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## Recognizing Race

Justin Driver

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# ESSAY

## RECOGNIZING RACE

*Justin Driver\**

*Judges habitually decide whether to identify individuals racially within the context of judicial opinions. Yet this practice, which this Essay labels “recognizing race,” has thus far gone virtually unexplored by legal scholars. The dearth of scholarly attention to this practice is lamentable, as judges often appear to make poor decisions in this arena—not only recognizing race when they should avoid doing so, but failing to recognize race when they should. This Essay represents the first sustained effort to offer a broad examination of the judiciary’s racial recognition in an attempt to articulate broadly applicable normative principles. After observing that the number of cases requiring judges to recognize race is dramatically smaller than is commonly appreciated, this Essay identifies and critiques two common pitfalls that judges should seek to avoid: asymmetric racial recognition and gratuitous racial recognition. The Essay then provides four reforms regarding how judges might affirmatively harness the potential of racial recognition. First, judges should explain in writing why opinions recognize race. Second, judges should contemplate how racial equality may be served by “unrecognizing” race, even if a particular legal question contains a racial element. Third, courts should practice racial inversion, a technique that assists judges in thinking through precisely what work—if any—racial considerations play in a particular case. Finally, and perhaps most importantly, judicial decisionmakers should bear in mind that opinions can adhere to the anticlassification principle while avoiding the colorblindness principle—two distinct concepts that legal scholars have incorrectly conflated. By defamiliarizing racial recognition, this Essay aims to make the legal community more conscious of its often confounding race-consciousness.*

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## INTRODUCTION

Few legal disputes have garnered more attention in recent years than *Ricci v. DeStefano*.<sup>1</sup> Even before the Supreme Court heard oral argument, the *New York Times* featured the case and lead plaintiff Frank Ricci on its front page.<sup>2</sup> The potential for a landmark decision coupled with the messy underlying facts—involving firefighters who claimed that New Haven, Connecticut racially discriminated by refusing to certify examination results that would have promoted only nonblack firefighters—made *Ricci* a natural candidate for widespread coverage. The media focus only intensified after President Obama nominated a member of the Second Circuit panel that resolved *Ricci*, then-Judge Sotomayor, to replace Justice Souter on the Court.<sup>3</sup> Although Justice Kennedy’s 5-4 decision ultimately declined to tackle the broad question of whether Title VII and the Equal Protection Clause could be reconciled,<sup>4</sup> his relatively narrow decision vindicating the firefighters’ claim hardly signaled the end of *Ricci*’s moment in the spotlight. Indeed, both *Ricci* and Ricci played starring roles in Sotomayor’s confirmation hearings.<sup>5</sup> Even weeks after the Court’s decision, moreover, prominent media outlets continued to run critiques of

1. 129 S. Ct. 2658 (2009).

2. Adam Liptak, Justices to Hear White Firefighters’ Bias Claims, *N.Y. Times*, Apr. 10, 2009, at A1.

3. See David D. Kirkpatrick, A Judge’s Focus on Race Issues May Be Hurdle, *N.Y. Times*, May 30, 2009, at A1 (reporting one judicial observer’s opinion that “[Sotomayor’s] nomination and the *Ricci* case have brought racial quotas back as a national issue” (quoting Gary Marx, Executive Director, Judicial Confirmation Network)).

4. For a prescient article exploring the potential tension between equal protection and Title VII’s disparate impact doctrine, see Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 *Harv. L. Rev.* 493, 498 (2003).

5. See Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm.

*Ricci*.<sup>6</sup> Legal scholarship—as is its wont—arrived late to the party. But what it lacked in promptness it has more than compensated for in volume.<sup>7</sup> Despite the torrent of journalistic and academic work parsing the decision, perhaps *Ricci*'s most notable—and certainly its most jarring—line has thus far utterly escaped analysis. That line appeared when Justice Kennedy described one of the many meetings held by the New Haven Civil Service Board (CSB) to consider whether to certify the firefighter examination results.<sup>8</sup> At that meeting, the CSB heard three witnesses testify about standardized testing and New Haven's method for determining promotions.<sup>9</sup> *Ricci* identified two of the three witnesses by citing only their relevant professional credentials. "The first witness, Christopher Hornick, spoke to the CSB by telephone," Justice Kennedy wrote.<sup>10</sup> "Hornick is an industrial/organizational psychologist from Texas who operates a consulting business that 'direct[ly]' competes with" the company that designed New Haven's test.<sup>11</sup> Similarly, Justice Kennedy explained: "The final witness was Janet Helms, a professor at Boston College whose 'primary area of expertise' is 'not with firefighters per se' but in 'race and

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on the Judiciary, 111th Cong. 73–78, 91–95, 414–19 (2009) (questioning of Judge Sotomayor by various Senators regarding *Ricci*); *id.* at 488–89 (statement of Frank Ricci).

6. See, e.g., Lani Guinier & Susan Sturm, Trial by Firefighters, *N.Y. Times*, July 11, 2009, at A19 (suggesting *Ricci* signals need for "a clear-eyed reassessment of our blind faith in entrenched testing regimes"); Shelby Steele, Affirmative Action Is Just a Distraction, *Wash. Post*, July 26, 2009, at B4 (contending *Ricci* demonstrates "irrationality of disparate impact").

7. See, e.g., Michelle Adams, Is Integration a Discriminatory Purpose?, 96 *Iowa L. Rev.* 837, 842–43 (2011) (contending *Ricci* prohibits government from inflicting racial harm but does not necessarily prevent it from pursuing integration); Cheryl I. Harris & Kimberly West-Faulcon, Reading *Ricci*: Whiting Discrimination, Racing Test Fairness, 58 *UCLA L. Rev.* 73, 73 (2010) (suggesting *Ricci* does not evaluate all claims of discrimination on equal grounds but rather "whitens" discrimination and "races" test fairness); Helen Norton, The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality, 52 *Wm. & Mary L. Rev.* 197, 229 (2010) ("The Court now, however, appears to treat a decision maker's attention to the disparities experienced by members of traditionally subordinated racial groups—that is, its antisubordination ends—as inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification."); Richard A. Primus, The Future of Disparate Impact, 108 *Mich. L. Rev.* 1341, 1344 (2010) (describing three ways to read *Ricci* and arguing Court's ruling treats disparate impact as inherently race-conscious theory that is susceptible to challenge under Equal Protection Clause); Joseph A. Seiner & Benjamin N. Gutman, Does *Ricci* Herald a New Disparate Impact?, 90 *B.U. L. Rev.* 2181, 2181–82 (2010) (suggesting *Ricci* can be read to create new affirmative defense for employers facing claims of disparate impact); Girardeau A. Spann, Disparate Impact, 98 *Geo. L.J.* 1133, 1135 (2010) (noting *Ricci* "appears to have commenced a campaign to eviscerate the racially disparate impact cause of action that was created by the employment discrimination prohibition of Title VII"); Michael J. Zimmer, *Ricci*'s "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?, 2010 *BYU L. Rev.* 1257, 1259 (arguing that Court established essentially "color-blind" standard of disparate treatment liability for Title VII).

8. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2667–68 (2009).

9. *Id.* at 2668.

