

Race and the Fourth Amendment

*Devon W. Carbado**

This chapter employs “real life” scenarios to highlight how Fourth Amendment law works on the ground. Few people, including lawyers, journalists, legislators, educators, and community organizers, understand the enormously important role Fourth Amendment law plays in enabling the very thing it ought to prevent: racial profiling and police violence. This chapter does not tell the full story of Fourth Amendment law along the preceding lines. Rather, my purpose here is to zone in on the specific body of Fourth Amendment law that determines whether the Fourth Amendment will even apply to the police conduct in question or whether that conduct will escape Fourth Amendment scrutiny altogether. I have two hopes for the chapter. One is that, whatever your views about policing, you will leave the chapter feeling like you have had a “teachable moment” about the range of investigation tactics police officers can employ without triggering the Fourth Amendment. My second hope is that you will employ the chapter as a tool to educate others in the conduct of the work you do, whether that work takes the form of “street law” sessions, public forums, know-your-rights campaigns, legislative decision-making, media education projects, community organizing, op-eds, classroom teaching, or conversations with friends and family.

INTRODUCTION

Across the United States, many African-Americans believe that police officers regularly approach and question African-Americans with no evidence of wrongdoing. We hold this view either because we experience such without-basis police contact directly or because we live that contact vicariously through the experiences of our brothers and sisters, mothers and fathers, aunts and uncles, and friends and neighbors. Without-basis police contacts, or what I will sometimes call “pedestrian checks,” are part of our collective consciousness as African-Americans. To borrow from Michael Dawson, they help to constitute our “linked fate.”¹

* The Honorable Harry Pregerson Professor of Law and Associate Vice Chancellor, BruinX, the Office of Equity, Diversity, and Inclusion, University of California, Los Angeles.

1. MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* (1994).

What many African-Americans might not know is the long-standing role the Supreme Court has played pushing pedestrian checks beyond the reach of the Fourth Amendment. The exterior position pedestrian checks occupy outside the scope of Fourth Amendment law accounts, at least in part, for the interior position they occupy inside the lives of black people.

I should be clear to note that I am using the term “pedestrian checks” in a rather specific sense. Some of you may have read the Department of Justice Report on Ferguson, Missouri, which was published in the aftermath of social upheaval and protest in Ferguson following the police shooting death of Michael Brown, an African-American teenager. To those of you who have not read the Ferguson Report, you should. It is a sobering look at a regional criminal justice system in which racism and classism were bureaucratized as normal features of governance. I reference the report here for a very narrow reason: it includes a discussion of what Ferguson police officers regularly referred to as “ped checks.” Here’s the relevant passage from the report:

This incident [involving a police officer seizing an African-American man and running a warrant check without any evidence that the man had engaged in any wrongdoing] is also consistent with a pattern of suspicionless, legally unsupportable stops we found documented in FPD’s [Ferguson Police Department’s] records, described by FPD as “ped checks” or “pedestrian checks.” Though at times officers use the term to refer to reasonable-suspicion-based pedestrian stops, or “Terry stops,” they often use it when stopping a person with no objective, articulable suspicion. For example, one night in December 2013, officers went out and “ped. checked those wandering around” in Ferguson’s apartment complexes. In another case, officers responded to a call about a man selling drugs by stopping a group of six African-American youths who, due to their numbers, did not match the facts of the call. The youths were “detained and ped checked.” Officers invoke the term “ped check” as though it has some unique constitutional legitimacy. It does not. Officers may not detain a person, even briefly, without articulable reasonable suspicion.²

2. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 18 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf. For discussions of *Terry* stops and race-based decisionmaking, see Jeffrey Fagan, “Race and the New Policing,” in the present Volume; Henry F. Fradella & Michael D. White, “Stop-and-Frisk,” in the present Volume; and David A. Harris, “Racial Profiling,” in the present Volume.

When the Ferguson Report speaks of pedestrian checks, then, it is referring to instances in which Ferguson police officers seized people without any evidence of wrongdoing in violation of the Fourth Amendment. While the unconstitutional pedestrian checks the Ferguson Report describes should be highlighted and condemned, I am referring to pedestrian checks of an altogether different sort—police interactions that do not trigger the Fourth Amendment and therefore do not need to be supported by any evidence of wrongdoing.

So that you appreciate the difference between my use of pedestrian checks and the Ferguson Report's use, you need to understand the basic analytical structure of Fourth Amendment law. The Fourth Amendment protects us from "unreasonable searches and seizures."³ When police officers engage in conduct that is search or seizure, the Fourth Amendment requires them to justify it. Failure on the part of the government to offer the appropriate justification renders that search or seizure unreasonable and therefore unconstitutional. The Ferguson Report's invocation of "ped checks" is intended to draw attention to the fact that the Ferguson Police Department was performing unconstitutional pedestrian checks by seizing and sometimes searching African-Americans without any justification.

The focus of this chapter is different. My concern is with pedestrian checks that do not trigger the Fourth Amendment and therefore do not require any justification. Remember, every time the Court determines that a pedestrian check is not a search or a seizure, the Court is ducking the question of whether that pedestrian check is reasonable in the sense of requiring some justification. To put that point slightly differently, when the Supreme Court concludes that a pedestrian check is not a search or a seizure, the court is saying that police officers may perform that pedestrian check without any basis—that is to say, without a warrant, without probable cause, and without reasonable suspicion. In short, without any justification whatsoever. Far from being illegal under the Fourth Amendment, then, pedestrian checks that are neither searches nor seizures do not implicate the Fourth Amendment at all.

The problem is even worse. The Supreme Court's conclusion that a pedestrian check is neither a search nor a seizure makes the question of whether that pedestrian check is racially motivated entirely irrelevant for Fourth Amendment purposes. Again, if police conduct is not a search or a seizure, Fourth Amendment law has absolutely nothing to say about it, whether that conduct is racially motivated or not. Pause for a moment and think about what this means: If a pedestrian check does not trigger the Fourth

3. U.S. CONST. amend. IV.

Amendment, police officers have discretion not only to initiate that pedestrian check without any basis but to racially select whom they wish to subject to that pedestrian check. You might think that the Equal Protection Clause of the Fourteenth Amendment solves this problem. It does not, in large part because for plaintiffs to win an equal protection claim, they must prove that the officer acted intentionally.⁴ The burden of proof will almost always be impossible to meet. So, you should put the Equal Protection Clause to one side, as does the rest of this chapter. In the meantime, the remainder of the chapter highlights the discretion Fourth Amendment law effectively gives to police officers to target and engage African-American pedestrians without any basis. My hope is that the examples I will offer paint a clear picture of the range of pedestrian checks police officers can deploy against African-Americans without violating the Fourth Amendment.

