

Cops on Trial: Did Fourth Amendment Case Law Help George Zimmerman’s Claim of Self-Defense?

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INTRODUCTION: POLICE PRIVILEGE

When police kill unarmed civilians, prosecutors and grand juries often decline to bring criminal charges. Even when police officers are indicted, they are seldom convicted at trial.¹ There are many reasons why

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police are rarely convicted for violent acts. Commentators have criticized the inherent conflict of interest for prosecutors who decide whether to bring charges² and the fact that police are investigating their own.³ However, this article considers another way that police may be treated differently than other people suspected of committing violent crimes. The Fourth Amendment, designed to protect civilians from overzealous officers, now helps insulate police suspected of committing violent crimes.

Tamir Rice was a twelve-year-old playing with a toy gun in a Cleveland park in November of 2014 when Officer Timothy Loehmann drove up in a cruiser. “Within two seconds of the car’s arrival, Officer Loehmann shot Tamir in the abdomen from point-blank range,” security camera footage of the incident showed, “raising doubts that he could have warned the boy three times to raise his hands, as the police later claimed.”⁴ The Cuyahoga County Prosecutor recommended to the grand jury that they find that there was no probable cause to conclude that Rice’s shooting had been a crime, and the grand jury followed this recommendation.⁵ The NAACP pronounced it a “miscarriage of justice” that demonstrated an “imbalance in the system that’s supposed to treat all citizens with impartiality and make decisions in reliance on basic facts

1. Kimberly Kindy and Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST, (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> [<https://perma.cc/8ET3-RXX8>] (“Among the thousands of fatal shootings at the hands of police since 2005, only 54 officers have been charged, a Post analysis found. Most were cleared or acquitted in the cases that have been resolved.”).

2. See Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL’Y 137, 140–41 (2015); Note, *Chapter Four Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1815 (2015); Monroe Freedman & Paul Butler, Opinion, *Ferguson Prosecutor Should Have Bowed Out*, NAT’L L.J., Dec. 8, 2014, at 30; Paul Butler, Opinion, *The System Must Counteract Prosecutors’ Natural Sympathies for Cops*, N.Y. TIMES: ROOM FOR DEBATE, (Apr. 18, 2015, 12:26 PM), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-gamers-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops> [<https://perma.cc/HPU4-57AJ>].

3. Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 n.15 (1998); Steven Rosenfeld, *10 Ways the System is Rigged Against Justice for People Wrongly Killed by Cops*, AM. PROSPECT (Dec. 4, 2014), <http://prospect.org/article/10-ways-system-rigged-against-justice-people-wrongly-killed-cops> [<https://perma.cc/CAW7-M8V6>] (explaining that one reason the Ferguson police officer who killed Michael Brown was not charged was because “police are investigating their own”).

4. Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <http://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html>.

5. Leon Neyfakh, *Tamir Rice’s Death Resulted from “Officer-Created Jeopardy.” So Why Were No Officers Indicted?*, SLATE: THE SLATEST (Dec. 28, 2015, 5:19 PM), http://www.slate.com/blogs/the_slatest/2015/12/28/tamir_rice_s_death_didn_t_lead_to_indictments_because_of_supreme_court_vagueness.html [<https://perma.cc/H9A4-3X2W>].

and probable cause.”⁶ The prosecutor explained that he relied on the Fourth Amendment law of search and seizure rather than Ohio law in reaching his conclusion.⁷ This is a problem.

The concept of excessive force became part of search and seizure doctrine in the 1985 Supreme Court case, *Tennessee v. Garner*.⁸ *Garner* provided some measure of protection by allowing civil rights lawsuits to proceed when police shot or killed suspects under the Supreme Court’s Fourth Amendment definition of “excessive force.” Because of the Fourth Amendment’s exclusionary rule, the decision would henceforth permit criminal defendants who had been victims of excessive force to suppress evidence found as a result of the police improperly shooting them. Subsequent Supreme Court cases have made it more difficult to sue police for excessive force under the Fourth Amendment and to suppress evidence, but this should not prevent police from facing job consequences for bad behavior.⁹ Nor should the diminished Fourth Amendment necessarily prevent prosecutors from charging police for violating state criminal codes.¹⁰

6. Polly Mosendz, ‘*This Was Not a Man. This Was a Child*’: Activists React to Grand Jury Decision in Tamir Rice’s Shooting Death, NEWSWEEK (Dec. 28, 2015, 4:31 PM), <http://www.newsweek.com/tamir-rice-jury-charges-reactions-409420> [https://perma.cc/NZ4N-RZXW].

7. Eric Heisig, *Here is the Case Law Prosecutor McGinty Used in the Tamir Rice Probe*, CLEVELAND.COM, (Dec. 30, 2015, 12:00 PM), http://www.cleveland.com/court-justice/index.ssf/2015/12/here_is_the_case_law_prosecuto_1.html [https://perma.cc/YKJ4-KDJY]. Prosecutor Timothy J. McGinty had first sought political cover for the decision not to charge by asking independent investigators to determine if the officer should be tried. Retired FBI Agent Kimberly Crawford and Denver Prosecutor S. Lamar Sims conducted the investigative reviews requested by the Cuyahoga County District Attorney. Both investigators cleared the officers of crimes, basing their conclusion on Fourth Amendment case law rather than Ohio law. See Goldie Taylor, *When Shooting a 12-Year-Old is Deemed ‘Reasonable’*, DAILY BEAST (Oct. 10, 2015, 6:05 PM), <http://www.thedailybeast.com/articles/2015/10/10/tamir-rice-shooting-found-reasonable.html> [https://perma.cc/82EG-9GQS].

8. 471 U.S. 1 (1985).

9. A few police departments have recently decided that the Fourth Amendment is an insufficient check on the police, especially when it comes to the use of force. These departments are requiring more from their officers. See *Criminal (In)justice: Episode 8*, DAVID HARRIS (May 17, 2016), <http://www.criminalinjusticepodcast.com/episodes/> [https://perma.cc/8XW5-LPT5]. David Harris is a professor of law at the University of Pittsburgh School of Law.

10. The expanded qualified immunity doctrine impedes civil rights litigation. See, e.g., Karen M. Blum, Scott v. Harris: *Death Knell for Deadly Force Policies and Garner Jury Instructions?*, 58 SYRACUSE L. REV. 45, 76 (2007) (discussing Scott v. Harris, 550 U.S. 372 (2007)); Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL’Y 1, 38–39 (2015) (discussing Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) and San Francisco v. Sheehan, 135 S. Ct. 1765 (2015)) (“The regime for the possible redress of excessive force makes the loss or preservation of life in police encounters dependent on the judgment of an individual officer in a framework in which killing is permissible unless it has been strictly forbidden by prior precedent or limited by individual local police authority. This is

In the criminal investigation into Tamir Rice's death, the Fourth Amendment's excessive force doctrine was used in a different way: instead of shielding an individual from the police, the search and seizure doctrine became a shield to protect police from the state's criminal laws. However, the Fourth Amendment provisions that prevent police from invading people's privacy without proper justification were always intended to be a floor, that is, a minimum set of protections against police power, rather than a ceiling.¹¹ For example, the Fourth Amendment's search and seizure rules are the proper law to use when an accused individual moves to suppress the evidence against him or her under the United States Constitution, but not when the accused relies on state law that grants greater protections against police intrusions.¹² When the Supreme Court rules in favor of the police, finding that they did not violate the Fourth Amendment in a given situation, the Court anticipates that the officers might be punished for violating other laws or regulations. Because the Fourth Amendment was designed to be a floor, the federal constitutional law on search and seizure should not guide prosecutors and juries who decide whether police officers violated a state's criminal code.¹³

When the defendant on trial is a police officer, it flips the usual paradigm. Both judges and prosecutors must switch their perspectives. In motions to suppress where the Fourth Amendment should control the outcome, the government is in the position of defending police tactics and seeking to enlarge the ability of police to use intrusive or aggressive behavior toward civilians. Police power and privilege benefits the prosecution and harms the accused. In contrast, when police officers are accused of violent crimes, police power and privilege serves to benefit the accused and hurt the prosecution. Prosecutors should no longer invoke the constitutional doctrines regarding police power, but should instead seek to treat the accused like any other criminal defendant. It is especially difficult for judges to switch their thinking and treat all defendants alike, for judges read many search and seizure cases where the Supreme Court expanded the right of police to behave aggressively and with racial animus without running afoul of the Fourth Amendment.

sanctioned arbitrariness in the imposition of death that has affected Black communities around the nation." *Id.* at 42–43.

11. Susan N. Herman, *The USA Patriot Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 119 (2006).

12. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

13. See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1183 (2008).

Should police defendants be treated the same as any other defendant at trial? After all, police are different from other criminal defendants. As Kristian Williams wrote in his history of policing in the United States, “[V]iolence is an inherent part of policing. The police represent the most direct means by which the state imposes its will on the citizenry.”¹⁴ In other words, the public asks police to use force and deadly force to carry out its missions; grabbing, searching, and shooting are all skills that an officer must possess. On the other hand, police should not be able to get away with murder. Nor should they be permitted to behave like bullies. Because police are permitted to use force in situations where civilians may not, prosecutors and judges might be tempted to turn to the Fourth Amendment to evaluate whether the accused police officer committed a violent crime such as murder or criminal assault.¹⁵ Judges who routinely read and apply search and seizure case law during preliminary motions might turn unconsciously to this case law when presiding over trials where the criminal defendant is a police officer.

While the experts who decided that the police who shot Tamir Rice should not be charged were explicit in their reliance upon Supreme Court search and seizure case law, decisions not to indict or to acquit are often opaque.¹⁶ Prosecutors need not reveal how they reach their decisions, and grand jury sessions can be as secret as petit jury deliberations. Ironically, the case that best illustrates the impact of Fourth Amendment doctrine upon a criminal trial was a situation where the victim was not even killed by a bona fide police officer.

The death of Trayvon Martin in 2012 at the hands of “neighborhood-watch volunteer” George Zimmerman launched a national discussion about racial profiling. As a result of national pressure, Zimmerman faced a six-week trial on murder charges. The trial ended in a complete acquittal on July 25, 2013, and the Black Lives Matter movement traces its origins to that not guilty verdict.¹⁷ Although

14. KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* 32 (AK Press, 2015).

15. Chase Madar, *Why It's Impossible to Indict a Cop*, NATION (Nov. 25, 2014), <http://www.thenation.com/article/why-its-impossible-indict-cop/> [https://perma.cc/NLZ8-TX7S] (“According to Erwin Chemerinsky, Dean of the UC Irvine Law School, recent Supreme Court decisions are not a path towards justice but rather a series of obstacles to holding police accountable for civil rights violations.”).

16. Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 206–07 (2005).

17. See Julia Craven, *Black Lives Matter Co-Founder Reflects on the Origins of the Movement*, HUFFINGTON POST (Sept. 30, 2015, 3:19 PM), http://www.huffingtonpost.com/entry/black-lives-matter-opal-tometi_us_560c1c59e4b0768127003227 [https://perma.cc/Z8X3-BHSF] (Opal Tometi:

George Zimmerman was merely a volunteer neighborhood watch captain, Zimmerman's case provides a useful vehicle for exploring how Fourth Amendment doctrine can privilege police defendants.

Although scholars described the favorable treatment afforded to Trayvon Martin's killer by police and prosecutors, they looked at explanations other than the Supreme Court's expansion of police power under the Fourth Amendment. Some commentators have explained Zimmerman's favorable treatment before trial by pointing to Florida's "Stand Your Ground" law.¹⁸ The statute, they assert, allowed Sanford police to let Zimmerman walk out of the police station a free man on the day he shot Martin, an innocent, unarmed seventeen-year-old.¹⁹ Other scholars have delved into the role that race played in the government's delay in charging Zimmerman, a white Hispanic, with killing a black youth. Tamara Lawson asserted that the "Stand Your Ground" statute was an excuse rather than the cause of the Sanford police and prosecutors' intransigence, blaming conscious or unconscious racial bias for Zimmerman's preferential treatment.²⁰ Cynthia Lee concurred, explaining: "Had Zimmerman been an African American man who followed and then shot an unarmed Caucasian teenager during a fist fight, it is unlikely that police would have released Zimmerman without any charges."²¹ While both "Stand Your Ground" statutes and racial bias

"I was struck with the fact that my younger brother—who was 14 at the time—could have been Trayvon.").

18. On April 26, 2005, Florida Governor Jeb Bush signed into law SB 436, known then as the "Castle Doctrine" or "Stand Your Ground." FLA. STAT. § 776.032 (2005).

19. Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 853–54 (2013); see also Aya Gruber, *Leniency as a Miscarriage of Race and Gender Justice*, 76 ALB. L. REV. 1571, 1572–73 (2013) ("It soon became politically polarized. Liberals condemn the shooter, George Zimmerman, for acting on racialized suspicion, the Sanford police for declining to arrest, and the Florida law for permitting a person to kill even when safe retreat is possible. Conservatives, by contrast, tend to side with Zimmerman, a local neighborhood watch leader, denying that he acted on the basis of race, and supporting the law as permitting law-abiding citizens to defend themselves."); Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271 (2012).

20. See Lawson, *supra* note 19; see also Michael Saba, *And Justice for All? Debating the Zimmerman Arrest and Race in America*, CNN (Apr. 13, 2012, 1:45 PM), <http://www.cnn.com/2012/04/13/us/zimmerman-reax-irpt/> [<https://perma.cc/9J8M-BVZH>]; CBS/AP *Zimmerman Booked on 2nd-Degree Murder Charge*, CBS (July 10, 2013, 9:51 PM), http://www.cbsnews.com/8301-201_162-57412675/ [<https://perma.cc/8UFP-QJ9N>].

21. See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Post-Racial Society*, 91 N.C. L. REV. 1555, 1565–66, 1577 (2013) ("It is unlikely that George Zimmerman set out that night intending to kill a Black person, but implicit bias likely influenced him to see Martin as someone who looked suspicious and dangerous When there is a dead victim and police know who killed the victim, they usually arrest the obvious perpetrator of the homicide and then investigate."). Lee also examined the role that race played in the shooting itself, noting: "It is unlikely that Zimmerman would have thought Martin was 'real suspicious,' 'up to no good,' and 'on

are important lenses to use to interpret Zimmerman's preferential treatment, another dimension to this drama has gone largely unnoticed. The government's delay in charging Zimmerman and the trial judge's rulings during trial should also be examined through the lens of police power and police privilege.

The excessive force doctrine is but one way that Fourth Amendment case law may influence the prosecution of police. This Article demonstrates how the Supreme Court's search and seizure decisions often mask aggressive and racially motivated policing methods. There is a risk that police who are accused of violent acts will benefit from this case law even though it was intended for pretrial motions to suppress evidence and civil rights lawsuits, rather than to guide judges during criminal trials. While police may need a different standard than other criminal defendants, applying the Fourth Amendment case law to criminal prosecutions can give police defendants an unfair advantage.

Part I analyzes Supreme Court doctrine that empowers the police. Part I.A analyzes the case law governing Fourth Amendment search and seizure and demonstrates that, through its opinions, the Supreme Court has labeled aggressive forms of policing as nonaggressive. In these decisions that resolve motions to suppress evidence and civil rights complaints, the Court camouflages aggression through doctrine. Part I.B demonstrates how racial profiling is tolerated and rendered invisible in the Fourth Amendment context. The Fourth Amendment case law on the police's power to use force against civilians is coupled with the police's power to treat civilians unequally based on conscious and unconscious racial bias.

Part II explores the relationship between Fourth Amendment doctrine and the George Zimmerman trial. Part II.A lays out the evidence introduced against Zimmerman to support a charge of murder or manslaughter, while Part II.B shows how Zimmerman's behavior that fateful night mimicked that of a police officer and how the government's response to the shooting of Trayvon Martin paralleled cases where police officers killed civilians. Part II.C examines the trial judge's first controversial ruling when she prevented the prosecution from arguing that Zimmerman engaged in racial profiling. While her ruling flies in the face of precedent in the criminal arena, her decision makes sense if one imagines the facts through a Fourth Amendment lens, where racial profiling is tolerated and rendered invisible. Part II.D explores the trial judge's second controversial ruling—her refusal to instruct

drugs or something' if Martin had been White. Race likely influenced Zimmerman's perception that Martin posed a threat of criminality, whether Zimmerman was aware of this or not." *Id.* at 1565.

Zimmerman's jury on the rule of aggressors, a core limitation on the right of self-defense. Although her ruling contradicts precedent in criminal trials, her decision makes sense if one looks through a Fourth Amendment lens because the Court has redefined aggressive police behavior so that judges must consider it lawful and benign. The trial judge did not explain either controversial ruling. Part II.E examines social science in the area of judicial decision-making to show how judges may be influenced on an unconscious level by what they read or view, such as Supreme Court case law. Thus, Supreme Court opinions that permit police aggressive behavior by relabeling it as benign, and case law that camouflages racial profiling, provide a plausible explanation for the controversial rulings in George Zimmerman's prosecution.

Part III seeks solutions to the unfair Fourth Amendment privilege that infects trials where police and their helpers stand accused. Neighborhood watch volunteers should be treated the same as any other defendant, and while legislatures may want to provide police defendants with more protections than civilian criminal defendants, the Fourth Amendment protections are excessive. The Fourth Amendment was designed to protect individuals from the police, but it has become a method to protect police from the reach of criminal statutes.

I. SUPREME COURT CASE LAW THAT CHARACTERIZES POLICE AGGRESSION AS BENIGN

In George Zimmerman's murder trial, the trial judge made two surprising rulings that helped the accused. In an early ruling, Zimmerman's judge refused to allow the prosecution to argue that the neighborhood-watch volunteer racially profiled Martin. In a later ruling, the trial judge refused to instruct the jury that aggressors lose their right to self-defense unless certain conditions are met. At first glance, these rulings confound the observer. For one, the government is usually allowed to prove racial bias as a motive for criminal violence. Even more confounding, the aggressor rule that the judge hid from the jury represents a core, long-standing limit on the right to self-defense. These rulings will make sense when put into the context of search and seizure case law.