10. *Id.*

11. *Id.* (quoting joint appendix).

culture as they influence performance on tests and other assessment procedures.’”<sup>12</sup> Justice Kennedy’s description of the second witness also started with professional qualifications. “The second witness was Vincent Lewis, a fire program specialist for the Department of Homeland Security and a retired fire captain from Michigan,” Justice Kennedy began.<sup>13</sup> But from that innocuous beginning, Justice Kennedy deviated sharply, introducing a conspicuous factor that he omitted from the other descriptions: “Lewis, *who is black*, had looked ‘extensively’ at the lieutenant exam and ‘a little less extensively’ at the captain exam.”<sup>14</sup>

This identification is striking because, in a decision that cautions against the dangers of racially disparate treatment, it treats Lewis disparately by race. *Ricci*’s disclosure that Lewis is black suggests that his race carries unusual significance, and that it is germane to the case in a way that the other two witnesses’ racial identities are not. Were it otherwise, *Ricci* presumably would have approached the three witnesses’ racial identities in the same fashion—either revealing them all or concealing them all. *Ricci*’s racial identification of Lewis is all the more arresting because it comes from the pen of Justice Kennedy, who has long insisted that the government should resist racially classifying individuals.<sup>15</sup>

What message, then, does the Court attempt to communicate by mentioning Lewis’s race? It is impossible to answer that question with certainty because *Ricci*, like most cases that identify the race of individuals, offers no explanation for its racial approach. The most compelling interpretation, however, understands Lewis’s blackness to support the notion that New Haven’s exam was nondiscriminatory. Of the three witnesses, it bears emphasizing, Lewis endorsed the test with the greatest force. While Hornick and Helms both noted that heavily weighting written tests typically results in racial minorities receiving disproportionately fewer promotions, Lewis praised the exam’s legitimacy.<sup>16</sup> “He stated that the candidates ‘should know that material,’” Justice Kennedy wrote.<sup>17</sup> “In Lewis’s view, the ‘questions were relevant for both exams,’ and the New Haven candidates had an advantage because the study materials identified the particular book chapters from which the questions were taken. In other departments, by contrast, ‘you had to know basically the . . . entire book.’”<sup>18</sup> That an expert who is black gave the test a passing mark, Justice

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12. *Id.* at 2669 (quoting joint appendix).

13. *Id.*

14. *Id.* (emphasis added) (quoting joint appendix).

15. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (Kennedy, J.) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”).

16. See *Ricci*, 129 S. Ct. at 2668–69 (discussing Lewis’s belief that test was relevant).

17. *Id.* at 2669 (quoting joint appendix).

18. *Id.* (quoting joint appendix).

Kennedy seemed to suggest, should alleviate concern about the exam's racially disparate impact.<sup>19</sup>

Support for this understanding may be located in the petitioners' Supreme Court brief filed on behalf of Frank Ricci and his fellow firefighters. That brief, it strongly appears, inspired the Court's racial (and nonracial) descriptions of the three witnesses. After noting that "Vincent Lewis [was] a highly credentialed expert in fire and homeland security services," the brief made the following observation in a construction that anticipated the Court's: "Lewis, who is African-American, thought well of the exams and believed they measured the [knowledge, skills, and abilities that promoted firefighters] must possess."<sup>20</sup> Like the Court's opinion in *Ricci*, the brief also declined to identify Hornick and Helms by race. Given that whiteness is often naturalized,<sup>21</sup> it seems plausible that the Court's racial silence regarding Hornick and Helms indicates that both are white. Intriguingly, though, this is not the case. Although Hornick does in fact identify as white, Helms identifies herself as black.<sup>22</sup> Thus, Justice Kennedy's opinion—perhaps unwittingly—highlighted an expert's blackness who supported the examination, but rendered raceless a black expert who cast doubt on it.

Justice Kennedy's unsettled and unsettling approach to identifying witnesses at a New Haven meeting—an approach embodied by a simple adjectival phrase that amounts to a grand total of three words ("who is black")—provides an occasion to step back and cast a critical eye over the judiciary's mottled practice of racial recognition. Judicial recognitions of race have thus far generally been viewed as preordained. Indeed, it is tempting to believe that courts simply recognize race whenever doing so is pertinent and avoid recognizing race whenever doing so is not pertinent. It quickly becomes apparent, however, that these categories are far from self-sorting. Judges often make seemingly small decisions about whose race to recognize within their larger judicial decisions.<sup>23</sup> But it

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19. After racially describing Lewis initially in the facts section, the Court returned to Lewis in the analysis and elevated his testimony. See *id.* at 2678 ("Of the outside witnesses who appeared before the CSB, only one, Vincent Lewis, had reviewed the examinations in any detail, and he was the only one with any firefighting experience. Lewis stated that the 'questions were relevant for both exams.'" (quoting joint appendix)).

20. Petitioners' Brief on the Merits at 13, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328), 2009 WL 453242.

21. See Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1775 (1993) (arguing colorblindness "ratifies existing white privilege by making it the referential base line").

22. E-mail from Janet Helms, Professor, Bos. Coll., to author (Feb. 18, 2011, 1:47 PM) (on file with the *Columbia Law Review*); E-mail from Christopher Hornick, President, CWH Research, Inc., to author (Feb. 20, 2011, 10:50 AM) (on file with the *Columbia Law Review*).

23. At least one distinguished scholar has suggested that race enters the legal equation in only a narrow band of cases. See Stephen L. Carter, *When Victims Happen to Be Black*, 97 Yale L.J. 420, 439 (1988) ("The law in its majestic neutrality takes no official note of the race of the victim unless the victim places race in issue, as for example in a claim of racial discrimination."). The history of racial recognition, however, contradicts

would be deeply mistaken to dismiss these race-based decisions as trivial. Rather, examining the manner in which judges recognize race elucidates how courts (and the broader legal culture of which they are part) both assess and simultaneously create racial significance.<sup>24</sup>

This Essay represents the first sustained effort to offer a broad examination of the judiciary's racial recognition in an attempt to articulate broadly applicable normative principles for when and how courts should recognize race. Thus far, legal scholars have not subjected the judiciary's racial recognition to much in the way of scrutiny. The paucity of scholarly attention to this common practice is disconcerting not least because judges often appear to make poor decisions regarding racial recognition: Courts not only recognize race when they should avoid doing so, but courts also fail to recognize race when they should. The few scholars who have addressed racial recognition, moreover, have done so only within the narrow confines of a discrete doctrinal area.<sup>25</sup> Perhaps in part because of their constrained doctrinal examinations, previous scholarly inquiries of this phenomenon have typically asserted that courts pay what many scholars regard as insufficient attention to race.<sup>26</sup> More racial justice, these scholars urge, requires more judicial recognition of race.

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this assessment, as courts have repeatedly recognized race in contexts where race appears to be either tangential or irrelevant to the underlying legal issue. See *infra* text accompanying notes 68–71 (discussing judges' superfluous recognition of race).

24. Cf. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4, 8 (2003) (arguing that “constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture”).

25. See Taunya Lovell Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts*, 57 *Mo. L. Rev.* 443, 446–47 (1992) (examining racial recognition in area of torts); Richard R.W. Brooks, *Incorporating Race*, 106 *Colum. L. Rev.* 2023, 2025–26 (2006) (corporations); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 *Mich. L. Rev.* 946, 967–68 (2002) (Fourth Amendment); Tracey Maclin, “Black and Blue Encounters”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 *Val. U. L. Rev.* 243, 265 (1991) [hereinafter Maclin, *Black and Blue*] (noting that Supreme Court never mentioned race of black shooting victim in Fourth Amendment case of *Tennessee v. Garner*, 471 U.S. 1 (1985)); Tracey Maclin, *Race and the Fourth Amendment*, 51 *Vand. L. Rev.* 333, 340–41 (1998) [hereinafter Maclin, *Race*] (examining racial recognition in context of Fourth Amendment). At least one scholar has focused on the related, but conceptually distinct, notion of how lawyers, as opposed to judges, should deploy race in a particular doctrinal context. See Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 *Mich. L. Rev.* 965, 999 (1997) (arguing in context of attorneys representing welfare recipients that “lawyers must struggle with whether, when, and how to mention race”).

