O.P.P.:* How "Occupy's" Race-Based Privilege May Improve Fourth Amendment Jurisprudence for All

Lenese C. Herbert**

What strikes me here is that you are an American talking about American society, and I am an American talking about American society—both of us very concerned with it—and yet your version of American society is really very difficult for me to recognize. My experience in it has simply not been yours. \(^1\)

Occupy is an organic, diverse, grassroots, and anarchist² protest of national scope.³ It arose from a groundswell of fomenting fury against "the One Percent," i.e., the ownership class that is broadening the gap between itself and the nonelite remainder classes of America. Occupy regards itself as a self-governing, consensus-based, direct-action collective of collectives that spans the United States.⁴ Occupy has no official

^{* &}quot;O.P.P." stands for "Other People's Privilege" and represents a light-hearted take on an equally light-hearted 1991 Rhino/Ada hit song, "O.P.P.," sung by the group Naughty by Nature. There, the charming yet hapless protagonist, lead singer Anthony "Treach" Criss, recounts a number of situations that found him far too involved with other people's property ("O.P.P."). See O.P.P. by Naughty by Nature, SONGFACTS, http://www.songfacts.com/detail.php?id=2899 (last visited Feb. 6, 2012). Not surprisingly, when Treach recounted the more ribald encounters, the second "P" took on a more adult meaning. See id.

^{**} Professor of Law, Albany Law School; Visiting Professor, Howard University School of Law. Many thanks to the members of the *Seattle University Law Review*, especially Joan Miller, Editor in Chief, and Lead Article Editor, Andrew Tingkang, who provided the most respectful and careful editing of my work experienced to date. Thanks also to the symposium staff and organizers, as well as the Fred T. Korematsu Center for Law and Equality. I hope that the reporting efforts of the Washington Task Force on Race and the Criminal Justice System ultimately serve as a foundation for equality in the application and enforcement of the criminal law.

^{1.} Stephen Steinberg, *The Liberal Retreat from Race During the Post-Civil Rights Era*, in The House that Race Built 13, 18 (Wahneema Lubiano ed., 1998) (emphasis added) (quoting James Baldwin, *Liberalism and the Negro: A Round-Table Discussion*, COMMENT., Mar. 1964, at 25, 31).

^{2.} See David Graeber, Op-Ed., Occupy Wall Street's Anarchist Roots, ALJAZEERA (Nov. 30, 2011), http://www.aljazeera.com/indepth/opinion/2011/11/2011112872835904508.html.

^{3.} To date, Occupy has spread to over one hundred U.S. cities. *About*, OCCUPYWALL STREET.ORG, http://occupywallst.org/about/ (last visited Feb. 6, 2012).

^{4.} *Id.* ("The occupations around the world are being organized using a non-binding consensus based collective decision making tool known as a 'people's assembly.""). Occupy protests and movements have spread around the United States and, it seems, the world. *See id.* Occupy movements include Occupy Atlanta, Occupy D.C., Occupy Denver, Occupy Houston, Occupy L.A., Occupy Oakland, Occupy Seattle, and the one eponymous, seminal one, Occupy Wall Street (OWS).

set of demands,⁵ projected outcomes, bottom lines, talking heads, or internal hierarchy.⁶ Rather, Occupy is about the "failure" of the United States to ensure the protesters' financial and professional success. It has "ignit[ed] a much-overdue conversation" about America's broken social contract and the government's bailout of "the wrong folks" on the backs of its working- and middle-class who "got nothing back." Occupy is all the rage in certain circles, strangely popular in others,⁸ and has even been called "sexy" and "hip." ⁹

See Occupy Directory, OCCUPY TOGETHER (Oct. 2011), http://www.occupytogether.org/docs/OccupyDirectory.pdf. This Article will discuss these protests collectively, as well as specifically, identifying the particular geographic location's events.

5. But see Dahlia Lithwick, Occupy the No-Spin Zone, SLATE (Oct. 26, 2011), http://www.slate.com/articles/news_and_politics/politics/2011/10/how_ows_confuses_and_ignores_fox_news_and_the_pundit_class_.html ("One of the most fatuous themes of mainstream OWS coverage is the endless loop of media bafflement at this movement that doesn't have a message."). Occupy supporters are quite adamant that they have had identifiable demands—if not from the outset, certainly as the movement matured. See, e.g., Declaration of the Occupation of New York City, N.Y.C. GEN. ASSEMBLY, http://www.nycga.net/resources/declaration/ (last visited Feb. 6, 2012). Lithwick, for example, points to signs that have been on display at various Occupy movements that "are perfectly and intrinsically clear: They want accountability for the banks that took their money, they want to end corporate control of government. They want their jobs back. They would like to feed their children." Lithwick, supra. As such:

Occupy Wall Street is not a movement without a message. It's a movement that has wisely shunned the one-note, pre-chewed, simple-minded messaging required for cable television as it now exists. It's a movement that feels no need to explain anything to the powers that be

Id. Moreover, supporters state that Occupy does not need a message or demands:

I feel it's time to explain something: Occupy Wall Street may not have laid out all of its demands in a perfectly cogent one-sentence bumper sticker for you, Mr. Pundit, but it knows precisely what it *doesn't* want. It doesn't want you.

What the movement clearly doesn't want is to have to explain itself through corporate television. To which I answer, Hallelujah. You can't talk down to a movement that won't talk back to you.

Id.

- 6. See, e.g., Marjorie Howard, Making Sense of the Occupy Movement, TUFTS NOW (Oct. 25, 2011), http://now.tufts.edu/articles/making-sense-occupy-movement (characterizing Occupy as a "leaderless movement" with "no clear goals").
- 7. Eliot Spitzer, Bill Kristol's Appalling Attack on Occupy Wall Street: His Despicable TV Ad Tars OWS as an Anti-Semitic Movement, SLATE (Oct. 24, 2011), http://www.slate.com/articles/news_and_politics/the_best_policy/2011/10/bill_kristol_and_occupy_wall_street_his_despicable_tv_ad_tars_ow.html.
- 8. See Documenting the Occupy Protest: Data Mining for Instant History, ECONOMIST (Dec. 7, 2011), http://www.economist.com/blogs/prospero/2011/12/documenting-occupy-protests (discussing the creation of "OccupyArchive," http://occupyarchive.org, the seminal virtual collection of new and old media and metadata associated with Occupy efforts by major museums and historical societies, such as the Smithsonian Institute, New York Public Library, New York Historical Society, and Museum of the City of New York); see also Cristian Salazar & Randy Herschaft, Museums, Historical Societies Collecting Occupy Wall Street Artifacts, ASSOCIATED PRESS, Dec. 24, 2011, available at http://www.commondreams.org/headline/2011/12/24-3 (revealing institutions' "frenzied collection" of Occupy material, as well as a planned 2012 exhibit at the Museum of the City of New York). But

Almost immediately, I supported Occupy.

With a startling quickness, however, my Occupy enthusiasm waned. It then began to vacillate between indifference and bare tolerance. My empathy curdled, it seemed, much sooner than expected.

Weird.

I am of the vintage and ilk that reveres the successes of those who participated in the American Civil Rights Movement—those preternaturally dapper and impossibly stylish gentlefolk who protested while coiffed and coated, sporting sharp trouser creases, meringue-puffy crinolines, skinny ties, and nicely polished saddle shoes. These Americans were generally quite ordinary. A few were privileged; many were quite poor. They were treated as second-class citizens and denied their birthright in their own country. As a result, they knew they would suffer criminal arrest for peacefully protesting unlawful state violations and for violating state segregation laws that contradicted human dignity and America's zeitgeist. These protesters steeled themselves against terrible mob violence and death, given the ferocity with which some whites believed that "the concept of whiteness was premised on white supremacy rather than mere difference." To my eyes—and no doubt, others "these citizens are iconic personifications of American courage and reform."

Thus far, Occupy has stirred none of these (admittedly) romanticized notions or even swells of authentic pride for me (save for the times U.S. military members and veterans have stepped in to protect Occupy

Amy Roberts, an Occupy member who is also a member of OccupyArchive's working group, has indicated that although it is positive that such venerated institutions desire Occupy material, "they would prefer the institutions collaborate with the participants. 'We know more about the movement and the stories behind the materials that have been collected" Id.

^{9.} See Salazar & Herschaft, supra note 8 (quoting Ben Alexander, head of the Queens College, N.Y. special collections and archive).

^{10.} Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1709, 1737 (1993).

^{11.} See, e.g., Robert McCartney, Occupy D.C. Camps Are Protesting the Right Way, WASH. POST, Nov. 20, 2011, at C1 (criticizing Occupy in multiple locations for "fail[ing] to protect their image adequately"). McCartney notes, "Their campgrounds were linked to sanitation problems, drug use and other woes. Mayors have ordered police to break up the camps—whose very presence typically violated some municipal ordinance—amid little public outcry." Id.

^{12.} See Anders Walker, Shotguns, Weddings, and Lunch Counters: Why Cultural Frames Matter to Constitutional Law, 38 FLA. ST. U. L. REV. 345, 349, 370 (2011) (identifying the American Civil Rights Movement as an inspiration to later social reform movements, such as Second Amendment litigation, the Lesbian/Bisexual/Gay/Transgendered social movement, and same-sex marriage legislation, given "various ways that movement organizers articulated reform agendas in terms that average people could understand" (citation omitted)).

members from police abuse). ¹³ Occupy protesters are, comparatively speaking, blessed with a stunning array of privileges, the least of which is state-of-the-art technology. ¹⁴ Occupy members communicate not only with each other but also with the world via the latest mobile devices and social-media platforms. ¹⁵ Additionally, Occupy has been the beneficiary of sympathetic merchants who, at various "encampments," deliver sustenance ranging from pizza to gourmet food according to the protesters' dietary specifications (e.g., vegan). ¹⁶ Occupy members have requested and received donated tents, generators, clothing, and all matter of outdoor gear and camping equipment to make their stay at various public locations more comfortable. ¹⁷

_

^{13.} E.g., Marine, Navy, Army and Airforce Vets and Police Vow to Protect Innocent Protesters, WASH.'S BLOG (Oct. 27, 2011), http://www.washingtonsblog.com/2011/10/marine-navy-army-and-airforce-vets-and-police-vow-to-protect-innocent-protesters.html (noting various military members' support of Occupy); Marine Sergeant Stands Up to NYPD to Protect Wall Street Protesters, WASH.'S BLOG (Oct. 17, 2011), http://www.washingtonsblog.com/2011/10/veterans-support-wall-street-protests.html (praising U.S. Marine Sergeant Shamar Thomas for his lambasting of N.Y.P.D. officers for their violent treatment of peaceful Occupy protesters); Official VFP Statement Regarding the Wounding of Scott Olsen at Occupy Oakland, VETERANS FOR PEACE (Oct. 26, 2011), http://www.veteransforpeace.org/news_detail.php?idx=123 (supporting U.S. Marines Corps veteran Scott Olsen who suffered a fractured skull during his peaceful protest at the Oakland, California Occupy site, as well as other Veterans for Peace members who actively support the Occupy protests).