The Fourth Amendment governs the rules of search and seizure, and the Supreme Court case law interpreting the Constitution, therefore, determines when the police have the power to arrest, detain, search, or use deadly force. In a large proportion of criminal trials, defense attorneys file motions called "motions to suppress" evidence, arguing that police violated the Constitution in gathering evidence, and, as a result, the government should not be permitted to use the resulting

evidence at trial. Judges, such as the trial court judge who presided over Zimmerman's case, routinely hold hearings with live testimony and must read and apply Supreme Court precedent to resolve the allegations before trial. It is unnecessary to decide whether the trial judge in Zimmerman's case consciously imported Fourth Amendment doctrine. Whether or not trial judges are consciously aware of how Supreme Court doctrine creates police privilege, it is reasonable to predict a spillover effect from motions to suppress where police are government witnesses into cases where police are criminal defendants. Sections A and B below lay out the Fourth Amendment decisions that correspond to the two contentious rulings that benefited George Zimmerman.

A. Chasing Civilians and Other Nonaggressive Behaviors

Many Supreme Court opinions pretend that police are neither aggressive nor their actions coercive when they interact with civilians. These opinions form a significant part of Fourth Amendment doctrine governing police behavior. This Section will examine some of the ways that the fiction of unthreatening police officers permeates constitutional law. Whether or not judges believe in the myth of nonintimidating police officers, judges have been trained to undervalue the fear and threat felt by those singled out for unwanted attention by police and are expected to apply Supreme Court doctrine.

One area where the Fourth Amendment doctrine imagines that police are nonthreatening is consent searches. The Supreme Court imagines that when police bang loudly on the front door of a home, yelling "police," the people inside will know that they may choose to assert their constitutional right to be left alone.²² According to recent precedent, if civilians open up the door it is because they are freely choosing to consent to this invasion of privacy. "Occupants who choose not to stand on their constitutional rights [by not answering the door when police bang on it] have only themselves to blame," reasoned the Court in *Kentucky v. King*.²³

In 2011, when the Supreme Court decided *Kentucky v. King*, there was long-established precedent declaring that civilians who acquiesce to

22. *Kentucky v. King*, 563 U.S. 452, 456 (2011) (discussing an example of an officer who testified that he and other officers banged on an apartment door "as loud as [they] could" and announced, "'this is the police' or 'Police, police, police'").

23. *Id.* at 470. Note that in *Kentucky v. King*, when the occupants did not open the door, the police broke down the door claiming to have smelled marijuana and to have heard sounds consistent with people moving about inside to destroy evidence. The issue before the Supreme Court was whether police can avoid the search warrant requirements by creating exigent circumstances by knocking on the door of a home seeking entry instead of obtaining a warrant and then using the response from the occupants to satisfy a warrant exception.

police demands are not giving voluntary consent.²⁴ As the Court explained, “acquiescence to” police demand is not consent.²⁵ The *King* case did not change this rule. Instead, the Court labeled the police behavior at issue as nonaggressive and pretended that the police did not demand entry. In fact, the Court compared police coming onto curtilage and knocking on doors to investigate crimes as similar to door-to-door salesmen or pollsters, strangers that can be easily ignored.²⁶ “When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.”²⁷ Police are so unthreatening that people need not be told they have a right to refuse consent.²⁸ This fiction that police are not authority figures who demand compliance with their requests permeates Fourth Amendment rules.

The *King* Court rejected the trial judge’s conclusion that the police officers “demanded” entry even though the trial judge based her conclusion on specific factual considerations, including the loudness of the knock and the officers yelling “police” multiple times.²⁹ Writing for the Court, Justice Alito explained:

Police officers may have a very good reason to announce their presence loudly and to knock on the door with some force. . . . Citizens who are startled by an unexpected knock on the door . . . may appreciate the opportunity to make an informed decision about whether to answer the door to the police.³⁰

24. *Mapp v. Ohio*, 367 U.S. 643, 644 (1961) (holding that a defendant who was shown a false search warrant was coerced into consenting to a search).

25. *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968) (“[A]cquiescence to a claim of lawful authority” is not consent.); see *United States v. Mendenhall*, 446 U.S. 544, 577 (1980) (White, J., dissenting) (“While the Government need not prove that Ms. Mendenhall knew that she had a right to refuse to accompany the officers, . . . it cannot rely solely on acquiescence to the officers’ wishes to establish the requisite consent.”); see also *Schaffer v. State*, 988 P.2d 610, 615–16 (1999) (concluding that consent is not proved when the facts “establish nothing more than acquiescence to apparent lawful authority”) (citing 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.6(g) (3d ed. 1996)).

26. The Court kept the definition of consent, but ruled that the behavior was not aggressive as a matter of law. Andrew Taslitz explains that in *Florida v. Jardines*, 133 S. Ct. 1409 (2013),

[t]he court agreed that under certain circumstances customs or social norms establish implied consent for persons to appear at the front door of a home. For example, girl scouts, trick-or-treaters, and salesmen may knock on a door, ask for an invitation to enter or talk, then either do so if the invitation is accepted or leave if it is rejected. Given that is so, the dissenters saw no difference in police engaging in analogous behavior.

Andrew E. Taslitz, *The Cold Nose Might Actually Know? Science & Scent Lineups*, 28 CRIM. JUST. 4, 7 (2013).

27. *King*, 563 U.S. at 469.

28. See generally *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

29. *King*, 563 U.S. at 471–72.

30. *Id.* at 468.

The Supreme Court rejected the notion that police banging “on the door as loud as [they] could” and announcing “Police, police, police” could be construed as demanding entry or a demand to the person inside to open the door.³¹ “There is no evidence of a ‘demand’ of any sort,” the majority opined, ruling that police may knock as loudly as they want and yell “police” repeatedly without a reasonable occupant thinking he must open the door, as long as police do not explicitly state “open up” or explicitly threaten to enter without a warrant.³²

Thus, the Court camouflages the aggressive nature of police activity by language that declares that knocking is what “any private citizen might do” at a person’s front door. Trial judges learn that the law expects them to pretend that a reasonable homeowner freely consents when she opens up her door to police who shout “police” as they loudly bang on her front door. In reading opinion after Supreme Court opinion, trial judges are taught to view aggressive police acts as nonaggressive.

Searches may even be considered consensual when the person submitting to the police is in custody or held by police.³³ Consider Sylvia Mendenhall, age twenty-two, who was taken to the Drug Enforcement Agency’s Office and strip-searched after she got off an airplane. Although a plurality of justices determined that Mendenhall was seized at the time she accompanied the agents to the airport office, the Court nevertheless categorized her cooperation with a strip search as consent. The Court was not persuaded by her gentle protestations. The Court opined that “when she was told that the search would require the removal of her clothing” and she responded that “she had a plane to catch,” this did not defeat the government’s burden to prove that she consented and that the consent was voluntary.³⁴ Rather, the Court found that this could mean that Mendenhall hoped “that the search be conducted quickly, not as indicating resistance to the search.”³⁵

The *Mendenhall* Court did not change the rule that consent must be voluntarily given and may not be a result of coercion.³⁶ In finding Mendenhall’s consent to be voluntarily given, the Court essentially declared that police are not aggressive when they seize individuals and

31. *Id.* at 471–72.

32. *See id.*

33. *Howes v. Fields*, 132 S. Ct. 1181, 1183 (2012) (holding that a prisoner taken to a locked conference room in the administrative section of a jail is not “in custody” for *Miranda* purposes, so there is no need to provide warnings before interrogation).

34. *United States v. Mendenhall*, 446 U.S. 544, 559 (1980).

35. *Id.* at 545. In addition, the Court was not impressed by the fact that all the officers involved were white while the young woman targeted was black; this did not even affect their decision that a woman in Mendenhall’s position would not view the police’s request to submit to a strip search as a demand. *Id.*

36. *See id.*

seek cooperation, even when seeking consent for a humiliating act, such as a young woman revealing her body to a stranger based on suspicion of criminality.³⁷ Thus, the law teaches trial judges to view inherently coercive encounters as voluntary and to see regular police aggression as nonaggressive.

The Fourth Amendment definition of a seizure also forces trial judges to view various types of aggressive police behavior as nonaggressive. An individual who reasonably believes he is not free to walk away or otherwise terminate the encounter has been seized, according to the Court.³⁸ Nevertheless, the Court often concludes that an individual was not seized in situations where it seems beyond dispute that he wished to terminate the encounter but instead felt coerced into cooperating.

The law allows police to target, pursue, and question individuals without naming it a seizure. For example, in *Florida v. Royer*, federal agents approached the defendant in the concourse at Miami International Airport and asked for his ticket and driver's license. "Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves,"³⁹ wrote Justice White for a plurality, meaning that police may take these investigative steps without any suspicion whatsoever. Thus, the Court pretends that Mr. Royer only had himself to blame for stopping and handing his ticket and license to officials. According to the Court, a reasonable person in Mr. Royer's position would have been under no compulsion to comply with these official requests.⁴⁰

Another example of the Court's penchant for recharacterizing unpleasant interactions between police and civilians as voluntary may be found in *United States v. Drayton*.⁴¹ There, police boarded an interstate bus to interdict drugs, asking each person individually to identify his or her bag so it could be searched. As the dissent explained: "The reasonable inference was that the 'interdiction' was not a consensual exercise, but one the police would carry out whatever the circumstances; that they would prefer 'cooperation' but would not let the

37. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 366 (2009) (stating that a strip search in a school was "embarrassing, frightening, and humiliating" to a teenaged suspect). "The reasonableness of her expectation is . . . indicated by the common reaction of other young people similarly searched, whose adolescent vulnerability intensifies the exposure's patent intrusiveness." Its indignity does not outlaw the search, but it does implicate the rule that "the search [be] 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 375 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

38. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

39. *Florida v. Royer*, 460 U.S. 491, 501 (1983).

40. *Id.*

41. 536 U.S. 194 (2002).

lack of it stand in their way.”⁴² Although the defendant was literally unable to leave because the bus was stopped to allow the police to investigate, and although the officer brought his face only one to one-and-a-half feet from Drayton’s face as he sought information from him, the Court concluded as a matter of law that Drayton had not been seized.⁴³ Drayton and the other passengers were not seized when police boarded the bus, nor was Drayton seized when a police officer went up to his seat, sought his “cooperation” in their drug-interdiction efforts, and asked him to identify his bag so they could search it.⁴⁴ A reasonable person would have felt free to tell the police to leave them alone, according to the Court. In addition, the search of the bag and the frisk of Drayton were both labeled as consensual acts. Reading the *Drayton* decision, trial judges would learn that police behavior has to be unusually coercive to constitute the type of pressure that mandates protections. Standard aggressive tactics of police in seeking cooperation from unwilling subjects do not even qualify as a search or seizure under the Fourth Amendment.

Tracy Maclin pointed to two cases that “indicate that citizens no longer have the right to come and go as they please”:⁴⁵ *Immigration and Naturalization Service v. Delgado*⁴⁶ and *Michigan v. Chesternut*.⁴⁷ After

42. *Id.* at 211–12.

43. *Id.* at 203.

44. *Id.* at 198. (“I’m Investigator Lang with the Tallahassee Police Department. We’re conducting bus interdiction [*sic*], attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?”) (alteration in original).

45. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1275 (1990).

46. *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984). In *Delgado*, immigration officials investigated employee papers at a factory. According to the dissent, the investigation was conspicuously vigorous:

[T]he surveys were carried out by surprise by relatively large numbers of agents, generally from 15 to 25, who moved systematically through the rows of workers who were seated at their work stations. Second, as the INS agents discovered persons whom they suspected of being illegal aliens, they would handcuff these persons and lead them away to waiting vans outside the factory. Third, all of the factory exits were conspicuously guarded by INS agents, stationed there to prevent anyone from leaving while the survey was being conducted. Finally, as the INS agents moved through the rows of workers, they would show their badges and direct pointed questions at the workers.

Id. at 230. Nevertheless, the Court concluded that Herman Delgado, one of the workers questioned, was free to leave. “This conduct should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer,” the majority reasoned. *Id.* at 218. In other words, to follow the Court’s dictates, a judge must refer to coercive conduct and aggressive tactics by police as noncoercive.

47. *Michigan v. Chesternut*, 486 U.S. 567 (1988).

these cases, people “only have the right to be free from an unduly intimidating police presence.”⁴⁸

In *Michigan v. Chesternut*, police chased a civilian who ran when he saw their cruiser. Police testified that “the patrol car followed respondent around the corner ‘to see where he was going’” and “caught up with respondent and drove alongside him for a short distance.”⁴⁹ On these facts, the chase did not amount to a Fourth Amendment seizure, held the Court. Police may chase civilians without any indicia of suspicion whatsoever without running afoul of the Fourth Amendment as long as the chase was no more intrusive than the one in this case. “Contrary to respondent’s assertion that a chase necessarily communicates that detention is intended and imminent, the police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent’s freedom of movement.”⁵⁰ It is difficult to imagine a more threatening act than being chased by armed men. Yet, the Supreme Court has decreed that when officers engage in a chase, it must be recharacterized as benign.

Trayvon Martin had just turned seventeen. When determining whether behavior is coercive or benign, I suspect that most people would look at the victim’s characteristics.⁵¹ Thus, people would intuitively sense that an officer telling someone to “hop in the car” would be more coercive if said to a child than an adult. In other contexts, the Supreme Court has become increasingly aware of young people’s differences. There have been a plethora of studies of brain development, showing that there is a biological basis for immature behavior by teenagers, and these became the basis for holding that the death penalty may not be applied to juvenile offenders.⁵² In addition, studies have proven that youth are more vulnerable to police coercion in the context of interrogation. Exonerations due to the advent of DNA testing proved that false confessions were a major cause of wrongful convictions and that youth were particularly prone to confess even when innocent.⁵³ However, the

48. Maclin, *supra* note 45, at 1275 (citing *Delgado*, 466 U.S. and *Chesternut*, 486 U.S.).

49. *Chesternut*, 486 U.S. at 569.

50. *Id.* at 574–75.

51. See Anne E. Supina, Jeffrey Snipes & Stephen Mastrofski, *Compliance on Demand: The Public’s Response to Specific Police Requests*, 33 J. RES. CRIME & DELINQ. 269, 269–305 (1996).

52. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

53. See Joshua A. Tepfer, Laura H. Nirider & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904 (2010) (analyzing exoneration data, finding that a third of the 103 youth exonerated, 31.1% of them, falsely confessed as compared to 17.8% of the adults).

Fourth Amendment generally treats youth and adults the same when evaluating coercive police behavior.

So far, the Supreme Court has never included age as a factor when determining if a reasonable person would feel free to walk away from a police encounter.⁵⁴ Thus, when police officers accost minors on the street without physically restraining them, judges are likely to rule that what the police did was not a seizure at all and that age is irrelevant to that calculation. In fact, police departments that use the stop and frisk tactic extensively often target minors for this particular Fourth Amendment intrusion.⁵⁵

B. Supreme Court Tolerance of Racial Profiling

“Though the death of Trayvon Martin was not the result of a law enforcement encounter, the issues of race and reasonable suspicion of criminal conduct are so closely linked in the minds of the public that his death cannot be separated from the law enforcement profiling debate.”

- U.S. Congressman John Conyers, Jr.⁵⁶

Prosecutors in the George Zimmerman trial tried to portray Zimmerman as aggressive. They also sought to portray him as racially biased in the way the neighborhood watchman targeted and treated Martin, an African-American teenager who was on his way home from purchasing juice and candy when Zimmerman saw Martin and decided Martin was suspicious. This Article will demonstrate that when trial Judge Debra Nelson forbade the prosecution from using the term “racial profiling,” that ruling resonated with the Supreme Court’s particular set of rules regarding racial profiling in the context of the Fourth Amendment protection against unreasonable searches and seizures.

54. *But see* J.D.B. v. North Carolina, 564 U.S. 261, 280–81 (2011) (holding that age could factor into a judge’s determination of custody for purposes of applying Fifth Amendment *Miranda* rights and that a reasonable thirteen-year-old might view his circumstances differently than would a reasonable adult). Age may eventually become a proper factor in determining whether a reasonable person would feel free to ignore an officer’s requests and go about his or her business, but even so, it is unlikely to benefit someone like Trayvon Martin, who, at seventeen years old, is close to majority.

55. New York Civil Liberties Union noted that fifty-five percent of all stop and frisks were conducted on individuals aged fourteen to twenty-four, and eighty-seven percent of all stop and frisks were conducted on minorities. *See* New York Civil Liberties Union, *Stop and Frisk Data* NYCLU, <http://www.nyclu.org/content/stop-and-frisk-data> [https://perma.cc/Q3WB-EUHH].

56. Lauren Fox, *Racial Profiling Bill Gets Another Chance Because of Trayvon Martin*, U.S. NEWS & WORLD REP. (July 30, 2013, 1:48 PM), <http://www.usnews.com/news/articles/2013/07/30/racial-profiling-bill-gets-another-chance-because-of-trayvon-martin> [https://perma.cc/7DLS-9DNU].

In 2002, William Stunz wrote that “[racial] profiling is the great issue of our time.”⁵⁷ Indeed, the phrase “driving while black” is widely recognized to explain the phenomenon where police single out minorities for traffic stops, allowing white Americans to get away with their driving infractions; traffic law violations are nearly ubiquitous.⁵⁸ The police practice of stopping minorities hugely out of proportion to their numbers in society—with the numbers of driving infractions or drug possession offenses demonstrably equal for white and black—raises serious Fourth Amendment concerns. The Fourth Amendment intended police to exercise individualized suspicion before curbing a person’s liberty.⁵⁹ Targeting someone based on group membership seems anathema to that principle.

Although race-based policing is well-documented,⁶⁰ the Supreme Court’s rulings allow it to flourish. The Court has taken two related approaches to racial profiling allegations in the context of searches and seizures that help the government defeat motions to suppress. In *Whren v. United States*,⁶¹ the Court established that racial profiling is not a cognizable claim within the Fourth Amendment, and, therefore, racially motivated seizures, although unconstitutional, will be tolerated as long as sufficient justification for the seizure exists once the offensive racial component is eliminated. A second, related approach is the color-blind analysis leveled by the Court in almost all Fourth Amendment cases, thereby obscuring the problem from public view.⁶²

57. William J. Stunz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2142 (2002).

58. See David A. Harris, “Driving While Black” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997).

In the most literal sense, no driver can avoid violating some traffic law during a short drive, even with the most careful attention. Fairly read, *Whren* says that any traffic violation can support a stop, no matter what the real reason for it is; this makes any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police.

