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RESPECT AND THE FOURTH AMENDMENT

ANDREW E. TASLITZ*

I. INTRODUCTION: THE FOURTH AMENDMENT AS A MERE TECHNICALITY

One question prompted this article: "Why do many minority communities experience rage at certain police search and seizure practices involving their communities' members?"¹ My apparently obvious answer: because the police act in ways that make minority communities feel disrespected. In reaching that answer, I came to recognize, however, that members of the majority also often bear the brunt of disrespectful search and seizure practices.² Minorities and the majority may differ in when they believe that "respect" has been shown.³ History, philosophy, and social science converge in establishing that "respect" should nevertheless be at the center of all Fourth Amendment reasoning.⁴ What "respect" is, how it is conceived of by minority versus majority communities, and what

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¹ See, e.g., Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Privacy, Technology, and Human Emotion*, 65 LAW & CONTEMP. PROBS. 125, 134-45 (2002) [hereinafter Taslitz, *Twenty-First Century*] (examining minority reactions to police invasions of privacy); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257 (2002) [hereinafter Taslitz, *Stories of Fourth Amendment Disrespect*] (discussing minority perceptions of, and reactions to, racial profiling).

² See *infra* text accompanying notes 95-141, 170 (illustrating potential impact on whites).

³ See Taslitz, *Twenty-First Century*, *supra* note 1, at 158-69; Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2257-80.

⁴ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2257-91.

psychological and social processes lead to its loss are, however, not so obvious. Nor has it yet become clear to the United States Supreme Court what role respect-based concerns should play in Fourth Amendment analysis.⁵ Those concerns have significant implications for every current search and seizure doctrine. Understanding the Court's current approach and its failures, and defending a respect-enhancing alternative, first requires an analysis of the dominant "mere technicality" vision of the Fourth Amendment.⁶ That vision seems at odds with the Amendment's sweeping language:

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.⁷

The right was of central importance to our Nation's Founders.⁸ It was included in the Bill of Rights that the people demanded be added to the 1789 Constitution as the price for its ratification.⁹ Images of King George's troops violating "a man's castle" in search of contraband come readily to mind.¹⁰ The brave colonists' resistance to monarchy seems embodied in this Amendment's lofty words.¹¹

Whatever noble ideals the Amendment's ringing language might seemingly inspire, however, the amendment is in practice modernly seen by many as a pointless annoyance.¹² Consider this scenario:

⁵ See *infra* text accompanying notes 95-105 (summarizing the high Court majority's views).

⁶ See *infra* text accompanying notes 7-41 (defining the "mere technicality" vision).

⁷ U.S. CONST. amend. IV.

⁸ See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 150-79 (1999); LEONARD W. LEVY, *SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY* 147-75 (1995); Telford Taylor, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 38 (1969); THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 151-83 (Eugene W. Hickok, Jr. ed., 1991); see generally NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

⁹ See sources cited *supra* note 8.

¹⁰ See William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 378-391 nn.38, 84 & 91 (1980).

¹¹ See sources cited *supra* note 8; Cuddihy & Hardy, *supra* note 10, at 378-91 nn.38, 84 & 91.

¹² See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) ("One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all.").

Two police officers, Cagney and Lacey, pay off a local stool pigeon for information about a planned cocaine sale. The stoolie's information is vague, and he refuses to reveal his sources. Nevertheless, based on this tip, Cagney and Lacey guess that a cocaine sale will happen that night at a Water Street warehouse and set up a stakeout. Unable to see much, they choose to break in. Inside, they find not only a massive quantity of cocaine but a large shipment of illegal firearms ready to hit the street. Their elation at a job well done is quickly ended when a judge suppresses the evidence. Because the search was done without a warrant or probable cause, the trial judge barred the jury from hearing or seeing anything about the drugs and weapons confiscated by the detectives. Lacking evidence, the prosecution was forced to withdraw the case, and another dangerous criminal walked free.

This image of left-wing judges allowing criminals to exploit the Fourth Amendment and other legal technicalities has long been standard fare in movies, television shows, and newspaper stories.¹³ The media feeds the impression of a massive, increasingly violent crime problem.¹⁴ That problem is portrayed as exacerbated by the helpless system's flooding of the streets with guilty men freed by wily lawyers.¹⁵ Recent reports of a declining crime problem have begun to combat the media-driven crime hysteria. That decline is portrayed by the media, however, as caused by new tough-on-crime measures to keep criminals behind bars, combined with the appointment of stricter judges.¹⁶ Political campaigns embrace assaults on any judges who insist on enforcing a generous constitutional vision.¹⁷

¹³ See, e.g., Greg Wilson, *Convicted Killer May Walk Free, Technicality is Key*, N.Y. DAILY NEWS, Feb. 18, 2001, at A1; see also NEW JACK CITY (Warner Bros. 1991); *The Sopranos: Funhouse* (HBO Cable Television 1999).

¹⁴ See generally JOEL BEST, *RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS* 28-47 (1999) (discussing how the news media brings new crime problems to the public's attention); Sarah Escholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL'Y 37 (1997); Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601 (1992).

¹⁵ See sources cited *supra* note 14; RAY SURETTE, *MEDIA, CRIME AND CRIMINAL JUSTICE: IMAGES AND REALITIES* 45 (2d ed. 1998) ("In shows focused on law enforcement, the courts are often alluded to as soft-on-crime, easy-on-criminals, due process-laden institutions that release the obviously guilty and dangerous.").

¹⁶ On the reasons offered by the media for the declining crime rate, see Vincent F. Sacco, *Media Constructions of Crime*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 141 (1995); see also Jeffrey Toobin, *Women in Black*, THE NEW YORKER, Oct. 30, 2000, at 48 (discussing tough-on-crime Texas judges joining the bench during the tenure of then-Governor George W. Bush); James Traub, *Giuliani's New York*, N.Y. TIMES, Feb. 2001, (Magazine), at 62 (describing the crime-reducing stop-and-frisk tactics of the NYPD).

¹⁷ For an example of a political assault on a judge for enforcing constitutional due process, see Clarence Page, *Ashcroft in Peril . . . or Due for a Grilling*, WASH. TIMES, Jan. 12, 2001, at A15.

Amazingly, despite the media onslaught, a large majority of the public, according to at least one study, opposes the admission of illegally obtained evidence.¹⁸ Yet many members of the public are swayed by the reduction of a core constitutional right—namely, freedom from unreasonable searches and seizures—to a mere annoyance obstructing justice.¹⁹ Perhaps more importantly, the decision makers and policy advisors who decide when and how searches and seizures shall be done reduce the Fourth Amendment to a mere technicality.²⁰ “The criminal is to go free because the constable has blundered” is the rallying cry.²¹ Academics insist that finding the truth is what trials are all about, and the Fourth Amendment must not undermine that goal.²² Of course, some of these pundits pay tribute to the value of the Amendment, objecting only to the remedy of suppression.²³ They propose alternative remedies, however, that have either proven fruitless in the past or that are obviously politically dead-on-arrival.²⁴ Furthermore, they pay tribute fleetingly, in small amounts, their tone emphasizing the social

¹⁸ On the public's surprising support for the “suppression remedy,” which excludes from the jury's hearing testimony about evidence illegally seized, see SHMUEL LOCK, *CRIME, PUBLIC OPINION, AND CIVIL LIBERTIES: THE TOLERANT PUBLIC* 45-47 (1999).

¹⁹ See generally Arthur G. LeFrancis, *On Exorcising the Exclusionary Demons: An Essay on Rhetoric, Principle, and the Exclusionary Rule*, 53 U. CIN. L. REV. 49 (1984) (discussing the ways in which academics, prosecutors, the public, and policemen are hostile to the exclusionary rule).

²⁰ See, e.g., Bill Renkin, *Abuse Evidence Reinstated: Justices Back Cops' Search in Terrell Case*, THE ATLANTA JOURNAL-CONSTITUTION, Mar. 3, 2001, at A:1.

²¹ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926); see also *United States v. Leon*, 468 U.S. 897, 907 (1984) (suggesting that the exclusion of probative evidence may result in some guilty defendants going free or receiving reduced sentences). Current arguments against the suppression remedy and striking the “constable has blundered” theme are summarized in H. RICHARD UVILLER, *VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA* 63-67 (1996).

²² The leading academic stressing the primacy of truth-finding under the Fourth Amendment is Akhil Reed Amar. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 20, 28 (1997) [hereinafter AMAR, *FIRST PRINCIPLES*] (“The Court has . . . concocted the awkward and embarrassing remedy of excluding reliable evidence of criminal guilt Under the exclusionary rule, the more guilty you are, the more you benefit.”).

²³ See, e.g., HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF THE CRIMINAL JUSTICE SYSTEM* 32, 64 (1996) (stating that “truth must be a primary goal of criminal procedure and [w]henver [the exclusionary rule] is applied, a criminal goes free”); Michael J. Daponte, Comment, *Discretion and the Fourth Amendment Exclusionary Rule: A New Suppression Doctrine Based on Judicial Integrity*, 30 MCGEORGE L. REV. 1293, 1297 (1999) (stating that the current exclusionary remedy undervalues truth); Sharon L. Davies, *The Penalty of Exclusion: A Price or a Sanction?*, 73 S. CAL. L. REV. 1275, 1276 n.6 (2000) (summarizing concisely the leading literature in the debate over the exclusionary rule).

²⁴ See Daponte, *supra* note 23, at 1313.

calamity caused by the Amendment more than the social benefits it might bring.²⁵

The police embrace this same sort of skepticism about the Amendment's value. Police often perjure themselves at hearings to suppress evidence, a phenomenon so widespread that it has its own name: "testilying."²⁶ They lie when they know that they have violated the Amendment because they do not want to see the illegally obtained evidence suppressed. Nor do they want to see the Department or themselves named in a lawsuit or to be demoted because of a pattern of Fourth Amendment suppression.²⁷

And the officers know that judges usually feel the same way.²⁸ Judges routinely deny suppression motions when they know that the police are lying.²⁹ For example, the Fourth Amendment does not protect a defendant who has abandoned his property. Therefore, officers repeatedly testify that defendants suddenly and intentionally "drop" drugs while fleeing from the police, in the suspects' purported hope that they cannot thus be linked to the drugs.³⁰ One judge explained: "[W]hen one stands back from the particular case and looks at a series of cases . . . [it] becomes apparent that policemen are committing perjury in at least some . . . [of these cases], and perhaps in nearly all of them."³¹ This judge admits that he nevertheless routinely accepts an officer's dropsy testimony as truthful in a particular case. Judges do so, he explains, because at some level they share the officers' attitude:

Policemen see themselves as fighting a two-front war—against criminals in the street and against "liberal" rules of law in court. All's fair in this war, including the use of

²⁵ See Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638 (1982) (discussing how the excessive economic cost that society pays for the suppression of evidence outweighs the social benefits of the rule).

²⁶ On "testilying" and judicial complicity in this phenomenon, see ALAN M. DERSHOWITZ, *REASONABLE DOUBTS: THE O. J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM* 49-68 (1996) [hereinafter DERSHOWITZ, O.J.]; Christopher Slobogin, *Reform: The Police: Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996). [hereinafter Slobogin, *Testilying*].

²⁷ See sources cited *supra* note 26.

²⁸ See Alan M. Dershowitz, *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17.

²⁹ See *id.*

³⁰ See Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 249 (1998) (discussing commonplace occurrence of dropsy testimony). For general background on the concept of abandonment, see ANDREW E. TASLITZ & MARGARET L. PARIS, *CONSTITUTIONAL CRIMINAL PROCEDURE* 136, 307 (2d ed., 2003).

³¹ DERSHOWITZ, O.J., *supra* note 26, at 50 (quoting former New York City criminal court judge Irving Younger).

perjury to subvert "liberal" rules of law that might free those who "ought" to be jailed . . . It is a peculiarity of our legal system that the police have unique opportunities (and unique temptations) to give false testimony. When the Supreme Court lays down a rule to govern the conduct of the police, the rule does not enforce itself.³²

While police "testilying" may help to subvert Supreme Court rulings, the Court too has generally accepted the view of the Fourth Amendment as a mere technicality: "[a]fter all it is the defendant, not the constable, who stands trial."³³ Most major decisions over the last three decades increasingly stress the importance of the truth-finding function at trial.³⁴ The Court subjects individual citizens' Fourth Amendment interests to a "balancing" test in which the needs of law enforcement get ever-heavier weight.³⁵ Though there are important exceptions, and though the Court occasionally praises the Amendment's value, the general trend is to narrow the scope of Fourth Amendment rights and, even when such rights are recognized, to narrow still further when the exclusionary remedy will be available to enforce the Amendment.³⁶

³² *People v. McMurty*, 314 N.Y.S.2d 196 (N.Y. Crim. Ct. 1970) (quoting Irving Younger, *The Perjury Routine*, THE NATION, May 1967, at 546); see also DERSHOWITZ, O.J., *supra* note 26, at 51 (interpreting then-Judge Younger as effectively admitting that he accepted officers' dropsy testimony in many individual cases despite his awareness of the perjury problem). Though Judge Younger's candid remarks were made three decades ago, the problem of testilying persists. See generally *id.* at 49-68; Slobogin, *Testilying*, *supra* note 26; MOLLEN COMM'N, THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PRACTICES OF THE POLICE DEPARTMENT 36 (July 7, 1994) (coining the term "testilying"):

Officers also commit falsification to serve what they perceive to be 'legitimate' law enforcement ends—and for ends that many honest and corrupt officers alike stubbornly defend as correct. In their view, regardless of the legality of the arrest, the defendant is in fact guilty and ought to be arrested.

Id.

³³ *United States v. Payner*, 447 U.S. 727, 734 (1980).

³⁴ See *id.* at 734-37; see also *Pa. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 364 (1998); *Smith v. Maryland*, 442 U.S. 735 (1979); *Rakas v. Illinois*, 439 U.S. 128, 137-38 (1978); *Stone v. Powell*, 428 U.S. 465, 490 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

³⁵ See TASLITZ & PARIS, *supra* note 30, at 169-77 (discussing the balancing test); David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 367 (2001) ("[T]he new conservative majority[']s . . . direction . . . [is] unquestionably away from the protection of criminal defendants' rights and toward a more expansive view of police . . . power.").

³⁶ See generally *United States v. Leon*, 468 U.S. 897 (1984) (holding that officer's reasonable good faith reliance on a search warrant later deemed invalid meant that the illegally obtained evidence would not be suppressed); *Ohio v. Robinette*, 519 U.S. 33 (1996) (holding that suspect need not be warned that his traffic stop is over and that he is free to leave for his subsequent consent to search his trunk to be valid); *Florida v. Bostick*, 501 U.S. 429 (1991) (holding that police may board bus and randomly request consent to search

The burden of this narrowing vision of Fourth Amendment rights has often fallen hardest on racial and ethnic minorities.³⁷ The Court purports to endorse a colorblind search and seizure jurisprudence.³⁸ Ignoring race, however, is often precisely what promotes racial disparities.³⁹

To use the most obvious example, an officer who stops a car going one mile over the speed limit has probable cause to believe that the law has been violated. If the officer only stops those speeders who are African American, or Hispanic American, or Asian American, that seems wrong. It unsettles American notions of equal treatment.⁴⁰ Yet if, as the Court suggests, we cannot consider the officer's racial attitudes and assumptions, or perhaps not even whether his conduct has a disparate racial impact, this "racial profiling" is tolerated by the state.⁴¹ The Court's position on profiling and the role of race in search and seizure decisions is a bit more

luggage without prior reasonable suspicion); *Illinois v. Krull*, 480 U.S. 340 (1987) (approving no suppression given officer's reasonable good faith reliance on a statute later deemed unconstitutional).

³⁷ See generally DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 16-62 (1999).

³⁸ See *Whren v. United States*, 517 U.S. 806 (1996) (holding that police officer racial animus is relevant only under the Fourteenth, *not* the Fourth, Amendment); *United States v. Armstrong*, 517 U.S. 456 (1996) (setting high burden for even obtaining discovery to prove racial animus under the Fourteenth Amendment); see also David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk"*, 50 OKLA. L. REV. 451 (1997); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271.

³⁹ On the Court's colorblind jurisprudence and its harm to minorities, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991); Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979 (1993); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994); see generally COLE, *supra* note 37 (putting forth extended defense of the argument that the Court's colorblind criminal procedure jurisprudence in a wide-range of areas, including the Fourth Amendment, harms minority, especially African American, interests while protecting white interests); ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992) (tracing evolution of the colorblind ideal in constitutional law); TASLITZ & PARIS, *supra* note 30, at 396-418 (examining colorblind ideal in Fourth Amendment jurisprudence). See also sources cited *supra* note 30 and *infra* note 40 (examining how Fourth Amendment colorblind ideal promotes racial disparities).

⁴⁰ See Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) [hereinafter Maclin, *Fourth Amendment*]; David A. Harris, *Factors For Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994).

⁴¹ See Davis, *supra* note 40, at 427; Harris, *supra* note 40, at 675; Maclin, *Fourth Amendment*, *supra* note 40, at 337 n.22.

complex and subtle than my claim here that they entirely ignore race.⁴² But the bottom line point would be unchanged by exploring those complexities: a colorblind search and seizure jurisprudence often results in racial injustice.⁴³

Racial minorities indeed have less trust in the police than do whites.⁴⁴ The level of trust is lowest among young African American males.⁴⁵ Even minority group members who may trust their local police are probably more troubled by invasive police conduct than are many whites.⁴⁶ Many minority group members are attentive to, and especially worried by, police violence, the stopping of young black males with little justification, or searches of homes without warrants.⁴⁷ Correspondingly, they worry that police offer minorities inadequate and unequal protection *from crime*.⁴⁸ Minority communities yearn for a police force that promotes community safety while valuing community rights. They agitate for a police force free from conduct that insults and denigrates minority communities.⁴⁹

⁴² See TASLITZ & PARIS, *supra* note 30, at 421-25, 441-42, 443-45 (summarizing case law).

⁴³ See *id.* at 427-51 (explaining these subtleties).

⁴⁴ See sources cited *supra* notes 38-39.

⁴⁵ See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221, 250 n.235 (2003) [hereinafter Taslitz, *Racial Auditors*] (African Americans and Latinos generally); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND THE COURTS 146-47 (2002) (discussing how African Americans, especially if young, are more dissatisfied with, and more unwilling to accept, police officer decisions than are whites). Some of the raw data might be interpreted to show little significant difference in racial attitudes toward the police. See, e.g., David P. Leonard, *Different Worlds, Different Realities*, 34 LOY. L.A. L. REV. 863, 870 (2001) ("Attitudes toward the police might also be a measure of our different realities. . . . Several findings show little difference between African Americans and whites."). There is, however, much contrary data and interesting results when the intersection of race and other variables is examined. See Taslitz, *Racial Auditors*, *supra*, at 250 n.235. Furthermore, minorities may sometimes be pleased with their local police yet have less trust than whites in the police in general. See *id.*

⁴⁶ See *infra* note 62; see generally JOHN L. BURRIS & CATHERINE WHITNEY, BLUE VS. BLACK: LET'S END THE CONFLICT BETWEEN COPS AND MINORITIES (1999).

⁴⁷ See generally BURRIS, *supra* note 46; Taslitz, *Racial Auditors*, *supra* note 45, at 239-58; TASLITZ & PARIS, *supra* note 30, at 438-39.

⁴⁸ See, e.g., RANDALL KENNEDY, RACE, CRIME AND THE LAW 29-75 (1998); Taslitz, *Racial Auditors*, *supra* note 45, at 239-48.

⁴⁹ See generally Taslitz, *Racial Auditors*, *supra* note 45, at 239-48 (offering examples of such agitation); Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong: The Paradox of Unwanted Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 3-30 (1999) [hereinafter URGENT TIMES] (critiquing "Rights, 1960s Style" as ignoring the modern need to protect inner city communities of color from violent crime).

What is lost in the mere technicality vision of the Fourth Amendment, therefore, is an appreciation for the ways that it affects the fate of communities of identity.⁵⁰ The Fourth Amendment protects core interests essential to human flourishing, interests in privacy, property, and freedom of movement.⁵¹ Media images, police talk, and jurisprudence that address primarily the costs of the amendment and only secondarily its benefits—and that too narrowly define those benefits—miss the central point.⁵² The image of the drug hustler manipulating the justice system to his own advantage both misleads the public (drawing attention from *police* wrongdoing) and ignores the many benefits that the Amendment bestows upon the innocent.⁵³ Innocent people are stopped on the street every day, while rushing to work, walking to church, or heading for day care.⁵⁴ Property is seized—from cars, to cash, to homes—from the innocent.⁵⁵ Homes are invaded with little cause and perhaps no apology when no evidence of wrongdoing is found.⁵⁶ These invasions are psychologically

⁵⁰ See generally Taslitz, *Racial Auditors*, *supra* note 45; Taslitz, *Twenty-First Century*, *supra* note 1; Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1.

⁵¹ See TASLITZ & PARIS, *supra* note 30, at 94-102; Taslitz, *Racial Auditors*, *supra* note 45; Taslitz, *Twenty-First Century*, *supra* note 1 (reviewing scholarly literature on the privacy interests protected by the Fourth Amendment); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990) [hereinafter Maclin, *Right to Locomotion*] (similar concerning freedom of movement); Daniel B. Yeager, *Search, Seizure, and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249 (1993) (similar concerning property).

⁵² See sources cited *supra* notes 15-40 (on media images and police talk); *infra* text accompanying notes 211-47 (on narrow conceptions of costs and benefits).

⁵³ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2293-94 (discussing the public uproar over initial trial court suppression of evidence in a drug case).

⁵⁴ See, e.g., KENNETH MEEKS, *DRIVING WHILE BLACK: WHAT TO DO IF YOU ARE A VICTIM OF RACIAL PROFILING* 11-15 (2000) (telling the tale of an innocent man on his way home from work detained by the police for apparently no reason); Jennifer R. Wyann, *Can Zero Tolerance Last?*, in *ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY* 107, 114 (Andrea McArdle & Tanya Erzen eds., 2001) (noting that of the 45,000 stops reported by the N.Y.P.D. Street Crimes Unit in 1997 and 1998, only 9500 resulted in arrests).

⁵⁵ See, e.g., RICHARD LAWRENCE MILLER, *DRUG WARRIORS AND THEIR PREY: FROM POLICE POWER TO POLICE STATE* 55, 93, 96-97, 100, 106, 108-12, 117-19, 132-34, 138-39 (1996) (recounting numerous instances of, and data concerning, state seizure of property of the innocent).

⁵⁶ See *id.* at 49 (describing a "drug squad's surreptitious illegal search of a room when the occupant might return unannounced at any moment"); *infra* text accompanying notes 57-58 (summarizing effect of the War on Drugs on the sanctity of the home).

painful. They send a message to their victims that they are unworthy of the government's respect.⁵⁷

[S]hocking images of combat-ready officers battering their way into a private home are routine in America's cities today thanks to the war on drugs, as well as the war on illegal immigration. All across the country, the SWATification of policing has led to a proliferation of special units trained to rely on aggressive tactics, barging into homes and swooping down on citizens with impunity.

....

Unfortunately, there seems to be little public enthusiasm for this debate. That's because few voters live in neighborhoods where gang units are likely to enter their kids' names and photos into the department database merely for wearing their hats backward. Nor do most of us lose sleep worrying whether the police might batter down our doors by mistake in search of drugs.⁵⁸

Law professor David Cole goes further, seeing discriminatory and unjustifiable police practices as encouraging distrust, anger, and even criminality among those individuals affected.⁵⁹

But individuals' identity is often linked closely to those groups that matter most to them.⁶⁰ When an individual is wrongly stopped because of his race, the sense of disrespect he feels may be felt by others in his racial community. When many persons of a certain race are regularly so stopped, the impact on the broader racial community is deeper.⁶¹ Minority communities sense, in a way that the Court does not, that strong Fourth Amendment protections are central to fostering respect for both individuals and their communities.⁶² At the same time, as grass roots activism and

⁵⁷ See generally Taslitz, *Racial Auditors*, *supra* note 45; Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1.

⁵⁸ Bonnie Bucqueroux, *When Cops Become Combat Troops: The Controversial Use of Force to Seize Elian Gonzales is Just Business as Usual in the War on Drugs*, May 2, 2000, at <http://archive.salon.com/news/feature/2000/05/02/swat/> (written by the executive director of Crime Victims for a Just Society and former Associate Director for the National Center for Community Policing at Michigan State University for almost a decade); cf. AMAR, *FIRST PRINCIPLES*, *supra* note 22, at 20-31 (emphasizing, albeit perhaps too exclusively, the role of the Fourth Amendment in protecting the innocent).

⁵⁹ See COLE, *supra* note 37, at 5-13. See generally Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3 (1995) (discussing importance of state-citizen trust in the law of constitutional criminal procedure).

⁶⁰ See Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong*, 40 B.C. L. REV. 739, 749-53, 757-63 (1999) [hereinafter Taslitz, *Racist Personality*].

⁶¹ See sources cited *supra* notes 40, 42, 45 (discussing racial profiling); Taslitz, *Racial Auditors*, *supra* note 45 (regarding stereotyping and disrespect under the Fourth Amendment).

⁶² See Taslitz, *Racial Auditors*, *supra* note 45, at 239-58 & nn.235, 241 (minority group

perceptions of the importance of Fourth Amendment-like protections). I want to be precise about my claims here. The data on the attitudes of various racial, ethnic, and class groups toward search and seizure practices are still too scanty and are subject to varying interpretations. Furthermore, at least one study suggests that African Americans and Hispanics, especially those in lower-income brackets and with limited education, are *more willing* than middle or upper income whites to support aggressive law enforcement, even when it impinges on civil liberties. See, e.g., Dennis P. Rosenbaum, *Civil Liberties and Aggressive Enforcement: Balancing the Rights of Individuals and Society in the Drug War*, in COMMUNITY JUSTICE: AN EMERGING FIELD 203, 218-29 (David R. Karp ed., 1998). But that study used survey questions that asked respondents what power the government should have to evict, seize the property of, and round-up suspected drug dealers, without asking specifically about situations where innocent persons suffer because of such practices. See *id.* at 218-29. Nor did the study address attitudes toward specific police practices. Furthermore, the study speculates that less educated and lower income individuals "probably had greater exposure to aggressive police behavior, which may desensitize them to such actions." *Id.* at 221.

