intelligent and respectful.”

<sup>134</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

are “outposts of law in a jungle.”<sup>135</sup> When white policymakers mischaracterize the problem between police and the black community as one of black hostility and resentment rather than one of police racism and misconduct,<sup>136</sup> they reject a valid (black) opinion on the state of the justice system. The white power structure thereby rejects Black itself, defining it as criminal and savage and establishing itself and its white community as civilized and law abiding.

¶45 One engages in defense and rejection of others to do no less than assert his own reality. Human relations for Lacan are mirror relations: what the Other is not, I am, and what the Other is, I am not. One of us will be real, and one of us will therefore be imaginary, a shadow of what is real.<sup>137</sup> We must establish our egos, therefore, in order to be real. By doing so, we escape the existential crisis: our egos become actual objects, the subjective and real “I” rather than the objective and imagined-by-the-Other “me.”<sup>138</sup> We thus take on that which we cannot bear to be without: existence.

¶46 The power structure rejects Black in order to be real. As a black Briton immigrating to America and “becoming” black through the white definition of black, Devon Carbado was racially profiled. The officers were engaging in “racial imagination . . . [in which all blacks are] criminal.”<sup>139</sup> Imagination is at the heart of whites’ creation of the black Other. Whites tend to use and possess more drugs and guns, but they imagine the black scourge of the black crack baby emerging to be a crazed drug addict, leading the vulnerable white population on a road of crime and prostitution.<sup>140</sup> Whites imagine the black Other as everything they do not want to be. Through this rejection of the other, whites thereby define themselves as everything they want to be.

¶47 All things logically converge. We must establish our reality by creating our ego. We create our ego by relating to others. What others are not is what we are. Others, therefore, must be imaginary for us to be real. We imagine the Other as bad through defense and rejection, thereby making us good and real. The Other’s negativity positives the self. Recall that Williams rejected the racist in order to establish herself as correct, as insightful, as seeing. She then pierced this process by doubting herself: if the racist was not really there, if there was no one to reject, could she be correct, insightful, and seeing? She was left wondering whether she was the crazy doomsayer. And if she saw only what was not really there, she herself was the imaginary Other and the deniers of the racist the real selves.

¶48 We establish ourselves by rejecting our mirror image, portrayed in the Other. We reject the Other’s vice, ugliness, and stupidity in order to see ourselves as the mirror opposite: virtuous, beautiful, and intelligent. When we speak of the excellences of others, as Confucius would have us do,<sup>141</sup> we self-efface, we become images to the

<sup>135</sup> Brown, *supra* note 27, at 790 (quoting Sherene Razack, *Outwhiting the White Guys: Men of Colour and Peacekeeping Violence*, 71 UMKC L. REV. 331, 342-43 (2002)).

<sup>136</sup> *Id.* at 759.

<sup>137</sup> LACAN, *supra* note 15, at 82-83.

<sup>138</sup> See HENRY & MILOVANOVIC, *supra* note 22, at 29.

<sup>139</sup> Carbado, *supra* note 37, at 961.

<sup>140</sup> *United States Sentencing Commission Hearings*, March 19, 2002 (testimony of Laura Murphy, Director, American Civil Liberties Union, Washington National Office) [hereinafter *Hearings*].

<sup>141</sup> See CONFUCIUS, *THE ANALECTS: WITH SELECTIONS FROM TRADITIONAL COMMENTARIES 75* (Edward Slingerland trans., Hachett Publishing Company, Inc. 2003) (ca. 500 B.C.E.).

Other's reality. This individual establishment process is found in groups and larger institutions as well, but the goal is always the same: will to reality.

¶49 The power structure's will to reality depends on inequality in the criminal justice system.<sup>142</sup> Without this inequality, whites could not feel as though they are automatically Law Abiding Citizens—they would have no intrinsic mandate to moral superiority. America, founded and ruled by the white dominant power structure, becomes itself, therefore, by excluding or rejecting Black.<sup>143</sup> The White rejection of Black takes a number of forms. It shows itself in unnecessary verbal and physical abuse by police officers.<sup>144</sup> It finds that a victim of racial profiling who passes a polygraph test in testifying to this profiling is not telling the truth.<sup>145</sup> It sees disparities in encounters with police, but fails to ask the questions that would reveal racial profiling.<sup>146</sup> It burdens Black with humiliation, depression, helplessness, fear, and anger.<sup>147</sup> It rejects Black so that White can be free of abuse, trusted and believed, proud, happy, able and unafraid.

### B. *Speech and Language*

¶50 Lacan's discussion of speech and language illustrates the machinery of the process of rejection.<sup>148</sup> The illusory nature of speech and language go hand in hand with that of the ego, so that when whites reject black declarations of police racism and misconduct, they reject not the suggestion of impropriety, but the voice of Black itself, whatever the message. When whites replace this black message with their own—namely, that the real problem is black hostility and resentment toward honest police officers—they create Black as they desire him to be. And so white language creates Black as Criminal.

¶51 Language is the conduit through which we relate to others. Because we must establish our egos by imagining others, language exists to prevent understanding.<sup>149</sup> It is false and fleeting.<sup>150</sup> The signifiers contained in language, such as “law-abiding citizen” and “criminal,” are value-laden and biased interpretations of the signified, the actual objects, people, or ideas the signifiers ostensibly represent.<sup>151</sup> Overenforcement of laws in certain (black) parts of town exemplifies the way that racial profiling speaks in value-laden signifiers. Overenforcement “rests on the racial stereotype of Black lawlessness and criminality.”<sup>152</sup> Its foundation is therefore one of the value-laden and obviously

<sup>142</sup> COLE, *supra* note 6, at 5.

<sup>143</sup> See Carbadó, *supra* note 37, at 947 (quoting Toni Morrison, in Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and The Sticky Mess of Race*, 85 CAL. L. REV. 1586, 1602 n.59 (1987)).

<sup>144</sup> See generally THREAT AND HUMILIATION, *supra* note 29.

<sup>145</sup> Complaint at 5-6, Scott v. Bevard, No. 02-1169 (C.D. Ill. May 8, 2002).

<sup>146</sup> See generally CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 11.

<sup>147</sup> THREAT AND HUMILIATION, *supra* note 29, at 29.

<sup>148</sup> See also Perry, *supra* note 41, at 109 (Imani Perry, too, finds that linguistic interpretation—the “words of law as it were”—is important in establishing her theories through sympathetic occupation). Like Lacan as well as Fanon and Farley, Perry eschews pure rationalism for the “more compelling rhetorical device” of occupying the subject through narrative, thus through emotion rather than logic. See *id.* at 106. This is problematic, since it will tend to convince only those people who are ready to be convinced. Nonetheless, it is the method that Perry and I find is best.

<sup>149</sup> See LACAN, *supra* note 125, at 244.

<sup>150</sup> See LACAN, *supra* note 15, at 54; see also LACAN, *supra* note 125, at 244.

<sup>151</sup> See HENRY & MILOVANOVIC, *supra* note 22, at 9.

<sup>152</sup> Brown, *supra* note 27, at 762.

biased signifiers of “lawlessness” and “criminality.” Overenforcement in black neighborhoods leads to racial profiling, pretextual stops, and illegal searches and seizures.<sup>153</sup> This is speech that declares blacks to be Criminal, undeserving of constitutional protection, and forever suspect. As a result, the Kerner Report of 1968 found that to many blacks, “police have come to symbolize [W]hite power, [W]hite racism, and [W]hite repression. And the fact is that many police do reflect and express these [W]hite attitudes.”<sup>154</sup>

¶52 Signifiers have an actual meaning (*veut dire*) and an intended meaning (*vouloir dire*).<sup>155</sup> The *veut dire* of “criminal” may be “one who violates law,” and the *vouloir dire* may be “black man; bad; one who should stay out of our town.” Signifiers are the visible tip of an iceberg whose numerous regressive meanings sink deep into the dark water of the psyche. The *veut dire* is hard to discern, but remembering that we use language to define ourselves and establish our egos against the imagination, defense, and rejection of others serves as a guide. The *vouloir dire* of Law-Abiding Citizen and Criminal is the dominant power structure’s desire to split people into “good” and “bad.” This justifies the power structure’s law enforcement and punishment schemes, makes the structure indispensable as a mediator between the two groups of people, and, by having society adopt the power structure’s good-bad construct, makes the structure *real*.

¶53 In language, the ego is conceived.<sup>156</sup> When one seeks to become real, one must speak, be heard, and be believed by others. The chain of events is, therefore: discourse (conversation with others about criminality) → truth claim (“black people are mostly criminal”) → belief by others (“yes, black people do seem to be criminal”) → reality of the subject (black people become Criminal and the speaker becomes the mirror opposite, a Law-Abiding Citizen).<sup>157</sup> Only when others believe our truth claims can we become real. It is, therefore, imperative that the dominant power structure convince society that its Criminals are indeed criminals and its Law Abiding Citizens are truly law abiding. It can do this in racial profiling by (1) having an ostensibly heartfelt and sensitive debate over the validity of racial profiling; (2) declaring racial profiling to be an acceptable and fact-based answer to crime; (3) engaging in racial profiling, thus exposing a higher number of black criminals than white criminals in a given time period and place; (4) arguing that this exposure proves that blacks commit more crimes and bolsters the need for racial profiling; and (5) repeating the cycle until all blacks are Criminal and all whites are Law Abiding Citizens.<sup>158</sup>

¶54 The only way to do this is to split races into “good” and “bad.” Racial profiling does this well. In one incident, a group of three black and three white friends were riding

<sup>153</sup> See *id.* at 761.

<sup>154</sup> *Id.* at 766 (quoting the National Advisory Commission on Civil Disorders (The Kerner Commission), Report 301 (1968) [hereinafter Kerner Report]).

<sup>155</sup> LACAN, *supra* note 15, at 242.

<sup>156</sup> See *id.* at 240.

<sup>157</sup> See HENRY & MILOVANOVIC, *supra* note 22, at 27-28: the authors discuss the notion that a subject changes as the discourse around him changes, and that discourse creates a convincing truth claim about the reality of the subject.