Id.

59. See, e.g., *Florida v. Wells*, 495 U.S. 1, 7 (1990); *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Colorado v. Bertine*, 479 U.S. 367, 375 (1987).

60. Maclin, *supra* note 46, at 1324; see also Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000).

61. 517 U.S. 806, 810 (1996).

62. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1033 (2002). In a third approach, the Court declared that racial profiling is permitted in immigration enforcement as long as it is one of many factors considered by the officer in making his decision. Thus, if a police officer pulls over a car near the border with Mexico seeking illegal immigrants, she may base the stop in part on the ethnic appearance of the car’s occupants. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975); see Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice’s 2003 Guidelines*, 50 LOY. L. REV. 67, 70 (2004); see also Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113 (2007).

Almost thirty years before *Whren*, the Supreme Court acknowledged the prevalence of police harassment towards certain groups in *Terry v. Ohio*,⁶³ but opined that nothing could be done to prevent this, because persons who violate the law would not be deterred by rules leading to the suppression of evidence.⁶⁴ While *Terry* condemned race-based policing, the Court did not take this problem into consideration in balancing the interests of society in being free from crime against the society's liberty interests. In *Whren*, the Court ducked the problem again, creating a situation where racial profiling is mostly invisible in published opinions but flourishes *sub silentio*.

Whren involved two black men in a car who were pulled over by vice officers dressed in plain clothes in an unmarked vehicle. The men were eventually charged and convicted of drug crimes. Under local regulations, plainclothes officers were permitted to make traffic stops "only in the case of a violation that is so grave as to pose an immediate threat to the safety of others."⁶⁵ The regulation was in place because plainclothes officers tended to provoke alarm and resistance from drivers who were pulled over.⁶⁶ While it seemed clear that police stopped the car because they had a hunch they might find drugs, and that stopping a car on a hunch alone would violate the Fourth Amendment, one of the police officers testified that they wanted to investigate a traffic infraction. The officer stated that the driver was "not paying full time and attention to his driving" as shown by the fact that he stopped at a stop sign for more than twenty seconds.⁶⁷ After reading the transcript from the *Whren* trial, Professor Kevin Johnson concluded that the trial judge was probably aware that there was a credibility problem here. Not only is the alleged infraction rarely ticketed, but during cross-examination on the motion to suppress the drugs, the officer was asked: "Isn't it true that your decision to stop the Pathfinder was because you believed that two young black

63. *Terry v. Ohio*, 392 U.S. 1, 11 (1968). See generally Frank Rudy Cooper, *The "Seesaw Effect" from Racial Profiling to Depolicing: Toward Critical Cultural Theory*, in *THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH* 139 (Benjamin Fieury-Steiner & Laura B. Nielsen eds., 2006).

64. *Terry*, 392 U.S. at 14–15 ("The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.").

65. Kevin R. Johnson, *The Story of Whren v. United States: The Song Remains the Same*, in *RACE LAW STORIES* 427 (Rachel P. Moran & Devon W. Carbado eds., 2006) [hereinafter Johnson, *The Song Remains the Same*]; see Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) [hereinafter Johnson, *How Racial Profiling in America Became the Law of the Land*]; see also Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

66. Johnson, *The Song Remains the Same*, *supra* note 65, at 419.

67. Johnson, *The Song Remains the Same*, *supra* note 65, at 429 n.50.

men in a Pathfinder with temporary tags were suspicious; isn't that true?" and before answering the question, the officer paused, "a lengthy pause," the trial judge wrote.⁶⁸ Nevertheless, the trial judge denied the motion to suppress because, ultimately, the driver committed two traffic infractions, turning without signaling and exceeding the speed limit, and the Supreme Court agreed that traffic infractions trump racial profiling in the Fourth Amendment context.⁶⁹ Counsel for the two men had argued that if the Court permitted pretextual stops based on suspicion of drugs, then police could select drivers to pull over simply based on race.⁷⁰ This argument was given short shrift in the Court's unanimous opinion. The Supreme Court held that it did not matter whether the officers subjectively intended to pull the car over based on an impermissible hunch of drug possession because at the time they stopped the car, the police officer had probable cause to believe that the driver had committed a traffic offense. Nor did it matter if a reasonable officer in the position of the police officer in that case would not have stopped the car.⁷¹ With this one case the Court taught trial judges to tolerate racially motivated seizures in deciding motions to suppress as long as the police could point to a criminal act or traffic infraction to serve as a pretext for the police activity.

The *Whren* decision also serves as an example of racial blindness. Although advocates for Whren and his co-defendant Brown focused on race and racial profiling, the opinion itself followed the usual colorblind approach of the Court, describing the facts without mentioning that Whren and his co-defendant were black.⁷² The only time race was brought into the opinion was when the Court dismissed the argument that the Fourth Amendment should prevent police from targeting civilians based on race.⁷³ In a seminal article on the Fourth Amendment, Professor Devon Carbado at UCLA School of Law provided a critical race theory critique of *Whren*:

The Court's racialization of the facts is not merely descriptive; it is performative, making race appear and disappear, relevant and

68. Johnson, *How Racial Profiling in America Became the Law of the Land*, *supra* note 65, at 1053–55; see also David O. Markus, *Whren v. United States: A Pretext To Subvert the Fourth Amendment*, 14 HARV. BLACK LETTER L.J. 91, 107 (1998) ("The [*Whren*] Court, in light of the numerous instances of police perjury that have been exposed in recent years, had an excellent opportunity to address the issue of police perjury. Instead, the Court chose to turn a blind eye toward the problem."); Johnson, *The Song Remains the Same*, *supra* note 65, at 419.

69. See sources, *supra* note 68.

70. Johnson, *The Song Remains the Same*, *supra* note 65, at 432.

71. *Id.* This was what counsel for Whren and Brown unsuccessfully argued to the D.C. Circuit Court of Appeals.

72. Carbado, *supra* note 62, at 981.

73. *Whren v. United States*, 517 U.S. 806, 810 (1996).

irrelevant . . . With words, the Court recognizes Whren's race to deny him remediation and de-recognizes his race to deny the "important" police function blackness performs as a proxy for suspicion.⁷⁴

Not only does the Supreme Court render racial profiling beyond the reach of Fourth Amendment remedy, but it also employs racial blindness to pretend that these officers did not actually engage in racial profiling. This sends a message to lower court judges to be wary of acknowledging racial profiling even in cases where it would be difficult not to see.

Whren v. United States aided Zimmerman's defense in two ways.⁷⁵ First, following *Whren*, judges have learned to exclude allegations of racial profiling or racialized policing from motions to suppress. Citing *United States v. Armstrong*, a case decided the same year as *Whren* that rolled back opportunities to pursue civil remedies for racial police practices, Kevin Johnson noted that, taken together, "Armstrong and Whren effectively immunize police from any challenges for race-based law enforcement conduct; only the most egregious police misconduct will likely be subject to sanction."⁷⁶ As Professor Johnson⁷⁷ wrote: "Lower courts fastidiously follow *Whren*, and prosecutors frequently invoke the holding as immunizing the conduct of police officers."⁷⁸

Second, the *Whren* Court continued a colorblind approach whereby courts render racial discrimination invisible when evaluating police behavior. After *Terry v. Ohio*, almost all Supreme Court Fourth Amendment decisions have eschewed racial description in favor of colorblindness.⁷⁹ Even cases that were previously discussed, such as *Mendenhall*⁸⁰ and *Drayton*,⁸¹ involved African-American civilians, but

74. Carbado, *supra* note 62, at 981. In addition, Carbado explained that the Supreme Court's colorblind approach intentionally blocks certain social meanings. Were the Court to reference the racial identities of the criminal defendants, it "would entrench existing negative racial impressions . . . The thinking might be that, because of stereotypes, the starting point for conceptualizing an interaction between a black man and a white police officer might be that the former is a criminal and the latter a racist." *Id.* In omitting racial description in its decisions, the Court hoped to prevent the reader from thinking that the officers had racial animus or operated using conventional stereotypes.

75. See *Whren*, 517 U.S. at 812 (stating that an improper motive by a police officer does not invalidate "objectively justifiable behavior under the Fourth Amendment").

76. Johnson, *The Song Remains the Same*, *supra* note 65, at 441 (rolled back civil suits such as selective enforcement of the laws).

77. Professor Kevin Johnson is Dean, Mabie-Apallas Professor of Public Interest Law, and Professor of Chicana/o Studies at University of California, Davis.

78. Johnson, *How Racial Profiling in America Became the Law of the Land*, *supra* note 65, at 1066.

79. See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 247-48 (2010); Carbado, *supra* note 62, at 968.

80. *United States v. Mendenhall*, 446 U.S. 544, 545 (1980).

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

their race is absent from the majority opinions. “Proponents of colorblindness,” explains Cynthia Lee, may think that this is a moral imperative, but, in fact, “[p]retending that race does not matter, which the principle of colorblindness encourages, only exacerbates the problem of implicit bias.”⁸²

The Fourth Amendment proves informative here. Without setting out to apply search and seizure law to the murder trial before her, Judge Nelson would have been eminently familiar with the rulings governing constitutional police behavior. In the Fourth Amendment context, for the past twenty years the Court has consistently excluded racial bias from consideration in determining if the police behaved appropriately.⁸³ Although a volunteer, not a police officer, killed Trayvon Martin, if Judge Nelson viewed Zimmerman as part of the police team, then her rulings make sense.

II. THE INVISIBLE HAND OF THE SUPREME COURT IN GEORGE ZIMMERMAN’S MURDER TRIAL

*“If an officer stops you, promise me you’ll
always be polite
And that you’ll never ever run away
Promise Mama you’ll keep your hands in sight”⁸⁴*

Bruce Springsteen wrote this song about Amadou Diallo, who was killed by police in a hail of forty-one bullets, and he later dedicated it to Trayvon Martin.

A. Evidence Presented to Prove Murder or Manslaughter

On February 26, 2012, Trayvon Martin lay face down on the ground with a bullet hole through his heart.⁸⁵ The seventeen-year-old was

82. Lee, *supra* note 21, at 1610.

83. David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 371 (2001); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 852 (2002); Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 GONZ. L. REV. 341, 346 (2011–2012) (“For example, in *Whren v. United States*, the Supreme Court held that racially discriminatory police investigations do not violate the Fourth Amendment.”).

84. Bruce Springsteen, *AMERICAN SKIN (41 SHOTS)* (2004). See Eric R Danton, *Bruce Springsteen Dedicates ‘American Skin (41 Shots)’ to Trayvon Martin*, ROLLING STONE, (July 17, 2013), <http://www.rollingstone.com/music/news/bruce-springsteen-dedicates-american-skin-41-shots-to-trayvon-martin-20130717> [<https://perma.cc/8SVX-KZ3S>] (“Springsteen wrote the song in response to the 1999 shooting death of Amadou Diallo, an unarmed man who was killed by four New York City police officers who said they thought Diallo had pulled a gun on them. The 23-year-old immigrant had actually taken his wallet out of his pocket.”).

dead in Sanford, Florida. This was not a case of “who done it?” George Zimmerman, age twenty-eight, had pulled the trigger. The question was “why?” After a two-month delay, Zimmerman was charged with second-degree murder and manslaughter,⁸⁶ and a six-week trial commenced on June 10, 2013, about fifteen months after the alleged murder.⁸⁷ In the end, the jury had to evaluate Zimmerman’s claim that in shooting Trayvon Martin, he was simply defending himself against deadly force by the unarmed teenager. This Section will lay out the trial in enough detail to allow the reader to comprehend the context and importance of two rulings made by the trial judge that benefited the accused.

Trayvon Martin was a visitor to the gated community in Sanford, Florida, visiting his father and his father’s fiancé. On the day of the alleged murder, Martin left the townhouse to go to a local shop. At the time of his death, the teenager was carrying a packet of Skittles and a can of Arizona brand juice.⁸⁸

On that fateful evening, Zimmerman was a volunteer, a self-titled watch “captain,” patrolling the neighborhood in a car, looking for people who might be engaged in criminal activity.⁸⁹ Although the National Sheriffs’ Association recommends that neighborhood-watch volunteers not carry weapons, Zimmerman was legally carrying a concealed semiautomatic, nine-millimeter pistol.⁹⁰ In contrast, Trayvon Martin was

85. Lizette Alvarez, *Martin Was Shot as He Leaned Over Zimmerman, Court Is Told*, N.Y. TIMES (July 10, 2013), http://www.nytimes.com/2013/07/10/us/teenager-was-over-zimmerman-as-he-was-shot-expert-says.html?_r=0 (“The bullet, he said, entered his heart from the front, in a left to right direction, and plunged into one of his lungs.”).

86. This charge is also referred to as involuntary manslaughter. For a discussion of the elements of these charges, see *infra* notes 97–98 and accompanying text.

87. Jury selection commenced June 10, 2013, and the jury reached a verdict on July 25, 2013. See Erin Donaghue, *George Zimmerman Verdict: Former Neighborhood Watch Leader Not Guilty in Death of Fla. Teen Trayvon Martin*, CBS NEWS (July 14, 2013, 3:21 AM), <http://www.cbsnews.com/news/george-zimmerman-verdict-former-neighborhood-watch-leader-not-guilty-in-death-of-fla-teen-trayvon-martin/> [<https://perma.cc/TPA7-5E3T>].

88. While it is often misreported that Trayvon had iced tea, this is because his juice was the Arizona brand that is mostly known for its tea. The prosecution at trial called it juice. See Yamiche Alcindor, *Experts: Prosecutors Failed to Humanize Trayvon*, USA TODAY (July 16, 2013, 3:44 PM), <http://www.usatoday.com/story/news/nation/2013/07/16/zimmerman-trayvon-juror-b37/2521529/> [perma.cc/V2Y5-XJPX].

89. Others have laid out the facts of the shooting in more detail. See Trymaine Lee, *George Zimmerman Neighbors Complained About Aggressive Tactics Before Trayvon Martin Killing*, HUFFINGTON POST (Mar. 12, 2012, 9:13 AM), http://www.huffingtonpost.com/2012/03/12/george-zimmerman-trayvon-martin_n_1340358.html [<https://perma.cc/7AJS-LAXD>].

90. See Dennis A. Henigan, *The Woollard Decision and the Lessons of the Trayvon Martin Tragedy*, 71 MD. L. REV. 1188, 1189 n.4 (2012) (“Although a legal gun carrier under Florida law, Zimmerman was armed in violation of the neighborhood watch program rule that members ‘shall not carry weapons.’” The National Sheriff’s Association neighborhood-watch volunteer manual states: “It should be emphasized to members that they do not possess police powers and they shall not carry

unarmed. Martin was talking on the phone until moments before he was killed.⁹¹

At approximately seven o'clock in the evening, Zimmerman saw Martin after the boy had left the store and was walking around, talking on his cell phone.⁹² Zimmerman did not know Martin but decided he was a criminal based on almost no facts other than that Martin was a black youth wearing a sweatshirt with the hood up, walking in the rain. Calling the police, Zimmerman told the dispatcher that he saw "a real suspicious guy . . . This guy looks like he's up to no good . . . It's raining and he's just walking around, looking about."⁹³ During the 911 call, Zimmerman told the police that the "suspect" was running away from him and that "these a-holes they always get away."⁹⁴ When Zimmerman admitted to the dispatcher that he was following the victim in his car, the dispatcher told Zimmerman to stop following the young man and to wait for police.⁹⁵

About three minutes after Zimmerman finished the 911 call, a single gunshot was heard. Zimmerman fired one bullet at close range, and it went into Martin's chest. Martin was pronounced dead at the scene.⁹⁶

weapons or pursue vehicles." Beth Kassab, *Trayvon Martin Would Be Alive if Neighborhood Watch Rules Followed*, ORLANDO SENT. (Mar. 14, 2012, 7:41 PM), http://articles.orlandosentinel.com/2012-03-14/news/os-trayvon-martin-beth-kassab-031512-20120314_1_orlando-police-block-captains-zimmerman [<https://perma.cc/DHL2-NAJ6>]. Yet Zimmerman's watch group was not registered with the National Sheriff Association and while the Sanford Police Department may have orally instructed Zimmerman not to carry a weapon while on patrol, it is not clear whether this happened. Jonathan Kaminsky, *Neighborhood Watch Groups Ponder Use of Guns After Zimmerman Trial*, WASH. POST (July 28, 2013), https://www.washingtonpost.com/politics/neighborhood-watch-groups-ponder-use-of-guns-after-zimmerman-trial/2013/07/28/a00f3248-f79f-11e2-afc1-c850c6ee5af8_story.html [<https://perma.cc/C6WZ-VH6W>].

91. Dan Barry et al., *In the Eye of a Firestorm: In Florida, an Intersection of Tragedy, Race and Outrage*, N.Y. TIMES (Apr. 2, 2012), at A1. See generally, Croakerqueen123, *George Zimmerman Trial*, YOUTUBE, <http://www.youtube.com/watch?v=qsgtFBN8uKs&list=PLYEBn4w1XOIeEsjliyfTohqC6BQLI81vx> [<https://perma.cc/A92M-F4B3>].

92. Julia Dahl, *Trayvon Martin Shooting: A Timeline of Events*, CBS NEWS (July 12, 2013, 5:11 PM), <http://www.cbsnews.com/news/trayvon-martin-shooting-a-timeline-of-events/> [<https://perma.cc/PSQ5-AXA7>]; see also Jeannine Bell, *Can't We Be Your Neighbor? Trayvon Martin, George Zimmerman, and the Resistance to Blacks as Neighbors*, 95 B.U. L. REV. 851, 853 (2015).

93. *Transcript of George Zimmerman's Call to the Police*, contributed by Sam Baldwin, MOTHER JONES, <http://www.documentcloud.org/documents/326700-full-transcript-zimmerman.html> [<https://perma.cc/PX6W-RHAB>] [hereinafter *Transcript of Zimmerman Call*].

94. See *id.* at 2. Note that the actual transcript reads "assholes."

95. *Id.* at 2.