Even if the study is taken to mean that the majority of inner city minorities would accept invasive policing, that may simply mean that, "in dire straits, and with limited options, they will grasp at any rope, no matter how steep the price." Carol Steiker, *More Wrong Than Rights*, in URGENT TIMES, *supra* note 49, at 49, 51. Moreover, these same residents might, despite such desperation and contrary to the Rosenbaum study, be quite aware of the ways in which police conduct may also insult individual residents and their communities. For example, there are numerous studies suggesting that blacks are highly dissatisfied with police behavior, especially as compared to Whites. See, e.g., Ronald Weitzer & Steven A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQ. 494, 498-99 (1999) [hereinafter Weitzer & Tuch, *Race, Class, and Perceptions*] (finding that 65.8% of blacks in this study had only some, little, or no confidence that their local police would treat blacks and whites equally; approximately five times as many blacks as whites reported experiencing mistreatment at the hands of the police; and a similar proportion believed that police racism was very common); Steven A. Tuch & Ronald Weitzer, *Racial Differences in Attitudes Toward the Police*, 61 PUB. OPINION Q. 642, 642 (1997) [hereinafter, Tuch & Weitzer, *Racial Differences*] ("African Americans are more likely than whites to express unfavorable attitudes toward various aspects of policing"); see also Richard R. Johnson, *Citizen Complaints: What the Police Should Know*, 67 FBI L. ENFORCEMENT BULL. 1, 5 (Dec. 1998) ("The research demonstrates that a misunderstanding exists between the police and young males from lower socioeconomic neighborhoods and also suggests a general lack of faith in the police by most ethnic minority groups. . . ."). Even the study most favorable to the police—reporting that a majority of blacks in twelve selected cities were satisfied with their local police—still reflected significantly lower percentages of blacks than whites in ten of those cities expressing such satisfaction, raising the question, why? See STEVEN K. SMITH ET AL., U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES, 1998, at 25 (1999).

Furthermore, there is reason to believe that when affected minorities are more aware of their rights, and of the community impact of particular police practices, minorities react with a greater degree of outrage than do whites. See, e.g., Weitzer & Tuch, *Race, Class, and Perceptions*, *supra*, at 494, 500 (finding that better educated blacks are more likely than less educated Blacks to believe in widespread police racism, though this belief did not vary with income); Tuch & Weitzer, *Racial Differences*, *supra*, at 646 (finding that blacks and, to a somewhat lesser extent, Latinos, develop deeper and longer-lasting negative attitudes toward

some community policing efforts have shown, respect-enhancing police actions *improve* law enforcement effectiveness. Citizens more actively and eagerly cooperate with a respectful police force.⁶³ The result is crime reduction.⁶⁴

the police than do whites after well-publicized police brutality incidents); cf. Rosenbaum, *supra*, at 225 (finding that minorities in surveys are consistently more strongly opposed than whites to police excessive use of force because of its highly visible nature). Additionally, there is some evidence that even when blacks have some confidence in their experiences with their local police, they may retain a greater skepticism than whites toward police practices in general. Cf. Tuch & Weitzer, *Racial Differences*, *supra*, at 646 (finding that while highly educated blacks are more skeptical of police in general than less educated blacks, both groups reveal a somewhat lower and relatively equal level of trust toward their local police relative to whites).

Ample anecdotal evidence also suggests a different perspective among black and white victims of invasive police conduct, especially based on the perception of racial discrimination. See generally BURRIS, *supra* note 46 (collecting such anecdotes); MEEKS, *supra* note 54 (similar). Group attitudes also change over time, and the longer view reveals the full scope of a group's interaction with the police. Past, not just present, attitudes and events thus matter. See TASLITZ & PARIS, *supra* note 30, at 427-38 (importance of examining racial group history). Furthermore, each minority group itself contains diverse viewpoints. Whether the views of a minority among a nationwide majority should control or even matter in crafting or applying a particular legal rule is a normative matter, but it is better to be aware of those views than ignorant of them. See *infra* Part III.C.

No single conclusion as to any particular search and seizure doctrine can be drawn from any of this data alone. Nor am I suggesting that more invasive police actions than are now accepted should never be embraced, regardless of the circumstances. Perhaps that is sometimes necessary. My major point is simply that it is important to listen to the diverse views and experiences of those groups most vulnerable to the costs imposed by police actions. We must listen and learn, from today and from yesterday. So informed, we are better equipped to craft and apply the relevant principles of constitutional morality. As I will shortly summarize, such listening aids in giving concrete shape to a respect-based jurisprudence.

⁶³ See generally BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION (1994); DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 117-28 (2002) (discussing the damage to minority group trust and willingness to cooperate with the police and to the criminal justice system's perceived legitimacy more generally); David A. Harris, *Racial Profiling Now: "Just Common Sense,"* 17 CRIM. JUST. 36-41, 59 (2002) [hereinafter Harris, *Common Sense*] (summarizing empirical data).

⁶⁴ Professor David Cole makes many similar points regarding the impact of discriminatory policing on racial and group trust in, and willingness to cooperate with, law enforcement, albeit using different language than I use here. See COLE, *supra* note 37, at 3-16, 52-54; see also Bucqueroux, *supra* note 58 (vigorously arguing for a certain sort of community policing as the remedy for high crime rates and minority distrust of the police). Cole argues, however, that whites benefit from this discrimination by, in practice, having more expansive constitutional protection (because the police do not readily invade white rights) than do minority communities. See COLE, *supra* note 37, at 5-13, 53-55. Although he favors candor and equality, he speculates that achieving those goals would unleash political pressures that would *reduce* the scope of constitutional protections for the accused. *Id.* at 9.

"Respect" is in part about status or esteem. Each person feels respected when he is treated as significant and of equal worth with every other person.⁶⁵ Groups too struggle for equal status.⁶⁶

But respect is also about inclusion, about being considered full members of the wider political community.⁶⁷ When African Americans in Jim Crow America could not sit at white lunch counters, they felt excluded from the American community.⁶⁸ Yet, what is rarely recognized is that Jim Crow laws went to the heart of the Fourth Amendment by regulating where certain citizens could choose to work, live, eat, and play.⁶⁹ Similarly, today,

I do not want to over-sell community policing. Many commentators believe that the successes of the movement are limited and that there is not even common agreement about what defines a policing style as community-oriented. See, e.g., Michael E. Buerger, *A Tale of Two Targets: Limitations of Community Anticrime Actions*, in COMMUNITY JUSTICE: AN EMERGING FIELD, *supra* note 62, at 137, 137-42; Randolph M. Grinc, "Angels in Marble": *Problems in Stimulating Community Involvement in Community Policing*, in COMMUNITY JUSTICE: AN EMERGING FIELD, *supra* note 62, at 167, 170-72. Among the reasons for this disappointing performance, however, are inadequate police efforts to allay a long history of community distrust of the police, see Grinc, *supra*, at 180-81; police failure adequately to inform the community of its role, see *id.* at 186-89; community policing being perceived as more a show than a reality, see, e.g., ELI B. SILVERMAN, *NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING* 61-62 (1999); and inadequate widespread re-training of officers in the empathetic, communicative, and problem-solving skills necessary to the new style of policing. See, e.g., BURRIS, *supra* note 46, at 214-17; SUSAN L. MILLER, *GENDER AND COMMUNITY POLICING: WALKING THE TALK* 193-227 (1999). In other words, a police failure to show adequate commitment to, and respect for, the community they serve accounts for the deficiencies in many current forms of purported "community" policing.

⁶⁵ See, e.g., Taslitz, *Racist Personality*, *supra* note 60, at 756-66; ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 134-51 (1999) [hereinafter TASLITZ, *RAPE AND CULTURE*]; accord RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* 58-80 (1998); KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 1-15 (1989).

⁶⁶ See, e.g., Taslitz, *Racist Personality*, *supra* note 60, at 756-66; TASLITZ, *RAPE AND CULTURE*, *supra* note 65, at 134-51, accord ABEL, *supra* note 65, at 58-80; KARST, *supra* note 65, at 1-15.

⁶⁷ See Taslitz, *Twenty-First Century*, *supra* note 1, at 158-65; Taslitz, *Racist Personality*, *supra* note 60; see generally Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1 (collecting historical examples).

⁶⁸ See Ella J. Baker, *Bigger than a Hamburger*, reprinted in *THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE, 1954-1990* 120, 120-21 (Clayborne Carson et al. eds., 1991).

⁶⁹ AMAR, *FIRST PRINCIPLES*, *supra* note 22.

[A] great many government actions can be properly understood as searches or seizures, especially when we remember that a person's "effects" may be intangible. . . . Unlike the due process clause, in whose name so much has been done, the Fourth Amendment clearly speaks to substantive as well as procedural unfairness and openly proclaims a need to distinguish between reasonable and unreasonable government policy. For those who believe in a "substantive due process" approach to the Constitution, the Fourth Amendment thus seems a far more plausible

when officers employ racial profiling to stop young African American males walking down the street, the officers insult and degrade the young men and their racial groups, making them feel less than full members of the American polity.⁷⁰

Respect requires recognizing that group identity is at the core of individual identity. The state must, therefore, embrace salient groups as equal partners in creating and implementing criminal justice policy. Group voices must be heard. But individuals must also be treated as unique, judged for what they do rather than what group they belong to. There is thus a healthy tension between group and individualized justice.⁷¹ Moreover, each citizen and his group must feel that the state intrudes upon their freedoms only when there is ample and trustworthy evidence of individual wrongdoing.⁷² Furthermore, all branches of government must recognize their constitutional obligation to express respect for citizens while enforcing the law.⁷³ As the testilying example illustrates, the courts cannot alone do the job. They must rely on the executive branch of police, prosecutors, state governors, the national President, and the political will of state and federal legislators, to enforce constitutional mandates.

Nevertheless, the courts must continue to play their role of setting "a constitutional floor protecting individuals and constraining government."⁷⁴

textual base than the due process clause itself. For those who believe in general rationality review, the Fourth, here too, is more explicit than its current doctrinal alternative, the equal protection clause.

Id. at 39-40. This article will try to illustrate some advantages of seeing certain issues as Fourth, rather than only Fourteenth, Amendment problems. The blindness of civil rights activists in not seeing the Fourth Amendment implications of Jim Crow may have stemmed from the flawed popular association between the Fourth Amendment and criminality. See *supra* and *infra* text accompanying notes 1-78.

⁷⁰ See Lu-in Wang, *Suitable Targets? Parallels and Connections Between "Hate" Crimes and "Driving While Black"*, 6 MICH. J. RACE & L. 209 (2001) (demonstrating similar injuries and mechanisms for their infliction in both hate crimes and racial profiling).

⁷¹ See Taslitz, *Racist Personality*, *supra* note 60, at 746-59; Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 204-09 (1999).

⁷² See TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 91-93 (1997) (arguing that decision accuracy and trustworthiness of evidence are aspects of procedural justice); Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1 (illustrating these points).

⁷³ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2283 nn.162-63, 2342-54 (using history and political theory to make this point concerning the Fourth Amendment); TASLITZ, *RAPE AND CULTURE*, *supra* note 65, at 148-51 (discussing more general constitutional obligations of legislatures to champion equal protection and free speech concerns); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* 41 (1994) (similar).

⁷⁴ Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787 (1999).

That floor too often collapses under the weight of the mere technicality vision.

I am not making a sharp analytical distinction here between “mere technicalities” and “rules of substance.” Rather, I am describing an *attitude* whose strength may vary from one situation to another.⁷⁵

Judges indeed likely understand—in a way that the lay public, the police, and the media may not—that even technicalities serve purposes.⁷⁶ Filing deadlines, for example, discourage lawyer laziness, intentional delay, and simple indifference to client needs.⁷⁷ But if a rule is even subconsciously viewed as merely a technicality, the courts will far more easily let it bend to countervailing concerns and will defer to other legal actors’ judgments about whether the rule has been met or requires an exception.⁷⁸ To avoid that result in the area of search and seizure law, a substantive vision of the Fourth Amendment’s value to our republic must replace the near-sighted view of mere technicalities. This article seeks to articulate such a vision, one rooted in the substantive value of respect. My major goals here are to define “respect,” to explore an approach to constitutional interpretation that gives respect concrete meaning in

⁷⁵ On the importance to judicial decisionmaking of judge’s attitudes—which are often embodied in the sorts of stories their opinions tell, see ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

⁷⁶ See J. Thomas Greene, *Causes of Popular Dissatisfaction with the Administration of Justice*, 40 JUDGES J. 22, 22-24 (2001) (arguing that public’s perception that criminals go free on technicalities partly reflects courts’ failure to explain to laypersons the value of such rules).

⁷⁷ A deadline set by legal rules is, again, not definitionally a mere technicality. Juridical attitude is what matters. If, as I observed to be true in criminal court practice in Philadelphia, courts readily excuse lateness in filing motions on the feeblest of lawyer excuses, especially in important cases, the filing deadlines become mere technicalities easily outweighed by other interests, with deference paid to the judgments of the affected parties (the lawyers). Yet the United States Supreme Court has imposed a much shorter deadline of forty-eight hours for an arrestee to receive a probable cause hearing. See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Although perhaps even this delay is too long, the Court’s attitude toward this presumptive deadline is more substantive than technical (something fairly unusual for this Court). If the deadline passes, the state has the burden of demonstrating the existence of a bona fide emergency or other extraordinary circumstance. See *id.* at 57. Even a hearing done within the deadline may, moreover, be invalid upon a showing by the suspect of unreasonable delay. See *id.* at 56.

⁷⁸ See, e.g., ROGER C. PARK ET AL., *EVIDENCE LAW* 542-43 (1998) (arguing that if a reviewing court finds that an evidentiary error was harmless—not significantly affecting the outcome of a case—the error will not justify reversal); David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1228-29 (1992) (arguing that an absence of meaningful appellate review of certain evidentiary rules gives trial judges virtually unlimited power).

individual cases, and to illustrate the ways in which a respect-full jurisprudence would alter the Court's Fourth Amendment methodology.

My approach to respect proceeds from the bottom up. All persons are entitled to respect. Yet certain marginalized groups in our society disproportionately bear the burden of state-imposed disrespect.⁷⁹ Moreover, there are sometimes on-average differences in these groups' perceptions and experiences as compared to more privileged members of the polity.⁸⁰ Understanding respect's meaning in the Fourth Amendment context therefore requires being especially attentive to whatever salient differences there may be between minority and majority group perspectives. Where there are differences, which group's view prevails will be a question of political morality.⁸¹ But it will often be the case that what benefits the oppressed benefits other people as well.⁸² Furthermore, it will always be the case that examining minority viewpoints will better inform an otherwise unduly constricted constitutional analysis.

Interestingly, the United States Supreme Court's most detailed consideration of respect's role under the Fourth Amendment concerned police treatment of a white, apparently middle-class, woman in *Atwater v. Lago Vista*.⁸³ Part II of this article explores in-depth the contrast between the majority's mere technicality view, in which respect merits little weight, and Justice O'Connor's dissenting substantive vision,⁸⁴ which places

⁷⁹ See COLE, *supra* note 37 (documenting this disproportionate burden throughout many stages of the criminal justice system); *infra* Part III.C (providing historical support).

⁸⁰ See *supra* text accompanying note 62 (summarizing some of the relevant empirical data); Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2282-2354 (illustrating differing perceptions).

⁸¹ See *infra* Part III.C.

⁸² See *infra* text accompanying notes 95-174 (offering illustrations).

⁸³ 532 U.S. 318 (2001).

⁸⁴ See *id.* at 360 (O'Connor, J., dissenting). I am using Justice O'Connor's dissenting opinion in *Atwater* as one example of an approach to the Fourth Amendment in which respect plays a central role and am expressing no opinion on whether O'Connor is likely to pursue that approach in future Fourth Amendment cases. One colleague who read an early draft of this article complained that Justice O'Connor is an opponent of racial justice, not a supporter. O'Connor's views on race might, however, be more complex than my colleague believes. See *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (authoring the majority opinion, which affirmed a law school admissions policy seeking racial diversity as justified by compelling state interests, including breaking down racial stereotypes and promoting cross-racial understanding). Furthermore, at least Justice O'Connor's words in her *Atwater* dissent, if taken at face value, show a sensitivity to the risks of law's modernly contributing to racial discrimination. See *infra* text accompanying notes 120-21. Finally, even if I accepted my colleague's view of O'Connor's approach to racial justice as deceptive, inconsistent, malicious, and ill-informed, that would not alter the wisdom of her dissenting opinion in *Atwater* nor its value in illustrating, and consistency with, the respect-based

respect at the center of the Fourth Amendment reasonableness determination. Doing so led Justice O'Connor to express especially grave concern about the implications of the majority's paradigm for minority communities in future cases, a concern entirely missing from the Court majority's reasoning.⁸⁵ These contrasting opinions help to clarify respect's meaning and role under the Fourth Amendment. Part II continues that task of clarification by examining first the idea of respect reflected in America's history of regulating search and seizure practices, especially during slavery and Reconstruction, and next examining the emotions of feeling respected and disrespected.⁸⁶ Part II argues that minimizing the emotional sense of disrespect is relevant to the balancing of interests process involved in determining the "reasonableness" of searches and seizures. But, concludes Part II, the more important concept of respect is an "objective" one rooted in social practice: respect as treating another "fittingly," a concept rooted in notions of human worth and the need for a sense of belonging to a common political community.⁸⁷ This broad concept will be given concrete meaning in the text of Part II.

If the principle of respect is derived from history and is expressed in current social practices, then giving that principle meaning in particular cases should require more focused historical and social practice inquiries. Part III adopts precisely this position, exploring three ways in which American history and current social practices give life to constitutional principles: first, in encouraging informed intuitions about meaning; second, in protecting reliance upon reasonable social expectations; and third, in identifying actual and reasonable social meanings given to search and seizure practices by both participants and observers concerning when treatment is "ill-fitting" for a political community of equals. Concerning this last point, Part III examines the role of subconscious meanings and offers new interpretations of *Plessy v. Ferguson*⁸⁸ and *Brown v. Board of Education*.⁸⁹ These new interpretations offer guidance for choosing when majority or minority perspectives on respectful treatment should prevail. That guidance further requires elaboration of the notion of "peoplehood"

approach that I defend here.

⁸⁵ See *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

⁸⁶ See also sources cited *infra* note 147 (summarizing history); cf. Andrew E. Taslitz, *The Limits of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 MARGINS 305 (2001) [hereinafter Taslitz, *Civil Society*] (analyzing respect-based emotions in the context of group-subordinating speech).

⁸⁷ See *infra* Part II.D (defining "fittingness").

⁸⁸ 163 U.S. 537 (1896).

⁸⁹ 347 U.S. 483 (1968).

and what the Fourth Amendment means in describing the rights that it recognizes as being "of the people."⁹⁰

Part IV explains why questions of respect in authorizing and conducting searches and seizures are better addressed under the Fourth, rather than the Fourteenth, Amendment. Among these reasons are that the equal protection clause embraces equality without a substantive vision of what sort of minimal treatment of persons the interests protected by the Fourth Amendment demand.⁹¹ Nor does the due process clause alone do enough because the Court generally assigns that clause the function of protecting "truth" at trial.⁹² But the Fourth Amendment serves other values, often undermining truth by, for example, excluding accurate evidence of guilt.⁹³

Part V recounts the practical differences that a respect-based jurisprudence will make to Fourth Amendment methodology and outcomes. In particular, a respect-based jurisprudence will sometimes bow to minority conceptions about what inferences are reasonable in fact-finding, will consider both racially-discriminatory motives and effects relevant to the reasonableness balancing process, will consider a broader notion than the Court now embraces of the social costs of search and seizure practices, will make heavier use of social science to understand current social practices, and will seek to learn lessons from the history of search and seizure practices during slavery, Reconstruction, and modern American history rather than only during the original framing period of the 1780s and 1790s.⁹⁴ Part V also offers selected illustrations of how this altered methodology may alter results in applying a number of Fourth Amendment doctrines.

Finally, Part VI concludes with a call for a prompt embrace of respect-based principles and some practical suggestions for implementing them.

⁹⁰ See U.S. CONST. amend. IV; *infra* Part III.C.4.

⁹¹ See *infra* text accompanying Part IV.B (summarizing equal protection principle's scope).

⁹² See *infra* text accompanying Part IV.A (summarizing central place of truth-finding in due process case law governing criminal procedure).

⁹³ See, e.g., TASLITZ & PARIS, *supra* note 30, at 579-88 (discussing range of values arguably protected by the Fourth Amendment exclusionary rule).

⁹⁴ The implications of a respect-based jurisprudence are further explored in Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1 (applying respect concept to analyzing four infamous search and seizure cases); Taslitz, *Twenty-First Century*, *supra* note 1 (focusing on the importance of a respect-full concept of privacy); Taslitz, *Racial Auditors*, *supra* note 45 (focusing on the social science underlying respect-based jurisprudence, the role of the "political emotions" under the Fourth Amendment, and practical ways to involve "the People" in setting search and seizure policy and practice).

II. SEARCHING FOR RESPECT

A. THE JURISPRUDENCE OF DISRESPECT

These clashing mere technicality and substantive visions of the Fourth Amendment are respectively illustrated by the majority and dissenting opinions in *Atwater v. City of Lago Vista*,⁹⁵ decided just recently.

1. Technicalities Triumphant: The Atwater Majority

Gail Atwater was arrested for, and subsequently pled no contest to, driving without her seatbelt or her two children's seatbelts fastened. These offenses were punishable by a fine only. Yet Atwater was handcuffed; taken to the police station in a squad car; booked; ordered to remove her shoes, jewelry, eyeglasses, and pocket contents and to submit to a mug shot; and left alone in a jail cell for one hour. Finally, she was taken before a magistrate, who released her on \$310 bond. The Court majority, in a 5-4 decision authored by Justice Souter, held that the officer's conduct had not violated the Fourth Amendment.

The majority's opinion began with a lengthy examination of history, but for a narrow purpose: to determine whether a warrantless misdemeanor arrest not involving a breach of the peace was prohibited by the common law at the time of the eighteenth century framing.⁹⁶ While admitting the ambiguity of the historical record, the Court nevertheless concluded that there was insufficient evidence of such a common law prohibition. Nor did tradition since the framing reveal a later embrace of a contrary view. These historical observations were entitled to great weight, argued the Court.

⁹⁵ 532 U.S. 318 (2001).

⁹⁶ For a thorough analysis of the flaws in this new Fourth Amendment originalism, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000). This new approach does not use history to "illuminate . . . what particular abuses most provoked those who framed and ratified the provision in question, and [to determine] what it was about those abuses that most provoked them." Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1170 (1995). Rather, the new Fourth Amendment originalism employs history to preserve "particular legal protections in place at the time of its framing," putting certain "traditional common-law guarantees . . . beyond time, place, and judicial predilection." Sklansky, *supra*, at 1764 (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 66 (1991) (Scalia, J., dissenting)). I would add that the new Fourth Amendment originalism is selective in choosing what framers' count, ignoring the framers' of the 1860s, whose work for the first time applied the Fourth Amendment to the states. See *infra* Part I.C. Professor Thomas Y. Davies adds, using *Atwater* as his primary example, that the Court simply does new Fourth Amendment originalism badly, getting the history quite wrong. See Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine* *Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002).

Therefore, those seeking a departure from the framers' understanding bore a "heavy burden" of justification.⁹⁷

The Court nevertheless proceeded to consider whether the balance of state and individual interests required a new rule. Curiously, the Court began by seemingly conceding that this balance favored Atwater:

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might . . . prevail. She was a known resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the city can raise against it specific to her case.⁹⁸

Subsequently, however, the Court belittled the invasion of Atwater's dignity interests. Though humiliating, the Court explained, Atwater's arrest was "no more 'harmful to . . . privacy or . . . physical interests than the normal custodial arrest.'"⁹⁹ The arrest and booking were "inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment."¹⁰⁰ In any event, these invasions were justified by probable cause and thus almost definitionally reasonable.

Equally important was the Court's disapproval of "standards requiring sensitive, case-by-case determination of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."¹⁰¹ Because the Fourth Amendment is to be applied in the heat of the moment, said the Court, clear, simple, readily administrable rules are needed. Atwater's proposed rule—that warrantless arrests for minor crimes not accompanied by violence or its threat be forbidden—failed this test. In the Court's view, Atwater's proposal put too heavy a burden on officers' distinguishing minor from major crimes. Nor would a tie-breaking rule for the police—"if in doubt, do not arrest"—make sense because it would "boil down to something akin to a 'least-restrictive-alternative limitation,' which is itself one of those 'ifs, and, and buts' rules . . . generally thought inappropriate in working out Fourth Amendment protection."¹⁰²

⁹⁷ *Atwater*, 532 U.S. at 346 n.14.

⁹⁸ *Id.* at 346-47.

⁹⁹ *Id.* at 354.

¹⁰⁰ *Id.* at 355.

¹⁰¹ *Id.* at 347.

¹⁰² *Id.* at 350. The Court's unexplained rejection of a "least restrict alternative" requirement to limit state power under the Fourth Amendment is troubling because the Fourth Amendment is a "fundamental right"; the violation of such rights generally mandates

Of greater concern to the Court was that police fear of liability for a mistaken judgment would create disincentives to arrest, and the "costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested" ¹⁰³ Moreover, said the Court, there was little reason to believe that warrantless arrests for petty offenses were a significant nationwide problem. Few other examples of such cases, emphasized the Court, were noted in the briefs or at oral argument. If arrests are to be prohibited for certain offenses, state legislatures, not being bound by general principles in the same way as are courts addressing constitutional questions, are better equipped to act. Prompt probable cause hearings, combined with categorical rules giving way to individualized review when a suspect proves that he or she was arrested in an extraordinary manner, provided, according to the Court, further protections against abusive arrests. "The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law enforcement officials, is a dearth of horrors demanding redress." ¹⁰⁴ The dissent's claims to the contrary, said the majority, were "speculative," there being no indication that potential abuse had ever "ripened into reality." ¹⁰⁵

"strict scrutiny," which definitionally permits state infringement only where no less restrictive (that is, less invasive) alternatives are available. See MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 16-17, 84, 158 (2001) (concluding that the Fourth Amendment is a fundamental right that should be protected by strict scrutiny); JEROME A. BARROW & C. THOMAS DIENES, *CONSTITUTIONAL LAW IN A NUTSHELL* 167 (1995) (declaring that, "[w]hen federal or state legislation burdens the exercise of fundamental personal rights, the courts . . . demand that government establish that the law is *narrowly tailored* to a compelling or substantial governmental interest," though further noting that in practice "the standard employed is not always uniform"); see generally Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) [hereinafter Maclin, *Central Meaning*] (arguing that the Court wrongly analyzes Fourth Amendment questions under a rational basis standard of review when a compelling justification standard is more appropriate).

¹⁰³ *Atwater*, 532 U.S. at 351.

¹⁰⁴ *Id.* at 353.

¹⁰⁵ *Id.* at 353 n.25. The Court conceded that there must be other instances of abuse of which it was unaware "but just as surely, the country is not confronting anything like an epidemic of minor-offense arrests." *Id.* at 353. Moreover, the Court agreed that *Terry v. Ohio*, 392 U.S. 1 (1968), supported a "more finely tuned approach to the Fourth Amendment." *Atwater*, 532 U.S. at 347 n.16. But the Court asserted, more than proved, that such fine-tuning mattered only when a seizure of a person involved something less than probable cause. *Id.*

2. *A Substantive Vision: The Atwater Dissent*

The dissent, authored by Justice O'Connor, and joined by Justices Stevens, Ginsburg, and Breyer, rejected the majority's methodology in its entirety.¹⁰⁶ Finding history inconclusive, and describing it as but one of the tools in the reasonableness inquiry, Justice O'Connor proceeded directly to interest balancing.

In doing so, Justice O'Connor repeatedly stressed that both Atwater's privacy *and* liberty interests had been violated. Concerning Atwater's right to locomotion, a full custodial arrest was especially intrusive, in Justice O'Connor's view, because arrest violated Atwater's reasonable expectations as a motorist. Ordinarily a motorist stopped by an officer expects to spend a short period of time answering questions while her license and registration are checked. The motorist assumes, Justice O'Connor declared, that a citation will follow, but she will then be allowed to proceed on her way. Atwater's arrest contradicted these reasonable expectations.