<sup>158</sup> See Kang, *supra* note 71, at 1491-1494 (Kang’s empirical research discussed in his *Trojan Horses of Race* implies this scheme of truth-creation. While Kang focuses on local news’ unbalanced portrayal of black criminal suspects, *id.* at 1495, we here focus on racial profiling, the unbalanced policing of black criminal suspects.).

their bicycles in Manalapan, New Jersey when the police stopped all six of them.<sup>159</sup> The police illegally searched the black kids without justification and called them names such as “little punk” and “baby.”<sup>160</sup> The officers sent the white kids home, telling them that they “don’t have to see this.”<sup>161</sup>

¶155 Bernard Harcourt’s cycle of image creation suggests a similar method of “truth” creation.<sup>162</sup> Harcourt’s human subject starts with an ideology and then searches for images in the real world to expose that ideology as true.<sup>163</sup> These images of, say, a black man’s mug shot after the man has allegedly just killed a white police officer (who had a family, no less!), impose themselves on society’s consciousness and bolster the ideology. The speech in this case declares: “black predators will kill law-abiding whites.” The stronger ideology will be better equipped to find new images, and it will do so. This cycle continues, with every revolution divorcing its adherent more and more from objective reality.<sup>164</sup>

¶156 The language of race and racial profiling is an attempt to define Black as Criminal and White as Law Abiding, and thereby provide a window through which to view black criminality and have that ideology reinforced. Physical and verbal abuse of blacks is speech that declares white superiority over black criminality. Court rulings declaring that officers’ motives do not matter as long as there is a pretext for the traffic stop is speech that declares the officers to be powerful and morally right and black motorists to be at best suspect, and at worst, criminal. The “perpetrator perspective” that claims to be colorblind, in reality, “races” our society to whites’ advantage.<sup>165</sup> Blacks are targeted more than whites for criminality, thus they are arrested and convicted more.<sup>166</sup> They fill our jails more, but since the criminal justice system is declared to be colorblind, blacks must be more prone to criminality than whites. The Bureau of Justice Statistics illustrates this view well. On its cover, it declares America’s non-racism proudly: “9% of white drivers were stopped . . . 9% of black drivers were stopped . . . 9% of Hispanic drivers were stopped.”<sup>167</sup> Crack the spine, however, and find that blacks are statistically more likely than whites to be searched, arrested, injured by police, have force used on them by police, and be handcuffed.<sup>168</sup> Given only one of two options, either the existence of unwarranted racial profiling or the biological propensity of blacks to criminal behavior, the Bureau of Justice Statistics advertises the absence of the former and thereby chooses the latter.

### 1. The Three Discourses

¶157 Lacan expands his discussion of language into three discourses which serve to bring his ego creation schema into the realm of institutional and group relations and

<sup>159</sup> ACLU Sues Manalapan Police, *supra* note 64.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See Harcourt, *supra* note 51, at 1167 (discussing racial imagery in the antebellum and Reconstruction periods).

<sup>163</sup> *Id.* at 1168 (“ideologies shape and sharpen images, but images also sharpen and transform ideologies”).

<sup>164</sup> Cf. Kang, *supra* note 71, in which he suggests a scientific basis for Harcourt’s ideology-imagery cycle.

<sup>165</sup> See Carbado, *supra* note 37, at 968, 971.

<sup>166</sup> *Id.*

<sup>167</sup> CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 11, at cover page.

<sup>168</sup> See generally *id.*

provide a framework into which we can readily insert the issue of racial profiling. The discourse discussion posits that there are three types of language, distinguished by their source and effectiveness in imposing their language on others.<sup>169</sup>

¶158 The discourse of the master is the language of the dominant social group.<sup>170</sup> In our case, the master is the government, law enforcement, prosecutors, and white, middle- and upper-class society in general—the white dominant power structure. The master has the power and connections to make his speech heard and believed: he has money to buy airtime, congressmen to use the bully pulpit and effect legislation, and political and other leverage to compel others to express his speech for him when necessary. It is the master who conveys legal ideology, defines terms such as Criminal and Law Abiding Citizen, splits people into “good” and “bad,” and creates the “truth” that becomes the actual truth because most of society believes in the master’s speech. The master says that blacks are Criminal and whites are Law Abiding.

¶159 The master speaks from the perpetrator perspective that believes in black hostility rather than white racism.<sup>171</sup> This perspective insulates police from accountability<sup>172</sup> by judicial declarations of their respectability.<sup>173</sup> This perspective also condemns racial profiling when it targets “good blacks”—black doctors, teachers, and other blacks “like us.” In doing so, it “confirms if not entrenches our racial suspicions about crime and criminality”<sup>174</sup> by highlighting only isolated incidents of “bad” cops profiling “good” blacks. This is the language of splitting, which highlights what most think of as exceptions to the rule that whites are good and blacks are bad. This language does nothing to acknowledge that the split between races is purely illusory and constructed. The purpose of the discourse of the master is that the master’s speech may be believed and the master’s viewpoint and therefore existence be *real*. When bystanders view a police officer making a traffic stop, they view justice investigating possible criminality. Repeated a thousand times over with a black person in the drivers’ seat, bystanders come to see not neutral policing for the public’s safety, but rather the power structure investigating possible *black* criminality. The discourse of the master exists in the traffic stop, and gradually, through racial profiling, its message—that blacks are Criminal—is believed by all onlookers.

¶160 Interestingly, there is a point at which the master does not want his message to be believed. At some point, black bystanders—and a few white ones—come to see through the performance of justice against the black criminal. They cease to believe the master’s claim that he is right, that he is the law. They begin to delegitimize the power structure, and when the law loses its moral force, people are more likely to engage in crime.<sup>175</sup> Blacks who see racial profiling for what it is, therefore, are more likely to commit actual crime, and become actual criminals, thus feeding the master’s discourse with fact. Less and less, then, does the master have to rely on illusion and lies to split society.

<sup>169</sup> See HENRY & MILOVANOVIC, *supra* note 22, at 28-33 on Lacan’s discourses of the master, university, and hysteric.

<sup>170</sup> See *id.* at 30 on Lacan’s discourses of the master, university, and hysteric.

<sup>171</sup> Brown, *supra* note 27, at 759.

<sup>172</sup> *Id.* at 792.

<sup>173</sup> United States v. Cortez-Rocha, 394 F.3d 1115, 1122 (9th Cir.), *cert. denied*, 126 S. Ct. 105 (2005).

<sup>174</sup> Carbado, *supra* note 37, at 974.

<sup>175</sup> COLE, *supra* note 6, at 11-12.

¶61 The discourse of university consists of the ideology posited by the master.<sup>176</sup> When we speak of the Criminal and the Law Abiding Citizen, the university is the law. The ideology of the law says that “a crime is a crime” and that “justice is blind.” This ideology claims that discrimination no longer exists, that legal doctrine is neutral, and that when a person, no matter the race, comes before the criminal court as a defendant, that person is treated the same as any other, no matter the race.<sup>177</sup> The Bureau of Justice Statistics report similarly holds out juicy statistics of disparate treatment, but refuses to ask the questions that would show racial profiling.<sup>178</sup> Beyond rejecting the existence of racial profiling, the *Bostick* Court accepted its use,<sup>179</sup> as did the *Whren* Court.<sup>180</sup> This ideology is published by the master to great effect, for the racist in the picture cannot be found. Even a detective as intrepid as Williams doubts her own finger pointing.

¶62 The hysteric points the finger as well. Her discourse is that of the disenfranchised and disempowered.<sup>181</sup> Williams is the hysteric, and so she does not speak of the master’s traditional legal doctrine. Instead, she speaks of homelessness, the bottom rung of the hysteric’s world.<sup>182</sup> The hysteric might be the black senior law firm associate, told to help the poor but “be cool.”<sup>183</sup> The hysteric is the poor black or even the middle class white who sees racism swirling in the post-Katrina flood waters of New Orleans. The hysteric opposes the master, and the hysteric, when heard (rarely), is discounted as irrational.<sup>184</sup> His language is deemed invalid and, worse, *imagined*. The hysteric remains in the mirror, and the master maintains his reality outside the glass.

¶63 When blacks complain of white racism and repression, they engage in the discourse of the hysteric—despite the fact that the power structure’s own Kerner Report found the very same thing.<sup>185</sup> The hysteric is the imagined Other in the mirror, and facts will not bring her out into reality. When a 17-year-old black man filed a complaint with the Illinois State Police, claiming that he was racially profiled, physically isolated, interrogated about the (non-)presence of drugs, and called a “mother-fucking nigger” by a police officer,<sup>186</sup> the state dismissed his voice as that of the hysteric. When he submitted these allegations under a polygraph test and passed, the state determined that his

<sup>176</sup> See HENRY & MILOVANOVIC, *supra* note 22, at 31-32. For Lacan’s discourses of the master, university, and hysteric, see *id.* at 31-33.

<sup>177</sup> This is only true when we speak of colorblindness in ignoring racial profiling. When the constructs of Black as Criminal and White as Law Abiding Citizen are at stake, we will see color to the extent it helps to perpetuate the constructs. See Carbado, *supra* note 37, at 1009-10 (in which he compares the Court’s declaration in *Florida v. Bostick*, 501 U.S. 429 (1991), that race is irrelevant when the defendant was black, and Justice O’Connor’s concern with the white defendant in her dissenting opinion in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (O’Connor, J., dissenting), who was arrested for not wearing her seatbelt. Justice O’Connor’s dissent was concerned that the defendant was humiliated, traumatized, and that she should not have had to go through the encounter with the police.)

<sup>178</sup> See generally CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 11.

<sup>179</sup> COLE, *supra* note 6, at 21 (citing *Bostick*, 501 U.S. at 441 n.1 (Marshall, J., dissenting)).

<sup>180</sup> *Whren v. United States*, 517 U.S. 806, 812-13 (1996).

<sup>181</sup> See HENRY & MILOVANOVIC, *supra* note 22, at 33.

<sup>182</sup> WILLIAMS, *supra* note 1, at 27-28.

<sup>183</sup> David Dante Troutt, *The Monkey Suit*, in THE MONKEY SUIT AND OTHER SHORT FICTION ON AFRICAN AMERICANS AND JUSTICE 255, 255 (1998).

<sup>184</sup> See HENRY & MILOVANOVIC, *supra* note 22, at 33.