96. "They found Martin 'face down in the grass.'" A sergeant checked and could not find a pulse. For the next six minutes, he and another police officer teamed up to conduct CPR on the teen. A plastic bag, brought by a neighbor, was used to seal his chest wound. Firefighters and EMS from the Sanford Fire Department arrived at 7:27 p.m., to continue efforts to try to save him. Three minutes later, at 7:30 p.m., Martin was pronounced dead. See Greg Botelho, *What Happened the*

What occurred during the three minutes between the Zimmerman's 911 call and the fatal gunshot was hotly disputed at trial. The prosecution wanted the jury to infer that Zimmerman caught up to Martin, confronted him aggressively, and when Martin fought back, defending himself, Zimmerman fired his weapon into Martin's chest. This, the prosecution contended, portrayed an indifference to human life, thereby proving second-degree murder.⁹⁷ Alternatively, the prosecution wanted the jury to find that Zimmerman's behavior in firing his gun into the unarmed youth was grossly negligent, thereby proving the lesser charge of involuntary manslaughter.⁹⁸

Much of the government's case rested on testimony by Trayvon Martin's teenage friend, Rachel Jeantel, who was talking to Martin on the phone when Zimmerman began following him. Martin complained to Jeantel that a "creepy-ass cracker" was following him.⁹⁹ Jeantel responded that the man was probably a pervert.¹⁰⁰ She recounted that Martin had tried to run away and was out of breath. Martin's final words before the phone went dead were "Get off. Get off."¹⁰¹

Night Trayvon Martin Died, CNN (May 23, 2012, 10:48 AM), <http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/> [<https://perma.cc/2HRK-2QB6>].

97. To prove the crime of second-degree murder under the depraved heart doctrine, the government need not prove that George Zimmerman intended Trayvon Martin's death. Florida requires the State to prove the following three elements beyond a reasonable doubt. Zimmerman committed an act or series of acts that: (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another; (2) is done from ill will, hatred, spite or an evil intent; and (3) is of such a nature that the act itself indicates an indifference to human life. FLA. STAT. tit. XLVI, § 782.04(2) (2013).

98. For involuntary manslaughter the government need not show ill will, but "only an intent to commit an act that was not merely negligent, justified, or excusable and which caused death." See Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 121-22 (1996) ("In most states, involuntary manslaughter requires proof of *grossly negligent conduct* causing death, such that the offender should have realized the conduct represented a substantial and unjustifiable risk to human life. The individual need not have been aware of the risk provided that a reasonable person in the same situation would have been.") (emphasis added). See FLA. STAT. tit. XLVI, § 782.07 (2013) for instructions on Manslaughter. In Florida, unlike some other jurisdictions, a defendant may be convicted of manslaughter if they have an honest but unreasonable belief in the need to act in self-defense.

99. Danielle Cadet, *Rachel Jeantel, Trayvon Martin Friend: Teen Was Trying to Escape George Zimmerman*, HUFFINGTON POST (June 27, 2013, 5:26 PM), http://www.huffingtonpost.com/2013/06/26/rachel-jeantel-trayvon-martin_n_3505587.html [<https://perma.cc/Z44B-BYRX>] (video and transcript).

100. Rachel Jeantel stated that the cracker reference meant pervert. See Yamiche Alcindor, *Trayvon Martin's Friend: Encounter Was Racially Charged*, USA TODAY (June 27, 2013), <http://www.usatoday.com/story/news/nation/2013/06/27/trayvon-martin-sanford-zimmerman-florida-race/2462403/> [<https://perma.cc/ZN2T-94WC>]. In closing argument, prosecution pointed to the telephone discussion about whether the man following Trayvon, Zimmerman, was "like a sex-pervert" to show that Trayvon was scared.

101. Cadet, *supra* note 99.

In a much-criticized move, the prosecution introduced Zimmerman's self-serving statements into court.¹⁰² The government brought in the defendant's statements to show that Zimmerman lied about what happened and that the physical evidence contradicted his story. However, this tactic meant that Zimmerman could mount a self-defense claim without exposing himself to the perils of cross-examination. Anyone who testifies is subject to cross-examination, but Zimmerman had no need to take the stand to testify once the jury heard what he said to police. Under the rules of evidence, a criminal defendant may not introduce self-serving out-of-court statements, but here the prosecutor was the one who introduced them. In effect, Zimmerman's out-of-court statements replaced live testimony, testimony whose veracity was never tested through the caldron of cross-examination.

Defense counsel benefited from the government's blunder by using Zimmerman's self-serving statements to police after the shooting to construct a claim of self-defense. Although Zimmerman admitted to police that he got out of his car, he claimed that Martin attacked him and that he was afraid Martin would kill him at the time he fired his gun. According to Zimmerman's statements, after Mr. Zimmerman got out of his car, "Mr. Martin soon emerged from the darkness and punched him, knocking him to the ground, suffocating him and then repeatedly bashing his head onto concrete while menacing him with the words 'You're going to die tonight.'" ¹⁰³ Zimmerman told police that Martin grabbed for Zimmerman's gun, but Zimmerman grabbed it first. Zimmerman fired into Martin's chest as Martin leaned over him because the defendant feared for his own life.

In order to show that he had the right to use deadly force against Trayvon Martin, Zimmerman documented some injuries to his face, nose, and back of his head in support of his self-defense theory. However, while this evidence established that Zimmerman was involved in a physical fight, it did not prove who started the altercation nor did it establish that deadly force was necessary. While the defense argued that the injuries proved Zimmerman was in fear for his life at the time he

102. See Bennett L. Gershman, *Prosecution's Biggest Mistake in Zimmerman Trial*, HUFFINGTON POST (July 10, 2013), http://www.huffingtonpost.com/bennett-l-gershman/prosecutions-biggest-mistake_b_3573932.html [https://perma.cc/U66K-DDSD]; see also Jarvis DeBerry, *Did George Zimmerman's Prosecutors Try to Get Him Off?*, TIMES-PICAYUNE (July 15, 2013, 3:00 PM), http://www.nola.com/opinions/index.ssf/2013/07/did_george_zimmermans_prosecut.html [https://perma.cc/2GE7-QPPN].

103. Cara Buckley, *Jury Hears Zimmerman's Recorded Account of Night of Fatal Shooting*, N.Y. TIMES (July 1, 2013), http://www.nytimes.com/2013/07/02/us/jurors-hear-zimmermans-taped-police-interview.html?_r=1&.

pulled the trigger, the government argued that the injuries did not support Zimmerman's story about being pummeled repeatedly on concrete. One area where the physical evidence appeared to strongly contradict Zimmerman's story was the state of the teenager's body. Martin was found dead with his hands underneath his body. Zimmerman had told police that he pulled Martin's hands off him and "moved [his] hands apart."¹⁰⁴ At trial the defense tried to show that Martin might have moved his own hands after the bullet pierced his heart and lodged in his lung. A *Washington Post* editorial noted this weakness in Zimmerman's self-defense claim:

But it strains credulity to believe that Trayvon could move his hands, which Zimmerman said he stretched away from Trayvon's body, to underneath his body, as a witness and Sanford police officer Ricardo Ayala noted. And all of this supposedly happened between the time Trayvon was shot and the time the first neighbor and first officers arrived. The elapsed time was about a minute.¹⁰⁵

The verdict turned on the credibility of Zimmerman's statements to police: whether the jury believed that Martin came at him from behind to start punching him; whether they believed that the unarmed Martin told Zimmerman he was going to "die tonight"; whether they believed Martin was leaning over Zimmerman at the time Zimmerman shot a bullet into his chest; and whether Zimmerman's head was pounded twenty-five times into the concrete pavement. According to one juror who spoke to the press afterwards, the original vote in the jury room was tied, with three for acquittal and three for conviction.¹⁰⁶ After deliberating for over sixteen hours, the jury returned a verdict of not guilty on both charges.

B. Zimmerman Behaved Like a Police Officer

Although Zimmerman was not a police officer, he was doing police officer type of work: patrolling the neighborhood, looking for suspects, and reporting suspicious behavior, to name the key similarities. In his written statement to police, Zimmerman used police language, referring to Martin as a "suspect" nine times, the way police would in writing a

104. Tom Winter, James Novogrod & Elizabeth Chuck, *Gunshot Wound Expert: Evidence Supports Zimmerman's Account of Fatal Encounter*, NBC NEWS (July 9, 2013), <http://www.nbcnews.com/news/us-news/gunshot-wound-expert-evidence-supports-zimmermans-account-fatal-encounter-v19375277> [<https://perma.cc/8JNC-8NFJ>].

105. Jonathan Capehart, *Trayvon Was 'Alive,' but Could He Move?*, WASH. POST (July 8, 2013), 2013 WLNR 16516955.

106. Dana Ford, *Juror: 'No doubt' that George Zimmerman Feared for His Life*, CNN (July 16, 2013), <http://www.cnn.com/2013/07/15/justice/zimmerman-juror-book/> [<https://perma.cc/NL56-RJNL>] ("An initial vote was divided. Three of the jurors first voted Zimmerman was guilty, while three voted he was not guilty, [stated Juror B37].").

report.¹⁰⁷ Defense attorneys brought in evidence of burglaries in the neighborhood to justify Zimmerman's targeting of Martin. His attorneys thereby suggested that Zimmerman kept track of crimes as police officers are trained to do and that Zimmerman's motives in following Martin were the same as any uniformed officer.

One place where there appears to be different rules for the police who kill is in the arrest and charging decisions. In Zimmerman's case, the government declined to charge him until the media attention and public outcry made Martin's death too costly to ignore. There was a forty-six-day delay before George Zimmerman stood accused of murdering Martin.¹⁰⁸ "When there is a dead victim and police know who killed the victim, they usually arrest the obvious perpetrator of the homicide and then investigate."¹⁰⁹ However, when police officers are the ones who kill a suspect, the officers may not be arrested at all, and prosecutors may decline to file criminal charges.

Consider the killing of twenty-two-year-old Amadou Diallo by four New York City police officers. He was unarmed when they shot him forty-one times. When the police refused to arrest or charge the officers who shot the unarmed man, there were public protests.¹¹⁰ It took fifty-five days for the police officers involved in the killing to finally face charges.¹¹¹

107. Jane Velez-Mitchell, *Was George Zimmerman a Cop Wannabe?*, CNN (July 3, 2013), <http://edition.cnn.com/TRANSCRIPTS/1307/03/ijvm.01.html> [https://perma.cc/V88W-D3SD]. Investigator Doris Singleton read Zimmerman's written statement where Zimmerman referred to Martin as a suspect nine different times:

The suspect emerged from darkness and circled my vehicle. The suspect once again disappeared in direction the suspect went. The dispatcher told me not to follow the suspect. The suspect emerged from the darkness. Suspect punched me in the face. The suspect got on top of me. The suspect told me, 'Shut the [expletive deleted] up.' The suspect slammed my head into the sidewalk.

Id.

108. Trayvon Martin was killed on February 26, 2012, and charges were brought on April 11, 2012. Lizette Alvarez & Michael Cooper, *Prosecutor Files Charge of 2nd-Degree Murder in Shooting of Martin*, N.Y. TIMES (Apr. 11, 2012), <http://www.nytimes.com/2012/04/12/us/zimmerman-to-be-charged-in-trayvon-martin-shooting.html?>; see Lawson, *A Fresh Cut in an Old Wound*, *supra* note 19, at 287. Zimmerman faced life imprisonment on the second-degree murder charge. FLA. STAT. § 782.04 (2012).

109. Lee, *supra* note 21, at 1566.

110. Michael Cooper, *12 Arrested During Sit-In to Protest Diallo Killing*, N.Y. TIMES (Mar. 10, 1999), <http://www.nytimes.com/1999/03/10/nyregion/12-arrested-during-sit-in-to-protest-diallo-killing.html>.

111. Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html?>

pagewanted=all&src=pm. On March 31, 1999, the four cops who murdered Amadou Diallo were charged with two counts of second-degree murder. See *New York: Protests Denounce Police Murder*

The killing of Amadou Diallo is a stark example of police privilege at work both before and after indictment. Defense counsel argued that officers shot Diallo in self-defense because they believed Diallo was reaching for a gun rather than his wallet. Before trial, eighty-one percent of prospective jurors polled “believed [that] there was ‘no justification possible’ for the police officers’ firing 41 shots at Mr. Diallo.”¹¹² However, the trial was moved to a different venue.

As in Zimmerman’s case, prosecuting Amadou Diallo’s killers required government lawyers to mentally switch sides. Instead of defending police aggression as they generally do, prosecutors had to switch to condemning it. Likewise, with racial bias, government lawyers had to mentally switch from defending racial profiling to excoriating it. As in Zimmerman’s case, Bronx prosecutors sought to show that the police officials had racially profiled Diallo when they initially confronted him.¹¹³ During closing arguments, the prosecution argued that the police officers “had caused the fatal confrontation by prejudging Mr. Diallo as a possible rapist or robber, and never considering that Mr. Diallo might have had a right to be on the stoop.”¹¹⁴ Their attempts to use racial profiling against the officers were unsuccessful. Jurors acquitted all four officers, demonstrating how the strength of police privilege continued beyond the initial charging decision into the trial itself.¹¹⁵

Similarly, in the police shooting of Sean Bell in Queens, New York, in 2006, those responsible for Bell’s death faced no charges until mounting public outrage made it impossible for the government to ignore the killing. The night before he was to marry, Bell held a bachelor party at a nightclub in Queens. When Bell left the club and entered his car with

of Amadou Diallo, REVOLUTIONARY WORKER (April 11, 1999), <http://www.revcom.us/a/v20/1000-1009/1001/diallo.htm> [<https://perma.cc/ZF7D-SDU7>].

If [the cops were] convicted of the most serious murder charge they face 25 to life in prison. Since 1995, the police in New York City have murdered almost 200. Only a very few of these cops have ever been charged with any crimes. In the past 15 years, none has ever been charged with murder . . . Since Amadou Diallo was killed on February 4 a storm of protest against police brutality has engulfed the city. As the weeks went on and the cops still were not arrested, were not questioned, and were allowed to work at desk jobs, the anger of the people continued to rise.

Id.

112. See Amy Waldman, *A Lawyer’s Legal Victory Goes Against an Old Haunt*, N.Y. TIMES (Dec. 18, 1999), <http://www.nytimes.com/1999/12/18/nyregion/a-lawyer-s-legal-victory-goes-against-an-old-haunt.html>.

113. Fritsch, *supra* note 111.

114. *Id.*

115. *Id.* (“Their lawyers laid much of the blame for the shooting on Mr. Diallo himself, saying he had behaved suspiciously and had not obeyed the officers’ commands to stop.”); see Joanne Armstrong Brandwood, *You Say “Fair Trial” and I Say “Free Press”*: *British and American Approaches to Protecting Defendants’ Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412 (2000).

three friends in the early hours of the morning, three plainclothes police officers followed them and approached Bell's car with guns drawn. When Bell accelerated the car, the three police officers fired fifty shots into Bell's car, killing Bell and severely injuring two of his companions. Immediately after the shooting, no arrests were made, not until thousands of people protested the police officers' use of force.¹¹⁶ Comparing the Bell shooting to that of Amadou Diallo, New York City mayor Michael Bloomberg called the shooting "inexplicable" and "unacceptable,"¹¹⁷ and New York governor George E. Pataki also criticized the officers' use of force.¹¹⁸ It took almost six months after the shooting for the three police officers to face formal charges.¹¹⁹

As with Diallo's shooters, the officers who killed Sean Bell were all acquitted. Criticizing the verdict, Delores Jones-Brown, director of the Center on Race, Crime and Justice at John Jay College of Criminal Justice, noted that the accused police officers received special treatment from the judge in the non-jury trial.¹²⁰ Certainly, the government established second-degree murder for "two of the four officers [who] fired forty-two bullets[—]nearly ten times the number fired on average by members of the department in other incidents," Professor Jones-Brown opined.¹²¹ This "should certainly equate to depraved indifference."¹²² "Surely, it would have if forty-two bullets were fired by two gang members under similar circumstances."¹²³ The verdict in the Sean Bell case likewise indicates that police officials charged with violent offenses receive privileged treatment.

116. Joseph Goldstein, *Police Trial Begins for Officers in Bell Shooting; Two Offer to Retire*, N.Y. TIMES (Oct. 24, 2011), <http://www.nytimes.com/2011/10/25/nyregion/police-trial-begins-for-officers-in-sean-bell-shooting-two-offer-to-retire.html?rref=collection%2Ftimestopic%2FBell%2C%20Sean>; see also Alfonso Serrano, *NYC Marchers Protest Police Shooting*, CBS NEWS (Dec. 16, 2006), <http://www.cbsnews.com/news/nyc-marchers-protest-police-shooting/> [<https://perma.cc/Q9GP-T6DS>].

117. Michael Wilson, *50 Shots Fired, and the Experts Offer a Theory*, N.Y. TIMES (Nov. 27, 2006), <http://www.nytimes.com/2006/11/27/nyregion/27fire.html?pagewanted=all>.

118. Patrick Healy, *Police Commissioner Looks Ahead, and Back*, N.Y. TIMES (Nov. 30, 2006), <http://www.nytimes.com/2006/11/30/nyregion/30kelly.html?ex=1322542800&en=2d61f9274f496d2a&ei=5090&partner=rssuserland&emc=rss>. Eventually the officers, although not arrested, were put on paid administrative leave and stripped of their weapons.

119. Fritsch, *supra* note 111.

120. Delores Jones-Brown, *The Right to Life? Policing, Race, and Criminal Injustice*, 36 HUM. RIGHTS MAG. 6 (2009). Jones-Brown criticized the trial judge for acquitting Sean Bell's killers: "Interestingly, that trial judge seemed to indicate that his decision was partly influenced by his sense that some of the testimony given during the criminal trial was designed to make a case for a subsequent lawsuit" and the judge "seemed disturbed by this possibility." *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

George Zimmerman arguably received special treatment from the police when they allowed him to walk away from the police station after he confessed to killing the unarmed high school student. While Trayvon Martin's race likely played a part in the decision not to initially charge Zimmerman, another case, the Jordan Davis shooting, illustrates that race alone does not ensure privileged treatment. Michael Dunn, a white man, killed a black seventeen-year-old teenager the same year that Zimmerman killed Trayvon Martin.¹²⁴ Dubbed "the loud music case" by the media, Dunn fired ten shots into an SUV containing three black teenagers after an argument about the volume on the SUV's radio and then claimed self-defense and invoked Florida's "Stand Your Ground" laws. Dunn claimed he believed that he saw the barrel of a gun in the back window of the SUV as one of the teens, seventeen-year-old Jordan Davis, started to get out of the vehicle, but no gun was found.¹²⁵ Davis died at the scene. Unlike Zimmerman, Dunn was arrested for killing an unarmed teenager, and prosecutors did not delay charging him. In fact, prosecutors leveled first-degree murder charges against Dunn. Although Dunn's jury deadlocked on the first-degree murder charge, it convicted him of four charges, including three counts of attempted second-degree murder.¹²⁶ While there were more egregious facts surrounding Dunn's use of lethal force than Zimmerman's, it is noteworthy that Dunn was neither a police officer nor a neighborhood-watch volunteer, and he did not receive police privilege.