Moreover, Justice O'Connor noted, an arrestee may be detained up to forty-eight hours before a magistrate determines whether there was probable cause for the arrest.¹⁰⁷ That period is potentially dangerous because the nonviolent offender may be housed together with violent ones. After release, the fact of a driver's arrest also becomes a permanent part of the public record. Although Atwater was not herself housed with violent offenders, she did suffer the fear and humiliation of arrest, then, upon release, returned to the scene to find that her car had been towed.

Justice O'Connor was especially concerned that this extended infringement on Atwater's freedom of movement imposed special costs upon her and her children:

With respect to the . . . goal of child welfare, the decision to arrest Atwater was nothing short of counterproductive. Atwater's children witnessed Officer Turek yell at their mother and threaten to take them all into custody. Ultimately, they were forced to leave her behind with Turek, knowing that she was being taken to jail. Understandably, the 3-year old boy was "very, very traumatized . . ." After the incident, he had to see a child psychologist regularly, who reported that the boy "felt very guilty that he couldn't stop this horrible thing[;] . . . he was powerless to help his mother or sister . . ." Both of Atwater's children are now terrified at the sight of any police car According to Atwater, the arrest "just never leaves us. It's a conversation we have every other day, once a week, and it's—it raises its head constantly in our lives."¹⁰⁸

¹⁰⁶ See 532 U.S. at 360-73 (O'Connor, J., dissenting).

¹⁰⁷ See *id.* at 364 (O'Connor, J., dissenting) (relying on *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)).

¹⁰⁸ *Atwater*, 532 U.S. at 370 (O'Connor, J., dissenting). Atwater had also asked Officer Turek to allow her to take her frightened children to a nearby friend's house, but Turek

Ticketing Atwater, by contrast, would, Justice O'Connor emphasized, have taught her to ensure that her children were buckled up in the future, while teaching her children to accept responsibility and obey the law. Instead, they were taught that "the bad person could just as easily be the policeman as it could be the most horrible person they could imagine."¹⁰⁹

Justice O'Connor also believed that the danger to Atwater's and other vehicle-code-violators' privacy interests was great. Driver-arrestees are subject to a full search of their person and confiscation of their possessions. Their entire passenger compartment and packages therein are subject to search, and their car may be impounded and its contents inventoried.¹¹⁰

This extreme invasion of drivers' privacy interests violated the principle of proportionality that Justice O'Connor found to be inherent in the idea of Fourth Amendment reasonableness. Atwater's offense was not subject to imprisonment, and Atwater was a local resident posing neither a flight risk nor a danger to the community. She had immediately apologized, accepting responsibility for her actions, thus suggesting that she would comply with the seatbelt law in the future. Were the costs imposed upon her extended to the significant number of fine-only offenses in this country, there would be "potentially serious consequences for the everyday lives of Americans."¹¹¹

Nevertheless, Justice O'Connor recognized that there may be unusual cases in which an arrest for a fine-only offense was necessary. To provide for this possibility, Justice O'Connor proposed this rule: Where there is probable cause to believe that a fine-only offense has been committed, the officer should ordinarily only issue a citation; he may, however, proceed further if he points to specific and articulable facts that, taken together with rational inferences drawn from those facts, reasonably warrant the additional intrusion of a full custodial arrest.¹¹² That rule set no less of a clear and simple bright-line, said Justice O'Connor, than did the majority's standard, because the probable cause required for the traffic citation itself "must be measured by the facts of the particular case."¹¹³

Furthermore, although Justice O'Connor agreed that certainty was a worthy Fourth Amendment value, "it by no means trumps the values of

refused. See *id.* at 324. Luckily, Atwater's friend learned about the incident and quickly arrived to take charge of the children. See *id.* When Atwater had asked Turek to lower his voice to avoid further scaring the children, he jabbed his finger in her face and responded, "You're going to jail." *Id.* at 368 (O'Connor, J., dissenting).

¹⁰⁹ *Id.* at 370 (O'Connor, J., dissenting).

¹¹⁰ For details on why this is so, see TASLITZ & PARIS, *supra* note 30, at 335-42, 396-401.

¹¹¹ *Atwater*, 532 U.S. at 371 (O'Connor, J., dissenting).

¹¹² See *id.* at 364 (O'Connor, J., dissenting).

¹¹³ *Id.* at 366 (O'Connor, J., dissenting).

liberty and privacy at the heart of the Amendment's protections."¹¹⁴ In any event, she explained, the proposed rule derived from the *Terry* stop-and-frisk doctrine, which had proven workable for street officers for the past thirty years.¹¹⁵ More importantly to Justice O'Connor, "[w]hat the *Terry* rule lacks in precision it makes up for in fidelity to the Fourth Amendment's command of reasonableness and sensitivity to the competing values protected by that Amendment."¹¹⁶

As for the majority's fear that officer liability would create disincentives for arrests, Justice O'Connor was dismissive. The qualified immunity doctrine, she believed, adequately protected officers who, for example, reasonably but mistakenly believed that a suspect posed a flight risk or danger to the community and therefore had to be arrested. "Of course, even the specter of liability can entail substantial social costs, such as inhibiting public officials in the discharge of their duties," O'Connor conceded. But, she declared, "We may not ignore the central command of the Fourth Amendment, however, to avoid these costs."¹¹⁷ Finally, and perhaps most importantly, Justice O'Connor worried far more than did the majority about the "unfettered discretion" its decision granted to officers to make arrest decisions.¹¹⁸ The mere existence of a significant *risk* of abuse, not proof of its widespread realization—which can prove elusive—was all that O'Connor required.¹¹⁹ The small number of published cases concerning similar arrests therefore "proves little," she said, and "should provide little solace."¹²⁰ "[A]s the recent debate over racial profiling demonstrates all too clearly," a "relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."¹²¹ Precisely because the Court has eschewed inquiry into officers' motivations,¹²² however, O'Connor believed that the Justices must "vigilantly ensure that officers' poststop actions . . . comport with the

¹¹⁴ *Id.* (O'Connor, J., dissenting).

¹¹⁵ *See id.* (O'Connor, J., dissenting) (relying upon *Terry v. Ohio*, 392 U.S. 1 (1968), which held that an officer may make a "stop"—a minimally intrusive seizure of the person—on reasonable suspicion rather than full probable cause).

¹¹⁶ 532 U.S. at 366 (O'Connor, J., dissenting).

¹¹⁷ *Id.* at 368 (O'Connor, J., dissenting). The majority, in turn, dismissed Justice O'Connor's reliance on the "panacea" of qualified immunity. *See id.* at 351 n.22. Qualified immunity would protect police from liability but not from the time and expense of litigation, placing impossible burdens on police, who must act quickly. *See id.*

¹¹⁸ *Id.* at 372 (O'Connor, J., dissenting).

¹¹⁹ *See id.* (O'Connor, J., dissenting).

¹²⁰ *Id.* (O'Connor, J., dissenting).

¹²¹ *Id.* (O'Connor, J., dissenting).

¹²² *See Whren v. United States*, 517 U.S. 806 (1996).

Fourth Amendment's guarantee of reasonableness."¹²³ Instead, the "Court neglects the Fourth Amendment's command in the name of administrative ease" and "cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness."¹²⁴

3. Assessing Justice O'Connor's Substantive Vision

Justice O'Connor's dissent, whatever its imperfections, clearly embraced a substantive vision of Fourth Amendment rights. She closely attended to the nature and extent of infringement on Atwater's interests, including especially her right to locomotion.¹²⁵ Justice O'Connor further examined the plausible significant costs to society as a whole of a per se rule permitting arrests upon probable cause for fine-only offenses. These risks were sufficient to justify rejecting such a per se rule, unless the state met its burden of showing that those risks were not being, and would not be, realized in practice. Additionally, she condemned the humiliating, disrespectful treatment of Atwater by the police, causing her and her children continuing psychological pain and fear, thus wounding healthy familial relationships and undermining trust in the police force.¹²⁶ These injuries demonstrated to Justice O'Connor the importance of constraining, rather than deferentially embracing, police officer discretion.¹²⁷ Critically, Justice O'Connor conceived of free movement and privacy as zones of sovereignty,¹²⁸ requiring pressing justifications, such as physical danger or imminent flight, to justify infringement. Even then, and *even given individualized evidence of wrongdoing* in the form of probable cause, infringement had to be proportionate.

The costs of a jurisprudence of mere technicalities would be intolerable were they widespread. Middle class whites certainly pay some

¹²³ *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

¹²⁴ *Id.* at 373 (O'Connor, J., dissenting).

¹²⁵ See generally Maclin, *Right to Locomotion*, *supra* note 51 (arguing that the Court has provided increasingly less protection to the right to locomotion, perhaps even less protection than it gives to the right of privacy).

¹²⁶ On the importance of citizen trust in the police under the Fourth Amendment, see Scott Sundby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

¹²⁷ See generally Tracey Maclin, *What Can Fourth Amendment Doctrine Learn From Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398 (2001) [hereinafter Maclin, *Vagueness Doctrine*] (discussing limiting police officer discretion as a central purpose of the Fourth Amendment).

¹²⁸ See Luna, *supra* note 74, at 829-31 (arguing that the Fourth Amendment must be understood especially to protect, subject only to weighty and unusual countervailing interests, "sovereign zones" in which the idiosyncratic and unique individual can "do anything and everything" to develop his special skills, talents, and capacities).

price, but the costs fall disproportionately on minorities.¹²⁹ As Justice O'Connor apparently recognized, increased officer discretion is most likely to be used against minorities, especially those sub-communities that are poor. In the words of Anthony V. Bouza, former chief of police in Minneapolis and commander of the Bronx police force,

There is a clear, yet subliminal, message being transmitted [by society] that the cops, if they are to remain on the payroll, had better obey.

The overclass—mostly white, well-off, educated, suburban, and voting—wants the underclass—frequently minority, homeless, jobless, uneducated, and excluded—controlled and, preferably, kept out of sight. Property rights are more sacred than human lives. And some lives are more precious than others.¹³⁰

4. Taking Stock: The Court Equivocates

I do not want to leave the misimpression that the Court majority always embraces a mere technicality vision of the Fourth Amendment. To the contrary, the Court generally views Fourth Amendment interests in one location—the home—as meriting significant protection.¹³¹ Invasions of the home routinely require both probable cause and a search or arrest warrant, as well as fair notice to the occupants concerning what is about to happen.¹³² Moreover, the Court does at least still require probable cause for arrests outside the home,¹³³ although *Atwater* demonstrates that this mandate may not in fact reflect anything approaching a substantive vision of Fourth Amendment freedoms.

But outside the home, the mere technicality vision generally rules. Ample exceptions are made to the exclusionary rule.¹³⁴ Most initial interferences with the right to locomotion fall far short of an arrest. Yet many such intrusions are permitted as “voluntary encounters,” requiring no

¹²⁹ See generally COLE, *supra* note 37 (defending this point).

¹³⁰ ANTHONY V. BOUZA, POLICE UNBOUND: CORRUPTION, ABUSE, AND HEROISM BY THE BOYS IN BLUE 13 (2001)

¹³¹ See also *Kyllo v. United States*, 532 U.S. 27 (2001) (declaring that the Fourth Amendment draws “a firm line at the entrance to the house”). Cf. Luna, *supra* note 74, at 849-56 (making analogous point).

¹³² See *id.*; see also TASLITZ & PARIS, *supra* note 30, at 250-52, 269-70 (summarizing case law).

¹³³ See TASLITZ & PARIS, *supra* note 30, at 269-70 (summarizing case law).

¹³⁴ Thus, the rule does not apply if officers acted in objectively reasonable good faith, if there is an independent source for the wrongly seized evidence or it inevitably would have been discovered, if the connection between the violation and the evidence is “attenuated,” if a defendant is being impeached at trial, or if the evidence is offered in ordinary civil cases, administrative or deportation proceedings, probation and parole revocation proceedings, civil tax proceedings, and civil forfeiture cases. See *id.* at 524-75.

suspicion at all, or “stops,” requiring only “reasonable suspicion.”¹³⁵ Although this latter requirement supposedly retains a mandate of individualized suspicion, in practice, trial courts defer to police judgments based on generalizations and stereotyping.¹³⁶ Property protection is diminished too, automobiles notably being subject to frequent seizure as a concomitant to arrest.¹³⁷ It is not that the Court provides no protection, but rather that, outside the home, individual and sub-community interests are too often easily outweighed by the needs of law enforcement.¹³⁸

This stark diminishment in protection also extends to privacy interests—which are the usual focus of the Court’s Fourth Amendment analyses.¹³⁹ Thus:

Whether infected by some form of hindsight bias, or a distancing effect, the Court has allowed increased police discretion in surveillance activities despite the privacy expectations of most citizens. Law enforcement may ignore “no trespassing” signs and jump over locked fences to sneak onto the property surrounding homes. They may snoop into the buildings adjacent to a residence, peering at even the most private activity occurring in sheds or barns. Police may parse through garbage bags to uncover everything from what someone reads to the medicine she takes. Government officials can obtain the telephone numbers that individuals dial from their homes in order to determine whom they have called, whether it be their mothers, paramours, or lawyers. And law enforcement may fly over homes in planes or helicopters, spying on backyard barbeques, sunbathing, and romantic interludes These intrusions can be undertaken without judicial oversight and in the absence of a warrant or probable cause.¹⁴⁰

Furthermore, there is no fixed coalition on one side of the divide or the other, individual Justices often switching sides in the debate.¹⁴¹ But, with rare exceptions, a majority is generally mustered for the mere technicality vision outside the home. And that is a vision, as the Court majority’s opinion in *Atwater* demonstrates, in which concepts such as respect, human dignity, and humiliation-minimization have little or no place.

¹³⁵ See *id.* at 299-316, 438-43.

¹³⁶ See generally David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric v. Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975 (1998) [hereinafter Harris, *Particularized Suspicion*].

¹³⁷ See TASLITZ & PARIS, *supra* note 30, at 396-99.

¹³⁸ See Maclin, *Right to Locomotion*, *supra* note 51, at 1288, 1328-34 (making similar point regarding the right to locomotion).

¹³⁹ See *id.* at 1328-30 (bemoaning the Court’s over-emphasis on privacy to the disparagement of other Fourth Amendment interests).

¹⁴⁰ Luna, *supra* note 74, at 827-28.

¹⁴¹ See *supra* notes 95-130 and accompanying text.

B. DISRESPECT IN AMERICAN HISTORY

The Court's failure to appreciate the importance of respect as a guiding constitutional value stems in part from its constricted vision of history. Courts generally, and the Supreme Court especially,¹⁴² until very recently often ignored history in giving constitutional meaning to the broad words of the Fourth Amendment. When they have addressed history, they have focused on 1791, the time of the adoption of the Bill of Rights.¹⁴³ The original Bill of Rights applied, however, only to the federal government, not to the states.¹⁴⁴ But most criminal prosecutions are at the state and local level.¹⁴⁵ It was only with the 1868 ratification of the Fourteenth Amendment that most of the Bill of Rights, including the Fourth Amendment's search and seizure provisions, were "incorporated" against the states.¹⁴⁶ Yet the Fourteenth Amendment stemmed from our nation's

¹⁴² See generally TASLITZ & PARIS, *supra* note 30 (summarizing and analyzing high Court's Fourth Amendment cases, finding few that seriously rely on the amendment's history). For a fascinating recent revisionist history of the Fourth Amendment, see Thomas Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); see also Tracy Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997). Between the 1970s and the 1990s, the United States Supreme Court rarely relied on history in Fourth Amendment cases. See Sklansky, *supra* note 96, at 1741, 1760. During the 1990s, Justice Scalia advocated, and the Court flirted with, relying heavily on history in a new Fourth Amendment originalism. See *id.* at 1754-60. In 1999, the Court finally embraced that originalism. See *id.* at 1760. However, the weight given to, and depth of, the Court's historical inquiry is unclear. Compare *Wyoming v. Houghton*, 526 U.S. 295 (1999) (declaring that only if historical inquiry yields no answer will the Court turn to traditional standards of reasonableness balancing) with *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (describing inquiry into what the framers' regarded as reasonable as "obviously relevant, if not entirely dispositive") (quoting *Payton v. New York*, 445 U.S. 573, 591 (1980)); Sklansky, *supra* note 96, at 1760-61 (contending that in some cases historical inquiry involved little more than reference to historical platitudes and maxims). The Court has also continued at times to eschew historical analysis entirely. See Sklansky, *supra* note 96, at 1761 n.144 (noting that the Court ignored common law history in three major Fourth Amendment cases in its 2000 term, but speculating that this was so because those cases were so easily resolved under earlier precedent); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (using traditional reasonableness balancing rather than history to judge the constitutionality of a drug-testing program for pregnant women). What is clear is that the Court looks to the framers of 1791 rather than 1867 and 1868.

¹⁴³ See *Florida v. White*, 526 U.S. 559, 563 (1999); sources cited *supra* note 142.

¹⁴⁴ See TASLITZ & PARIS, *supra* note 30, at 39-40.

¹⁴⁵ See WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 4 (2d ed. 1992) ("Within our federated system of government, it is the states that have borne the primary responsibility for defining criminal behavior and enforcing the law against those who engage in such behavior."). But see Sara Sun-Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995) (examining the increasing federalization of the criminal law).

¹⁴⁶ See TASLITZ & PARIS, *supra* note 30, at 39-40.

troubled history with slavery and the South's violent resistance during Reconstruction to changing the racial status quo. Again, though rarely recognized, slavery was partly defined by the deprivation of Fourth Amendment interests in freedom of movement, privacy, and property. A slave could not go where he pleased on a plantation unless permitted to do so by his owner. The slave certainly could not leave the plantation, quit his "job," and find work elsewhere. Nor could he set off for school, visit or even make friends nearby, or engage in the other myriad activities of life that freedom of movement ensures.¹⁴⁷

Privacy, whether in the sense of seclusion from private eyes or autonomy to make one's own life choices, was unheard of as a slave entitlement.¹⁴⁸ No slave actions could be freed from the master's prying eyes if he heard of them or wished to stop or observe them.¹⁴⁹ Slave women similarly had no right or ability to resist masters' sexual overtures on the grounds that the women's sexuality was a private matter of their own choice.¹⁵⁰

Slaves also could not usually own property, though they might keep some at the masters' sufferance. Yet slaves were themselves property.¹⁵¹

¹⁴⁷ See Andrew E. Taslitz, *Slaves No More! The Implications of the Informed Citizen Ideal Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 738-43 (1999) [hereinafter Taslitz, *Slaves No More!*] (outlining connection between slave history and the interests protected by the Fourth Amendment).

¹⁴⁸ See, e.g., JAMES OAKES, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* 145 (1990).

For slaves there was no such thing as a right of privacy. To be a slave could mean filing past the master to be examined for cleanliness, for torn clothes, or for receipt of weekly rations. Slave cabins were not simply built to the masters' specifications; they were open to periodic inspections. One owner required his overseer to "visit every Negro house at daylight" to see that the slaves were out and "once a week or more . . . after horn blow at night, to see that all are in." An overseer boasted that "once or twice in the month, I made it my business to visit each Negro house: I examined everything therein; saw that the Negroes permitted no dirt or filth."

Id. See also Lloyd L. Weinreb, *The Fourth Amendment Today, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING*, *supra* note 8, at 185 (defining the meanings of privacy under the Fourth Amendment); MICHAEL WAYNE: *DEATH OF AN OVERSEER: REOPENING A MURDER INVESTIGATION FROM THE PLANTATION SOUTH* 96 (2001) ("Servants . . . warned other slaves when their cabins were to be searched . . .").

¹⁴⁹ See sources cited *supra* notes 147-48.

¹⁵⁰ See Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1335 (2000) [hereinafter Taslitz, *Contract of Mutual Indifference*] (summarizing sexual plight of African American women); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 34-35 (1997) (similar).

¹⁵¹ See JENNY BOURNE WAHL, *THE BONDMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY* 157-58, 256-57 n.133 (Arthur McEvoy & Christopher Tomlins eds., 1998) (discussing how slaves could not own property but could sometimes control it at the master's sufferance); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE*

All these restrictions on slave freedoms were declared by law or enforced by legal practice. These sorts of restrictions were essential to marking the slave as outside the community of political and social equals.¹⁵² The "socially dead" and excluded slave belonged to a group of a reviled status.¹⁵³ The slaves understood, albeit not in precisely this language, the disrespect for them inherent in the Old South's laws and practices.¹⁵⁴ Yet slavery could not exist if the slave could "quit," leave the plantation, seek work elsewhere, keep the property he earned "by the sweat of his brow," and find peace, safety, and privacy in the nighttime embrace of family.¹⁵⁵

When the Thirteenth Amendment ended slavery after the Civil War, the South's restrictions of former slaves' freedoms of movement, privacy, and property did not end.¹⁵⁶ Black codes were passed, essentially requiring the freedmen to work for their former masters.¹⁵⁷ Passes were required to leave the plantation.¹⁵⁸ Violent night riders like the Ku Klux Klan assaulted and terrorized former slaves, restoring white "honor" and black subjugation.¹⁵⁹ Many of these night riders were state officials, and state policy otherwise often sanctioned the violence.¹⁶⁰ State-enforced disrespect by infringement of Fourth Amendment freedoms thus continued. The current meaning of the Fourth Amendment thus requires looking through the lens of search and seizure practices during slavery and Reconstruction. As I have demonstrated elsewhere, that lens reveals the idea of respect articulated here to be a central Fourth Amendment value.¹⁶¹

LAW, 1619-1866, 61-80 (Thomas A. Green & Hendrik Hartog eds., 1996) (describing slaves as property).

¹⁵² See Taslitz, *Contract of Mutual Indifference*, *supra* note 150, at 1283-1337 (documenting history showing slave exclusion from the American social contract).

¹⁵³ See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 38-65 (1982) (analogizing slavery to social death).

¹⁵⁴ See Taslitz, *Contract of Mutual Indifference*, *supra* note 150, at 1316-37.

¹⁵⁵ See Taslitz, *Slaves No More!*, *supra* note 147, at 740-43; Taslitz, *Contract of Mutual Indifference*, *supra* note 150, at 1381 (quoting Cong. Globe, 38th Cong., 1st Sess., 2990, which records debates over the Thirteenth Amendment) (declaring the position of some Republicans that emancipation vested each freed slave with "inalienable rights . . . to live and live in a state of freedom . . . to breathe the free air and enjoy God's free sunshine . . . to till the soil, to earn his bread by the sweat of his brow . . . to the endearment and enjoyment of family ties").

¹⁵⁶ See Taslitz, *Contract of Mutual Indifference*, *supra* note 150, at 1379-87.

¹⁵⁷ See *id.* at 1383-87.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*; Taslitz, *Slaves No More!*, *supra* note 147, at 147-48.

¹⁶¹ See generally Taslitz, *Slaves No More!*, *supra* note 147 (illustrating effect of viewing modern Fourth Amendment as incorporated against the states by the Fourteenth Amendment through the lens of search and seizure practices during slavery and Reconstruction); Taslitz,

C. RESPECT AS AN EMOTION

"Respect," as used here, is thus partly a historical concept, but it is also a sociological one. To understand the current relevance of the history of Fourth Amendment disrespect, we must understand the meaning of respect for minority communities affected by searches and seizures.¹⁶² History and sociology reveal an idea of respect as beginning with those most vulnerable to search and seizure abuses.¹⁶³ In the 1800s, it was the slaves and, later, the freedmen. Today it is certain subsets of minority communities.¹⁶⁴ By protecting the most vulnerable among us, however, we protect all Americans.¹⁶⁵

Whites are frequently victimized by the same sorts of disrespectful police officer conduct as are racial and ethnic minorities. Most often it is working class and poor whites who suffer. Because modern public culture more easily recognizes racial and ethnic ties than class ones, class-based abuses of individuals are not so readily understood as having ill consequences for lower income whites as a group.¹⁶⁶ Class-consciousness is weak in America.¹⁶⁷ White involvement in the criminal justice system also gets less media attention than minority, especially African American, involvement.¹⁶⁸ Yet whites suffer just the same, this observation more than occasionally even being true of middle-class whites.¹⁶⁹

Stories of Fourth Amendment Disrespect, *supra* note 1, at 2280-81 (linking the view through this lens to the fundamental value of "respect").

¹⁶² See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1 (providing extended illustration of this point).

¹⁶³ See Taslitz, *Racial Auditors*, *supra* note 45 (providing extended analysis and illustration of the political science and sociological literature supporting a view of the Fourth Amendment from the "bottom up," that is, from the perspective of those groups most vulnerable to oppressive search and seizure practices); cf. Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183 (2003) (discussing importance of gaining minority citizens' trust by hearing their voices); Taslitz, *Slaves No More!*, *supra* note 147 (reviewing key aspects of the relevant history). I detail that history in far greater detail in a forthcoming book.

¹⁶⁴ See sources cited *supra* note 163.

¹⁶⁵ Cf. CAROLINE FORRELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN, at xvii-xxii, 3-7 (2000) (making an analogous argument, specifically that adopting a "reasonable woman" standard protects men too).

¹⁶⁶ See Taslitz, *Racial Auditors*, *supra* note 45, at 266-67; WILLIAM J. CHAMBLISS, POWER, POLITICS, AND CRIME 100-24 (1999) (discussing police treatment of "the white lower class").

¹⁶⁷ See, e.g., BELL HOOKS, WHERE WE STAND: CLASS MATTERS, at vii-viii, 1-9, 93 (2001).

¹⁶⁸ See generally ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 78-93 (Susan Herbst & Benjamin I. Page eds., 2000).

¹⁶⁹ See, e.g., CHAMBLISS, *supra* note 166, at 100-24 (describing police treatment of lower

One of my friends, a white, middle-class professional, tells this story (I paraphrase, as I did not expect to hear, and thus did not tape-record, this tale):

I had a few drinks coming home from a party, so I asked my wife to drive. As we got near the highway exit to our home, two officers pulled us over. They questioned my wife, a bit too abruptly, I thought. I interjected something in response to one of the officers' questions to my wife. The officer gruffly told me that he would arrest me if I said one more word. I said something like, "You don't have to talk to her so roughly," and the officer pulled me out of the car, cuffed me, charged me with resisting arrest and public drunkenness, and kept me overnight in a jail cell. My case was ultimately dismissed on some legal motion, but the judge lectured me in open court about being drunk in public (I had had two drinks and never left my car). I felt insulted and degraded by the officers and by the court. No one recognized that a wrong had been done to me, and I received no apology. Ever since, I don't trust the police, and I more easily understand when minorities complain about them.¹⁷⁰

None of what is said here is meant to disparage the police. I am a former prosecutor who spent much time working with the police. Many officers are honest, good people struggling to do their best at a difficult job. Even for such officers, however, there are institutional notions of what constitutes "professionalism" and doing a "good job"—notions often endorsed by the law—that have ill social effects.¹⁷¹ Subconscious assumptions can also lead good and well-trained officers astray.¹⁷² Those officers who are less well-intentioned or less well-trained magnify the problem intensely.¹⁷³

class whites); *infra* text accompanying note 170 (recounting story of police abuse of middle class whites).