26. See Carbado, *supra* note 25, at 968–69 (contending Supreme Court's Fourth Amendment jurisprudence is insufficiently sensitive to race of criminal suspects and defendants); Maclin, *Black and Blue*, *supra* note 25, at 265 (“Whatever the motivation, ignoring the impact of race does a disservice to blacks and the country as a whole. The problem of race-based excessive force by the police will not go away simply because the Court sticks its collective head in the sand.”); Maclin, *Race*, *supra* note 25, at 340 (“Although the casual reader of the Court's Fourth Amendment opinions would never know it, race matters when measuring the dynamics and legitimacy of certain police-citizen

This Essay departs from that tradition by insisting that, when it comes to recognizing race, less is sometimes more. Courts should, in other words, sometimes contemplate omitting race from opinions rather than injecting it. But writing about race, for whatever reason, often leads to scholarship that tends toward absolutes. This Essay attempts to carve out a middle path, where *always* and *never* are replaced by *often* and *sometimes*. Against scholars writing in the critical race theory tradition,<sup>27</sup> this Essay insists that the path to racial equality often requires judges to avoid recognizing race. Against advocates of a purely colorblind approach,<sup>28</sup> this Essay insists that the path to racial equality sometimes requires racial recognition.

The balance of this Essay evaluates the descriptive and prescriptive aspects of how judges recognize race. Part I canvases the judicial practice

encounters.” (citation omitted)); see also T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. Colo. L. Rev. 325, 328 (1992) [hereinafter Aleinikoff, *Context*] (“[T]he persistence and power of racism ought to be seen as an important part of the social ‘context’ with which constitutional norms regarding equal protection and racial justice interact.”); Regina Austin, “Bad for Business”: Contextual Analysis, Race Discrimination, and Fast Food, 34 J. Marshall L. Rev. 207, 207 (2000) (“If race truly mattered, legal argument, writing, and scholarship would pay much more attention to context than it does today.”). Professor Brooks does not, admittedly, encourage courts to increase their racial recognition of corporations. See Brooks, *supra* note 25, at 2092 (“The courts’ recognition of the presence or absence of race in corporations should be avoided . . .”). But his analysis elevates the bar for permitting courts to recognize race to an exceedingly high level. See *id.* (arguing “[l]egal judgments about race should recognize race as minimally as possible”).

27. See, e.g., Carbado, *supra* note 25, at 970 (advocating without qualification for interpretation of Fourth Amendment that would be “explicitly race-conscious”). Beyond the racial recognition context, critical race theory often traffics in absolutism. See Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 373 (1992) (“Black people will never gain full equality in this country.”); Richard Delgado, *Rodrigo’s Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 Nw. U. L. Rev. 215, 243 (1998) (arguing “race will always remain a separate and independent subordinating factor”).

28. See Lino A. Graglia, *Special Admission of the “Culturally Deprived” to Law School*, 119 U. Pa. L. Rev. 351, 354 (1970) (contending that “the democratic ideal” requires “people not be classified—and neither taught nor expected to classify others—on the grounds of race”); see also William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775, 790 (1979) (“The state may neither use race in its own business nor may it encourage others to take it into account. Both are equally divisive and equally wrong.”). Colorblindness also has adherents in high places. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring) (“My view of the Constitution is Justice Harlan’s view in *Plessy*: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))). Some scholars who appear sympathetic to the colorblindness ideal realize that forbidding the government from ever taking account of race is not only unworkable, but would also be unwise. See Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 Harv. L. Rev. 107, 111 (1990) (“It is impossible to ignore racial differences entirely—pure color-blindness is too extreme a principle.”); *id.* at 111 n.19 (“If a disease . . . overwhelmingly afflicts a particular ethnic group, it would be unreasonable to ignore that fact. If a criminal gang has an exclusive racial composition, it would be fanatical to require the government to ignore this fact in recruiting agents to infiltrate that gang.”).



of racial recognition in order to make two primary points. First, the number of cases doctrinally requiring judges to recognize race is dramatically smaller than is commonly appreciated. Second, when courts recognize race for a discernible reason, they have tended to do so either to highlight a broad need for judicial intervention or to demonstrate that judicial intervention is unnecessary. Placing the courts' historical practices and varied purposes squarely in view sets the parameters of the debate, thus permitting assessment of the warrants for racial recognition.

With that analytical foundation established, the Essay examines the normative considerations involved when courts recognize race. Part II identifies and critiques two types of racial recognition that judges should attempt to avoid when they write opinions. The first pitfall—racial asymmetry—occurs when a judicial opinion acknowledges the race of some actors, but not the race of similarly situated actors. Judges should not limit their focus to avoiding racial asymmetries within the confines of a particular opinion; rather, judges should attempt to develop a generally symmetrical approach across doctrinal areas. The second pitfall—gratuitous disclosures of race—arises when judges reveal race for no apparent reason. Courts should be particularly leery of such racial gratuitousness in cases that have the potential to confirm damaging stereotypes.

After analyzing how judges should *not* recognize race, Part III shifts the focus to exploring how judges might affirmatively harness the potential of racial recognition. The first step in that process involves judges acknowledging the choice associated with racial recognition by offering an explanation of why, precisely, the opinion identifies someone by race. In addition, judges should contemplate whether justice may be more readily achieved when race is “unrecognized”—even if there is a racial component to the legal issue at hand. Relatedly, courts should utilize the technique of “racial inversion,” which assists judges in thinking through precisely what work, if any, racial considerations are playing in cases by inverting the races of the key players. Finally, judges should bear in mind that, contrary to the conventional wisdom among legal scholars, the anticlassification principle is conceptually distinct from the colorblindness principle. Because these two concepts are not coextensive, judges may take account of racial realities that exist in society without racially identifying particular individuals. Given the current Justices' views regarding race, this strategic insight could prove vitally important for legal advocates who wish to have the Supreme Court recognize the continuing role that race plays in society.

The thread unifying these three Parts is the aim of making the legal community—lawyers and judges, students and scholars—more conscious of judicial race-consciousness. Although this Essay aims to identify some previously underappreciated common ground, not everyone will agree with every recommendation regarding when courts should recognize race and when they should refrain from doing so. But this Essay does not seek universal agreement. Instead, it seeks to generate a nuanced discussion of

racial recognition in our legal culture—a discussion that has thus far been sorely lacking in this essential arena.

## I. PRACTICES

### A. *When*

In certain cases, courts possess virtually no discretion regarding whether to recognize a particular person's racial identity. This set of cases involving required racial determinations, however, accounts for an infinitesimal percentage of the standard judicial practices of recognizing race. Because judges *must* recognize race in a very limited number of cases (and many of those cases stretch back to a much earlier era), this means that in the overwhelming number of instances judges make an elective choice to recognize race. Legitimate prudential reasons may well motivate the decision to identify individuals by race. Judges delude themselves, however, if they believe that they generally exercise no choice regarding whether to recognize race. Indeed, even in cases that seem to cry out for racial recognition—cases that involve, say, claims of racial discrimination—it is typically *possible* to avoid racially designating individuals, even if it would be unwise to do so. Exploring the considerable discretion that judges confront exposes the wrongheaded notion that judges discuss race only when they must.