I. DECISION 1: TO FOLLOW

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

The foregoing conduct would not trigger the Fourth Amendment.⁵ The Supreme Court would conclude that Tanya has not been seized. Indeed, the officers haven't even approached her. That the officers' decision to follow Tanya was racially motivated along the gendered lines I have suggested does not matter. The Fourth Amendment is not a bar to this form of racialized surveillance.

4. *Washington v. Davis*, 426 U.S. 229 (1976).

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

II. DECISION 2: TO APPROACH

Stipulate now that the police officers decide to approach Tanya. That alone would not trigger Fourth Amendment protections. In this context as well, the Court would conclude that Tanya has not been seized.⁶ Because following and approaching Tanya is not conduct that implicates the Fourth Amendment, the officer does not need a prior justification to do so. As with the previous example, the outcome of this hypothetical remains the same if race influenced the officers' decision to approach Tanya.

III. DECISION 3: TO QUESTION WHEREABOUTS AND IDENTITY

But what if in the context of approaching Tanya, the officers decide to question her? Assume, more specifically, that they ask Tanya the following questions: "Do you live around here?" "What's your name?" "Where are you going?" "Where are you coming from?" "May I see your identification?" The officers' engagement⁷ with Tanya along the preceding lines still would not constitute a seizure.

IV. DECISION 4: TO QUESTION ON A BUS

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

This is a good place to describe more precisely how the Supreme Court has defined what constitutes a seizure. The doctrinal standard is that a seizure does not occur if the person feels free to decline officers' requests or otherwise terminate the encounter.⁸ The Supreme Court has repeatedly stated that the mere fact that police officers question a person does not mean that that person is seized.⁹ Under the Court's view, suspects whom the police question are "free to leave."

One of the most striking articulations of this view appears in *Florida v. Bostick*.¹⁰ In that case, officers observed Bostick sitting in the back of a bus and proceeded

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

7. *Id.*

8. *Id.* at 436.

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

10. *Bostick*, 501 U.S. at 434.

to question him.¹¹ The government stipulated that the police officers had no reason to believe that Bostick had done anything wrong.¹² Thus, the government could not argue that Bostick was seized and that the seizure was reasonable. The thrust of the government's argument, therefore, was that the officers' conduct did not implicate the Fourth Amendment, for Bostick was not seized.¹³ Thus, the officers needed no justification to approach and engage Bostick.¹⁴

While the *Bostick* Court did not definitively decide the seizure question, it made clear that "mere police questioning" does not constitute a seizure—even if it occurs in the confined space of a bus.¹⁵ The Court maintained that passengers on buses are constrained, not necessarily because of what police officers do, but because of their decision to travel by bus. According to the Court, the officers merely "walked up to Bostick ... asked him a few questions, and asked if they could search his bags."¹⁶ The Court intimated that that is not enough to transform a consensual bus encounter into a seizure.¹⁷ More than a decade later, in *United States v. Drayton*,¹⁸ the Court made that point explicit: police officers may question people on buses without triggering the Fourth Amendment.¹⁹ Particularly remarkable about the Court's conclusion in *Drayton* is that the record revealed that the officer in the case had boarded more than 800 buses in the past year to question passengers. Only five to seven passengers declined to have their luggage searched.²⁰

The Court's reasoning in *Bostick* and *Drayton* would have even more traction with respect to a person who is on the street, not on a bus. Indeed, in both cases, the Court noted that had Bostick's encounter occurred off the bus, like the hypothetical I describe in Decision 3, it would be easy to conclude that he was not seized.²¹ The Court's reasoning in *Bostick* and *Drayton* suggests not only that a police officer would not need to justify his decision to approach and question Tanya on the street or on a bus, but also that his decision to do so could be racially motivated because his subjective intent does not matter.

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

12. *Id.* at 431, 433–34 (maj. op.).

13. *Id.* at 434.

14. *Id.*

15. *Id.*

16. *Id.* at 437.

17. *Id.*

18. *United States v. Drayton*, 536 U.S. 194 (2002).

19. *Id.* at 194.

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

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

V. DECISION 5: TO QUESTION ABOUT IMMIGRATION STATUS

Assume that the officers perceive Tanya to be a foreigner and question her about her immigration status.²² One might surmise, notwithstanding what I have said so far, that some forms of questioning, like questioning about immigration status, might be so intrusive or intimidating that an officer's decision to pursue them would automatically trigger the Fourth Amendment. One would be wrong to so conclude. Stipulate that the officers have no objective reason to believe that Tanya is undocumented. Nevertheless, one of the officers approaches Tanya and asks: "Do you speak English?" "How long have you been in this country?" "Are you an illegal alien?" "May I see proof of citizenship?" Police officers may ask these and other questions of Tanya without implicating the Fourth Amendment.²³

One of the most troubling examples of the Court's conclusion that questioning people about their immigration status does not trigger the Fourth Amendment is *INS v. Delgado*. The case adjudicated the constitutionality of so-called "factory sweeps"—the Immigration and Naturalization Service (INS) practice of entering workplaces, with the employer's consent, to question workers about their immigration status.²⁴ Today, such practices are carried out by the Immigration and Customs Enforcement, or ICE.

Like the bus sweep in *Bostick*, the factory surveys in *Delgado* were conducted without individualized suspicion. That is, in none of the surveys did the INS have reason to believe that any particular worker was undocumented.²⁵ Thus, as in *Bostick*, the Court had to decide whether the law enforcement's activity constituted a seizure. Answering that question in the affirmative would have made the INS's conduct an unreasonable seizure, since it was not supported by evidence that any individual person was undocumented.

The Court, per Chief Justice William Rehnquist, asked two questions: (1) whether the individual workers whom the INS questioned were seized, and (2) whether the INS's conduct effectuated a seizure of the entire workforce. He answered both in the negative. With respect to the first, Justice Rehnquist

22. These dynamics would affect Latinos who are not black. I include them here to disrupt the tendency of framing blackness outside of the Latino experience. As for the issue of the criminalization of immigration, see Jennifer M. Chacón, "Criminalizing Immigration," in Volume 1 of the present Report.