¹⁷⁰ This conversation took place in the fall of 1999. For more information on abusive police traffic stops, see David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highways*, 66 GEO. WASH. L. REV. 556 (1998).

¹⁷¹ See, e.g., CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 175-99 (2003); JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983-91, 1008-13 (1999) (tracing often subconscious psychological mechanisms and aspects of police culture that lead even well-meaning police to engage in racially motivated searches and seizures); see also TASLITZ & PARIS, *supra* note 30, at 425-26 (summarizing research on police culture and psychological processes contributing to racially discriminatory law enforcement).

¹⁷² See TASLITZ & PARIS, *supra* note 30, at 425-26; Thompson, *supra* note 171, at 983-91, 1008-13.

¹⁷³ See TASLITZ & PARIS, *supra* note 30, at 425-26. Thompson, *supra* note 171, at 983-91, 1008-13.

My goal, therefore, in encouraging a jurisprudence of respect is partly to help the police truly do a better job by re-defining professionalism.¹⁷⁴ The lead must come from the courts, but all branches of government must alter their search and seizure policies and practices. The courts and other branches must learn from history, a history of physical and emotional abuse of minority communities.

D. RE-DEFINING RESPECT AS TREATING FITTINGLY

1. Hyper- and Hypo-Sensitive Groups

The idea of respect as an emotion is nevertheless inadequate standing alone because it does not address the problems of *hyper-* and *hypo-*sensitive groups.¹⁷⁵ A “hypersensitive” group is one that continues to feel insulted despite society’s best efforts at fair treatment.¹⁷⁶ That sense of insult dissipates only when the group gets precisely the result that it wants.

For example, a right-to-life group who blocks the entrance to an abortion clinic still commits criminal trespass. If the protestors refuse to leave when ordered to do so by the police, the police may lawfully arrest the protestors. The police clearly have probable cause to do so—furthermore, if we assume that the arrests are done neither harshly nor because of political animus, the police action seems justified, even required.¹⁷⁷ If the right-to-life group members nevertheless feel insulted by

¹⁷⁴ For general background on police ethics and professionalism, see MORAL ISSUES IN POLICE WORK (Frederick A. Elliston & Michael Feldberg eds., 1985).

¹⁷⁵ The terms “hypersensitive” and “hyposensitive” groups are mine. I do not mean by these terms to suggest that members of these groups do not deserve to be listened to or accommodated. But certain accommodations go beyond the pale of what political morality requires or permits.

¹⁷⁶ This description might fairly characterize those Miami Cuban-Americans who refused to relinquish Elian Gonzales to his father, despite the extensive efforts of the Clinton Administration to hear their complaints. See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2327-55.

¹⁷⁷ This conclusion is true for three reasons: first, the protesters direct their ire at the ethics of abortion, not the wisdom of criminal trespass laws; second, given that the Court has held that there is a constitutional right to abortion rooted in the Fourteenth Amendment, permitting trespass denies the clinic’s patients a right that our society deems central to personhood; third, although the protesters are entitled to challenge the wisdom of the right, sound principles of civil disobedience require them to accept punishment to vindicate the rule of law where their chosen method of dissent violates state criminal codes. See, e.g., S. JONATHAN BASS, *BLESSED ARE THE PEACEMAKERS: MARTIN LUTHER KING JR., EIGHT WHITE RELIGIOUS LEADERS, AND THE “LETTER FROM A BIRMINGHAM JAIL”* 110-30 (2001) (summarizing the Rev. Dr. Martin Luther King, Jr.’s philosophy of non-violent disobedience); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 290-92 (3d ed. 2001) (explaining why courts generally, and many commentators, do not recognize a necessity or

being thwarted from blocking patients' entry to the clinic, that group should not be free to exercise an emotional veto of the trespass laws.

A "hyposensitive" group is one that does not feel insulted despite questionable conduct by the police. Here the danger is one of false consciousness.¹⁷⁸ Suppose that police believe that Asian Americans are more likely than non-Asian whites to transport illegal drugs. Accordingly, the police stop many more Asian Americans than non-Asian American motorists on trumped-up speeding charges. If the Asian American drivers believe that the officers are honest,¹⁷⁹ and if the officers treat the drivers courteously, the drivers may feel respectfully treated. Yet the police are by hypothesis singling out these drivers based on an insulting group stereotype. The driver's ignorance of that fact does not excuse the police misconduct. In this situation, unlike with the right-to-life protestors, the police acted disrespectfully because they have treated others unfittingly.

2. Fittingness

Respect as fittingness is the idea that each person is entitled to be treated in accordance with his status concerning some specified attribute.¹⁸⁰ Any lesser treatment is insulting. The status is objective: It either exists or

"political necessity" defense to indirect civil disobedience—violating laws other than the one that you wish to protest). *But see* David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 PHIL. & PUB. AFF. 31 (1998) (attempting to cast doubt on the idea that civil disobedients must accept punishment for their actions). In any event, the abortion protestor hypothetical articulated here does not violate any of the six principles of respect that I have articulated elsewhere. *See* Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2282-84.

¹⁷⁸ *See, e.g.*, ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 149-51 (Marshall Cohen ed., 1988) (explaining the definition and role of false consciousness and cognate concepts in various feminist theories); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 404-19 (1996) [hereinafter Taslitz, *Patriarchal Stories I*] (discussing how cognitive and affective processes blind persons from recognizing certain wrongs done to them).

¹⁷⁹ The reasons for the drivers' believing in the honesty of the police might affect our choice of terminology. Strictly speaking, some theorists would not describe the drivers' simple ignorance of the practice of racial profiling as "false consciousness." *See* sources cited *supra* note 178. On the other hand, if the drivers shared a belief in the trustworthiness of state authority, thus refusing to accept or even see evidence showing that racial profiling was afoot, that would be false consciousness. *See* sources cited *supra* note 177. Either way, being accepting of demeaning treatment, whether due to your ignorance or false consciousness, does not alter the treatment's nature as demeaning.

¹⁸⁰ *See* GEOFFREY CUPIT, *JUSTICE AS FITTINGNESS* 1-2 (1996). Cupit sees "respect" and "justice" as both parts of the fittingness family of concepts, with respect being the broader idea. *See id.* at 15-28. His distinctions are subtle and complex but of no moment whatsoever for the arguments made here, so I now ignore them, though I will return to them in future publications.

it does not.¹⁸¹ Thus a trustworthy co-worker is treated unfittingly if other co-workers act as if he is not trustworthy. That both he and his co-workers honestly believe that he is untrustworthy does not alter the fact that he has been treated unfittingly.¹⁸²

Human rights theorists generally agree that in some respect all humans are alike, thus all sharing the same status and requiring treatment befitting that status.¹⁸³ Theorists debate what attribute of sameness all humans share. Some think that it is being made in "the image of God," others that it is the *capacity* to achieve moral goodness, and still others (the Kantians) that it is rationality and autonomy—humans' nature as self-directing beings legislating their own life plans.¹⁸⁴ Whatever the quality that we all share, that quality entails certain rights or entitlements without which our status as humans is ignored.¹⁸⁵ Freedom of conscience, privacy, the right to own property earned by the sweat of our brow, and freedom of movement are among the rights commonly deemed to belong to every person simply by nature of her humanity.¹⁸⁶ Furthermore, many fittingness theorists agree that these sorts of entitlements necessarily imply diversity in life choices.¹⁸⁷ Respect must therefore be shown for the sorts of differences that are central

¹⁸¹ See CUPIT, *supra* note 180, at 15.

¹⁸² See *id.*

¹⁸³ See JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* 3-15 (1999) (discussing how all rights in Western political thought are justified by appeal to an idea of a "distinctive existent" quality shared in equal measure by all humans).

¹⁸⁴ See *id.* at 13, 116-22 (summarizing and contrasting Kantian theory and alternative of capacity to achieve moral goodness); MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11-41 (1998) (arguing that the idea of human rights is "ineliminably religious"); WILLIAM F. SCHULTZ, *IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL* 17-37 (2001) (offering pragmatic arguments for accepting the ideas of human rights and equality).

¹⁸⁵ See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1697 (1992).

¹⁸⁶ See, e.g., JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, & INTENT* 13-56, 73-75 (1999) (recognizing privacy, property, and free movement as universal rights); cf. Martha Minow, *Equality and the Bill of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 118, 118-28 (Michael J. Meyer & William A. Parents eds., 1992) (discussing how human dignity and equality are embraced in the Bill of Rights, especially in the protections of the First Amendment).

¹⁸⁷ Professor Cupit is responsible for the terminology of "fittingness," an idea that captures an underlying similarity among theorists writing about respect, dignity, insult, and humiliation. I thus refer to them all as "fittingness theorists." On the importance of diversity in life choices, see Jean Hampton, *Retribution and the Liberal State*, 1993 J. CONTEMP. LEGAL ISSUES 117, 140-41 (defending a "perfectionist liberalism" in which the state must promote "'value pluralism,' so that the citizenry have plenty of options and opportunities to choose from in creating their lives").

to personal identity.¹⁸⁸ Many of these differences are rooted in our identification with historically important social groups, each person's total set of overlapping connections to such groups helping to define who he uniquely is.¹⁸⁹ That individual-group connection requires fitting treatment for both.¹⁹⁰

3. *Fittingness and Belongingness*

But how can we determine in an individual case whether we have "treated" someone fittingly? That is a question I will answer in Part III; I first want to examine one aspect of fitting treatment: encouraging a sense of "belongingness."

To treat someone as a whole—as uniquely complete in himself—is status-enhancing, expressing the idea that each human is of equal and infinite worth.¹⁹¹ Simultaneously treating a person as a part or member of a valued broader whole—as someone essential to making society what it is—is also status-enhancing.¹⁹² The idea of "partnership" best expresses this ideal: each of us is a whole unto ourselves yet a valuable partner committed to, and essential for, the greater good.¹⁹³

A different way to make this same point is to view fitting treatment as treatment that is not humiliating—that does not act as if we are outside the family of man.¹⁹⁴ All men are entitled to membership in *some* political society, albeit not necessarily in any particular one. Members of a political society who are treated as not full members—as second-class citizens—usually face that fate because they are viewed as less than fully human.¹⁹⁵ That perceived sub-humanity is usually rooted in their membership in an oppressed sub-group.¹⁹⁶ Exclusion from full citizenship rights is therefore

¹⁸⁸ See Taslitz, *Racist Personality*, *supra* note 60, at 746-65.

¹⁸⁹ See, e.g., AVISHAI MARGALIT, *THE DECENT SOCIETY* 135-38, 140-42, 153, 158-61, 167-69 (Naomi Goldblum trans., 1996). Margalit is what I call a "negative" fittingness theorist, focusing on what conduct we must avoid if we do not wish to insult others. See *id.* at 9, 112, 115, 137. Cupit is a "positive" fittingness theorist, focusing on what conduct respect entitles us to receive. See CUPIT, *supra* note 180, at 1-12.

¹⁹⁰ See Taslitz, *Racist Personality*, *supra* note 60, at 746-65, 782-85 (explaining the importance of serving justice for both individuals and the encompassing salient social groups with whom they identify, including avoiding the individual and group humiliation so abhorred by those, like Avishai Margalit, whom I now label "fittingness theorists").

¹⁹¹ See CUPIT, *supra* note 180, at 66-70, 81-85.

¹⁹² See *id.*

¹⁹³ See *id.* at 70-92.

¹⁹⁴ See MARGALIT, *supra* note 189, at 1-4, 84-85, 135-37.

¹⁹⁵ See *id.* at 137-38, 140-42, 153, 158-61, 167-69.

¹⁹⁶ Margalit apparently sees humiliation as necessarily aimed at group membership. See *id.* at 135-38. I agree that this is one form of humiliation from which we can learn much, but

humiliating and thus unfitting.¹⁹⁷ State-enforced disrespect consequently is doubly insulting: first, by treating its victims as unworthy of better treatment in and of themselves; second, by excluding them from full membership in the polity.

This concept of humiliation has long been recognized by civil rights law. The Senate Commerce Committee's Report on what eventually became the Civil Rights Act of 1964 put it this way:

Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.¹⁹⁸

What is true in statutory civil rights law is true as well of the constitutional law governing searches and seizures. Racial profiling of African Americans, for example, humiliates the person stopped, who is treated as less than fully and equally human because of his membership in a historically oppressed group.¹⁹⁹ But whites stopped on fabricated motor vehicle violations to meet ticketing quotas are also insulted. To infringe upon the right of free movement without adequate reason is to treat a person as unworthy of having that right, a right necessarily entailed by his simple humanity.²⁰⁰

III. PRACTICES, PRINCIPLES, AND HISTORY

I have thus far defined respect as having three aspects: the historical, the emotional, and the universal. Understanding why all three aspects are necessary to fully articulate the idea of respect requires exploring the respective roles of practices, principles, and history in ethical and legal judgment.

I disagree that it is the only form of humiliation. As Cupit recognizes, unfitting treatment can occur entirely absent group animus or disparate group impact, for there are innumerable ways to treat others as less than fully human. See CUPIT, *supra* note 180, at 13-15. Margalit recognizes this possibility too but sees a focus on group-biased humiliation as the only practical way to operationalize his theory. See MARGALIT, *supra* note 189, at 135-38.

¹⁹⁷ See CUPIT, *supra* note 189, at 80-92; see generally KARST, *supra* note 65.

¹⁹⁸ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting Senate Commerce Committee Report, S. REP. NO. 88-872, at 16 (1966)).

¹⁹⁹ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2257-63.

²⁰⁰ For illustrations of the centrality of free movement to human personhood, see *id.* at 2302-27 (Japanese-American internment and racial profiling as examples of the degrading effects of unjustified interference with another's free locomotion).

"Social practices" are current "standards of human behavior recognized within a community or communities."²⁰¹ The term "social practices" is interchangeable with custom, convention, institutions, tradition, and shared understandings and norms.²⁰² "History," in its relevant sense as used here, instead explores *past* standards of human behavior recognized within a community or communities, relying on similar, albeit older, sources to those used in determining current social practices.²⁰³ "Principles" are ethical or legal rules concerning what persons or institutions *should* do or believe rather than what they in fact do or believe.²⁰⁴ Principles can be stated at varying levels of generality.²⁰⁵

Law both reflects and shapes social practices, as well as being the product of current and past understandings of history and its lessons.²⁰⁶ Any analysis of what the law is or should be thus requires inquiries into the

²⁰¹ See MARK TUNICK, *PRACTICES AND PRINCIPLES: APPROACHES TO ETHICAL AND LEGAL JUDGMENT* 11 (1998).

²⁰² *Id.*

²⁰³ See MICHAEL STANFORD, *AN INTRODUCTION TO THE PHILOSOPHY OF HISTORY* 11, 16-17, 45, 62 (1998) (contending that history is based on real past data, including past traditions and expressions of understandings, but is also necessarily interpretive). The connection between past practices and the interpretive enterprise of assigning meaning to constitutional text has been explained by Professor David A. J. Richards:

American constitutionalism should be understood in terms of historically evolving interpretive practices that aspire to narrative integrity in telling the constitutional story of a people's self-consciously historical struggle to achieve a politically legitimate government that would guarantee persons their equal human rights. Constitutional interpretation must make use of historical argument constructively to articulate the thread of legal texts, principles, and institutions that constitute over time the struggle for a political community in the genre of American revolutionary constitutionalism. Such interpretation must use the best available political theory of human rights to make contextual sense of the ultimate rights-based normative ends of the constitutional project.

DAVID A. J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* 17 (1993).

²⁰⁴ See Taslitz, *Racist Personality*, *supra* note 60, at 780 ("The normative impulse views . . . text and the history behind it as a source of insight into how others answered similar questions in the past. Text and history, however, help to illuminate, rather than mandate, how we should constitute our political community today."); TUNICK, *supra* note 201, at 9 ("[O]ur practices can be irrational, unreasonable, or thoroughly evil. . . . [T]he fact that we do something is not as strong a reason . . . for doing it, as that there are principled reasons for doing it.").

²⁰⁵ See TASLITZ & PARIS, *supra* note 30, at 10-13 (arguing that principles derived by an originalist methodology can be stated at varying levels of generality).

²⁰⁶ See TASLITZ, *RAPE AND CULTURE*, *supra* note 65 (providing an extended examination of interaction between law and social practices concerning rape); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 192-98 (1994) (arguing that constitutional law is the product of current and past understanding of history and its lessons).

existence and nature of relevant history and of current human beliefs and behavior. Yet some current norms can be morally objectionable. Widespread eavesdropping as a means of social control in Nazi Germany was one example.²⁰⁷ History can also be one of domination and insult, as was true during antebellum slavery and Jim Crow segregation.²⁰⁸ History and social practices must thus sometimes be rejected on moral grounds as inappropriate justifications for a legal rule. As Justice Harlan explained in his dissent in *United States v. White*,²⁰⁹ “[s]ince it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.”²¹⁰

This section explores the ways in which history and current social practices should inform the crafting and application of legal rules articulated pursuant to the authority of the Fourth Amendment to the United States Constitution. This section seeks to offer guidance on how the principle of conducting searches and seizures in ways that enhance human respect can be given concrete meaning consistent with the highest aspirations of the American people.

A. SOCIAL AND HISTORICAL PRACTICES ARE BASES FOR INTUITIONS USEFUL IN DEVELOPING AND JUSTIFYING PRINCIPLES

Exploring current social practices can give us information and ideas that would otherwise escape us in crafting ethical and legal rules. Such information can spark insights about how to modify and apply principles to best serve moral or other social goals. In particular, learning from the experiences and attitudes of the subjugated helps society to see its failings more clearly. This is the “method of listening,”²¹¹ which requires decision makers to move back and forth between hearing the voices of the oppressed and comparing their experiences and perspectives to current governing principles:

While everyday discourse about justice certainly makes claims, these are not theorems to be demonstrated in a self-enclosed system. They are instead calls, pleas, claims

²⁰⁷ See TUNICK, *supra* note 201, at 159-60, 165 (using similar example).

²⁰⁸ See KARST, *supra* note 65, at 4.

²⁰⁹ 401 U.S. 745 (1971).

²¹⁰ *Id.* at 786 (Harlan, J., dissenting); see also TUNICK, *supra* note 201, at 9 (arguing that moral principles sometimes require rejecting practices); WEST, *supra* note 206, at 192-98 (arguing that what lessons we learn from the past and whether it binds us is a judgment of political morality).

²¹¹ See MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION 12 (1998).

upon some people by others. Rational reflection on justice begins . . . in a hearing, in heeding a call, rather than in asserting and mastering a state of affairs, however ideal.²¹²

One strategy for effective listening is to hear with the aid of the device of "subperson-hood." Remember that respect-as-fittingness theorists agree that all "persons" are entitled to some minimum level of equal treatment simply by virtue of their humanity.²¹³ But, sometimes overtly, sometimes covertly, majorities behave in ways that exclude minorities from the category of full "persons" entitled to equal treatment.²¹⁴ Physical "stigmata" such as skin color, an accent, or an odd way of dress trigger a dominant group's moral blindness, serving as "marks of Cain upon people's very humanity."²¹⁵ Bearers of stigmata are "seen as human beings, but as severely flawed human beings—in other words, as subhuman."²¹⁶ Respect for persons is usually justified by their presumed rationality and autonomy.²¹⁷ But subpersons are subconsciously viewed by, or at least treated by, majorities ("persons") as neither fully rational nor fully capable of guiding their own destinies.²¹⁸ They are victimized by the "smart culture" that grades types of humans based upon presumed degrees of intelligence and self-directedness.²¹⁹ Persons must pay equal respect to other persons but owe no such obligation to subpersons.²²⁰ Subpersons, on the other hand, owe persons deference and obedience.²²¹

Kant himself, the founder of the secular version of the idea of human respect,²²² apparently embraced the subpersonhood idea. Thus, in his *Observations on the Feeling of the Beautiful and Sublime*, he saw the difference between the black and white races of man as so fundamental regarding mental capacities that "a clear proof that what [a Negro] said was stupid" was simply that "this fellow was quite black from head to foot."²²³

²¹² IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 5 (1990).

²¹³ See *supra* text accompanying notes 175-200.

²¹⁴ See CHARLES W. MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 107 (1998).

²¹⁵ MARGALIT, *supra* note 189, at 104.

²¹⁶ *Id.*

²¹⁷ See MILLS, *supra* note 214, at 106-07, 152-55.

²¹⁸ See *id.* at 108-09.

²¹⁹ See ROBERT L. HAYMAN, JR., *THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW* 1-26 (1998).

²²⁰ See MILLS, *supra* note 214, at 108-09.

²²¹ See *id.* at 6-7, 108-13, 153-54.

²²² See ROGER J. SULLIVAN, *AN INTRODUCTION TO KANT'S ETHICS* 15-16, 32, 70-71, 76-77, 140 (1994).

²²³ IMMANUEL KANT, *OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME* 111-13 (John T. Goldthwait trans., 1960) (1763).

In Kant's later essay, *On the Different Races of Man*, he articulated a theory of racial makeup in which racial heredity also determined intelligence and the capacities for human development.²²⁴ Indeed, the totality of Kant's work over forty years of lecturing demonstrated his embrace of a "natural color-coded racial hierarchy" of, from top to bottom, "white Europeans, yellow Asians, black Africans, and red Americans, with corresponding differential capacities for moral educability."²²⁵ For Kant, Europeans are self-starters, Asians cannot grasp abstract concepts, Native Americans are hopeless, and "Africans can at least be morally educated as slaves and servants, with the help of a split bamboo cane," which is needed for their moral education because of "the thickness of their skins."²²⁶ Blacks can accordingly "be denied full humanity since full and 'true' humanity accrues only to the white European."²²⁷

While conscious attitudes such as those expressed by Kant can be illuminating in exploring the subpersonhood idea, they are not necessary. The central component of the idea is that members of a dominant group behave *as if* members of a subordinated group are subhuman.²²⁸ The virtue of the idea is that it makes visible the ways that a society of de jure equality involves a de facto caste system—one in which limited resources and mechanisms are made available to enforce antidiscrimination laws, judicially embraced rights are evaded by narrow constructions of precedent, continuing cultural and financial hardships from the period of de jure discrimination are ignored, and the dominant group's perspectives on the proper interpretation of constitutional provisions prevail.²²⁹ Additionally, the subpersonhood idea exposes the ways in which the abstract, raceless, colorless persons of Kantian ethics and law are really "concrete, raced, white persons [who] will . . . relate to another with reciprocal respect as moral equals" but will not show the same respect toward members of other

²²⁴ See Immanuel Kant, *On the Different Races of Man*, in RACE AND THE ENLIGHTENMENT: A READER 38-48 (Emmanuel Chukwudi Eze ed., 1997); MILLS, *supra* note 214, at 73 (characterizing Kant's essay); GEORGE L. MOSSE, TOWARD THE FINAL SOLUTION: A HISTORY OF EUROPEAN RACISM 31 (1978) (summarizing Kant's essay thusly: "Racial make-up becomes an unchanging substance and the foundation of all physical appearance and human development.").

²²⁵ MILLS, *supra* note 214, at 73.

²²⁶ *Id.* at 73-74.

²²⁷ Emmanuel C. Eze, *The Color of Reason: The Idea of Race in Kant's Anthropology*, in ANTHROPOLOGY AND THE GERMAN ENLIGHTENMENT: PERSPECTIVES ON HUMANITY 200, 221 (Katherine M. Faull ed., 1995).

²²⁸ See MARGALIT, *supra* note 189, at 108-12. Consequently, you can be treated as subhuman even if your oppressors harbor you no conscious ill will. See *id.*

²²⁹ See MILLS, *supra* note 214, at 107.

racism.²³⁰ Furthermore, the social contract can be understood as a racial contract, one inferred from actual social practices rather than from abstract theories, a contract in which whites informally agree to categorize non-whites as having an inferior moral and civil status.²³¹ In short, the subpersonhood idea exposes the many ways that our practices fall short of our publicly stated ideals.

In the Fourth Amendment area, the elements of subpersonhood are evident everywhere. Consent searches and quality of life policing are used disproportionately against African Americans.²³² How the "reasonable person" would behave or feel during interactions with the police is in effect judged from the perspective of the middle-class white person expecting police protection rather than the poor person familiar with police abuse.²³³ Police racial animus is deemed irrelevant to Fourth Amendment reasoning.²³⁴ While animus is still relevant to proving a Fourteenth Amendment equal protection violation, the standards of proof even to obtain discovery in such cases are so high as to render relief highly unlikely.²³⁵ Poor suspects, again disproportionately racial minorities, rely on underpaid lawyers in overcrowded courts to uncover police wrongdoing and combat police abuse.²³⁶ Moreover, judicial doctrine leaves the police substantial discretion regarding their conduct in many areas.²³⁷ Police are exquisitely sensitive to political considerations and understand that the use of aggressive tactics in middle class white neighborhoods would evoke widespread outrage.²³⁸ The message they receive, according to some commentators, is that their job is to subdue the rowdier elements of the underclass while protecting the property of the overclass.²³⁹ "By affording criminal suspects substantial constitutional protections in theory," however, "the Supreme Court validates the results of the criminal justice system [in practice] as fair."²⁴⁰ The costs of the system fall largely on the poor, the

²³⁰ *Id.* at 108 (emphasis omitted).

²³¹ See CHARLES W. MILLS, THE RACIAL CONTRACT 11 (1997); Taslitz, *Contract of Mutual Indifference*, *supra* note 150, at 1288-1303.

²³² See COLE, *supra* note 37, at 8.

²³³ See TASLITZ & PARIS, *supra* note 30, at 438-49.

²³⁴ See *id.* at 422-24 (discussing *Whren v. United States*, 517 U.S. 806 (1996)).

²³⁵ See *id.* at 443-45 (discussing *United States v. Armstrong*, 517 U.S. 456 (1996)).

²³⁶ See COLE, *supra* note 37, at 63-65, 76-95.

²³⁷ See generally Maclin, *Vagueness Doctrine*, *supra* note 127.

²³⁸ See COLE, *supra* note 37, at 26-27, 54-55.

²³⁹ See BOUZA, *supra* note 130, at 13.

²⁴⁰ COLE, *supra* note 37, at 8.

minorities, and the disenfranchised, ensuring continued public support for crime control measures.²⁴¹

The subpersonhood idea does more, however, than highlight systemic inequalities. It is a lens through which stories can be told to build empathy among receptive members of the majority. That empathy does more than encourage equal treatment. It enables the dominant group to understand the true nature of the interests at stake.²⁴² Those aligned with the power of the majority at one time and place may be its victims under other circumstances.²⁴³ A legal doctrine protective of the less privileged can in other circumstances help the more privileged. The interests in privacy, property, and free movement protected by the Fourth Amendment serve critical functions in a democratic society.²⁴⁴ Individualized suspicion and warrant requirements protect those functions.²⁴⁵ A middle class white person victimized by unjustified warrantless searches and seizures is also denied his equal humanity. Understanding what behaviors by the state constitute some as subpersons helps us all better to understand what practices are needed to define our own full humanity.

