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Maclin: "Black and Blue Encounters" Some Preliminary Thoughts About Fourt

"BLACK AND BLUE ENCOUNTERS" - SOME PRELIMINARY THOUGHTS ABOUT FOURTH AMENDMENT SEIZURES: SHOULD RACE MATTER?

TRACEY MACLIN^{*}

I. INTRODUCTION

Two years ago, a provocative assertion appeared in the editorial pages of the New York Times. It read: "The black American finds that the most prominent reminder of his second-class citizenship are the police."¹ The author of this sentence, Don Jackson, knew what he was talking about because he is a former police officer, who also happened to be a black man. Part of the foundation for Mr. Jackson's charge is a deep-seated distrust between police officers and black citizens. The evidence in support of this distrust has been available for a long time. Scholars and observers of the police, for example, have known for decades about the negative and anxious attitudes police officers hold toward blacks.² Today, when the pressure to "get tough" on crime is

^{*} See Don Wycliff, *Black and Blue Encounters*, 7 CRIM. JUST. ETHICS 2 (Summer/Fall 1988).

^{**} © Copyright 1991 Tracey Maclin. I want to thank Kathryn Abrams, Stan Fisher, and Sheri Lynn Johnson for reading and commenting on an earlier draft of this article.

1. Don Jackson, *Police Embody Racism To My People*, N.Y. TIMES, January 23, 1989, at A25.

2. See, e.g., President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 183 (1967) [hereinafter *Task Force Report*] (noting 1951 survey in one midwestern city where police officers "believed that the only way to treat certain groups of people, including Negroes and the poor, is to treat them roughly"); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 80 (2d ed. 1975) ("A negative attitude toward Blacks was a norm among the police studied, as recognized by the chief himself. If a policeman did not subscribe to it, unless Black himself, he would be somewhat resented by his fellows."); DAVID H. BAYLEY & HAROLD MENDELSON, *MINORITIES AND THE POLICE* 91 (1969) [hereinafter *BAYLEY & MENDELSON*] ("There seems little doubt that interpersonal violence as well as violence directed against policemen is considered [by the police] more likely to take place in minority neighborhoods regardless of economic class. Anxiety levels among officers are likely to be higher, therefore, in minority areas than in any other parts of the city."). *Id.* at 107. ("Policemen approach minority group members cautiously -- alert for danger. The factor of race is clearly a specific clue in the policeman's world. Policemen associate minority status with a high incidence of crime, especially crimes against the person, with bodily harm to police officers, and with a general lack of support for the police."); Richard E. Sykes & John P. Clark, *Deference Exchange in Police-Civilian Encounters*, in *POLICE BEHAVIOR* 95 (Richard J. Lundman ed., 1980) ("[I]t is not surprising that neither police nor minorities desire contact with one another unless absolutely necessary, for they possess conflicting expectations and obligations. An entirely

mixed with biased, over-aggressive, and sometimes hostile police conduct, it is not surprising that tensions between the police and the local community explode in black neighborhoods.³

unprejudiced officer, in expecting general deference, may be interpreted by a minority civilian as indicating the officer's own ethnic group's superordination. On the other hand, the minority citizen's refusal to express deference may be viewed by the officer as refusal to acknowledge normal social obligations of all citizens and the officer's symbolic status."); J. E. CURRY, ET AL., *RACE TENSIONS AND THE POLICE* 15 (1962) ("It is likely that [a police officer] has absorbed some of the prejudices and hatreds toward minority groups that are so tragically widespread in our society. It would be absurd to presume that the mere act of donning a uniform and badge would remove ideas, opinions and prejudices instilled in him from his childhood."); *Report of the Independent Commission on the Los Angeles Police Department* 69 (1991) [hereinafter Christopher Commission] (A Los Angeles Police Department "survey of 960 officers found approximately one-quarter (24.5%) of 650 officers responding agreed that 'racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.' (55.4% disagreed; 20.1% had no opinion.) More than one-quarter of the poll's respondents (27.6%) agreed that 'an officer's prejudice towards the suspect's race may lead to the use of excessive force.' (15% expressed no opinion; 57.3% disagreed.))."

3. See, e.g., The outrageous and illegal response of the Boston Police Department to the shooting of a white couple by an alleged black assailant shows what can happen when police officers are given the "green light" to ignore constitutional liberties in black neighborhoods. Jerry Thomas, *Mission Hill Wants Action Over Searches*, BOSTON GLOBE, Feb. 9, 1990, at 1 (police and city officials ignored complaints of residents that police were randomly detaining and searching black men); Bruce Mohl, *Speakers Support Bill to Create Stuart Probe*, BOSTON GLOBE, Feb. 9, 1990, at 13 (state legislator charged that "black people are treated differently by police than white people, [and] accused Boston police officers of being 'marauders' in the wake of Stuart murder"); Peter S. Canellos, *Youths Decry Search Tactics*, BOSTON GLOBE, Jan. 14, 1990, at 1 (describing how black youths were stopped, frisked, and stripped searched by the police where there was no apparent connection to the suspect sought in the Stuart shooting). See also Alex Kotlowitz, *Drug War's Emphasis On Law Enforcement Takes a Toll on Police*, WALL ST. J., January 11, 1991, at A1 (describing incident of black police officer's grabbing hot iron and touching it to the bare chest and stomach of a handcuffed prisoner who had uttered an indirect threat to the officer; this incident reaffirmed the conclusions of black leaders in Dayton that "[t]he police had been overstepping their bounds" in their investigations of narcotics activity in black neighborhoods).

Regrettably, it appears that hostility among significant numbers of police officers toward minority citizens is not an isolated phenomenon. The Christopher Commission recently documented the negative attitudes and tactics of many Los Angeles police officers. The Commission heard testimony from several commanding officers who stated that "too many LAPD patrol officers view the public with resentment and hostility. One recently promoted lieutenant, who is currently a watch commander, testified that LAPD training emphasizes 'command presence' that can lead to inappropriate confrontations on the street. He also testified that, in his view, too many LAPD officers fail to treat the public with the necessary courtesy and respect." Christopher Commission, *supra* note 2, at 99.

The Commission also noted that the former Deputy Chief of the LAPD, William Rathburn, who is now Chief of Police in Dallas, Texas, "testified that many techniques and procedures used by the LAPD tend to exacerbate, rather than calm, potentially volatile situations. Chief Rathburn specifically noted that the 'prone-out' position as used in minority neighborhoods generates substantial hostility against the LAPD in those communities. While acknowledging the need for officer safety, Chief Rathburn expressed the view that the prone-out tactic was used by many LAPD officers in an indiscriminate and offensive manner." *Id.*

On the other hand, blacks generally, and black men particularly, are sometimes hostile toward and distrustful of the police.⁴ The origins of this hostility was summed up by one commentator who noted: "Even black men who share no other problem with the black underclass share this one. The most successful, respectable black man can find himself in a one-sided confrontation with a cop who thinks his first name is 'Nigger' and his last name is 'Boy.'"⁵ In many parts of the country, black males have been treated with open disrespect and contempt by the police. Such pervasive abuse forced one Los Angeles religious leader to explain that "he wore his collar in his driver's license picture and when driving his car in order 'to avoid getting harassed'" by the police.⁶

Many may wonder what the above discussion has to do with the Fourth Amendment, which guarantees that *all* persons will not be subjected to unreasonable searches and seizures.⁷ This past term, the Court decided two

4. Hatred and distrust of the police among some blacks has been around for a long time and continues today. See generally, Granville J. Cross, *The Negro, Prejudice, And The Police*, 55 J. CRIM. L. & CRIMINOLOGY & POL. SCI. 405, 407 (1964); Task Force Report, *supra* note 2, at 146-47 (noting surveys that document a contrast in attitudes between blacks and whites toward police discourtesy and misconduct; adding, that "surveys may not accurately reflect full extent of minority group dissatisfaction with the police"); BAYLEY & MENDELSON, *supra* note 2, at 113 ("[T]he most important factor influencing people's views of the police is ethnicity. Negroes and Spanish-named persons share among themselves views of the police that are less favorable than those of the rest of the community and which are not materially affected by the success they achieve in life in terms of social and economic position."); GEOFFREY P. ALPERT & ROGER G. DUNHAM, *POLICING MULTI-ETHNIC NEIGHBORHOODS* 125 (1988) ("Even though there are important differences between blacks in the middle-class neighborhood and the poor blacks, overall they are much more negative and suspicious toward the police than the Cubans. Apparently, they do not view the police as their agents of social control, and perceive a disjuncture between the formal control system and their system of informal control. Rather, they tend to view the police as representatives of the majority class. This is an especially interesting finding in light of the numerous differences between the two black neighborhoods. In spite of their different views on specific issues, they share this general conflict orientation.").

The attitudes of blacks toward the police that the above studies document was recently captured by an aide to an elected black official in Los Angeles: "The black community is under siege from fall-out of racism, gangs, drugs, and violence. . . . I need a protector. But if I'm walking down the street and see some gangbangers on the one side and an LAPD car on the other, I'm not really sure which group I'm more afraid of. But actually, I feel more threatened by the police. The gangs see me as a tall, powerfully built foe. To the cops, I'm one more nigger." Marc Cooper, *Dum DA Dum-Dum: L.A. Beware: The Mother of All Police Departments Is Here to Serve and Protect*, VILLAGE VOICE, Apr. 16, 1991, at 26 [hereinafter *L.A. Beware*].

5. Don Wycliff, *Blacks and Blue Power*, N.Y. TIMES, Feb. 8, 1987, at 22.

6. Christopher Commission, *supra* note 2, at 75.

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

cases dealing with police-citizen encounters, *California v. Hodari D.*⁸ and *Florida v. Bostick*.⁹ At issue in both cases was whether an individual confronted by the police had been seized within the meaning of the Fourth Amendment. In each case, the United States Supreme Court found that no seizure had occurred.

Hodari involved a police chase and head-on confrontation of a person who ran at the sight of a police patrol car.¹⁰ The Court held that a police show of authority, directed at a particular individual, does not constitute a seizure within the meaning of the Fourth Amendment unless and until the individual yields or is physically restrained by the police presence. Writing for the majority, Justice Scalia explained that the Fourth Amendment did not apply in this setting because its text "does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure."¹¹ Trying to square its reasoning with history, the Court also found that a show of authority, by itself, did not constitute an "arrest" under the common law. An arrest requires application of physical force, or "where that is absent, *submission* to the assertion of authority."¹²

In order to obtain the result reached in *Hodari*, Justice Scalia added a significant new twist to the traditional test for determining whether a person has been seized. Prior to *Hodari*, a person was seized within the meaning of the Fourth Amendment "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."¹³ In *Hodari*, however, Justice Scalia explained that the traditional reasonable person standard stated only a partial declaration of what is required to trigger Fourth Amendment protection. The reasonable person test "states a *necessary*, but not a *sufficient* condition . . . for seizure effected through a

8. 111 S. Ct. 1547 (1991).

9. 111 S. Ct. 2382 (1991).

10. *Hodari* involved the following facts. While standing next to a car, several youths apparently saw an unmarked police patrol car approaching them. Inside the patrol car were Officers McColgin and Pertoso. Both officers wore jackets with "Police" written on front and back. When the youths, including Hodari, saw the vehicle, they took flight.

After the youths fled the scene, the police gave chase. Officer Pertoso left the police car and headed down the back of the street where several of the youth had run. Pertoso approached Hodari from behind. "Looking behind as he ran, [Hodari] did not turn and see Pertoso until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, Pertoso tackled Hodari, handcuffed him, and radioed for assistance. Hodari was found to be carrying \$130 in cash and a pager; and the rock he had discarded was found to be crack cocaine." *Hodari*, 111 S. Ct. at 1549.

11. *Id.* at 1550 (footnote omitted).

12. *Id.* at 1551.

13. *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988), (quoting *United States v. Mendenhall* 446 U.S. 544, 554 (1980) (plurality opinion)).

'show of authority.'¹⁴ In other words, even where the police convey the message that a person is not free to leave their presence, the Fourth Amendment is not implicated unless and until the person is physically restrained by or yields to the police.¹⁵

In *Florida v. Bostick*,¹⁶ the Court ruled that the Fourth Amendment did not automatically bar law enforcement officers from boarding a bus and randomly approaching passengers, asking to see their identification and tickets, and seeking permission to search their luggage for illegal drugs.¹⁷ As in *Hodari*, the *Bostick* Court also altered the traditional standards for determining whether the police conduct constituted a seizure.