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

24. See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside of Law*, 59 DUKE L.J. 1723, 1747-49 (2011) (discussing how workplace raids affect employee rights).

25. *Delgado*, 466 U.S. at 212.

noted that the interactions were brief.²⁶ The INS merely “asked one or two questions.”²⁷ Moreover, the questions that the INS asked focused on place of birth, citizenship status, and proof of residency, and were “not particularly intrusive.”²⁸ According to Justice Rehnquist, the INS’s conduct “could hardly result in a reasonable fear that respondents were not free to continue working or to move about in the factory.”²⁹ Thus, he concluded, the individual workers whom the INS questioned were not seized.

Justice Rehnquist’s account sanitizes the episode, which involved between 20 and 30 INS agents. These agents wore their INS badges, carried handcuffs—and they were armed.³⁰ Some of the agents guarded the exits; others moved systematically through the factory, row by row, “in para-military formation.”³¹ The entire episode lasted between one and two hours. At no time during any of this did the agents inform the workers that they were free to leave.³² Presumably, the workers inferred just the opposite, especially since the INS arrested several of the workers who attempted to exit the factory.³³ Indeed, as one worker explained, “They see you leaving and they think I’m guilty.”³⁴ Against this backdrop, Justice Brennan is right to suggest in dissent that Justice Rehnquist’s analysis is “rooted ... in fantasy”³⁵ and “striking ... [in] its studied air of unreality.”³⁶

In addition to concluding that the individual workers whom the INS questioned were not seized, Justice Rehnquist also held that the workplace as a whole was not seized. He repeated his point that the mere questioning of individuals is not a seizure.³⁷ He then added that the fact that the questioning occurred in the workplace does not necessarily change the analysis. According to Justice Rehnquist, “[o]rordinarily, when people are at work their freedom to move about has been

26. *Id.* at 219.

27. *Id.* at 220.

28. *Id.* at 219–20.

29. *Id.* at 220–21.

30. Brief for Respondents at 4, *INS v. Delgado*, 466 U.S. 210 (1984) (No. 82-1271).

31. *Id.* at 17.

32. *Delgado*, 466 U.S. at 217.

33. Brief for Respondents, *supra* note 30, at 18.

34. *Id.* at 20 (testimony of one of the workers).

35. *Delgado*, 466 U.S. at 229 (Brennan, J., dissenting).

36. *Id.*

37. *Id.* at 216 (maj. op.).

meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."³⁸ In other words, assuming the employees in *Delgado* felt constrained, that sense of constraint derived from their workplace responsibilities and not the INS's actions.³⁹

As Tracey Maclin has observed, Justice Rehnquist's approach is tantamount to "blam[ing] the victim,"⁴⁰ The burden is placed not "on the government to show justification for the intrusion [but] on the citizen to challenge government authority."⁴¹ Moreover, Rehnquist's analysis discounts the ways in which law enforcement's presence alters how people experience social spaces. When, for example, the INS agents in *Delgado* entered the factory, they transformed that already confining space into a government-centered and more coercive environment: an INS raid.⁴²

The bottom line for Tanya is that whether she is on the street as a pedestrian or at her workplace as an employee, the government may question her about her immigration status without triggering the Fourth Amendment. Moreover, were an officer to say, "I questioned Tanya because she looked like a Nigerian immigrant in terms of her dress and appearance," that racial motivation would not violate the Fourth Amendment. In a related context, the Supreme Court has said that "apparent Mexican ancestry" (whatever that means) can be a basis for determining whether someone is undocumented.

38. *Id.* at 218.

39. *Id.* In its brief, the government advanced a similar argument: "Preliminarily, we note that it is only in a theoretical sense that the work force here, or in any typical factory survey, can be characterized as having a 'freedom to leave' that is restrained by the appearance of the INS. The factory surveys in this case were conducted entirely during normal working hours. At such times the employees presumably were obligated to their employer to be present at their work stations performing their employment duties; accordingly, quite apart from the appearance of the INS agents, the employees were not 'free to leave' the factory in any real sense." Brief for Petitioners at 22–23, *INS v. Delgado*, 466 U.S. 210 (1984) (No. 82-1271).

40. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1305 (1990).

41. *Id.* at 1306.

42. It is also important to note that at urban work sites such as the facilities raided in *Delgado*, as opposed to farming or ranching operations, there is a greater likelihood that citizens and legal residents work alongside illegal aliens. Asian immigrants also make up a substantial percentage of the labor force at factories subject to immigration raids. In 1995, federal and state authorities raided a garment factory in El Monte, California, where 72 Thai nationals were forced to work 18-hour days, seven days a week. The facility was surrounded by barbed wire to prevent escapes. See Editorial, *Slavery's Long Gone? Don't Bet on It*, L.A. TIMES, Aug. 4, 1995, at B8.

VI. DECISION 6: TO SEEK PERMISSION TO SEARCH

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

The Supreme Court has held that police officers need not inform people of their right to refuse consent.⁴³ Their failure to do so does not make a search invalid. Nor does the failure to warn people of their right to refuse consent turn an encounter into a seizure.⁴⁴ Thus, consistent with Fourth Amendment law, police officers may approach individuals whom they have no reason to believe engaged in wrongdoing, and ask those individuals for permission to search their persons or effects. Under such circumstances, people are not seized because (ostensibly) they are free to say no and go about their business. That people may not know that they have this right to refuse consent—or would not feel empowered to exercise that right—is largely irrelevant for Fourth Amendment purposes.

The case in which the Supreme Court developed this doctrine is *Schneckloth v. Bustamonte*.⁴⁵ The facts are these: A police officer, Officer Rand, stopped a car after observing two burned-out lights.⁴⁶ Robert Bustamonte was a passenger, and five other men were in the car. Only one of the men, passenger Joe Alcala, had identification.⁴⁷ Officer Rand asked each man to exit the car.⁴⁸ By this time, two other officers had arrived.⁴⁹ (Why other patrol cars were summoned to the scene when the basis for the stop was a burned-out light, you tell me.) One of the officers, Officer Rand, requested permission to search the car.⁵⁰ Alcala responded, “Sure, go ahead.”⁵¹ While there was no indication that Officer Rand or the other two officers employed direct force to elicit Alcala’s consent, none of the officers informed Alcala that he had the right to refuse consent.⁵² Upon searching the car, the officers found three stolen checks under one of the seats.⁵³ Bustamonte challenged the legality of the search, and lost.