Finally, examining history can serve the same moral function as does studying current social practices in highlighting how we fall short of our moral ideals. History can also reveal repeating patterns, uncover intergenerational grievances and depths of feeling, and expose moral controversies whose resolution led to new law, thus informing moral sensibilities in a way that a concentration on current social practices alone cannot.²⁴⁶ Constitutional historian and political theorist David Richards,

²⁴¹ See *id.* at 8-9, 20-21.

²⁴² See MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE*, at xvi, 72-78 (1995) (arguing that stories promote empathy and thus aid the moral imagination); Taslitz, *Contract of Mutual Indifference*, *supra* note 150, at 1362-68 (noting that a favored abolitionist tactic was telling stories of slave suffering, hoping thereby to awaken whites' slumbering moral conscience).

²⁴³ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2286-88.

²⁴⁴ See Taslitz, *Twenty-First Century*, *supra* note 1 (privacy); Maclin, *Right to Locomotion*, *supra* note 51 (freedom of movement); Yeager, *supra* note 51 (property).

²⁴⁵ Cf. Taslitz, *Slaves No More!*, *supra* note 147 (arguing Fourth Amendment, properly understood, promotes an informed and active citizenry); Maclin, *Central Meaning*, *supra* note 102, at 201 ("[T]he central meaning of the Fourth Amendment is distrust of police power and discretion," as expressed in the warrant and probable cause requirement.).

²⁴⁶ See DAVID HARLAN, *THE DEGRADATION OF AMERICAN HISTORY* (1997) (constituting an extended argument that one of the primary functions of history is to inform modern moral judgments); MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* (2000) (providing a superb illustration of each of the points noted in text on how history adds to what we can learn from studying current social practices).

drawing on the teachings of Enlightenment social contract philosopher John Locke, put the point this way:

Locke had taught . . . [Americans] . . . that a critical analysis of history could often clarify the ways in which corrupt abuses of power had subverted the very intellectual, moral, and political foundations of recognizing, let alone implementing, the inalienable rights of human nature. Such analysis could afford invaluable historical instruction in the need for political and constitutional principles protecting against such corruption.²⁴⁷

The history of search and seizure practices during slavery and the incarceration of Japanese-Americans in concentration camps paired with the seizure of their property during World War II are just two of the most infamous and familiar examples among many—the implications of which I have detailed elsewhere—that serve to illuminate the ways in which “corrupt abuses of power” subvert the recognition and implementation of the American conception of human rights.²⁴⁸

B. SOCIAL AND HISTORICAL PRACTICES ESTABLISH RELIANCE ON EXPECTATIONS THAT SHOULD BE FRUSTRATED ONLY FOR SUBSTANTIAL REASONS

Social practices often create expectations upon which many people rely. Frustrating those expectations without good reason is unfair.²⁴⁹ For example, Americans are comfortable using public restrooms located in movie theatres, restaurants, or parks.²⁵⁰ That comfort stems from their expectation that no third parties’ eyes will intrude upon the privacy of the bathroom stall.²⁵¹ Absent that expectation, some people might, where nature permitted, postpone the bathroom visit until reaching home, or preemptively pay such a visit before going to the restaurant or movie

²⁴⁷ David A. J. Richards, *Constitutional Liberty, Dignity and Reasonable Justification*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 73, 75 (Michael J. Meyer & William Parent eds., 1992).

²⁴⁸ See Taslitz, *Slaves No More!*, *supra* note 147 (recounting search and seizure practices under slavery); Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2302-16 (examining Fourth Amendment implications of the Japanese-American internment). When I discuss principles here, I need not distinguish between the universalistic concept of respect I have applied here and an American concept of respect because I believe that both are the same. However, as I will soon describe, the *application* of these general principles to modern America does require an inquiry into distinctly American historical and current social practices. See *infra* Part III.C; cf. RICHARD H. KING, *CIVIL RIGHTS AND THE IDEA OF FREEDOM* (1992) (arguing that the history of the Civil Rights Movement shows that it was part of a larger struggle for African American self-respect).

²⁴⁹ See TUNICK, *supra* note 201, at 155-58.

²⁵⁰ See *id.* at 156.

²⁵¹ See *id.*

theatre, or reduce or eliminate their public activities altogether, whenever possible. Frustration of this expectation is certainly perceived as an invasion of our humanity: "If one wants to find assured privacy in our culture, one flees to the bathroom [I]t symbolizes utmost privacy. Intrusion into the bathroom symbolizes violation of the private sphere of the person."²⁵² For this reason, many courts have repeatedly declared it impermissible for officers to peer into closed stalls.²⁵³

In another example, the United States Supreme Court recently held that a person has a reasonable expectation of privacy in the heat emanating from his home.²⁵⁴ Accordingly, the Court held that police use of a thermal imaging device to detect high levels of heat—which are often associated with the use of high-intensity lamps to grow marijuana—constituted a search, thereby requiring compliance with the Fourth Amendment. The Court grounded its decision in a newly articulated principle. This principle recognized a reasonable privacy expectation whenever police use technology that is "not in general public use" to "explore details of [a] home that would previously have been unknowable without physical intrusion"²⁵⁵ This principle seems rooted in the idea that the Court should not easily countenance violation of settled expectations.²⁵⁶

²⁵² CARL D. SCHNEIDER, SHAME, EXPOSURE, AND PRIVACY 72 (1977); cf. Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOLOGY 1, 89 (1989) ("[O]ur society demands privacy for evacuation and nudity.").

²⁵³ See, e.g., *Britt v. Super. Ct. of Santa Clara County*, 374 P.2d 817 (Cal. 1962); *Ward v. State*, 636 So. 2d 68 (Fla. Dist. Ct. App. 1994); *Brown v. State*, 238 A.2d 147 (Md. Ct. Spec. App. 1968); *State v. Bryant*, 177 N.W.2d 800 (Minn. 1970). But see *United States v. Billings*, 858 F.2d 617 (10th Cir. 1988) (officer's looking through the gap between the floor and bottom of the stall door upheld); *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965) (park worker's looking through a ceiling hole into a public restroom stall upheld).

²⁵⁴ *Kyllo v. United States*, 533 U.S. 27 (2001).

²⁵⁵ *Id.* at 40.

²⁵⁶ The Court's position can fairly be read as this: At the time of the framing, obtaining any information regarding activities taking place within the home would have been considered a search. See *id.* at 34 ("This [holding] assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."). That expectation continues today, its power and depth demonstrated by its long historical roots. See *id.* ("[I]n the case of the search of the interior of homes—the prototypical . . . area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists . . ."). There was, in the Court's view, no good reason to violate this settled expectation. See *id.* ("To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.").

A distinction must be made among what degree of privacy people want, what they expect, and what they believe they have a right to expect.²⁵⁷ The Court often adopts rules inconsistent with, and eschews serious examination of, most people's expectations or desires about their privacy.²⁵⁸ Thus there is at least some empirical support for believing that most Americans place a significantly higher weight on their privacy interests in their bank accounts and their conversations with trusted employees, such as secretaries and chauffeurs, than does the Court.²⁵⁹ The Court finds *no* reasonable privacy expectation in bank account information or conversations with third parties—even trusted ones—who may turn out to be undercover police agents.²⁶⁰

History can shed light both on the depth of current social expectations and whether a sense of their right to continuance is likely to persist in the face of contrary government action.²⁶¹ American culture has long had as one of its defining features a commitment to mobility.²⁶² Geographical mobility—the right to move for a better job or a different lifestyle, to drive to visit nearby friends, to obtain better medical care or access to a better school system—is closely linked to Americans' sense of their entitlement to struggle for social and economic mobility.²⁶³ The institution of a national pass system to move or drive from one county to another would therefore engender massive coercion to achieve compliance.²⁶⁴

Expectations both about how things are and how they should be can vary among groups. Relatively few middle class whites expect to be stopped and questioned on the street. For young black males of all social classes, however, the opposite expectation may hold.²⁶⁵ Yet these same

²⁵⁷ See TUNICK, *supra* note 201, at 153-54.

²⁵⁸ See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727 (1993) (finding some wide differences between public's and the Court's designation of activities in which privacy is seen as reasonably expected).

²⁵⁹ See *id.* at 740-41.

²⁶⁰ See TASLITZ & PARIS, *supra* note 30, at 116-20 (summarizing case law).

²⁶¹ See *supra* note 256 (illustrating this point in *Kyllo v. United States*, 533 U.S. 27 (2001)).

²⁶² See generally JAMES J. JASPER, *RESTLESS NATION: STARTING OVER IN AMERICA* (2000) (providing book-length defense of this point); JOHN HARMON MCELROY, *AMERICAN BELIEFS: WHAT KEEPS A BIG COUNTRY AND A DIVERSE PEOPLE UNITED* 60-92 (1999) (similar chapter-length defense).

²⁶³ See sources cited *supra* note 262.

²⁶⁴ See TUNICK, *supra* note 201, at 197 ("[S]ome existing understandings are so entrenched that to implement radically different practices would require massive coercion.").

²⁶⁵ See TASLITZ & PARIS, *supra* note 30, at 438-39.

black males may be incensed by such stops, believing that they have a right to expect more. The degree of insult they feel is informed by their understanding of the history of slavery, Jim Crow laws, and modern institutional discrimination, as well as by current life experience.²⁶⁶

Edmund Burke captured well the sense of unfairness that stems from inadequately justified violations of expectations:

When men are encouraged to go into a certain mode of life by the existing laws, and protected in that mode as a lawful occupation—when they have accommodated all their ideas, and all their habits to it—when the law had long made their adherence to its rules a ground of reputation, and their departure from them a ground of disgrace and even of penalty—I am sure it is unjust in legislature, by an arbitrary act, to offer a sudden violence to their minds and to their feelings; forcibly to degrade them from their state and condition, and to stigmatize with shame and infamy that character and those customs which before had been made the measure of their happiness and honour.²⁶⁷

Here Burke is talking about frustrating expectations of what is rather than what should be. But his ruminations are equally applicable to the latter context. Whites expect to move freely about city streets unmolested by the police. For this very reason, blacks believe that they too should be similarly treated, though they expect otherwise.²⁶⁸ Nevertheless, if they are stopped without cause, they feel degraded and stigmatized “with shame and infamy” by an “arbitrary act . . . [doing] sudden violence to their minds and . . . their feelings.”²⁶⁹

C. SOCIAL AND HISTORICAL PRACTICES DEFINE WHAT “TREATMENT” IS ILL-FITTING

1. *Hard-to-Determine Social Meanings and Unfit Treatment*

Respect for others, I have explained, requires treating them consistently with their status as human beings. But when does “treatment”

²⁶⁶ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 156-66 (discussing profiling); see generally GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002) (discussing historical and social-psychological roots of black stigmatization in American society); DEBORAH MATHIS, *YET A STRANGER: WHY BLACK AMERICANS STILL DON'T FEEL AT HOME* (2002) (discussing causes and examples of black awareness of continuing racial stigmatization and white blindness to the same phenomenon).

²⁶⁷ EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 328 (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790).

²⁶⁸ See *supra* note 62 and accompanying text (reviewing empirical data on African American conceptions of the police); Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 134-43 (discussing African American attitudes toward, and meaning of flight from, the police).

²⁶⁹ See BURKE, *supra* note 267, at 171.

meet this test? Whether treatment is disrespectful or not turns on the action's meaning. But this meaning

need not coincide with what an observer of the action happens to infer from the action, nor with the actual beliefs of the actor. The meaning of what we do, like the meaning of what we say, is to be distinguished from what our hearers infer, and from our own beliefs. If I treat you as untrustworthy when you are not, I may do you an injustice even if it is the case that I do not believe you to be untrustworthy.²⁷⁰

This does not mean that actual beliefs are irrelevant. When both the actor and the recipient consciously understand an action as demeaning, that is generally a fair way to understand the act.²⁷¹

The harder case occurs when the actor intends no insult, but the recipient perceives one. In such a situation, judges must choose one person's meaning over another person's understanding. A still harder case arises when neither the actor nor the recipient consciously perceives an insult but most of society does. Alternatively, neither the parties nor society as a whole may perceive an insult, but some social sub-group does. Again, judges must choose whose meaning controls.

Making this choice requires understanding the two different harms of stigmatizing actions: first, they assault each person's self-respect; second, they brand each such individual with a sign of her inferiority and outcast status to others.²⁷² Both harms, as relevant here, commonly stem from the message that the person's unworthiness is rooted in her membership in a degraded social group. Because the individual is stigmatized for belonging to the group, an insulting action directed at the individual will be perceived by other group members as also degrading them. Other group members, who are not the immediate object of the insulting action, thus experience it as also degrading them.²⁷³ Comprehending the nature of both harms therefore necessitates exploring social practices, both those widely shared in society and those instead characteristic primarily of the subordinate or the dominant groups involved. That exploration will also shed light on the likely understandings of the particular individuals involved. Nevertheless, looking to social and sub-group attitudes still does not tell us which understandings should govern where they conflict.

²⁷⁰ CUPIT, *supra* note 180, at 15.

²⁷¹ See, e.g., Taslitz, *Racist Personality*, *supra* note 60, at 758-65 (describing why intentional infliction of bodily harm motivated by racist reasons is best understood as creating a group-subordinating message that is an independent harm from any bodily pain or injury).

²⁷² See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351 (1987).

²⁷³ Cf. Taslitz, *Racist Personality*, *supra* note 60 (making similar point in the context of hate crimes).

2. Subconscious Meanings As Part of a Possible Solution

One possible solution is to look to subconscious meanings. Indeed, there is a growing literature that establishes that racial, gender, and ethnic bias often operate at the subconscious level.²⁷⁴ People who ardently believe in racial equality may still consistently behave in ways that devalue members of certain races. For example, there is much evidence that juries are more likely to impose the death penalty where crime victims are white than where they are black.²⁷⁵ Randall Kennedy calls this phenomenon "racially selective empathy": "the unconscious failure to extend to [blacks] the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to [whites]."²⁷⁶

The same well-meaning egalitarians may make decisions based upon biased prototypes, such as believing that only certain types of men are likely to rape or that black men are dangerous.²⁷⁷ Like devaluation, prototypical reasoning can proceed at the subconscious level, based upon deeply engrained stereotypes.²⁷⁸ Because such stereotypes can operate subconsciously, and in a fashion directly opposing an actor's conscious beliefs, it is particularly difficult to identify the mental process at work or to correct it. Yet, it continues to manifest itself in behavior that stigmatizes subordinate groups and deprives them of equal access to political, economic, and symbolic resources.²⁷⁹

That stigmatization arises from the culture's widespread understanding of the action's meaning, even if that understanding is subconscious.²⁸⁰ An action's meaning derives from this long-term, pervasive association with certain thoughts or feelings.²⁸¹ That association leads to the internalization

²⁷⁴ See, e.g., JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COST OF BEING BLACK IN AMERICA* (1997); AARON T. BECK, M.D., *PRISONERS OF HATE: THE COGNITIVE BASIS OF ANGER, HOSTILITY, AND VIOLENCE* (1999); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Deevaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); TASLITZ, *RAPE AND CULTURE*, *supra* note 65.

²⁷⁵ See Chamallas, *supra* note 274, at 761.

²⁷⁶ Randall L. Kennedy, *McKlesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1420 (1988) (citing Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976) (citations omitted)).

²⁷⁷ See Chamallas, *supra* note 274, at 778-89.

²⁷⁸ See *id.*

²⁷⁹ See *id.*; ARMOUR, *supra* note 274, at 68-77.

²⁸⁰ See Lawrence, *supra* note 272, at 324 (making this point); ROBERT E. HASKELL, *BETWEEN THE LINES: UNCONSCIOUS MEANING IN EVERYDAY CONVERSATION* 205-30 (1999) (describing psychological processes at work for conveying racist stigma in everyday conversation).

²⁸¹ See Lawrence, *supra* note 272, at 363.

of the thoughts or feelings.²⁸² If that internalization is sufficiently widespread, it will become expressed in a system of social symbols or meanings not easily changed by civil rights laws.²⁸³ "The feelings may be repressed from consciousness, but so long as the symbols they have created retain their meaning, the feelings continue to exist and to shape behavior."²⁸⁴

Obstacles to proving the existence of stigmatizing meanings based on subconscious processes will be large. Dominant groups may sincerely and righteously deny that such processes are at work.²⁸⁵ Alternative plausible explanations to stereotypical thinking may be offered. Stereotypes may be acknowledged but claimed to be supported by empirical evidence, with any stigmatized meaning denied. Thus, an officer may question more young, African American males than white males about purchasing crack cocaine, arguing that crack use is much higher among the former group than the latter.²⁸⁶ Finally, apart from any problem of proof, it may genuinely be the case that the conscious or subconscious understandings at work may differ between dominant and subordinate groups or may be so diverse as to deny categorization of any shared understanding whatsoever.²⁸⁷

Professor Charles Lawrence has proposed circumventing the proof problem by approaching the quest for cultural meaning as an act of interpretation of human behavior as a social text, that is, studying people in much the same way that a literary critic studies great novels.²⁸⁸ Meanings do not exist "out there" as some objectively definable fact about the physical world, such as whether the color of a traffic light was red or green when a car entered an intersection. Meanings are plausible constructions crafted from social context, values, debate, and common sense.²⁸⁹ Social scientists frequently engage in such interpretive enterprises concerning human behavior, distinguishing between "surface" and "depth"

²⁸² See *id.*

²⁸³ See *id.*

²⁸⁴ *Id.*

²⁸⁵ See ARMOUR, *supra* note 274, at 119-53 (describing this process at work concerning the unconscious impact of race at trials); Taslitz, *Patriarchal Stories I*, *supra* note 178, at 404-33 (describing psychological processes that lead even feminist jurors to routinely acquit alleged rapists).

²⁸⁶ Professor Jody Armour describes this sort of argument as made by the "intelligent Bayesian racist." See ARMOUR, *supra* note 274, at 35-60.

²⁸⁷ See *supra* note 62 (summarizing data on majority versus minority attitudes toward the police as an illustration).

²⁸⁸ See LAWRENCE, *supra* note 272, at 334.

²⁸⁹ See Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 12-25 (1998) [hereinafter Taslitz, *Feminist Approach*].

hermeneutics. "Surface" hermeneutics refers to a person's or group's overt messages.²⁹⁰ "Depth" hermeneutics refers to concealed messages. Messages may be concealed because: we are unaware of all the messages that we send, we seek to "pretty them up," we give oversimplified accounts, or we do not trust the observer.²⁹¹ Thus the combination of male lawyers sexually harassing female lawyers in the same firm, frequently mistaking them for secretaries, and turning social events with them into beer-drinking and sports trivia contests was most plausibly understood by one social scientist as sending the "deep" message: "We have higher social status than you; you must, therefore, not try to rise above your station."²⁹² This same sort of hermeneutic reasoning can be applied to broader cultural institutions.

3. *Plessy and Brown: Struggling to Choose Which Group's Meaning Prevails*

Professor Lawrence's interpretive turn has much to commend it, both standing on its own and as a supplement to social scientific empirical and theoretical work on the subconscious, such interpretation being helpful in identifying the fairly understood meanings of allegedly insulting actions. Yet he concedes that where meanings given to the same action are diverse among subgroups, it is easiest simply to declare that no one group's view prevails, rather than choosing which among the competing interpretations dominates.²⁹³ By default, the law cannot then treat a challenged action as stigmatizing where only one subgroup finds it so.

More recently, Professors Tom Tyler and John Darley have similarly declared that where disadvantaged minorities and middle class whites disagree over the question of how intrusive of privacy a police search or seizure is, "it would be problematic to bring the law into line with the values of one group, as opposed to another."²⁹⁴ They offer no explanation for this conclusion, however, apparently seeing it as self-evident. I disagree with this refusal to choose. Examining the high Court's decisions in *Plessy*

²⁹⁰ See *id.* at 67 (citing PAUL DIESING, *HOW DOES SOCIAL SCIENCE WORK?* 29-54 (1991)).

²⁹¹ See *id.*

²⁹² See JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* 17-22, 106-39, 176-87 (1995); Taslitz, *Feminist Approach*, *supra* note 289, at 66-67 (summarizing Pierce's work).

²⁹³ See Lawrence, *supra* note 272, at 379 (arguing that where governmental action may be given different meanings by different subcultures, the action should be viewed as racially discriminatory "only when the evidence indicates that the racial understanding will be widely shared within the predominant culture," not simply in the subordinate culture).

²⁹⁴ Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account When Formulating Substantive Law*, 28 *HOFSTRA L. REV.* 707, 727-28 (2000).

*v. Ferguson*²⁹⁵ and *Brown v. Board of Education*²⁹⁶ lays the groundwork for explaining why.

In *Plessy*, decided during May 1896, the Supreme Court upheld against Thirteenth and Fourteenth Amendment challenges Louisiana's law requiring non-streetcar railroad lines to provide "equal but separate accommodations for the white and colored races." Albion Tourgee, Homer Plessy's lead counsel,²⁹⁷ expressly addressed the law's stigmatizing meaning in his brief to the Court on Plessy's behalf:

[A] discrimination intended to humiliate or degrade one race in order to promote the pride of ascendancy in another, is not made a "police regulation" by insisting that the one will not be entirely happy unless the other is shut out of their presence. Haman was troubled with the same sort of unhappiness because he saw Mordecai the Jew sitting at the Kings gate. He wanted a "police regulation" to prevent his being contaminated by the sight. He did not set out the real cause of his zeal for the public welfare: neither does this statute. He wanted to "down" the Jew: this act is intended to "keep the Negro in his place." The exemption of nurses shows that the real evil lies not in the color of the skin, but in the relation the colored person sustains to the white. If he is a dependent, he may be endured: if he is not, his presence is insufferable²⁹⁸

Justice Henry Billings Brown, writing for the Court majority, squarely rejected Tourgee's argument:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.²⁹⁹

Justice Brown's response may simply be mendacious, the stigmatizing intent of the law being quite clear to him.³⁰⁰ Alternatively, he may be self-

²⁹⁵ 163 U.S. 537 (1896).

²⁹⁶ 347 U.S. 483 (1954).

²⁹⁷ See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 113 (1992).

²⁹⁸ Brief for Plaintiff in Error at 19, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210), reprinted in 13 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* at 46 (Phillip B. Kurland & Gerhard Casper eds., 1975). See also KULL, *supra* note 297, at 120 (discussing the Tourgee brief).

²⁹⁹ *Plessy*, 163 U.S. at 551. In *Strauder v. West Virginia*, 100 U.S. 393 (1880), the Court had earlier struck down a state law excluding blacks "from legal society." *Plessy* arguably did not retreat from that principle but relied on the dubious psychological and sociological minor premise that segregation did not carry such an implication. See Charles Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L. J.* 421, 422 (1960) (first making this point); ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW & SOCIAL EQUALITY* 57-76 (1996) (amplifying this point and exploring its implications).

³⁰⁰ Whether conceding his own dishonesty or merely gaining understanding with the hindsight offered by age, Justice Brown did later note that *Plessy* dissenter Justice Harlan "assumed what is probably the fact, that the statute had its origin in the purpose, not so much

deluding, the dishonoring meaning operating for him and perhaps many of Louisiana's whites at a less-than-conscious level. Indeed, a racist might easily deny such intent to himself, reasoning that no law is necessary to degrade a self-evidently inferior race. Another possibility is that Justice Brown was a poor hermeneuticist, not understanding the meaning widely shared among Louisianans. The express text of his opinion offers a different explanation: his belief that even if the "colored race" felt stigmatized, their feelings were irrelevant.³⁰¹

Some sixty years later, in *Brown v. Board of Education*,³⁰² the Court adopted a very different view of the role of group stigma. There, the Court unanimously held that forced segregation of black and white public school children violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In reaching this conclusion, the Court assumed that all "tangible" factors—buildings, curricula, teacher salaries—were equal or being equalized in both black and white classrooms. Nevertheless, the Court concluded that the law's sanctioning of racial segregation was "usually interpreted as denoting the inferiority of the Negro group."³⁰³ In particular, the Court relied on social science studies supporting the Kansas trial court's findings that segregation had a detrimental impact on the educational and mental development of black children.³⁰⁴ This detrimental impact stemmed from black pupils' segregation "generat[ing in them] a feeling of inferiority as to their status in the community."³⁰⁵

to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied [by] or assigned to white persons." H.B. Brown, *The Dissenting Opinions of Mr. Justice Harlan*, 46 AM. U. L. REV. 321, 338 (1912).

³⁰¹ Justice Brown's reasoning is ambiguous, perhaps intentionally so, in yet another way. His language may be read as denying that the Act was intended to stigmatize African Americans by reason of their skin color. But his language may also be read as not so much denying this intention as ignoring any ill effects it has on the African American community or its individual members. "No one can make you feel inferior but yourself" seems to be the message. The blame, if any, for harm resulting from the Act therefore falls on the weakness or foolishness of "the colored race," who impose on themselves the "badge of inferiority." The blameworthy merit no compassion, and their perspective, experiences, and feelings may therefore be ignored. Brown seems implicitly to say, seemingly unaware of, or unwilling candidly to recognize, the reality that even an expression of indifference toward another group is in itself stigmatizing. See Taslitz, *Contract of Mutual Indifference*, *supra* note 150, at 1284-1303 (explaining the role of majority indifference in subordinating minority status).

³⁰² 347 U.S. 483.

³⁰³ *Id.* at 494 (quoting the Kansas case trial court).

³⁰⁴ See *id.* at 494 n.11; KULL, *supra* note 297, at 154 (so interpreting *Brown*).

³⁰⁵ 347 U.S. at 494.

Brown's reasoning is notoriously sparse and ambiguous.³⁰⁶ The Court's opinion never openly suggested that the segregation laws were intended to stigmatize black children. Rather, the Court emphasized blacks' own perception of a stigmatizing message.³⁰⁷ That perception was not always a conscious one. Thus, the Court cited studies by Professor Kenneth Clark in which black children were more likely to choose a white doll than a black doll as "'nice' or 'good.'"³⁰⁸ That arguably suggests a feeling of race-based inferiority, but it is unlikely that these children consciously articulated this message to themselves.

Brown does contain some language that could be interpreted as the Court relying upon the stigmatizing messages most plausibly sent by state-imposed segregation rather than upon whether these messages were in fact intended or received.³⁰⁹ But this language pales in comparison to the

³⁰⁶ See KULL, *supra* note 297, at 154 (defending this point). See also WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack M. Balkin ed., 2001) [hereinafter WHAT *BROWN SHOULD HAVE SAID*], where leading academic commentators each take a stab at writing a more complete and persuasive version of the *Brown* opinion.

³⁰⁷ Thus the Court relied in part on its precedent in *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), which required a black student admitted to a white graduate school to be treated like all other students because otherwise "his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession" would be hampered. *Brown*, 347 U.S. at 493 (quoting *McLaurin*, 339 U.S. at 641). Similarly, in the case before the Court, segregation of public school children based on race might, because of the sense of inferior status that it generates in the children, "affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494. Similarly, the trial court finding in the Kansas case, upon which the Supreme Court partly relied, declared that segregation "has a detrimental impact upon the colored children," resulting in a sense of inferiority that "affects the motivation of a child to learn" and "has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated system." *Id.* (quoting Kansas trial court finding). In short, and in direct contradiction to *Plessy*, the *Brown* Court stressed the interpretation made of segregation by its victims and the resulting ill effects on them.