The law had been that a person was seized if he reasonably believed that he was not "free to leave" the police encounter.¹⁸ In *Bostick*, however, the Court concluded that the fact that Bostick did not feel free to leave when agents approached him while he was lying on the backseat of the bus was not dispositive. Writing for a majority, Justice O'Connor explained that the "free to leave" standard makes sense "[w]hen police attempt to question a person who is walking down the street or through an airport lobby."¹⁹ But for someone in Bostick's position who is already seated on a bus and "has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter."²⁰

While Bostick may not have felt free to leave, that was not the fault of the officers. Rather, his predicament "was the natural result of his decision to take

14. *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991).

15. For good measure, Justice Scalia also concluded that public policy did not justify imposition of constitutional restraints in *Hodari* because "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply." *Hodari*, 111 S. Ct. at 1551.

16. 111 S. Ct. 2382 (1991).

17. While the actual facts remain in dispute, the Court decided *Bostick* under the following background: Two police officers with badges, police insignia on their jackets, and one holding a recognizable gun pouch, boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale, Florida. The officers, without any suspicion, approached Bostick, who was lying on the last seat in the bus. They asked for and received Bostick's ticket and identification.

After these were returned to him, the officers continued their confrontation and informed Bostick that they were narcotics officers and requested consent to search his luggage for illegal drugs. Although Bostick claimed that he was not informed of his right to refuse consent, and stated that he did not consent to any search, the officers claimed otherwise. A search of Bostick's luggage disclosed illegal narcotics. *Bostick*, 111 S. Ct. at 2385.

18. See *supra* note 13 and accompanying text.

19. *Florida v. Bostick*, 111 S. Ct. 2382, 2387 (1991).

20. *Id.*

the bus; it says nothing about whether or not the police conduct at issue was coercive."²¹ The correct test, according to the Court, for measuring Bostick's Fourth Amendment rights was whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."²² The fact that no reasonable person in Bostick's shoes would let the police search his luggage when that luggage contained illegal drugs is irrelevant. The so-called "reasonable person" the Court has in mind "presupposes an *innocent* person."²³

There is much that can be said about the Court's reasoning in *Hodari* and *Bostick*.²⁴ In this forum, however, I want to discuss an aspect of these cases that was not addressed by the majority of the Court, and only briefly mentioned by the dissenting Justices. That element is the question of race, and the role it plays in police encounters involving black men. The hobgoblin lurking in the shadows of both cases that the Court does not confront is the anger and mistrust that surrounds encounters between black men and police officers. Instead of acknowledging the reality that exists on the street, the Court hides behind a legal fiction. The Court constructs Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers. This notion is naive, it produces distorted Fourth Amendment rules and ignores the real world that police officers and black men live in.

Currently, the Court supposes that there is an *average, hypothetical, reasonable* person out there to serve as the model for deciding Fourth Amendment cases. For example, the Court has said that a reasonable person will not feel coerced when federal drug agents accost her in an airport and ask to see her identification and airline ticket.²⁵ The Court takes this position even

21. *Id.*

22. *Id.* at 2387.

23. *Id.* at 2388, citing *Florida v. Royer*, 460 U.S. 491, 519 n.4 (1983) (Blackmun, J., dissenting).

24. See Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment Seizures?*, 1991 U. ILL. L. REV. (forthcoming). [hereinafter LaFave, *Whence Fourth Amendment Seizures?*] (criticizing both *Hodari* and *Bostick*); Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. (forthcoming 1992) (same); Yale Kamisar, *Arrest, Search And Seizure: Florida v. Bostick, California v. Hodari D. and California v. Acevedo*, Prepared Remarks of Yale Kamisar at the U.S. Law Week's 13th Annual Constitutional Law Conference (Sept. 6, 1991) (on file with author) (same).

25. See *Florida v. Rodriguez*, 469 U.S. 1, 5 (1984) ("The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest."); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such

when the person approached has not been expressly informed of her right to decline to cooperate with agents' inquiries.²⁶ Similarly, no seizure occurs, according to the Court, when federal agents enter a factory to systematically question workers about their citizenship while other agents are positioned at the exits of the factory.²⁷

More recently, the Court has explained that a reasonable person who is being chased by a carload of police officers as he runs down the street is not necessarily seized by the police action.²⁸ In all of these cases, the Court reasoned that the challenged police confrontations do not trigger constitutional interests because the average, reasonable person will know of his or her right to leave or to ignore the police presence.

I have argued elsewhere that the Court's definition of seizure is wholly unrealistic.²⁹ The average, reasonable individual -- whether he or she be found on the street, in an airport lobby, inside a factory, or seated on a bus or train - will not feel free to walk away from a typical police confrontation. Common

questions."); *United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980) (plurality opinion) ("The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions.").

26. *Mendenhall*, 446 U.S. at 555 ("Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed.").

27. *INS v. Delgado*, 466 U.S. 210 (1984). In *Delgado*, the Court reasoned that a seizure occurs only when the circumstances become "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded." *Id.* at 216. The fact that the workers' freedom of movement may have been restricted during the factory raids did not bother the Court. Such a restriction was constitutionally irrelevant because "[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *Id.* at 218. Finally, positioning agents at the factory exits did not demonstrate an intent to prevent people from leaving because there was nothing in the record to show "that this is what the agents at the doors actually did." *Id.*

28. *Michigan v. Chesternut*, 486 U.S. 567 (1988). In *Chesternut*, a police car pursued Chesternut when police noticed that he ran after observing their car. After catching up with him, the police vehicle drove alongside Chesternut. Eventually, Chesternut pulled packets from his pocket, discarded them, and then stopped running. An officer arrested Chesternut after he examined the packets and found that they contained contraband.

A unanimous Court concluded that the police chase did not constitute a seizure because it "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [his] freedom of movement." *Id.* at 574-75. While conceding that the police presence could be "somewhat intimidating," it "was not 'so intimidating' that [Chesternut] could reasonably have believed that he was not free to disregard the police presence and go about his business." *Id.* at 575-76, quoting *INS v. Delgado*, 466 U.S. 210, 216 (1984).

29. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1297-1307 (1990) [hereinafter *Right of Locomotion*].

sense teaches that most of us do not have the chutzpuh or stupidity to tell a police officer to "get lost" after he has stopped us and asked for identification or questioned us about possible criminal conduct. Indeed, practically every constitutional scholar who has considered the issue has agreed that the average, reasonable person will not feel free to leave a law enforcement official who has approached and addressed questions to them.³⁰

But even if I am mistaken in saying that the current state of the law is out of touch with the perspective of the *average, hypothetical, reasonable* person that the Court has in mind when it formulates Fourth Amendment standards, I submit that the dynamics surrounding an encounter between a police officer and a black male are quite different from those that surround an encounter between an officer and the so-called average, reasonable person. My tentative proposal is that the Court should disregard the notion that there is an average, hypothetical, reasonable person out there by which to judge the constitutionality of police encounters. When assessing the coercive nature of an encounter, the Court should consider the race of the person confronted by the police, and how that person's race might have influenced his attitude toward the encounter.

In the space and time that remains I hope to do the following: First, I want to provide you with a few examples of police encounters involving black males. Second, I want to consider some of the objections to my thesis that the Court should consider race in deciding the constitutionality of a police confrontation. Finally, I would like to offer my views on why the Court should move in the direction I am proposing.

II. "BLACK AND BLUE ENCOUNTERS"³¹

There has been a lot of discussion about encounters between police officers

30. *Id.* at 1301 n.205 (citing references). Before *Hodari* and *Bostick* were decided, Professor LaFave, who, along with Justice Stewart, has been cited as being primarily responsible for the reasonable person standard adopted in *United States v. Mendenhall*, see Yale Kamisar, *Introduction: Trends and Developments with Respect to that Amendment Central to Enjoyment of Other Guarantees of the Bill of Rights*, 17 U. MICH. J.L. REF. 409, 410 (1984) (the analysis of *Mendenhall* "is essentially the approach suggested by [Professor] LaFave" in his treatise on the Fourth Amendment) (citing 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.2(g) at 53-55 (1978)), gave qualified support to the reasonable person standard. See 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 9.2 (h), at 411-18 (2d ed. 1987). Professor LaFave, however, has acknowledged a "temptation" to shift his position on the advisability of the reasonable person standard in light of the reasoning and results in *Hodari* and *Bostick*. See LaFave, *Whence Fourth Amendment Seizures?*, *supra* note 24.

31. See Don Wycliff, *Black and Blue Encounters* 7 CRIM. JUST. ETHICS 2 (Summer/Fall 1988) [hereinafter *Black and Blue Encounters*].

and black males.³² The following incidents are taken from the Massachusetts Attorney General's Report on the practices of the Boston Police Department.³³ Press reports and anecdotal discussions among black people³⁴ suggest that the incidents catalogued by the Attorney General's Report may be representative of a larger phenomenon.

1. In mid-February 1990, a black male taxicab driver was driving home in his own car when a police cruiser pulled him over and frisked him. When the taxicab driver asked why, he was arrested for disorderly conduct. The charge was eventually dismissed.³⁵

2. In January 1990, a black male high school student was stopped with his friends around 9:00 p.m. while walking home. Two detectives asked the boys their names and where they were going. When they did not respond, which was their right to do, the detectives searched the boys. One detective then told the youths not to say anything or he would arrest them for "mouthing off."³⁶

32. See generally Brent Staples, *Growing Up to Fear the Law*, N.Y. TIMES, Mar. 28, 1991 at A25; Don Terry, *Badge Tarnishes on Los Angeles Streets, Police Say*, N.Y. TIMES, Mar. 25, 1991, at A1; Daniel Golden, *A Failure to Communicate*, THE BOSTON GLOBE MAGAZINE 16, Feb. 17, 1991; L.A. *Beware*, supra note 4; Bill Girdner, *Charge of Racism by California Police is Latest in Long Line*, BOSTON GLOBE, Jan. 19, 1991; Sean Murphy, *5 File Lawsuit Challenging Boston Police on Search Policy*, BOSTON GLOBE, Nov. 22, 1989, § Metro/Regional at 17; *Toledo Is Sued Over Random Stopping of Blacks*, N.Y. TIMES, Aug. 14, 1988, § 1, at 31; Chris Woodyard, *Long Beach Task Force Told to Act Within Law*, L.A. TIMES, Oct. 1, 1987, § 9, at 1; Don Wycliff, *Blacks and Blue Power*, N.Y. TIMES, Feb. 2, 1987, § 4, at 22; Brent Staples, *Black Men And Public Space*, HARPER'S MAG., 19, 20 (Dec. 1986).

For a sample of some of the recent legal scholarship on this topic that has enlightened my understanding, see Sheri L. Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214 (1983); John Burkoff, *Non-Investigatory Police Encounters*, 13 HARV. C.R.-C.L. L. REV. 681 (1978); Robert L. Bogomolny, *Street Patrol: The Decision to Stop a Citizen*, 12 CRIM. L. BULL. 544 (1976); Dan Stormer & Paul Bernstein, *The Impact of Kolender v. Lawson on Law Enforcement and Minority Groups*, 12 HAST. CONST. L.Q. 105 (1984); Charles Ogletree, *Does Race Matter In Criminal Prosecutions?*, THE CHAMPION 7 (July, 1991). I have written about the subject in Tracey Maclin, *Seeing the Constitution from the Backseat of a Police Squad Car*, 70 B.U. L. REV. 543, 563-75 (1990) (reviewing H. RICHARD UVILLER, *TEMPERED ZEAL* (1988)) [hereinafter *Seeing the Constitution*].

The attention devoted to this matter by the United States Supreme Court has been disappointing. See *infra* notes 94-103 and accompanying text.

33. See Report Of The Attorney General's Civil Rights Division On Boston Police Department Practices (Dec. 18, 1990) [hereinafter *Attorney General's Report*]. It should be noted that the Boston Police Department issued their own report in response to the Attorney General's findings. See *The Boston Police Department's Response To The December 18, 1990 Civil Rights Division's Report* (Jan. 31, 1991).

34. See *supra* note 32.

35. *Attorney General's Report*, supra note 33, at 21.

36. *Id.* at 22.