Police are notorious for protecting their own, even to the extent of lying under oath.¹²⁷ Some attribute this loyalty to the "thin blue line" mentality, meaning the unwritten rule that police look out for other police believing they are what prevent our society from spiraling into

124. Dunn's shooting took place on November 23, 2012, nine months after the Martin shooting, which took place on February 26, 2012. See Greg Botelho, Steve Almasy & Sunny Hostin, *Dunn Convicted of Attempted Murder; Hung Jury on Murder in 'Loud Music' Trial*, CNN (Feb. 17, 2014), <http://www.cnn.com/2014/02/16/justice/florida-loud-music-trial/> [https://perma.cc/ZV6J-9XTL]; see also *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 7, 2016), <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/> [https://perma.cc/Z22S-U689].

125. Susan Cooper Eastman, *Accused Shooter Takes Stand in Florida Loud Music Murder Trial*, REUTERS (Feb. 11, 2014), <http://www.reuters.com/article/2014/02/11/us-usa-florida-shooting-dunn-idUSBREA1A1HJ20140211>. Unlike Zimmerman, Michael Dunn had left the scene before police arrived.

126. A mistrial was declared on the first-degree murder charge, permitting a retrial. Michael Muskal, *Michael Dunn Convicted on 4 of 5 Charges in Loud-Music Murder Case*, L.A. TIMES (Feb. 15, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-michael-dunn-loud-music-verdict-20140213,0,5446202.story#ixzz2upVWuheS> [https://perma.cc/5Q58-77DL].

127. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 836 (2008) ("In New York, the Mollen Commission found that perjury was 'so common in certain precincts that it has spawned its own word: *testifying*.'").

anarchy.¹²⁸ The police who investigated Zimmerman helped him in myriad ways beyond refusing to arrest him. As Tamara Rice Lave wrote, “[T]he police did not vigorously investigate the shooting but instead deferred to Zimmerman’s account.”¹²⁹ Even the botched preservation of DNA evidence by detectives might be attributed to this deferential treatment.

During Zimmerman’s trial, prosecutors sought to use Zimmerman’s desire to be a police officer against him. Prosecutors tried to portray Zimmerman as a “wannabe cop” and “vigilante” who racially profiled Martin.¹³⁰ The government introduced evidence in their case in chief that the defendant took courses in law enforcement and called the professor who taught him criminal procedure to testify to this. Despite the government’s attempts to put a pejorative spin on these facts, Zimmerman’s connection to the police arguably helped his defense.

One example of police assistance for Zimmerman during the trial was the testimony of the Sanford police officer that questioned Zimmerman after the shooting. On direct examination, Officer Christopher Serino testified that he found Zimmerman was telling the truth about being attacked by Martin,¹³¹ even though the rules of evidence do not permit witnesses to give such opinions.¹³² In run-of-the-mill prosecutions, police witnesses rarely, if ever, offer unsolicited testimony to sway the jury in favor of the accused. What makes this testimony particularly troublesome is that the sole reason the government introduced Zimmerman’s statements was to show that he lied to police and here was an officer calling him truthful. Moreover, the police officer commented on the central issue for the jury, namely Zimmerman’s justification for using deadly force. As I presented this

128. Errol Morris, *The Thin Blue Line*, PARAMOUNT PRODUCTIONS (1988); see Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 LOY. L.A. L. REV. 665, 679 (2001) (discussing the judicial tolerance of police perjury or the blue wall of silence); Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998); Morgan Cloud, *Judges, ‘Testilying,’ and the Constitution*, 69 S. CAL. L. REV. 1341 (1996); David Hinson, *Pressure Points: How a Combination of Methods Employed to Reduce Urban Firearm Crime Threatens the 4th Amendment and Proposed Solutions*, 43 NEW ENG. L. REV. 869, 896 (2009) (discussing the origin and pervasiveness of the “thin blue” line mentality).

129. Lave, *supra* note 19, at 854.

130. Before opening statements, Judge Debra Nelson forbade the government from using the phrases “wannabe cop,” “vigilante,” and “racial profiling” in their opening. See Cara Buckley, *Zimmerman Judge Bars Testimony on 911 Call*, N.Y. TIMES (June 23, 2013), <http://www.nytimes.com/2013/06/23/us/zimmerman-judge-bars-testimony-on-911-call.html>.

131. Yamiche Alcindor, *Officer Testimony No Slam Dunk for Zimmerman Prosecutors*, USA TODAY (July 2, 2013), <http://www.usatoday.com/story/news/nation/2013/07/02/zimmerman-trayvon-martin-murder-trial/2482325/> [<https://perma.cc/EA5M-9YJ2>].

132. See FLA. STAT. ANN. § 90.404 (West 2016).

issue to various audiences, no defense attorney could remember a police officer vouching for a civilian defendant's credibility during a criminal trial, let alone a murder trial.

Apparently, Zimmerman's investigating officer viewed Zimmerman as a member of the police team, thereby affording the neighborhood-watch volunteer a certain amount of police protection even during the trial. Consequently, it is easy to imagine that other players in the trial, notably the prosecutors and the judge, would similarly view Zimmerman as part of the police team. Once the judge viewed Zimmerman as part of the police team, it would be a natural next step to apply search and seizure law to the encounter on a conscious or unconscious basis.

C. Controversial Ruling No. 1: The Trial Court Bars Prosecutors from Arguing that Zimmerman "Racially Profiled" Martin

The first controversial ruling by the trial judge came before trial started, when defense counsel moved to prevent the government from alleging that Zimmerman racially profiled the young man whom he later killed.¹³³ Judge Debra Nelson ruled for the defense, forbidding the government from using the phrases "wannabe cop," "vigilante," and, most importantly, "racial profiling" to describe Zimmerman's motives and behavior.¹³⁴ This ruling came before the opening arguments and therefore altered what the jury would hear throughout the trial. Prosecutors were allowed to state that Zimmerman "profiled" Martin, but not that he "racially profiled" him.¹³⁵

Profiling and racial profiling are not synonymous concepts, as Deborah A. Ramirez, Jennifer Hoopes, and Tara Lai Quinlan explained: "The term '*profiling*' refers to the 'police practice of viewing certain characteristics as indicators of criminal behavior.' Profiling is now an established law enforcement practice that incorporates social science theory and statistical methodology into crime solving strategies."¹³⁶ In contrast, racial profiling involves the use of "race, ethnicity, national

133. See Buckley, *supra* note 130.

134. *Id.*

135. See Lisa Bloom, *Zimmerman Prosecutors Duck the Race Issue*, N.Y. TIMES (July 15, 2013), <http://www.nytimes.com/2013/07/16/opinion/zimmerman-prosecutors-duck-the-race-issue.html>; Erin Donaghue, *George Zimmerman Trial: Prosecutors Can Say Former Neighborhood Watch Captain Profiled Trayvon Martin, Judge Rules*, CBS NEWS (July 21, 2013), http://www.cbsnews.com/8301-504083_162-57590432-504083/george-zimmerman-trial-prosecutors-can-say-former-neighborhood-watch-captain-profiled-trayvon-martin-judge-rules/ [<https://perma.cc/P53N-49JX>].

136. Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1202 (2003) (emphasis added).

origin, or religion as one of several factors in determining whom to stop, search, or question” and is generally not accepted by the public.¹³⁷ Although some politicians refer to racial profiling as a stop based solely on race or ethnicity, in fact, race may be one of many factors, as long as “race is part of the calculus of suspicion.”¹³⁸ Quoting Randall Kennedy, Hoopes and Quinlan agree that “racial profiling occurs whenever police routinely use race as a negative signal that, along with an accumulation of other signals, causes an officer to react with suspicion.”¹³⁹ Racial profiling is often a product of unconscious police biases rather than intentional bigotry.

It was not a stretch for the government to accuse Zimmerman of racial profiling.¹⁴⁰ After all, Zimmerman first fixated on the young Martin due to little else besides that he was a black youth wearing the hoodie of his sweatshirt to cover his head in the rain. Although it is often condemned, racial profiling is currently ingrained in American policing. One sociology study found that police officers “know which communities are whiter, blacker (or more minority), or some combination of the two and where in their own community racial, ethnic, and class composition differ [Who is stopped] is inextricably tied not only to race, but to officers’ conception[s] of place, of what should typically occur in an area and who belongs, as well as where they belong.”¹⁴¹ Arguably, law enforcement police the same

137. *Id.* at 1204.

138. *Id.*

139. *Id.* at 1204–05 (citing Randall Kennedy, *Suspect Policy*, NEW REPUBLIC (Sept. 13 & 20, 1999), at 30, 35).

140. Ironically, George Zimmerman’s race bias was on full display after he was acquitted. For example, in 2015, two years after he was acquitted, Zimmerman “went on a depraved Twitter tirade Monday afternoon, spewing racist rants.” See Jason Silverstein, *George Zimmerman Goes on Depraved Twitter Rant After Retweeting Picture of Trayvon Martin’s Corpse*, N.Y. DAILY NEWS (Sept. 28, 2015), <http://www.nydailynews.com/news/national/george-zimmerman-retweets-picture-trayvon-martin-corpse-article-1.2376777> [<http://perma.cc/SQK6-RDVD>]. Earlier that month Zimmerman retweeted the graphic image of Trayvon Martin’s corpse that was introduced at trial to his 11,000 twitter followers. *Id.* To raise funds, Zimmerman created prints of a painting he made of a Confederate flag and sold them through a partnership with a gun shop in Central Florida whose owner declared that he would refuse to allow Muslims into his store. See Abby Ohlheiser, *‘Muslim-free’ Gun Shop Teams with George Zimmerman to Sell Confederate Flag Prints*, WASH. POST (Aug. 18, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/18/facing-legal-bills-muslim-free-gun-shop-teams-with-george-zimmerman-to-sell-confederate-flag-prints/> [<http://perma.cc/P3VQ-TKZT>].

141. See Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 66 (2009) (“Such ‘commonsense geography’ informs their decisions about whom to deem ‘out of place,’ which in turn send expressive messages about who belongs and who does not.”); see also Albert J. Meehan & Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling of African American Motorists*, 19 JUST. Q. 399, 402 (2002).

segregation boundaries that Congress outlawed fifty years ago.¹⁴² This standard policing method could easily describe Zimmerman's thought process as he patrolled seeking to identify those who might be thieves or burglars.¹⁴³

Since there was so much evidence from which a jury could infer that Zimmerman engaged in racial profiling when he singled out Martin as a suspect, it is surprising that the trial judge prevented the government from arguing that Zimmerman racially profiled Martin. Ordinarily, prosecutors are given wide latitude to establish a defendant's motive. Murder trials are often filled with evidence that the defendant was racist or biased in some way that would provide a motive for the criminal behavior. For example, in the trial of John William King for the murder of James Byrd of Texas, the prosecution succeeded in introducing the defendant's racist tattoos and arguing that this proved a racial motive in the killings.¹⁴⁴ Bias against a particular subset of people would ordinarily be considered fair game in a murder trial.¹⁴⁵

142. Capers, *supra* note 141. Although the Court has placed a remedy beyond the reach of most plaintiffs, the practice of purposefully singling out minorities for enhanced policing runs afoul of the Fourteenth Amendment's Equal Protection Clause. See *Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."); The Honorable Phyllis W. Beck & Patricia A. Daly, Esq., *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 617 (1999) ("[N]either Pennsylvania nor any other state court can rely on the United States Supreme Court's equal protection safety net to rescue victims of racial profiling. Indeed, that net has a gaping hole."). In the housing-discrimination area, see Michelle Adams, *Separate and (Un)equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 477 (1996) (Although there are several federal statutes prohibiting racial discrimination in the provision of housing, the most powerful in terms of achieving equalization remediation is the Fair Housing Act of 1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969) (ruling that unfair housing practices to keep Blacks out of certain neighborhoods were unconstitutional); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (ruling that actions of estate brokers to steer minorities to non-white communities to purchase property were in violation of the FHA and unconstitutional).

143. In fact, Zimmerman called 911 forty-six times since 2004. See Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform*, 90 DENV. U. L. REV. 333, 337 (2012); Frances Robles, *Shooter of Trayvon Martin a Habitual Caller to Cops*, MIAMI HERALD (Mar. 19, 2012), <http://www.mcclatchydc.com/news/crime/article24726289.html> [<http://perma.cc/937P-8LBP>].

144. Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809, 826 (2000).

145. See David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439 (2001) ("Motives affect behavior. Thus, although 'motive' is not an essential element of any charge, claim, or defense, evidence that a person has a particular motive can be relevant to an ultimate fact in both civil and criminal cases."). There are occasions where evidence of prior criminal behavior may be brought in to prove motive or intent to commit the crime. See FED. R. EVID. 404(b). See generally Jordan Blair Woods, *Ensuring a Right of Access to the Courts for Bias Crime Victims: A Section 5 Defense of the Matthew Shepard Act*, 12 CHAP. L. REV. 389, 393 (2008) (recognizing that prosecutors have a right and duty to prove biasness in the prosecution of hate crimes—gender, disability, race, and sexual orientation).

While it is possible that the term “profiling” may have been interpreted as racial profiling by jurors, the term profiling is considered standard police methodology and does not carry the pejorative message. Meanwhile, racial profiling is condemned despite the fact that it is still practiced.¹⁴⁶ Zimmerman’s prosecutors wanted to take advantage of public sentiment condemning racial profiling. Had the judge allowed it, the racial profiling label might have displaced the defense narrative that Zimmerman was upholding the law by patrolling.¹⁴⁷ Also, a juror who believes that Zimmerman used race as a proxy for criminality is more likely to deduce that Zimmerman did not interact with Martin in the friendly way he treated the white neighbor who testified on Zimmerman’s behalf about a conversation they had about a break-in.¹⁴⁸ Rather, someone who racially profiles is likely to treat a young black man as a bully or bigot would—aggressively.

There is an intrinsic connection between racial profiling and aggressive policing, even when the bias is unconscious. As Andrew Taslitz wrote, there is an “escalating cycle of aggression” that starts with the “unconscious process of stereotyping and selective inattention,” a “presumption . . . not simply that a black suspect committed a particular crime, but rather that black character is paradigmatically criminal and deceptive.”¹⁴⁹ Taslitz goes on to explain the circular nature of this problem:

146. Kary L. Moss & Daniel S. Korobkin, *Destination Justice*, 80 MICH. B.J. 36, 40 (2001) (“[A] 1999 nationwide Gallup poll on the subject sought to define racial profiling in terms as neutral as possible, describing it as the practice by which ‘police officers stop motorists of certain racial or ethnic groups because the officers believe that these groups are more likely than others to commit certain types of crimes.’ A full 81 percent of Americans said they disapproved.”).

147. In making her decision, Judge Nelson credited one narrative over another when it came to finding the facts surrounding the shooting. Under the defense narrative, jurors were asked to look at the moment that Zimmerman pulled the trigger. At that moment, Trayvon was arguably beating Zimmerman’s head against the pavement. At that moment, if Mr. Zimmerman was reasonable in thinking that this pounding constituted deadly force, the defendant had the right to use deadly force to protect himself. The focus for the defense was on the moment Zimmerman pulled the trigger, not how he got there. In contrast, the prosecution case asked the jury to employ a broader lens. Prosecutors focused on George Zimmerman’s initial decision to target Trayvon, to pursue him, and to eventually get out of the car even when he was told to stay put.

148. Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 140 (2014); see also Gene Demby, *One Trayvon Martin Case, but Two Very Different Trials*, NPR (July 9, 2013), <http://www.npr.org/blogs/codeswitch/2013/07/09/200480983/the-two-trials-of-george-zimmerman>.

149. Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 1091, 1092 (2008) [hereinafter Taslitz, *Wrongly Accused Redux*]; see also Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 125 (2006) [hereinafter Taslitz, *Wrongly Accused*].

Police therefore use more intense—and riskier—investigative techniques when having contact with black suspects. But those suspects are more likely than white ones to react to such pressure defensively. That reaction leads the officers to be still more suspicious of their subject, leading them in turn to still more aggressive policing tactics.¹⁵⁰

Zimmerman's trial showcased the connection between race and policing; this was not just a question of whether Zimmerman harbored racial bias in initially selecting Martin, but how Zimmerman behaved once the two of them stood face-to-face.

Whether Zimmerman's behavior represented unconscious bias or purposeful stereotyping, the racial dimension to his fixation on Martin was clearly relevant to the charges. Motive is what divides murder from manslaughter and what separates mistake from aggression in the self-defense context. Nevertheless, the trial judge decided that it would be unfair to Zimmerman for the prosecutors to assert that Zimmerman racially profiled Martin.

In the usual paradigm, excluding race from consideration helps the government defeat a criminal defendant's motion to suppress evidence or motion to dismiss. But excluding the racialized nature of Zimmerman's focus on Martin as a suspect helped the defense and hindered the government. Removing race from the trial may have had negative subconscious effects on the jurors' thought processes. As Cynthia Lee observes, the social science literature on race salience demonstrates that when race is highlighted, jurors tend to treat similarly situated black and white defendants equally; when race is not made salient, jurors tend to favor white defendants and be more condemning of black defendants.¹⁵¹ In addition, prosecutors wanted to shape perceptions of Zimmerman's motive for attacking Martin, and if the allegation stuck, it might have diminished Zimmerman's credibility.¹⁵² At the very least, Zimmerman's prosecutors were hampered by a ruling that prevented them from communicating their allegations directly and succinctly to the jury.

To follow the color-blind tradition mandated by the Supreme Court's Fourth Amendment approach, judges might exclude any mention of racial profiling. One judge who refused to ignore racial profiling did

150. Taslitz, *Wrongly Accused Redux*, *supra* note 149, at 1091–92; *see also* Taslitz, *Wrongly Accused*, *supra* note 149, at 125, 127.