³⁰⁸ See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 43-44 (2001) (describing Kenneth Clark's research). The Court also relied on other social scientists' work supporting conclusions similar to Clark's. See *id.* at 67-69; *Brown*, 347 U.S. at 494 n.11. Whether Clark's studies embodied quality social science is irrelevant to my purpose here: to examine whether the Court's use of those studies constituted a judicial embrace of the meaning given to legal segregation by the subordinate group.

³⁰⁹ For example, the Court emphasized that today education "is the very foundation of good citizenship" and "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown*, 347 U.S. at 493. Taken in isolation, this language could be read to support an equality principle divorced from the meanings that African Americans gave to the practice of segregation. The argument would be that "good citizens" must work and live together with all racial groups, that such racial comity must be part of a normal environment, and that the state must send a message—regardless of its impact on anyone (though we hope

Court's emphasis on the actual feelings of the black children. The Court may, therefore, have sided with the meaning perceived by the subordinate group, finding the dominant group's psychological processes irrelevant, a precise inversion of the position of Justice Brown in *Plessy*.

If this is so, the Court offers no justification for privileging the black community's perceptions, and it was certainly not self-evident to all whites at the time why this should be so.³¹⁰ Moreover, if later social science showed black children to have strong self-esteem, performing well academically despite forced racial segregation, the opinion's rationale would be undermined.³¹¹ Similarly, if the black community became so fiercely nationalistic as to prefer racial separation, even to ask for it, so that they perceived no insult in legal segregation—an admittedly unlikely event—that too would undermine the opinion.

But there is another way to understand *Brown* that can both justify privileging black perspectives while simultaneously not solely relying on those perspectives to generate meaning. That way, also relevant to the search and seizure issues that this article addresses, begins with the Fourth Amendment's declaration that it is the right of "the people" to be free from unreasonable searches and seizures.³¹²

that it has a positive impact on all groups)—that treating persons of all races as equally belonging to the same overarching group, namely, "Americans," is central to our national cultural values. In short, this interpretation would prohibit racial segregation in education as a matter of political morality. Something like that approach is indeed apparently what really animated the Court's decision. See KULL, *supra* note 297, at 155. See also Jack M. Balkin, *Rewriting Brown*, in WHAT BROWN SHOULD HAVE SAID, *supra* note 306, at 50-53 (describing several commentators trying to rewrite *Brown* to adopt a position more explicitly turning on educational segregation's "social meaning" rather than arguing that *Brown* itself did so and without offering a complete theory of a social meaning stance or its Fourth Amendment implications).

³¹⁰ See PATTERSON, *supra* note 308, at 86-117 (describing white reaction in the aftermath of *Brown*).

³¹¹ See KOPPELMAN, *supra* note 299, at 61-62 (arguing that although discrimination does hurt the self-esteem of some blacks, the "most thorough aggregate studies of self concept among blacks [today] have found that 'personal self-esteem among black populations [is] either equal to or greater than that among whites'") (quoting Judith R. Porter & Robert E. Washington, *Black Identity and Self-Esteem: A Review of Studies in Black Self-Concept, 1968-1978*, 5 ANN. REV. SOC. 53, 62 (1979)). Koppelman goes on to note, however, that blacks may still suffer a different sort of injury: resentment, tension, anger, distraction from valuable pursuits, and a drain on time and energy. *Id.* at 62. Koppelman agrees as well that many blacks perceive the insult in racial discrimination even if that understanding does not necessarily translate into resulting psychological harm.

³¹² U.S. CONST. amend. IV.

4. Defining "Peoplehood" As the Solution

a. Peoplehood Defined

Numerous definitions have been offered of what it means to be a "people."³¹³ Liberals traditionally tend toward a relatively shallow notion of individuals associating for narrow and wholly instrumental reasons, such as safeguarding property and overseeing the market.³¹⁴ Communitarians define peoplehood by a deeper set of shared beliefs, interests, and values, something hard to find in so diverse a place as the United States.³¹⁵ The liberal conception effectively denies the reality of peoplehood entirely, viewing it as a useful fiction.³¹⁶ The communitarian conception requires a considerable degree of homogeneity and like-mindedness that may unduly undermine individual autonomy.³¹⁷

A more appealing conception has recently been articulated by Jed Rubenfeld. He defines a people as individuals' "co-existence, *over time*, under the rule of a given legal and political order."³¹⁸ An analogy to the problem of individual identity clarifies the significance of Rubenfeld's stress on the element of time. A person who is ten years old today will, in twenty years, have different attitudes, beliefs, goals, and desires. He may have fewer organs, such as the removal of his gall bladder, may be fatter or thinner, more or less energetic. Even at the molecular level, the precise molecules constituting his body will have changed. Yet he and others will still think of him as the same person, as "Hank Jones" and not suddenly "Clay Smith."³¹⁹

What explains this sense of individual continuity is the narrative coherence of human lives. We each tell ourselves stories that link together

³¹³ See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 45-48 (2001).

³¹⁴ See *id.* at 148.

³¹⁵ See *id.* at 149-50 ("[L]inguo-nationalists" hold that "in order to be a people, [persons] have to share a common way of looking at the world and at themselves, a shared set of values, attitudes, understandings, and interests."). The danger in such a vision, of course, is that it promotes homogeneity, "liberalism's dystopia." *Id.* at 150-51. But see R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 42-56 (2001) (arguing that the boundaries are blurring between liberalism and communitarianism so that it is now possible to speak of communitarian-liberals or liberal communitarians).

³¹⁶ See RUBENFELD, *supra* note 313, at 145-49.

³¹⁷ See *id.* at 148-51. I exclude from this criticism those communitarian theorists who have fused their ideas with liberal insights. See DUFF, *supra* note 315, at 42-60.

³¹⁸ RUBENFELD, *supra* note 313, at 153 (emphasis added).

³¹⁹ See *id.* at 131-42 (making similar point).

the different phases of our lives.³²⁰ Our sense of self largely consists of these stories.³²¹ "Our plannings, our rememberings, even our loving and hating, are guided by narrative plots."³²² Narratives, of course, move through time, having a beginning, middle, and an end.³²³ One cannot, therefore, be a person at a single moment in time.³²⁴ To be a person is to be the combination of what you were, are, and will be.³²⁵ The narrative nature of personhood does not make it a fiction. The narrative is who you are.³²⁶

So it is with "a people." Although the precise persons constituting a people change through death, birth, immigration, and emigration, the people live on. Although the goals, activities, and beliefs of people change, we are still the American people. We are defined by the story of our past, present, and future.³²⁷

Yet this move from the individual to the people seemingly raises problems. Diversity among members of a nation means that many stories will abound. Even where there is agreement over events and action, there will be disagreement over their interpretation.³²⁸ In what sense is there a

³²⁰ See Taslitz, *Feminist Approach*, *supra* note 289, at 34-46.

³²¹ See *id.*; JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 63-89 (2002) (discussing the narrative creation of the self).

³²² See Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology*, in *NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT* 3, 11 (Theodore R. Sarbin ed., 1986).

³²³ RUBENFELD, *supra* note 313, at 137; accord BRUNER, *supra* note 321, at 15 ("[W]e know that narrative in all its forms is a dialectic between what was expected and what came to pass.").

³²⁴ See RUBENFELD, *supra* note 313, at 137.

³²⁵ *Id.*

³²⁶ See *id.* Nor does this mean that the narrative can be based on fictions. Though our memories are partly constructed, we do try to create a coherent sense of self—an interpretation of who we are—based on our best beliefs about our own experiences as "out there" facts, such as whether we had a dog as a child, what persons attended our Bar-Mitzvah, and what our grades were like in school. See Taslitz, *Feminist Approach*, *supra* note 289, at 5-6, 12-34 (distinguishing between "out there" facts and interpretive facts). The same sort of analysis is true with "peoplehood": it is defined by a narrative moving over time but is not therefore a fiction. See *infra* Part III.C.4.

³²⁷ See RUBENFELD, *supra* note 313, at 148-59. Two further distinctions should be noted. First, Rubinfeld is discussing what makes "a people," not any particular people. *Id.* at 152. Thus a shared collective narrative is necessary for any people to exist, but the specific narrative told, and even some widely shared qualities and beliefs, might define the "American people." See *id.* at 153. Second, Rubinfeld believes that his observations about peoplehood have implications for interpreting all constitutional provisions. See *id.* at 178-95. Nevertheless, his arguments seem even more apt in the context of a constitutional provision like the Fourth Amendment that explicitly refers to the right of "the people."

³²⁸ See, e.g., Taslitz, *Contract of Mutual Indifference*, *supra* note 150, at 1316-28 (recounting differing interpretations of slavery's meaning between the antebellum, through

common story that unites us as a people? The answer to this question lies in the second part of Rubenfeld's definition of peoplehood: living under the rule of a given legal and political order.

The precise rules of such an order, of course, change over time. What makes it the same legal and political order is a shared set of commitments.³²⁹

Again, an analogy to individual personhood is helpful. A commitment is an enduring normative determination made in the past to govern the future.³³⁰ Commitments give purpose and direction to our lives. Each of us has numerous commitments. Some are initially chosen, while others can at first be imposed on us by circumstances, as happens when we are born into a family.³³¹ "To be a son, in the normative sense . . . is to be committed to certain familial values, to find important aspects of my good in the life and flourishing of this family, to recognize certain obligations to other members of the family."³³²

This son may, out of thoughtlessness or limited abilities, fail fully to honor his commitments to his family. If they are still *his* commitments, however, he will feel guilty about his failures and try to do better next time. But this last point reveals an unusual aspect of commitments: they must be open to constant reflection and occasional change. Their normative force stems from our sense that they are chosen, helping to define us. If we cannot re-evaluate the wisdom of our commitments and accordingly change them, they are no longer chosen, thus no longer ours.³³³ On the other hand, if our commitments change too readily, they are no longer enduring, becoming momentary preferences rather than commitments at all.³³⁴

To make a commitment does not mean to understand all that the commitment entails. Our understanding of what our commitments require necessarily changes over time.³³⁵ The son does not really know what it fully means to be a son until he must care for an aging parent. Indeed that aspect of "son-hood" may never have previously crossed the son's mind.

immediate post-Civil War, South and North).

³²⁹ See RUBENFELD, *supra* note 313, at 154-58. Rubenfeld initially declares that he cannot precisely define "rule" under the same "order" but then describes its characteristics as including the temporal extension of shared commitments. See *id.* at 154-56.

³³⁰ See *id.* at 92.

³³¹ See *id.* at 91-102.

³³² DUFF, *supra* note 315, at 50.

³³³ See RUBENFELD, *supra* note 313, at 96-100.

³³⁴ See *id.* at 96, 100.

³³⁵ See *id.* at 95. Rubenfeld writes that the committed person is "entrained in the task of working out the implications and possibilities of certain engagements he already has with the world." *Id.* at 95.

A legal and political order consists of a people's commitments. As with the son, a people's commitments must endure but may change. And, as with the son, what a people's commitments require may only be realized over time.³³⁶

Diversity among individuals does not preclude this shared commitment. Commitments can be shared by persons who radically disagree about their meaning in one circumstance versus another.³³⁷ If enough individuals are prepared to live under institutions embodying shared legal and political commitments, it is fair to consider them a people despite their interpretive disagreements.³³⁸

Constitutionalism in a democracy is therefore a people's struggle over time to craft and live out its most fundamental commitments, even if they are contrary to the popular will at a given moment in time.³³⁹ Understanding the meaning of a constitutional provision therefore requires exploring both its relevant history and salient current social practices.³⁴⁰ Importantly, commitments derive from passion. Our most important constitutional commitments indeed tend to be enacted "*not in moments of*

³³⁶ See *id.* at 54-58.

³³⁷ See *id.* at 156.

³³⁸ See *id.* This definition of peoplehood thus reconciles commonality with diversity. See *id.* at 158 ("To recognize a people as a subject persisting over time, despite the heterogeneity of its composition, is ultimately no more mystical than recognizing individuals as subjects persisting over time despite the heterogeneity of their composition.").

³³⁹ See *id.* at 183-84. Cf. ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 1-40, 192-98 (1994) (arguing that history matters to help to inform us how we shall constitute ourselves as a people today); DUFF, *supra* note 315, at 59, 69 (arguing that the "common law" is a phrase best understood not as judge-made law but as law that "embodies the shared values and normative understandings of the community," meaning the shared commitments to certain political values). In an analogous argument, Professor George Fletcher argues that the Reconstruction Amendments embodied a recognition that we had moved from being a loose collection of individuals at the founding to being an "organic nation." See GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 57-74 (2001). Rubenfeld would likely argue that we were always one people (Fletcher is inconsistent but seems to use the terms "people" and "nation" interchangeably, see *id.* at 73), whether we realized it or not, because we are defined by who we are, were, and will be. See RUBENFELD, *supra* note 313, at 56-73, 80-88, 158. Both scholars would agree, however, that our current sense of political commitment requires exploring our past, particularly the changes wrought by slavery and Reconstruction. See FLETCHER, *supra*, at 33 ("[A] practice can be become part of the accumulated historical constitution without this being the purpose of those who initiated the practice," as Lincoln's Gettysburg address has become "the preamble to a new order of nationhood, equality, and democracy . . ."); RUBENFELD, *supra* note 313, at 80, 199 ("In any particular nation, this we will have been the product of a history, a constitutional struggle, usually waged at the cost of considerable blood and fortune," as is illustrated by the paradigm case of the struggle against the post-Civil War black codes).

³⁴⁰ See RUBENFELD, *supra* note 313, at 56-73, 80-88, 158.

sober rationality but rather of high political feeling . . ."³⁴¹ This passion is part of what unites us over time. Commitmentarianism "captures the sometimes superior claim of feeling over reason—of an enduring normative passion over day-to-day rationality."³⁴²

Furthermore, the members of a people, like the members of a family, owe obligations to one another.³⁴³ These obligations arise from the people's shared commitments. The political-legal order helps both to express those commitments and to encourage members to fulfill the obligations that they accordingly owe each other.³⁴⁴

b. Implications for Meaning-Making

Now we are in a position to answer the two questions raised by *Brown v. Board of Education*:³⁴⁵ Why privilege one group's meaning concerning respectful treatment over another's, and can appropriate meaning be derived without necessarily resorting solely to proof of the respective group members' *subjective* mental states?³⁴⁶

³⁴¹ *Id.* at 129 (emphasis in original).

³⁴² *Id.* at 94.

³⁴³ Cf. DUFF, *supra* note 315, at 46-48 (describing how members of a liberal political community share obligations to one another, including the duty to respect and encourage diversity); KOPPELMAN, *supra* note 299, at 70 ("Where stigma exists, there is already community—and therefore communal obligations.").

³⁴⁴ See sources cited *supra* note 343.

³⁴⁵ 347 U.S. 483. See *supra* text accompanying notes 296-312 (discussing *Brown*'s importance to this article's thesis).

³⁴⁶ My repeated reference to "one group's views" versus "another group's views" or to an "African American" or "Asian-American" perspective will meet the obvious and all too-familiar objection of essentialism.

I offer several responses. First, how we define each group when addressing particular legal questions is important. Thus, "low-income, young African American males" may (or may not) have very different views on a particular issue from "high income, older African American women." If so, to speak of an "African American perspective" is misleading. But sub-group definition then requires us to offer justifications for why we might, for example, privilege the younger males' views over the older women's. Other times, group sub-division may make no sense at all.

Second, of course there will be a diversity of views within any group, however defined. But that does not prevent our fairly concluding either that a majority of that group's members hold a certain belief, or, alternatively, that the members of one group are more likely than the members of another group to hold that belief. See MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION 5-6 (1998).

Indeed, it would be odd, given the different life experiences of many members of one group from those of another, if there were no *on-average* differences in perspective. See *id.*; ROBIN WEST, CARING FOR JUSTICE 18 (1997). Those claiming no link between group membership and the likelihood of holding certain beliefs or attitudes thus bear the burden of

proving that claim. *See* WEST, *supra*, at 18. This point is all the more true if we distinguish "mere aggregate groups" from those who identify with one another based on a consciousness of shared belonging and solidarity. *See* DAVID INGRAM, *GROUP RIGHTS: RECONCILING EQUALITY AND DIFFERENCE* 52-54 (2000). The former can lead to the creation of the latter, but the latter seek to build solidarity through commonality and are thus more likely to widely share certain attitudes. *See id.*

The level of generality at which we define attitudes similarly affects whether they are sufficiently similar to be seen as shared. Jesse Jackson and Justice Clarence Thomas, two well-known African American figures, disagree both about certain values and their meaning. *See id.* at 59. Nevertheless, they might share a "common perspective accompanied by feelings of corporeal vulnerability and perhaps corporeal alienation," *id.* at 58, in this sense:

[D]espite their different interests and value judgments, both Jackson and Thomas have spoken poignantly about the discrimination and hardship they as blacks have had to endure. In other words, Thomas and Jackson share, along with virtually every African American, a general perspective on race, an understanding unique to blacks of what it is like to grow up as a "black person" in a "white" society.

Id. at 59.

Third, I have spoken for simplicity's sake of one group's perspective prevailing over another's. But numerous alternative outcomes are possible: only part of one group's perspective but none of another's may prevail; or no part of either group's views may win. What a respect-based jurisprudence counsels is to look at the history and current experiences and views of those groups who are, or were, historically most vulnerable to suffering from certain state search and seizure practices.

This listening helps better to inform the eventual normative judgment. Such listening also ensures more adequate representation of under-represented voices in law-creation (including diverse views *within* each group), builds empathy for the plight of others, and prods new and perhaps clearer ways to conceptualize the problems and solutions being considered. *See, e.g.,* FORRELL & MATTHEWS, *supra* note 165, at xvii-xxii, 184-85; WEST, *supra*, at 18-19. But the ultimate result is a normative judgment, including what the best moral/political conception of respect requires.

Professors Caroline A. Forrell and Donna Matthews have notably suggested applying a "reasonable woman standard" to both men and women in a wide array of gender related aspects of law. *See* FORRELL & MATTHEWS, *supra* note 165, at xvii-xxi, 184-85. But they are not defining that standard as an empirical matter, that is, as how most women would view certain questions. *See id.* Rather, the "reasonable woman" is a normative construct embodying the values of respect, personal autonomy, agency, and bodily integrity, *as informed by women's history, experiences, and attitudes.* *See id.* at xiv. Although I argue elsewhere for a more contextual approach to criminal procedure, a "reasonable young African American male" standard will similarly in fact make sense in many areas. *Cf.* TASLITZ & PARIS, *supra* note 30, at 438-39, 443 (illustrating usefulness of "African American" perspectives in defining the reasonable person when distinguishing seizures from voluntary encounters, stops from arrests, and consensual searches from their opposite). Moreover, applying such standards equally to *all* persons can be "transformative and foster meaningful and positive equality." FORRELL & MATTHEWS, *supra* note 165, at xxi.

Finally, minority and majority groups will agree on many issues, or at least there will be reason to believe that they will agree, even though our evidence on the point is limited. But making the effort to discover the existence and reasons for areas of commonality can itself be a worthwhile endeavor.

In short, an essentially normative analysis that is informed by on-average group

First, a case can be, and often has been, made for the American people's being committed by the Reconstruction Amendments to providing heightened protection to certain groups, paradigmatically including African Americans.³⁴⁷ If *Brown* was indeed in part about those amendments' prohibiting state conduct that stigmatizes such groups, then we can fairly derive the principle that we are committed to safeguarding protected groups from state-sanctioned stigma.³⁴⁸ But group members are not protected against all demeaning state actions. At a minimum, however, they are protected against stigma imposed because of their membership in the subordinated group, an arbitrary reason for imposing such a burden.³⁴⁹ They are also only protected if their own sense of stigma results from sound reasons.³⁵⁰ Whether reasons are sound requires exploring in greater depth the nature of our commitments as a people, which in turn requires examining the history that stirred Constitution-altering passions and led to current practices.³⁵¹ The endurance into the present, even if in superficially altered form, of cultural symbols and actions reminiscent of a protected group's history of cultural subordination constitutes a sound reason for group members to experience insult.³⁵² In such a circumstance, deferring to the protected group's interpretation of the meaning of a challenged action makes sense.

But we can go even one step further. The Civil War alerted our polity to the tremendous dangers raised by relationships even resembling that of

experiences and perspectives and in which no single group's views are mandated to prevail (in part or in toto) in any single instance is not fairly characterized as involving a false, homogeneous "essential" group nature. See INGRAM, *supra*, at 57 (defining "essentialist").

³⁴⁷ See BARROW & DIENES, *supra* note 102, at 218-92 (summarizing modern equal protection doctrine); RUBENFELD, *supra* note 313, at 182-84, 190-207 (holding that Civil War and later Black Codes are essential to understanding the core constitutional commitments embodied in the Fourteenth Amendment).

³⁴⁸ See KOPPELMAN, *supra* note 299, at 68-99 (making similar argument). Koppelman argues that all anti-discrimination theorists ultimately ground their arguments in stigma-minimization concepts, albeit different theories emphasizing different points in the process by which stigma does its work: stigma-creation, stigma manifestation in decisionmaking, and stigma internalization into the hearts of those participating in the culture. See *id.* at 97.

³⁴⁹ See William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 65-71 (Michael J. Meyer ed., 1992) (arguing that both the criminal procedure protections of the Bill of Rights and due process protect against arbitrary state-sanctioned contempt and disparagement); KARST, *supra* note 65, at 15-27.

³⁵⁰ This follows from the idea that whether we privilege a group's perspective concerning respect is a normative question. See *supra* text accompanying notes 270-312.

³⁵¹ See *supra* text accompanying notes 314-42 (discussing the role of commitmentarianism in constitutional interpretation).

³⁵² See KOPPELMAN, *supra* note 299, at 68-76; Lawrence, *supra* note 272, at 324, 386.

master to slave.³⁵³ The core benefit to slaveholders and the defining essence of the American variation of slavery as a social institution “were emotional rather than tangible, generating a sense of honor for the master and of dishonor for the slave.”³⁵⁴ As Orlando Patterson has explained:

The real sweetness of mastery for the slaveholder lay not immediately in profit, but in the lightening of the soul that comes with the realization that at one’s feet is another human creature who lives and breathes only for one’s self, as a surrogate for one’s power, as a living embodiment of one’s manhood and honor.³⁵⁵

The harm done by any system that sanctions white identity and worth as rooted in black degradation is so enormous that even a significant risk of its occurrence must be prevented.³⁵⁶ Behavior that creates such a risk, even if unconscious, and even without proof of black understanding of the message of degradation or black psychic pain, must be combated.³⁵⁷ Where there are sound reasons for a protected group to feel insulted, such a risk is present.³⁵⁸ This conclusion offers a basis for re-interpreting *Brown* in the way that Charles Lawrence has, namely as prohibiting the state’s fostering or sanctioning actions or cultural symbols plausibly carrying an unconscious message of black inferiority and subpersonhood.³⁵⁹

Several corollaries and caveats must be noted. First, shared understandings are still relevant. Where dominant and subordinate groups share an understanding of an action as carrying a culturally stigmatizing meaning, no further inquiry seems necessary.³⁶⁰ Where they disagree or proof of majority understandings is scarce, the subordinate group’s interpretation matters both because the harms caused by such perceptions are themselves ones we should strive to reduce (as *Brown* recognized) and because they alert us to the need for inquiry to determine whether there are

³⁵³ KOPPELMAN, *supra* note 299, at 62.

³⁵⁴ *Id.*

³⁵⁵ PATTERSON, *supra* note 153, at 78.

³⁵⁶ See generally JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (2000) (cataloguing these harms).

³⁵⁷ See, e.g., Chamallas, *supra* note 274 (illustrating social harms caused by subconscious psychological processes of group devaluation and prototype bias); Lawrence, *supra* note 272 (similar).

³⁵⁸ Cf. Taslitz, *Racist Personality*, *supra* note 60, at 762-65 (discussing why the mere risk of state-sanctioned or tolerated group stigmatization justifies ethical and legal intervention).

³⁵⁹ See Lawrence, *supra* note 272, at 324, 358-59, 363, 377-79; Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 59-62 (Mari J. Matsuda et al. eds., 1993).

³⁶⁰ Cf. Lawrence, *supra* note 272 (discussing the “cultural meaning” test).

sound reasons for their perceptions.³⁶¹ If they sensibly have or could interpret the challenged practice as insulting, their perspective prevails.

Second, though I have used African Americans as the paradigm group, there are, of course, already other recognized protected groups.³⁶² But that does not necessarily mean that the sphere of protected groups should not grow or that who may count as in need of special protection may not vary with context.³⁶³

Third, the emphasis on sound reasons for insult means that a protected group will not always prevail. A group's sense of insult may be based on inadequate information, result from too quickly drawing negative conclusions, or stem from conduct outside the sphere of the people's commitments.³⁶⁴

Fourth, even if there are sound reasons for insult, that is not alone enough to invalidate a practice. Society legitimately has competing goals to preventing group stigma. A principle of empathy may aid in the fair balancing of priorities:

The harms that the stigma and group-disadvantaging theories identify are not sufficient without balancing to make out a Fourteenth Amendment claim, because the prevention of these harms is not an absolute goal. The question arises again whether the law would find these injuries a price worth paying if they fell on whites.³⁶⁵

Fifth, while protected groups merit heightened concern, our people's commitments do not extend only to those groups.³⁶⁶ Whites are more likely than blacks to suffer a non-comparative harm, that is, the state is unlikely to engage in conduct that insults a white person *because he is white*.³⁶⁷ Nevertheless, any state conduct that treats a white person as less than fully

³⁶¹ See *supra* text accompanying notes 211-48, 274-312.

³⁶² See, e.g., BARROW & DIENES, *supra* note 102, at 228-67.

³⁶³ See generally DAVID A. J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* (1999).

³⁶⁴ The Miami Cuban-Americans opposing Elian Gonzales's return to his father and to Cuba illustrate all three problems. They made assumptions that Elian's father was being coerced into returning Elian to Cuba without case-specific evidence that this was so; they relied on the Castro regime's evil nature as self-evidently over-riding other concerns; and they therefore ignored the fundamental American commitment to the biological family unit. See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2323-47.

³⁶⁵ KOPPELMAN, *supra* note 299, at 110.

³⁶⁶ Thus the Fourteenth Amendment Due Process and Equal Protection clauses protect all "persons," and the Fourth Amendment protects the "right of the people," not the rights of only certain racial or ethnic groups. See U.S. CONST. amend. IV, XIV.

³⁶⁷ On white privilege, see generally CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado ed., 2000); CUPIT, *supra* note 180, at 28-33 (explaining that there are two forms of unfitting treatment—comparative and non-comparative).

human is to be constitutionally condemned.³⁶⁸ Indeed, one way to build political support for a respect-based jurisprudence is to ask what is necessary to protect vulnerable groups and then extend that protection to everyone.³⁶⁹

Finally, because the Fourth Amendment is incorporated against the states by the Fourteenth Amendment, the above discussion of Fourteenth Amendment stigma concepts is helpful in interpreting the Fourth Amendment.³⁷⁰ Importantly, the white and black communities have historically had different relationships with the police. Whites often see the police as public servants protecting lives and property.³⁷¹ "For blacks, those entrusted with law enforcement and the firepower that gives them authority have," however, "always been servants of the white men in power who exploit blacks economically and demean them socially."³⁷² That is all the

³⁶⁸ See *supra* text accompanying notes 180-90 (describing how one can be unfittingly treated as less than human in ways that have nothing to do with your race or other group membership).