<sup>185</sup> Brown, *supra* note 27, at 766-68 (quoting the Kerner Report of 1968, which was commissioned by President Johnson to explain the 1967 race riots and provide recommendations for preventing future riots. The Report was “highly publicized and received national attention.”).

<sup>186</sup> Scott Complaint, *supra* note 145, at 1.

complaint was unfounded.<sup>187</sup> The black man and his hysteric voice remained an illusion, a nothingness. The maze of Supreme Court jurisprudence also does not give credence to the hysteric voice. By portraying Bostick’s encounter with police as one in which race was not a factor, the *Bostick* Court effectively denied that race was relevant in the search and seizure of a black man by white law enforcement officers,<sup>188</sup> and the *Whren* Court found that racial profiling had nothing to do with the Fourth Amendment.<sup>189</sup> Instead, a complaint of racial profiling must be filed under the Equal Protection Clause, thus forcing a nearly-impossible finding of discriminatory intent.<sup>190</sup>

#### IV. FANON

¶64 Frantz Fanon’s *Black Skin, White Masks* provides a vital link between Lacan’s theories and black-white race relations.<sup>191</sup> Writing before Lacan’s theories were widely published, Fanon adopts four of the same key ideas as Lacan. First, blacks establish their selves through whites. Second, whites, as functionaries of the dominant power structure, define and create blacks. They reject blacks by defining them as animals, savage, murderers, and criminals. In so doing, whites create their selves as refined, intelligent, superior, and law abiding. Third, whites do so through language, rejecting blacks to establish themselves. Fourth, the black-white mirror relationship is based on illusion and misunderstanding.<sup>192</sup>

##### A. *Black Self-Definition Through White’s Definition of Black*

¶65 Fanon wrote about the relationship between the white European colonizer and the black African native who has been colonized. His observations can, however, be applied to contemporary American race relations, as Farley suggests in his discussion of the modern-day American black ghetto as a neocolony<sup>193</sup> and as John Hayakawa Torok suggests in his description of “anti-colonial, anti-subordination race consciousness.”<sup>194</sup> In this colony, the black person can establish his self—he can become *real*—only through the limited definitions that the white colonist gives him.<sup>195</sup> The black can become real only by being black as the white person imagines blacks to be.<sup>196</sup> This means a choice between “acting white,” acting like a criminal, actually being a criminal, being a “sho’ good nigger,”<sup>197</sup> or asserting oneself. All choices are deadly. Acting white will only lead to whites continuing to exclude the actor and blacks ostracizing the black actor as

<sup>187</sup> *Id.* at 5-6.

<sup>188</sup> Carbado, *supra* note 37, at 981.

<sup>189</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>190</sup> *Id.*

<sup>191</sup> See generally FANON, *supra* note 27.

<sup>192</sup> See *id.* throughout for demonstrations of these four ideas.

<sup>193</sup> Farley, *supra* note 32, at 517-18.

<sup>194</sup> John Hayakawa Torok, *Freedom Now!—Race Consciousness and the Work of De-Colonization Today*, 48 HOW. L.J. 351, 353 (2004). In this article, Torok sees in contemporary America a “white, male, and straight supremacy . . . [a] white oppressor,” *id.* at 378, and a “White over Black paradigm of race,” that was born in American colonialism. *Id.* at 369 (footnote omitted). Torok finds “intersectionality between imperialism, colonialism, and racial and other subordination.” *Id.* at 393-94 (footnote omitted).

<sup>195</sup> See Farley, *supra* note 32, at 462-64; see also FANON, *supra* note 27, at 51.

<sup>196</sup> FANON, *supra* note 27, at 107.

<sup>197</sup> *Id.* at 52 n.12.

white.<sup>198</sup> Acting like a criminal is a mere minstrel act, unless one is a talented showman such as 50 Cent or The Game, in which case one is a well-paid minstrel. Actually being a criminal lands one in jail and only serves to perpetuate the Criminal image of blacks. Being a “sho’ good nigger” is yet another minstrel act of the Sambo variety. Asserting oneself is the deadliest choice, for then the black person becomes “militant” in white eyes, a threat to be put down by any means necessary.<sup>199</sup> For Fanon, the black person must accord with White definitions of Black.<sup>200</sup> If he does not, he may disappear.<sup>201</sup> When the definitions are all of inferiority, the black person is hemmed in and must play the inferior or be nothing at all.

¶66 Upon his arrival in America, Devon Carbado worked through a couple of his choices: “I was not eager, upon my arrival to the United States, to assert a black American identity. . . . But I became a black American anyway. . . . [This identity] was ascribed to me.”<sup>202</sup> For Carbado, being black in America is not a mode of true existence, of being one’s true self. Rather, it is a “performance of blackness” consisting of being obedient to police, not asserting one’s rights, not maintaining one’s dignity, and not confronting authority.<sup>203</sup> Carbado, a law abiding, black law professor must play the role of the inferior, the minstrel, or else be branded a criminal. Even playing this role, he must work hard to prove his innocence, because to be anything other than criminal is to depart from the script.<sup>204</sup> In departing from the script, others lose sight of the black man, because they look for a criminal and do not find it. In departing from the script—in being other than inferior and/or criminal—the black man disappears.<sup>205</sup>

### B. *The Disappearance of Black*

¶67 The disappearance of Black manifests itself in a few ways. Carbado disappears when he does not play the role that white America has set for him. He disappears when he attempts to be himself, to be free, to be undefined. Blacks disappear when they are racially profiled. Through racial profiling, blacks are demoralized.<sup>206</sup> Their morals—their values and therefore their selves—are literally taken from them, and the morals of the criminal placed within them. Through racial profiling, blacks’ histories and past achievements are taken from them and are replaced with stock histories that lead to the stock criminal. One “well-dressed, 28-year-old [black] advertising account executive with a media company” was racially profiled.<sup>207</sup> After years of playing the game and

<sup>198</sup> See Troutt, *supra* note 183, at 256 (“She heads one of the community groups down in South Central I’m supposed to be counseling on their nonprofit status. She called me white boy. Right to my face.”).

<sup>199</sup> These choices exclude the one choice that leads to true freedom and is given to whites: genuine self-expression. Self-assertion comes closest, but when we consciously assert ourselves, we are not totally ourselves, but are advertising our genuine selves. Even where the advertised/asserted object/person is genuine, the process of advertisement/assertion renders the object/person sullied and not quite genuine. Self-expression is unconscious and effortless; self-assertion, on the other hand, is conscious and requires effort to sustain the assertion.

<sup>200</sup> FANON, *supra* note 27, at 107.

<sup>201</sup> *Id.* at 96-97.

<sup>202</sup> Carbado, *supra* note 37, at 948.

<sup>203</sup> *Id.* at 954-55.

<sup>204</sup> *Id.* at 1017.

<sup>205</sup> FANON, *supra* note 27, at 96-97.

<sup>206</sup> THREAT AND HUMILIATION, *supra* note 29, at 11.

<sup>207</sup> Harris, *supra* note 28, at 271.

looking and acting the part, the system still will not let him in. He is black, so he's suspect, a man to be watched, a likely criminal.<sup>208</sup> Disappearance occurs when Black is defined, even if it is defined as a positive. Mary Joe Frug<sup>209</sup> wrote that women will be free only when they cease to be able to be defined.<sup>210</sup> So is the case with blacks: only when they cannot be seen as criminal, minstrel, self-assertive, or any stereotype will they be freed from racial profiling and their own disappearance through their definition at the hands of the white power structure.

¶168 The white colonist creates many colorful definitions of inferiority for the black native.<sup>211</sup> In so doing, the colonist rejects blacks and embraces his self as beautiful, virtuous, intelligent, and rational. He must, furthermore, convince the black person to accept his definitions, since he must be heard and believed for his construct to become real. Carbado writes that police interaction with blacks is intended to “make black people feel bad about, and uncomfortable with, being black.”<sup>212</sup> The depression, fear, and anger that results in the victim of racial profiling comes about because he has been penetrated—raped even—by a powerful, almost irresistible force that compels him to believe in his own inferiority. Only one incidence of racial profiling may stigmatize the victim for the rest of her life.<sup>213</sup> Repeated victimization will traumatize the black person and, at worst, convince her that she is, in fact, inferior and criminal.<sup>214</sup>

¶169 White therefore needs Black recognition, but is unwilling to recognize Black in return.<sup>215</sup> Fanon ventures past Lacan, however, in suggesting a reason that whites need to define blacks as inferior: just as American whites created the “Bad Injun” stereotype, they may also need to create the “Bad Black” image in order to lull their uneasy national conscience in light of past mass crimes against humanity.<sup>216</sup> From slavery, through the Black Codes, through Jim Crow, to today, “the legacy of slavery . . . still infects police policies and practices toward Black people.”<sup>217</sup> To hide from their own criminality, whites criminalize blacks. By doing so, they both justify their own anti-black crimes in history and create themselves as law-abiding citizens.

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<sup>208</sup> *Id.*

<sup>209</sup> Mary Joe Frug was professor of law at New England School of Law from 1981 until her murder in 1991. In her life, she was instrumental in developing postmodern feminist theory.

<sup>210</sup> Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1075 (1992) (“Only when sex means more than male or female, only when the word ‘woman’ cannot be coherently understood, will oppression by sex be fatally undermined.”).

<sup>211</sup> See generally FANON, *supra* note 27.

<sup>212</sup> Carbado, *supra* note 37, at 952.

<sup>213</sup> Press Release, American Civil Liberties Union, Federal Appeals Court to Hear Two ACLU of Michigan Cases This Week (April 19, 2005),

[http://www.aclu.org/racialjustice/racialprofiling/15911prs20050419.html?s\\_src=rss](http://www.aclu.org/racialjustice/racialprofiling/15911prs20050419.html?s_src=rss) [hereinafter ACLU Michigan Cases Press Release].

<sup>214</sup> Racial profiling also traumatizes black family members. Lenese Herbert writes that “[f]or the parent and the child, the experience of race-based policing has long and detrimental effects.” Lenese Herbert, *Plantation Lullabies: How Fourth Amendment Policing Violates the Fourteenth Amendment Right of African Americans to Parent*, 19 ST. JOHN’S J. LEGAL COMMENT. 197, 223 (2005).