1. *Required?* — Historically, a prominent type of case that virtually mandates that courts recognize race has arisen when parties disagree about whether a race-specific statute either includes or excludes a particular individual.<sup>29</sup> During the 1920s, for example, the Supreme Court decided a pair of immigration cases that turned on whether two individuals could become naturalized U.S. citizens under a provision that applied in relevant part only to “white persons.”<sup>30</sup> In *Ozawa v. United States*, Takao Ozawa, a Japanese man, claimed that he should be permitted to naturalize because he was a “white person.”<sup>31</sup> The Court, however, disagreed and deemed Ozawa a nonwhite person and therefore ineligible to naturalize.<sup>32</sup> Rather than focusing on skin color, the Court found that the term “white person” could be understood roughly as amounting to “a person of the Caucasian race.”<sup>33</sup> One significant feature of *Ozawa*'s test was that it articulated what might be dubbed *a common law approach to race*. The Court in *Ozawa* did not “establish a sharp line of demarcation” for natu-

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29. For a thorough historical examination of cases where courts resolved contested issues of racial identity, see Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* 14 (2008) (exploring why “legal institutions invested so much time and effort in determining racial boundaries”).

30. Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318 (amending Act of July 14, 1870, ch. 254, 16 Stat. 254, 256).

31. 260 U.S. 178, 194–95 (1922).

32. *Id.* at 198 (determining “appellant . . . is not Caucasian and therefore belongs entirely outside the zone on the negative side”).

33. *Id.* (internal quotation marks omitted).

ralization, “but rather a zone of more or less debatable ground outside of which . . . are those clearly eligible, and outside of which . . . are those clearly ineligible for citizenship.”<sup>34</sup> The Court continued: “Individual cases falling within this zone must be determined as they arise from time to time by what this Court has called, in another connection . . . ‘the gradual process of judicial inclusion and exclusion.’”<sup>35</sup> There may well be hard racial cases, but *Ozawa*’s was not among them. “The appellant . . . is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side,” the Court concluded.<sup>36</sup>

Just three months after deciding *Ozawa*, the Court availed itself of the common law approach to race when it weighed whether Bhagat Singh Thind, “a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India,” qualified as a “white person” for purposes of the naturalization statute.<sup>37</sup> In *United States v. Thind*, the Court partially retreated from equating whiteness with the Caucasian race: “What we now hold is that the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood.”<sup>38</sup> And Thind, the Court reasoned, was popularly understood to be a nonwhite person.<sup>39</sup>

As should by now be evident, it would have been extremely difficult for the Court to avoid recognizing race in either *Ozawa* or *Thind*. Both cases boiled down to the fundamental question of whether the men qualified as “white.” But even when recognizing race seems mandatory, the Court has sometimes managed to resist the mandate.

Another pair of Supreme Court cases, decided exactly one hundred years apart, vividly demonstrate this significant discretionary element. In *United States v. Perryman*, the Court in 1879 was charged with resolving the seemingly straightforward question of whether “a negro” was in fact “a white person.”<sup>40</sup> Although the Court ultimately answered in the negative, *Perryman*’s delicate statutory context imbued the question with substantially greater difficulty than this unadorned setup suggests. The events giving rise to the case occurred in December 1874, when “Henry Carter, a negro, and not an Indian,” stole twenty-three head of cattle “from the claimant, a friendly Creek Indian.”<sup>41</sup> Carter was convicted and sentenced to pay the claimant twice the value of the stolen cattle.<sup>42</sup> Because Carter

34. *Id.*

35. *Id.* (quoting *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877)).

36. *Id.*

37. *United States v. Thind*, 261 U.S. 204, 206 (1923) (internal quotation marks omitted).

38. *Id.* at 214–15.

39. *Id.* at 215 (noting racial differences in appearance would be apparent, even in subsequent generations).

40. 100 U.S. 235, 236 (1879).

41. *Id.* at 235–36.

42. *Id.*

lacked the money to satisfy the judgment, however, the claimant filed a lawsuit seeking to recover directly from the United States.<sup>43</sup> Availing himself of provisions from the Nonintercourse Act of 1834, the claimant—a “friendly Indian” whose property had been stolen “within the Indian country” by a non-Indian, who was “unable to pay a sum”—contended that “whatever such payment . . . [fell] short . . . [should] be paid out of the treasury of the United States.”<sup>44</sup> The United States contested neither the claimant’s friendliness nor his Indianness. But the government nevertheless insisted that it should not be held liable for Carter’s theft because the statute applied to acts committed only by a “white person,” a term of art with a meaning distinct from “not an Indian.”<sup>45</sup>

The Court, in an opinion by Chief Justice Waite, endorsed this rationale, concluding that the claimant could not recover because Carter was black.<sup>46</sup> “The term ‘white person,’ in the Revised Statutes, must be given the same meaning it had in the original act of 1834,” wrote Chief Justice Waite.<sup>47</sup> The Civil War and the ensuing Reconstruction Amendments had elevated blacks to citizenship, Chief Justice Waite allowed. But those subsequent events did nothing to alter the terms of the relevant statute:

While the negro, under the operation of the constitutional amendments, has been endowed with certain civil and political rights which he did not have in 1834, he is no more, in fact, a white person now than he was then. He is a citizen of the United States, and free. No State can abridge his privileges and immunities as a citizen, or deny him the equal protection of the laws; but his race and color are the same, and he is no more included now within the descriptive term of a white person, than he always has been.<sup>48</sup>

Comparing the statutory language at issue with earlier statutes, Chief Justice Waite suggested that Congress in the 1830s had deliberately invoked the term “white person.”<sup>49</sup> By substituting “white person” for the broader terminology that had previously been used (“any citizen or other person residing within the United States”) in this particular statute, *Perryman* reasoned: “[W]e cannot but think that Congress meant just what the language used conveys to the popular mind.”<sup>50</sup> Offering a brief history lesson, Chief Justice Waite contended that the United States would have had good reason to avail itself of race-specific language inten-

43. *Id.* The statute provided in relevant part: “[I]f such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States.” Nonintercourse Act of 1834, ch. 161, § 16, 4 Stat. 729, 731 (codified as amended at 18 U.S.C. § 1160 (2006)).

44. Nonintercourse Act of 1834, § 16, 4 Stat. at 731.

45. *Perryman*, 100 U.S. at 237.

46. *Id.* at 236, 238.

47. *Id.* at 236.

48. *Id.*

49. *Id.* at 237–38.

50. *Id.* at 238.

tionally. “The Cherokee nation, which had given the State of Georgia so much trouble, was about to remove to its new home west of the Mississippi,” Waite noted quaintly.<sup>51</sup> “It was . . . thought if the United States made themselves liable only for . . . depredations . . . committed by the whites, these and other Indians would be less likely to tolerate fugitive blacks in their country. Hence, as a means of preventing the escape of slaves, the change in the law was made.”<sup>52</sup> Slavery had been extinguished, Chief Justice Waite conceded, but the statutory language endured: “As the right is statutory, the claimant cannot recover unless he brings himself within the terms of the statute. That he has not done.”<sup>53</sup> Thus, in *Perryman* the statutory regime seemed to require the Court to render a racial determination—in so doing, it took care to recognize Carter as a black person, which is to say, not a white person.