151. *See* Lee, *supra* note 21.

152. The jury could decide that if Zimmerman was lying about why he followed Martin, then he might be lying about whether he was afraid of him, challenging his statement that he was in fear for his life rather than angry at being hit. Or a jury could decide that since Zimmerman suspected Martin of wrongdoing based on the color of his skin, Zimmerman's fear of Martin was honest but unreasonable. Either process would lead to negating Zimmerman's self-defense justification.

so at her own peril. On August 12, 2013, after a trial on the merits, District Judge Shira Scheindlin ruled that New York City police stop-and-frisk policy systematically violated the rights of citizens.¹⁵³ Judge Scheindlin's decision in *Floyd v. City of New York*¹⁵⁴ was largely based on the fact that the practice primarily targeted young men of color, although she also found that police often lacked the appropriate level of suspicion.¹⁵⁵ Relying on statistics collected by the police department, Judge Scheindlin concluded that the discriminatory practice violated both the Fourteenth Amendment Equal Protection Clause and the Fourth Amendment and issued a remedial order. In considering an appeal from the city, a three-judge panel of the U.S. Court of Appeals for the Second Circuit took the unusual step of removing Judge Scheindlin from the case.¹⁵⁶

The Circuit Court panel explained that they removed Judge Scheindlin from the case for two reasons; although, on closer examination, neither reason holds water.¹⁵⁷ First, she participated in three media interviews, even though the judge did not speak about any pending cases during those interviews. Second, the panel questioned her implementation of the related cases rule, when Judge Scheindlin advised plaintiffs before her in one stop-and-frisk lawsuit to mark a second racial profiling stop-and-frisk lawsuit "related" on the file so it would be routed to her court.¹⁵⁸ While the panel expressly refused to find any judicial

153. *Floyd v. City of New York*, 861 F. Supp. 2d 274 (S.D.N.Y. 2012).

154. *Id.*

155. *Id.* at 282.

156. See David McAfee, *6 Judges Seek Review of Stop-And-Frisk Justice's Removal*, LAW 360 (Nov. 19, 2013, 4:18 PM), <http://www.law360.com/articles/489980/6-judges-seek-review-of-stop-and-frisk-justice-s-removal> [<http://perma.cc/56P2-SHR8>].

157. See, e.g., L. Darnell Weeden, *Leadership Matters: Saving Judge Scheindlin's NYPD Racial Profiling Remedy in Floyd v. City of New York*, 36 WHITTIER L. REV. 95, 105–11 (2014); see also Editorial Board, *Judge Scheindlin's Case*, N.Y. TIMES (Nov. 7, 2013), <http://www.nytimes.com/2013/11/08/opinion/judge-scheindlins-case.html>.

158. S.D.N.Y. & E.D.N.Y. Local Rule 13, Transfer of Related Cases (known as the "related case rule") [<http://perma.cc/TRY6-3QL6>]. Local Rule 13 states,

In determining relatedness, a judge will consider whether (A) the actions concern the same or substantially similar parties, property, transactions or events; (B) there is substantial factual overlap; (C) the parties could be subjected to conflicting orders; and (D) whether absent a determination of relatedness there would be a substantial duplication of effort and expense, delay, or undue burden on the Court, parties or witnesses.

(2) *Assignment of Cases That are Designated as Related.* A case, bankruptcy appeal, or motion to withdraw the bankruptcy reference that is designated as related shall be forwarded to the judge before whom the allegedly related case, appeal or motion having the lowest docket number is or was pending, who shall decide whether to accept or reject the case. The decision of the judge with the lowest docket number shall control unless the Assignment Committee determines otherwise, applying the standards of relatedness set forth in this Rule. The judge with the lowest docket number shall notify the Assignment Committee of his or her decision to accept or reject the case, appeal or motion and pro-

misconduct or ethical lapse, they concluded, “the appearance of [her] impartiality” might reasonably be questioned.¹⁵⁹ Generally, matters of recusal are handled before the judge in question.¹⁶⁰ In the case of *Floyd*, neither party asked the judge to recuse herself so there was no record from which the appellate panel could make its determination.

Ironically, removing an independent judge who behaved properly, when the panel insists they found no wrongdoing, itself creates the appearance of impropriety; namely, the appearance that the sanctions are a consequence of her controversial rulings.¹⁶¹ The removal created the appearance that Judge Scheindlin was punished for being explicit about race instead of colorblind. Nancy Gertner, a former federal district court judge, commented, “If there is bias here, it is that of the 2nd Circuit that went out of its way to disqualify a judge—outside of the normal processes.”¹⁶² Backlash or not, the panel’s decision sent a message that if this could happen to a federal judge, then all judges must be wary of acknowledging the existence of racialized policing.

In Zimmerman’s case, the judge’s decision may be understood as a combination of race and policing, rather than race alone. The case law on search and seizure serves to create a different set of rules for police, who allegedly engage in aggressive and even violent behavior, than for civilians. The case law on racial profiling helps insulate police further. If

vide the Committee with the Related Case Statement and any submission in opposition to the contention that the cases are related. If the Assignment Committee does not concur with the judge’s decision to accept the allegedly related case, appeal or motion, the matter shall be assigned by the Clerk by random selection.

Id.

159. Benjamin Weisner & Joseph Goldstein, *Federal Panel Softens Tone on Judge It Removed from Stop-and-Frisk Case*, N.Y. TIMES (Nov. 13, 2013), <http://www.nytimes.com/2013/11/14/nyregion/federal-panel-softens-tone-on-judge-it-removed-from-stop-and-frisk-case.html?>; Rich Calder & Bruce Golding, *Court Blocks and Boots Judge on Stop and Frisk*, N.Y. POST (Oct. 31, 2013), <http://nypost.com/2013/10/31/court-blocks-judges-ruling-on-stop-and-frisk/> [<http://perma.cc/8ANK-8N58>].

160. See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 21 (1994) (outlining the procedures for disqualification of federal judges).

161. Note that the panel stayed the remedial order, although it did not rule on the liability decision. See Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER (Oct. 31, 2013), <http://www.newyorker.com/news/news-desk/the-preposterous-removal-of-judge-scheindlin> [<http://perma.cc/Y735-UJW6>].

162. Emily Bazelon, *Shut Up, Judge!*, SLATE (Nov. 1, 2013, 3:51 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/nypd_and_judge_shira_scheindlin_2nd_circuit_appeals_court_judges_try_to.html [<http://perma.cc/L9ZV-7EUI>]; see also Armondo, *On the Removal of Judge Scheindlin from the Stop and Frisk Case*, DAILY KOS (Nov. 4, 2013), <http://www.dailykos.com/story/2013/11/04/1252985/-On-The-Removal-Of-Judge-Scheindlin-From-the-Stop-and-Frisk-Case#/> [<http://perma.cc/94JV-2R83>] (quoting from Harvard Law Professor Nancy Gertner, a former federal district court judge, who stated “it was [New York City’s] acts that violated procedural fairness, and who disrespected the process.”).

the judge viewed Zimmerman as a part of the police team, then it would make sense that she excluded racial bias from the jury's consideration.

D. Controversial Ruling No. 2: The Trial Court Refuses to Instruct the Jury on the Rule of Aggressors

Judge Nelson's second controversial ruling, and the more significant one, occurred at the end of the Zimmerman trial at a conference regarding proposed jury instructions. During the jury instruction conference, prosecutors asked the judge to inform the jury that aggressors lose their right to self-defense.¹⁶³ It is a standard rule that an initial aggressor cannot claim self-defense. In fact, the rule of aggressors is central to the concept of self-defense.¹⁶⁴ The Florida instruction sought by the Zimmerman prosecution team reads as follows:

Use of force by aggressor—The justification [self-defense] described in the preceding sections of this chapter is not available to a person who:

(2) Initially provokes [by force or the threat of force]¹⁶⁵ the use of force against himself or herself, unless:

(a) Such force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or

(b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.¹⁶⁶

Zimmerman's defense team orally moved to block the provocation instruction, pointing to a 2001 case named *Gibbs v. State*¹⁶⁷ that

163. TheCount.com, *George Zimmerman Trial Jury Instructions Argument Pt. 8*, YOUTUBE (July 11, 2013), http://www.youtube.com/watch?v=1_UY18DMHV4 [<http://perma.cc/WA8K-3K7K>] [hereinafter TheCount.com, *Jury Instructions Pt. 8*].

164. WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 10.4 (2d ed. 2003). LaFave's definition of justifiable use of force (emphasis added):

One who is *not the aggressor* in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.

165. Language about force or threat of force was added by the author because the Florida District Court of Appeals narrowed the definition of provocation in 2001. *See Gibbs v. State*, 789 So. 2d 443, 444 (Fla. Dist. Ct. App. 2001).

166. FLA. STAT. § 776.041 (2011).

167. *Gibbs*, 789 So. 2d at 444.

narrowed Florida's previously expansive definition of provocation. The court in *Gibbs* reasoned that a jury might understand the word provocation to include "any provocation by the defendant—no matter how slight or subjective the provocation. By that standard, a mere insult could be deemed sufficient to prohibit defending oneself from an attacker."¹⁶⁸ Thus, *Gibbs* held that when instructed on self-defense, jurors should be told that an aggressor is one who initially provokes the other party "by force or the threat of force."¹⁶⁹ While Zimmerman's prosecutors were happy for the jury to receive the *Gibbs* instruction, defense counsel wanted no instruction at all, arguing that the jury was given no credible evidence that Zimmerman used force or threat of force against Martin that night.¹⁷⁰ Zimmerman's lawyers argued that certain witnesses were not credible, urging the judge to ignore their testimony when determining if the prosecution had introduced evidence from which a reasonable juror could infer that Martin was provoked.¹⁷¹

The prosecution had the better argument in support of the aggressor instruction: that credibility is generally a matter for the jury to decide¹⁷² and that the state had a right to this instruction since it had set forth evidence upon which a jury could find provocation.¹⁷³ Specifically, the prosecution pointed to (1) evidence that the defendant followed the victim in his car; (2) evidence that Zimmerman pursued Martin even after he was told not to and that the victim even told his friend on the phone that he was being pursued; (3) testimony from a couple of witnesses who heard the scuffle; (4) testimony from the victim's friend that she specifically heard Martin tell Zimmerman to get off of him; and (5) testimony from an eye witness who saw the defendant on top of Martin, before he heard the gunshot.¹⁷⁴

After hearing arguments from counsel for both prosecution and defense, Judge Nelson declined to give the instruction that people who provoke an assault cannot claim self-defense unless certain conditions

168. *Id.* at 445.

169. *Id.* at 444. That would have excluded a racial slur but permitted a jury to find that Gibbs slapped the victim before the victim hit her.

170. TheCount.com, *George Zimmerman Trial Jury Instructions Argument*, YOUTUBE (July 11, 2013), <https://www.youtube.com/watch?v=0ma-coEcsCg> [<http://perma.cc/MSM8-95VP>] [hereinafter TheCount.com, *Jury Instructions Pt. 6*].

171. *Id.*

172. See, e.g., *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) ("[Th]e jury is the lie detector in the courtroom."); *United States v. Ward*, 169 F.2d 460, 462 (3d Cir. 1948) (It is "axiomatic that the 'expert' may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.").

173. See TheCount.com, *Jury Instructions Pt. 6*, *supra* note 170.

174. *Id.*

are met.¹⁷⁵ This ruling meant that prosecutors also could not argue to the jury that Zimmerman forfeited his right to self-defense because he provoked the fight. The judge did not give a reason for her decision.

This ruling was surprising since Florida law supported the prosecutor's request. According to case law, a court should provide the state with an aggressor instruction on request whenever there is "evidence in the record that [the defendant] may have initially provoked the use of force against himself."¹⁷⁶ The provocation must be either "by force or the threat of force."¹⁷⁷ In addition, *Gibbs* did not direct judges to evaluate the credibility of the government witnesses before determining if there was evidence of provocation in the record.

As in many murder trials, Zimmerman's prosecutors lacked direct proof of the defendant's actions leading up to Martin's death, but had this been an ordinary case, there would have been more than enough evidence of provocation to allow an instruction. The prosecution was

175. See TheCount.com, *Jury Instructions Pt. 8*, *supra* note 163. Judge Nelson did not state her reasons on the record, leaving room for speculation regarding the basis for her decision, simply stating, "The court is not going to give it." *Id.*

176. *Johnson v. State*, 65 So. 3d 1147, 1149 (Fla. Dist. Ct. App. 2011). Historically, Florida erected a broad barrier to those who sought to invoke the self-defense shield. "One may not provoke a difficulty and having done so act under the necessity produced by the difficulty, then kill his adversary and justify the homicide under the plea of self defense." *Mixon v. State*, 59 So. 2d 38, 39 (Fla. 1952). In 1974, Florida law codified the Florida common law rule in a statute:

The justification described in the preceding sections of this chapter [self-defense] is not available to a person who . . . initially provokes the use of force against himself or herself, unless (a) Such force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or (b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

FLA. STAT. § 776.041 (2016). The definition of "provoke" was narrowed in *Gibbs* (holding that jurors should be told that an aggressor is one who initially provokes the other party "by force or the threat of force"); see *Gibbs*, 789 So. 2d at 444.

176. *Gibbs*, 789 So. 2d at 444.

177. *Id.* at 443. Zimmerman's defense counsel relied upon *Gibbs* to support his argument that Judge Nelson should not give an aggressor jury instruction at all in his trial. Zimmerman's counsel argued that the certain witnesses were not credible, urging the judge to ignore their testimony when determining if the prosecution had introduced evidence from which a reasonable juror could infer that Trayvon Martin was provoked. Credibility, however, is generally a matter for the jury to decide. Ironically, the decision in *Gibbs* was designed to rectify a racially suspect verdict, where a white jury convicted a black woman, possibly based on a racial slur defendant made in response to the victim's use of the "N" word. *Id.* The Court in *Gibbs* opined: "The facts of this case are a sad and disturbing reminder of the tragic consequences that racial conflict can lead to." *Id.* at 444. There was no analogous danger of racial overreaching in Zimmerman's trial. In fact, the danger went the other way, that a mostly white jury might view the dead victim as provoking his own fate based on racial stereotypes.

correct to point to the fact that Martin ran away from Zimmerman,¹⁷⁸ a fact established by the defendant's own statements to the 911 operator and corroborated by Rachel Jeantel's testimony. Jeantel's testimony supported the claim that Martin ran because he felt threatened by the "creepy" man following him.¹⁷⁹ Beyond the prosecutor's recital of facts, the judge could have acknowledged that jurors could make an easy inference that Zimmerman continued to pursue Martin after the dispatcher told him to stop following his "suspect." For one, Zimmerman refused to meet the police officer at his home or at a set location, suggesting Zimmerman planned to continue pursuing his target.¹⁸⁰ Second, Zimmerman's state of mind suggested someone who would continue the chase when he told the dispatcher "these a-holes they always get away."¹⁸¹ Pursuit alone should be enough to establish a threat of force,¹⁸² but there was also evidence of actual force. Jeantel testified

178. One Florida case, *Mixon v. State*, 59 So. 2d 38 (1952), foreshadowed Zimmerman's claim of self-defense despite his initial pursuit of the victim. In *Mixon*, the victim was walking down a road away from the defendant after an argument. Defendant *Mixon* pursued the victim by car, armed with a gun, and ended up shooting him. Like Zimmerman, the defendant *Mixon* claimed self-defense. At trial he testified that the victim was beating his head against the steering wheel when *Mixon* shot him. Upholding the murder verdict, the appeals court explained that "the facts believed by the jury point too strongly to a deliberate pursuit by appellant, after the original difficulty had ended and the parties had separated." *Mixon*, 59 So. 2d at 39. Although *Mixon* predates the Florida appellate decision in *Gibbs* that narrowed provocation to force or threat of force, *Mixon* appears to be good law insofar as it defines the timing of the provocation. Although Florida cases require the provocation to be "contemporaneous," this language should not have precluded prosecutors from using Zimmerman's pursuit of Trayvon Martin. See *Johnson*, 65 So. 3d at 1149 (the aggressor statute "'precludes the initial aggressor from asserting self-defense where he or she is the individual who provoked the use of force' contemporaneously to the actions of the victim to which the defendant claims self-defense."). However, even as the court used the term "contemporaneous," it applied it to a situation where the alleged provocation occurred two or three hours before the assault for which the defendant was charged.

179. Note that there was no evidence that Trayvon Martin knew Zimmerman was armed. Even if Martin realized Zimmerman had a weapon, the Supreme Court imagines that people are not afraid of armed police, as long as the guns are holstered. See *United States v. Drayton*, 536 U.S. 194, 194 (2002); see also *Florida v. Bostick*, 501 U.S. 429, 432 (1991) (using the fact that officers never removed their guns from zippered clear plastic pouches that they held in their hands as a factor to conclude that the defendant was not seized in the constitutional sense).

180. See *Transcript of Zimmerman's Call*, *supra* note 93.

181. *Id.*

182. Stalking laws generally recognize that a man's pursuit of an individual despite being informed of the victim's desire to be left alone could be viewed as a threat of force by the victim. See Susan M. Dennison & Donald M. Thomson Griffith, *Criticisms or Plaudits for Stalking Laws? What Psychological Research Tells Us About Proscribing Stalking*, 11 PSYCHOL. PUB. POL'Y & L. 384, 392 (2005) ("Given the plethora of behaviors that fall under the ambit of stalking, debates have centered on the relevance of the intentions of the perpetrator, the question of when arousing fear in another is reasonably foreseeable, and whether the consequences to the victim should be an essential element in the law."); see also Dorothy E. Roberts, *Foreword: The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1, 2 (1994). But Florida's stalking laws specifically exempt someone in George Zimmerman's situation who calls the police.

that after Martin stopped running, she heard him ask, “Why are you following me?” and she heard Martin yell, “Get off! Get off!” seconds before the phone went silent.¹⁸³ This constitutes evidence on the record that Zimmerman used actual force and was therefore an initial aggressor. Witnesses heard screams, and while there was conflicting testimony about whether the screams came from Martin or Zimmerman, jurors could reasonably find that it was Martin screaming for help.¹⁸⁴ Moreover, by referring to Martin as an “a-hole,” Zimmerman demonstrated a state of mind suggesting that he was hostile and aggressive rather than peaceful or meek when he made contact with Martin minutes later. Hence, Judge Nelson’s ruling that the jury was not entitled to consider whether Zimmerman was an initial aggressor ran counter to the evidence. There was sufficient evidence for jurors to find that Zimmerman pursued Martin, who was innocent and unarmed, and that Martin simply stood his ground against his pursuer, as Florida law permits.