^{14.} E.g., Alexis Madrigal, #Occupy: The Tech at the Heart of the Movement, THE ATLANTIC (Nov. 11, 2011), http://www.theatlantic.com/technology/archive/2011/11/-occupy-the-tech-at-the-heart-of-the-movement/248435/ (noting the importance of Occupy's use of modern technology in message and information dissemination).

^{15.} See, e.g., Occupy Facebook: Protesters Planning Their Own Social Network, SLATE (Dec. 29, 2011), http://www.slate.com/blogs/trending/2011/12/29/occupy_facebook_protesters_planning_their_own_social_network.html (describing the anticipated January 2012 unveiling of Global Square, an Occupy-specific social network platform). On March 16, 2012, a call for coders was issued on Global Square's Facebook page. The Global Square, FACEBOOK, (Mar. 16, 2012, 12:20 PM), https://www.facebook.com/theglobalsquare.

^{16.} E.g., Shelley Emling, Occupy Montclair to Deliver Vegan Thanksgiving Dinners to Zuccotti Park, MontclairPatch (Nov. 23, 2011), http://montclair.patch.com/articles/occupymontclair-to-deliver-vegan-thanksgiving-dinners-to-zuccotti-park (detailing how Occupy Montclair sought volunteer drivers to deliver "at least 200 individually packaged hot vegan meals" to ensure "Wall Street protesters gathered at Zuccotti Park ha[d] a cooked Thanksgiving dinner"); see also Justin Elliott, Donations to Occupy Wall Street Plummet, SALON (Dec. 15, 2011), http://www.salon.com/2011/12/15/donations_to_occupy_wall_street_plummet/ (noting that Occupy's expenditures included payment for "tincture and salve materials . . . requested by herbalists treating people in Zuccotti Park").

^{17.} E.g., Andrew Schulman, Occupy Ann Arbor Discusses Challenges, MICH. DAILY, Oct. 20, 2011, http://www.michigandaily.com/news/occupy-ann-arbor-holds-third-meeting-liberty-plaza (noting encampment donations of blankets, tents, kitchenware, and other goods); see also Elliott, supra note 16 (calculating the cash donations raised by U.S. Occupy movements to be over \$667,000 dollars in two-and-a-half months, with donations "[i]n the heady days of early October" peaking at approximately \$15,000–\$20,000 per day).

Occupy critics abound. Some have commented on Occupy's aesthetic as sprawling, disorganized, and unkempt. Some distrust or dismiss Occupy due to its lack of organizational structure or clear objectives. So, when a seemingly coordinated law enforcement effort was undertaken across the nation to "move" Occupy "encampments" from commandeered public spaces, it was startling to encounter shrill missives of disbelief, emotional entreaties, and shock. Why, in twenty-first century America, is anyone surprised that police use violence to disperse peaceful, nonviolent protesters? It was my turn to be shocked, though I found the response of Occupy and its supporters understandably naïve (given my perception of the age range and life experiences of Occupy's members).

I was not alone. Occupy's frantic social media communications that "they are arresting people" or "they are beating people" or "they are tightly handcuffing and roughly handling people" irked many. Had Occupy members not paid attention to American history? When Occupy members complained that law enforcement officers harmed media that recorded officer violence against Occupy members, I wondered why these occupiers did not expect that police would monitor their communications, attack those recording less-than-honorable officer conduct, and

^{18.} See, e.g., Erin Sherbert, Newt Gingrich Tells Occupy Protesters to Take a Bath, S.F. Weekly (Nov. 21, 2011, 8:10 AM), http://blogs.sfweekly.com/thesnitch/2011/11/newt_gingrich_tells_occupy_mov.php.

^{19.} E.g., Rick Cohen, Occupy Wall Street, the Tea Party . . . And Us, NONPROFIT Q. (Oct. 11, 2011), http://www.nonprofitquarterly.org/index.php?option=com_content&view=article&id=16631: occupy-wall-street-the-tea-party-and-us&catid=153:features&Itemid=336 ("Critics suggest that the political message of the Occupy groups has been confused, or that multiple groups have attached themselves to the protests so that it is hard to figure out whether this is just a protest against the economic power of Wall Street or one that also incorporates opposition to the decade-long war in Afghanistan or support for Palestinian independence, etc.").

^{20.} See, e.g., Darren Martin, Blacks Are Not and Will Not Occupy Wall Street, MAROON TIGER (Dec. 4, 2011), http://www.themaroontiger.com/?p=1632 (noting "a plethora of reasons" why Occupy suffers from few black supporters, including but not limited to "a feeling of revenge").

^{21.} See Connor Adams Sheets, Twitter Subpoena Reveals Law Enforcement Monitoring OWS Via Social Media, INT'L BUS. TIMES (Dec. 27, 2011), http://www.ibtimes.com/articles/273273/20111227/twitter-subpoena-reveals-law-enforcement-monitoring-ows (characterizing charges against "[h]undreds of protesters . . . for assembling peacefully" as "bogus"); cf. Ray Rivera et al., A Few Blocks, 4 Years, 52,000 Police Stops, N.Y. TIMES, July 11, 2010, at A1, available at www.nytimes.com/2010/07/12/nyregion/12frisk.html?_r=1&hp (detailing the excessive deployment of "stop-and-frisk" and arrest powers on the residents of Brownsville, Brooklyn, N.Y. by the N.Y.P.D.). "[D]ay-to-day interactions with officers can seem so arbitrary that many residents say they often come away from encounters with officers feeling violated, degraded and resentful." Id. Even a number of former N.Y.P.D. officers have characterized this level of police activity in this neighborhood as "less geared to bringing down crime than feeding the department's appetite for numbers." Id.

destroy the evidence.²² Squelching civil unrest with official violence is a textbook tactic of American law enforcement agencies.²³ All of these patterns (and more) were evidenced by the American Civil Rights Movement.

Yet, Occupy supporters seemed incapable of seeing the parallels and shared identity. Apparently, a significant number of Occupy members felt no kinship or identity with those wives, poets, scholars, academicians, students, men, women, and children of that "theatre of cruelty,"²⁴ the American Civil Rights Movement.²⁵ The disconnect was puz-

Had Hass viewed the ample and available footage and pondered the identity of the causes, he might have been less shocked about the price paid by peaceful, albeit disparaged and disfavored, populations. For example, Hass indicates that when he heard that "campus police had moved in to take down the Occupy tents and that students had been 'beaten viciously,'" he did not believe it: "I didn't believe it. In broad daylight? And without provocation?" Hass, *supra*. When Hass and his

^{22.} See Sheets, supra note 21 (revealing law enforcement subpoenaed Twitter for subscriber information associated with Occupy Boston's Dewey Square "encampment" between December 8 and December 13, 2011, in pursuit of an "official criminal investigation"). The Suffolk County District Attorney's Office in Massachusetts also subpoenaed subscriber information regarding OWS persona "Guido Fawkes," likely the most visible online voice regarding "Occupy" activities. See Milton Valencia, Occupy Blogger Fighting Subpoena, Bos. GLOBE, Dec. 29, 2011, at B1. Despite a specific request in the subpoena to "not disclose the existence of this request to the subscriber," Twitter also notified OWS persona "Guido Fawkes," who posted the department's subpoena online. Sheets, supra note 21. But contrast the "almost fanatical zeal" with which J. Edgar Hoover's FBI sought incriminating evidence against Dr. Martin Luther King, Jr. See Jen Christensen, FBI Tracked King's Every Move, CNN.COM (Dec. 29, 2008), http://edition.cnn.com/2008/US/03/31/mlk.fbi.con spiracy/index.html. The agency placed the civil-rights activist under "constant" surveillance, "secretly tracking King's flights," "tap[ping] King's and his associates' phones and ... bug[ging] their homes and offices." Id. (revealing that the information gleaned via the government's spying "is disclosed in tens of thousands of memos" and "intensified after the March on Washington"); see also FBI Spied on Coretta Scott King, Files Show, L.A. TIMES, Aug. 31, 2007, http://articles.latimes.com/ 2007/aug/31/nation/na-king31 (revealing that the U.S. government also spied on Martin Luther King, Jr.'s widow, Coretta Scott King, "for several years after his assassination" by intense, constant surveillance).

^{23.} See infra text accompanying notes 106-11.

^{24.} Henry A. Giroux, *Living in the Age of Imposed Amnesia: The Eclipse of Democratic Formative Culture*, TRUTHOUT (Nov. 16, 2010), http://archive.truthout.org/living-age-imposed-amnesia-the-eclipse-democratic-formative-culture65144 ("We live in an age in which punitive justice and a theater of cruelty have become the defining elements of a mainstream cultural apparatus that trades in historical and social amnesia.").

^{25.} For example, Robert Hass, former poet laureate of the United States, wrote about his November 2011 Occupy Berkeley experiences. Robert Hass, Op-Ed., *Poet-Bashing Police*, N.Y. TIMES, Nov. 20, 2011, at SR9, *available at* http://www.nytimes.com/2011/11/20/opinion/sunday/at-occupy-berkeley-beat-poets-has-new-meaning.html?pagewanted=all. Although Hass reflects on the "Free Speech Movement" that occurred fifty years ago at U.C. Berkeley, at no point in the essay did he reference the American Civil Rights Movement. *See id.* Similarly, in defending Occupy, Heather Gautney wrote in detail of "feminists" and "gay rights activism" but completely ignored the American Civil Rights Movement. *See* Heather Gautney, *What is Occupy Wall Street? The History of Leaderless Movements*, WASH. POST, Oct. 10, 2011, http://www.washingtonpost.com/national/onleadership/what-is-occupy-wall-street-the-history-of-leaderless-movements/2011/10/10/gIQAwkFja L_story.html ("This is not just a charming mess. *We are all leaders* represents a real praxis, and it has a real history.").

zling. If the Revolutionary War created and the Civil War preserved the United States, the American Civil Rights Movement beatified (not fully, but sufficiently) its ideals and constitutional guarantees. ²⁶ Certainly, there are Occupy members who are students of the American Civil Rights Movement and emotionally connected to its tectonic movement of the United States, ²⁷ the aftershocks of which continue to reverberate continents away. ²⁸ Even for those occupiers who did not immediately think of the American Civil Rights Movement, at a minimum, did they not recognize modern policing's ²⁹ callous disregard and brute demoralization

wife investigated for themselves, Hass's wife was shoved in the chest and knocked down after "speaking to the young deputies about the importance of nonviolence and explaining why they should be at home reading to their children." *Id.* When Hass tried to help his wife, who had "bounced nimbly to her feet." campus police

began to hammer at the bodies of the line of students. It was stunning to see. They swung hard into their chests and bellies. Particularly shocking to me—it must be a generational reaction—was that they assaulted both the young men and the young women with the same indiscriminate force. If the students turned away, they pounded their ribs. If they turned further away to escape, they hit them on their spines.

Id.

In addition to his injuries ("[t]hey had hit me hard enough so that I was sore for days, but not hard enough to leave much of a mark"), Hass reports that one of his colleagues suffered a broken rib, while another "got dragged across the grass by her hair when she presented herself for arrest." *Id.* Hass must not recall that American Civil Rights Movement protesters faced unprovoked brutality that was as bad and often worse—why else would he be so shocked?