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

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

45. 412 U.S. 218 (1973).

46. *Id.* at 220.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 222.

53. *Id.* at 220.

Central to the Court's conclusion that the consent search was constitutional was the idea that "If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary."⁵⁴ The logic here seems reasonable enough. But adding race squarely into the analysis exposes some limitations in the Court's analysis. If African-Americans believe that police officers are likely to perceive African-Americans as criminally suspect, they may feel extra pressure to say yes to consent searches to disconfirm that stereotype. African-Americans might also feel pressured to say yes to consent searches on the view that saying no carries the risk of both prolonging the encounter and escalating the tension.

Of course, whites are also subject to pressures to comply with requests from the police. The point is that, because of racial stereotypes of black criminality, blacks are subject to a kind of surplus compliance. Blacks, as a general matter, are going to be less trusting of the police, less comfortable in their presence, and more concerned about their physical safety than whites. These fears, whether justified or not, create added pressure for blacks to terminate police encounters by giving up their rights, consenting to searches, and otherwise being overly cooperative. None of these racial concerns figures in the Court's analysis. What concerns, then, did? The following quote provides a partial answer:

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants. Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable.⁵⁵

54. *Id.* at 228.

55. *Id.* at 227-28.

The passage is quite remarkable. It links the legitimacy of consent searches to the fact that police officers often will not have the requisite justification—reasonable suspicion, probable cause, or a warrant—to intrude on a person’s privacy. This turns Fourth Amendment protections upside down; it is precisely because consent searches do not require reasonable suspicion, probable cause, or a warrant that they ought to be suspect.

Nor is the Court right in assuming that consenting to a search will “convince the police that an arrest with its possible stigma and embarrassment is unnecessary.”⁵⁶ While exposing the interior of one’s bag to a police officer is one way of saying, “I am not carrying drugs,” this innocence-signaling strategy will not always be enough to dissipate an officer’s suspicions. To understand why, let’s bring Tanya back into the analysis. Assume that a police officer perceives, but does not have objective reason to believe, that Tanya is a drug dealer. Assume that Tanya is carrying a bag and that the officer requests permission to search it. Stipulate that Tanya says yes, and the officer searches the bag but does not find any drugs. The officer’s suspicions of Tanya’s criminality will not necessarily disappear. Tanya’s consent to the search of her bag will not necessarily terminate the interaction. In fact, her consent may prolong it. The officer may believe that Tanya granted permission to search her bag because she is carrying drugs elsewhere on her person; the officer may further assume that Tanya strategically consented to conceal her criminality.

Alternatively, the officer may know that Tanya’s race puts her in a vulnerable position in that Tanya might be eager to terminate the encounter because of her fear of the police and eager to prove her innocence because of her worry that the officer perceives her to be criminally suspect. If the officer believes that any of the preceding concerns motivated Tanya’s consent, he may request permission to conduct another and more intrusive search: a search of Tanya’s clothing. If Tanya does not consent to this second search, the officer’s suspicions would presumably intensify. Why would a person who is not carrying drugs grant permission to search her bag but not her person? Something like this hypothetical played itself out in a Supreme Court case I mentioned earlier, *United States v. Drayton*.⁵⁷

In *Drayton*, three members of the Tallahassee Police Department—one black and two white—boarded a bus just as it was about to depart. Working from the back of the bus forward, the officers asked passengers questions as to their travel destinations, their identity, and their personal belongings. The

56. *Id.* at 228.

57. 536 U.S. 194 (2002).

“[d]efendants Drayton and Brown were seated next to each other a few rows from the rear.”⁵⁸ One of the officers identified himself as a police officer, informed the defendants that he was part of a drug interdiction team, and asked whether they had any luggage. Both responded in the affirmative. The officer then asked for permission to search the bag, to which Brown responded, “Go ahead.”⁵⁹ Another officer searched the bag but no illegal substances were found.

If Brown’s consent was a privacy-compromising performance tactic to disconfirm the assumption of his criminality and to end the encounter, the strategy did not work. Indeed, it had the opposite effect. Upon learning that Brown’s bag did not contain any illegal drugs, the officer requested permission to conduct another, more intrusive search of Brown’s person: a pat-down. His reason? He thought the defendants “were overly cooperative during the search [of the bag].”⁶⁰ In short, the fact that Brown and Drayton consented to the search of their bag created, rather than eliminated, the officer’s suspicion and prolonged, rather than terminated, the encounter. In this case, the officer’s suspicions were confirmed: The pat-down of Brown produced incriminating evidence, as did the subsequent pat-down of Drayton.⁶¹ The Court of Appeals concluded that because neither search was consensual, the evidence should have been excluded.⁶² The Supreme Court disagreed and ruled that the search was consensual.⁶³

Enter again Tanya. With *Drayton* in mind, it is fair to say that Tanya is vulnerable to multiple consent search requests, and not just one. Saying yes to an officer’s request for permission to search her bag won’t necessarily terminate the encounter. It could lead to another request, this time for permission to search Tanya’s person. Without more, the officer’s second request for permission to search would not make the encounter a seizure. Thus, the officer would not need any justification to seek that consent.

Nor, as stated earlier, does it matter whether the officer informed Tanya of her right to refuse consent. Police officers are free to exploit a person’s lack of knowledge with respect to their Fourth Amendment rights.

The question now becomes: Why would the Court interpret the Fourth Amendment in such a police-friendly way? Why not require police officers to inform people of their right to refuse consent? Is it really fair to say that a

58. United States v. Drayton, 231 F.3d 787, 789 (11th Cir. 2000).

59. *Id.*

60. *Id.*

61. *See id.* at 788-90.

62. *See id.* at 788.

63. *See* United States v. Drayton, 536 U.S. 194 (2002).

person consents to something when they do not know they have a right to refuse that consent? And even if people know their rights, wouldn't a requirement that police officers inform them of that right increase the likelihood that the average person, and certainly the average black person, would feel empowered to exercise it?