3. A 20 year-old black man reported that in February 1990, two officers approached him while he was parked outside a local high school waiting to pick up a friend. The officers searched his car. When he asked a question he was told to "shut the fuck up."³⁷

4. Two black teenagers reported that they were stopped while walking in the Mission Hill area of Boston. An officer asked, "'What are you doing here?' to which [one youth] responded, 'We live around here.' When his companion then said, 'What's the problem? I don't have to take this shit,'" the officer grabbed the youth, threw him against a car and frisked him. After the search, the companion asked the officers for their badge numbers. One of the officers responded, "'You don't need no motherfucking badge numbers,' adding, 'I better not see you around anymore. If I do, I'll take you in.'"³⁸

5. A 30 year-old black man, in another case, was stopped while driving in Boston with a friend. An officer told him, "'Get out of the motherfucking jeep and don't let me have to tell you twice.' When the [man] said, 'Excuse me?', the officer reportedly responded, 'Oh, you're a fucking tough guy. Give me your registration.' The [man] was taken from the jeep, handcuffed, and placed in the [police] cruiser."³⁹

6. A 19 year-old black man was stopped and searched in January 1989, while walking home in Roxbury. "Officers asked him where he was going, and why he was out so late. They then searched his coat and pants pockets."⁴⁰ When the man asked why he was stopped, one officer responded, "'This is a drug restricted area; you shouldn't be out this late.' The other officer said, 'Why do you want to be a wise-ass? You want to be a wise-ass I can lock you up for being disorderly.' This officer then reportedly handcuffed the [man], punched him in the stomach and face, and put him in the [police] cruiser."⁴¹ This man was subsequently arrested for disorderly conduct.⁴²

These examples, which are only a few of the incidents catalogued in the Attorney General's report, show the huge gap that exists between the law as theory and the law that gets applied to black males on the street. The Supreme Court has said over and over that *all citizens* -- not just rich, white men from

37. *Id.* at 22. In another incident, this same complainant reported that he was stopped by the Boston Police in the Mission Hill neighborhood but not searched.

38. *Id.* at 23.

39. *Attorney General's Report, supra* note 33, at 23. The complainant in this incident was later arrested on a non-support warrant.

40. *Id.* at 31.

41. *Id.*

42. *Id.* at 31-32.

the suburbs -- are free to ignore a police officer who accosts them. In *Florida v. Royer*, Justice White explained that: "The person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds."⁴³

This is what the law is supposed to be; black men, however, know that a different "law" exists on the street. Black men know they are liable to be stopped at anytime, and that when they question the authority of the police, the response from the cops is often swift and violent.⁴⁴ This applies to black men of all economic strata, regardless of their level of education, and whatever their job status or place in the community.⁴⁵

43. *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion); see also *Brown v. Texas* 443 U.S. 47, 52 (1979) (Police may not detain individual, even for purposes of identification. "In the absence of any basis for suspecting [an individual] of misconduct, the balance between the public interest and [an individual's] right to personal security and privacy tilts in favor of freedom from police interference.") (emphasis added).

44. See, e.g., *L.A. Beware*, *supra* note 4 (quoting black man from Los Angeles: "The LAPD now exercises authority to stop any black person in this community and subject them to any threat with total impunity.").

45. See *Black and Blue Encounters*, *supra* note 31 (Arguing that "law-abiding" blacks go out of their way to behave in a manner so that they are not mistaken for criminals by the police. "Blacks . . . cannot assume when they call 911 that it will bring help. There is a good chance that it will bring humiliation, abuse, even death, from police who still seem to think that every black person -- and especially every black man -- is guilty of something until proven innocent."); Derrick Z. Jackson, *Bias Can Wear a Police Uniform*, BOSTON GLOBE, Dec. 21, 1990, at 37 (describing incident where Felix Yeboah, a black customer service representative, was physically threatened, detained and had his possessions searched when he questioned a federal police officer who had told Yoboah to leave the men's room in the John F. Kennedy Federal Building; "[t]hat federal police officer took one look at me and decided that I was black and stupid and no way could I work for the federal government, I cannot believe that if I was white and I had shown my IRS ID that they would have treated me the way they did.'").

A well-known example of a economically successful, well-educated, "law-abiding" black man who was repeatedly hassled, questioned, detained and arrested by the police is the case of Edward Lawson. See *Kolender v. Lawson*, 461 U.S. 352 (1983). At the time in question, Lawson was a thirty-six year-old San Francisco business consultant who wore his hair in dreadlocks. He was detained or arrested fifteen times by the police while walking late at night in white neighborhoods while on business trips in San Diego. See Dan Stormer & Paul Bernstein, *supra* note 32. Some of the reasons proffered by the police for stopping Lawson were ridiculous, and leave one to wonder whether the police would have stopped a similarly situated white person. See, e.g., *id.* at 105 n.4 (While lawfully hitchhiking in white neighborhood, the officer observed Lawson "dancing" along the street. The officer testified: "I thought if a pedestrian was to walk by, possibly by [Lawson's] actions or what I observed, that [he] could have assaulted a pedestrian. I thought, by the way [Lawson was] dancing around, that [he was] capable of moving onto the street in front of a car, injuring [himself] or causing somebody else to be injured.'" The officer admitted that Lawson was hitchhiking in a lawful manner, and that there was no law against "dancing."); *id.* at 106, n.5 (Another officer testified that he had been on the lookout for a tall, thin, black male burglary

If the stories of black men in Boston are not convincing, consider what happened to Don Jackson, a former police officer from southern California. Mr. Jackson was trying to document that the police in Long Beach, California were discriminating against and harassing minority citizens who lived and visited Long Beach. Jackson and a companion were stopped while driving along Martin Luther King, Jr. Boulevard. When he asked the officers why he was stopped, an officer pushed Mr. Jackson through a plate glass store window. Unknown to the officers, an NBC camera crew filmed the entire incident.⁴⁶

In a *New York Times* op-ed article entitled, *Police Embody Racism To My People*, Mr. Jackson wrote: "Operating free of constitutional limitations, the police have long been the greatest nemesis of blacks, irrespective of whether we are complying with the law or not. We have learned that there are cars we are not supposed to drive, streets we are not supposed to walk. We may still be stopped and asked 'Where are you going, boy?' Whether we're in a Mercedes or a Volkswagen."⁴⁷

Mr. Jackson's remarks demonstrate the illusory quality of the Court's view that police encounters are not deserving of Fourth Amendment scrutiny because citizens will feel free to leave and *know* of their right to ignore a police officer who has accosted them. The Court's approach, as it is applied in the case of black men, is flawed not because black males have not been informed, as a technical matter, of their legal rights. I have spoken with a number of black lawyers and law students who know their constitutional rights but never feel free to ignore the police. The Court's view is wrong because it is out of touch with the reality on the streets of America. Most black men simply do not trust police officers to respect their rights.⁴⁸

What is meant by the charge that black men do not trust the police to

suspect. When asked what actions of Lawson caused the officer to make the stop, the officer stated that Lawson "[b]asically [had] the look of someone who's caught with their hand in the cookie jar.' . . . When asked whether he stopped each suspect who met th[is] description, [the officer] responded that he did not."

Regrettably, there are many other cases of black men receiving similar treatment by law enforcement officers. See, e.g., Steve Fainaru, *Hall Gets Detained by Two DEA Agents*, BOSTON GLOBE, Sept. 21, 1991, at 35 (N.Y. Yankee baseball star detained at Logan Airport. According to a Drug Enforcement Administration spokesperson, Hall raised suspicions because "he was coming in from south Florida, was walking quickly, and didn't have any bags.").

46. See Girdner, *Charge of Racism by California Police is Latest in Long Line*, *supra* note 32.

47. Jackson, *supra* note 1.

48. A white colleague gave me his view of the matter: "When a cop comes up to me, I don't feel free to leave either, but the difference is that I don't feel as threatened if I stay with the cop. If I stay and don't give the cop any lip, things will be fine. Certainly I have no expectation of violence." In an encounter between a black and a police officer, according to this colleague, the "black person fears or doubts the encounter will end peaceably."

respect their rights? I have said in a different forum, "[r]ounding up and detaining black males is an old (unconstitutional) police habit."⁴⁹ And while this bad habit resurfaces from time-to-time in some places,⁵⁰ my concern here is of a different sort. What underlies my thesis is that police encounters involving black men contain a combination of fear, distrust, anger and coercion that make these encounters unique and always potentially explosive.

Why do black men fear the police? As one commentator noted, "[w]ith reason, African-Americans tend to grow up believing that the law is the enemy, because those who are sworn to uphold the law so often enforce it in a biased way."⁵¹ Black males learn at an early age that confrontations with the police should be avoided; black teenagers are advised never to challenge a police officer, even when the officer is wrong. Even if a police officer has arguable grounds for stopping a black male, such an encounter often engenders distinct feelings for the black man.⁵² Those feelings are fear of possible violence or humiliation.

49. *Seeing the Constitution*, *supra* note 32 at 573. Cf. Task Force Report, *supra* note 2, at 186 (noting that arresting persons for investigation "has been a common practice in a number of [police] departments").

The Court has had first-hand experience with this bad habit by the police. *see Davis v. Mississippi*, 394 U.S. 721 (1969) (Davis and twenty-four other black youths were seized and detained for interrogation and fingerprinting concerning rape of white woman); *See also Chambers v. Florida*, 309 U.S. 227 (1940).

50. *See, e.g., Kotlowitz, supra* note 3 (describing drug sweeps in black neighborhoods of Dayton, Ohio which caused black leaders to complain that innocent persons were arrested; Chief of Police "later acknowledged that the tactic was like 'fishing for a tuna with a net 40 miles long.'"); Nat Henoff, *Forgetting the Fourth Amendment In Philadelphia*, WASHINGTON POST, Apr. 16, 1988, at A25 (describing police tactics of stopping, frisking, interrogating, and arresting black men during police investigation of series of rapes).

For a particularly graphic example of this continued police habit in Los Angeles, *see L.A. Beware, supra* note 4. Responding to calls for a crackdown on gang violence:

the LAPD, led by its CRASH [Community Resources Against Street Hoodlums] division and under the banner of Operation Hammer, mounted full-scale retaliatory raids on the black community. In April 1988, a thousand extra cops were sent into South Central, and in a single night they rounded up 1453 black and Latino teenagers. Since then a state of siege has persisted in South Central, where each night -- and often during the day -- any teenager on the street is fair game for an LAPD roust, "jack-up," or bust. An astonishing total of more than 50,000 youths have been detained in Operation Hammer's ongoing maneuvers. And, . . . as much as 90% of the victims of Operation Hammer are released without charge - having been arrested in the first place as an act of sheer intimidation.

51. Staples, *supra* note 32.

52. *See Theodore Souris, Stop And Frisk Or Arrest And Search - The Use And Misuse Of Euphemisms*, 57 J. CRIM. L. CRIMINOLOGY & POL. SCI. 251, 252 (1966) (Describing incident where Detroit police officers stopped black youth they saw running: "He tried to look unemotional, but he was scared. Beads of perspiration started forming on his forehead and his hands shook.").

To be sure, when whites are stopped by the police, they too feel uneasy and often experience fear. Inherent in any police encounter, even for whites, is the fear that an officer will abuse his authority by being arrogant, or act in a manner that causes the individual to feel more nervous than necessary. Even during a routine traffic stop, everyone knows that an officer has the discretion and ability to make a motorist feel very uncomfortable. The power and authority of the officer are plainly evident -- the tone of voice, the hand on the gun, or the threat that a ticket will be issued for driving over the speed limit.

But I wonder whether the average white person worries that an otherwise routine police encounter may lead to a violent confrontation. When they are stopped by the police, do whites contemplate the possibility that they will be physically abused for questioning why an officer has stopped them?⁵³ White teenagers who walk the streets or hang-out in the local mall, do they worry about being strip-searched by the police?⁵⁴ Does the average white person ever see himself experiencing what Rodney King or Don Jackson went through during their encounters with the police?

Police officers have shown, in the past as well as today, that they will not hesitate to "teach a lesson" to any black male who, even in the slightest way challenges his authority.⁵⁵ For example, in Los Angeles, even before Rodney King was nearly beaten to death by the police, blacks knew not to argue with the police unless they wanted to risk death in a police choke-hold that seemed to be applied more frequently in the case of black males than other citizens.⁵⁶

In addition to fear, distrust is another component that swirls around encounters between black males and the police. Over the years, black males

53. See *supra* notes 35-42 and accompanying text.

54. Canellos, *supra* note 3, at 1 (describing incidents of black and Hispanic teenagers who were subjected to strip searches by Boston police).