- 26. Howard Winant, Racial Dualism at Century's End, in THE HOUSE THAT RACE BUILT, supra note 1, at 87, 93–94. "The racial dynamics of conquest, of colonization, and of enslavement placed an indelible stamp on U.S. Society." Id. at 90. For actual and putative descendants of that history to rebuke its de jure apartheid justifies why many consider the American Civil Rights Movement as not only historic but also seminal, given that "[f]or centuries white supremacy went almost entirely unquestioned in the political mainstream." Id.; see also Steinberg, supra note 1, at 41 ("The civil rights movement served as a training ground for many of the activists who later organized movements within their own communities. Indeed, the modern women's movement, student movement, farm workers' movement, and others of the period were triggered by the unprecedented scale of non-traditional politics in the civil rights movement." (quoting ALDON MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 288 (1984) (internal quotation marks omitted))).
- 27. Perhaps there are not. *See, e.g.*, Matt Towery, Op-Ed., *Atlanta Mayor Is Tough With Occupy Protests*, FLA. TIMES-UNION, Nov. 9, 2011, http://jacksonville.com/opinion/columnists/2011-11-09/story/atlanta-mayor-tough-occupy-protests (criticizing Occupy Atlanta as "literally too ignorant to recognize a true civil rights icon, Rep. John Lewis, whom they booed and refused to allow to speak to them").
- 28. E.g., Michael Cavna, Amid Revolution, Arab Cartoonists Draw Attention to Their Cause, WASH. POST, Mar. 7, 2011, http://voices.washingtonpost.com/comic-riffs/2011/03/arab_cartoons. html (relating the story of Dalia Ziada, the Egyptian writer and social activist who translated an American comic book about Dr. Martin Luther King, Jr. into Arabic and distributed "thousands" of copies throughout the Middle East and in Tahrir Square during the height of the "Arab Spring" in order to "inform, inflame and open the hearts and minds of their Mideast readers in the throes of revolution").
- 29. Much has been written on racial profiling and race-based policing. Some of the most compelling samples of that work include I. Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203 (2006); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Frank Rudy Cooper, *The "Seesaw Effect" From Racial Profiling to Depolicing:*

that was experienced disproportionately by nonwhite "symbolic assailants," irrespective of criminality? ³¹

"Weird." Or maybe not. 33

Toward Critical Cultural Theory, in The New Civil Rights Research: A Constitutive Approach 139 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006); Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. Miami L. Rev. 425 (1997); David A. Harris, "Driving While Black" and All Other Traffic Offenses, 87 J. Crim. L. & Criminology 544 (1997); Lenese C. Herbert, Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas, 9 Geo. J. On Poverty L. & Pol'y 135, 136–37 nn.4–6 (2002) [hereinafter Herbert, Can't You See?] (offering several examples of innocent, noncriminal blacks such as a Harvard Law student and a law professor who, despite their level of achievement, education, social class, or bearing, "have a long tale to tell of police incompetence, injustice, or brutality"); Tracey Maclin, Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion, 72 St. John's L. Rev. 1271 (1998); Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333 (1998).

- 30. See JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 45–48 (1966) (defining police culture that develops "perceptual shorthand" to identify individuals who officers associate with crime). When police racially profile, "suspicious behavior is reduced to an assumption that racial minorities are more likely to be engaged in criminal behavior than other groups. Police attention will then focus more on these groups than others." Elizabeth E. Joh, Discretionless Policing: Terminology and the Fourth Amendment, 95 CALIF. L. REV. 199, 208 (2007).
- 31. See, e.g., Lenese Herbert, Plantation Lullabies: How Fourth Amendment Policing Violates the Fourteenth Amendment Right of African Americans to Parent, 19 St. John's J. Legal Comment. 197, 201–02 (2005) [hereinafter Herbert, Plantation Lullabies] (describing how race-based policing against or in the presence of children violates, inter alia, the Fourteenth Amendment right to parent one's children free of governmental interference); Elon James White, Dear OWS: Welcome to Our World, The Root (Nov. 29, 2011), http://www.theroot.com/views/ows-blackness (acknowledging ambivalence toward the outcry regarding N.Y.P.D.'s violent 1:00 a.m. raid and eviction of the occupiers in Zuccotti Park, given "an issue that's become so commonplace within my community that small children are taught never to disobey a police officer, to quietly go along with whatever is happening in order not to be on the receiving end of abuse").
- 32. White, *supra* note 31. White's essay was written after he tweeted the following: "Oh? The NYPD are treating you badly? Violent for no reason? Weird.' Black People." *Id.* White notes that "more than a week later, it [had] been retweeted thousands of times." *Id.* It reached "hundreds of thousands of people," given that it was reposted and copied and shared on other social media like Tumblr, Facebook, and even an eCard. *Id.* White noted:

Apparently I struck a chord.

Many people—black, white, Hispanic, all kinds of folks—read it and said, "At least somebody said it." People tweeted thank you to me for saying what they were feeling. People expressed that this was their issue with the OWS movement as a whole.

As. A. Whole.

Id.

White was not alone. Occupy had struck a chord, albeit, one might assume, not deliberately. Social media like Twitter registered sadness, disgust, anger, and rebuke. See, e.g., Itgurl, TWITTER, (Nov. 20, 2011, 10:39 AM), https://twitter.com/#!/itgurl_29/status/138325574987948032 ("Again, where are these ows supporters when black/latinos get brutalized by police everyday?"). This tweet was directed at the historical and societal ignorance expressed by run-of-the-mill Occupy demonstrators, see, e.g., Mandi Milligan, Occupy Wall Street Protests Come to Atlanta, CBSATLANTA (Nov. 6, 2011), http://www.cbsatlanta.com/story/15630309/occupy-wall-street-protests-come-to-atlanta (reporting booing and silencing of John Lewis, D-South Carolina, a veteran and survivor of violence inflicted upon him and fellow Freedom Riders during the American Civil Rights Movement), or

Alas, it has become clear that Occupy members are poor students of history. Of course, these Occupiers did not actually feel kinship with the protesters of the American Civil Rights Movement—they could not. They may be far removed from the centuries-long institution of chattel slavery and post-Civil War American apartheid, but they—in whiteness—are still its inheritors. And perhaps like the whites who felt disenfranchised by the societal shift after the success of the Freedom Rides of 1961 and felt betrayed by their federal government, Occupy whites have learned that their privilege is not inalienable, but legal. Arguably, this is still not too shabby a result. Yet, if the law giveth, it can taketh away. If "[t]he common core of inalienability is the negation of the possibility of separation of an entitlement, right, or attribute from its holder," and if one has known only a world structured on racial subordination of nonwhites, the property interest in white privilege becomes an expectation. The structure of the possibility of nonwhites, the property interest in white privilege becomes an expectation.

In other words? What Occupy and perhaps the rest of us are learning is that law has "constructed 'whiteness' as an objective fact, although in reality it is an ideological proposition imposed through subordination." Occupy has (temporarily) lost its whiteness, which provides "access to a whole set of public and private privileges that materially and permanently guaranteed basic subsistence needs and, therefore, survival." Losing that which has defined your personhood and upon which your personhood relies, then, must be quite the cosmic shift.

expressed by Occupy's celebrated cultural historians such as Naomi Wolf after she tweeted, "[W]e do have our first death in the US caused by police violence." Naomi Wolf, TWITTER (Nov. 22, 2011, 10:19 AM), http://twitter.com/#!/naomirwolf/status/139045322658811904 ("I am very sad to say we do have our first death in the US caused by police violence and it is a fetal death"). While I admire Ms. Wolf's work generally, and I recognize that she did not really mean that incredulous statement, her initial tweet was in perfect tune with Occupy's general ignorance of the long history of police brutality. Every death caused by unnecessary police violence is a tragedy, but Occupy has not brought any "firsts" in this regard.

^{33.} See, e.g., Wahneema Lubiano, *Introduction* to THE HOUSE THAT RACE BUILT, *supra* note 1, at viii ("Central to the existence of racism is the politics of its denial.").

^{34.} Harris, *supra* note 10, at 1730 ("In a society structured on racial subordination, white privilege became an expectation.... The law construed 'whiteness' as an objective fact, although in reality it is an ideological proposition...." (citation omitted)).

^{35.} Id. at 1731 (citation omitted).

^{36.} *Id.* at 1713–14. "The state's official recognition of a racial identity that subordinated Blacks and of privileged rights in property based on race elevated whiteness from a passive attribute to an object of law and a resource deployable at the social, political, and institutional level to maintain control." *Id.* at 1734.

^{37.} Id. at 1730.

^{38.} Id. at 1713.

Occupy, you have a race problem.³⁹

But Occupy's race problem may ultimately prove to be a boon to those who decry the overly aggressive, abusive tactics employed by militarized police departments on nonwhites. This Article submits that Occupy's race problem could, ironically, prove to be a solution if protesters grow more serious about exposing the injury of political subordination and systems of privilege that adhere to the criminal justice system. Privilege is a "systemic conferral of benefit and advantage [as a result of] affiliation, conscious or not and chosen or not, to the dominant side of a power system."⁴⁰ Accordingly, now that police mistreatment affects them personally, 41 Occupy may finally help kill a fictitious Fourth Amendment⁴² jurisprudence that ignores oppression through improper policing based on racial stigma. Occupy may also help usher in an era in which courts are free(er) to produce a more legitimate jurisprudence regarding police conduct⁴³ that inspires greater confidence in reality-based adjudications of modern (albeit longstanding) police misconduct, irrespective of race, as the current "[s]ystems of privilege maintain hierarchies of inequality, adversely impacting the possibility of full societal participation.",44

_

^{39.} And, it seems, a woman problem. E.g., Tina Dupuy, The Occupy Movement's Woman Problem, The Atlantic (Nov. 21, 2011), http://www.theatlantic.com/politics/archive/2011/11/theoccupy-movements-woman-problem/248831/ (identifying Occupy's gender gap as "really a microcosm of the greater culture at large"). There have also been reports of rape of women in "a couple" of Occupy's "encampments." Id. This Article will leave the analysis of that issue, as well as the intersectionality of gender and race, to other able scholars, including analysis by Los Angeles Occupy member Elise Whitaker, who takes pride in and is appropriately regarded as "that white bitch who gets everything she wants." Id.

^{40.} Stephanie M. Wildman, Privilege Revealed: How Invisible Preference Undermines America 29 (1996).

^{41. [}P]rivileged group members can rely on this privilege to avoid objecting to oppression or subordination. Those with privilege can afford to look away from mistreatment that does not affect them personally. The conflation of privilege with the societal norm and this option to ignore oppression contribute to the invisibility of that privilege both to its holder and to society.

Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & Pol'Y 245, 247 (2005) (citations omitted).

^{42.} See Barbara E. Armacost, Organizational Culture and Police Misconduct, 72 GEO. WASH. L. REV. 453, 455–56 (2004) (contradicting common exculpatory explanations for police misconduct, given "theoretical and empirical scholarship on policing strongly suggests that the police organization bears significant responsibility for police misbehavior").