The Court was not oblivious to these questions and the concerns they raise. But far more important to the Court was the worry that requiring police officers to notify people of their right to refuse consent would impose too high a burden on law enforcement. The Court seemed to imagine that police officers would be required to employ something like the following script:

You have a right to refuse to allow me to search your home, and if you decide to refuse, I will respect your refusal. If you do decide to let me search, you won't be able to change your mind later on, and during the search I'll be able to look in places and take things that I couldn't even if I could get a warrant. You have the right to a lawyer before you decide, and if you can't afford a lawyer we will get you one and you won't have to pay for him. There are many different laws which are designed to protect you from my searching, but they are too complicated for me to explain or for you to understand, so if you think you would like to take advantage of this very important information, you will need a lawyer to help you before you tell me I can search.⁶⁴

Many people would argue that requiring that kind of warning would be impractical.⁶⁵ Indeed, that is precisely what the government argued on appeal—"that the very complexity of such warnings proves its unworkability."⁶⁶ But to say that warnings of some sort should be required is not yet to establish the nature of the warnings. In other words, one might conclude that police officers should be required to warn people of their right to refuse consent and reject the idea that the warnings would need to be extensive. The choice is not between telling a person everything and telling her nothing. There is a middle

64. Brief for Petitioner at 21-22, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (No. 71-732) (quoting Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 158 (1967)).

65. *Bustamonte*, 412 U.S. at 231 (arguing that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning").

66. Brief for Petitioner, *supra* note 64, at 22.

ground: Prior to conducting a consent search, police officers could be required to inform a person of nothing more than “you have a right to refuse consent.” Full stop. At the time *Bustamonte* was litigated, federal law enforcement officials regularly dished such warnings.

But Tanya is unlikely to get them. Fourth Amendment law has created a fiction that people can exercise rights they don’t even know they have. Under *Bustamonte*, Tanya can unknowingly waive her Fourth Amendment right to refuse an officer’s request for permission to search, and police officers are free to exploit Tanya’s lack of knowledge. This does not mean that police officers may actively coerce a consent out of Tanya. Fourth Amendment law doesn’t allow that. But an officer may seek permission to search Tanya and her effects knowing that Tanya may not know her rights or may not feel empowered to exercise them.

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

VII. DECISION 7: TO INFILTRATE

Assume for the next three scenarios that Tanya is Muslim and that the government is interested in investigating whether she has engaged in terrorist activity.⁶⁷ Let’s first explore how Tanya could be affected by the freedom with which the government may infiltrate mosques. Assume that Tanya regularly attends a neighborhood mosque. Assume further that the government enlists Mohammed (who goes by “Mo”), one of Tanya’s friends, to inform on her. As before, the government has no evidence that Tanya has engaged in criminal wrongdoing. The government’s view is that the fact that Tanya is Muslim and regularly attends a mosque whose leader routinely and publicly criticizes U.S.

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

foreign policy in the Middle East is reason enough to investigate her. Imagine that Mo surreptitiously records every conversation he has with Tanya for six months. Does this violate the Fourth Amendment? No. Indeed, Mo's activity would not even trigger the Fourth Amendment.

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

But what about the other Fourth Amendment trigger question? Has the government searched Tanya or her conversation? No. The Supreme Court would conclude that Mo's conduct does not constitute a search. More specifically, the Court would reason that Tanya assumed the risk that the person with whom she had those interactions (Mo) was a government official.⁶⁸ The burden is on Tanya to choose her friends more carefully. That Mo surreptitiously recorded the conversation does not matter.⁶⁹ The point remains the same: The Fourth Amendment does not protect us from "misplaced confidence"⁷⁰ or "false friends."⁷¹ We assume the risk that the people with whom we interact will listen to, record, and transmit our conversations,⁷² even when they are acting under the direction of law enforcement.

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

The freedom with which law enforcement can use informants to investigate terrorism has become a profound problem for Muslim communities. As Amna Akbar explains, "There is reason to believe that there are informants at each and every mosque in the United States."⁷³ The potential chilling effects of the government's use of informants cannot be overstated. It creates an incentive for Muslims not to attend mosques, and to severely circumscribe their interactions when they do.

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

69. *Id.* at 752.

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

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

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

73. Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. 809, 862 (2013).

VIII. DECISION 8: TO CONDUCT VOLUNTARY INTERVIEWS

Assume that law enforcement still suspects Tanya of terrorism, though they have no objective reason to believe that she is a terrorist. Here, again, race and religious affiliation motivate their suspicion. Agents show up at her house, knock on the door, and announce that they are the Federal Bureau of Investigation (FBI).⁷⁴ Tanya answers the door. FBI agent Nelson says, “Good afternoon, Tanya. Would you mind accompanying us to the FBI’s office? We are investigating terrorist activity and just want to make sure that you are not involved.” Tanya accompanies the agents to the office, where they question her for three hours and then indicate that she is “free to leave but that we might follow up.” Embarrassed, humiliated, and concerned that the FBI might seek to question her again, Tanya relays her experience to the American Civil Liberties Union (ACLU) to ascertain whether the agency violated her Fourth Amendment rights. She is surprised to learn that the answer is no and that the FBI regularly employs what it refers to as “voluntary interviews.”

That the FBI refers to investigatory engagements of the sort Tanya experienced as “voluntary interviews” is a window on how the Supreme Court would respond to the practice.⁷⁵ Likely, the Court would conclude that because Tanya voluntarily went to the FBI’s office, she was not seized. Because the FBI agents did not use a show of force or otherwise coerce Tanya into staying, she was free to leave at any time. As with prior examples, the fact that Tanya did not know her rights or may have felt disempowered to exercise them during the FBI questioning does not change this outcome. “Mere questioning,” even in the context of a police station, would not transform a voluntary encounter into a seizure. In short, the Court would conclude that Tanya went, stayed, and subjected herself to questioning at the FBI office of her own free will.

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

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

What if Tanya could demonstrate that, in fact, she exercised no such free will? Subjectively, she felt compelled both to accompany FBI agents to the station and to answer their questions while she was there. If you've recalled the doctrinal test for a seizure, you will recognize that Tanya's subjective feelings are not dispositive.⁷⁶ The inquiry concerns not what Tanya subjectively felt but what a reasonable person under the circumstances would have felt.⁷⁷

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

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

But I have already said that the Court could conclude that Tanya has not been seized. Two structural features of the seizure analysis help to explain why. First, the free-to-leave framework is a normative inquiry rhetorically disguised as an empirical one. When the Court asks "whether a reasonable person would feel free to leave or otherwise terminate the encounter," it is really asking whether a reasonable person *should* feel free to leave or otherwise terminate the encounter. In every Supreme Court decision in which the question is whether a person has been seized, the Justices construct the very thing they purport empirically to locate—the reasonable person. Applying this insight to our hypothetical, the legal conclusion that a reasonable person is not seized in the context of a voluntary interview is a normative position that a reasonable person *should not* feel seized.