In 1979, one century after deciding *Perryman*, the Court took a decidedly different path regarding racial recognition when faced with an extremely similar race-specific provision in *Wilson v. Omaha Indian Tribe*.<sup>54</sup> *Wilson* involved a dispute over a tract of land between Omaha Indians, on one side, and several entities (nine individuals, two corporations, and the State of Iowa), on the other side.<sup>55</sup> The statute in question, which also stemmed from the Nonintercourse Act, provided that in trials regarding property “in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.”<sup>56</sup> *Wilson* concluded that “white person” applied to the two corporations,<sup>57</sup> but did not apply to Iowa because a sovereign state is not a person.<sup>58</sup> The Court refused, however, to determine expressly whether the nine individuals were

51. *Id.*

52. *Id.*

53. *Id.*

54. 442 U.S. 653 (1979).

55. *Id.* at 679 (Blackmun, J., concurring).

56. 25 U.S.C. § 194 (1976).

57. *Wilson*, 442 U.S. at 666–67. (“The word ‘person’ . . . is normally construed to include ‘corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.’” (quoting 1 U.S.C. § 1 (1976))). The Court simply ignored the racial modifier, and instead noted that corporations were persons within the statute’s meaning. But *Wilson*’s conclusion that the provision applied to the two corporations may caution somewhat against Professor Brooks’s broad claim that the Supreme Court has uniformly denied that corporations possess racial identity. See Brooks, *supra* note 25, at 2073 (“The U.S. Supreme Court has only twice addressed the possibility of corporate racial identity, denying it in both instances.”). Professor Brooks’s generally illuminating and thorough article, however, does not mention *Wilson*. In the context of 25 U.S.C. § 194, at least, the Court seems to have concluded that all non-Indian corporations are “white.” See *Wilson*, 442 U.S. at 667 & n.17 (“It stands to reason that . . . Congress was fully aware that [the provision] would be interpreted to cover artificial entities as well as individuals.”).

58. *Wilson*, 442 U.S. at 667 (“[I]n common usage, the term “person” does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to

“white,” even though it found that they were covered by the terms of the statute.<sup>59</sup> Instead, *Wilson* sidestepped *Perryman*’s racial recognition with reasoning that bordered on ipse dixit,<sup>60</sup> then simply asserted that “[w]hether *Perryman* would be followed today is a question we need not decide.”<sup>61</sup>

The Court declined to recognize the race of individuals in *Wilson*, even though Justice Blackmun wrote a concurring opinion suggesting that they were required to do so.<sup>62</sup> Given that no evidence existed in the record regarding the individuals’ race and that the burden for proving the statute’s factual predicate rested with the tribe, Justice Blackmun reasoned that the Court could not simply assume that the individuals were Caucasian.<sup>63</sup> Instead, Justice Blackmun emphasized, the Court must have assumed that “white person” within the statute “refers, not to a Caucasian, but to a ‘non-Indian’ individual. On this assumption, the race of the individual petitioners (so long as they are not Indians) would be irrelevant in determining [the statute’s] applicability.”<sup>64</sup> Justice Blackmun noted that this assumption placed *Wilson* in sharp tension with *Perryman*. In his view, that tension meant that *Perryman* should be jettisoned, because construing the statute “as applicable to disputes between Indians and Caucasians, but not to disputes between Indians and black or oriental individuals, would create an irrational racial classification highly questionable under the Fifth Amendment’s equal protection guarantee.”<sup>65</sup> Of course, the majority disagreed—demonstrating that the Court can render seemingly mandatory racial recognition optional if it so desires.

2. *Choice*. — As the *Perryman-Wilson* split exquisitely highlights, it is important to understand that today’s courts are typically not *required* to recognize the race of particular individuals. Cases involving racially specific statutes are overwhelmingly a thing of the past. Immigration law, for instance, has long since abandoned racial limitations upon naturaliza-

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exclude it.” (alterations in original) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941))).

59. *Id.* at 669 (“[Section] 194 contemplates the non-Indian’s shouldering the burden of persuasion.”).

60. *Id.* at 666 n.16 (rejecting comparison to *Perryman* because that “case dealt with another provision of the 1834 Nonintercourse Act, § 16, and there were distinct grounds in the legislative history indicating that the term ‘white person’ as used in § 16 did not include a Negro”).

61. *Id.*

62. *Id.* at 679–80 (Blackmun, J., concurring) (arguing majority must make explicit which assumption it is using to apply § 194 to private petitioners).

63. *Id.* at 680.

64. *Id.*

65. *Id.* at 680–81.

tion.<sup>66</sup> Decisions involving the 1834 Nonintercourse Act's race-specific language have never been legion.<sup>67</sup>

When judges recognize race in judicial decisions today, it is usually because they have chosen to do so.<sup>68</sup> That statement applies even to cases regarding claims of racial discrimination under the Fourteenth Amendment's Equal Protection Clause or Title VII of the 1964 Civil Rights Act. It has been clear since at least *Strauder v. West Virginia* that the Fourteenth Amendment provides protection to people of all different races—including whites.<sup>69</sup> Similarly, there has been no question since Justice Thurgood Marshall's opinion in *McDonald v. Santa Fe Trail Transportation Co.* in 1976 that Title VII protects whites and nonwhites alike.<sup>70</sup> Thus, rather than disclosing that, say, a *black person* has filed a lawsuit alleging racial discrimination against his *white employer*, a court could instead elect to note that an employee has filed a racial discrimination suit against his employer, who is of a different race.<sup>71</sup>

This construction of a racial discrimination claim—a construction that seeks to avoid racial recognition—is not as fanciful as one might initially suspect. Five years ago, the Court issued a per curiam opinion in *Los Angeles County v. Rettele* that began in a manner that seemed designed to resist racial recognition. The Court's opinion opened: "Deputies of the Los Angeles County Sheriff's Department obtained a valid warrant to search a house, but they were unaware that the suspects being sought had moved out three months earlier. When the deputies searched the house, they found in a bedroom two residents *who were of a different race than the suspects*."<sup>72</sup> After observing that the couple's race did not match the suspects' race on the warrant, the police nevertheless ordered the couple out of bed.<sup>73</sup> Complying with this order proved embarrassing because the couple had been sleeping in the nude.<sup>74</sup> The couple filed a lawsuit claim-

66. See Adam B. Cox & Eric A. Posner, The Second-Order Structure of Immigration Law, 59 Stan. L. Rev. 809, 817 (2007) (noting racial restrictions on naturalization were not eliminated until after World War II).

67. See, e.g., *Wilson*, 442 U.S. at 658 (describing 25 U.S.C. § 194 (1976) as "a 145-year-old, but seldom used, statute").

68. Appellate courts do not, of course, have an unlimited ability to recognize race. The record typically reflects the race of a party or other individual before appellate courts opt to do so.

69. 100 U.S. 303, 308 (1879) (arguing that prohibition on entire race serving on juries would be unconstitutional if applied to whites).

70. 427 U.S. 273, 286–87 (1976).

71. I do not suggest, of course, that people cannot racially discriminate against members of their own race, nor do I suggest that such treatment is beyond law's reach. For an exploration of these issues, see generally Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 Duke L.J. 1487 (2000) (discussing discrimination based on color as opposed to race and describing law's role in countering such discrimination).