^{43.} See, e.g., Robin K. Magee, The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt, 23 CAP. U. L. REV. 151, 160–61 (1994) (analyzing the benefits that accrue to police officers when law enforcement conduct is assessed via a "good cop paradigm" that, too often, inappropriately presumes lawful governmental conduct and motives).

^{44.} Stephanie M. Wildman, *Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 707, 732 (2004).

II.

The idea of race and the operation of racism are the best friends that the economic and political elite have in the United States. They are the means by which a state and a political economy largely inimical to most of the U.S. citizenry achieve the consent of the governed. They act as a distorting prism that allows the citizenry to imagine itself functioning as a moral and just people while ignoring the widespread devastation directed at black Americans particularly, but at a much larger number of people generally. Poverty has a black face—not in reality, but in the public imagination. Crime has a black face—again, not in reality, but in the public imagination. And I use the word "public" without a race adjective because the operation of racism is so thoroughgoing that even those individuals who are its objects are not exempt from thinking about the world through its prism.

Occupy, you should have seen this coming.

Many sent you warnings that police too often operate not as you are told or perhaps as you have experienced:⁴⁶ Officer Friendly retrieving treed cats with a folksy smile; offering a gentlemanly crook of the elbow while assisting elders across busy intersections; rescuing distressed damsels by thwarting the untoward and knavish; shooting to warn, slow, or stymie.

For many years, those who are charged with keeping the law have eschewed it. For many years, police have been regarded as a joke and, often as a result, so has local policing, government, and in some circles, even America.

Now you know what has been known: police violence is systemic and organizational.⁴⁷

Perhaps you now see that in your freedom, "as in all freedoms (especially stolen ones), lies danger." When law enforcement violence and abuse is shielded by our legal system, such atrocities are too often swept under the amulet-like mantra that we should not punish the officer for

^{45.} Lubiano, supra note 33, at vii (emphasis added).

^{46.} Herbert, Can't You See?, supra note 29, at 143 ("[R]esidents and frequenters of no- or low-crime areas are often personally unfamiliar with the policing done in high-crime areas, where members of respectful and friendly police departments become abusive and hostile." (citations omitted)).

^{47.} Armacost, *supra* note 42, at 459 (refuting "bad apple" and "rogue cop" individual-specific notions of police violence, as "the role of the police organization [is an important component] in shaping attitudes and influencing decision making").

^{48.} Toni Morrison, *Home, in* THE HOUSE THAT RACE BUILT, *supra* note 1, at 3–4; *see also* Winant, *supra* note 26, at 87 ("The United States: what is it? A nation built on the soil of conquest, battened on the theft of human beings."). But in this context, "stolen" mainly refers to the staggering windfall of benefits wrought by centuries of chattel slavery.

"just trying to do his job." But, if we—and by extension, our civil and criminal laws—presume that punishing misbehaving officers deters improper police violence, we should understand that the lack of punishment has the opposite effect. Indeed, to the extent that police departments promote problem officers, they are actually rewarding their aggressive conduct." When supervisors do not discipline officers, despite lawsuits or complaints involving police brutality, and those officers' personnel files remain exemplary, the officers have no incentive to change their behavior."

Many of us are quite aware that our disfavored status as nonwhites erroneously relegates us to the low status of The Other, the outsider, even when our family roots grow deeper⁵⁴ and yield sweeter fruit⁵⁵ than whites who, ostensibly, have no excuse given the advantages that accrue thanks to whiteness.⁵⁶

^{49.} Armacost, *supra* note 42, at 465–68 (detailing the numerous doctrinal, evidentiary, jurisdictional, and systemic difficulties and disadvantages that thwart legal recourse in both civil and criminal cases against police violence).

^{50.} *Id.* at 464 ("Behavioral theories of civil and criminal liability posit that individuals who suffer negative consequences for their conduct will think twice before repeating their acts (specific deterrence), and observing others' punishments will discourage potential wrongdoers from engaging in similar acts (general deterrence).").

^{51.} *Id.* at 474 ("[M]any police departments apparently consider the money they pay out in damages and settlements as simply a 'cost of doing business.'" (citation omitted)).

^{52.} Id.

^{53.} *Id*.

^{54.} See NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 200, 211 (2010) (describing historical "enlargements" of American whiteness via providing the vote to non-landowning white males and naturalizing waves of white male European immigrants "against a backdrop of the black/white dichotomy").

^{55.} Racial inferiority of nonwhites is repeatedly refuted by empirical evidence. For example, East Asian immigrant children or first-generation children score so well on American standardized tests that their "Model Minority" status has sparked various backlashes. See, e.g., Bill Sing, Toward Equality: Exploring a World of Difference: Backlash Against the "Model Minority," L.A. TIMES, Feb. 13, 1989, http://articles.latimes.com/1989-02-13/news/ss-1612_1_model-minority. Even though black Americans are repeatedly regarded and reported as inferior in all walks and ways of life (save for athleticism, musicality, and criminality), that so many occupy the middle- and upper-classes only two to three generations removed from slavery is a fact worth pondering. Consider also that "the grandsons and [grand]daughters of antebellum America's slave commodities have become the masters of the nation's creative profile." Greg Tate, Nigs R Us, or How Blackfolk Became Fetish Objects, in Everything But the Burden: What White People Are Taking From Black Culture 3 (Greg Tate ed., 2003).

^{56.} DEVAH PAGER & BRUCE WESTERN, SCHOMBURG CTR. FOR RES. IN BLACK CULTURE, RACE AT WORK: REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET 7–12 (2005) (finding "a complex pattern of racial inequality" in employment opportunities, as race-based discrimination in the employment market was so severe that white felons were more likely to receive a job offer than black college graduates with no criminal record, and that if blacks were offered a position, they were channeled into the lower positions far more than Hispanic and white candidates).

Nonwhites have tried to alert you to race-based injustices and inequality.⁵⁷ More than not, whites would—as one comedian once joked with a twinge of bitterness—rather be poor than black and rich, even though the circumstances of their lives will likely remain as is.⁵⁸ Now, you are aware that targeted head-knocking occurs when disempowered civilians communicate protest or dissent.⁵⁹

Did you think we were lying to you? Instead of believing our credible evidence and sound arguments, did you deem those who challenged aggressive policing as "emotional" and "sensitive," vigilantly playing a dog-eared "race card," as some have?⁶⁰ Your understanding seemed unshaken by, say, the overwhelming number of times members of a mere, albeit rather visible, 6% of the entire U.S. population have disproportionately suffered at the hands of the police. Or have you forgotten that nonwhites constitute a disproportionate number of the drivers and passengers pulled over on the side of the road by police?⁶¹ Or those publicly frisked by the police? Or those handcuffed and led away or placed in the back seat of a cruiser?⁶²

But it is clear and even understandable what you thought you were doing by ignoring the warning signs: feeling safer, superior, and relieved

^{57.} White, supra note 31.

^{58.} CHRIS ROCK, ROCK THIS 31 (2000) ("There's not a white person reading this book who would change places with me. And I'm rich!... Even you white guys making minimum wage are going, 'Uh uh. I'm going to roll these white dice and ride this white thing out a *little* longer. See where it takes me.""). Racializing individuals in the United States "denied the existence of commonalities among whites and nonwhites—such as shared economic activities and statuses, shared rights as citizens, even on occasion shared humanity—thus constructing race, at least in principle, in terms of all-embracing social difference." Winant, *supra* note 26, at 90–91.

^{59.} See, e.g., Herbert, Can't You See?, supra note 29, at 145 (noting that officer-perceived challenges to authority often met "punishment swiftly, harshly, and unequivocally").

^{60.} See White, supra note 31.

^{61.} See Mario L. Barnes & Robert S. Chang, Analyzing Stops, Citations, and Searches in Washington and Beyond, 35 SEATTLE U. L. REV. 673, 677 (2012) (analyzing data that indicate racial disparities at the stop level in many jurisdictions, but finding encouragement that "there is no discernible bias with regard to traffic stops" by the Washington State Patrol); Clayton Mosher & J. Mitchell Pickerill, Methodological Issues in Biased Policing Research with Applications to the Washington State Patrol, 35 SEATTLE U. L. REV. 769, 772–74 (2012) (discussing studies on traffic stop data in Los Angeles, New York City, San Francisco, and San Jose that revealed that African-Americans were more likely to be stopped than whites); Task Force on Race & the Criminal Justice Sys., Preliminary Report on Race and Washington's Criminal Justice System, 35 SEATTLE U. L. REV. 623, 656–57 (2012) (finding racial disparities in the outcomes associated with traffic stops, including higher citations rates and a greater likelihood of being searched among drivers of color).

^{62.} E.g., Tim Wise, Flying Below Radar: Race, Privilege and the Evidence of Things Not Felt, TIMWISE.COM (Jan. 30, 2012), http://www.timwise.org/2012/01/flying-below-radar-race-privilege-a (describing the race-based policing suffered by blacks on a portion of I-95 in Maryland where "about 70 percent of those pulled over by state troopers . . . were black, despite African Americans comprising only about 20 percent of all drivers and those speeding or breaking other laws"). This disproportionality of burden based on race was not limited to Maryland but also included a number of states that were ultimately the subject of an ACLU lawsuit brought on behalf of black drivers. Id.

that your tax dollars were at work. "Race matters" then in an insufficiently articulated sense; "it matters not only as a means of rendering the social world intelligible, but simultaneously as a way of making it opaque and mysterious." Innocent people don't get abused by police. Police don't plant drugs. Police don't resort to violence unless violence threatens their lives or the lives of other innocents. All the while, the racial disparities and white privileges that explain police misconduct are ignored.

You never listened because we are not you.⁶⁴ It is your privilege. It has never been your obligation or burden.⁶⁵ You have, overwhelmingly, been free to bear everything but the burden.⁶⁶ Even when we have been yours—your co-worker, colleague, wife, lover, friend—somehow, you never quite believed our take on reality, our reality's "take."

Now that Occupy movements around the nation have been met with police violence irrespective of the lack of people of color, you can finally see what we have been saying.⁶⁷

Or can you?⁶⁸

Cops knock heads, sons and daughters of white privilege. They rape, lie, humiliate, plant drugs, and destroy property. ⁶⁹ They mis and

^{63.} Winant, supra note 26, at 90.

^{64.} See id. at 88. "[T]oday agreement about the continuing existence of racial subordination has vanished. The meaning of race has been deeply problematized. Indeed, the very idea that 'race matters' is something which today must be argued, something which is not self-evident." Id. (comparing American society's pre-World War I awareness of racial subordination with today).

^{65.} See id. at 87–88. "Not only did racialization tend to minimize differences among people considered white, but it also homogenized distinctions among those whose difference with whites were considered the only crucial component of their identities." *Id.* at 91.

^{66.} See generally EVERYTHING BUT THE BURDEN: WHAT WHITE PEOPLE ARE TAKING FROM BLACK CULTURE, supra note 55, at 3, 14 (compiling a variety of essays that explain that though "the grandsons and [grand]daughters of antebellum America's slave commodities have become the masters of the nation's creative profile" and are allowed "creative superiority," they have been unable to escape fully prevalent, delimiting stereotypes about black Americans' intelligence, morality, criminality, and "feelings of political inferiority").