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

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

Consider now the second structural feature of the seizure doctrine that makes it difficult to argue that Tanya's "voluntary interview" constitutes a seizure. After an early nod in the direction of factoring race into the seizure analysis,⁷⁸ the Supreme Court has never since taken race into account in determining whether a person is seized, effectively adopting a colorblind approach to the seizure analysis.⁷⁹ This colorblind approach is particularly striking not only because the seizure test is a "totality of the circumstances" inquiry⁸⁰ (why isn't race considered a part of the "totality of the circumstances"?), but also because in a relatively recent opinion the Court concluded that age is a part of the "totality of the circumstances." According to the Court:

In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.⁸¹

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

In some circumstances, a person's *race* "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." That is, a reasonable *black* person subjected to police questioning will sometimes feel pressured to submit when a reasonable *white* person would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

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

79. Devon Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 968 (2002) (arguing that the Court applies the Fourth Amendment with an assumption of race neutrality, that under this jurisprudence neither the way police engage people nor the way people interact with the police are shaped by race, and that race only becomes doctrinally relevant when an officer is overtly racist in her actions).

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

81. *Id.* at 271–72.

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

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

A young black male who has grown up in South Central Los Angeles knows that if he is stopped by a police officer, he should do whatever the officer says and not talk back unless he wants to kiss the ground. This young man may not feel free to leave or terminate the encounter with the officer, but if the reviewing court believes the average (white) person would have felt free to leave, then the encounter will not be considered a seizure and the young black male will not be able to complain that his Fourth Amendment rights have been violated.⁸²

Lee's point pertains to blacks more generally. The racial asymmetry she describes is why Paul Butler describes the Fourth Amendment with more racial specificity as "the white Fourth Amendment."⁸³ His point is that the Supreme Court's colorblind interpretation of the Fourth Amendment ends up protecting whites more than it does people of color.

The Supreme Court does not take any of this into account. Its failure to do so elides a particular kind of precarity: racial insecurity. By racial insecurity I mean a racial sense of exposure, anxiety, and vulnerability that some people experience

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

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

in the context of police encounters.⁸⁴ Whites generally do not experience racial insecurity because whites generally are neither disproportionately targeted by the police nor burdened by the concern that their race exposes them to police surveillance, social control, and violence.

Certainly, incorporating race into the seizure analysis would not be a simple endeavor. Would that entail adopting a “reasonable black person” standard when the suspect is black, a “reasonable Latino” standard when the suspect is a Latino, and a “reasonable Muslim” standard when the suspect is Muslim? Not necessarily. Such particularized standards could get very messy very quickly. Thus, I am not advocating an identity-specific approach. It bears mentioning that when the Court included age in the custody analysis, it did not adopt a 16-year-old standard or a 15-year-old standard or a 13-year-old standard. The Court simply noted, “[a] child’s age is far ‘more than a chronological fact.’ It is a fact that ‘generates common sense conclusions about behavior and perception.’ Such conclusions apply broadly to children as a class.”⁸⁵ Suffice it to say that these points can be made about race as well.⁸⁶

My suggestion that the Court take race into account in determining whether a person is seized is modest given that the seizure analysis is a “totality of the circumstances” inquiry.⁸⁷ I am simply proposing including race as one of the contextual factors that guide the Court’s analysis. I am not the only one to advance this position. More than two decades ago, Tracey Maclin articulated a similar recommendation:

My tentative proposal is that the Court should disregard the notion that there is an average, hypothetical, reasonable person out there by which to judge the constitutionality of police encounters. When assessing the coercive nature of an encounter, the Court should consider the race of the person confronted by the police, and how that person’s race might have influenced his attitude toward the encounter.⁸⁸

84. For a discussion of racial anxiety, see L. Song Richardson, “Police Use of Force,” in the present Volume.

85. *J.D.B.*, 564 U.S. at 261.

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

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

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

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

Currently, the Court assesses the coercive nature of a police encounter by considering *the totality of the circumstances* surrounding the confrontation. All I want the Court to do is to consider the role race might play, along with the other factors it considers, when judging the constitutionality of the encounter.⁸⁹

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

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

That the Fourth Amendment would not protect Tanya from "voluntary interviews" does not answer whether some other procedural safeguard offers protection. One might surmise that *Miranda* would be helpful in this context, particularly because the questioning occurred at the FBI's office. In fact, however, Tanya could not invoke the *Miranda* protections. For one thing, the state is not seeking to admit Tanya's statements against her—thus, there is no self-incrimination issue.⁹⁰ For another, the Court would conclude that Tanya was not in custody, a necessary predicate for the application of *Miranda*.⁹¹ The test for whether a person is in custody is whether that person is formally under arrest or experiencing its functional equivalent.⁹² Because, arguably, Tanya wasn't even seized, it is easy to conclude that she was not in custody.

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

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

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

92. *See id.* at 441–42.

Similarly, the Sixth Amendment right to counsel would not help. Its procedural framework applies only when the state has commenced formal proceedings against a person.⁹³ Finally, because the Supreme Court would perceive “voluntary interviews” as consensual encounters, arguments against the practice that invoke due process also would fail.⁹⁴ The reality, then, is that Tanya is stuck with the Fourth Amendment, even as it offers her no protections from the racially motivated “voluntary interview” she experienced.

IX. DECISION 9: TO CONDUCT COMPUTER SURVEILLANCE

Assume now that the police, still suspecting Tanya of aiding or abetting terrorism, monitor the Internet websites she visits and track to and from whom she sends and receives e-mail. Yet again, race and religious affiliation form the sole basis for their suspicion. Moreover, the Fourth Amendment is not implicated, because neither of these surveillance activities is legally construed as a search or seizure. Online addresses used during Internet surfing or online communication are considered public information, unlike the actual content of communications, and courts have analogized the collection of such information to the government’s long-established right to monitor telephone transmission records and postal addresses/addressees appearing on the outsides of sealed envelopes.⁹⁵

X. DECISION 10: TO INVESTIGATE TO VERIFY WELFARE ELIGIBILITY

Assume now that Tanya has applied for welfare benefits. Her county has a program requiring that all prospective welfare recipients submit to mandatory home visits by county social workers to verify the recipients’ eligibility for welfare benefits. The county welfare agency notifies Tanya in advance that the inspection visit will occur at some point during the following week, between the hours of noon and five in the afternoon. When the social workers visit Tanya’s home, they find a small bag of marijuana owned by Tanya’s son on