Denying the instruction struck at the heart of the prosecution’s case. When Zimmerman raised a self-defense claim, it placed the burden on the prosecution to prove that Zimmerman was not in imminent fear of death or great bodily harm, or that the defense was unavailable to Zimmerman because he was the initial aggressor. Zimmerman could have regained his right to self-defense by arguing that Martin was only entitled to use nondeadly force and escalated the confrontation by using deadly force. Nevertheless, even if Zimmerman regained his right to self-defense during the scuffle, he would still lose his right to stand his ground. The Stand Your Ground instruction, as read, influenced at least one juror toward guilt.¹⁸⁵ Because of the way that the Stand Your Ground

183. See Evan S. Benn & Audra D.S. Burch, *Trayvon Martin’s Childhood Friend Back on the Witness Stand in Zimmerman Trial*, MIAMI HERALD (June 27, 2013), <http://www.nfvzone.com/news/2013/06/27/7237848.htm> [<https://perma.cc/8RNK-5AKV>] (noting that Rachel Jeantel “is one of the prosecution’s most important witnesses because she bolsters the contention that George Zimmerman was the aggressor in his confrontation with 17-year-old Martin”); see also Amanda Sloane & Graham Winch, *Key Witness Recounts Trayvon Martin’s Final Phone Call*, CNN (June 27, 2013), <http://www.cnn.com/2013/06/26/justice/zimmerman-trial/> [<http://perma.cc/WHR3-YJLA>] (noting witness testimony where Rachel Jeantel recalled hearing Trayvon Martin say “Get off, get off!”). Although no one saw whether Zimmerman grabbed Martin, Martin’s “get off” plea only makes sense if Zimmerman grabbed Martin or got on top of him.

184. *Trayvon Martin Case 911 Call: Screams Not George Zimmerman’s, 2 Experts Say*, NBC NEWS (Mar. 31, 2012), http://usnews.nbcnews.com/_news/2012/04/01/10963191-trayvon-martin-case-911-call-screams-not-george-zimmermans-2-experts-say?lite [<http://perma.cc/4UXT-LCSV>].

185. The jury only heard the Stand Your Ground instructions and nothing about how to evaluate an aggressor’s claim to self-defense. One juror interviewed stated that the Stand Your Ground instructions helped sway her towards a not guilty verdict. However, this juror also claimed that she had to acquit even for manslaughter because the prosecution did not prove Zimmerman’s intent to kill Martin. Alyssa Newcomb, *George Zimmerman Juror Says “In Our Hearts We Felt He Was Guilty”*, ABC NEWS (July 25, 2013), <http://abcnews.go.com/US/george-zimmerman-juror-murder/story?id=19770659> [<http://perma.cc/UEE2-4GQ3>] (Juror B29 tells Robin Roberts: “But as

statute intersects with the aggressor rules, there were legal consequences if the jury thought Zimmerman initiated the confrontation.¹⁸⁶ Thus, when the judge declined to give the aggressor instruction, she deprived the jury of one avenue to reject Zimmerman's self-defense claim and eliminated jury deliberation about which person was the aggressor and who, therefore, had the right to stand his ground.

As the judge gave no explanation for her ruling, either orally or in writing, the reader is left to surmise what might have influenced her to disregard the prosecution's evidence of aggressive behavior. Ultimately, the judge's ruling prevented the jury from determining if Zimmerman, rather than Martin, provoked the deadly violence and if Martin had a right to stand his ground.

E. Unconscious Influence on Trial Judges

*"The human mind . . . is not simply a complex organ: it is a collection of complex organs each serving a separate purpose, each operating according to its own rules."*¹⁸⁷

the law was read to me, if you have no proof that he killed him intentionally, you can't say he is guilty."). In fact, the jury was instructed that manslaughter was proved if George Zimmerman intentionally committed an act or acts that caused the death of Trayvon Martin. The act, such as the shooting, must be intended, while the result, death, need not be intended. Thus, the juror did not fully comprehend the jury instructions, and was overly swayed by the accumulation of instructions on stand your ground and self-defense that benefited the defendant. Thus, it well could have made a difference to the outcome if Stand Your Ground language had been offset by language about initial aggressors.

186. Jurors were instructed that there was no duty to retreat as long as three requirements were met: (1) Zimmerman was not engaged in unlawful activity; (2) Zimmerman had a right to be where he was at the time he was attacked; and (3) if deadly force was used, the force was necessary to prevent death or great bodily harm. *Accord* Novak v. State, 974 So. 2d 520 (Fla. Dist. Ct. App. 2008) ("If the defendant was not engaged in an unlawful activity and was attacked in any place where [he] [she] had a right to be, [he] [she] had no duty to retreat and had the right to stand [his] [her] ground and meet force with force, including deadly force, if [he] [she] reasonably believed that it was necessary to do so to prevent death or great bodily harm to [himself] [herself] [another] or to prevent the commission of a forcible felony.") (citing *In re* Std. Jury Instructions in Crim. Cases (2006-3), 947 So. 2d 1159, 1161 (Fla. 2007)). There is an interesting interplay between the Stand Your Ground instructions and the aggressor instructions. Aggressors are deprived their right to use deadly force if they can retreat in safety. Thus, for aggressors the rule reverts back to the way it was before Stand Your Ground was implemented in 2005. Before Stand Your Ground, a person using deadly force in Florida "must have used all reasonable means in his power, consistent with his own safety, to avoid the danger and to avert the necessity of taking human life." See Lave, *supra* note 19, at 832 (citing Baker v. State, 506 So. 2d 1056, 1058 (Fla. Dist. Ct. App. 1987)). That is still what an aggressor must do before he uses deadly force.

187. JUDITH RICH HARRIS, NO TWO ALIKE, HUMAN NATURE AND HUMAN INDIVIDUALITY, at ix (2006); see also Barry Ravech, *On Being Certain: Believing You Are Right Even When You're Not*, 93 MASS. L. REV. 364, 370 (2011) (reviewing ROBERT A. BURTON, ON BEING CERTAIN: BELIEVING YOU ARE RIGHT EVEN WHEN YOU'RE NOT (2008)).

As in most criminal trials, the trial judge in Zimmerman's case made most of her rulings quickly, ruling from the bench after hearing oral arguments from counsel. This included the two controversial rulings discussed in Sections C and D above. In the first ruling, Judge Nelson prevented the prosecutor from arguing that Zimmerman racially profiled Martin. In her second ruling, Judge Nelson refused to instruct the jury on the law that generally denies aggressors the right to self-defense. Since the trial judge did not explain these rulings, it is useful to review what is known about unconscious decision-making to determine whether repeated exposure to Supreme Court cases regarding police power may have influenced her view of the evidence.

Trial judges make many decisions quickly. Social scientists have referred to this style of decision-making as "blinking." Blinking refers to "quick, heat-of-trial decisions"¹⁸⁸ as opposed to the slower process of deliberation often applied to "matters submitted and taken under advisement."¹⁸⁹ Implicit cognition science predicts that "actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions."¹⁹⁰ Unconscious or subconscious influences shape the way human beings reach decisions, and judges are not immune from this process.¹⁹¹ Research suggests that implicit cognition or biases affect deliberate decisions as well as quick, intuitive ones, although appellate judges who have more time to deliberate may correct their intuition if they recognize and seek to overcome known unconscious biases. As Professor W. Bradley Wendel wrote, "instead of worrying about crooked judges, we should worry about decent judges who are susceptible to the same sorts of cognitive errors that affect the rest of us."¹⁹²

188. Hon. John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 2–5 (2010); see also Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 27–28 (2007) ("[J]udges rely heavily on their intuitive faculties . . . [w]hen awarding damages, accessing liability based on statistical evidence, and predicating outcomes on appeal . . .").

189. *Id.* at 7 (arguing that even deliberative decisions reached after the passage of time and careful consideration may be impacted by the judges' implicit biases).

190. Anthony G. Greenwald et al., *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946–47 (2006) (arguing that actors may not be aware that they hold particular biases).

191. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009); see also Irwin & Real, *supra* note 188, at 7 ("It seems reasonable to expect that implicit biases could have a significant impact on the decisions made by judges, regardless of whether those decisions are quick and intuitive, or slow and deliberative.").

192. W. Bradley Wendel, *The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 MCGEORGE L. REV. 35, 39 (2010) ("Reliance on fast, automatic processing is a pervasive feature of human decision-making. Errors sometimes result from the influence of these System 1 processes, and because they are mostly unconscious, judges may not be aware of the errors they are making.").

Implicit biases can form early in a person's life, or they can come from repeated exposure later in life.¹⁹³ While there are no tests to see how repeated reading of case law influences judges, the closest analogy is probably exposure to the media, including exposure to newspapers and magazines. The media plays a role in how we "map" external stimuli.¹⁹⁴ According to Professor Perry Moriearty, when reports of juvenile delinquency and crime dominated the local news in the 1990s, these stories affected the criminal justice system by entering the viewers' subconscious.¹⁹⁵ Media works on the unconscious and without the viewer's knowledge; subliminal messages are downloaded.¹⁹⁶ Studies such as the "Mug Shot Test" reported that when a black suspect's mug shot is briefly highlighted in a crime news report, white participants showed six percent more support for enhanced punishment than did the control group which saw no crime story.¹⁹⁷ Illinois Appellate Court Justice Michael B. Hyman reviewed the literature on pernicious influences, writing that "the pervasiveness of implicit bias can be surprising, particularly to those who pursue impartiality by profession—namely judges."¹⁹⁸

Much of the research on judicial bias has focused on biases that are harmful to goals of fairness and equal treatment, such as race or gender bias.¹⁹⁹ But biases extend well beyond these categories and "need not

193. Siri Carpenter, *Buried Prejudice*, 19 SCI. AM. MIND 33, 35 (2008) ("Whatever the neural underpinnings of implicit bias, cultural factors—such as shopworn ethnic jokes, careless catch phrases and playground taunts dispensed by peers, parents or the media—often reinforce prejudice.").

194. Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decision-Making*, 69 MD. L. REV. 849, 887–88 (2010) ("Problems arise . . . when the material presented by the media is imbalanced or inaccurate. When the images transmitted by the media are distorted, the racial meanings in our schemas become distorted.").

195. *Id.* at 852.

196. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1557 (2005).

197. See Franklin D. Gilliam, Jr. et al., *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 563–67 (2007) ("The principal objective of the test was to manipulate the main elements of the crime news script. Four levels of the manipulation were established. First, some participants watched a story in which the alleged perpetrator of a murder was an African-American male. Second, other subjects were given the same news report, but this time featuring a white male as the murder suspect. A third set of participants watched the news report [which] excluded . . . the identity of the perpetrator. Finally, a control group saw no crime news story at all. The Black and White suspects were represented by the same digitized picture then painted to alter skin color leaving the suspects' features identical. White participants' exposure to the black perpetrator had the greatest impact (6%) on support for punitive policies."). Kang, *supra* note 196, at 1492.

198. Justice Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 41–42 (2014).

199. Deborah Ruble Round, *Gender Bias in the Justice System*, 61 S. CAL. L. REV. 2193, 2194 (1988) ("In the judicial system, gender bias results in decisions or actions that are based upon preconceived notions of sexual roles rather than on fair and impartial appraisals of individual situations."); Marsha S. Stern, *Courting Justice: Addressing Gender Bias in the Judicial System*,

have a pejorative connotation.”²⁰⁰ Implicit biases must simply be recognized as “unconscious attitudes and correlations that are formed by one’s life experiences and that lurk beneath the surface of the conscious.”²⁰¹ Intuitive associations between “thunder and rain, for instance, or gray hair and old age” involve implicit cognition without the pejorative connotations.²⁰² Media can also unconsciously influence viewers in a positive way. Implicit bias studies demonstrate that viewing images can improve attitudes towards minorities by exposing people to content containing positive role models.²⁰³ Thus, a judge who associates black men with crime may actively counter that bias with images of Martin Luther King, Jr. and other positive images of black men.²⁰⁴ Thus, repeated exposure in life may create or change implicit associations. If repeated exposure to media and photographs can change judicial attitudes, then it stands to reason that repeated exposure to case law could influence a judge’s thinking as well. Arguably, Supreme Court decisions would influence judges even more than media, since judges not only read the cases, but they apply the law found in those cases. Moreover, if they do not apply the case law they read, they risk reversal on appeal.

Trial judges generally make decisions regarding the scope of police power in the context of criminal prosecutions where defendants move to suppress evidence against them. Judges must also apply this jurisprudence in civil rights lawsuits where plaintiffs sue the police and other government actors for violating the Fourth or Fifth Amendments. Motions to suppress are filed in a substantial percentage of criminal

1996 ANN. SURV. AM. L. 1, 22 (1996) (“Gender bias in the judicial system has the potential to have a multi-level impact involving: a) harm to the individual; b) harm to the judicial proceeding; and c) harm to the system as a whole.”); *see also* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 48 (1994) (“[R]acial and ethnic bias may operate as a factor in disproportionate treatment of minorities during plea bargaining, jury selection through use of peremptory challenges, the adequacy of defense representation and in setting of bail.”).

200. Irwin & Real, *supra* note 191, at 2 (explaining the term “bias” should not be perceived as wholly negative); *see also* Greenwald et al., *supra* note 190, at 950 (“[Bias] accurately denotes a displacement of [one’s] responses along a continuum of possible judgments.”).

201. *See* Irwin & Real, *supra* note 191, at 4.

202. *Id.* at 3. *See also* Mahzarin R. Banaji et al., *How (Un)Ethical Are You?*, HARV. BUS. REV. 81, no. 12 (2003) (“Early on, we learn to associate things that commonly go together and expect them to inevitably coexist: thunder and rain, for instance, or gray hair and old age.”).

203. Kang, *supra* note 196, at 1553–54; *see also* Nilanjana Dasgupta et al., *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY AND SOC. PSYCH. 800, 807 (2001) (“[E]xposure to liked members of a devalued group and disliked members of a valued group may create new abstract representations of target groups without erasing the old ones. These new knowledge structures may influence automatic attitudinal responses as long as they remain accessible.”).

204. Rachlinski et al., *supra* note 191, at 1226 (posting portrait of President Obama alongside the [pictures] of mostly white male judges in many courtrooms is a stereotype-incongruent model).

cases, and thus, the judge would be steeped in the case law and exposed regularly to arguments and testimony that relate to that case law. Judges would also be expected to apply that case law to the facts before them with some regularity.

Recognizing that much decision-making occurs on an unconscious level, it follows that trial judges who have internalized the Fourth Amendment case law will unconsciously apply it when making decisions in the heat of trial. This is especially likely where the factual situation at trial closely mirrors the factual patterns found in search and seizure opinions, such as following or subduing a suspect. Repeated exposure to acceptable aggressive police behavior could make a judge view aggressive police officer behavior differently than similar behavior by an ordinary criminal defendant. Similarly, judges are likely to associate claims of racial profiling in a trial with claims of racial profiling asserted in pre-trial motions. Even if judges had time to deliberate and take a formal approach using syllogistic reasoning,²⁰⁵ they may wish to treat like things alike. In other words, if police are allowed to be aggressive in one context, it may seem unfair to permit the government to criminalize that same behavior in another context. If police are implicitly permitted to racially profile suspects in one context, it may seem unfair to allow the government to stigmatize that behavior as racist in another context. Thus, it need not even be pro-police bias that influences judges to bestow privileges for criminal defendants who are connected to law enforcement but simply intuitive association between police and power, similar to gray hair and old age.

Because a neighborhood watch captain, not a police officer, killed Trayvon Martin, the trial judge would unconsciously attribute police privilege to Zimmerman only if she saw the defendant as part of the police team. What makes the police privilege theory appealing is how well her rulings dovetail with Fourth Amendment precedent. For example, the defense team provided no legal support for their oral request to bar the government from mentioning racial profiling. But while allegations of racial bias are routinely permitted in murder trials to prove motive, the Fourth Amendment excludes racial motive arguments whenever there is probable cause to justify the seizure or search. Moreover, the trial judge's influences may have been more unconscious than conscious. The motion to prevent the term "racial profiling" was

205. Irwin & Real, *supra* note 191, at 5 (illustrating that judges utilize syllogistic reasoning by applying the law to the facts in a logical and mechanical manner).

argued during a pretrial hearing before opening statements.²⁰⁶ Judge Nelson did not take it under advisement but ruled right from the bench. According to the bias studies, this type of decision-making corresponds to a blinking or intuitive reasoning process.²⁰⁷

Similarly, when Judge Nelson was asked to exclude the law on provocation from the jury's consideration, this was done during a bench conference where there was no time for the "staring" or deliberative model of judging. In fact, Judge Nelson was surprised by the defense's move to exclude the jury instruction, for their written submission had made it appear that the defense team merely sought to include the narrowing language from the *Gibbs* decision, and Judge Nelson expressed her willingness to grant that request.²⁰⁸ Ruling in favor of the prosecution, Judge Nelson declined to give a reason for excluding the jury instruction on the rule of aggressors, simply announcing from the bench: "The Court is not going to give it."²⁰⁹

While Florida self-defense case law contravened Judge Nelson's decision on provocation, her ruling fits well with Supreme Court Fourth Amendment precedent. For example, under Fourth Amendment case law, a police officer in George Zimmerman's shoes would be permitted to chase Martin in order to investigate even unsupported suspicions. In fact, as we saw in *Chesternut*, that behavior would be deemed noncoercive as a matter of law.²¹⁰ Moreover, if the judge thought that a police officer in Zimmerman's position had reasonable suspicion to believe Martin was planning to commit a crime, then the law empowers officers to physically grab and detain the suspected wrongdoer until the suspicions can be investigated.²¹¹ Thus, a judge who viewed Zimmerman as an agent of police or quasi-police would be hard-pressed to label such actions "provocation" under self-defense law. Nevertheless, were this decision operating on a purely conscious level, Judge Nelson may have decided that the Fourth Amendment was not an issue before her during the trial and the case law was therefore irrelevant. On a conscious level,

206. Tracy Connor, *Zimmerman Judge: Prosecutors can use 'Profiled' at Trial*, NBC NEWS (June 21, 2013), http://usnews.nbcnews.com/_news/2013/06/21/19076806-zimmerman-judge-prosecutors-can-use-profiled-at-trial [<http://perma.cc/7DPS-MZEM>].