<sup>215</sup> See FANON, *supra* note 27, at 216-217.

<sup>216</sup> See *id.* at 146-47.

<sup>217</sup> Brown, *supra* note 27, at 760.

### C. Language

¶70 Language is the medium in which White creates Black. Language, as Lacan says, tells us more about the speaker than about the subject,<sup>218</sup> and Fanon provides a reason why: speech is desire.<sup>219</sup> When the white man speaks of the criminal black man, he desires to be himself a law-abiding citizen. When he speaks of blacks' separateness, he desires to be integrated into the dominant power structure. When he refers to blacks as a "problem people,"<sup>220</sup> he wishes himself to be the solution and non-problem. Language itself is a way to assume the dominant power structure and is a way into the structure. It is why Fanon's black natives return from France having "forgotten" how to speak pidgin and having adopted "proper" French.<sup>221</sup> It is why "talking white" takes on such suggestive importance in black America today. A word of warning, however: language can get one access to the dominant power structure only if that structure is prepared to admit the person in the first place.<sup>222</sup> That is why "acting white" is a deadly choice for blacks—the structure does not want to let them in, no matter how proper the English.

¶71 The stops, searches, and arrests of racial profiling are speech as well. It allows blacks to assume their proper role as Criminal in the dominant power structure's system. We are to believe the power structure when it implies, through court rulings, statistical analyses, and disparate treatment in the criminal justice system that blacks have a biological propensity to crime.

¶72 Fanon, like Lacan, rests his observations on an uneasy bed of illusion and misunderstanding.<sup>223</sup> Whites' definitions of Black are misunderstandings at best, outright lies intended to maintain white power at worst. And the worst has arrived: Fanon observes that whites want the world. They must, therefore, reject all others as unworthy of existence, of being real.<sup>224</sup> Whites therefore use their creative and persuasive power to define blacks, and their physical and coercive power to force blacks to accord with these meanings.<sup>225</sup> Whites therefore find suspicion in blacks wearing baggy clothes.<sup>226</sup> Whites find suspicion in blacks driving nice cars.<sup>227</sup> Where blacks offer no suspicious activity, whites will create it: half the cocaine seized by Dallas police in 2001 turned out to be

<sup>218</sup> LACAN, *supra* note 15, at 260.

<sup>219</sup> FANON, *supra* note 27, at 17-18 ("To speak means . . . above all to assume a culture, to support the weight of a civilization.").

<sup>220</sup> Brown, *supra* note 27, at 773 (quoting CORNEL WEST, RACE MATTERS, 2-3 (1993)).

<sup>221</sup> FANON, *supra* note 27, at 35-37.

<sup>222</sup> *Id.* at 28-29 ("[P]hilosophy has never saved anyone. When someone else strives and strains to prove to me that black men are as intelligent as white men, I say that intelligence has never saved anyone; and that is true, for, if philosophy and intelligence are invoked to proclaim the equality of men, they have also been employed to justify the extermination of men.").

<sup>223</sup> *Id.* at 85 ("[T]he confrontation of "civilized" and "primitive" men creates a special situation—the colonial situation—and brings about the *emergence* of a mass of illusions and misunderstandings . . .") (quoting O. MANNONI, PROSPERO AND CALIBAN: THE PSYCHOLOGY OF COLONIZATION 40 (1964)) (quotation marks omitted).

<sup>224</sup> *Id.* at 128.

<sup>225</sup> *See generally id.*

<sup>226</sup> Baird & Black, *supra* note 126, at 752 (In one case, the defendant's "baggy clothes gave the officer reasonable suspicion of criminal conduct and led the officer to ask to perform the pat down.").

<sup>227</sup> Gene Callahan & William Anderson, *The Roots of Racial Profiling*, REASON, Aug.-Sept. 2001, at 37 (A well-dressed black man in an SUV was stopped. The officer asked mockingly, "Hey, where did you get the money for something like this?").

powderized sheetrock, a substance the police use when they plant drugs on people.<sup>228</sup> When whites want the world for themselves and their definitions for blacks all lead to certain death, the only choice is slow, seemingly voluntary, genocide.<sup>229</sup> Indeed, blacks are a “protected class”—an endangered species that, like others, is dying out at the hands of the dominant power structure. The introduction to rap artist Ice Cube’s song “Endangered Species,” echoes this sentiment.<sup>230</sup> There is also a thread of self-fulfilling prophesy in Fanon’s writing. White has defined Black as Criminal and has rejected him as such. The black person may either attempt to become real through the white world by becoming Criminal, or he may, expecting to be rejected as such, do all he can to realize the rejection. Either way, the black person “chooses” to be Criminal. Where being Criminal is one of only a few choices one has for expression, one will likely choose that, however abased it is.<sup>231</sup> Where blacks are believed to be more involved in the drug trade than they are, and they are racially profiled because of this belief, the prophesy will be fulfilled and they will in fact enter the drug trade.<sup>232</sup>

¶73 The result is as Barnard Harcourt would predict. He posits a cycle in which ideology informs imagery, which, in turn, feeds ideology. The white ideology of blacks as Criminal leads to images that reinforce that ideology, which, in turn, lead to a greater availability of images.<sup>233</sup> This ideology engenders overenforcement of law in black neighborhoods,<sup>234</sup> which puts more blacks in jail, even when they are innocent.<sup>235</sup> Racial profiling through overenforcement, the relative ease with which blacks are convicted at trial,<sup>236</sup> and the disparity between amounts of black and white prisoners provide ample imagery to feed the ideology of black criminality. The upshot is a perception and actual reality of more black criminals.

## V. FARLEY

¶74 Where Fanon revealed black-white relations in Europe and Africa to support Lacan’s theories, Anthony Farley shows that Fanon’s observations and Lacan’s theories apply in contemporary America as well. In his article “The Black Body as Fetish Object,” Farley examines American black-white relations through the lens of a sadist-

<sup>228</sup> THREAT AND HUMILIATION, *supra* note 29, at 14.

<sup>229</sup> See SARTRE, *supra* note 45, at 83 (“[G]enocide presents itself as the *only possible reaction* to the rising of a whole people against its oppressors.”).

<sup>230</sup> ICE CUBE, *Endangered Species*, on AMERIKKKA’S MOST WANTED (Priority Records 1990) (Opening the song, a news reporter tells us: “At the bottom of our news tonight, there’s been a new animal aimed in the direction of falling off the face of the earth. Yes, young black teenagers are reported to be the oldest, and the newest, creatures added to the endangered species list. As of now, the government has not made steps to preserve the blacks. When asked why, a top law official adds, ‘because they make good game.’”).

<sup>231</sup> See FANON, *supra* note 27, at 35-36 (“To make [the black man] talk pidgin is to fasten him to the effigy of him, to snare him, to imprison him, the eternal victim of an essence, of an *appearance* for which he is not responsible . . . . [On the other hand,] a black man who quotes Montesquieu had better be watched. Please understand me: watched in the sense that he is starting something . . . . [When the black man proves to be] as knowledgeable [as the white man] . . . this game cannot be played . . . . So there is nothing to do but to give in.”).

<sup>232</sup> Harris, *supra* note 28, at 297.

<sup>233</sup> See generally Harcourt, *supra* note 51.

<sup>234</sup> Brown, *supra* note 27, at 762.

<sup>235</sup> Fortunato, *supra* note 46, at 489.

<sup>236</sup> THREAT AND HUMILIATION, *supra* note 29, at 23.

masochist pursuit of white pleasure through black humiliation.<sup>237</sup> Farley invokes Fanon's and Lacan's thinking in seeing that White "excrementalizes" Black in order that White may feel blessed.<sup>238</sup> By "nobodying" blacks, furthermore, whites feel an "ecstasy of belonging."<sup>239</sup> Farley thus recalls Lacan's belief that we reject others so that we may become real. Whites create themselves as the opposite of how they create blacks.

¶75 First, Farley places race in the realm of sadist-masochist pursuit of pleasure, in which whites play the role of sadist, of superior-to-black, in order to feel morally good about their own race. Whites control blacks' condition of subordination: the black suffering under racial profiling and other racist mechanisms will be ameliorated and blacks will get their constitutional rights only to the extent that white policy-makers find it in their interests to ameliorate.<sup>240</sup> Whites establish their superiority by the Lacanian rejection of blacks. They do so primarily through humiliation, which most often takes the form of anti-black violence or threatened violence. Racial profiling strongly correlates with excessive use of force by police officers.<sup>241</sup> Racial profiling, indeed, is a focal point in the white dominant power structure's attempt to maintain and enhance its limited definition of Black as Criminal and White as Law Abiding. Where Brown posits "law enforcers [seeing themselves] in a community of savages, as outposts in the law in a jungle,"<sup>242</sup> Farley sees a sadist-masochist relationship. If we define others through speech, then white sadism is extreme speech designed to impute extreme criminality on the black victim.

#### A. Speech

¶76 The speech of police sadism has many examples. Leonard Mitchell is a 500-pound black man who was arrested. Because of his weight and the fact that he was handcuffed, he had a difficult time fitting into the back seat of the police car. He was thus charged with resisting arrest and was called a "nigger" by an officer.<sup>243</sup> A Latino man with his two young children in his car was approached by an officer. Without provocation, the officer maced and beat the man as his children looked on in fear.<sup>244</sup> A well-dressed MBA student, on his way to a job interview in his late-model Ford Explorer, was stopped. The officers asked mockingly about the car: "Hey, where did you get the money for something like this?" They tore the car apart, damaging it, looking for drugs. Finding nothing, the officers simply drove off, leaving the victim weeping "in his anger and humiliation."<sup>245</sup> This is sadism manifest. One's weight, one's familial status, one's appearance of propriety and property are all used in the sadist-masochist performance of whiteness as the law, as an outpost of civilization, and blackness as obedience to police,

<sup>237</sup> Farley, *supra* note 32, at 464-465.

<sup>238</sup> *Id.* at 492.

<sup>239</sup> *Id.* at 491.

<sup>240</sup> Brown, *supra* note 27, at 779.

<sup>241</sup> THREAT AND HUMILIATION, *supra* note 29, at 21.

<sup>242</sup> Brown, *supra* note 27, at 790.