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

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

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

the floor of his bedroom. Per the terms of the county program, they report this finding to county prosecutors. Although the district attorney declines to prosecute, the county welfare agency uses the incriminating evidence as a basis to disqualify Tanya from welfare eligibility. Tanya cannot claim Fourth Amendment protection from the social workers' search, because courts, including the Supreme Court, have held either that such investigations do not constitute a Fourth Amendment "search," or else that they represent a "special needs" exception to the Fourth Amendment that is allowable so long as the primary purpose of the search is justifiable for reasons other than strictly law enforcement purposes.⁹⁶

XI. DECISION 11: TO CONDUCT SURVEILLANCE OF HOMELESS DWELLING

Within months of being found ineligible for welfare benefits, Tanya is evicted from her apartment and finds herself homeless. She ultimately joins other homeless people living in makeshift structures made from tarps and cardboard boxes in the Skid Row area of town. Like many other cities, Tanya's city has an ordinance against obstruction of municipal streets and sidewalks, but her "home," and the rest of the homeless tent city, intrudes a few feet onto a city sidewalk. Police officers appear at the tent city to investigate the theft of merchandise from a nearby business. The officers may freely look inside Tanya's dwelling, and may even pull aside a tarp flap or piece of cardboard to

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

do so; any evidence they see within will be, constitutionally, fair game. Courts generally have held that there is no reasonable expectation of privacy in an unauthorized dwelling illegally erected on public land, so police surveillance of such dwellings does not constitute a search under the Fourth Amendment.⁹⁷

XII. DECISION 12: TO CHASE

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

That is what she does one day. The police officers chase Tanya down the street, shouting, “Stop, it’s the police!” as they do so. Is Tanya now seized? No. The fact that she is not formally under the control of the police in the sense of submitting to authority or being apprehended means that she is not seized.⁹⁸ Thus, police officers are free to chase Tanya, even under circumstances where they have no reason to think she has engaged in wrongdoing—and even if their primary reason for doing so is the fact that she is a black woman.

The problem is even worse. If Tanya is running in a “high-crime area,” the officer is pretty close to having reasonable suspicion to justify stopping her. To back up: initially the officer has no reason to believe that Tanya has done anything wrong. Initially, Tanya has the right to avoid the police. To put the point

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

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

doctrinally, she is “free to leave.” But if Tanya exercises that right by running away, the officer may draw an adverse inference from her decision to flee. If Tanya is running in a “high-crime area,” which several scholars have suggested is code for a predominantly black or brown neighborhood,⁹⁹ the officer may now have a basis to stop her, at least according to Supreme Court law.¹⁰⁰

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

[T]he finding that black males in Boston are disproportionately and repeatedly targeted for FIO [“field interrogation observation”] encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.¹⁰¹

The Supreme Court has not embraced the foregoing reasoning, and it remains to be seen whether other jurisdictions will. What this mean for Tanya if she runs from the police is quite demoralizing: An officer’s decision to chase her will not amount to a seizure, so the officer is free to do so even if, prior to the chase, he has no reason to believe that Tanya did anything wrong. Moreover, if Tanya is subsequently seized—either because the officer apprehends her or because Tanya stops running and submits to the officer’s authority¹⁰²—a court may conclude that that seizure is reasonable, particularly if Tanya is running in a “high-crime area.”

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

99. See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245, 254 (2010) (“The police have more power in high-crime neighborhoods than in low-crime neighborhoods.”); see also Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas,”* 63 HASTINGS L.J. 179, 183 (2011); Margaret Raymond, *Down on the Corner, out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999).

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

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

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

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

XIII. DECISION 13: TO SEIZE

In each of the foregoing examples, our assumption is that Tanya has not been seized. But let's now suppose that the officer seizes Tanya by, for example, compelling, and not merely asking, her to produce her identification. Stipulate that this violates the Fourth Amendment in the sense of constituting an unreasonable seizure because the officer has no evidence that Tanya engaged in wrongdoing. After obtaining Tanya's identification, the officer runs her name through a warrant database and discovers that Tanya has an outstanding warrant for a parking violation that she neglected (or could not afford) to pay. The officer handcuffs Tanya, arrests her, and then transports her to the station house.

Assume that Tanya argues that her arrest is unconstitutional. Her claim is that but for the officer's decision illegally to seize her and demand that she produce her identification, the officer would not have discovered the warrant for her parking ticket. To put this point in the language of Fourth Amendment law, the arrest was the "fruit of the poisonous tree" (the illegal seizure).¹⁰³

Tanya could very well lose that argument, particularly if a court concludes that the officer's unconstitutional seizure of Tanya was a reasonable mistake.¹⁰⁴ Under Fourth Amendment law, police officers not only have tremendous

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

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

discretion, they have broad latitude to make mistakes.¹⁰⁵ Were a court to conclude that the officer's unconstitutional seizure of Tanya was a reasonable mistake, it would also likely conclude that the officer's discovery of the outstanding warrant effectively cured the unconstitutional seizure in the sense of being a separate "intervening act." If you are confused by that argument, you should be. How does a warrant whose existence was discovered by an unconstitutional seizure become an intervening act—something that happened—between the unconstitutional seizure and the discovery of the warrant? The unconstitutional seizure of Tanya, not something else, led to the discovery of the warrant, and the warrant was the basis for Tanya's arrest.

The foundational case on how we should think about an intervening act, *Wong Sun v. United States*,¹⁰⁶ provides a more sensible way of thinking about causation and the "fruit of the poisonous tree" analysis. Simplifying the case, *Wong Sun* involved the admissibility of two confessions.¹⁰⁷ Let's call these confessions Statement 1 and Statement 2. Without too much difficulty, the Court concluded that Statement 1 was inadmissible because it was the product of an unreasonable seizure. Not so with respect to Statement 2. The defendant had argued that Statement 2 should be excluded as the fruit of the same poisonous tree that produced Statement 1—to wit, the unreasonable seizure.

The Court disagreed, pointing to, among other things, the fact that the defendant voluntarily showed up to the station house two days after Statement 1 and provided Statement 2. His decision to do so, reasoned the Court, was an "intervening act" that broke the chain of causation between the initial illegal seizure that produced Statement 1 and the defendant's utterance of Statement 2.