207. See Irwin & Real, *supra* note 188 (One "way of categorizing this process is to consider the quick and intuitive decisions as ones that are made in the course of "blinking" at a problem, while the slow and deliberative decisions are made in the course of "staring" at a problem.").

208. See TheCount.com, *Jury Instructions Pt. 8*, *supra* note 163.

209. See TheCount.com, *Jury Instructions Pt. 8*, *supra* note 163.

210. *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

211. *Terry v. Ohio*, 392 U.S. 1, 1 (1968) (allowing pat downs or frisks of the person's body if the officer also has reasonable suspicion to believe the detained suspect is armed and dangerous). See generally Rudy Cooper, *The "Seesaw Effect" From Racial Profiling to Depolicing: Toward Critical Cultural Theory*, in *THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH* 139 (2006).

the judge may have wanted to treat Zimmerman the same way she would any criminal defendant in her courtroom. However, on a subconscious or unconscious level, the case law might have shaped the way she viewed the facts, the law, or applied the law to the facts.

Consider the prosecution team in Zimmerman's murder trial. Prosecutors, like judges, have to switch their perspective when the defendant on trial is a police officer. In motions to suppress, the prosecution is in the position of defending police tactics and seeking to enlarge the ability of police to use intrusive or aggressive behavior toward civilians. Police power and privilege benefits the prosecution and harms the accused. When police officers are accused of violent crimes, the standard paradigm is flipped. In these situations, police power and privilege serve to benefit the accused and hurt the prosecution. Prosecutors no longer invoke the constitutional doctrines regarding police power but instead seek to treat the accused like any other criminal defendant.

There is evidence that at least one of Zimmerman's prosecutors had a difficult time switching roles. During the trial, the prosecution's strategy was to portray Zimmerman as the aggressor, arguing that the neighborhood watch volunteer had no business racially profiling Martin at the start, and furthermore, by stalking and grabbing Martin, Zimmerman forfeited his right to self-defense.²¹² Yet, during the closing argument in the Zimmerman trial, the prosecutor inexplicably took a detour to insert these observations: "Police are allowed to go up to individuals and ask them, what are you doing here? And that person can ignore him or not. It's not a crime."²¹³

The prosecutor's observation that it was not a crime for Zimmerman to go up to Martin to ask him what he was doing there is directly at odds with the point the prosecution needed to make to prevail, namely that Zimmerman behaved as an aggressor. The observation betrayed a deep fissure in the prosecution's ability to understand its role in the murder case. The prosecutor was not being asked to defend police power the way he would in a motion to suppress evidence, but rather the

212. Although there was no direct testimony that Zimmerman grabbed Martin, this could be inferred from the fact, if believed, that Martin yelled "Get off!"

213. Martysoffice, *George Zimmerman Trial-Prosecution closing argument*, YOUTUBE, <http://www.youtube.com/watch?v=Rnv8Q6FCQ8Y> [<http://perma.cc/EK6B-7ZC3>] (last visited Oct. 10, 2013) ("The law does not allow people to take the law into their own hands, it doesn't allow even the police to take the law into their own hands, if the police had gotten called out there, they would have gone out and asked, what are you doing here? Do you mind telling me what you are doing here? Under the law they are allowed to ask somebody who is walking down the street and the person can ignore them or no, that is not a crime.").

opposite, to show how Zimmerman's quasi-police behavior was aggressive, violent, and threatening.

Certainly the prosecutor quoted the law accurately in closing argument when he stated, "Under the law [police] are allowed to ask someone who is walking down the street [what are you doing here?] and the person can ignore them or not."²¹⁴ That represents the law but not the reality of street encounters between police and civilians when police seek to investigate those they suspect of criminal mischief.²¹⁵ This fiction helps prosecutors when they seek to defend their officers from claims that they violated a suspect's rights. But that same fiction hurts prosecutors when they seek to charge individual police officers for assaultive behavior.

In turn, judges are provided a set of rules to apply to police when ruling on motions to suppress evidence and civil rights complaints, and it would be difficult for them to abandon those fictions when applying facts and law during trials. Case law instructs trial judges to treat allegations of police coercion with suspicion and to follow a legal fiction in deciding whether a person would be free to walk away from police, free to ignore police questioning, and free to assert rights. In context of search and seizure case law, Judge Nelson's two controversial rulings make sense.

III. HOW TO REMEDY THE POLICE PRIVILEGE

Trial judges who are regularly exposed to motions to suppress evidence based on violations of the Fourth Amendment may unconsciously import the Supreme Court's standards of police power into trials where police officers are accused of wrongdoing, and sometimes into cases involving volunteers who take on the policing role.

Whether judges should import Supreme Court precedent involving motions to suppress and civil rights lawsuits into criminal trials raises difficult issues. On the one hand, it would be odd to give police one set of rules that allow them to profile individuals based on race and then use that racialized policing against them when they are accused of a crime. Similarly, it would be odd to give police one set of rules to investigate civilians they consider suspects but then expect the officers to withdraw as aggressors when the civilian fights back. After all, once police officers are given the green light to act aggressively for Fourth Amendment

214. *Id.*

215. See generally Josephine Ross, *Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment*, 18 WASH. & LEE J. C.R. & SOC. JUST. 315 (2012). See also Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153 (2002) (arguing that because of multiple psychological factors, people do not actually feel free to walk away when approached by police).

purposes, one must expect officers to behave as forcefully as the law permits.

While the best argument for consciously importing Supreme Court precedent into police prosecutions centers on fairness to the accused police officer, fairness concerns go both ways. While it may be fair to the police officer on trial, it is unfair to the victims of police violence and to their families to bestow special privileges on the person who attacked or killed their loved one based on that person's job status. The police privilege also contradicts society's twin goals of condemning violent criminal behavior and doing so in an evenhanded manner. Blind justice demands that there should not be two systems, one for the privileged, and one for everybody else.²¹⁶ A run-of-the-mill defendant is not getting a fair trial if he is treated unequally compared to privileged defendants. Fair trials mean fair to the prosecution as well as to police officer defendants.

Volunteers like George Zimmerman provide another twist. When volunteer patrollers act as agents of the police, they should be treated the same as government actors. General agency principles govern the definition of government action in the Fourth Amendment context. In a seminal case, the Supreme Court explained, "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities."²¹⁷ Where "the Government did more than adopt a passive position toward the underlying private conduct," it cannot simply absolve itself of responsibility by the "fact that the Government has not compelled a private party to perform a search."²¹⁸ Indeed, police departments should not be able to outsource their police work to volunteers in order to evade their duty of preserving whatever rights remain to privacy and dignity under the Constitution. Arguably, George Zimmerman did not act as an agent of the police in pursuing Trayvon Martin, let alone in shooting him, since the dispatcher instructed Zimmerman specifically not to pursue the suspect. Nevertheless, the fact that police did not compel Zimmerman to detain Martin is not the end of the inquiry. For the purposes of police privilege, it is irrelevant that Zimmerman acted

216. "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). A two-tier system would also run afoul of the Fifth Amendment due process clause.

217. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989).

218. *Id.* at 615.

against explicit dispatcher instructions, for he still derived benefit from law enforcement protections even if he did not merit those benefits.

There are additional policy considerations that favor treating police defendants the same as ordinary criminal defendants. Giving police officer defendants a special advantage at trial makes it more likely that the defendants will be acquitted and that the verdicts will be suspect. Society's interest in fair trials was demonstrated in the reaction to the Rodney King and Amadou Diallo verdicts.²¹⁹ After the acquittal of the Diallo defendants, there were widespread demonstrations, while people rioted in reaction to the acquittals of those who beat Rodney King. There was a widespread sense that when police commit crimes, the victim is put on trial.²²⁰ Anger at those verdicts stemmed in part from the belief that the reason the victims did not receive a fair trial was because of their race. Indeed, race and police privilege are often intertwined, for many victims of violent policing are people of color.²²¹ Thus, on balance, the police privilege is problematic and should be addressed to allow disaffected segments of society to begin to trust the justice system and to allow society to move toward the founding concept of equal treatment under the law.

The problem lies not with trial judges but with the Supreme Court doctrine itself. The Supreme Court decisions mask aggression and call it consent, creating doctrine that hides racialized policing and sanctions the practice by setting it beyond remedy. Therefore, the clearest solution would be to change the Supreme Court doctrine. This would be fairer to police officer defendants as well as to victims of police violence. The reason it would be fairer to police is that they would be given consistent rules to follow. An individual officer should not suffer for following protocols set by his department in compliance with current Supreme Court doctrine, and officers should not be incarcerated based on a vague and slippery set of rules.

219. See generally RICHARD KROOTH & HIROSHI FUKURAI, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION, STATE UNIVERSITY OF NEW YORK PRESS (2003). See Michael A. Santivasci, *Change of Venue in Criminal Trials: Should Trial Courts be Required to Consider Demographic Factors When Choosing a New Location for a Criminal Trial?*, 98 DICK. L. REV. 107, 109 (1993); see also *A Panel Discussion with Darius Charney, Jesus Gonzalez, David Kennedy, Noel Leader, and Robert Perry, Suspect Fits Description: Responses to Racial Profiling in New York City*, 14 CUNY L. REV. 57, 58 (2010).

220. See generally Lawrence Vogelmann, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571 (1993).

221. An analysis of federally collected data shows that young black males in recent years were at a far greater risk of being shot dead by police than their white counterparts—21 times greater. Brent Staples, *Race and Death in Police Shootings*, N.Y. TIMES: TAKING NOTE (Oct. 10, 2014), http://takingnote.blogs.nytimes.com/2014/10/10/whos-killing-all-those-black-men-and-boys/?_r=0 [https://perma.cc/4P5S-5HXM] (citing PRO PUBLICA, <http://www.propublica.org/article/deadly-force-in-black-and-white> [http://perma.cc/RG3B-XGKQ]).

On the other hand, making it clear that the Fourth Amendment does not apply to criminal prosecutions of police officers would help the victims and their families. Victims of police violence would receive equal treatment to those killed or hurt by civilians. Changing the rules would mean the status of the defendant does not determine whether the victim receives justice.

There are some clear obstacles that stand in the way of remedying Fourth Amendment doctrine. These obstacles are those current Supreme Court justices who hide police aggression and racialized policing through doctrinal sleights of hand in order to enlarge the power that police have in relation to citizens. Although the Court occasionally issues opinions that strengthen individual rights, as a general rule, Fourth Amendment rights have continued to shrink after the Warren Court decisions of the 1960s.²²² Thus, until the makeup of the high court changes, other remedies must be considered.

Another way to correct the legal fiction of the friendly police officer is to pass legislation that corrects the offending Supreme Court precedents. Legislation could correct the license for police to behave aggressively without sufficient provocation or justification. In other words, legislation would undo the legal fictions that young men and women accosted by police are free to walk away and the fiction that people who acquiesce to police demands are consenting. In addition, legislation should make it clear that orders should be understood from the standpoint of the individual receiving the order. Further, legislation should include examples, such as police pounding on the front door of a home while yelling “police,” which create an inference that police are demanding that the occupants open their door. Federal legislation such as this will even out the playing field in murder and assault trials and also enhance the fairness of motions to suppress. This legislation would be in addition to efforts to end racial profiling, such as the End Racial Profiling Act.²²³

Unfortunately, Congress’s track record of legislative efforts to correct the Supreme Court’s racial profiling case law does not inspire confidence. For more than fifteen years, Representative John Conyers

222. See Steven Wisotsky, *Crackdown: The Emerging ‘Drug Exception’ to the Bill of Rights*, 38 HASTINGS L.J. 889, 907–09 (1987); see also Morgan Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 477, 515 (2013) (discussing *Herring v. United States*, 555 U.S. 135 (2009) and other cases that carved exceptions into the exclusionary rule).

223. The End Racial Profiling Act of 2013 was introduced in the House as H.R. 2851 by Congressman John Conyers (D-MI) in July 2013 and in the Senate as S. 1038 by Senator Ben Cardin (D-MD) in May 2013. See Govtrack, *Text of the End Racial Profiling Act of 2013*, <https://www.govtrack.us/congress/bills/113/hr2851/text> [<http://perma.cc/CE3A-PMAC>].

has been trying to enact federal legislation that prohibits police from targeting men and women based on racial stereotypes. Filing his first bill in 1997, Representative Conyers continues to sponsor legislation in the House, while a similar measure has been introduced in the Senate.²²⁴ The proposed legislation would have prohibited racial profiling, required training to law enforcement on these issues, mandated collection of data so that compliance with the law can be tracked, and provided procedures for related complaints.²²⁵ The most recent House and Senate bills died in Congress.²²⁶ The difficulty with passing The End Racial Profiling Act can be traced back to a lack of political clout. Similar problems would hamper efforts to correct overly aggressive policing. The problems associated with aggressive policing fall on a subset of civilians, primarily on the poor and on minorities—two groups that have decidedly less political power than their numbers would suggest.²²⁷

Judicial education might provide some buffer against blinker decisions that favor police officer defendants. Instead of allowing the Supreme Court cases to unconsciously advantage accused police officers and volunteer watchmen at the expense of the prosecution, judges should be encouraged to consciously determine if Fourth Amendment police privilege makes sense in criminal trials. Judges currently receive training on gender bias and racial bias,²²⁸ so it is not difficult to imagine trainings that target police bias. Judges should be informed that the law does not require them to import decisions on stop and frisk and racial profiling into criminal prosecutions. While aimed at helping the families of victims like Amadou Diallo and Trayvon Martin, this change would also benefit ordinary defendants who are accused of assaulting police. A

224. *Id.*

225. *Id.*

226. *Id.*

227. Police trials often identify the schism in the population, usually along racial lines. For example, many white Americans supported George Zimmerman's actions even as others rallied on Trayvon Martin's behalf, demanding that Zimmerman be charged with a crime. *See* Lee, *supra* note 21, at 1567 (noting that "[t]he public's reaction to the shooting was sharply divided along racial lines" with eighty percent of Blacks surveyed saying they thought the killing of Martin was unjustified and only thirty-eight percent of Whites feeling the same way); *see also* Jon Cohen, *Zimmerman verdict: 86 percent of African Americans Disapprove*, WASH. POST (July 22, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/22/zimmerman-verdict-86-percent-of-african-americans-disapprove/> [http://perma.cc/683C-2Y3R]; *see also* Lawson, *A Fresh Cut in an Old Wound*, *supra* note 19, at 296.

228. *See, e.g.*, The Hon. Lynne A. Battaglia, Evelyn C. Lombardo, *Investing in the Future of Maryland Women*, 44 MD. B.J. 12, 18 (2011) ("The Select Committee also was instrumental in the development of a curriculum addressing gender bias in the profession for the mandatory professionalism course for new admittees."); Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis"*, 99 KY. L.J. 259, 311–12 (2011) ("Fortunately, judicial training regimes have been created to address unconscious biases.").

woman who is grabbed by a plainclothes police officer or volunteer, who does not realize that her aggressor is an officer, should have the same rights to self-defense as a woman grabbed by a civilian attacker. Similarly, a man who is accosted by volunteers or unmarked officers should be able to invoke Stand Your Ground in those jurisdictions that have adopted that law. Making the decisions more conscious for trial court judges will not solve all the problems created by the Supreme Court case law. However, it should ameliorate some of the inequality in police prosecutions. Social science indicates that judges are often capable of correcting implicit biases when they are made aware of these hidden assumptions.²²⁹

CONCLUSION

The United States Supreme Court is the unheralded source of a long list of police powers and privilege. In the past thirty years, the Court has made a series of rulings concerning the scope of police authority. The Fourth Amendment jurisprudence endows police with broad latitude to target and question people on the street, including minors, without it being seen as intrusive or even as an invasion of privacy. Overall, case law instructs trial judges to treat allegations of police coercion with suspicion and to relabel aggressive behavior as nonthreatening and benign. Similarly, the Fourth Amendment empowers police to target individuals based on race or racial animosity, as long as the officer can develop probable cause to believe a traffic violation, misdemeanor, or felony was committed by the time the officer orders an individual to submit to a stop, frisk, or full-blown search.

Although no rule directs judges to apply Fourth Amendment doctrine to situations where police are accused of violence and stand trial for violent felonies, this Article contends that there is a spillover effect. Judges who digest the Supreme Court's constitutional opinions regarding police power and apply this case law to multiple situations would find it difficult to suddenly disregard these teachings when the accused happens to be a police officer or a civilian who employed force in the aid of law enforcement efforts. While judges may not consciously seek to treat criminal defendants differently if they are police officers, much judicial decision-making operates at the unconscious level.

229. Jack Glaser et al., *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164–65, 170–71 (2008) (explicit motivation to control prejudice moderates the relation between implicit perjury. Making the decisions more conscious for trial court judges should serve to ameliorate some of the inequality in police killings; however, it will not solve all the problems created by the Supreme Court case law and explicit prejudice).

George Zimmerman, Trayvon Martin's killer, was a volunteer rather than a true patrolman, yet it appears likely that he benefited from the Supreme Court doctrine that condones police aggression and racial selection through legal sleight of hand. If a neighborhood watch activist was the beneficiary of unconscious Fourth Amendment police privilege, then certainly there is a risk that other police who kill will receive the same advantage. While part of Trayvon Martin's legacy has been a push to eliminate Stand Your Ground laws, there should also be a push to overwrite offensive case law precedents with legislation that encourages judges to honestly label aggression as such when the perpetrator is a police officer or a neighborhood watch volunteer helping the police. Similarly, legislation would encourage judges to label racial profiling as such even when the offenders are engaged in law enforcement. At the very least, judges should be trained to consider the damage these rulings can make to fairness and the perception of fairness. Judicial training may encourage many trial judges to resist unconsciously importing these troubling Supreme Court decisions into criminal trials where the accused is a member of the police team.