55. Cf. *Task Force Report*, *supra* note 2, at 182 ("One study conducted in a large city revealed that when juveniles show disrespect to officers, many of the officers prefer to settle the challenge to their authority by physical means."); Kotlowitz, *supra* note 3 (officer describing how he "once whacked a fleeing suspect across the forehead with an aluminum flashlight. Another time he shoved a drug suspect against the van, shattering a window. 'If [a suspect] ran and got caught, he took an ass-whipping.'").

56. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 116 n.3 (1983) (Marshall, J., dissenting) ("[S]ince 1975 no less than sixteen persons have died following use of a chokehold by an LAPD police officer. Twelve have been Negro males. . . . Thus in a city where Negro males constitute nine per cent of the population, they have accounted for seventy-five per cent of the deaths resulting from the use of chokehold.").

One black community leader in Los Angeles noted: "'Our community does not believe the L.A.P.D. is here to protect and serve as it says on the side of their cars. They are here to prosecute and abuse. When people see them, they fear them. They do not welcome them.'" Terry, *supra* note 32, at A1; see also Staples, *supra* note 32.

have learned that police officers have little regard for their Fourth Amendment rights. Two years ago in Boston, for instance, a city learned what can happen when a police department is encouraged to ignore the constitutional rights of a targeted class of individuals -- black males. In the aftermath of a tragic shooting of a white couple and the declaration of a "war" against teenage gangs and their associates, black males were subjected to what one state judge called "martial law"⁵⁷ tactics by a police department that offered no apologies for its disregard of constitutional liberties.⁵⁸

When such an atmosphere exists, it is not surprising that black males have little reason to believe that police officers will respect their rights. It is also understandable that their distrust produces different responses from black males enmeshed in a police encounter. For some, the response may be flight.⁵⁹

57. *Commonwealth v. Phillips and Woody*, No. 080275-6, Memorandum and Order, at 3 (Suffolk Sup. Ct. Sept. 17, 1989) (Judge Cortland Mathers found that a police order that all known gang members and their associates would be searched on sight was "a proclamation of martial law in Roxbury for a narrow class of people, young blacks, suspected of membership in a gang or perceived by the police to be in the company of someone thought to be a member."). It appears that the "martial law" tactics of the Boston Police Department continue unabated. See Phillip Bennett, *Community Center Workers File Complaint Against Police*, BOSTON GLOBE, Nov. 8, 1991, at 25 (Counselors at a city-run community center accuse police officers of physical and verbal abuse "during an unprovoked confrontation while dozens of students looked on, some of them in tears." When asked what provoked the incident, one counselor said, "Racism. They [the officers] saw fifty black kids walking down the street together.'").

58. Boston Police Deputy Superintendent William Celester had been quoted as saying: "People are going to say we're violating their [gang members'] constitutional rights, but we're not too concerned about that. . . . If we have to violate their rights, if that's what it takes, then that's what we're going to do." Sean Murphy, *supra* note 32. Cf. Bruce Mohl, *supra* note 3 (The main representative of Boston police officers, Frank McGee, the attorney for the Boston Police Patrolmen's Association, saw nothing wrong with the aggressive police response to the Stuart shooting. "The police response was excellent. If anything, they should have been even more aggressive," McGee said.'").

After the search on sight policy was ruled unconstitutional by Judge Mather, *see supra* note 57, Deputy Superintendent Celester "called [Judge] Mather's ruling 'unfair,' 'unjustified' and 'out of line,' and said he would not order his officers to alter their methods for dealing with suspected gang members." Doris S. Wong, *Search-on-Sight Judge Illegal*, BOSTON GLOBE, Aug. 30, 1989, at 1. Celester, flanked by Boston Police Commissioner Francis Roache and other political leaders, vowed to continue a policy that had been declared unconstitutional by Judge Mathers. See Doris S. Wong & Peter S. Canellos, *Police Vow to Continue Searches*, BOSTON GLOBE, Aug. 31, 1989, at 31 ("This decision will not stop our aggressiveness one bit. . . . We're talking about known gang areas, areas with gang violence. Before I see my officers go into those areas, they will stop and frisk people suspected of gang activity.'").

When high-ranking police officials and political leaders publicly show such contempt for the law and the judicial process, why should the average black man think that the officer on the street will respect his Fourth Amendment rights when there are no reporters or television cameras available to record the action?

59. Kotlowitz, *supra* note 3 (noting that some black teenagers "were so scared of [a Dayton police drug] task force they ran even if they weren't selling drugs.'").

Others may simply remain silent and offer no resistance to police inquiries or requests. In a context where they have no faith that the police will respect their rights, either of these responses is reasonable.

This combination of fear and distrust produce in many blacks a hidden, but seething anger and contempt for the police. When black men are stopped by the police this anger may be present, regardless of the reasons for the stop.⁶⁰ Although police officers are able to perceive this anger, seldom will they undertake any effort to diffuse the tension, even in cases where an innocent person has been stopped or searched.⁶¹ The black male who is stopped is left with little choice but to remain calm and silent. Challenging the police or becoming belligerent is not an advisable course of conduct, although some individuals do choose this option.⁶² As the cases in the Massachusetts Attorney General's Report demonstrate, black males who do question the authority of the police are often subjected to violent and abusive police responses.

Thus, in the paradigm case of a black man stopped by the police in a white neighborhood,⁶³ such an encounter is fraught with coercion, wariness and anger. From the vantage point of the officer, a stop is necessary "because [the officer] feels the person does not belong there. This may be an unwholesome

60. See, e.g., JONATHAN RUBENSTEIN, CITY POLICE 350 (1973) ("The people who live in these [principally black] neighborhoods are frequently terrified to walk on the street for fear of being mugged, but they are also angered when a policeman, black or white, stops them and violates their autonomy and privacy by frisking them and asking them where they live and where they are going.").

61. See *id.* at 262-64:

[The officer] knows that they [persons stopped for investigation] are angry at him; he sees anger in their eyes. But he checks his temper, and when he is finished questioning them, he allows them to go without an apology. He feels they should thank him, although he knows this will never happen. He does not feel any guilt or sadness; he has done his job properly and correctly. . . . [The officer] knows that people do not like being stopped, and he limits, as much as possible, the amount of contact between himself and his suspect. Some people object to the surly manner of the policemen who stop them, their reluctance to explain the reasons for the stop, but the policeman knows that explanations frequently lead to arguments, complaints, or something worse. . . . Many [police]men protect themselves by becoming 'tough cops,' who limit their conversation to the formalities of the investigation and offer no hint of their reasons for making a stop.

62. Cf. Don Terry, *supra* note 32 ("A black sergeant [in Los Angeles], Dana Walker, twenty-eight, said: 'I've been on several calls when people have become belligerent. They say things like, 'Are you all going to beat me up like you did Rodney King?''"). More often than not, however, individuals stopped by the police do not offer resistance.

63. See generally Stormer & Bernstein, *supra* note 32, at 116; Kolender v. Lawson, 461 U.S. 352 (1983).

perception, but the policeman's experience tells him it is by and large valid.⁶⁴ The officer knows that he has unchecked discretion to make the stop.⁶⁵ An innocent person, the officer reasons, would not be bothered by the intrusion, and if the individual declines to cooperate or becomes belligerent, harsher methods are readily available.⁶⁶

More generally speaking, being black constitutes a "double-brand" in the mind of the police. Black men are associated with "crimes against the person, with bodily harm to police officers, and with a general lack of support for the police."⁶⁷ Also, because of their race, black males "are bound to appear discordant to policemen in most of the environment of a middle-class white society. For this reason, black males doubly draw the attention of police officers."⁶⁸ In essence, the police officer "identif[ies] the black man with

64. RUBENSTEIN, *supra* note 60, at 263; MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM*, 170 (1981) ("[T]he patrolman said he investigated the car in the first place because there were blacks in it, and with blacks 'there is always a greater chance of something wrong.'"); Stormer & Bernstein, *supra* note 32, at 144 ("Peer pressure and custom teach rookie officers that minorities are treated differently. This conditioning may account for studies showing that racial prejudice dramatically increases as a result of time spent on the police force. Numerous studies indicate that factors such as race, sex, age, general appearance, demeanor, and social class routinely influence an officer's decision to make a stop or an arrest. Of these characteristics, officers most often perceive race as the salient factor in establishing reasonable suspicion.") (footnotes omitted).

65. RUBENSTEIN, *supra* note 60, at 263 ("There are no formal restrictions on [the officer's] right to stop people. He has the authority and the power to stop anyone and to emasculate their objections with whatever force or argument he feels necessary.").

66. *Id.* at 263 ("If someone declines to answer any question put to him [by the officer], which is his right, the policeman may take him to the station house for investigation. He does not think that the questions he puts to people are the kind an honest person would hesitate to answer.").

For an example of what can happen to a black man in Los Angeles who offers the slightest complaint about police behavior during an investigatory stop, see *City of Los Angeles v. Lyons*, 461 U.S. 95, 114-15 (1983) (Marshall, J., dissenting):

Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a patdown search, Lyons dropped his hands, but was ordered to place them back above his head, and one of the officers grabbed Lyons' hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within 5 to 10 seconds, the officer began to choke Lyons applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.

67. BAYLEY & MENDELSON, *supra* note 2, at 107.

68. *Id.*

danger."⁶⁹

From the perspective of the black man, however, these police attitudes only reinforce the view that "[t]he police system is a dictatorship toward the black people."⁷⁰ When police accost and question black men, this tactic is viewed as a form of harassment.⁷¹ Black men are considered suspicious and targeted for questioning not because of any objective or empirical evidence that they are involved in criminality, but because of police bias and societal indifference to the plight of black males who are on the receiving-end of aggressive police tactics.⁷² In effect, black men are accorded "sub-citizen" status for Fourth

69. SKOLNICK, *supra* note 2, at 49.

70. BOB BLAUNER, *BLACK LIVES, WHITE LIVES* 110 (1989).

71. See Seth Gitell, *Black Harvard Students Protest Actions by Police*, BOSTON GLOBE, Mar. 23, 1989 (responding to the detention and search of two black male Harvard students by the police, a former black student leader said, "When I can't feel safe because I'm black, I feel that is racism."); BLAUNER, *supra*, note 70, at 119 ("It's more [police] harassment now than actual brutality. Picking you up on bum raps, stopping you for suspicion. Getting out of your car, hands in the air, and being patted down. Issuing you warning citations. The police have become a great deal more sophisticated in their oppression. They *provoke* a black man so they can use force. You witness a normal routine arrest procedure, how that's handled. I think the police [and the National Guard] are there to maintain you in your place, to dehumanize you in every sense of the word. That's their role."); *Task Force Report*, *supra* note 2, at 183-85.

72. Many whites recognize the silliness of the Supreme Court's conclusion that the average, reasonable person feels free to ignore a police officer who accosts and questions them. Whites also acknowledge the greater absurdity of applying and imposing this legal conclusion in the context of a police encounter involving a black male. Yet, despite these concessions, some whites resist embracing my proposal that we consider race in judging the constitutionality of police encounters, or abandon the Court's current Fourth Amendment rules.

A cynical response to this position might contend that societal acceptance of the Court's unrealistic standards is motivated by fears of what would happen to law enforcement if the Court were to abandon its present methods for deciding seizure questions under the Fourth Amendment. That is, the majority of society *want* the police to stop and question black men found in white neighborhoods. They *want* police officers to harass and search teenage gangs found loitering on the streets. These whites *want*, as one Long Beach, California officer put it, the police to stop and question "anyone you see who you wouldn't want your wife, mother or daughter coming in contact with." Woodyard, *supra* note 32.

Furthermore, some whites are prepared to accept the Court's Fourth Amendment rules because they anticipate that they are unlikely to be the targets of police suspicions, detentions and questions. And if, by some unforeseen chance, they become enmeshed in a police encounter, well, their attitude is that that's the price they and society must pay to enable the police to do their jobs. See also *L.A. Beware*, *supra* note 4 ("[T]he beating of Rodney King is seen by many in Los Angeles as acceptable 'collateral damage' in the LAPD's much-needed war against crime. . . . As far as the white liberals are concerned, police abuse has never been a sexy issue. [According to one key political organizer,] 'People [in the West side of Los Angeles, a white liberal area] are privileged and they are not touched by the LAPD. They talk a lot about Nicaragua, South Africa, and apartheid, but not racism here at home.' . . . 'Th[is] attitude tells you a lot about the essence of white Los Angeles,' says a black advisor to a local state senator. 'They like having a moderately liberal, relatively powerless black mayor who gives the city a face of dignity. But they also want a redneck, get-tough police chief who will kick butt. Not either/or, mind you. They want *both*!'"").