<sup>243</sup> THREAT AND HUMILIATION, *supra* note 29, at 4.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

non-assertion of rights, of losing one's dignity.<sup>246</sup> But this sadist-masochist relationship is not always non-violent.

### B. Excrementalizing Black

¶77 When Farley speaks of White “excrementalizing” Black, he points to his theory that the racial sadist-masochist relationship, like sex, is about the pleasure of the physical body. When Carbado was racially profiled, the bystanders’ “eyes were all over our bodies.”<sup>247</sup> When the ACLU’s Laura Murphy testified before the U.S. Sentencing Commission, she spoke of the stereotype of blacks as sexual beasts who would turn white virgins into hyper-sexed prostitutes.<sup>248</sup> Race is primitive, feral, and physical. The pleasure whites derive from anti-black sadism must, therefore, be sadism directed not only at blacks’ psyche, but also their bodies themselves. Thus, there has been talk of castrating (primarily black) rape convicts. Excrementalizing Black—turning his body into the substance that was his body but is now the antithesis of his body, viz., body itself rejected—is an attempt to destroy Black’s body from within. Abner Louima is a case in point. In sodomizing Louima, the officers engaged in the height of sadism: they humiliated him, they penetrated and raped him, they excrementalized him. His body, for that time, was a body rejected. It had turned to waste. For that time, the police nobodied Louima. Louima as a person, as a holder of constitutional rights, as a moral being, did not exist. By nobodying Louima, the officers became real people, with rights, with morals, with existence.

### C. Why Race?

¶78 Why must race be the operand upon which whites create themselves? If, as Farley argues, race itself is about feeling morally good,<sup>249</sup> then the white creation of the wretched, abased, criminal black person is a necessary “process by which whites exorcise their own demons, and is, therefore, a pleasure in itself. If the black body is the site and cite of all ills, then the white body is not.”<sup>250</sup> White debasement of blacks leads to pleasure, pleasure leads to ego enhancement, and ego enhancement leads to reality. This debasement is especially required when whites have so many demons of historical slavery to exorcise,<sup>251</sup> and when whites today use and possess more drugs and weapons than blacks.<sup>252</sup> Farley has thus interpreted Lacan for twenty-first century America and provided a reason for racism.

¶79 Farley also notes that White must create Black as naturally prone to crime since only then will the hierarchy of white pleasure and black humiliation be justified.<sup>253</sup> Ironically, one way to accomplish this is to deny race itself: “[t]he colorline . . . is painful to contemplate and so we often choose to dismiss the evidence of our eyes . . . . It hurts to

<sup>246</sup> Carbado, *supra* note 37, at 954.

<sup>247</sup> *Id.* at 960.

<sup>248</sup> *Hearings*, *supra* note 140 (testimony of ACLU Director Laura Murphy).

<sup>249</sup> Farley, *supra* note 32, at 467 (“Race, like sexuality, is a way of feeling good about and in one’s body . . . . Race is . . . pleasure for whites only. For blacks, it is . . . humiliation.”).

<sup>250</sup> *Id.* at 475.

<sup>251</sup> See FANON, *supra* note 27, at 146.

<sup>252</sup> CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 11, at 14.

<sup>253</sup> See Farley, *supra* note 32, at 476.

look one's oppression in the face."<sup>254</sup> By denying the colorline, we deny discrimination its reality; we thereby deny social context its power to create black crime and thus place all responsibility on the individual. The Bureau of Justice Statistics therefore collects data showing disparate treatment, but does not ask questions that would reveal racial profiling.<sup>255</sup> It also advertises on its cover the one statistic that suggests a truly colorblind society in which officers treat races equally.<sup>256</sup> Reading further, statistics showing disparate treatment implicitly ask us to believe in blacks' biological propensity to crime.

¶180 In addition to colorblinding society, the power structure hides the mechanisms of power, and must do so, for when the mechanisms are revealed, the power is lost. The *Bustamonte* Court alluded to this when it held that officers do not have to inform people that they may refuse an officer's request to search.<sup>257</sup> Since blacks are more likely not to know or not assert their rights, this holding encourages disparate treatment of blacks in racial profiling, and provides a judicial imprimatur on a method of policing dependant on people's ignorance of their rights.<sup>258</sup> When this happens, the power structure targets more blacks than whites and thus apprehends more black criminals. With discrimination and social context excluded from the courtroom, the defendant is convicted and anti-black racist ideology grows stronger with its new image. Under the guise of colorblindness (*Bustamonte* applies to *everyone*, does it not?), blacks continue to be disparately arrested, but since the law treats everyone the same, society concludes that blacks are biologically prone to crime.

¶181 This criminal stigmatization of blacks justifies their subordination as a group.<sup>259</sup> Sinking Black pushes White up to the status of law enforcing and Law Abiding. The hierarchy is thus established. Overenforcement of laws in black communities is a consequence, therefore, of increased black arrests and imagery that feeds the original ideology of Black as Criminal.

¶182 Farley echoes Fanon in placing his observations in the neocolonialist structure, in which the American black ghetto is the colony, white America the home country. Where Fanon's colony would produce textiles or foodstuffs, Farley's ghetto colony exports its criminality for white consumption. Whites purchase their purity by watching black depravity in the form of crime statistics, violent hip-hop, broken homes, drugs, and poverty.<sup>260</sup> Since America's neocolonies around the world today are primarily economic in nature, as opposed to geo-militaristic, it pays to look at the domestic anti-black neocolonies in the same way.

#### D. *The Economic Neocolony*

¶183 There is a movement today that attempts to deprive black America of its economic wealth and opportunity. If "time is money," then whenever an officer racially profiles a

<sup>254</sup> *Id.* at 476-477.

<sup>255</sup> See generally CONTACTS BETWEEN POLICE AND THE PUBLIC, *supra* note 11.

<sup>256</sup> *Id.*

<sup>257</sup> COLE, *supra* note 6, at 29 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)).

<sup>258</sup> *Id.* at 30.

<sup>259</sup> *Id.* at 177.

<sup>260</sup> Farley, *supra* note 32, at 517-518 ("The neocolony produces the spectacle of violence, narcotics, illiteracy, illegitimacy, and disease for its masters. The spectacle of black-on-black crime is a commodity, race-pleasure, which is exported from the heart of darkness to the living rooms and museums of white America.").

black person—a stop which can often take over an hour—that officer deprives the victim of his time and, therefore, money. One woman was profiled, arrested for parking tickets that had already been paid, and missed work as a result.<sup>261</sup> One young man was on his way to a job interview when he was profiled. He was left in tears, angry and humiliated.<sup>262</sup> If he did not miss his interview, he certainly did not perform as well as he might have.

¶84 Law enforcement steals more than blacks' time. Law enforcement confiscates goods. It confiscates black children's bicycles and sells them.<sup>263</sup> It accuses a black shopper of stealing items, detains her for three hours, and even when the items are proven to be paid for, it still confiscates them.<sup>264</sup> In 1997, local police departments and sheriff's departments received \$648 million worth of cash, goods, and property from drug asset forfeiture programs.<sup>265</sup> Although it is unknown how much of this total was seized from blacks, the system of civil and criminal asset forfeiture is set up to encourage racial profiling.<sup>266</sup>

¶85 Local civil forfeiture statutes normally require a large percentage of seized assets to be used to fund, say, local education.<sup>267</sup> Aided by "federal adoption" of seized assets, however, local law enforcement can turn the assets over to the federal government and receive back up to eighty percent of their value.<sup>268</sup> Such a process has "minimal constitutional protections,"<sup>269</sup> namely, that the burden of proof for recovery of assets is on the person whose property has been seized.<sup>270</sup> This seizure regime "almost inevitably lead[s] to a conflict between economic self-interest and traditional law enforcement objectives. Such a conflict . . . promotes overzealous law enforcement practices such as . . . racial profiling."<sup>271</sup> The regime also made it so law enforcement officers' best hauls would come from seizing goods from people who lacked "the resources to win them back."<sup>272</sup> With minority status and poverty closed correlated, this means a further incentive to racially profile blacks.

¶86 In addition to civil forfeiture schemes, federal and state programs increase local agencies' funding based on the number of drug-related arrests and convictions the local agencies make.<sup>273</sup> Since minorities are less likely to hire defense attorneys and are "more likely to be viewed as inherently suspect by judges and jurors," they are easier to convict, so police departments target these groups.<sup>274</sup> By engaging in this process of self-enrichment, law enforcement concomitantly inflicts mass deprivation on the black

<sup>261</sup> Harris, *supra* note 28, at 270.

<sup>262</sup> Callahan & Anderson, *supra* note 227, at 37.

<sup>263</sup> ACLU Michigan Cases Press Release, *supra* note 213.

<sup>264</sup> THREAT AND HUMILIATION, *supra* note 29, at 9.

<sup>265</sup> Callahan & Anderson, *supra* note 227, at 42.

<sup>266</sup> Jason R. Humke, *Passing the Buck: An Analysis of State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), and *Nebraska's Civil Forfeiture Law*, 83 NEB. L. REV. 1299, 1317 (2005).

<sup>267</sup> *Id.* at 1313.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 1301.

<sup>270</sup> Callahan & Anderson, *supra* note 227, at 42.

<sup>271</sup> Humke, *supra* note 266, at 1317.

<sup>272</sup> Callahan & Anderson, *supra* note 227, at 42.

<sup>273</sup> THREAT AND HUMILIATION, *supra* note 29, at 23.

<sup>274</sup> *Id.*

community by jailing large numbers of its youth. This process “is no accident. It is the direct consequence of ‘rational law enforcement’ policies that target blacks.”<sup>275</sup>

¶187 Is there another way out? Can blacks play a part other than the criminal? They may play the minstrel,<sup>276</sup> but this is no choice at all, since both the criminal and the minstrel are humiliated in order to ensure the race pleasure of the whites. There is no way out through reason, because white pleasure and enjoyment through stereotyping always prevail over facts and experience.