^{67.} A significant number of videos posted by Occupy protesters show aggressive and violent police officers—no matter the site or city—against whites. The commentary in and surrounding the videos made a point of decrying the violence, given that their victims merely asked an officer a question, only ignored the officer, or were just standing in a public place, as if civilian wrongdoing or lawbreaking is ever required to trigger officer violence.

^{68. &}quot;Race is not only real, but also illusory. Not only is it common sense; it is also common nonsense. Not only does it establish identity; it also denies our identity." Winant, *supra* note 26, at 90

^{69.} See, e.g., Mario Diaz, Alleged Rape Cop's Arresting Officer: "I Threw (His Badge) To The Ground in Disgust," WPIX-TV (Dec. 15, 2011), http://www.wpix.com/news/wpix-rape-cop-new-developments,0,6230827.story (describing N.Y.P.D. officer caught by two others while in the act of raping a young teacher, likely at gunpoint); Steve Mills, Illinois High Court Orders Hearing in Cop

manhandle children five years old or even younger. ⁷⁰ We knew this. Yet, viewing violent police treatment of what has heretofore been privileged whiteness has been a wonder to behold. "Monolithic white supremacy is over...."⁷¹

Now? Deal with it.⁷²

Brutality Case, CHI. TRIB., Feb. 2, 2012, http://articles.chicagotribune.com/2012-02-02/news/chi-illinois-high-court-to-rule-in-police-torture-case-20120202_1_detective-peter-dignan-harmless-error -area-two-police-headquarters (reporting that the court reaffirmed that coerced confessions via police torture are inadmissible evidence in Illinois criminal trials, which cleared the way for Stanley Wrice to challenge the introduction at trial of his "confession," maintaining it was extracted by officer torture consistent with the practices of "disgraced former Chicago police Cmdr. Jon Burge"); Mary Murphy, Cop Was a Part-Time Pimp: NYPD, WPIX-TV (Jan. 13, 2012), http://www.wpix.com/news/wpix-nypd-cop-pimp,0,2468354.story (reporting "moonlighting" N.Y.P.D. officer Monty Green was charged with prostituting women and that police detective Wayne Taylor had previously been sentenced to jail for prostituting a minor girl); Graham Rayman, The NYPD Tapes: Inside Bed-Stuy's 81st Precinct, VILLAGE VOICE, May 4, 2010, http://www.villagevoice.com/content/print Version/1797847/ (highlighting former police officer and whistleblower Adrian Schoolcraft's ordeal after his department superiors learned that he had been secretly audiotaping illegal orders to affect unconstitutional searches and seizures for quota purposes that led to civil rights violations, as well as to ignore actual victims of serious crime).

70. See, e.g., David E. B. Smith, Note, Clean Sweep or Witch Hunt?: Constitutional Issues in Chicago's Public Housing Sweeps, 69 CHI.-KENT L. REV. 505, 513 n.84 (1993) (noting physical searches by police of "children ranging in age from two months to six-years-old"). See generally Herbert, Plantation Lullabies, supra note 31 (noting the significant risk of psychological damage done to children who suffer race-based policing).

71. Winant, *supra* note 26, at 88. Some would say this resonates deeper still, given the U.S. Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which affirmed that First Amendment protections extend to corporations because they constitute legal persons. *Id.* It has long been lamented that "corporations have 'no pants to kick and no soul to damn." Don Mayer, *Legal Loopholes, Business Ethics, and Corporate Legal Strategy: A Reply to Professor Ostas*, 48 AM. BUS. L.J. 713, 740 n.93 (2011) (citation omitted). But they do have massive amounts of money to lavish. If, for example, corporations choose to lavish money on police departments, the purchased political power would trump even white privilege. This is what some suspect occurred during the October 2011 surprise eviction of Occupy protesters from New York City's Zuccotti Park after large banking corporations such as Goldman Sachs, Barclays Capital, Jeffries and Co., Bank of America, and JP Morgan Chase donated large sums of money to the N.Y.P.D. Justin Elliott, *The NYPD, Now Sponsored by Wall Street*, SALON (Oct. 7, 2011), http://www.salon.com/2011/10/07/the_nypd_now_sponsored_by_wall_street. JP Morgan Chase alone donated \$4.6 million dollars to the N.Y.P.D.—an "unprecedented" gift—on the eve of the department's violent eviction. *Id.*

72. See, e.g., Martin, supra note 20. Martin reports:

After speaking with a myriad [of] student scholars here at Morehouse, it was a consensus that black people do not go to the Occupy movements because they think that it does not help the black agenda. Most in the black community feel as if the whites should get a taste of what blacks have been going through for a while. Furthermore, unlike the Civil Rights Movement, blacks do not see a solid reason for fighting against something they have been going through since the end of slavery, why revolt now?

Id.; see also Stacey Patton, Why Wall Street Protests Don't Speak to African-Americans, MADISON.COM (Dec. 5, 2011), http://host.madison.com/ct/news/opinion/column/stacey-patton-why-wall-street-protests-don-t-speak-to/article_5f64c22b-fa81-5078-9da7-07060cd57a0a.html ("[B]lacks are not seeing anything new for themselves in the movement. Why should they ally with whites who are just now experiencing the hardships that blacks have known for generations?").

III.

The United States is not just the domicile of a historically specific form of racial oppression, but it sustains itself as a structure through that oppression.⁷³

"Whites are no longer the official 'ruling race,' yet they still enjoy many of the privileges descended from the time when they were." [I]n a more concealed way, white power and privilege live on." Twenty-first-century America remains racialized, in that "racial meaning is engraved upon all our experiences." For blacks and other people of color, one's perceived racial phenotype unduly affects not only one's trajectory but also whether, under certain circumstances, one is likely or destined to keep—or lose—life itself. Blacks and other racially defined minorities are no longer subject to legal segregation, but they have not been relieved of the burdens of discrimination, even by laws supposedly intended to do so."

This is evidenced in the U.S. Supreme Court's Fourth Amendment jurisprudence. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁷⁹

According to the Supreme Court, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."80

Yet, for an overwhelming number of nonwhites who seek redress for race-based policing under the Fourth Amendment, "the authority of law that allows for interference with their right to be let alone is far from 'clear and unquestionable." ⁸¹ In fact, the Court has proclaimed that

^{73.} Lubiano, supra note 33, at vii (emphasis added).

^{74.} Winant, supra note 26, at 88.

^{75.} *Id*.

^{76.} Id. at 88-89.

^{77.} See id. at 89.

^{78.} Id. at 88.

^{79.} U.S. CONST. amend. IV.

^{80.} Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

^{81.} Lenese C. Herbert, *Bête Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 164 (2003) [hereinafter Herbert, *Bête Noire*] (citation omitted).

complaints of improper subjective officer motivation are properly asserted under the Fourteenth, not the Fourth, Amendment. Thus, the most egregious and racially discriminatory policing in the initial intrusion on a nonwhite person's right to be let alone "evade[s] constitutional scrutiny under the Fourth Amendment analysis," representing what amounts to judicial obeisance to law enforcement and disregard for nonwhite suffering at the hands of the police. Adding insult to constitutional injury, if, after the Fourth Amendment violation, officers locate no evidence of criminality, there is little remedy for the violated nonwhite given that Fourth Amendment remedies are limited to suppression of the unconstitutionally gained evidence. Thus, if there is no evidence to suppress, there is no Fourth Amendment relief.

IV.

If race—and its strategic social and ideological deployment as racism—didn't exist, the United States' severe inequalities and betrayal of its formal commitments to social equality and social justice would be readily apparent to anyone existing on this ground. 85

To understand the fragility of our identities can be profoundly disconcerting, especially in the absence of a political and moral vision in which the individual and the group can see themselves as included, supported, and contributing to the construction of a better society. To counter the authoritarian interpretation of fear and uncertainty, to resist the imposition of exclusive and repressive models of order, a radical democratic politics must acknowledge those very fears and uncertainties, while at the same time offering a way to accept and interpret these emotions publicly and collectively. 866

True power, it may turn out, is not actually what or where many Americans suspect⁸⁷—in whiteness—but resides within the ranks of our

^{82.} See Whren v. United States, 517 U.S. 806, 813, 819 (1996) (locating the proper constitutional challenge for such claims in the Fourteenth Amendment's Equal Protection Clause).

^{83.} Eric J. Miller, Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere," 94 CALIF. L. REV. 617, 651 (2006).

^{84.} Kevin R. Johnson, *The Story of* Whren v. United States: *The Song Remains the Same, in* RACE LAW STORIES 9 (Rachel F. Moran & Devon W. Carbado eds., 2008) ("Many observers find problematic the discretion that the Supreme Court's Fourth Amendment analysis has afforded police and the difficulty such discretion has created for the efforts to end racial profiling.").

^{85.} Lubiano, supra note 33, at vii (emphasis added).

^{86.} Winant, supra note 26, at 111 (emphasis added).

^{87.} Gary Segura, *The End of the End of History*, Bos. REV. (Dec. 9, 2011), http://www.bostonreview.net/BR36.6/gary_segura_occupy_movement_future.php.

capitalistic society's wealthy corporate oligarchy. ⁸⁸ The Occupy movement has provided a rare moment of clarity, making many millions of white and other Americans realize that as massive as white-skin privilege is when compared to nonwhites, it is rendered a nullity against the power of the One Percent. ⁸⁹

Dave Chappelle, comedian, understands whiteness. He once wryly informed an audience that only after a certain level of extraordinary success, you are introduced to those who have assets and financial wealth beyond belief. These individuals possess so much disposable income, that they are capable of paying a stand-up comic approximately 300 million dollars just to use a racial epithet. These deepest pockets, explained Chappelle, are the real/true white people. "The rest of you," he added, "only think you're white." 90

Yet, it seems that more Americans understand the unfair, disproportionate violence of a race-based Fourth Amendment doctrine than a class-based one. Law has long served as the tool by which racial identity grew imbued with value. [L]aw has established and protected an actual property interest in whiteness itself.... Police have long enforced that law. Thus, when police brutalize blacks, there seems to be a collective unconsciousness regarding its appropriateness, bolstered by modern media's obsession with coverage of the black criminal, the colored miscreant. The person "should not have been" engaged in some of the

93. See id. at 1720 ("Because the 'presumption of freedom [arose] from color [white]' and the 'black color of the race [raised] the presumption of slavery, whiteness became a shield from slavery...." (citation omitted)).

Naomi Wolf wrote that she was arrested at an OWS demonstration while "standing lawfully on the sidewalk in an evening gown," as if to connote that nice white ladies on the way to high-society gatherings wouldn't or shouldn't be treated as criminal by the police.

^{88.} *Id.* ("Wealthy interests, in turn, cry 'class warfare' although they and their representatives have engaged in a 60-year assault, launched with the anti-union Taft–Harley Act of 1947, on the very reforms that saved capitalism from its inegalitarian excesses.").

^{89.} A number noted the synchronicity of JP Morgan Chase's \$4.6 million and Bank of America's millions of dollars "donated" to the N.Y.P.D. mere hours before OWS was treated to some of the most violent policing. Occupy had begun protesting the financial policies of the banks, which were, in crucial part, subsisting on taxpayer-financed federal bailout(s). *E.g.*, Elliott, *supra* note 71.