³⁶⁹ One reason for opposition to race-based affirmative action is the belief that it benefits minorities to the detriment of the white majority. See, e.g., CHARLES R. LAWRENCE & MARI MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 181 (1997) ("The myth that affirmative action helps only the privileged . . . assumes that the sole beneficiaries of affirmative action are 'privileged' women and minorities."). One of the arguments sometimes made for preferring class-based affirmative action is precisely that it will foster cross-racial coalitions. Cf. RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* 10-11 (1992) (arguing that race-based affirmative action justified by compensatory justice breeds class-based resentment). Although I reject the idea of ending race based affirmative action, the insight that programs perceived as widely distributing their benefits are more likely to survive the political marketplace is correct and should be equally applicable to the Fourth Amendment context. See Taslitz, *Twenty-First Century*, *supra* note 1, at 128 n.171, 138 (explaining that, although it is a contextual question, the broad-based imposition of search and seizure policy costs and benefits on many groups often makes abuse of Fourth Amendment rights less likely). See generally William Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 *STAN. L. REV.* 553, 558-90 (1992) (flatly asserting that the broad distribution of the costs of searches and seizures will spur majoritarian political action that will cure unwise infringements on Fourth Amendment freedoms). Stuntz's insufficient consideration of context ignores, however, the forces that can sometimes slow or halt this process of political homeostasis. See Taslitz, *Twenty-First Century*, *supra* note 1, at 128 n.171, 138.

³⁷⁰ See TASLITZ & PARIS, *supra* note 30, at 39-40, 427, 433-38 (discussing the incorporation doctrine); Taslitz, *Slaves No More!*, *supra* note 147 (explaining and illustrating how Fourteenth Amendment stigma-like concepts can inform Fourth Amendment analysis).

³⁷¹ See Taslitz, *Slaves No More!*, *supra* note 147. The picture of black-white differences concerning the police that I have just expressed in text is more subtle, varied, and complex than I have just presented it, but none of those subtleties would alter my analysis here. See *supra* note 62 (summarizing data on respective white and black attitudes toward the police).

³⁷² See Lawrence, *supra* note 272, at 371.

more reason for a respect-based Fourth Amendment to be attentive to relevant black history and current attitudes.

IV. WHY THESE QUESTIONS ARE BEST ADDRESSED UNDER THE MUTATED FOURTH AMENDMENT

The immediately preceding discussion, with its emphasis on Fourteenth Amendment case law and history, raises this question: Why not address respect-based search and seizure concerns under the Fourteenth Amendment alone, rather than under some notion of a Reconstruction-mutated *Fourth* Amendment at all? Specifically, why not address respect-based concerns as equal protection or due process violations?

A. EQUAL PROTECTION

The response concerning the equal protection clause is fairly straightforward. The Court has modernly interpreted that clause to require proof of intentionally discriminatory application of the law by the police.³⁷³ At the same time, the Court has created such a high burden of proof for a defendant even to obtain discovery on whether the state acted with a discriminatory purpose as to render the effectiveness of the equal protection clause as a means of monitoring police racial discrimination close to nil.³⁷⁴ Correspondingly, the Court has held that the subjective intentions of the police, including proof of their racial animus, are irrelevant under the Fourth Amendment.³⁷⁵

There is a strong argument that the Court was wrong to exclude proof of racial animus as one way to establish a Fourth Amendment violation.³⁷⁶ Nevertheless, there is a plausible argument, not yet addressed by the Supreme Court, that racially discriminatory *effects* alone can, at least under certain conditions, render a search or seizure “unreasonable” under the Fourth Amendment. Indeed, there is language in at least one Supreme Court opinion suggesting that the mere risk of discriminatory police action, or even simply the mere *perception* of such a risk by affected minority

³⁷³ See TASLITZ & PARIS, *supra* note 30, at 443-45; *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that a defendant challenging allegedly racially disparate federal crack cocaine prosecutions under the Equal Protection Clause could not even obtain discovery without first proving that similarly situated defendants of other races were known to prosecutors, despite defendant's having already submitted several affidavits supporting that point).

³⁷⁴ See TASLITZ & PARIS, *supra* note 30, at 443-45; *Whren v. United States*, 517 U.S. 806 (1996).

³⁷⁵ See, e.g., Taslitz, *Slaves No More!*, *supra* note 147, at 771-75.

³⁷⁶ See, e.g., Maclin, *Fourth Amendment*, *supra* note 40 (arguing for the relevance of racial impact to Fourth Amendment reasonableness balancing).

communities, is at least a relevant factor in determining Fourth Amendment reasonableness.³⁷⁷

Therefore, where proof of police animus is lacking, no Fourteenth Amendment equal protection claim is viable. But a *Fourth* Amendment claim still may be.

Perhaps even more importantly, the Fourth Amendment has substantive content, that is, the amendment can be violated even absent proof of either discriminatory effects or intentions. Thus any arrest requires probable cause to believe that the suspect has committed a crime, and many lesser intrusions upon the person, such as a "stop" for brief police questioning, require individualized reasonable suspicion.³⁷⁸ Similarly, arrests in the home require arrest warrants, and searches of the home require search warrants.³⁷⁹ Failure of the police to use a warrant or to refrain from acting until they gather probable cause invalidates searches of white persons every bit as much as it invalidates searches of black persons.

Racial discrimination may be involved in some suspicionless and warrantless searches, but such discrimination must not necessarily be proven to make out a Fourth Amendment claim. This insight proves important, for example, in understanding the story of the Japanese-

³⁷⁷ See *Terry v. Ohio*, 392 U.S. 1, 14-15 n.11, 17 n.14 (1968) ("[T]he degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices."); Maclin, *Fourth Amendment*, *supra* note 40, at 362-75 (analyzing *Terry* and other Supreme Court case law suggesting the Fourth Amendment relevance of racial impact). I agree with Professor Maclin that *Terry* recognized the relevance of racial impact to Fourth Amendment reasoning, but, though ambiguous on the point, the Court seemed to suggest that a major part of the problem was one that legislators or the executive, but not the criminal courts, were competent to address. See *Terry*, 392 U.S. at 14-15.

The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.

Id. But see *id.* at 14-16 (then immediately adding, "[C]ourts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the evidentiary justification which the Constitution requires. [S]uch conduct . . . must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials."). For an argument at the other extreme from Professor Maclin's, see Adina Schwartz, "*Just Take Away Their Guns*": *The Hidden Racism of Terry v. Ohio*, 23 *FORDHAM URB. L.J.* 317 (1996) (arguing that *Terry* rendered race irrelevant under the Fourth Amendment).

³⁷⁸ See *TASLITZ & PARIS*, *supra* note 30, at 299-300 (describing arrests), 342 (describing protective sweeps), 298-316 (describing stops and frisks), 369-70 (describing special needs searches of high school student purses).

³⁷⁹ See *id.* at 269-70.

American internment during World War II. Many citizens were in effect rounded up, arrested, and incarcerated for years at a time without a warrant or any individualized evidence of wrongdoing.³⁸⁰ An equality norm had been breached because the round-up was based on race and ethnicity, but there were independent grounds of complaint apart from any unequal treatment. A suspicionless arrest is violative of an important principle of the American understanding of human dignity:

Political power must . . . be justified in terms of public reasons accessible to and available to all as beings capable of epistemic and practical rationality, that is, in terms of assessments of fact consistent with reliable and publicly understood procedures of empirical investigation and in light of . . . the common or general goods that all reasonably demand in order to pursue their ends, whatever they are Failure to respect this requirement bases the exercise of political power on sectarian assessments of fact or on values not reasonably available to all and thus fails to respect the reasonable judgment, the dignity, of those who do not share these assessments.³⁸¹

The assumption that all Japanese-Americans were, by the mere fact of their race alone, a threat to national security was not an "assessment of fact consistent with publicly understood procedures of empirical investigation" ³⁸² Indeed, the Fourth Amendment requires precisely rational proof of certain sorts of facts—such as individualized probable cause—to ensure that fundamental entitlements at the core of human dignity are not violated.³⁸³ Japanese-Americans were doubly insulted—first by state intrusion upon their autonomy absent proof of individualized suspicion of their wrongdoing; second, by being treated disrespectfully *because of their race*. The violations of equality norms and other sorts of autonomy-protecting norms embodied in the Fourth Amendment were inseparable. Thoroughly addressing the problems involved required viewing the events surrounding the internment as Fourth Amendment wrongs, informed by Fourteenth Amendment equality values. To treat this infamous episode as

³⁸⁰ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2300-13 (describing internment process in detail and its implications for modern Fourth Amendment jurisprudence).

³⁸¹ Richards, *supra* note 247, at 93-94; cf. Parent, *supra* note 349, at 65 ("Constitutional due process . . . condemns governmental denials of life, liberty, or property based on beliefs or feelings that have no factual support," thus forbidding the government from punishing an individual because "he looks like the kind of person who could have committed this offense."); *infra* text accompanying notes 385-417 (explaining why the sorts of evidentiary concerns raised by Professor Parent are better addressed as Fourth Amendment rather than due process concerns).

³⁸² See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2301-02.

³⁸³ See TASLITZ & PARIS, *supra* note 30, at 178-96 (describing standards of evidentiary proof of probable cause).

an equal protection violation alone is to distort the full nature of the wrong done, to contribute to minimizing Fourth Amendment values in much the way that the mere technicality view of that Amendment does, and to miss the important lessons that the internment can teach about search and seizure law today—lessons not learned if the event is viewed as a highly unusual violation of equality norms alone rather than also as a reminder of the enduring substantive dangers against which the Fourth Amendment protects.³⁸⁴

B. DUE PROCESS

The Due Process Clause analysis is a bit more complex. Because the Fourteenth Amendment's Due Process Clause is the very reason that the Fourth Amendment applies to the states,³⁸⁵ in a sense every state search and seizure already requires due process analysis.³⁸⁶ The question is whether, apart from applying the Fourth Amendment to the states as an essential aspect of "fundamental fairness," the Due Process Clause serves some independent, freestanding function in addressing search and seizure issues.³⁸⁷

The Court has at times strongly disfavored the concept of freestanding due process where a particular Bill of Rights provision seems to control.³⁸⁸ In *Dowling v. United States*,³⁸⁹ Justice White, writing for the Court, was quite clear: "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have

³⁸⁴ I have been arguing throughout this piece that the Fourth Amendment must be read as informed by Fourteenth Amendment equality values. Because the Fourteenth Amendment mentions only the "state," not the federal, government, arguably the Fourteenth Amendment did not change the Fourth Amendment's meaning or that of due process when applied to the Federal government. This would seem to be an odd result: one set of search and seizure rules for the states, a different set for the federal government. The Court arguably ruled out such oddities in *Bolling v. Sharpe*, 319 U.S. 624 (1943), holding that Fifth Amendment due process restrictions on the federal government embraced Fourteenth Amendment equal protection concepts that applied in the same fashion to both levels of government. Although the logic of *Bolling* has been sharply criticized, other scholars have articulated a more persuasive series of justifications for the *Bolling* result than did the Court itself, see WHAT BROWN SHOULD HAVE SAID, *supra* note 306, at 59-64, rendering it unnecessary for me to worry solely that the "oddity argument" for varying the Fourth Amendment's meaning based solely on what level of government is involved will be taken seriously.

³⁸⁵ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2300-13.

³⁸⁶ See TASLITZ & PARIS, *supra* note 30, at 13, 39-40; *Mapp v. Ohio*, 367 U.S. 643 (1961). See generally Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001).

³⁸⁷ See generally Israel, *supra* note 386.

³⁸⁸ See *id.* at 388-89.

³⁸⁹ 493 U.S. 342 (1990).

defined the category of infractions that violate 'fundamental fairness' very narrowly."³⁹⁰ Subsequently, Justice Kennedy, writing for the Court majority in *Medina v. California*,³⁹¹ explained that the Court had "defined the category of infractions that violate 'fundamental fairness' narrowly" given the recognition that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."³⁹² The Bill of Rights, the Court has explained, speaks specifically to many aspects of criminal procedure. Expanding those rights would, in the Court's view, invite undue interference with considered state legislative judgments and with the careful balance struck by the Constitution between order and liberty.³⁹³

The Court specifically addressed whether the Fourth Amendment pre-empts further due process analysis in *Gerstein v. Pugh*.³⁹⁴ There, a Florida procedure in non-capital cases permitted a prosecutor to proceed against a suspect by way of information rather than grand jury indictment but without a prior preliminary hearing. That meant that a person arrested without a warrant might not receive a judicial determination of probable cause until after arraignment on the information, a month or more after arrest. A lower federal court held that this procedure violated the Fourth Amendment and directed the Florida courts to provide prompt preliminary hearings.

The United States Supreme Court agreed that a prompt probable cause hearing was required under the Fourth Amendment. But the Court rejected mandating the protections of a full adversarial preliminary hearing under that amendment. After all, explained the Court, the amendment permits arrests with warrants stemming from ex parte proceedings involving no more than sworn affidavits as supporting evidence.

Justice Stewart, in his concurring opinion,³⁹⁵ disagreed with the Court's rejection of the adversarial preliminary hearing requirement. In Justice Stewart's view, more of an interest was involved than an improper initial arrest under the Fourth Amendment. The "continued incarceration of a presumptively innocent person" was, for Justice Stewart, a due process question. Yet a series of civil due process rulings had required more substantial hearings before seizing property or terminating benefits than the

³⁹⁰ *Id.* at 352.

³⁹¹ 505 U.S. 437 (1992).

³⁹² *Id.* at 443 (citing *Dowling*, 493 U.S. at 352).

³⁹³ Israel, *supra* note 386, at 388-89 nn.480, 482.

³⁹⁴ 420 U.S. 103 (1975).

³⁹⁵ *Id.* at 126 (Stewart, J., concurring).

Court required in connection with seizing a person to begin criminal proceedings against him.³⁹⁶

The majority's response to this argument was forthright:

Mr. Justice Stewart objects to the Court's choice of the Fourth Amendment: as the rationale for decision Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of persons or property in criminal cases, including the detention of suspects pending trial.³⁹⁷

Despite these pronouncements and arguably similar ones in later Fourth Amendment cases,³⁹⁸ "[t]he response of the *Gerstein* majority . . . largely has been forgotten."³⁹⁹ The Court has more recently stopped speaking of freestanding due process as having only "limited operation."⁴⁰⁰ The Court continues to speak of the need for restraint, but rests that caution on the primary responsibility of the states for criminal justice and as "laboratories for testing solutions to novel legal problems."⁴⁰¹ Moreover, if we look at what the Court does rather than just at what it says, freestanding due process seems to continue to play an important role, even where specific Bill of Rights provisions arguably control. Thus the Court has sometimes failed even to consider the application of a specific provision, other times simply preferred to rest on due process alone, and still other times initially relied on due process but later or simultaneously supplemented its reasoning by resort to a specific provision.⁴⁰² Professor Jerold Israel, in an exhaustive recent history of freestanding due process in criminal cases, notes that many plausible positions on the question can be read from the Court's precedent, and still other plausible positions can fairly be expected to arise before the Court in the future.⁴⁰³

³⁹⁶ See *id.* at 127 (Stewart, J., concurring).

³⁹⁷ *Id.* at 125 n.27 (Stewart, J., concurring).

³⁹⁸ See, e.g., *Graham v. Connor*, 490 U.S. 386 (1989); Israel, *supra* note 386, at 399-407 (analyzing significance of this and related cases for the relative responsibilities of the Due Process Clause and the Fourth Amendment).

³⁹⁹ Israel, *supra* note 386, at 405.

⁴⁰⁰ See *id.* at 397-98.

⁴⁰¹ See *id.* at 397-99 (reviewing case law).

⁴⁰² See *id.* at 405-14 (summarizing case law).

⁴⁰³ See *id.* at 424-26. Professor Margaret L. Paris has argued that the Court's failure to clarify its criminal justice due process jurisprudence and the implicit underlying human rights justifications has undermined political support for strong due process protections in criminal cases. See Margaret L. Paris, *Why It Matters*, 45 ST. LOUIS U. L.J. 495 (2001).

Nevertheless, Professor Israel believes that a few generalizations can be made. Most importantly, with a few exceptions, freestanding due process rulings tend to focus on the value of adjudicatory fairness—on protecting against conviction of the innocent—“rather than on the broader range of values reflected in the whole of the specific guarantees.”⁴⁰⁴ The Fourth Amendment, as currently and properly understood, has little to do with protecting against convicting the innocent.⁴⁰⁵ The exclusionary rule in fact serves to make it harder to convict the guilty by excluding probative inculpatory evidence from the jury’s hearing.⁴⁰⁶ The amendment and the remedies it offers are designed to serve purposes other than determining historical truth, including preventing unjustified police intrusions on persons’ privacy, property, and freedom of movement, though the exclusion of evidence may at times incidentally benefit the innocent as well.⁴⁰⁷

⁴⁰⁴ Israel, *supra* note 386, at 397-98.

⁴⁰⁵ See *United States v. Leon*, 468 U.S. 897 (1984) (asserting that the exclusionary rule in Fourth Amendment cases impedes truth-finding function at trial, and thus the rule’s application depends on the weight of countervailing concerns). Although the Fourth Amendment does not directly promote the discovery of truth at trial, it can sometimes do so indirectly. For example, strong screening mechanisms to prevent arrests based on ignorant or lying informants thus halts their repeating their lies at trial, lies occasionally believed to the regret of wholly innocent defendants. Cf. TASLITZ & PARIS, *supra* note 30, at 59 (summarizing the dangers informants pose to the innocent and cataloging potential solutions).

⁴⁰⁶ See *Leon*, 468 U.S. at 935 (Brennan, J., dissenting) (expressing view that the Fourth Amendment “comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures”). Justice Brennan continues:

If nothing else, the [Fourth] Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the “price” our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment. Thus, some criminals will go free, not, in Justice (then Judge) Cardozo’s misleading epigram, “because the constable has blundered” [citation omitted], but rather because official compliance with Fourth Amendment requirements make it more difficult to catch criminals. Understood in this way, the Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore it is not the exclusionary rule, but the Amendment itself that has imposed this cost.

Id. at 941. But see AMAR, *FIRST PRINCIPLES*, *supra* note 22, at 25-31 (arguing for giving the truth-finding function greater weight in Fourth Amendment analysis).

⁴⁰⁷ Cf. TASLITZ & PARIS, *supra* note 30, at 579-87 (reviewing purposes of the exclusionary rule other than truth-promotion, especially in the Fourth Amendment context); Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2316-27 (detailed analysis of a Fourth Amendment violation that ensnared the innocent); Taslitz, *Twenty-First Century*, *supra* note 1, at 138 n.87 (discussing the “trilogy” of Fourth Amendment interests in privacy, property, and freedom of movement).

Furthermore, freestanding due process criminal justice rulings are, again with exceptions, largely limited to the facts of each specific case.⁴⁰⁸ This approach is not entirely inconsistent with Fourth Amendment case law, which also is often fact-sensitive and relies on “totality of the circumstances” tests.⁴⁰⁹ But the Court also strives in its Fourth Amendment jurisprudence toward more bright-line, case-transcendent rules to give clearer guidance to the police.⁴¹⁰ The Fourth Amendment thus seems a more appropriate constitutional vehicle than due process—though it is nevertheless still a flawed vehicle—for attempting to fuse flexibility with predictability.

Focusing on the Fourth Amendment also prods the Court toward a closer analysis of the interests at stake—privacy, property, and free movement⁴¹¹—as best understood in light of the history of search and seizure practices.⁴¹² Both the history of those practices leading up to that amendment and the later history of why continued concerns about those practices required the Fourth Amendment’s incorporation into the Fourteenth Amendment⁴¹³ are helpful.

Indeed, what is the point of incorporation at all if search and seizure practices are analyzed under the due process clause as a free-standing entity? If I am right that our political commitments as a nation can only be understood as an evolving narrative over time, then our commitments in the area of search and seizure practices that began with the original Fourth Amendment are today best understood in terms of the evolving meaning and history of that amendment over time. That evolution includes the Fourth Amendment’s ultimate mutation by the Fourteenth.⁴¹⁴

⁴⁰⁸ See Israel, *supra* note 386, at 396.

⁴⁰⁹ See *id.* (making similar point).

⁴¹⁰ See *supra* text accompanying notes 95-130 (describing how the Supreme Court majority in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), decided recently, stressed the importance of simple bright-line rules in the constitutional law of search and seizure); *Chimel v. California*, 395 U.S. 752 (1969) (holding that there is automatic police authority for a warrantless search of the person and grabbing room of an arrestee without any suspicion justifying that search if pursuant to a valid arrest).

⁴¹¹ See Taslitz, *Twenty-First Century*, *supra* note 1, at 138 n.87 (summarizing the interests protected by the Fourth Amendment).

⁴¹² See generally Taslitz, *Slaves No More!*, *supra* note 147 (describing relevance of history of search and seizure practices during slavery and Reconstruction).

⁴¹³ See generally *id.* (explaining the evolving history of the Fourth Amendment from slavery to Reconstruction).

⁴¹⁴ See *id.* at 761-79 (stating that fair procedures inherent in Fourth Amendment require wide open defense discovery in preparation for suppression hearing). But see Israel, *supra* note 386, at 390 (describing two cases concerning fair procedures in connection with suppression hearings but decided as due process questions).

The real error may lie in the quest to think of the Fourth and Fourteenth Amendments as sharply distinct from one another in the area of searches and seizures. Although the Fourth Amendment is not designed to further the truth-finding function at trial, the Amendment does require fair procedures in fact-finding at hearings on motions to suppress evidence.⁴¹⁵ That requirement is due-process-like.⁴¹⁶ Yet those procedures are undertaken to ensure better protection of Fourth Amendment interests in the way that that amendment seems to contemplate. Correspondingly, the Fourth Amendment's meaning changed, as did that of the entire Bill of Rights, as part of the same struggle over slavery that led to the Fourteenth Amendment's adoption.⁴¹⁷ The two amendments cannot, therefore, be adequately understood in isolation. Each informs the other. It thus seems most congenial to effect a partial fusion of the two, viewing the post-Reconstruction Fourth Amendment as mutated by the equality, dignity, and fairness concerns of the Fourteenth. In any event, given the lack of clarity of the high Court's precedent on the respective functions of these amendments, this view is at least a plausible place to start.

V. WHAT PRACTICAL DIFFERENCE WILL A RESPECT-BASED SEARCH AND SEIZURE JURISPRUDENCE MAKE?

My use of the word "respect" may be troubling to some readers. In everyday usage, the word often implies simple courtesy.⁴¹⁸ An image is called to mind of an officer speaking in gentle tones, listening attentively to a driver's explanation of why he ran a red light, then issuing the ticket anyway. The officer listened and spoke "respectfully," but the results of his interaction with the driver were unchanged.

That is not worrisome if the officer had every right to stop the driver. But if the officer lied about the color of the light to meet some self-imposed ticketing quota, his conduct would still be wrong. Its wrongness would be unaltered even if the officer convinced the driver that the light was indeed red, the driver therefore feeling that he was treated fairly.

Respectful listening and speaking in the sense used in this example are part of what a respect-based constitutional philosophy embraces. Such

⁴¹⁵ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2282-84 (arguing that requirements of group voice and evidentiary accuracy under the Fourth Amendment serve important psychological and political purposes); TASLITZ & PARIS, *supra* note 30, at 5, 182-96, 210-14 (describing Court's Fourth Amendment jurisprudence on evidentiary accuracy).

⁴¹⁶ See generally Taslitz, *Slaves No More!*, *supra* note 147.

⁴¹⁷ See sources cited *supra* note 410.

⁴¹⁸ See WEBSTER'S NEW COLLEGIATE DICTIONARY 474 (2000).

behavior in fact is simply good policing, enhancing the community's willingness to support police actions.⁴¹⁹ But respectful treatment requires more. The mendacious officer in the altered hypothetical acts disrespectfully despite his courtesy. He treats the driver as a mere "means," not an end in himself, effectively punishing the driver in a way that he did not deserve.⁴²⁰

Current jurisprudence would, of course, condemn the above officer's conduct if his lies were discovered.⁴²¹ But in many other situations, a respect-based jurisprudence will lead to different results than under current law. As I explore in more depth elsewhere, a respect-based approach has implications for every current search and seizure doctrine.⁴²²

I am generally more concerned in one of my companion pieces on respect with showing rather than telling.⁴²³ Nevertheless, I want briefly to note here seven important ways in which my approach can change results.

First, a respect-based approach will alter the nature of fact-finding at suppression hearings and in magistrates' decisions on warrant applications. Judges thus must often decide whether there was reasonable suspicion for police to stop a pedestrian whom the officers believed to be involved in a crime.⁴²⁴ But "reasonable suspicion"—like "negligence" in a tort trial or "consent" in a rape trial—is not some indisputable truth existing "out there." If we could time travel, there are of course some relevant historical truths that we could discover. Did the suspect run upon police arriving on the scene, or did he simply continue leisurely walking? How tall was he? There are clear true or false answers to these questions.⁴²⁵

Once we know the historical truth, however, we must decide whether, given the information available to the police, their suspicion of the

⁴¹⁹ See DAVID HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002) (providing an extended defense of this point).

⁴²⁰ See *supra* text accompanying notes 180-200 (discussing Kantian rule of respect: Treat persons as ends unto themselves and never as mere means).

⁴²¹ See, e.g., Taslitz, *Twenty-First Century*, *supra* note 1 (search definition); Andrew E. Taslitz, *A Feminist Fourth Amendment? Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1 (2002) (consent search and administrative search doctrines); Taslitz, *Racial Auditors*, *supra* note 45, at 239-58 (racial profiling and stop-and-frisk).

⁴²² See Taslitz, *Slaves No More!*, *supra* note 147 (illustrating some of these doctrinal implications); Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1 (illustrating other doctrinal implications); Taslitz, *Racial Auditors*, *supra* note 45 (illustrating still further doctrinal implications); and my forthcoming book on the subject.

⁴²³ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1.

⁴²⁴ See *Terry v. Ohio*, 392 U.S. 1 (1968).

⁴²⁵ See Taslitz, *Feminist Approach*, *supra* note 289, at 28-29 (on realist versus interpretive truth).

pedestrian was "reasonable." Yet that question turns on a series of value-based judgments about what inferences can fairly be drawn, and with what degree of confidence, from the information available. If minority and majority communities on average draw very different conclusions from the same observations, whose perspective the courts recognize alters the outcome. As one illustration, assume that police see a young African American male in a poor, predominantly African American neighborhood "fleeing" when police arrive on the scene.⁴²⁶ The white middle class majority might see such flight as revealing the suspect's consciousness of guilt.⁴²⁷ The African American community likely sees the youth's flight as more consistent with self-preservation, fleeing because he wants to avoid the risk of an unfair and unpleasant confrontation with the police.⁴²⁸ Current law generally favors the consciousness of guilt argument, but a respect-based jurisprudence, absent more individualized evidence, favors the self-preservation inference.⁴²⁹

Second, by infusing equality norms into the Fourth Amendment, a respect-based jurisprudence makes inquiry into discriminatory police motives and racially disparate police actions relevant at suppression hearings.⁴³⁰ Moreover, standards of discovery and proof must be receptive

⁴²⁶ This hypothetical is based on a series of real-world cases, one of which reached the Supreme Court, discussed in depth in Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2290-302.