## VI. FOUCAULT: TOWARD A “WHY” OF RACIAL PROFILING

### A. *What is Racial Profiling?*

¶188 Earlier in this article, I noted that racial profiling occurs when law enforcement officials—in the absence of a suspect-specific description—selectively consider race in deciding when to investigate, arrest, and prosecute.<sup>277</sup> This, however, is perhaps merely its surface manifestation. Lacan, Fanon, and Farley would undoubtedly dig deeper to discover what racial profiling, in essence, is. While never mentioning racial profiling per se, Michel Foucault would likely argue that racial profiling is an expression of power. Power, writes Foucault, is that which represses a class or individuals.<sup>278</sup> The role of political power “is perpetually to use a sort of silent war to re-inscribe that relationship of force, and to re-inscribe it in institutions, economic inequalities, language, and even the bodies of individuals.”<sup>279</sup> A Lacanian, Fanonian, and Farleyian notion of racial profiling does just that: it sets the relations of power and instills inequalities through language and upon the bodies of white and black subjects. Foucault’s silent war, furthermore, is one which divides White and Black into two camps: “[t]he war that is going on beneath order and peace, the war that undermines our society and divides it in a binary mode is, basically, a race war.”<sup>280</sup> In fact, race lies at the heart of Foucault’s notion of political power as war.<sup>281</sup>

¶189 Racial profiling, therefore, is both an expression of power and a weapon in the silent race war that Williams, the Detective, detects. This power cannot be proven by traditional legal discourse and analysis, since power “has gradually been penetrated by quite new mechanisms of power that are probably irreducible to the representation of law.”<sup>282</sup> Law, for Foucault, has become “increasingly incapable of coding power, of serving as its system of representation.”<sup>283</sup> Suggesting a new approach to analyzing

<sup>275</sup> Harris, *supra* note 28, at 301.

<sup>276</sup> Farley, *supra* note 32, at 516 (“This race pleasure is produced by the sociological thematization of the black bodies as minstrels and as criminals all.”).

<sup>277</sup> See THREAT AND HUMILIATION, *supra* note 29, at ix.

<sup>278</sup> MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 15 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., Picador 2003) (1997).

<sup>279</sup> *Id.* at 16.

<sup>280</sup> *Id.* at 59-60.

<sup>281</sup> *Id.* at 18-19 (“the race problem . . . racial binarism that led the West to see for the first time that it was possible to analyze political power as war”).

<sup>282</sup> MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 89 (Robert Hurley trans., Vintage Books 1990) (1976).

<sup>283</sup> *Id.* at 89.

power, Foucault argues for a mode of analysis that challenges the white male dominant discourse of law. He writes:

It is this image that we must break free of, that is, of the theoretical privilege of law and sovereignty, if we wish to analyze power within the concrete and historical framework of its operation. We must construct an analysis of power that no longer takes law as a model and a code.<sup>284</sup>

¶90 Although he does not clearly describe this new analysis of power, he points to an analysis that I take on in this essay through Lacan, Fanon, and Farley. Foucault writes that to understand power, we must “abandon the juridical notion of sovereignty . . . [and instead] inquire how relations of subjectivization can manufacture subjects.”<sup>285</sup> In other words, an inquiry into racial profiling must ask how the power structure creates Black as Criminal and White as Law Abiding. Not only does power create subjects,<sup>286</sup> but it also creates knowledge.<sup>287</sup> In the case of racial profiling, the knowledge that power creates—however fantastic—is that blacks commit more crime than whites, that blacks are biologically predisposed to criminality, and that blacks are therefore a legitimate target of police surveillance. Power and knowledge finally come together to reinforce each other: “[t]he exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects on power.”<sup>288</sup> By racially profiling, we create more subjects against whom racial profiling is justifiable. We create the Lacanian Criminal in the black person.

¶91 Racial profiling, therefore, for the purposes of this article, is an expression of the power wielded by the white male dominant power structure and is a tool in the silent race war being waged across America. This power is not a legal one (though, to be sure, legal means are marshaled in its exercise) and cannot be discovered through such traditional means. Foucault’s well-known maxim strikes a tone all too familiar to Williams: the success of power “is proportional to its ability to hide its own mechanisms.”<sup>289</sup> This power, rather, is one that exists beyond that state apparatus.<sup>290</sup> It exists in all of us<sup>291</sup> and so we ought to take a psychological approach to understanding this power and racial profiling. With this approach, I conclude that racial profiling is, in a word, a tool in the creation of subjects. Why, then, must we create subjects? In other words, why do we racially profile?

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<sup>284</sup> *Id.* at 90.

<sup>285</sup> MICHEL FOUCAULT, *ETHICS: SUBJECTIVITY AND TRUTH* 59 (Paul Rabinow ed., Robert Hurley et al. trans., The New Press 1997) (1994).

<sup>286</sup> DAN BEER, *MICHEL FOUCAULT: FORM AND POWER* 100 (2002).

<sup>287</sup> MICHAEL FOUCAULT, *POWER/KNOWLEDGE* 119 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980) (1977).

<sup>288</sup> *Id.* at 52.

<sup>289</sup> FOUCAULT, *supra* note 282, at 86.

<sup>290</sup> *See* FOUCAULT, *supra* note 287, at 72 (“[O]ne cannot confine oneself to analyzing the State apparatus alone if one wants to grasp the mechanisms of power in their detail and complexity.”).

<sup>291</sup> *Id.* at 189 (“[T]here is not an injustice in the world to which we are not accomplices.”).

### B. *Why Do We Racially Profile?*

¶92 Foucault repeatedly avoids the question of why people engage in power and why power relations are as they are. He writes that asking why “leads us, I think, into a labyrinth from which there is no way out.”<sup>292</sup> In this labyrinth, the “why” of power is an “unanswerable question.”<sup>293</sup> The proper questions—the answerable questions that might produce change—inquire into what power relations are at work, how these relations make possible certain discourses—in the case of this article, the discourse of Black as Criminal and White as Law Abiding Citizen—and, finally, how these discourses are used to support the power relations.<sup>294</sup> Foucault inquires into the mechanisms, effects, and relations of power,<sup>295</sup> and he answers these questions with a focus aligned with that of this article. One commentator writes that: “Foucault’s concept of individualization implies that individuals are entirely constructed and changeable: that there is a process at work that first separates humans from one another, and then defines the parameters and possibilities of each separated person. Foucault’s individuals are frequently both the product and the victims of power.”<sup>296</sup>

¶93 Foucault’s answer to the “how” of power is thus an answer posited by Lacan, Fanon, and Farley: the dominant power structure shapes power relations through racial profiling by constructing blacks as criminals and whites as law-abiding citizens. By so doing, power creates a discourse that separates the races and defines the possibilities of each race as those associated with criminals and law-abiding citizens. This article thus answers the Foucaultian “how.” It goes beyond Foucault’s stated intentions, however, in suggesting why people racially profile. We shall see, as well, that although he denies his ability to do so, Foucault himself suggests some answers to this “why.”

¶94 Lacan would likely suggest that people racially profile out of a primitive and immature need to establish their own egos through rejection of the Other. Indeed, this creation of the other as less-than seems to be a common thread in the thoughts of Lacan, Fanon, Farley, and Harcourt. Foucault concurs with this arguably fundamental psychological need: he writes that “the law comes to be seen as a Janus-faced reality: the triumph of some means the submission of others.”<sup>297</sup> He goes on, writing that “[i]n order to live, you must destroy your enemies’ . . . [and] racism makes it possible to establish a relationship between my life and the death of the other that is . . . a biological-type relationship.”<sup>298</sup>

¶95 Racism is, for Foucault, necessary to the State: only with racism can state killing be justified,<sup>299</sup> and only with racism can the State exercise its sovereign power.<sup>300</sup> The aim of this killing and power is nothing less than the purity of the race. Foucault writes that “the actual roots of racism” are bound up in the State’s need “to use race, the elimination

<sup>292</sup> FOUCAULT, *supra* note 278, at 28.

<sup>293</sup> FOUCAULT, *supra* note 287, at 97.

<sup>294</sup> FOUCAULT, *supra* note 282, at 97.

<sup>295</sup> FOUCAULT, *supra* note 278, at 13.

<sup>296</sup> BEER, *supra* note 286, at 119.

<sup>297</sup> FOUCAULT, *supra* note 278, at 70.

<sup>298</sup> *Id.* at 255.

<sup>299</sup> *Id.* at 256.

<sup>300</sup> *Id.* at 258.

of races and the purification of the race, to exercise its sovereign power.”<sup>301</sup> He goes on, writing that racism is used “to take control of life, to manage it, to compensate for its aleatory nature, to explore and reduce biological accidents and possibilities.”<sup>302</sup> Racial profiling, then, as a manifestation of racism, is used to effect racial purity, and within that purity, achieve a kind of control and predictability over society. Power of its nature expands until it surveys and controls everything. A heterogeneous racial society is complex and unpredictable—a homogenous one is unified, therefore simple, and therefore easy to survey and control. Racial profiling is therefore a tool used to achieve control over society and life itself.

¶96 But why must the target be black Americans? Why not Asians, or Jews, or people with red hair? For Foucault, power relations and associated repressions are born in history and random historical events surrounding past wars and conflicts. Foucault writes that:

[A]t the beginning of history and law one will posit a series of brute facts (physical vigor, force, character traits), a series of chance happenings (defeats, victories, successes or failures of conspiracy, rebellions or alliances). And only above this tangle will a growing rationality take shape, that of calculations and strategies—a rationality that, as one rises and it develops, becomes increasingly fragile, more and more spiteful, more closely tied to illusion, to fancy, to mystification. So we have the complete opposite of those traditional analyses which attempt to rediscover, beneath the visible brutality of bodies and passions, a fundamental, abiding rationality, linked by nature to the just and the good . . . . [The search for the source of power relations seeks] to awaken, beneath the form of institutions or laws, the forgotten past of real struggles, of masked victories or defeats, the dried blood in the codes.<sup>303</sup>

¶97 Foucault, therefore, would locate the source of racial profiling in the history of black-white relations in America. From the slave trade, plantation life, the Civil War, and subsequent fights for and against racial equality up to the present day, Foucault’s “brute facts” and “series of chance happenings” have morphed into the “calculations and strategies” of today that seek to insinuate that blacks are naturally criminals and whites law abiding. Foucault echoes Lacan at this point, noting that such calculations are fragile and based on illusion and fantasy. Foucault also suggests Farley’s notion of the body fetish, implying a fantastic fascination with the black body as virile, exotic, dangerous, and Criminal. In fact, writes Foucault, the very notion of the “social body is . . . the materiality of power operating on the very bodies of individuals.”<sup>304</sup> “[N]othing,” writes Foucault, “is more material, physical, corporal than the exercise of power.”<sup>305</sup>

¶98 If we can suggest why people racially profile, what can be said of the importance of this knowledge?