72. *Los Angeles County v. Rettele*, 550 U.S. 609, 609–10 (2007) (per curiam) (emphasis added).

73. *Id.* at 610.

74. *Id.*

ing that the order violated their Fourth Amendment right against unreasonable searches and seizures.<sup>75</sup> *Rettele* then summarized the holdings below, seeming to take care to avoid racial recognition:

The District Court granted summary judgment to all named defendants. The Court of Appeals . . . conclud[ed] both that the deputies violated the Fourth Amendment and that they were not entitled to qualified immunity because a reasonable deputy would have stopped the search upon discovering that respondents *were of a different race than the suspects* and because a reasonable deputy would not have ordered respondents from their bed.<sup>76</sup>

This factual recitation appears deliberately crafted to avoid recognizing race. It would have been more straightforward for the Court to communicate *Rettele's* essential facts roughly as follows: Though police officers obtained a valid warrant to search a house that they believed to be occupied by black residents, the officers encountered white occupants when they conducted the search. *Rettele* itself ultimately retreated to the more familiar terrain of racial recognition.<sup>77</sup> It is important to realize, however, both that it was not required to do so and that other terrain existed.

Avoiding racial recognition may well have much to recommend against it. As *Rettele's* opening illustrates, avoiding racial recognition can quickly grow cumbersome. The practice would grow more cumbersome still if a legal dispute involved individuals from several different races, rather than only two races, as was the case in *Rettele*. Many judges, moreover, could plausibly conclude that knowing the relevant races in *Rettele* paints a vibrant racial picture, and that the public should know that it was white people—not racial minorities—who claimed that the officers violated their rights.<sup>78</sup> But these are prudential reasons for recognizing particular racial identities, not reasons that mandate racial recognition. To

75. *Id.*

76. *Id.* (emphasis added).

77. See, e.g., *id.* at 611 (“All three . . . are Caucasians.”).

78. Some observers, for instance, might view the claim in *Rettele* as being predicated upon a perceived entitlement to avoid unwanted encounters with the police. The Supreme Court, for its part, was unimpressed by the court of appeals’ conclusion that “[a]fter taking one look at [respondents], the deputies should have realized that [respondents] were not the subjects of the search warrant and did not pose a threat to the deputies’ safety.” *Id.* at 613 (alterations in original) (quoting *Rettele v. Los Angeles County*, 186 F. App’x 765, 766 (9th Cir. 2006)). In a remarkable passage striking a blow for racial equality, the Court retorted:

We need not pause long in rejecting this unsound proposition. When the deputies ordered respondents from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house. The presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well. As the deputies stated in their affidavits, it is not uncommon in our society for people of different races to live together. Just as people of different races live and work together, so too might they engage in joint criminal activity.

*Id.*



day, judges almost invariably choose when to recognize race rather than having that decision imposed upon them. The question becomes, then, whether judges are exercising their racial choices wisely.

### B. *Why*

This section explores why courts decide to recognize race in instances when doing so is not, as a formal matter, required. What information, precisely, are judges communicating that would be missing from the opinion if the racial recognition in question were omitted? Put simply: What work does recognizing race perform? In many instances, the answer to these questions is that racial recognition does precious little work, if any at all. In an important subset of cases, though, racial recognition seems to perform significant work. Dating back to the beginning of the twentieth century, this subset of cases can be usefully divided into two broad categories. First, the Court sometimes recognizes race to suggest that racial considerations reveal the nature of a problem that demands judicial intervention. In the second category, conversely, the Court sometimes recognizes race in order to suggest that racial considerations reveal that no problem demanding judicial intervention exists. It should be stated at the outset that this inquiry requires at least some speculation because, as will be discussed and critiqued below,<sup>79</sup> judges far too infrequently explain their racial invocations.

1. *Problem.* — The archetypal set of cases in which judges recognized race to alert readers to a problem that demanded judicial intervention arose in a series of criminal cases that emerged from the Jim Crow South.<sup>80</sup> It is surely not by happenstance that in *Powell v. Alabama*—the first of the Scottsboro Boys cases to make its way to the Supreme Court—Justice Sutherland addressed the highly-charged racial background in the case’s opening sentence.<sup>81</sup> “The petitioners,” Justice Sutherland began, “hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls.”<sup>82</sup> To describe these facts as occurring in 1930s Alabama was to describe the need for judicial intervention.<sup>83</sup> In *Brown v. Mississippi*, a 1936 case involving a forced confession, Chief Justice Hughes’s opinion for the Court took a more subtle tack than the one adopted in *Powell*.<sup>84</sup> But the opinion left no doubt that the Court viewed itself as correcting a racial outrage.

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79. See *infra* Part II.A (discussing asymmetrical invocation of race in opinions).

80. For an argument that racial considerations animated the Court’s intervention in criminal procedure, see Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 49 (2000).

81. 287 U.S. 45, 49 (1932) (identifying petitioners as black in opening sentence); see also *Patterson v. Alabama*, 294 U.S. 600, 601 (1935) (same); *Norris v. Alabama*, 294 U.S. 587, 588 (1935) (same).

82. *Powell*, 287 U.S. at 49.

83. See generally James Goodman, *Stories of Scottsboro* (1995) (analyzing various accounts of Scottsboro case and placing them in context of 1930s Alabama).

84. *Brown v. Mississippi*, 297 U.S. 278 (1936).

Rather than recognizing the criminal defendants' race directly, Chief Justice Hughes did so indirectly by quoting at length a dissenting opinion from the Mississippi Supreme Court: "This deputy was put on the stand . . . and admitted the whippings. It is interesting to note that in his testimony . . . and in response to the inquiry as to how severely he was whipped, the deputy stated, "Not too much for a negro . . . ."'<sup>85</sup> Highlighting the racial elements of these cases may have been designed to explain why the Court was intervening in matters that would have at the time traditionally fallen within the purview of state courts.<sup>86</sup>

The Court continued to recognize race in cases involving criminal defendants who were racial minorities well beyond the 1930s.<sup>87</sup> Indeed, by the time that Chief Justice Earl Warren drafted *Miranda v. Arizona* in 1966,<sup>88</sup> the quest for criminal justice was, in the minds of many, inextricably connected to the quest for racial justice.<sup>89</sup> It is not especially surprising, then, that this connection appears within the *Miranda* opinion itself. Chief Justice Warren's opinion took pains to observe the race of the criminal defendants in two of the four consolidated cases that the Court considered in *Miranda*, intimating that being a racial minority could add to the coercive nature of police interrogation.<sup>90</sup> "In each of the [four] cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures," Warren wrote.<sup>91</sup> "The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defen-

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85. *Id.* at 284 (emphasis added) (quoting *Brown v. State*, 161 So. 465, 471 (Miss. 1935) (Griffith, J., dissenting)).

86. See Klarman, *supra* note 80, at 53 (describing Supreme Court's expanded interpretation of Due Process Clause in state criminal cases where it had previously been narrowly construed).

87. See, e.g., *Fikes v. Alabama*, 352 U.S. 191, 193 (1957) ("It is, of course, highly material to the question before this Court to ascertain petitioner's character and background. He is a Negro, 27 years old in 1953, who started school at age eight and left at 16 while still in the third grade.").

88. 384 U.S. 436 (1966).