^{90.} David Chappelle, Live Performance at the Warner Theatre (Aug. 24, 2006), http://www.swamppolitics.com/news/politics/blog/2006/08/dave chappelles birthday surpr.html.

^{91.} Harris, *supra* note 10, at 1721–22 ("Slavery linked the privilege of whites to the subordination of Blacks through a legal regime that attempted the conversion of Blacks into objects of property.").

^{92.} Id. at 1724.

^{94.} When Naomi Wolf complained that the N.Y.P.D. arrested her "in [her] home town, outside an event to which [she] had been invited, for standing lawfully on the sidewalk in an evening gown," her privilege drew ire. See Naomi Wolf, How I Was Arrested At Occupy Wall Street, GUARDIAN, Oct. 19, 2011, http://www.guardian.co.uk/commentisfree/cifamerica/2011/oct/19/naomi-wolf-arrest-occupy-wall-street. Political writer and commentator Kenyon Farrow seemed appalled by Wolf's commentary:

most innocuous yet, suddenly, suspect conduct. ⁹⁵ For example, the *Terry* doctrine is basically about the ability of police to criminalize non-criminal conduct in order to investigate for suspected criminality. ⁹⁶ In the United States, too often race trumps all other considerations, including class and wealth.

Occupy, if you listen to what nonwhites and our supporters have been communicating, you will learn that your reaction to police brutality cannot be solely about publicly exposing the officer that pepper-sprayed or sucker-punched you. ⁹⁷ Individual officers are only the tip of the troublesome iceberg. Further, focusing only on isolated actors may divert attention away from needed institutional reform. ⁹⁸

But when police brutalize whites, they also brutalize whiteness and devalue "self-identity in the domain of the intrinsic, personal, and psy-

She went on to detail the ways in which police lied or broke the law in handling the protest. Though blacks and Latinos are never mentioned directly, statements that accuse police of misconduct when they clash with ostensibly law-abiding activists highlight how much white occupiers take for granted that only "criminals" will be the target of police violence and harassment.

Kenyon Farrow, Occupy Wall Street's Race Problem, AM. PROSPECT (Oct. 24, 2011), http://www.prospect.org/article/occupy-wall-streets-race-problem#.

95. Lubiano, supra note 33, at viii. Lubiano states:

It is in the best interests of the right to assert the nonexistence of racism except as a manifestation of individual pathology—a matter simply of individuals with bad attitudes. But it is the shame of liberals who think of themselves as guardians and witnesses of corrective concern and conscience that they too have elected to treat racism as a problem of individual social relations and not the systemic operation of power at work throughout our political economy.

Ιά

96. In *Terry v. Ohio*, the U.S. Supreme Court lowered the level of constitutional suspicion required prior to governmental agents searching and seizing an individual. Terry v. Ohio, 392 U.S. 1, 35–36 (1968) (Douglas, J., dissenting). Prior to *Terry*, police were required by the Fourth Amendment to possess, at a minimum, probable cause to believe that a criminal suspect had committed or was in the process of committing a crime in order to justify a lawful Fourth Amendment search or seizure of a suspect. *Id.* In *Terry*, the Court created and lowered the amount of criminal suspicion—reasonable or articulable—officers needed to conduct "brief" or "limited" searches and seizures, typically referred to as "frisks" and "stops." *See id.* at 30 (majority opinion). A lawful *Terry* stop justifies temporary governmental seizures when criminality is "afoot." *Id.* A lawful *Terry* frisk justifies less intrusive governmental searching, such as for weaponry on or about the person, if the officer reasonably believes the individual is armed and presently dangerous. *Id.*

97. One of the impressive feats of Occupy is its ability to "out" via "doxing" officers who have—in the protesters' view—violated civil rights and liberties. Doxing has been described by the U.S. Federal Bureau of Investigations as the releasing—often expeditiously via Twitter—of "identifying information including full name, date of birth, address, and pictures typically retrieved from the social networking site profiles of a targeted individual." FED. BUREAU OF INVESTIGATION, DOMESTIC THREATS CYBER INTELLIGENCE UNIT, LAW ENFORCEMENT AT RISK FOR HARASSMENT AND IDENTITY THEFT THROUGH "DOXING" 1 (2011); see also Sheets, supra note 21 (describing Occupy Boston's successful hacking of Boston Police Patrolmens' Association servers and publicizing of "home phone numbers, names, [] addresses[, and late 2008 payroll] from 40 various ranking police officers from the Boston Police Department").

98. Armacost, *supra* note 42, at 493–94

chological; as reputation in the interstices between internal and external identity; and, as property in the extrinsic, public, and legal realms." ⁹⁹

According whiteness actual legal status converted an aspect of identity into an external object of property, moving whiteness from privileged identity to a vested interest. The law's construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what *legal* entitlements arise from that status). 100

Had whites believed what blacks and other nonwhites have said for years, nay decades, the policing of the Occupy protesters would have been less shocking, psychologically damaging, and nightmarish. Moreover, there would have been a level of anticipatory preparation for what was almost certain to, and did in fact, result. Now, Occupy's capacity to combat its own cultural cache will prove to be the primary measure of whether it ultimately is regarded as relevant to nonwhites, and especially to black Americans.

This may be too much to ask. Being blind to the reality of racism and regarding anarchy or, at a minimum, self-regulation and selfmanagement as preferable to governing bodies speaks also to the combined privilege of numerical majority and positional superiority. 101 "[T]he artificial construction of whiteness almost always comes to possess white people themselves unless they develop antiracist identities, unless they disinvest and divest themselves of their investments in white supremacy." Additionally, as this Article notes, despite the years of attention given to race-based policing, reports of alleged abuses of police discretion remain consistent and prevalent:

[Police] organizational culture [was] characterized by: formal and informal norms that favored a confrontational, hard-nosed style of policing; an evaluation and promotion system that had the functional effect of rewarding illegal uses of force through nonenforcement of stated management policies; and a work environment that tolerated (even encouraged) violent and discriminatory language and attitudes that may have contributed to violent and discriminatory conduct. All of this leads to a picture of a police department in which, regardless of formal policies, the informal message that the depart-

^{99.} Harris, supra note 10, at 1725.

^{100.} Id.

^{101.} See From the Issue: Columbia Occupied, BWOG (Dec. 19. 2011, 6:30 PM), http://bwog. com/2011/12/19/from-the-issue-columbia-occupied/ (interviewing Columbia Journalism School Professor Todd Gitlin). But see id. ("Not everybody is an anarchist; not everybody has the same view of the total corruption of the political system.").

^{102.} GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS viii (rev. & expanded ed. 2006).

ment conveyed was that confrontational, aggressive policing would be rewarded, even if it resulted in repeated incidents of violence that gave rise to citizen complaints and lawsuits.¹⁰³

However:

[T]he impulse to isolate misbehaving officers as "rogue cops" is, essentially, a search for scapegoats. While punishing individual miscreants may satisfy society's thirst for someone to blame, it also causes us to miss important systemic and organizational causes that lie behind individual acts of brutality. That is not to say that individual officers bear no causal or moral responsibility for their own harm-causing deeds. Indeed, the fact that individuals function within an organizational framework poses special risks of unintended and inadvertent harms, and imposes corresponding obligations to guard against such harms. Focusing only on isolated actors, however, may divert attention away from needed institutional reform. ¹⁰⁴

103. Armacost, *supra* note 42, at 498–99 (summarizing the Christopher Commission's post-Rodney King beating findings regarding the influence of the L.A.P.D.'s organizational culture on officer violence). This operational strategy, "[t]he combination of aggressive training, coupled with a heavy emphasis on high citation and arrest statistics as a measure of success, meant that [L.A.P.D.] officers were habituated into commanding and confronting, rather than communicating." *Id.* at 495. This Article submits that the L.A.P.D. and the Christopher Commission findings are not an aberration, but systemic. *See id.* at 503 (citing a Human Rights Watch study of fourteen big-city U.S. police departments that concluded "[t]hose who claim that each high-profile case of abuse by a 'rogue' officer is an aberration are missing the point: problem officers frequently persist because the accountability systems are so seriously flawed" (citation omitted)). "The Mollen Commission came to similar conclusions in its investigation of the NYPD," where it determined, among other things, that

[P]olice culture [] exalts loyalty over integrity; because of the silence of honest officers who fear the consequences of "ratting" on another cop no matter how grave the crime; because of willfully blind supervisors who fear the consequences of a corruption scandal more than corruption itself; because of the demise of the principle of accountability that makes all commanders responsible for fighting corruption in their commands; because of a hostility and alienation between the police and community... which breeds an "Us versus Them" mentality; and because for years the New York City Police Department abandoned its responsibility to insure the integrity of its members.

Id. at 501 (quoting City of N.Y., Comm'n to Investigate Allegations of Police Corruption & the Anti-Corruption Procedures of the Police Dep't, Comm'n Rep. 1–2 (1994)). Armacost notes:

[E]ven when NYPD officers committed extreme forms of police brutality in an open and notorious manner, they did so with no apparent attempt to hide their actions from the eyes of their peers and supervisors. Moreover, while most police officers were "genuinely sickened" by the worst forms of brutality, many were willing to tolerate a significant level of violence. "An excessive use of fists to face, nightsticks to ribs, and knees to groin [were] seen as the realities of policing." . . . These practice and attitudes, the Commission concluded, fuel a police culture that . . . fosters and protects corruption and brutality.

Id. at 501–02 (internal citations omitted); see also Herbert, Can't You See?, supra note 29, at 143 ("Unlike their no- or low-crime area counterparts, residents or visitors of high-crime areas consistently characterize their interactions with police as overwhelmingly adversarial; many such areas have turned into virtual war zones." (citation omitted)).

104. Armacost, *supra* note 42, at 493–94 (citations omitted).

Blacks want to support OWS. Actually, a number of blacks across the country do support Occupy, even if what exactly Occupy supports has been unclear. 105 The concept of "the 99%" does not escape blacks, nor does it sit beyond their or other nonwhites' intellectual grasp. Again, nonwhites of all classes have long been painfully aware of the "occupational culture" of policing and its values that define and impact policing, particularly in big American cities with populations diverse in socioeconomic status and race or ethnic background. 106 But we may be a bit slower digesting Occupy's white privilege in decrying abusive policing. For decades, police officers and their employing departments have militarized members and their tactics, e.g., during a decades-long War on Drugs in which percussion bombs, ¹⁰⁷ no-knock warrants, ¹⁰⁸ raids, ¹⁰⁹ and jump-outs ¹¹⁰ have been deployed. ¹¹¹ Police have extracted confessions via terroristic tactics and have treated law-abiding citizens as criminals in their own homes and neighborhoods, shaking entire communities down repeatedly, invading their normal lives, declaring such environs as war zones, and deploying violative, unconstitutional, unlawful conduct in order to get what they want and need. These tactics, which are in contrast to protecting and serving the neighborhoods and residents, have been used very disproportionately against nonwhites for decades, and as a result, we are neither shocked nor outraged that they are using these same tactics on white protesters today.