⁴²⁷ *See id.*

⁴²⁸ *See id.*

⁴²⁹ *See id.*

⁴³⁰ The ideas of "respect" and "justice" are intimately related, both being members of the "fittingness" family of concepts, with respect being the broader notion. *See* CUPIT, *supra* note 180, at 15-33. "Justice" (I am oversimplifying a bit here) is fitting treatment demonstrated by a person or entity deemed especially competent to judge what is fitting and directed toward a being with the capacity to understand what is happening. *See id.* at 20, 23. If one lawyer treats another lawyer or a judge in a trial courtroom unfittingly, that is disrespect. If a trial judge treats either lawyer unfittingly in ways deemed to be within the ambit of the judge's role as a judge, that is injustice. *See id.* at 15-33. But it is also disrespect. *See id.* at 15-33.

Among the various justice motives is retribution—the desire to bring an offender down a peg, to demonstrate to his victim and society that he is in fact of no greater worth than his victim. *See generally* Neil Vidmar, *Retribution and Revenge*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 31-64 (2001). Retribution need not be solely in the form of criminal punishment, and we feel the need for retribution against those who have treated us unfittingly, even if not technically "unjustly" in the sense defined above. *See id.*; Taslitz, *Civil Society*, *supra* note 86. Retribution reinforces equality. *See* Vidmar, *supra*, at 36-37; Taslitz, *Civil Society*, *supra*, 313-24, 335-39. Our strongest retributive desires arise from being intentionally victimized by another, although we also feel lesser degrees of retributive need when faced, in descending order, with knowing, reckless, and negligent insulting conduct. *See* Taslitz, *Civil Society*, *supra* note 86, at 335-38 nn.165-66. Additionally,

to these concerns.⁴³¹ Racial profiling claims are not, therefore, relegated to hard-to-prove equal-protection-based civil class actions.⁴³² Rather, they are also central Fourth Amendment concerns of the *criminal* justice system.⁴³³ Furthermore, because racially disparate impact theories should be embraced, evidence of certain widespread police practices, rather than only of the conduct of the individual officers involved in a specific complaint, becomes highly relevant.⁴³⁴ As noted earlier, current law by contrast prohibits inquiry into subjective police officer motivations under the Fourth Amendment and is ambiguous about the relevance of disparate impact. Much case law also often limits evidence of police misconduct to the officers' actions in the individual case, making patterns of police conduct difficult to prove.⁴³⁵

Third, for novel cases, the Court balances the depth of the state's intrusion on the individual against the state's justifications for its actions to determine what is reasonable. Usually the Court engages in "categorical balancing," crafting a new rule to determine reasonableness in future

insults that demean us based on our membership in groups central to our identity inflict especially painful psychic wounds. *See id.* at 349-55. When police engage in actions insulting the equal worth of citizens, therefore, police motives matter in determining the depth of the resulting social injury and the remedy required to restore equality norms.

Racially disparate impact is also likely to promote at least the *perception* of racial insult. *See* Maclin, *Fourth Amendment*, *supra* note 40, at 386-92. Furthermore, disparate impact raises concerns about police abuse of discretion, *see id.* at 376-79, perhaps based on entirely subconscious flaws in reasoning and perception. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983-88 (1999) (reviewing social science research concerning impact of categorization, schemas, and stereotyping on police work). Equality norms require checking such abuses of discretion. *See id.* at 1005-12. But police actions also treat persons unfittingly who are stopped without adequate justification, separate and apart from equality norms. *See supra* text accompanying notes 371-82.

⁴³¹ On discovery, *see* generally Taslitz, *Slaves No More!*, *supra* note 147. For illustrations of the Court's flawed standards of proof, *see* generally Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1.

⁴³² *See* Sean P. Trende, *Why Modest Proposals Offer the Best Solutions for Combating Racial Profiling*, 50 DUKE L.J. 331, 342-57 (2000) (cataloguing the many obstacles to a successful civil suit equal protection claim, even if not always in the form of a class action, for combating racial profiling).

⁴³³ *See id.* at 358-79 (making similar point). Trende also argues that Fourteenth Amendment equality norms inform the Fourth Amendment's meaning, but he relies primarily on text and precedent, rather than history, for support. *See id.* at 372-76.

⁴³⁴ *See* generally Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999) [hereinafter Bandes, *Patterns of Injustice*]; accord Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 LOY. L.A. L. REV. 665 (2001).

⁴³⁵ *See* Bandes, *Patterns of Injustice*, *supra* note 434, at 1279-80, 1290-99.

similar cases.⁴³⁶ This balancing currently involves a thumb on the police side of the scale.⁴³⁷ The Court frequently considers widely-defined social benefits of police action but only its costs to the individual suspect.⁴³⁸ When the Court does consider broader social costs, it often (albeit not always) gives them short shrift.⁴³⁹ It also defines those costs narrowly, often ignoring the impact of its decisions on racial unity, labor discipline, and healthy human relationships. Police concerns are weighty; broader citizenry sub-group concerns slight.⁴⁴⁰ A respect-based jurisprudence would routinely consider all the social costs of police action, including the impact on communities of color.⁴⁴¹ That would not necessarily alter outcomes in all cases because state actions under current law might meet the requirements of respectful treatment.⁴⁴² But results may be changed in some instances.

⁴³⁶ See TASLITZ & PARIS, *supra* note 30, at 169-75.

⁴³⁷ See Maclin, *Central Meaning*, *supra* note 102, at 208-16, 228-29 (describing the Court's reasonableness balancing approach as in practice a "rational basis" model of decisionmaking, giving a "blank check" to the police); Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 771 (1992) [hereinafter Maclin, *Justice Thurgood Marshall*] ("[W]hen balancing occurs, the government generally wins—at least in search and seizure cases. Few cases exist in which the government's interest in effective law enforcement is insubstantial."). See generally Maclin, *Vagueness Doctrine*, *supra* note 127 (arguing that Court's Fourth Amendment jurisprudence fails to provide adequate constraints on police discretion).

⁴³⁸ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1 (analyzing illustrative cases, including the effects of searching individuals on broader communities); TASLITZ & PARIS, *supra* note 30, at 438-50 (summarizing impact of search and seizure practices on racial sub-communities); Taslitz, *Racial Auditors*, *supra* note 45 (noting broad impact of search and seizure practices on racial minorities, racial majorities, media, partisan political groups, and the American people as a whole); cf. Maclin, *Justice Thurgood Marshall*, *supra* note 437, at 772.

[T]he Court's balancing process is distorted because it generally sees only a guilty defendant on the other side of the scale When the Court proffers its reasoning and conclusions for a particular result, it rarely considers the effect on innocent persons subjected to the police intrusion permitted by the Court.

Id.

⁴³⁹ See *supra* text accompanying notes 95-130 (discussing the recent *Atwater* case).

⁴⁴⁰ See Maclin, *Justice Thurgood Marshall*, *supra* note 437, at 772 ("Foremost in the minds of the Justices is the need for effective law enforcement. Thus, Fourth Amendment rights are seldom considered positive rights. Rather, the Court generally views them as restraints on law enforcement to be acknowledged, but not taken seriously.").

⁴⁴¹ See generally Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1 (illustrating how community-impact consideration would alter the Court's analyses).

⁴⁴² See *id.* at 2327-55 (discussing why the Clinton Administration's actions in the *Elían Gonzales* case met the requirements of respectful treatment).

Notably, remember that in *Terry v. Ohio*,⁴⁴³ discussed earlier in this article, the Supreme Court first permitted police stop-and-frisks on mere reasonable suspicion rather than probable cause. The Court acknowledged, in passing only, its awareness of the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain"⁴⁴⁴ The Court elaborated, in a footnote, that field interrogations "are a major source of friction between the police and minority groups."⁴⁴⁵ Additionally, the Court acknowledged that the exacerbation of police-community tensions would be "particularly true in situations where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.'"⁴⁴⁶

Nevertheless, despite this rare recognition of the risks to minority community respect, the Court adopted the *Terry* stop-and-frisk on mere reasonable suspicion rule, summarily concluding that such police harassment would not be stopped by applying the exclusionary rule. Such application would be a "futile protest" against practices that the Court cannot control and would "exact a high toll in human injury and frustration of efforts to prevent crime."⁴⁴⁷ Yet in the same paragraph, the Court stressed that the judiciary "still retain their traditional responsibility to guard against police conduct which is overbearing or harassing"⁴⁴⁸ The Court also declared that its words should "in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate."⁴⁴⁹

The Court's readiness to dismiss the effectiveness of the exclusionary rule seems particularly odd in light of later decisions stressing the rule's deterrent effect as its central justification.⁴⁵⁰ If the Court prohibited, and

⁴⁴³ 392 U.S. 1 (1968).

⁴⁴⁴ *Id.* at 14.

⁴⁴⁵ *Id.* at 14 n.11.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 15.

⁴⁴⁸ The Court was even more ambiguous in other language concerning whether it meant to render exploration of the impact of its rules on racial minorities irrelevant, though in practice it effectively so read *Terry*. Compare Schwartz, *supra* note 377, at 346 (arguing the *Terry* Court recognized racial impact to make clear that it was irrelevant to Fourth Amendment analysis) with Maclin, *Fourth Amendment*, *supra* note 40, at 365-66 (arguing the modern Court has ignored the racial impact analysis of *Terry* but nevertheless continued in other precedent to consider such impact, a consideration ended by *Whren*).

⁴⁴⁹ *Terry*, 392 U.S. at 15.

⁴⁵⁰ See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984).

made subject to judicial sanction, street encounters on less than probable cause, there would be no informed reason to believe that those encounters would not decline.⁴⁵¹

The Court had also then purportedly embraced a second rationale for the exclusionary rule: protecting the "dignity" of the courts, that is, not making them complicit in constitutional wrongdoing, a complicity undermining respect for law.⁴⁵² That recognition of the symbolic functions of the Court's decisions might have prompted the Court to give greater weight to the humiliation that unjustified street encounters cause to their victims.

None of this means that the *Terry* rule itself is necessarily wrong. But a respect-based jurisprudence would give the humiliation concerns noted by the Court greater weight. Despite its ambiguity, *Terry* is fairly read as the Court washing its hands of such concerns with humiliation.⁴⁵³ At a minimum, a willingness to dirty its hands could have led the Court to narrow the scope of the *Terry* rule. Instead, the rule and its unguided balancing approach have expanded, making police intrusions based on guesses and stereotypes all that much easier.⁴⁵⁴ The Court's refusal to inquire into beat officers' subjective motivations may also have made more likely the very sorts of police actions motivated by the police need to "maintain the power image of the police officer" of which the Court complained. Arguably, the result has been such fiascos as the recent Street Crime Unit scandal in New York City and growing police-minority community tensions.⁴⁵⁵ Perhaps Justice Douglas was right to worry in his *Terry* dissent that the Court had taken "a long step down the totalitarian path."⁴⁵⁶

⁴⁵¹ See Thompson, *supra* note 430, at 1003 n.248 (summarizing scholarship making similar argument for returning to a pre-*Terry* world).

⁴⁵² See *Elkins v. United States*, 364 U.S. 206, 222-23 (1960) (asserting that exclusionary rule is required by the "imperative of judicial integrity," meaning that the courts cannot become "accomplices in the willful disobedience of a Constitution they are sworn to uphold").

⁴⁵³ See Maclin, *Fourth Amendment*, *supra* note 40, at 365-66 (suggesting *Terry* Court either did wash its hands or modern Court has implicitly so reinterpreted *Terry*).

⁴⁵⁴ See, e.g., Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457 (2000) (providing empirical data on *Terry*'s impact on raced-based policing in New York City); Harris, *Particularized Suspicion*, *supra* note 136 (discussing *Terry* and stereotyping).

⁴⁵⁵ See ELI B. SILVERMAN, N.Y.P.D. BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING 187-89 (1999) (describing recent trials and tribulations of New York City's Street Crime Unit and its aggressive tactics).

⁴⁵⁶ See Saleem, *supra* note 38; Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 *ST. JOHN'S L. REV.* 1271 (1998); Maclin,

Fourth, a respect-based jurisprudence emphasizes that all three branches of government are bound by the Fourth Amendment.⁴⁵⁷ *Terry's* acknowledgement of other remedies than the exclusionary rule may implicitly have embraced a judgment that other branches were better equipped to address minority group concerns.⁴⁵⁸ If so, that is a judgment that the Court should have defended. The Court has an obligation to create incentives for other branches to meet their constitutional obligations.⁴⁵⁹ Bowing entirely out of setting adequate minimum standards for respectful police behavior does not serve that goal.⁴⁶⁰ At a minimum, the Court should have interceded with an express willingness to lower its vigilance if other branches proved up to the task.⁴⁶¹

Perhaps equally important, a three-branch emphasis introduces the language of constitutionality, with its moral authority to persuade, into legislative debates and police administrative decision-making.⁴⁶² Each branch has its obligations,⁴⁶³ and each must be so reminded.⁴⁶⁴ Reminding

Fourth Amendment, supra note 40.

⁴⁵⁷ See Taslitz, *Stories of Fourth Amendment Disrespect, supra* note 1, at 2283. But see FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 190-213 (2002) (describing, albeit ultimately rejecting, the views of those who defend racial profiling as "rational discrimination").

⁴⁵⁸ See William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1227-28 (1998) (arguing that courts can separate the most egregious police-citizen encounters from the rest, but a more ambitious reasonableness agenda is better handled by other branches of government); Meares & Kahan, *supra* note 49, at 3-30 (arguing that, at least under certain conditions, the courts should defer to legislative judgments on what searches and seizures are reasonable); *United States v. Leon*, 468 U.S. 897, 932 (1984) (Brennan, J., dissenting) ("[T]he [Fourth] Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected.").

⁴⁵⁹ See Taslitz, *Stories of Fourth Amendment Disrespect, supra* note 1, at 2282.

⁴⁶⁰ See Luna, *supra* note 74, at 829-32, 837-48 (arguing that the courts, rather than the legislature or executive, have the obligation to set a constitutional floor, protecting Fourth Amendment "zones of sovereignty").

⁴⁶¹ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 490 (1996) (encouraging Congress and state legislatures to come up with their own standards for the admissibility of confessions "so long as they are fully as effective as" the *Miranda* warnings); *United States v. Wade*, 388 U.S. 218, 239 (1967) ("Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial, may also remove the basis for regarding the stage as 'critical.'").

⁴⁶² See TASLITZ, *RAPE AND CULTURE, supra* note 65, at 148-51.

⁴⁶³ See WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* 212 (1996) (arguing that legislative and executive branches can sometimes secure constitutional prerogatives "in ways that the judges alone could not"); Matthew Holden, Jr., *Race and Constitutional Change in the Twentieth Century: The Role of the Executive*, in *AFRICAN*

is, of course, not the sole function of the courts. It also requires a more actively engaged monitorial citizenry.⁴⁶⁵ A respect-based philosophy encourages citizen-monitoring of the police by open access to the press, a willing embrace of outside auditors, acquiescence in defense discovery requests, and creative modifications of civilian review boards.⁴⁶⁶

Fifth, because a respect-based jurisprudence is very concerned with current social practices and attitudes, it makes far more extensive use of social science than is true today. Such social science is not always decisive, but it is frequently relevant.⁴⁶⁷ Social science could enlighten efforts to understand minority versus majority group experiences, inform judgments about which governmental branches can best function in their own particular ways, and reveal likely or unexpected effects of police actions.⁴⁶⁸

AMERICANS AND THE LIVING CONSTITUTION 117-43 (John Hope Franklin & Genna Rae McNeil eds., 1995) [hereinafter LIVING CONSTITUTION]; Gary Orfield, *Congress and Civil Rights*, in LIVING CONSTITUTION, *supra*, at 144-80 (analyzing some of the forces determining when Congress can, and sometimes has, served as the institution best able to protect civil rights). See generally JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS (1998) (arguing that legislatures perform commendably in protecting individual rights under certain circumstances).

⁴⁶⁴ See MICHAEL A. BAMBERGER, RECKLESS LEGISLATION: HOW LAWMAKERS IGNORE THE CONSTITUTION (2000) (seeking to spark effort to remind lawmakers of their obligations to serve the Constitution, especially given their unique institutional competencies).

⁴⁶⁵ See Taslitz, *Slaves No More!*, *supra* note 147 (providing historical and textual support for this proposition). Accord Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1120 (2000).

A transparent approach to government [search and seizure policy] does not envision citizens as mere depositories of information; they should be directly involved in the formation and reformulation of these decisions. Empowering citizens through access to government information and by giving them a voice in the decisionmaking process is not only more democratic, but has the potential to establish a basis for trust in otherwise distrusting communities.

Id.

⁴⁶⁶ See Luna, *supra* note 465, at 1167-94 (describing more open and local community review boards, videotaping of police-citizen interactions, public police administrative rule-making, mandatory recordkeeping, and crime-mapping as tools to promote transparent policing); Taslitz, *Racial Auditors*, *supra* note 45 (valuing outside auditors as a restraint on abusive searches and seizures); Taslitz, *Slaves No More!*, *supra* note 147, at 761-79 (arguing that open discovery made available to the defense of material relevant to search and seizure issues aids the citizenry's monitorial function).

⁴⁶⁷ See generally David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541 (1991) (discussing advantages of, and methods for, using social science in creating and applying constitutional rules).

⁴⁶⁸ See *supra* note 62 (describing majority versus minority group experiences and attitudes); Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1 (illustrating relevance of such experiences to Fourth Amendment case law); MICHAEL TONRY, MALIGN

At times, reliance on social science would readily alter results, as Justice Stevens argued in his recent dissent in *Illinois v. Wardlow*.⁴⁶⁹ There, Justice Stevens concluded, empirical data suggested that African American males fleeing from the police in a high crime neighborhood were more likely to do so from fear of the police rather than as recognition of guilt. Accordingly, contrary to the majority's holding, Stevens would have found no reasonable suspicion where a *Terry* stop was based solely on a suspect's flight in a crime-ridden community.

Nor does it matter that there may be a dearth of social science evidence on some questions. Decision makers should use the best science available, and how widely we define "science" can affect the perceived supply of relevant studies.⁴⁷⁰

Additionally, a respect-based jurisprudence involves the Court in history more deeply than is now the case. As noted earlier, the history of slavery and Reconstruction, not merely of the 1791 ratification of the Bill of Rights, becomes critical.⁴⁷¹ That history supports the emphasis on respect, sheds light on some specific issues, identifies paradigm cases, and aids in balancing.⁴⁷² But understanding the evolving nature of our commitments and the ways in which, and reasons for, our failures to meet them requires immersion in more modern history as well. The Japanese-American internment is once again a primary example, thus becoming relevant to understanding modern racial profiling of Hispanic and African Americans. In particular, the study of the internment reveals the critical social functions of freedom of movement, helping to combat minimization of this value in

NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 104-07 (1995) (arguing that disparate racial impact of the War on Drugs was foreseeable, partly because of awareness that "relatively more drug arrests are made in minority communities than elsewhere . . . [because] they are easier to make," the result being that "police emphasis on disorganized minority neighborhoods produce[d] racial proportions in arrests that do not mirror racial proportions in drug use"); Tracey L. Meares & Bernard Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000) (providing defense of, and guidance for, using social science to inform search and seizure policy).

⁴⁶⁹ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2297-2300 (analyzing Stevens's dissent).

⁴⁷⁰ See Slobogin & Schumacher, *supra* note 258, at 743-58 (defending relevance of even a single empirical study of Americans' privacy expectations to Fourth Amendment decisionmaking); Meares & Harcourt, *supra* note 468.

⁴⁷¹ See *supra* text accompanying notes 142-61.

⁴⁷² See Taslitz, *Slaves No More!*, *supra* note 147 (illustrating using that history to resolve a very specific issue); RUBENFELD, *supra* note 313, at 178-95 (arguing that history reveals paradigm cases to identify core constitutional commitments).

reasonableness balancing.⁴⁷³ The commitments of a people to respect its members are meaningless if abstracted from relevant history.

Finally, although I have repeatedly talked about minority group historical experiences and minority attitudes, many Fourth Amendment questions will not turn on issues of race. Nevertheless, the experiences of the most vulnerable among us can help to inform judgments about whether search and seizure practices that burden all equally adequately demonstrate respect for human value. Moreover, the history of African Americans led to the Fourteenth Amendment and thus is important to whites as well as to racial and ethnic minorities.⁴⁷⁴ In any event, the value of respect is important to all and is a too-often-neglected Fourth Amendment value, as the analysis of the arrest of the driver who did not wear her seatbelt in the *Atwater* case, discussed earlier in this article, illustrates.⁴⁷⁵ Respect is, of course, not the only value that the Fourth Amendment serves. Furthermore, sometimes there are respect-based injuries no matter what choice we make.⁴⁷⁶ Additionally, an increased scope of Fourth Amendment protections can be financially costly.⁴⁷⁷ A respect-based approach does not, therefore, promise mechanical solutions to constitutional problems. But it does hold out the hope of more careful, fully informed decisions aspiring to the best of American ideals.

VI. CONCLUSION

That all persons deserve equal respect is a largely unchallenged assumption of the American political and legal systems.⁴⁷⁸ Yet, curiously, the United States Supreme Court has never clearly defined the concept nor adequately explored its implications in the highly emotionally-charged setting of police searches and seizures of criminal suspects, where the mandate to treat others with respect is sorely needed.

⁴⁷³ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2300-14 (recounting the internment process and its relevance to modern racial profiling).

⁴⁷⁴ See *supra* text accompanying notes 142-61.

⁴⁷⁵ See *supra* text accompanying notes 95-141.

⁴⁷⁶ See Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1, at 2327-54 (discussing *Elian Gonzales*).

⁴⁷⁷ See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999) (demonstrating that all rights entail financial costs).

⁴⁷⁸ See generally Taslitz, *Civil Society*, *supra* note 86 (analyzing role of respect in American culture in resolving issues raised by group-subordinating speech). Cf. CHARLES W. ANDERSON, *A DEEPER FREEDOM: LIBERAL DEMOCRACY AS AN EVERYDAY MORALITY* (2002) (addressing alternative theories of freedom but concluding that any sound theory must recognize the uniqueness and infinite worth of every individual as well as his social nature).

This article has sought to fill this gap, defining “respect” as treating others fittingly, that is, as equal status members of a common political community. Unfitting “treatment” is an objective question of the plausible meaning that may fairly be assigned to particular police action. A sound political morality, this article has argued, requires recognizing that individual identity is partly rooted in group identity and that groups often differ, on average, in their perceptions of police behavior. Equality norms suggest, furthermore, that the views of groups most likely to be vulnerable to abusive search and seizure practices deserve the most attention.

Accordingly, inquiring into and comparing minority and majority community attitudes about particular police practices can inform our judgments about whether police treatment of suspects should plausibly be understood as carrying an insulting social meaning. Apart from informing that judgment, if certain groups subjectively experience a sense of disrespect, however unfairly, that is a social cost that we should seek to minimize whenever possible. A respect-based jurisprudence thus warmly embraces social science studies on community attitudes toward the police and toward justice, as well as on the likely impact of police policy choices.

Yet, where group attitudes indeed differ, the choice of which group’s views to honor is necessarily a value-laden one. A search for the controlling values can be guided by taking seriously the Fourth Amendment’s declaration that it recognizes the right of “the People” to be free from unreasonable searches and seizures.⁴⁷⁹ “Peoplehood” is best understood as a common narrative about the changing nature of a political community over time. That requires heeding the lessons to be learned from search and seizure practices throughout, and including modern, American history rather than turning solely to the history of the 1791 framers of the Bill of Rights. Indeed, because the Fourth Amendment applies to the states via the 1868 Fourteenth Amendment, the history surrounding ratification of the latter amendment—including search and seizure practices under slavery and Reconstruction—is important in giving the Fourth Amendment meaning. That history itself offers support for a respect-based jurisprudence, as defined here, as well as offering guidance regarding how to make such a jurisprudence concrete in individual cases.

The study of current social practices and the wider sweep of American history matters even when majority and minority attitudes coincide. Such study reminds us of the dangers of state-enforced disrespect that history and social science reveal can afflict even members of the racial majority. Studying both history and current social practices helps to protect

⁴⁷⁹ U.S. CONST. amend. IV.

individuals' expectations concerning proper treatment by the state, to heighten the People's sense of political morality, and to alert us to the costs of risking an overweening state. At the same time, when group attitudes do indeed differ and there are sound reasons to favor the minority, political common sense, equality norms, and substantive Fourth Amendment aspirations require providing to the majority the same degree of protection that is accorded to the more vulnerable minority.⁴⁸⁰

If respect requires attention to group norms, it also requires the seemingly inconsistent honoring of the uniqueness of every individual, thus discouraging reliance on group-based stereotypes in determining whether individualized probable cause or reasonable suspicion exists. The apparent inconsistency is better described as a tension between individualized and group justice. But that tension can be resolved, for example, by demonstrating that young African American males are victims of racial profiling (violating the aspiration to judge others based on their individual capacities and commitments rather than on their membership in a group) and that African American males, on average, are more likely as a group to flee from the police.⁴⁸¹

Respect also requires salient groups to have a voice in police decisionmaking processes, decisions that must be based on substantial and likely accurate evidence of individual wrongdoing, and on recognition of the shared institutional Fourth Amendments obligations of all three branches of government.⁴⁸² The totality of these principles of a respect-based jurisprudence will lead to more informed judgments than, and often different results from, what is the situation under current case law. A respect-full jurisprudence would alter the inferences made at suppression fact-finding hearings, explore racially discriminatory motives and impact, consider the broader costs of law enforcement to social sub-groups and to society rather than only to the individual suspect, and encourage courts to craft rules giving the executive and legislative branches incentives to address problems that the courts are ill-equipped to challenge. These consequences would likely alter current law by making both intentional and subconscious racial profiling into Fourth Amendment concerns, reducing the number of instances in which reasonable suspicion to stop suspects can be shown upon skimpy evidence of doubtful accuracy, bringing Fourth Amendment case law closer to ordinary citizens' expectations, and

⁴⁸⁰ See *supra* Part II.B.

⁴⁸¹ See *supra* Part III.

⁴⁸² See generally Taslitz, *Stories of Fourth Amendment Disrespect*, *supra* note 1 (illustrating the group-individualized justice tension in four infamous search and seizure episodes in twentieth-century American history).

expanding the role of the press and of independent groups in monitoring the police. In short, a respect-based jurisprudence would matter by promoting social unity, citizen voice, and police accountability, bringing the American people closer to making real the promise of treating all persons as being “created equal,”⁴⁸³ the animating promise behind the creation and flourishing of our nation.

⁴⁸³ See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