Amendment purposes; they cannot come and go as they please, free from arbitrary and oppressive police interference.

Black men are rightfully angry about this state of affairs. Like every other American, they are entitled to walk the streets free of arbitrary and oppressive police interference.⁷³ Why should the black man be forced to undergo a humiliating, frightening and coercive police encounter simply because a police officer feels that with blacks "there is always a greater chance of something wrong"⁷⁴ or because a black man seen in a white neighborhood is out of place? Who knows, maybe, the black man actually lives in the white neighborhood.⁷⁵ And even if he does not, he still has a right to be there despite the misplaced views of the police and community that want him stopped. It is not surprising, therefore, that black men experience distinct and complex emotions about police encounters.⁷⁶ An understandable and rational response to this state of affairs would be for black men to decline to cooperate and to

73. "In the absence of any basis for suspecting [a black man] of misconduct, the balance between the [police desire to question] and [a black man's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52 (1979).

74. *BROWN*, *supra* note 64, at 170.

75. *Cf. Souris*, *supra* note 52, at 252-53 ("Unfortunately, it is not at all true that only those engaged in criminal activity need worry about police harassment. . . . An eminent jurist, a Negro, was stopped by a police officer allegedly for having made a 'rolling stop' while driving home at night after visiting his fiancée in a fashionable residential neighborhood. The judge, at the police officer's request, handed over his driver's license and automobile registration and informed the officer that he had been visiting a friend in the neighborhood. However, he refused to identify his fiancée and was thereupon taken to police headquarters where he was immediately recognized by the lieutenant on duty and released with appropriate apologies. That judge's experience, except for the apology, is not unique even in my own city of Detroit.").

76. At least this was so twenty years ago. *See BAYLEY & MENDELSON*, *supra* note 2, at 128:

When unfair police treatment of minorities is being discussed, what seems to be troubling minority people most is not the outright use of an unwarranted amount of force. Rather, they are more concerned about harassment in the form of street interrogations and arrests on spurious grounds. . . . In short, minorities are sensitive about their position; they know they are peculiarly visible. Policemen reinforce this feeling when they appear to single minority people out for special attention. Even if policemen were, therefore, to abandon any form of physical coercion directed at minority people, wariness of the police would continue to remain strong among minorities as long as the police appeared to be looking upon them with chronic suspicion.

At this stage in my research I am not aware of any evidence that undermines Bayley and Mendelson's conclusion that blacks remain wary about police confrontations. In fact, there is good reason to believe that their conclusions remain accurate today. *See supra* note 32 (citing references in press reports); *Stormer & Bernstein*, *supra* note 32, at 117 ("[B]ased on their prejudices, police officers are more likely to stop minorities, and minorities are less likely to respond with deference because of their hostility toward police."). Indeed, in light of recent events like the police brutality exercised in the Rodney King case and the charges documented in the Massachusetts Attorney General's Report, *supra* text accompanying nn. 35-42, blacks probably worry about *both* police harassment and excessive force by the police.

question the officer's right to conduct the stop. The realities of the street, however, make challenging an officer's authority out of the question for a black man.⁷⁷

III. THE ROLE OF THE SUPREME COURT

While it is my position that encounters between the police and black males raise unique and troubling issues, there remains the question of what role, if any, the Supreme Court will or should play in addressing some of the concerns I have raised. Some may wonder whether the Court can play a constructive part in addressing the questions that I have raised.

It might be argued that the Court is not interested in a candid debate about the influence of race in our criminal justice system generally and its impact on police investigative practices specifically.⁷⁸ The history of racial discrimination in the administration of criminal justice in this country is well known.⁷⁹ From the colonial era⁸⁰ to the Court's current rulings on allegations of racial discrimination in the criminal justice system,⁸¹ equality before the law has always been an elusive concept for black citizens. Even today, "[r]acial disparity and racial prejudice continue to corrupt the criminal justice system, the

77. That the attitudes of the police make such challenges hopeless is revealed by the following incident:

While riding with the police, an observer told how two patrolmen responded rather aggressively to the driver of a vehicle stopped for drinking inside a moving vehicle. The occupants of the car were two upper-middle-class, presumably white individuals, one of whom identified himself to the patrolmen as a lawyer of one of Los Angeles' biggest law firms.

When the driver questioned the police, the "patrolmen reacted quickly and aggressively to this: the driver was given a field sobriety test; the passenger was pulled from the front seat and checked for wants and warrants. At one point, the driver stepped off the curb to close the door of his car, and his action was met with a loud 'get back over here.' To put it mildly, he was surprised."

The response of the police if the individuals "had not been middle-class was made in a rather revealing comment by one of the patrolmen as they left: 'If that had been a Mexican. . . , I would have choked him out.'" BROWN, *supra* note 64, at 197-98. What would the officer had done if the motorist had been black?

78. Professor Charles Ogletree has aptly noted that "[e]ven in situations where the United States Supreme Court has determined police practices toward racial minorities to be unconstitutional [citing *Papachristou v. City of Jacksonville*, 405 U.S. 56 (1972); *Koleder v. Lawson*, 461 U.S. 352 (1983)], little attention has been focused on the race of the suspect." Ogletree, *supra* note 32, at 10.

79. For a recent review, see *Developments In The Law, Race And The Criminal Process*, 101 HARV. L. REV. 1472 (1988).

80. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* (1978).

81. See Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, And The Supreme Court*, 101 HARV. L. REV. 1388 (1988).

level of despair there far outdistancing the level of hope."⁸²

82. Ogletree, *supra* note 32, at 7. See also Wycliff, *supra* note 31, at 84 (The distrust blacks harbor toward the criminal justice system "stems logically from the[ir] experience . . . in the United States in relation to the law. The law is always a two-edged sword, an instrument both of justice and of social control. For most of their history in this country, blacks have felt the edge that enforces social control.").

One of the more interesting examples of how race disparity corrupted the criminal justice system, but generated little direct interest from the Court concerned the discriminatory application of the death penalty in the case of rape. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court declared that capital punishment for rape violates the Eighth Amendment. The crux of *Coker's* reasoning that the death penalty for rape violates the Eighth Amendment's ban on cruel and unusual punishment turned on the fact that a rapist does not take the life of his victim. See 433 U.S. at 598 ("[I]n terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person.") (footnote omitted).

What is interesting about *Coker* is not the result reached by a majority of the Court, but what was *not* discussed by the Court. The Court was either unconcerned or "not impressed by the fact, that of 455 men executed [between 1930-1967] for rape, 405 (90%) were Negroes." JACK GREENBERG, *JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION* 424 (1977); see also *id.* at 432 (All persons "executed for rape from 1930-68 were in southern or border states or the District of Columbia. Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia executed only black defendants in this period, while all persons executed for this crime in Arkansas, Delaware, Florida, Kentucky and Missouri had, with a solitary exception in each state, been black." Cf. ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950* (1980); David Bruck, *Decisions of Death*, *THE NEW REPUBLIC*, at 18, Dec. 12, 1983.

If the unconstitutionality of capital punishment for rape turned on considerations of "history" and "objective evidence" of the acceptability of death as a penalty in particular cases, *Coker*, 433 U.S. at 593, as well as the Court's "own judgment" of the appropriateness of capital punishment under particular circumstances, *id.* at 597, the racial impact of capital punishment for rape ought to be relevant to the Court's constitutional analysis.

The historical roots of Georgia's death penalty law for rape grew from a system of race-conscious criminal justice. See *McCleskey v. Kemp*, 481 U.S. 279, 329-30 (1987) (Brennan, J., dissenting) (At the time of the Civil War, Georgia's penal code "established that the rape of a free white female by a black 'shall be' punishable by death. However, rape by anyone else of a free white female was punishable by a prison term not less than 2 nor more than 20 years. The rape of blacks was punishable 'by fine and imprisonment, at the discretion of the court.')" (citations omitted).

There was also plenty of "objective evidence" demonstrating the disparate impact of capital punishment for rape. In addition to the evidence noted above, the Court knew that "by 1977 Georgia had executed 62 men for rape since the Federal Government began compiling statistics in 1930. Of these men, 58 were black and 4 were white." *McCleskey*, 483 U.S. at 332 (Brennan, J., dissenting) (citing Brief of Petitioner at 56, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444) and M.E. Wolfgang & M. Riedel, *Rape, Race and the Death Penalty in Georgia*, 45 *AM. J. ORTHOPSYCHIATRY* 658 (1975)).

If all of this evidence was not sufficient to jog the Court's subjective sense of justice on the constitutional validity of the death penalty for rape, then, maybe, the cynics are correct in saying that the Court is uninterested in addressing the undeniable influence of race in America's criminal justice system.

For many blacks, police officers are the most visible and immediate representatives of the justice system. When police harass black men, the history of discrimination which many black teenagers learned about in school and heard from parents and friends, suddenly becomes very alive and current. The actions of police officers have no doubt contributed to the mistrust that many blacks feel toward law enforcement.⁸³ Although the Court's rhetoric has indicated its sensitivity to these concerns of mistrust, some of its rulings, particularly in the area of police investigative practices, have been inadequate to beat back the influence of race.

It is no accident, for example, that many of the confession cases decided before the landmark case of *Miranda v. Arizona*⁸⁴ involved black defendants who claimed that their confessions were the result of brutal and coercive police tactics.⁸⁵ As Professor Gerald Caplan has noted, the ruling in *Miranda*, at least partially, was an effort to address the problems of coercive police tactics used against black defendants.⁸⁶ Indeed, as Professor Yale Kamisar has observed, before *Miranda* the society turned a blind eye to the inquisitorial system that characterized police interrogation methods.⁸⁷

83. The brutality suffered by black men in the custody of law enforcement officers is legendary, see, e.g., RICHARD C. CORTNER, A "SCOTTBORO" CASE IN MISSISSIPPI (1986), and still continues in some places today, see Peter Applebome & Roberto Suro, *A Death in Texas, and a Town's Racial Current Continues to Flow Slowly*, *Death as a Ripple in Deep Racial Current - Race and Justice, A Killing in East Texas*, N.Y. TIMES, May 11, 1990, at A1 (describing the story of the death of Loyal Garner, Jr., a 34 year-old black truck-driver who was beaten to death after being stopped for drunk driving and taken to a local jail in a small Texas town).

The Court, too, is well aware of this history. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 284 (1936) (A sheriff deputy was put on the stand by the state in rebuttal, and admitted the whippings [of the three black defendants]. "It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; no as much as I would have done if it were left to me.'"); *Davis v. North Carolina*, 384 U.S. 737 (1966). In *Davis*, the defendant, a poor, black man of low intelligence was held incommunicado for sixteen days. Davis claimed that he was "beaten, threatened, and cursed by the police." *Id.* at 741. Davis said that he was repeatedly denied access to a lawyer. While the police denied these claims, the state did opine that "[s]urely, Davis was not such a sensitive person, after all his years in prison, that 'cussing' and being called 'Nigger' constituted any degree of fear or coercion." *Id.* at 741 n.2. See generally LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 277-82 (1966) [hereinafter MILLER].

84. 384 U.S. 436 (1966).

85. See MILLER, *supra* note 83, at 281 n.5 (citing cases).

86. Gerald Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1470 (1985) ("*Miranda* itself was decided not only in the shadow of the police practices exposed in *Brown v. Mississippi* and *Chambers v. Florida* [309 U.S. 227 (1940)] but also in the more recent past of the third degree applied particularly to southern blacks.") (footnotes omitted).

87. YALE KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *POLICE INTERROGATION AND CONFESSIONS* 27 (Yale Kamisar ed., 1980).

Similarly, the use of deadly force by the police has always generated tension between the police and minority citizens.⁸⁸ Before the Supreme Court pronounced Fourth Amendment restrictions on the use of deadly force in *Tennessee v. Garner*,⁸⁹ which involved a police shooting of a burglary suspect in Memphis, Tennessee, Professor James Fyfe found that black property crime suspects in Memphis were four times as likely to be wounded, and forty per cent more likely to be killed by the police than their white counterparts.⁹⁰ Interestingly, the *Garner* Court never mentioned that Garner was black.