89. See Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 *Sup. Ct. Rev.* 59, 85 ("Perhaps the clearest evidence of the gravitational pull of race on Warren Court constitutional doctrine was in the areas of criminal law and procedure."); Louis Michael Seidman, *Brown and Miranda*, 80 *Calif. L. Rev.* 673, 678 (1992) ("Both supporters and opponents of *Miranda* understood that, in large measure, the crime problem *was* the race problem . . ."). For an argument contending that judicial concern about police harassment of gay men may have also played a role in shaping modern criminal procedure, see David Alan Sklansky, "One Train May Hide Another": *Katz*, *Stonewall*, and the Secret Subtext of Criminal Procedure, 41 *U.C. Davis L. Rev.* 875, 896-931 (2008).

90. *Miranda*, 384 U.S. at 457.

91. *Id.*

dant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade.”<sup>92</sup>

Notably, racial considerations appear to have motivated Chief Justice Warren’s decision in *Miranda* even more than the opinion’s final text reveals. An early draft of the opinion underscored the often racialized element of harsh interrogation techniques:

“In a series of cases decided by this Court long after these studies, Negro defendants were subjected to physical brutality—beatings, hangings, whipping—employed to extort confessions. In 1947, the President’s Committee on Civil Rights probed further into police violence upon minority groups. The files of the Justice Department, in the words of the Committee, abounded ‘with evidence of illegal official action in southern states.’”<sup>93</sup>

Warren sent Justice Brennan the draft before circulating it to the entire Court, and Brennan implored him to remove the above passage: “I wonder if it is appropriate in this context to turn police brutality into a racial problem. If anything characterizes the group this opinion concerns it is poverty more than race.”<sup>94</sup> Warren removed the offending passage from the final text. The racial recognition of the parties in *Miranda*, of course, remained.

In addition to recognizing the race of parties, the Court has also racially recognized decisionmakers to signal that it believes all is not well on the racial front. Although this tradition arguably stretches back to at least 1880,<sup>95</sup> the most well-known instance occurred in the Court’s 1989 decision in *City of Richmond v. J.A. Croson Co.*<sup>96</sup> In *Croson*, the Court encountered a program enacted by the Richmond City Council that was designed to steer a larger percentage of city construction contracts to companies owned by racial minorities.<sup>97</sup> Richmond closely modeled its program on a federally enacted program from the 1970s, which the Court

92. *Id.* Relatedly, Warren also recognized racial salience in observing that “custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.” *Id.* at 455. In the footnote accompanying this point, moreover, Warren noted the potential connection between interrogation methods and false confessions: “The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed.” *Id.* at 455 n.24.

93. Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* 591 (1983) (quoting early draft of Chief Justice Warren’s opinion).

94. *Id.* (quoting Memorandum from Justice William J. Brennan, Jr. to Chief Justice Earl Warren (May 11, 1966)).

95. See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (contending “[i]f in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service” such statute would violate equal protection).

96. 488 U.S. 469 (1989).

97. *Id.* at 477–79 (describing Richmond’s Minority Business Utilization Plan).

declared constitutional in *Fullilove v. Klutznick*.<sup>98</sup> In determining whether to apply strict scrutiny or a less exacting standard, *Croson* noted: “If one aspect of the judiciary’s role under the Equal Protection Clause is to protect ‘discrete and insular minorities’ from majoritarian prejudice or indifference . . . some maintain that these concerns are not implicated when the ‘white majority’ places burdens upon itself.”<sup>99</sup> But this justification for viewing affirmative action with relaxed scrutiny, an idea advanced by Professor John Hart Ely, had no bearing on Richmond’s program. As *Croson* noted, no white majority had disadvantaged itself here:

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.<sup>100</sup>

In support of this proposition, *Croson* again drew on Professor Ely’s scholarship, quoting him as arguing: “‘Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature.’”<sup>101</sup> By prominently recognizing Richmond’s racial composition and that of its city council, *Croson* undercut the program by raising the specter of what is sometimes derisively referred to as “self-dealing.”<sup>102</sup>

98. 448 U.S. 448, 492 (1980) (upholding “minority business enterprise” provision of Public Works Employment Act of 1977, Pub. L. No. 95-28, tit. 1, § 103, 91 Stat. 116, 116–17 (codified at 42 U.S.C. § 6705(f)(2) (2006))).

99. *Id.* at 495 (quoting *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938); John Hart Ely, *Democracy and Distrust* 170 (1980)).

100. *Id.* at 495–96.

101. *Id.* at 496 (quoting John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 *U. Chi. L. Rev.* 723, 739 n.58 (1974)).

102. See John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 *Stan. L. Rev.* 607, 621 (1998) (“A central theme of our Constitution and critical function of our judiciary is the *preclusion*, not the privileging, of self-dealing maneuvers on the part of incumbents seeking to perpetuate their incumbency or otherwise promote the fortunes of their party.” (footnote omitted)). Justice Alito’s concurring opinion in *Ricci* is, not insignificantly, driven by New Haven’s racial atmospherics in general and concerns about self-dealing in particular. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2684–88 (2009) (Alito, J., concurring). Given that concerns about self-dealing motivated at least some justices in the *Ricci* majority, this may help to explain Justice Kennedy’s decision in the case to draw *Ricci*’s governing standard directly from *Croson*. See *id.* at 2675 (majority opinion) (“The Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary.” (quoting *Croson*, 488 U.S. at 500)).

During oral argument regarding Louisville, Kentucky’s school integration program in 2006, Justice Scalia seemed to suggest that racial motives—either benign or malignant—could be discerned from knowing the race of decisionmakers. Solicitor General Paul Clement suggested that, even allowing that the school board’s goal of achieving greater integration was “benign,” its motivation did not mean that the Court should scrutinize the

2. *No Problem.* — Judges have also recognized race to suggest that no racial problem exists that requires judicial intervention. In the criminal context, Justice Robert Jackson deployed racial recognition in a case presenting facts that were, in some respects, a mirror image of those involving the Scottsboro Boys. In *Ashcraft v. Tennessee*, the Court in 1944 found that a confession from a murder suspect had been coerced and, accordingly, granted him relief.<sup>103</sup> But unlike many of the criminal cases arising from southern states that drew the Court's attention during this era, the criminal defendant claiming that he had confessed involuntarily was not a marginalized black person. And for one Justice, at least, that was no minor detail. "This is not the case of an ignorant and unrepresented defendant who has been the victim of prejudice," Justice Jackson noted in dissent.<sup>104</sup> "Ashcraft was a white man of good reputation, good position, and substantial property."<sup>105</sup>

Two decades before *Ashcraft*, the Court in 1927 issued its notorious decision in *Buck v. Bell*, which validated state authority to force sterilizations upon women who were in some way deemed deficient.<sup>106</sup> In *Buck's* most famous line, Justice Holmes's opinion for the Court provided the ready-made aphorism: "Three generations of imbeciles are enough."<sup>107</sup> But before arriving at that rhetorical climax, Holmes set the stage in part by racially recognizing the woman Virginia sought to sterilize. "Carrie Buck is a feeble minded white woman who was committed to the State Colony above mentioned in due form," Justice Holmes wrote.<sup>108</sup> "She is the daughter of a feeble minded woman in the same institution, and the mother of an illegitimate feeble minded child."<sup>109</sup>

Justice Holmes likely mentioned Buck's race for two closely related but conceptually distinct reasons, both of which supported the notion that the racial dynamics undergirding this case did not cry out for judicial intervention. First, racial recognition allowed Justice Holmes to identify Buck's sterilization as part of the flourishing eugenics movement's desire

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program less than strictly. Oral Argument at 25:38, *Meredith v. Jefferson Cnty. Bd. of Educ.*, 548 U.S. 938 (2006) (No. 05-915), available at [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_915/argument](http://www.oyez.org/cases/2000-2009/2006/2006_05_915/argument) (on file with the *Columbia Law Review*). Justice Scalia was not, however, prepared to accept that the school board's plan stemmed from good intentions: "Do we know the race of the school board here? I mean, that was not—how do we know these are benign school boards? Is it stipulated that they are benign school boards?" *Id.* at 26:03.