What, then, does it mean for whites to proclaim, "We are the 99%"?¹¹² Can Occupy "redecorate, redesign, even reconceive the racial house without forfeiting a home" that they have loved enjoying as

^{105.} E.g., Occupy Protesters: No End Goal, No End in Sight, CBS NEWS (Nov. 2, 2011), http://www.cbsnews.com/8301-201_162-20128926/occupy-protesters-no-end-goal-no-end-in-sight/ ("Six weeks after the first protesters planted their flag in New York, Occupy movements across the country are still without a set of demands, an agenda or even a plan for what to do next.").

^{106.} See, e.g., CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 69–89 (1999) (explaining how cities' increased reliance on aggressive, militarized policing for decades "has disproportionately affected communities of color").

^{107.} See id. at 114.

^{108.} Id. at 10.

^{109.} Id. at 13.

^{110.} Id. at 86.

^{111.} President Richard Nixon began laying the groundwork for the "war on drugs" in 1969. *Id.* at 9 ("Six months after taking office [Nixon] told Congress that '[w]ithin the last decade, the abuse of drugs has grown from essentially a local police problem into a serious national threat to the personal health and safety of millions of Americans [A] new urgency and concerted national policy are needed at the federal level " (citation omitted)).

^{112.} See From the Issue: Columbia Occupied, supra note 101.

^{113.} See Morrison, supra note 48, at 4 ("Could I redecorate, redesign, even reconceive the racial house without forfeiting a home of my own?"). Ms. Morrison discussed her attempt to configure not so much a race-free world, but a world where race exists while not constructing life as "a windowless prison... a thick-walled, impenetrable container from which no cry could be heard." Id.

their own? At times, it seems that Americans are capable of recognizing that race-based stratification and differentiation is a result of political, not scientific or actual, constructs. ¹¹⁴ Thanks to Occupy, we too—meaning we civilians (and police officers of color)—may finally come together over our shared understanding of police officer violence against the politically disempowered. ¹¹⁵

Occupy, then, is not a "black" but a "white" thing. 116 Nevertheless, we need Occupy, as heavily white as its numbers may be. 117 In fact, white privilege and all that it continues to reap and wrought may prove a doctrinal boon to those of us who believe in social justice and a fair(er) criminal justice system. These require fresh troops and more effective strategies to combat police violence, given

The typical complainant in an excessive force case is a criminal suspect from a poor, minority neighborhood, often with a criminal record—not a very credible witness in the eyes of the jury. In addition, the plaintiff's witnesses—who are likely to be family, friends, or acquaintances from the same neighborhood—will not be viewed as disinterested witnesses and may suffer from some of the same credibility problems as the plaintiff

... Moreover, the tendency by judicial decision makers to favor police officers over alleged victims of excessive force is reinforced by

What is interesting is that the analysis Ms. Morrison uses reminds me of some of the complaints uttered by whites when confronted with the discomfort of the perceived forced change of "political correctness": when the law or social convention requires certain public performances and word selections while in polite (and potentially litigious) company. Resisting seems to be out of fear of a similar erasure, of sorts, of raced existence. Of course, given that whites are regarded as not raced, but the norm, such resistance suggests that their resistance is more about the fear of loss of the racial hierarchy. Or, per Ms. Morrison, "intolerable circumspection, a self-censoring bond to the locus of racial architecture." *Id.*

114. The biological significance of race has been challenged, e.g., Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11–17 (1994) (refuting the argument that race is biologically significant); ridiculed, e.g., D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 439–42 (1993) (deeming race an "incoherent fiction"); and dismissed, see, e.g., Winant, *supra* note 26, at 108 ("All the evidence suggests that once created and institutionalized, once having evolved over many centuries, racial difference is a permanent, though flexible, attribute of human society. Racial categories can neither be liquidated ('color blindness'), nor reified as unchanging features of human nature (biological racism)." (citation omitted)).

115. Contra Armacost, supra note 42, at 506. Armacost speaks of law enforcement culture's "shared meaning" and "shared understanding," which spawns "a process of reality construction that allows [members and participants] to see and understand particular events, actions, objects, utterances, or situations in distinctive ways." *Id.* (quoting GARETH MORGAN, IMAGES OF ORGANIZATION 128 (1986)).

116. E.g., Stacey Patton, Occupy Isn't Black America's Fight, WASH. POST, Nov. 27, 2011, at B1; White, supra note 31.

117. See Winant, supra note 26, at 110 ("It is crucial that antiracist whites take part in multiracial political activity if there is to be any effective challenge to the [race-based system].").

a widely held public view that a little bit of police brutality is simply the price we pay for crime control. 118

Heretofore, "we" has meant "them"—nonwhites. Now, if at all successful, and I submit that it has been in small measure thus far, 119 Occupy is poised (perhaps in the spring and summer months of 2012), 120 in this faux post-racial age, to gift the United States with a more robust, responsive, and perhaps, radical democracy that is "racially inclusive as well as substantively egalitarian." 121

Before Occupy, modern police officers did not self-identify as "members" of the groups upon which they customarily and overwhelmingly inflict violence. ¹²² Nor has the violence and abusive modern policing (sub)culture been on as ugly a display since, again, the American Civil Rights Movement. Now, thanks to Occupy, perhaps we are closer to a shared narrative about government and policing that will no longer be riddled with the pervasive incoherence of race-based privilege. ¹²³ Per-

^{118.} Armacost, supra note 42, at 467–68 (emphasis added).

^{119.} Notwithstanding the concerns expressed *infra*, Occupy has been credited—some might say improperly—with several victories, most important is leading Americans to question, even briefly, our society's fundamental, and particularly economic, divides. *See* Paul Loeb, *From Occupy Wall Street to Occupy the Neighborhoods*, HUFFINGTON POST (Nov. 9, 2011), http://www.huffington post.com/paul-loeb/from-occupy-wall-street-t_b_1085255.html (crediting Occupy with playing "a powerful role in highlighting America's profound economic disparities" as well as creating "powerful political theater, engaged community, an alternative to silence and powerlessness"). I submit that the Occupy zeitgeist has absolutely contributed to these successes and has also benefitted from the election of President Barack H. Obama, an American achievement so tectonic "that it has provided a sense that the world has been dramatically altered forever." Mario L. Barnes, *Reflection on a Dream World: Race, Post-Race and the Question of Making it Over*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 6, 13 (2009).

^{120.} As the U.S. weather patterns change from fall to winter, speculation grew regarding the commitment and longevity of Occupy in the face of impending inclement and "encampment"-unfriendly weather. *See, e.g.*, Alec MacGillis, *Occupy What Else?*, WASH. POST, Nov. 6, 2011, at B1 (suggesting the impending winter would force Occupy Wall Street protesters to other destinations).

^{121.} Winant, supra note 26, at 107.

^{122.} See, e.g., An Open Letter to the Citizens of Oakland from the Oakland Police Officers' Association, OAKLAND POLICE OFFICER'S ASS'N (Nov. 1, 2011), http://www.opoa.org/uncategor ized/an-open-letter-to-the-citizens-of-oakland-from-the-oakland-police-officers%E2%80%99-asso ciation/ (self-identifying as "the 99%," expressing confusion in following back-to-back orders by city administrators and the mayor to clear out and then leave alone Occupy Oakland "encampments," and "respectfully" requesting "the citizens of Oakland to join us in demanding that our City officials, including Mayor Quan, make sound decisions and take responsibility for" them).

^{123.} There is hope. See, e.g., Elon James White, Take Back the Capitol: Lessons for OWS, THE ROOT (Dec. 8, 2011), http://www.theroot.com/views/take-back-capitol-and-ows-same-goals-diffe rent-style (lauding the multiple December 7, 2011 "Take Back the Capitol" marches in Washington, D.C., which "seemed to draw the crowd that the Occupy movement has been criticized for not representing"). "This protest was multicolored. This protest was a true cross section of America, down to the hippie-esque guy with a sign reading, 'I am the 1% . . . of Americans who grow their own food, have a compost heap and proudly works part-time." Id.

But the hope may be premature or, perhaps, short-lived. White goes on to characterize the December 7, 2011, melding of Take Back the Capitol and Occupy marchers as "unity. For about seven

haps Occupy's efforts will dissolve the narrative myths of the bad and rogue cops, as well as the uselessness of so-called colorblindness, which will be particularly desirable in reworking the Court's Fourth Amendment jurisprudence, as it "mocks juridical earnestness and legitimacy." ¹²⁴

The impact of the Occupy movements' members may go a ways toward reimagining America as a nation of equals, and thus plausibly reinventing this country's constitutional culture, ¹²⁵ particularly that culture in which Fourth Amendment policing has devolved. ¹²⁶

"When the instabilities inherent in both minority and majority identities are acknowledged, the door to coalition politics—closed since the defection to the right of the civil rights 'moderates' in the mid-1960s—can be reopened." In the twenty-first century's Age of Obama as our President himself exhibits—"[n]o individual belongs to 'just' one

minutes." *Id.* He notes that some members of Occupy were "shrill," yelled at Take Back the Capitol marchers, and "wanted to push the civil disobedience line as a whole" and "get arrested." *Id.* According to White, Take Back the Capitol organizers were seasoned activists, hailing from national unions; the coordinated teams of its marchers "planned action with a desired result," which did not include its marchers being arrested and incurring the financial costs of defending themselves in D.C. courts or the professional hindrance of an arrest record. *Id.*; *see also* Robert McCartney, *Friction Creates Static in D.C. Occupiers' Message*, WASH. POST, Dec. 11, 2011, at C1 (describing the Take Back the Capitol and Occupy groups as "wary of one another," with Occupy fearful of being coopted by Take Back the Capitol's traditional protest politics, and Take Back the Capitol being opposed to Occupy's anarchist elements).

124. Herbert, Bête Noire, supra note 81, at 210.

125. See Walker, supra note 12, at 345–50 (arguing for alignment of "cultural frames and constitutional results"). Or maybe not:

The identity of the individual is most often sacrificed for the identity of the collective.... The evolution of human existence is propelled by a constant narcissism; a struggle to negotiate one's perception of self and one's perception of the other, and some of the most (historically) flawed (though pervasive) acts of negotiating a collective identity are politicized oppression.... Hierarchical notions of humanity are formed, and, eventually, once the tracks are laid, people will have to pitch their tents on either side. Conflict. War. Somebody (or bodies) in opposition to the populace will have to be dismembered so that new orders of identity can be formed.

Carl Hancock Rux, *Eminem: The New White Negro*, *in* EVERYTHING BUT THE BURDEN: WHAT WHITE PEOPLE ARE TAKING FROM BLACK CULTURE, *supra* note 55, at 17; *see also* Patton, *supra* note 116, at B1 (warning Occupy to "grow in solidarity with other constituencies of exploited and oppressed people," lest "the powerful undertow of race and class in America... keep both blacks and whites from being free").

126. See, e.g., Mark Naison, Eleven Things Occupy Wall Street Has Accomplished, SOLIDARITY (Dec. 16, 2011), http://www.solidarity-us.org/site/eleven_things_occupy_has_accomp lished (Occupy has "[f]ocused attention on the issue of police brutality and the militarization of urban police forces in ways that reinforces longstanding complaints of police misconduct and abuse in Black and Latino communities.").