No such intervening act applies to my hypothetical. Instead, you have a line of causation from an unconstitutional seizure (the officer's decision to stop Tanya without reasonable suspicion), to the discovery of the outstanding warrant, to Tanya's arrest. The chain of causation between the officer's illegal seizure of Tanya and her arrest is like the chain of causation between the illegal seizure in *Wong Sun* and Statement 1; her illegal seizure and arrest bear virtually no resemblance to the illegal seizure and Statement 2 in *Wong Sun*. Nevertheless,

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

106. *Wong Sun*, 371 U.S. at 471.

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

because of a recent Supreme Court case that effectively expands the meaning of an intervening act,¹⁰⁸ Tanya's argument that her arrest is unconstitutional—the “fruit of the poisonous tree” of an illegal seizure—could fall on deaf ears.

An African-American's vulnerability to a *legal* arrest that began as an *illegal* seizure is quite real given how many jurisdictions have engaged in what I call “predatory policing”—the utilization of policing as a mechanism to raise revenue for cities generally and police departments specifically.¹⁰⁹ Predatory policing includes issuing citations to people for minor infractions, which, when unpaid, result in the issuance of a warrant. The number of warrants that police officers issue in any given year may surprise you. Consider, for example, Ferguson Missouri. Ferguson's population numbers 21,000. As of 2014, Ferguson had issued 90,000 summonses and citations; and in 2013 alone, Ferguson issued 9,007 warrants.¹¹⁰

Against the background of that many outstanding warrants, police officers have an incentive not only to follow people and ask them for their identification (which many people will “voluntarily” turn over on the assumption that they have to), but also to demand their identification (when people refuse to comply or assert their rights). If it turns out that the person the officer stops does not have an outstanding warrant, the officer will simply send that person on her way. At worst for the officer, that person will file a formal complaint. Chances are, she won't even do that. Certainly, she won't file a lawsuit. Would you? If the officer's license check reveals that the person has an outstanding warrant, the officer will be able not only to arrest the person, but also to subject the person to a number of additional intrusions. The bottom line is that even though the officer had no reason to believe that Tanya did anything wrong when he approached her, he could end up with a legitimate basis on which to arrest her.

CONCLUSION

That I have employed hypotheticals to frame this chapter does not mean that pedestrian checks of the sort I have described are a hypothetical problem. They are not. Just ask any African-American. Likely, they will have a story to tell about themselves or someone they know. Moreover, the hypotheticals are grounded in Supreme Court cases in which many of the litigants are black. Take a look at Figure 1 below. The left column lists some of the pedestrian

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

109. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1489 (2016); see Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

110. U.S. DEP'T OF JUSTICE, *supra* note 2, at 7, 55.

checks that the Supreme Court has ruled are not a search or a seizure; the middle column reveals the case and year in which the Court rendered that ruling; and the column to the right notes the race of the litigant in the case.

Figure 1: Supreme Court Cases Involving Black Litigants

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

One might say, borrowing from Toni Morrison, that Figure 1 tells a story about Supreme Court decision-making “on the backs of blacks.”¹¹¹ The point being that, in deciding whether police conduct triggers the Fourth Amendment, the Court regularly adjudicates cases that involve and impact African-Americans without expressly engaging how members of that community perceive and experience the police.¹¹² The question then becomes whether the rest of Fourth Amendment law looks any better. The short answer, distressingly, is no, as my book, again using mostly hypotheticals, *The 4th: From Stopping Black People to Killing Black People*, will discuss in greater detail.

RECOMMENDATIONS

I have two hopes for the chapter. One is that, whatever your views about policing, you will leave the chapter feeling like you have had a “teachable moment” about the range of investigation tactics police officers can employ without triggering the Fourth Amendment. My second hope is that you will employ the chapter as a tool to educate others in the conduct of the work you do, whether that work takes the form of “street law” sessions, public forums,

111. Toni Morrison, *On the Backs of Blacks*, TIME, Dec. 2, 1993, at 57.

112. This is another moment to remind the reader that I am not suggesting that blacks are the only racial group who are impacted by the Court’s seizure analysis. Note, for example, that the case establishing the idea that law enforcement may question a person about their immigration status without implicating the Fourth Amendment involved Latina/o litigants.

know-your-rights campaigns, legislative decision-making, media education projects, community organizing, op-eds, classroom teaching, or conversations with friends and family.

There are four more specific recommendations that flow from the Fourth Amendment problems this chapter describes:

1. **Messaging to police officers.** Over the past few years, there has been quite a bit of discussion about whether police officers should be trained on implicit bias and de-escalation techniques. The consensus is they should. This chapter suggests that police officers should be “trained” in another sense: We should encourage them *not* to employ the power the Fourth Amendment effectively gives police officers to force interactions with people with little or no basis. Much of our engagement with law enforcement assumes that the police conduct that we find troubling is inconsistent with the United States Constitution. As this chapter makes clear, that assumption is flawed. “Bad” policing and constitutional policing are not the same thing. Thus, our collective message to police officers should be: Just because the Constitution allows you to do X, doesn’t mean you should.
2. **Police administrative procedures and protocols.** Consistent with the above, police departments should be clear in their training materials and regulatory and administrative guidelines about where their internal governance protocols are more stringent than Fourth Amendment law.
3. **State law.** State law decision-makers—including judges and legislatures—should take seriously that Fourth Amendment law sets the floor with respect to the scope of our privacy and security from governmental intrusions. That is to say, state law can provide more protections than Fourth Amendment law affords.
4. **Community organizing and social protest.** Although the foregoing suggestions are decidedly modest, likely they will not occur without political organizing and social protest. In other words, a “bottom up” approach to social change is required. To appreciate what a relatively narrow but important version of this strategy might look like, think about the LGBTQ movement for marriage equality. Proponents for marriage equality pushed cities, state courts, and state legislatures to legitimize same-sex marriage well before the Supreme Court did the same. There was nothing particularly radical about this strategy; it just didn’t overly rely on the Supreme Court or even litigation.

Advocates against police violence should, at a minimum, adopt a similar “bottom up” strategy. This chapter can help them do precisely that. Specifically, community organizers, political activists, policymakers and litigators can employ the race and Fourth Amendment story this chapter tells to generate on-the-ground political activity directed at moving the important levers of change I highlighted above: (1) police department rules and regulations, (2) municipal laws and ordinances, (3) state legislation, and (4) state supreme court decision-making.