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 261.

<sup>303</sup> FOUCAULT, *supra* note 285, at 62.

<sup>304</sup> FOUCAULT, *supra* note 287, at 55.

<sup>305</sup> *Id.* at 57-58.

1. Why is it Important to Understand Why People Racially Profile? Why Will Understanding Why People Racially Profile Help Alleviate the Problem?

¶99 By understanding why people racially profile—or, from a Foucaultian viewpoint, by understanding at least what the mechanisms, effects, and relations of power are—we reveal the mechanics of power. By revealing the racist mechanics of the power that is racial profiling, this racist power is defeated, since the success of power “is proportional to its ability to hide its own mechanisms.”<sup>306</sup> By discussing racial profiling, we speak of racism, and by speaking of racism, we upset the established racist state of affairs and anticipate freedom from this state.<sup>307</sup> By speaking of racism, we fight the silent race war.<sup>308</sup> By speaking, we remove obstacles and break secrets in order to escape the grasp of repressive power.<sup>309</sup>

¶100 By speaking of racial profiling, however, we do not only reveal and thereby defeat the racist power structure. By speaking, we also produce a new truth<sup>310</sup> to replace the current racist truth. Foucault calls for “the revelation of truth, the overturning of global laws, the proclamation of a new day to come, and the promise of a certain felicity.”<sup>311</sup> By refuting the power structure that perpetuates racial profiling and replacing it with one that reveals racial profiling to be based not on fact and empirical data, but on illusion and misunderstanding, this article hopes to reveal the truth and thereby overturn the current racist legal structure.

¶101 This article aims at the type of revolution Foucault envisions, but it also aims at simple justice and fairness. In a system in which one segment of the population is targeted for no other reason than the color of its members’ skin, that segment is demoralized and tends to disappear. It is condemned before it has deserved condemnation. As a result, the entire population, black as well as white, is hurt. It is hurt because racial profiling lessens the legitimacy of the justice system as well as reduces the efficiency and effectiveness of policing. Racial profiling possibly even serves to create criminals and thus increase the level of criminality in society. We all, therefore, have a stake in fighting racial profiling.

¶102 At the very least, this article can teach those of us who would not support racially motivated policing but for misguided beliefs that it is effective and that blacks do actually commit more crime. Foucault writes that “there is not an injustice in the world to which we are not accomplices.”<sup>312</sup> He goes on to say that “[individuals] are not only [power’s] inert or consenting target; they are always also the elements of its articulation . . . . The individual which power has constituted is at the same time its vehicle.”<sup>313</sup> In short, “we all have a fascism in our heads . . . we all have a power in our bodies.”<sup>314</sup> By understanding the “them” who we see as racist purveyors of racial profiling, we may

<sup>306</sup> FOUCAULT, *supra* note 282, at 86.

<sup>307</sup> *Id.* at 6.

<sup>308</sup> FOUCAULT, *supra* note 278, at 54 (“The subject who is speaking is . . . a subject who is fighting a war.”).

<sup>309</sup> FOUCAULT, *supra* note 282, at 34.

<sup>310</sup> FOUCAULT, *supra* note 287, at 145 (“The role for theory today seems to me to be just this: . . . to analyse the specificity of mechanisms of power, to locate the connections and extensions, to build little by little a strategic knowledge.”).

<sup>311</sup> FOUCAULT, *supra* note 282, at 7.

<sup>312</sup> FOUCAULT, *supra* note 287, at 189.

<sup>313</sup> *Id.* at 98.

<sup>314</sup> *Id.* at 99.

begin to see our own acts which, although we do not initially recognize as racist, become apparent as contributors to the racist power structure.

## VII. SOLUTIONS: TRUTH-SPREADING AND *TERRY*

¶103 There is in this article a disturbing suggestion that because the power source of racial profiling is fortress in people's subconscious and unconscious it is at best a nearly impossible demon to slay. Derrick Bell, in his book *Silent Covenants*, suggests the same.<sup>315</sup> Implicit in this article is also, however, a faith in language and communication to lead us to a better society. If enough people speak out against racial profiling and if enough people believe these voices, Lacan's, Fanon's, and Farley's theories all hold that society will gradually change into one that speaks out, collectively, against racial profiling and by doing so, will cease to racially profile. Like Hamlet, we too may take up the arms of language against a sea of racial profiling, and by opposing, end it.<sup>316</sup> This is, in fact, exactly what is happening.

¶104 Countless commentators have in recent years joined the fight against racial profiling, and in doing so have offered solutions and raised others' consciousness about the problem. As a result, racial profiling as this article defines it is largely condemned, even in law enforcement circles. Society is hearing and believing the voice against racial profiling. The solution to the problem lies, perhaps, not in the adoption of any one solution, but in the very process of offering such solutions.

¶105 Commentators have offered solutions that lie in one of two camps. Some are what I call "truth-spreading" solutions, and others are "legal-judicial" in nature. Truth-spreading solutions are based on data collection, analysis of the data, and use of the data to manage and train police officers with a view to a shift in culture away from racial profiling.<sup>317</sup> Such solutions depend on the cooperation of police departments and officers to collect data,<sup>318</sup> supervise themselves, problem-solve based on the data findings,<sup>319</sup> and engage in critical self-evaluation in light of accusations of racial profiling.<sup>320</sup> Truth-spreading then requires police to work cooperatively with communities of color in order to further raise officers' awareness of their own biases and eventually change their behavior.<sup>321</sup> Truth-spreading depends on police departments making their own policies,

<sup>315</sup> DERRICK BELL, *SILENT COVENANTS* 69 (2004). Bell's Interest-Convergence Principle is similarly skeptical of the possibility of real progress. This principle consists of two rules: "Rule 1. The interest of blacks in achieving racial equality will be accommodated only when that interest converges with the interests of whites in policy-making positions. This convergence is far more important for gaining relief than the degree of harm suffered by blacks or the character of proof offered to prove that harm. Rule 2. Even when interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites, particularly those in the middle and upper classes." *Id.*

<sup>316</sup> WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

<sup>317</sup> Jerome H. Skolnick & Abigail Coplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 431 (2001).

<sup>318</sup> Lisa Walter, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 293 (2000).

<sup>319</sup> Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 46 (2001).

<sup>320</sup> Walter, *supra* note 318, at 292.

<sup>321</sup> Elisabeth R. Calcaterra & Natalie G. Mitchell, *Subtracting Race from the "Reasonable Calculus": An End to Racial Profiling?* *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) *Cert. Denied Sub Nom.*, 6 MICH. J. RACE & L. 339, 351 (2001).

self-regulating,<sup>322</sup> and addressing police misconduct internally.<sup>323</sup> This suggests the principle upon which truth-spreading is based: that police are not racist and that they police in the most progressive, non-race-based ways that the data shows to be effective.

¶106 Legal-judicial solutions, in contrast, have as their founding principle the theory that police will abuse their power and use impermissible considerations of race to the extent the law allows. Legal-judicial solutions thus suggest changes to the law, to the way judges consider cases in which race is involved, and to the way attorneys argue such cases that will serve to limit the power and authority of police officers. These solutions include those such as adopting a per se rule against racially motivated searches and seizures;<sup>324</sup> sanctioning police departments with loss of funds when they engage in racially disproportionate traffic stops;<sup>325</sup> recognizing that state courts can, and do, rule that *Whren*-type stops violate state constitutions;<sup>326</sup> requiring officers to inform stopped motorists of their right to refuse consent to search and their right to drive away<sup>327</sup>; and a number of others. Such legal-judicial solutions are problematic because their founding principle is that police use race impermissibly and will continue to do so by finding ways around any new rule promulgated to prevent that use.<sup>328</sup> Their bedrock principle thereby indicates their impotence to address the problem. This is not, however, to say that truth-spreading is a panacea. Its psychological and philosophical underpinnings lack a comfortable empiricism that we like to feel in our solutions, and its faith in the power structure to reform itself goes against the theories of dominant power discussed in this article. The conclusion to be drawn, then, is that we must continue to speak out against racial profiling and offer any solution we can formulate, be it truth-spreading, legal-judicial, or a mixture of the two.

¶107 Truth-spreading is the main solution to racial profiling. It assumes that as racist power is revealed in all its truth, that racist power will be weakened and a more truth-based, less racist power structure will arise in its place. Leaving that solution aside, however, are there any legal-judicial avenues to explore? There are, certainly, as many such avenues as one's imagination can envision, most if not all of which will betray Foucault, since, as he writes, "[o]ur task is to conquer power, not bring about justice. Justice simply reconstitutes power."<sup>329</sup> Since this article begins with *Terry v. Ohio*, however, it seems only fair to give that opinion its due chance to serve in the silent war against racial profiling.

<sup>322</sup> *Id.* at 351.

<sup>323</sup> Walter, *supra* note 318, at 293.

<sup>324</sup> Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 364 (2000).

<sup>325</sup> George C. Thomas III, *Blinded by the Light: How to Deter Racial Profiling—Thinking about Remedies*, 3 RUTGERS RACE & L. REV. 39, 53 (2001).

<sup>326</sup> Abraham Abramovsky & Jonathan Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 741 (2000).

<sup>327</sup> Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1414, 1466 (2000).

<sup>328</sup> Thomas, *supra* note 325, at 59 ("If police believe racial profiling is a valid tool, they will continue to use it even in the face of a law making it illegal and excluding evidence found by means of profiling. That law would be just another exclusionary rule to find a way around.")

<sup>329</sup> CHRIS HORROCKS & ZORAN JEVTIC, INTRODUCING FOUCAULT 103 (Richard Appignanesi ed., Totem Books 1997).