Perhaps the Court believed that Garner's race was irrelevant to the question of whether the use of deadly force to apprehend a fleeing felon was unreasonable police behavior under the Fourth Amendment. Maybe the Court believed race-based police decisions on whether to use deadly force were no longer a problem. Whatever the motivation, ignoring the impact of race does a disservice to blacks and the country as a whole. The problem of race-based excessive force by the police will not go away simply because the Court sticks its collective head in the sand.

In many places, including some of the nation's largest cities, race appears to remain a salient factor in the use of excessive force by the police. For example, the Christopher Commission's investigation of the Los Angeles Police Department noted that nearly one-quarter of the police officers polled in a Police Department survey agreed that "racial bias on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community."⁹¹ This same survey showed that twenty-

88. See, e.g., Anna Quindlen, *Deadly Force*, N.Y. TIMES, Feb. 4, 1990, at E23 (People who live in minority neighborhoods "think white police officers are quick on the trigger in neighborhoods like theirs, where the people are all black or Hispanic.").

89. 471 U.S. 1, 11 (1985) (rejecting argument that deadly force may be used to apprehend a fleeing felony suspect who poses no apparent danger to officer or others. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

90. See Joint Appendix at 101, on microfilm U.S. Supreme Court Records & Briefs (Congressional Info. Serv.) *Tennessee v. Garner*, 471 U.S. 1 (1985) (Nos. 83-1035 & 83-1070). Professor Fyfe's analysis of police shootings in Memphis lead him to the following conclusions:

First, the "circumstances under which the Memphis Police shot and killed citizens during 1969 to 1976 varied dramatically with the race of the victims." Second, the "Memphis Police were far more likely to shoot and kill blacks in non-threatening circumstances than they were to shoot whites in non-threatening circumstances in this period." Third, the "great disproportion of black citizens shot and killed by Memphis Police between 1969 to 1976 is largely accounted for by the great number of black citizens shot in circumstances in which they presented little or no danger to police or other citizens." *Id.* at 104. See also James Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 718-20 (1982).

91. Christopher Commission, *supra* note 2, at 69.

seven per cent of the officers agreed "an officer's prejudice towards the suspect's race may lead to the use of excessive force."⁹² The Commission also found that "[w]ithin the minority communities of Los Angeles, there is a widely-held view that police misconduct is commonplace."⁹³ Neither the police nor the communities they serve are helped when the Court ignores evidence that race plays a part in police decisions.

The use of excessive force has not been the only police practice that has caused resentment among blacks. In 1968, when the Court was confronted with the question whether the police should be allowed to stop and frisk individuals on less than probable cause in *Terry v. Ohio*, the NAACP Legal Defense and Education Fund urged the Court to consider several studies documenting the hostility that many blacks harbored against the police.⁹⁴ The Legal Defense Fund's amicus brief noted that police field interrogation practices were a major cause of friction between the police and minority communities.⁹⁵ In fact, even before *Terry* was decided, a Presidential Commission had documented the

92. *Id.*

93. *Id.* at 70.

94. Brief for the N.A.A.C.P. Legal Defense And Education Fund, Inc. as *Amicus Curiae* 58-69, *Terry v. Ohio*, 392 U.S. 1 (1968).

95. It should be noted that the NAACP did not argue that the tensions caused in black communities by field interrogation practices were relevant to the Court's constitutional assessment of the validity of stop and frisk tactics. See NAACP Brief, *supra* note 94 at 68, *Terry* ("We do not suppose that such considerations as these can or should determine the Fourth Amendment question."). Instead, the studies were offered in anticipation that prosecutors "will make the familiar inflated claims for stop and frisk as tools of law and order." *Id.*

Whatever may have been the situation in the late 1960s when *Terry v. Ohio* was argued and decided, today, when the Court consistently relies upon the alleged benefit to effective law enforcement in assessing challenged police practices under the Fourth Amendment, I submit that considerations of the type raised by the NAACP brief *should* be part of the Court's Fourth Amendment analysis. Space and time limitations preclude elaboration on this position in this essay. I do believe, however, that the Fourth Amendment affords *substantive*, as well as procedural protections. See *Seeing the Constitution*, *supra* note 32, at 554 n.41. Considerations regarding race could and should be assessed when defining the substantive protection provided by the Fourth Amendment.

humiliation⁹⁶ and anger⁹⁷ felt by black males who were subjected to field interrogation and other "preventive" patrol tactics.

The *Terry* Court ruled that stop and frisk by the police did not violate the Fourth Amendment.⁹⁸ While the evidence of police abuse and harassment of minority citizens was acknowledged by the Court,⁹⁹ it was given subordinate status to the Court's main concern with police officer safety. This was unfortunate for two reasons. First, although officer safety is an obviously very important concern, there was reason to believe that frisking tactics were "generally used for much more than self-protection."¹⁰⁰ Second, by placing evidence of biased enforcement at a subordinate rank in its Fourth Amendment analysis, the *Terry* Court made it easier for more conservative Justices to be equally unconcerned with similar evidence when raised in later cases.

The ruling in *Terry* was a significant setback in the fight against

96. "The Commission has found that field interrogations, used sometimes in conjunction with aggressive, preventive patrol, are often conducted on a broad-scale basis by many police departments. . . . The effect on attitude which can result is revealed by the following comment of a lower income Negro: 'When they stop everybody, they say, well, they haven't seen you around, you know, they want to get to know your name, and all this. I can see them stopping you one time, but the same police stopping you every other day, and asking you the same old question.'" *Task Force Report, supra* note 2, at 184, (quoting 1 JOSEPH D. LOHMAN & GORDON E. MISNER, *THE POLICE AND THE COMMUNITY* 86 (Berkeley: University of California School of Criminology, 1986).

97. An observer for the Commission recorded the following incident:

The officers were flagged down by a white man and woman. "The man who flagged us down said a Negro was inside the (public transportation station) causing trouble. The woman said he had sworn at her as did the man. One said: 'What's a nigger doing here; he should be down on . . .'. The two white officers went in and grabbed him. They shoved him into a phone booth. Both officers beat him with fists and a flashlight and also hit him in the groin, then they dragged him out and kept him on his knees. He said he had just been released from a mental hospital that day. He begged them not to hit him again and let him go back to the hospital. One officer said: 'Don't you like us Nigger; we're here to help you! You're a crazy nigger.' They took him to the car and he kept begging them not to hurt him. Then they put him on the wrong bus - he wanted to go to the hospital and they sent him the wrong way. The last thing the Negro man said was: 'You police just like to shoot and beat people.' Officer No. 1 said: 'Get moving nigger or I'll shoot you.' The offender was crying and bleeding as he was put on the bus. Officer No. 2 said: 'He won't be back.'

Id. at 182.

98. *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (where a police officer has reasonable suspicion of criminal conduct and that the person he is confronting may be armed and dangerous, the officer is entitled to conduct a "carefully limited search of the outer clothing of [the] person[] in an attempt to discover weapons which might be used to assault [the officer].").

99. *Id.* at 12-15.

100. See Herman Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. & CRIMINOLOGY & POL. SCI. 433, 443-44 (1967) (police employ frisks to gather evidence, confiscate weapons, and to maintain image of authority on the streets).

discriminatory police tactics. Because evidence of police harassment of blacks was given little, if any weight, and because the Court failed to adhere to traditional Fourth Amendment standards, "twenty years after *Terry*, the day-to-day experience of residents of many urban centers shows that the power to stop and frisk is still applied discriminatorily against people of color."¹⁰¹ Because of the "loophole" created in *Terry* and a subsequent line of cases expanding the contours of the *Terry* exception, police officers are now free to accost, detain and search individuals on criteria that "have a chameleon-like way of adapting to any particular set of observations."¹⁰² While law enforcement officials deny it, in many places it appears that race still has much to do with who is chosen for investigatory detentions and searches.¹⁰³

IV. IS A RACE-NEUTRAL APPROACH PREFERABLE?

The above discussion suggests that the Court's race-neutral approach to assessing investigative practices has not been adequate to check race-based police conduct. As I stated earlier, my thesis is that the Court should, when assessing whether a police encounter constitutes a seizure under the Fourth Amendment, consider the race of the person confronted. Currently, the Court assesses the coercive nature of a police encounter by considering the *totality of the circumstances* surrounding the confrontation. All I want the Court to do is to consider the role race might play,¹⁰⁴ along with the other factors it

101. Ogletree, *supra* note 32, at 10.

102. *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989).

103. See generally Johnson, *supra* note 32, at 225-36; BROWN, *supra* note 64, at 166-79; see also *Right of Locomotion*, *supra* note 29, at 1325 n.322.

104. In *United States v. Mendenhall*, 446 U.S. 544 (1980), where the "reasonable person" standard was first announced, Justice Stewart's plurality opinion acknowledged that Mendenhall's race and gender could be considered in deciding whether or not she had *consented* to accompany two federal agents to a police office away from the location from where she had first been confronted by the agents. *Id.* at 558. See also *United States v. Lewis*, 921 F.2d 1294, 1301 (D.C. Cir. 1990) (when deciding consent questions, "analysis focuses on the particular individual rather than on a hypothetical reasonable person").

While conceding that race and gender were "not irrelevant," *Mendenhall*, 446 U.S. at 558, regarding the issue of consent, see *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27, 248-49 (1973) (voluntariness of consent is question of fact determined by totality of circumstances), the Court seemed unwilling to consider race in deciding whether a seizure has occurred. Since *Mendenhall* was decided, the Court has not once mentioned the race or ethnic background of individuals coming before it who argued that police encounters constituted seizures under the Fourth Amendment.

The apparent willingness of the Court to consider race relevant to the issue of consent, but irrelevant or unimportant on the issue of seizure is curious in light of the fact that both the consent and seizure standards purport to consider the "totality of the circumstances" in deciding the respective constitutional questions. See *Bustamonte*, 412 U.S. at 218; *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991), quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988). ("the crucial test is whether, taking into account all of the circumstances surrounding the encounter the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police

considers,¹⁰⁵ when judging the constitutionality of the encounter.¹⁰⁶

presence and go about his business.'").

Most likely because of the Supreme Court's position, the lower federal courts have been equally reticent about mentioning the race and ethnic background of individuals who argue that police encounters constitute seizures under the Fourth Amendment. *But cf. United States v. Alexander*, 755 F. Supp. 448 (D.D.C. 1991):

If I were authorized to do so, I would find . . . that a reasonable innocent person in defendant's circumstances [a 32 year old black male familiar with Washington, D.C. who had at least one violent altercation with the police] would have done what Alexander did: i.e. what the armed police who chased and confronted him asked him to do. . . . A reasonable person in defendant's circumstances . . . could reasonably fear that if he walked away from the officers confronting him or declined to permit a search of his underwear that he would be forcibly restrained, if not beaten, or as defendant testified, shot.

105. The *Mendenhall* plurality signaled that factors indicative of a seizure might include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

In *Florida v. Royer*, 460 U.S. 491 (1983), the Court made clear that asking and examining a person's airline ticket and personal identification would not constitute a seizure. However, when officers "identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to [a] police room [located away from a public concourse], while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment." *Id.* at 501.

In *Michigan v. Chesternut*, 486 U.S. 567 (1988), the Court rejected Chesternut's claim that any and all investigatory pursuits should be considered seizures. In fact, the Court expressly stated that it was prepared to accept police practices that were "somewhat intimidating" without imposing Fourth Amendment scrutiny. *Id.* at 575. The Court hinted, however, that certain forms of conduct like activating a siren or flasher, or commanding a person to halt, or displaying weapons, or operating a police vehicle in a manner to block or control a pedestrian's direction or speed of movement, might constitute a seizure under the Fourth Amendment. *Id.* at 575 (footnote omitted).

In light of the considerable authority the Court has given law enforcement officials to accost, stop and chase persons, it is not surprising that lower courts have given law enforcement officials wide scope in how they fashion police-citizen encounters without triggering Fourth Amendment scrutiny. See LaFave, *Whence Fourth Amendment Seizures?*, *supra* note 24.