127. Winant, supra note 26, at 109.

128. But see McCartney, supra note 11, at C1 ("[Occupy] Washington [D.C.'s] experience has been different partly because the liberal Obama administration and D.C. government sympathize with the cause. They are looking the other way rather than enforcing laws prohibiting long-term encampments in public parks.").

socially constructed category: each has his or her multiple racial, gender, class-based, national identities, and that's just a start of the list." To recognize our many selves is to understand the vast social construction that is not only the individual, but history itself, the present as history." As such, Occupy needs some new destinations and additional targets, given that the "wide inequality in this country has been driven in large part by specific actions, or failures to act, by people and organizations in positions of authority."

Even though it is at the expense of the white privilege, the police abuse against Occupy may serve to bring much needed reform. Criminal justice actors may benefit from finally obtaining more appropriate paradigms when assessing, for example, the initiation of criminal prosecutions, ¹³² the framing of criminal defenses, ¹³³ juridical evidentiary deter-

^{129.} Winant, *supra* note 26, at 110 ("Nor are these categories uniform or stable; we are Whitmanesque, we contain multitudes.").

^{130.} Id. at 110-11.

^{131.} MacGillis, supra note 120, at B1.

^{132.} See, e.g., Al Baker, Commander Faces Penalty Over Use of Pepper Spray, N.Y. TIMES, Oct. 19, 2011, at A25 (reporting that deputy inspector Anthony Bologna was found to have "used pepper spray outside departmental guidelines" and could be facing criminal charges (citation omitted)); Al Baker, Ex-Officer in Demonstration May Have Charges Dismissed, N.Y. TIMES, Jan. 26, 2012, at A25 (reporting dismissal of disorderly conduct charges against former Philadelphia police commander Ray Lewis for his participation in Occupy's "day of action"); Charges Dropped for Some Protesters, N.Y. TIMES, Jan. 10, 2012, at A18 (reporting the Manhattan District Attorney Office dismissed nearly two dozen Occupy arrestees).

^{133.} For example, in 2002, I offered a fundamental problem with the Court's Fourth Amendment analysis in so-called "high-crime areas." Herbert, *Can't You See?*, *supra* note 29. My critique was simple: by focusing solely on purported Fourth Amendment criminally suspicious conduct—there, reactive (to police presence) flight in *Illinois v. Wardlow*—the Court's jurisprudence improperly facilitated officers' ability to repackage expressive conduct that actually communicated loathing or dissent as criminally suspicious behavior, thus stripping what otherwise would be First Amendment speech of constitutional protection:

To those unaware of the police practices in high-crime areas, the conduct of a person spontaneously fleeing the presence of police appears reactionary, defensive and instantaneous, evidencing little or no reasoned thought. Unfortunately, for those in high-crime areas who choose to protest the police via reactive flight, society seems incapable of recognizing that which in a low- or no-crime area would be protected speech. In a highcrime area, the forum, the method of speaking, and the speaker are commonly assumed to be less intelligent or intelligible. Ironically, in these neighborhoods, reactive flight may be the most effective way for residents to communicate their distaste of the police and to exercise their choice to remove themselves from police presence without compromising the safety of themselves or others—especially when the speakers perceive disdain by society. Of all places where protest politics and expressive dissent occur, the high-crime area, with the tension that comes from aggressive policing and an oppressed citizenry, is likely to have a disproportionate amount of such expression. Yet the police, who enforce society's assessment of those in high-crime areas as subordinate and deviant, are allowed to define what is being said, to maintain their grip on their constituents' ability to speak, and to preserve their role as the only speakers in these areas who deserve a voice. Thus, police have the ability via recasting expressions of protest as criminal conduct to deny members of these disparaged areas rights commensurate with full citizenship.

minations, ¹³⁴ and the credibility of officer evidence, ¹³⁵ thanks to the policing that Occupy has (finally) suffered. ¹³⁶ Perhaps, via Occupy, we will

. . .

Characterizing Wardlow's flight as pure conduct may be appropriate. In high-crime areas, however, such activity may be better interpreted as expressive conduct, particularly when no other indicia of criminality are evident. Given the heavy policing in these areas, reactive flight is one of the few viable methods individuals in high-crime areas have of communicating dissent against the police, and may not signal criminality at all.

Id. at 153-54, 156 (emphasis added) (citations omitted).

Occupy—clearly regarded by many as a political protest—has allowed all willing to see that police abhor dissent, and they will, to the extent possible, force a more deferential communication or extinguish it. Because of the Occupy members' privileges of race and location—as well as a preternatural level of real-time visibility and articulation—their speech and dissent is pellucid, which causes not merely image-based concerns for the various police departments but also potential constitutional challenges by those who are able to mount formidable criminal defenses and civil claims, as governments are generally prohibited from content-based regulation of speech. *See id.* at 154.

134. For example, in *United States v. Cortez*, 449 U.S. 411 (1981), the U.S. Supreme Court "appears to command courts to defer almost completely to the view of police [officers] in stop and frisk cases." David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 49 (1994); *see also* Walker, *supra* note 12, at 345–50 (emphasizing the practical importance of cultural and social movements' framing of constitutional law).

135. This Article is optimistic, but it may not be realistic. Much has changed since the creation of the United States, but race-based privilege has been most stubborn. Perhaps even Occupy may be incapable of shifting this seemingly inextricable element from analysis. Perhaps instead, Occupy may usher in what has been suggested by scholars such as Elizabeth E. Joh. In *Discretionless Policing: Technology and the Fourth Amendment*, Joh asked, "What if a computer could accomplish what police officers do, with efficiency and accuracy, and more importantly, without racial prejudice?" Joh, *supra* note 30, at 199. Although the technology of which Joh spoke concerned vehicles, the U.S. Department of Transportation's Intelligent Transportation Systems plan, and police traffic stops, Joh confronted the limitations of current Fourth Amendment jurisprudence "to a problem that has captured the attention of academic lawyers for fifty years." *Id.* at 202. She offered "telematics"—"telecommunications for sending, receiving, and collecting information . . . between cars and private or public infrastructures." *Id.* at 216 (citation omitted). Joh proposed radio-frequency identification devices (RFIDs) as a solution to minimize improper uses of police discretion such as racial profiling, given "political pressures on the police to render their own practices transparent or to embrace a fully democratic policing ideal have yielded only limited success" *Id.* at 215–16, 217.

But even with such "objective" technology, Joh admitted that the system will continue to suffer officer abuse, as "room for discretionary judgment exists whenever 'a person enters the scene." *Id.* at 229 (citation omitted). For example, unconscious or subconscious race-based bias has been recently found and specifically documented as predictive of bias-holders' behavior, thanks to the Implicit Association Test (IAT). *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 803 (2012) ("[T]he simple methodology of the IAT has shown how implicit bias leads to important real-world consequences."). *See generally* Lenese Herbert, *Othello Error: Facial Profiling, Privacy, and the Suppression of Dissent*, 5 OHIO ST. J. CRIM. L. 79 (2007) (critiquing the U.S. Transportation Security Administration's post-9/11 use of Screening Passengers by Observation Technique via Facial Action Coding System as susceptible to implicit biases based on race or ethnicity).

136. Author and activist Naomi Klein puts it this way: "[T]he system has been breaking its own rules so defiantly that its credibility is shot. And there's a vacuum. There's a vacuum for other credible voices to fill that, and it's very exciting." Naomi Klein & Yotam Marom, Why Now? What's Next? Naomi Klein and Yotam Marom in Conversation About Occupy Wall Street, THE NATION

begin to "restructure the manner in which we think about the legitimacy of policing practices and the type of authority the police wield." ¹³⁷

Occupy protesters: welcome to America. May you, your power, ¹³⁸ and your privilege ¹³⁹ work for the good of all. ¹⁴⁰

(Jan. 9, 2012), http://www.thenation.com/article/165530/why-now-whats-next-naomi-klein-and-yo tam-marom-conversation-about-occupy-wall-street.

Law enforcement veterans such as former Philadelphia police chief Ray Lewis and members of the U.S. military, such as U.S. Marine Corps Sergeant Shamar Thomas, U.S. Marine Corps veteran Scott Olsen, and U.S. Navy veteran Joshua Sheperd, have been vocal regarding what they regard as inappropriate, confrontational, and civil-liberties-destroying policing. *See supra* note 13.

137. Miller, *supra* note 83, at 621 (positing that law enforcement's use of "public order" legislation provides an improper backdoor to Fourth Amendment policing without prophylactic protection of individual rights).

138. See Walker, supra note 12, at 348 (illustrating how the American Civil Rights Movement and constitutional litigation borne of it aligned legal claims with the shifting culture, forcing a practical relationship "between constitutional law and culture in systemic, cross-disciplinary terms, reconciling the fields of law, sociology, and political science").

139. See Winant, supra note 26, at 90 ("Not only does [race] allocate resources, power, and privilege; it also provides means for challenging that allocation."). So, for example, the U.C. Davis chancellor suspended the school's police chief a mere three days after two campus police pepper-sprayed approximately one dozen seated, peaceful Occupy protesters, given the reports of "wide-spread outrage" and a need—per the chancellor—to restore "trust on our campus." Ta-Nehisi Coates, UC Davis Police Chief Suspended, THE ATLANTIC (Nov. 21, 2011), http://www.theatlantic.com/national/archive/2011/11/uc-davis-police-chief-suspended/248849/. Additionally, the officers were placed on administrative leave with pay pending an investigation. Id. Similarly, N.Y.P.D. police commissioner Ray Kelly indicated that an internal investigation and referral to a civilian-complaint review board would be launched regarding deputy inspector Anthony Bologna's use of pepper spray on Union Square Occupy protesters. Christopher Robbins, Ray Kelly: NYPD Will Look Into Pepper Spraying Incident, GOTHAMIST (Sept. 28, 2011), http://gothamist.com/2011/09/28/ray_kelly_nypd_will_look_into_peppe.php.

Consider also Occupy's technological capacity to "dox" individual officers who are perceived as acting outside of the public interest. See supra note 96. Also, as a direct result of the Occupy arrests, handy new smartphone app(lication)s allow those arrested to provide critical contact. Aylin Zafar, Occupy Wall Street Inspires "I'm Getting Arrested" Android App, TIME (Oct. 17, 2011), http://newsfeed.time.com/2011/10/17/occupy-wall-street-inspires-im-getting-arrested-android-app/. But see, e.g., Shoshana Walter, Report: Police Response to Occupy Oakland Raises "Serious Concerns," BAY CITIZEN (Jan. 17, 2012), http://www.baycitizen.org/occupy-oakland-8/story/report-occupy-oakland-reveals-problems/ (reporting that although Occupy Oakland's treatment by the Oakland Police Department raised "serious concerns' about the Department's ability to 'hold true to the best practices in American policing" that may lead to a federal receivership, the department continues to make glacial progress regarding 2003 court-ordered reforms for officers' improper use of force, false arrests, and planting of evidence).

140. Unrelated to criminal justice and Fourth Amendment policing but absolutely related to privilege, national archivists and museum curators are gathering and preserving Occupy artifacts for their collections, given its identification as "a post-print movement." *See supra* note 8 and accompanying text.