- ¶108 *Terry* presented the Court with a situation in which an officer observed three men, whose activities comprised “suspicious circumstances.”<sup>330</sup> The officer feared that one or more of the men may have had a gun.<sup>331</sup> Stirred to action by his suspicions, the officer accosted the men, patted one of them down, and found a gun.<sup>332</sup> He then proceeded to search all three men.<sup>333</sup>
- ¶109 The trial court denied the defendants’ motion to suppress the guns, holding that the officer had the right to pat down the outer clothing of the defendants “purely for his own protection.”<sup>334</sup> The trial court went on to distinguish between an investigatory “stop” and an arrest, as well as between a “frisk” of the outer clothing of a suspect and a full-blown search for evidence of a crime.<sup>335</sup> The trial court suggested that even if the officer feels he must search a suspect for his own protection, he might be limited to a frisk and be prohibited from engaging in a search for Fourth Amendment purposes.
- ¶110 The appeals court affirmed the trial court’s holding, and the Supreme Court dismissed defendants’ appeal, stating that there was no constitutional question involved.<sup>336</sup>
- ¶111 The State court’s holding was thus one that limited officers’ prerogative to act to only those circumstances in which they feel threatened. Whether an officer could engage in a full-blown search under such circumstances was doubtful, but ultimately unclear. The Supreme Court would expand the officer’s prerogative, but would place search jurisprudence at a reasonable point.
- ¶112 The Supreme Court first noted the traditional requirements for a search: the officer needs to have “specific and articulable facts” that reasonably warrant the intrusion<sup>337</sup> and in taking action, the officer’s “good faith” belief in the necessity of the intrusion is not enough.<sup>338</sup> The Court then, however, wrote that its concern was the ability of the officer to protect himself from immediately dangerous criminals.<sup>339</sup> The Court thus held that if an officer has reason to believe that he is dealing with an armed and dangerous person, the officer can perform a search *only* for weapons that might be used against himself or others nearby.<sup>340</sup> Probable cause is not required,<sup>341</sup> but reasonable suspicion is.<sup>342</sup>
- ¶113 Commentators have derided *Terry* because it allowed officers to base traffic stops and other officer-citizen searches on reasonable suspicion, thereby erasing the long-held requirement of probable cause. Justice Douglas, dissenting in *Terry*, wrote in no uncertain terms that the *Terry* majority’s decision took us all “a long step down the totalitarian path.”<sup>343</sup> Subsequent Fourth Amendment cases have interpreted *Terry* to require only reasonable suspicion in all traffic stop searches. I believe, however, that in

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<sup>330</sup> 392 U.S. 1, 4 (1968).

<sup>331</sup> *Id.* at 6.

<sup>332</sup> *Id.* at 7.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 8.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 21.

<sup>338</sup> *Id.* at 21-22.

<sup>339</sup> *Id.* at 23-24.

<sup>340</sup> *Id.* at 25-27.

<sup>341</sup> *Id.* at 25.

<sup>342</sup> *Id.* at 30.

<sup>343</sup> *Id.* at 38.

this way *Terry* has been abused. Instead of killing off probable cause wholesale, I believe that the *Terry* Court carved out a narrow exception that would allow searches based on reasonable suspicion only when the officer believes, based on specific and articulable facts, that either she or those nearby are in immediate physical danger from the suspect the officer is observing. Such physical danger and the tools used to effect physical harm—“guns, knives, clubs, or other hidden instruments for the assault of the police officer”<sup>344</sup>—were the majority’s focus, and they thus limited their holding to such circumstances.

¶114 My solution to racial profiling rests on this reading of *Terry* and the necessary following theory, that subsequent cases such as *Whren* abused *Terry* by paying homage to it while expanding the acceptance of reasonable suspicion for searches far beyond situations in which immediate physical danger is perceived. We ought, in my opinion, to return to *Terry* and restore Fourth Amendment search jurisprudence in light of that decision. Thus, probable cause would be needed for all searches in which an officer does not perceive danger. The officer would still be able to protect herself and others if she perceived immediate physical danger by engaging in a search based on reasonable suspicion.

¶115 This radical regime would help to reduce racial profiling because most of racial profiling relies on pretext stops intended to uncover narcotics. Pretext stops would no longer be allowed, and if an officer did search someone based on something less than probable cause and found an amount of narcotics, the narcotics would not be admissible in evidence.

¶116 I might go even further than an exclusionary rule and argue that if an officer searches someone based on a standard less than probable cause, that officer can arrest the suspect only if the officer finds an illegal weapon that can be used immediately against others in the suspect’s possession. If the officer finds narcotics, the officer would not be able to arrest the suspect, but could merely confiscate the contraband.

¶117 A couple of examples might help.

¶118 An officer stops a motorist because she believes that the motorist is carrying narcotics. She stops the motorist on the pretext of his broken taillight. She searches the motorist’s car with his consent, and she indeed finds three kilograms of cocaine, but no illegal weapons. The motorist does not represent an immediate physical danger to anyone, and so the officer could merely confiscate the cocaine and send the motorist on his way.

¶119 A beat cop sees a young woman walking along a street, seemingly attempting to remain in the shadows and clutching something in her pocket. The officer sees a number of yards ahead of the suspect a couple whom the woman seems to be following furtively. The cop believes the woman has a gun and intends to accost the couple for some reason. The cop thus has a reasonable suspicion that the woman is an immediate danger to the couple. The cop can thus stop and search the woman. If he finds a gun, he can arrest the woman. If in this search he also finds an amount of illegal narcotics, the prosecution would also be able to introduce this in evidence on a drug charge.

¶120 In short, if the officer has probable cause, she can search and make an arrest based on anything illegal she finds. If she has only reasonable suspicion, *Terry* applies and she can search the suspect only if she has reasonable suspicion that the suspect represents an

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<sup>344</sup> *Id.* at 27.

immediate physical danger to others. If she finds an illegal weapon that constitutes such an immediate threat, she can arrest the suspect and the gun can come in as evidence. If she finds no illegal gun but some other contraband, she can confiscate the contraband but not make an arrest. If she finds an illegal weapon and other contraband, she can make an arrest for all items and all items are admissible in evidence. If the officer has something less than reasonable suspicion, then no search is allowed.

¶121 This solution may reduce racial profiling by disallowing pretext stops as well as stops used to find drugs but that rely on something less than probable cause. This solution also may reduce the violence associated with the drug trade by providing an incentive for drug dealers to leave their weapons at home. The nexus between drugs and guns would thus be weakened, along with the nexus between drug and gang violence. This solution may also reduce the incidence of illegal gun possession by highlighting the problem through the gun-specific lower standard of reasonable suspicion.

¶122 There are, obviously, problems with this solution. Police organizations and prosecutors will be against it, and justifiably so, for why, when we have a drug dealer in hand, would we want to let him go? Politicians, in turn, will not find much public support for a regime that lets criminals off before they have even been arrested. I believe, however, that this solution will not only address racial profiling and make sense in terms of social policy, but, more importantly, I believe that this is the constitutionally correct path to take.

#### VIII. CONCLUSION

¶123 What here has been proven? Like Williams, I could be making all this up. The statistics, the testimonies, the Supreme Court rulings, and state and federal policies may all be just the random result of an honest attempt to make good law and reduce crime. If a couple of racist cops emerge every now and then, it is unfortunate but, overall, not a systemic problem and therefore not to be addressed. Perhaps they are right: racism is a thing of America's past, and I see it only because I want to see it.

¶124 Then again, there are the statistics, the testimonies, and the government actions. They cannot be random. There must be some underlying paradigm, some belief structure, some common goal toward which people who have power push. What could it be?

¶125 Like Patricia Williams, I too will play the detective. Like her, I also cannot produce a document, signed by the white male dominant power structure declaring boldly, "We are Law Abiding Citizens, Blacks are Criminals, and We Shall Reify This Racist Doctrine in Every Facet of Our Law Enforcement Institutions!" I must corner the racist with circumstantial evidence, penning him in until he is defined, and Black loses his burdensome definition of Criminal. What, then, is my evidence?

¶126 Blacks are disparately treated in all areas of the criminal justice system. This is most salient in the realm of racial profiling. The government's own statisticians tell me this.

¶127 Court rulings have acknowledged the existence of racial profiling but have refused to take steps to eradicate it. Courts have declared that police officers' racist intentions in profiling blacks are irrelevant to the legal analysis.

¶128 The stories of those who have been racially profiled demonstrate the variegated trauma that racial profiling inflicts on and within the victim. Along with the statistics, the necessary conclusion is that this trauma is visited more on blacks than on whites.

¶129 Racial profiling has been approved by state and federal law enforcement agencies as an effective law enforcement tool.

¶130 So much is clear. But, taken separately or together, none of the above four pieces of evidence prove that racial profiling or racism itself exists. Here a leap of faith is required, but it is a leap that has been taken by twenty-five percent of LAPD Officers, an Oakland Police Department Captain, Justice Douglas, Judge Fortunato, Northeastern University, the ACLU, Amnesty International, countless legal scholars, and many others. When you leap, you leap into acceptance that institutionalized racism exists and labels Black as Criminal and White as Law Abiding. This same institution creates its laws, its jurisprudence, and its policies based on that one fallacious assumption, and thus creates two separate justice systems: one for whites, in which they get their constitutional rights with courtesy and respect, and one for blacks, who are lucky to be thrown a constitutional bone, and when done so, are done so at the feet of hostile and suspicious white masters. Why must this be?

¶131 The theories of Lacan, Fanon, and Farley suggest much as to “why.” The white male dominant power structure—the government, the courts, law enforcement, and their associates—wills itself to reality, wills the establishment of itself through the rejection of the black Other. The power structure is in a mirror relation with the Other, and so creates the Other as Criminal so that it may become Law Abiding. This Lacanian psychology is played out on the Fanonian field of colony, in which Black is forever inferior and must find definition only through White. Black is never, however, good enough, and White never quite bad enough for the races to overlap. Farley relocates us into contemporary America and finds White definition of self in the sadist-masochist relation it has with Black. The humiliation, threat, and violence that racial profiling poses to the black victim creates the white as morally good, good because of his skin color. Black remains excrementalized, a nobody, a black hole containing nothing at one point (the minstrel) and every sort of danger at another (the criminal).

¶132 White thus defines Black, and by defining controls him. White manages Black’s existence, and does so for one purpose: White’s own will to power through his will to reality.