106. For example, race might be an appropriate consideration if a black man contended that he did not feel free to leave a police encounter that took place on a deserted city street after his arrival from interstate bus or train trip. See *United States v. Alexander*, 755 F. Supp. 448, 451 (D.D.C. 1991) ("When asked why he didn't walk away, Alexander testified: 'I couldn't. I mean you don't walk away from a police officer . . . I didn't know I could just walk away. He didn't tell me I could walk away. . . . Plus, his buddy was right on my back, so I felt cornered. You don't leave no police officer in Washington and just walk away from him.'"). Race might be an appropriate consideration in this context because black men know that they have been targeted by the police for these sorts encounters, see notes 47-56 and accompanying text, and know that police officers do not take kindly to black men questioning their authority to make such stops.

Race might also be an appropriate consideration, for instance, if a black youth in Boston challenged the constitutionality of a police encounter. Such an individual might persuasively argue that the "martial law" tactics of the Boston Police Department, see *Commonwealth v. Phillips and Woody*, No. 080275-6, Memorandum and Order (Suffolk Sup. Ct., Sept. 17, 1989), left him feeling

Some will no doubt object to the explicit use of race in deciding constitutional questions. Understandably, some will ask: If we really wish to live in a future non-racial society, shouldn't we be moving away from procedures and decisions in which people are classified by their race?¹⁰⁷

I too would like to see a future in which decision-makers will not have to consider the race of individuals in deciding important legal and constitutional questions. But in *today's* world, where the anger and distrust between black males and the police is rising, not decreasing, we must recall Justice Blackmun's familiar stance in the affirmative action debate. "In order to get beyond racism, we must first take account of race. There is no other way."¹⁰⁸

that he was no in a position to walk away from a police encounter without risking a violent response from the police. Tracy Thompson, *Doubt About D.C. Police Results in More Mistrials; Some Jurors Suspect Lies, Phony Evidence*, WASH. POST, July 9, 1991, at A1, ("A recurring subtext among the jurors [who sat on drug cases] who declined to convict defendants was a belief that police routinely harass young black men. 'In this city and in other inner cities, the mere fact that you are black and male and your gives the police carte blanche to investigate [you] for any reason,' said W. Lloyd Reeves, a federal Communications Commission lawyer who was the jury foreman in a drug case that ended in mistrial. He said one reason he voted against conviction was his concern that police had no reason to stop the defendant's car — an argument not raised by the defendant.").

107. Of course, whenever government involves itself with racial classifications, the Fourteenth Amendment's guarantee of equal protection of the laws is implicated. When race is a consideration in government decision-making, the Court has favored strict scrutiny of the government action. In order to survive constitutional scrutiny, racial classifications must have a compelling government interest and be narrowly tailored to achieve those interests. See *Palmore v. Sidoti*, 466 U.S. 429 (1984).

While space and time limitations preclude full elaboration on this point in this forum, I submit that the consideration of race as one of several factors in deciding the issue of seizure under the Fourth Amendment satisfies constitutional concerns of equal protection.

First, the government generally, and certainly the judiciary specifically, has a compelling interest in protecting an individual's Fourth Amendment right to be free from unreasonable seizures. Second, the means I propose, considering race as one among several factors the Court considers, seem narrowly tailored to achieve this legitimate purpose. My thesis is not outcome determinative; race is just one factor that should be considered. Nor does my approach involve any harm for innocent third-parties. I do not see how my approach would cause any stigma for either black men or others. Cf. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., announcing opinion of the Court) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). The consideration of race in this context is not intended to reaffirm prejudiced and biased notions. Rather, it is designed to recognize that such prejudiced and biased notions do exist among some police officers, and that these notions have been employed to deprive black men of their Fourth Amendment rights.

108. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting). For a recent critique of the emerging "colorblind" approach of the current Court, see T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060, 1087 (1991) ("[R]ecognizing race validates the lives and experiences of those who have been burdened because of their race. White racism has made 'blackness' a relevant category in our society. Yet colorblindness seeks to deny the continued social significance of the category, to tell blacks that they are no different from whites, even though blacks as blacks are persistently made to feel that

A harmonious future will not be achieved by ignoring the realities of today. Many black males, especially black teenagers, still view police officers as oppressors and part of a system designed to keep them in their place. These negative attitudes even extend to minority officers. As one Boston area youth put it: "There are a few good cops, but they are exceptions. There are black cops out there slamming [heads], not just white cops. We see them as a gang themselves. They walk around acting tough and saying, 'Get off my block.' They need to stay in the law."¹⁰⁹

At the same time, some officers will openly express their bias and negative attitudes about blacks.¹¹⁰ In some places, it has been departmental policy -- occasionally acknowledged, but more often unannounced -- to subject black males to "aggressive patrol" practices, which is a euphemism for police harassment.

For example, in December 1986, Sheriff Harry Lee of Jefferson Parish, Louisiana, announced that his officers would routinely stop blacks seen in white neighborhoods.¹¹¹ Sheriff Lee said his officers would:

stop everybody that we think has no business in the neighborhood. It's obvious that two young blacks driving a rinky-dink car in a predominately white neighborhood -- I'm not talking about on the main thoroughfare, but if they're on one of the side streets and they're cruising around -- they'll be stopped.¹¹²

After his announcement generated sufficient controversy, Sheriff Lee apologized and withdrew the policy.

Similar charges of police harassment of black males have been recently raised in Boston and Cambridge, Massachusetts; Miami; Long Beach, California; Los Angeles; New York; Philadelphia; Teaneck, New Jersey; Toledo, Ohio; and Vineland, New Jersey. The Court, therefore, only promotes future instability and unrest by ignoring the mistrust and hostility that currently exists between black males and the police. While it might be comforting to

difference.").

109. Golden, *supra* note 32, at 43.

110. See Christopher Commission, *supra* note 2, at 71-78.

111. See J. Michael Kennedy, *Sheriff Rescinds Order To Stop Blacks in White Areas*, L.A. TIMES, Dec. 4, 1986, § 1, at 18; Frances F. Marcus, *An Order on Halting Blacks is Rescinded in Louisiana*, N.Y. TIMES, Dec. 4, 1986, at A32. A similar policy of stopping blacks in white neighborhoods was pursued (and then withdrawn) in Jackson, Mississippi. See Brown, *supra* note 64, at 350 n.25, citing John Williams, *Darks Tells Police to Halt Questioning Policy Based on Race*, JACKSON CLARION LEDGER, March 11, 1987.

112. Kennedy, *supra* note 111.

pretend that black males react to police encounters in the same way that other people do, the reality on the streets teaches us that this is not the case.

A second objection I have heard against my thesis is that my solution is a form of "affirmative action" for black males. This criticism apparently stems from the notion that black men are somehow receiving a special advantage or benefit under a theory that considers their race in assessing the coerciveness of a police encounter. Some see my proposal as creating a separate Fourth Amendment standard for black men. Nothing could be further from the truth.

Under my approach, black males would only receive what the Fourth Amendment already guarantees them. That is, their constitutional right not to be stopped and detained by police officers who lack objective reasons for the seizure.¹¹³ The Court currently measures that right by assessing the coercive character of the police confrontation.

My position simply recognizes that, for most black men, the typical police confrontation is not a consensual encounter.¹¹⁴ Black men simply do not trust police officers to respect their rights. Although many black men *know* of their right to walk away from a police encounter, I submit that most do not trust the police to respect their decision to do so. I only propose that the Court consider race when assessing the coercive nature of a police confrontation. Indeed, why would the Court *want* to ignore this reality? If the Court were to acknowledge and take account of the coercive dynamics that surround police confrontations involving black males, it would only be enforcing what the Constitution already establishes. Black men would get no special treatment under this approach, they would only receive what the Fourth Amendment guarantees them.

This leads to a third objection to my thesis. This objection claims that if the Court were to acknowledge the role race plays in police confrontations with black males, it might be forced to do the same in the case of Hispanics, Asian-Americans, women, and other ethnic and social groups who have had run-ins with the police.

You will pardon me if I label this objection a "fear of too much

113. See *Brown v. Texas*, 443 U.S. 47 (1979).

114. My position is not intended to undercut or compromise the Fourth Amendment protections of individuals who are not black males. Indeed, as already noted, see *Right of Locomotion*, *supra* note 29, I have argued that the average, reasonable person (whoever that is) does not feel free to leave a typical police encounter. My point here is to highlight the inadequacy of the Court's Fourth Amendment analysis in the context of police-citizen encounters involving black males. There is nothing in my thesis that jeopardizes the claims presented by white men or any other ethnic or gender group that police encounters involving their members are similarly coercive.

justice."¹¹⁵ At bottom, this rejection does not refute my main point -- which is that police confrontations involving black males ordinarily are coercive -- but instead, seeks to dismiss it by arguing that recognition of this reality may cause the Court to address the claims of other groups.

If my thesis compels the Court at some future date to face the fact that, for example, Mexican-Americans, Native Americans, or some other ethnic group experience tensions with the law enforcement officials, then so much the better.¹¹⁶ In the meantime, it strikes me as curious why society and the Court would want to deny the fact that one group, black males, currently experiences real tensions between themselves and the police. Just because similar claims may be presented by other groups today or at some future date is no reason not to consider the case of black males who have sufficient cause for complaint now.

A more substantive objection to my thesis is that it relies too heavily on the *subjective perceptions* of black males. Professor Wayne LaFave, the nation's foremost search and seizure scholar, has eschewed a Fourth Amendment standard that measures the seizure question by the subjective perceptions of the person confronted. In his view, "any test intended to determine what street encounters are not seizures must be expressed in terms that can be understood and applied by the officer."¹¹⁷ Asking a police officer to decide or guess whether a person feels free to leave would require predictive skills that neither the police nor anyone else possesses.¹¹⁸

I must admit that this objection does cause me trouble. It troubles me not because it casts doubt on my original premise that police confrontations are inherently coercive. It is troubling because of the deep roots in our justice system that require lawyers to address legal questions in the framework of the average, hypothetical, reasonable person. But the Court claims to be committed to considering the *totality of the circumstances* in deciding whether a police confrontation constitutes a seizure. If this is true, the Court should include the consideration of race in order to gain a full view of the circumstances and

115. Kennedy, *supra* note 81, at 1414.

116. See, e.g., Clifford Krauss, *Latin Immigrants in Capital Find Unrest a Sad Tie to Past*, N.Y. TIMES, May 8, 1991, at A1 (describing complaints of police brutality and discrimination of Washington, D.C. police against Central American immigrants). Cf. *The F.B.I. Is Calling*, N.Y. TIMES, Jan 29, 1991, at A20 (describing FBI program of "interviewing" Arab-Americans for information about potential domestic violence).

117. 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT* § 9.2(h) at 407 (2d ed. 1987).

118. *Id.* at 407-08.

dynamics surrounding the encounter.¹¹⁹

Moreover, just as logic suggests that in evaluating the severity and pervasiveness of a sexual harassment complaint a "reasonable woman" standard makes more sense than a "reasonable person" standard,¹²⁰ so too in assessing the coerciveness surrounding a police encounter, the Court should focus on the perspective of the person who is on the other side of the police confrontation. Continued use of a reasonable person test runs the risk that majoritarian values and perceptions of police practices will go unchallenged. Scholars of police-community relations tell us that perceptions of the police vary among different economic and ethnic communities.¹²¹ Thus, it makes no sense to devise Fourth Amendment rules as if we lived in a nation where there are no differences among us.

Furthermore, guidance and understanding may be promoted, and not undermined, if police officers are provided information regarding how their investigative tactics are perceived by different segments of the community. Under my model, police officers will not be asked to "guess" whether a particular person feels free to leave depending on his or her skin color. Rather, under my proposal, police departments would be encouraged to keep abreast of minority groups' perceptions of police behavior and investigative tactics, and to make sure that the officers on-the-beat are kept updated about these perceptions.¹²²

119. As the Court has said in a Fifth Amendment context, "[c]oercion is determined from the perspective of the suspect." *Illinois v. Perkins*, 110 S. Ct. 2394, 2397 (1990) (citations omitted).

120. See *Ellison v. Brady*, 924 F.2d. 872 (9th Cir. 1991); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202-15 (1989).

121. See generally SKOLNICK, *supra* note 2; BROWN, *supra* note 64; RUBENSTEIN, *supra* note 60; ALPERT & DUNHAM, *supra* note 4.

122. Ignorance or indifference regarding the impact numerous police investigative practices had on minority individuals no doubt contributed to the urban unrest and riots that occurred in the late 1960s. In light of the police abuse and violence that occurred, greater sensitivity and consideration of the concerns and perceptions of minority persons might have prevented some of the tragic events of the 1960s, and thus, does not strike me as a radical or unrealistic proposal. Cf. *Task Force Report*, *supra* note 2, at 178 ("Although many allegations of police misconduct or discriminatory treatment are unwarranted, Commission surveys reveal that police practices exist which cannot be justified. For example, the Commission found that abusive treatment of minority groups and the poor continues to occur. Many established police policies -- such as the use of arrests for investigative purposes -- alienate the community and have no legal basis. Departments now utilize procedures, such as the use of dogs to control crowds, without balancing the potential harm to police-community relations. And some valuable law enforcement techniques, like field interrogations, are frequently abused to the detriment of community relations. Too few departments give necessary guidance to assist their personnel in resolving potentially explosive social and criminal problems.").

For instance, an officer should know (indeed, many probably already do know) that black males are likely to be offended and angered if asked to produce identification or provide an accounting for their presence in a particular locale. When police stop a black man (or anyone else) based upon legitimate, objective criteria and it turns out that the person is innocent, then officers should be encouraged to provide an explanation and answer the person's inquiries, if he has any, rather than act as if the person got what he deserved because he had the wrong skin color and was found in the wrong place.¹²³

Finally, even if it were to cause some initial hesitancy and confusion among police officers, I would still favor taking account of the subjective perceptions of black males in assessing police confrontations. The Fourth Amendment, after all, guarantees the rights of persons, not the police. While it is important for the Court to provide guidance to the officer on the beat, it is equally, if not more important, to consider the perspective of the individual who is the subject of a police intrusion. Recently, however, it seems the Rehnquist Court is more concerned about the needs and interests of police officers, than the rights of individuals. This is regrettable. As Professor Yale Kamisar asked me once, "Whose Amendment Is It, Anyway?"¹²⁴

This leads to my final explanation why the Court should move in the direction that I am proposing. In his acclaimed book, *Justice Without Trial*, Jerome Skolnick observed that those who write about criminal procedural rules too often "fail to give sufficient consideration to the simple notion that legal practices must have a differential impact in a stratified and racially constructed society."¹²⁵ Skolnick's observation is particularly germane to the Court's definition of seizure. In our racially diverse society, rules that allow police officers to decide for themselves who to stop and question will likely have a disparate impact on blacks. This is not surprising; indeed, it is a predictable result when "community-based standards" guide law enforcement policies.¹²⁶ But it should also come as no surprise when those on the receiving end of these "community-based standards" balk at the application of these standards. It is evident, however, from the reasoning in *Hodari* and *Bostick* that a majority of

123. This does not seem like an unreasonable rule. Indeed, during an era not so long ago when the federal government seemed to care about the civil liberties of its citizens, a Presidential Commission recommended a similar policy. See *Task Force Report*, *supra* note 2, at 185 (recommending, *inter alia*, that during a stop, "[t]he citizen should be addressed politely and should receive a suitable explanation of the reason for the stop.").

124. See Tracey Maclin, *Constructing Fourth Amendment Principles From the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669 (1988).

125. SKOLNICK, *supra* note 2, at 217.

126. BROWN, *supra* note 64, at 350 ("It is apparent that the degree of racial separation in American society means that community-based standards for order and law enforcement will inevitably be, to some degree, standards based upon race and enforcing racist distinctions.").

the Supreme Court has neither paid sufficient attention to Skolnick's caution, nor come to grips with the perspective of black males who are targeted by the police.

Consider, for example, Justice Scalia's gratuitous suggestion in *Hodari* that the prosecution was mistaken in conceding that there was no reasonable suspicion to seize Hodari, who ran when he saw a patrol car.¹²⁷ Justice Scalia intimated that it is reasonable to detain young men who "scatter in panic upon the mere sighting of the police."¹²⁸ For Scalia, the prosecution's concession contradicted proverbial common sense, whereupon he noted that "The wicked flee when no man pursueth."¹²⁹

From a police perspective, Justice Scalia's remarks may make sense. "Flight from an approaching patrol car implies guilt; an innocent person, patrolmen reason, would have nothing to fear from the police and would not [run] away"¹³⁰ as did Hodari. Of course, this viewpoint, never considers that Hodari, a black youth, may have had alternative reasons for wanting to avoid the cops. Many persons who have never committed a crime have ambivalent or negative attitudes about the police. Perhaps, a youth like Hodari flees at the sight of police because he does not wish to drop his pants, as many black youths in Boston have been forced to do, just because the cops suspect he belongs to a gang or is selling drugs.¹³¹

Or maybe Hodari has had an older sibling or friend roughed up by the police, and does not wish to undergo a similar experience with the approaching officers. Perhaps Hodari has seen the video-tape of the Los Angeles police beating and kicking Rodney King, or he has seen the NBC video of Don Jackson, a former police officer himself, being pushed through a store window by Long Beach, California police officers for no reason. Maybe Hodari believed that the officer who wants to ask him "What's going on here?" may engage in similar brutality in his case. As California Assemblyman Curtis Tucker was quoted as saying: "When black people in Los Angeles see a police car approaching, 'They don't know whether justice will be meted out or whether judge, jury and executioner is pulling up behind them.'"¹³²

127. *California v. Hodari D.*, 111 S. Ct. 1547, 1549 n.1 (1991) ("That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense.").

128. *Id.*

129. *Id.* (quoting *Proverbs* 28:1).

130. BROWN, *supra* note 64, at 175; see also RUBENSTEIN, *supra* note 60, at 236.

131. See *Attorney General's Report*, *supra* note 33, at 36-46.

132. Richard W. Stevenson, *Los Angeles Chief Taunted at Hearing*, N.Y. TIMES, Mar. 14, 1991, at A16.

Similarly, the fact that a challenged encounter is the product of an apparently "neutral" police procedure should not immunize the procedure from race-based scrutiny where evidence suggests that the police procedure has a disproportionate impact on the *attitudes* and *subjective expectations* of black citizens. A few examples might help make my point.

In April 1990, Justice Carol Berkman of the State Supreme Court in New York found that the Port Authority drug interdiction program, which involved observing and questioning bus travelers who engaged in "unusual conduct," led to an unconstitutional seizure of a black woman.¹³³ Justice Berkman, who was responsible for presiding over the arraignment of one-third of the felony cases in Manhattan, could not recall any defendant in a Port Authority drug interdiction case who was not either black or Hispanic. Indeed, Port Authority data showed that all but two of the 210 persons arrested in its 1989 drug interdiction program were black or Hispanic.¹³⁴

In December 1998, the Public Defender's Office in Middlesex County, New Jersey, conducted a study of the arrests of motorists for drug trafficking by the New Jersey State Police. While the study showed that black motorists driving out-of-state cars represented only 4.7 percent of the total vehicles traveling on a particular portion of the New Jersey Turnpike, they constituted 80 percent of the cases in which drug arrests were made.¹³⁵

Finally, in *Bostick* the Court's attention was directed to the fact that in the reported cases involving bus raids, *all* the defendants appear to be black or Hispanic.¹³⁶ In one case, an officer admitted that one factor motivating his decision to approach the defendants was the fact that they were "young and

133. *People v. Evans*, 556 N.Y.S.2d 794 (N.Y. Sup. Ct. 1990).

134. See Ronald Sullivan, *Police Say Drug-Program Profiles Are Not Biased*, N.Y. TIMES, Apr. 26, 1990, at B3.

135. Joseph F. Sullivan, *New Jersey Police Are Accused of Minority Arrest Campaigns*, N.Y. TIMES, Feb. 19, 1990, at B3.

136. Brief for *Amicus Curiae* of the American Civil Liberties Union, et. al., at 18 n.19, *Florida v. Bostick*, 111 S. Ct. 2382 (1991). Even the *Amicus* Brief of the Americans for Effective Law Enforcement -- a law enforcement organization that has filed eighty-five previous briefs in the Court supporting the legal position of police and prosecutors -- alluded to the possibility of discriminatory law enforcement in bus raids:

The rationale of [the Court's prior] cases has not been extended to citizens at large merely because they are travelers, without any relationship to safety on board a common carrier; moreover, any such extension would be constitutionally invalid. Setting aside *equal protection issues*, it is difficult to imagine a scenario of police activities, as in [*Bostick*], upon a planeload of business class air passengers arriving at a busy air terminal after an interstate flight.

Motion to File Brief and Brief for *Amicus Curiae* of Americans for Effective Law Enforcement, Inc., at 8, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (emphasis added).

black."¹³⁷ While the Court never acknowledges the fact, reality forces the rest of us to concede that many black men like Bostick are unlikely to challenge or resist the requests of armed drug agents who appear, unannounced, inside a bus aisle seeking permission to search for illegal drugs.

These confrontations are not casual encounters. The attitude of officers is not normally friendly. Officers are given a mission, and they do not tolerate interference with their tasks. People who challenge an officer's authority or respond in a manner deemed out-of-line from a police perspective are more "likely to be treated in a hostile, authoritarian or belittling manner by the police than citizens who behave with civility or who extend deference."¹³⁸

Thus, it comes as no surprise that some black men go out of their way to be calm and extremely congenial when approached by a police officer. A black man's silence in the face of police demands should not be interpreted as cooperation, however. His silent exterior masks a complex reaction of fear, anger and distrust that must be kept under wraps in order to avoid a more intense and violent confrontation than history has too often shown places the black man in an overmatched and vulnerable position. When faced with this reality, the *Bostick* Court's confidence in the ability of bus passengers like Bostick to "just say no" to armed drug agents seems a bit strained.

It is my view that the perspective of the decisionmaker often plays a central role in the formulation of Fourth Amendment principles. From a police perspective, it may make sense to focus investigative energy on black males,¹³⁹ but "concentrating on the activities of a particular subgroup may lead to biased estimates of the propensity of that group to commit crimes."¹⁴⁰ Black men, of course, have their own perspective on police encounters. When black men know that they are the *real targets* of an allegedly neutral official policy designed to detect drug couriers or other perpetrators of crime, it is not too surprising if their view of the coercive nature and morality of that practice differs from someone who is not similarly targeted.

137. *Florida v. Bostick*, 111 S. Ct. at 2390 n.1 (Marshall, J., dissenting) quoting *United States v. Williams*, No. 1:89CR0135 (N.D. Ohio, June 13, 1989), at p.3 ("Detective Zaller testified that the factors initiating the focus upon the three young blacks males in this case included: (1) that they were young and black. . . ."), *aff'd*, No. 89-4083 (6th Cir. Oct. 19, 1990), at p.7 (the officers "knew that the couriers, more often than not, were young black males"), *vacated and remanded*, 111 S. Ct. 1572 (1991).

138. ALBERT J. REISS, *THE POLICE AND THE PUBLIC* 53 (1971).

139. See BROWN, *supra* note 64, at 170 and 177.

140. *Id.* at 177. Professor Sheri Johnson has made a similar point: Drug "[a]gents who look for Hispanic drug couriers find them, and agents who lie in wait for black females do not arrest white males." Johnson, *supra* note 32, at 240.

CONCLUSION

I think it accurate, but sad, to say that many black persons were not surprised when they saw or read about the police brutality suffered by Rodney King at the hands of twenty-one police officers earlier this year.¹⁴¹ For many blacks, it is a joke to speak about Fourth Amendment protection, and more accurate to describe their status in relation to the police as "sub-citizens." That such a state of affairs exists during the time when we celebrate the bicentennial of the Bill of Rights is particularly unfortunate, but not surprising.

Justice Thurgood Marshall recently reminded us that society still has a long journey to travel in order to achieve the ideals and principles enshrined in our Constitution.¹⁴² In the context of its Fourth Amendment jurisprudence, the Court can take a step in the direction Justice Marshall had in mind by discarding the notion that there is an average, reasonable person out there by which to judge the constitutionality of police encounters.

When assessing a challenged police confrontation, the Court should consider the race of the citizen and how the citizen's race might have influenced his attitude toward the encounter. If the Court is sincerely interested in analyzing the dynamics of police-citizen encounters, it should abandon a naive theory of the Fourth Amendment, and consider the real world that exists on the street.

141. Seth Mydana, *Tape of Beating by Police Revives Charges of Racism*, N.Y. TIMES, Mar. 7, 1991, at A18. Cf. Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L.J. 431, 461 ("[B]lack folks know that no racial incident is 'isolated' in America. That is what makes the incidents so horrible, so scary. . . . [Racial] incidents are manifestations of an ubiquitous and deeply ingrained cultural belief system, an American way of life.") (footnote omitted).

142. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