103. 322 U.S. 143, 155–56 (1944).

104. *Id.* at 173 (Jackson, J., dissenting).

105. *Id.*

106. 274 U.S. 200, 207 (1927) (upholding Virginia statute providing for sterilization of inmates deemed deficient in order to promote welfare of patient and society).

107. *Id.* For an argument attacking the veracity of Holmes's factual predicate, see generally Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (2008) (discussing history of eugenics and criticizing decision in *Buck v. Bell*).

108. *Buck*, 274 U.S. at 205.

109. *Id.*

to improve the white race scientifically by preventing whites deemed undesirable from reproducing.<sup>110</sup> *Buck* came down just one year after the publication of the popular jeremiad, *Our Testing Time: Will the White Race Win Through?*,<sup>111</sup> and just two years after the fictional character Tom Buchanan expressed deep apprehension regarding the future of the white race in F. Scott Fitzgerald's *The Great Gatsby*.<sup>112</sup> It seems readily predictable, then, that notes on *Buck*'s "family history" prepared by Dr. Albert Priddy—the director of her institution and a leading eugenicist of his day—portrayed *Buck* as a discredit to her race. "These people belong to the shiftless, ignorant, and worthless class of antisocial whites of the South," Priddy wrote.<sup>113</sup>

Second, racial recognition allowed Holmes to make clear that *Buck* was not a racial minority, an ugly hypothetical that may have cast the sterilization program in a considerably less favorable light. Indeed, at oral argument, *Buck*'s counsel raised the racial issue by noting "new classes . . . even races may be brought within the scope of such regulation."<sup>114</sup> As early as 1913, the New Jersey Supreme Court in *Smith v. Board of Examiners of Feeble-Minded* invalidated a sterilization statute in part out of the concern that "the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the Legislature, be a distinct benefit to society."<sup>115</sup> Erasing any ambiguity regarding the identity of who these unnamed other "persons in the community" might be, *Smith* stated: "Racial differences, for instance, might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue."<sup>116</sup>

110. See Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 *Iowa L. Rev.* 833, 843–44 (1986) ("During the early twentieth century, many shared Holmes' belief that science could breed a better race. The science of improving 'the race' by breeding was the science of eugenics." (footnote omitted)).

111. See generally J.H. Curle, *Our Testing Time: Will the White Race Win Through?* (1926) (contending that white race must avoid degeneration by preventing reproduction of unfit members of race).

112. F. Scott Fitzgerald, *The Great Gatsby* 12–13 (Scribner 2004) (1925) (quoting Buchanan extolling virtues of book entitled *The Rise of the Colored Empires*).

113. Lombardo, *supra* note 107, at 134 (quoting Deposition of Harry Laughlin, Transcript of Record at 41, *Buck*, 274 U.S. 200 (No. 292)).

114. Victoria F. Nourse, In *Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics* 29, 185 n.37 (2008) (quoting *Buck*, 274 U.S. at 202).

115. 88 A. 963, 966 (N.J. 1913).

116. *Id.* Professor Nourse has suggested that this roundabout language may refer to the South. Nourse, *supra* note 114, at 29 (interpreting court's language as "presumably" referring to South). History would prove the New Jersey Supreme Court prescient regarding sterilization's impact on blacks. See *id.* at 158 ("In the 1970s, for example, one federal court found that over 100,000 people had been sterilized under federal health and welfare programs, and one study found that over half of them were black." (citations omitted)).

The Court has also appeared to use racial recognition as a method for ascertaining (or perhaps more aptly, asserting) black views more broadly. One prominent instance occurred in *Georgia v. Ashcroft*, when the Court rebuffed a challenge to the state's redistricting plan filed under section 5 of the Voting Rights Act in 2003.<sup>117</sup> In vacating the district court's finding that Georgia's reconfigured boundaries were retrogressive to the electoral power of racial minorities, the Court appeared to place considerable emphasis upon the fact that black politicians supported the new plan. For example, the Court observed that, when the Georgia Senate adopted the plan by a narrow majority in 2001, "[t]en of the eleven black Senators voted for the plan."<sup>118</sup> Additionally, the Court recognized the race of individual black politicians who testified in support of the plan. In identifying Senator Robert Brown, who led the redistricting effort, the Court noted: "Senator Brown, who is black, chaired the subcommittee that developed the Senate plan at issue here."<sup>119</sup> The Court recognized race with slightly more subtlety—but perhaps greater imprecision—in identifying the Senate's majority leader, Charles Walker: "Senator Walker testified that it was important to attempt to maintain a Democratic majority in the Senate because 'we [African-Americans] have a better chance to participate in the political process under the Democratic majority than we would have under a Republican majority.'"<sup>120</sup> The Court's insertion of "[African-Americans]" may have introduced imprecision because the "we" in that sentence could also conceivably mean "Democrats," "black Democrats," "Democratic politicians," or even "black Democratic politicians."

It merits briefly noting here that *Georgia v. Ashcroft* did not observe the racial identity of every black decisionmaker who played a role in the case. Most notably, the Court declined to observe the racial composition of the special three-judge district court panel whose decision it reversed.<sup>121</sup> That panel, drawn from judges serving on Washington, D.C.'s federal bench, was composed of Judge Harry Edwards, Judge Emmet

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117. 539 U.S. 461, 485–91 (2003) (rejecting district court's application of law); see also Pamela S. Karlan, *Georgia v. Ashcroft* and the Retrogression of Retrogression, 3 Election L.J. 21, 21 (2004) (discussing how case departed from prior section 5 analyses).

118. *Ashcroft*, 539 U.S. at 471.

119. *Id.* at 469.

120. *Id.* at 469–70 (alteration in original) (quoting plaintiffs' exhibits). The Court also seems to have relied upon readers' racial (and historical) awareness of another supporter of Georgia's redistricting plan, U.S. Congressman John Lewis. Lewis was, of course, one of the genuine heroes of the civil rights movement. See, e.g., Taylor Branch, *Parting the Waters: America in the King Years 1945–1964*, at 379–80 (1988) (describing Lewis's involvement in civil rights sit-ins). But *Ashcroft* initially identified him merely as "Lewis, who represents the Atlanta area." *Ashcroft*, 539 U.S. at 472. Toward the opinion's crescendo, however, the Court does have Lewis speak on behalf of black voters and portrays its decision as advancing Lewis's conception of the civil rights movement's goal of "creating the beloved community." *Id.* at 489–91.

121. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002), vacated, 539 U.S. 461.

Sullivan, and Judge Louis Oberdorfer.<sup>122</sup> The Court notes that Judge Oberdorfer alone agreed with the Supreme Court's ultimate resolution of the case, as Judge Edwards and Judge Sullivan both found that Georgia's plan violated section 5.<sup>123</sup> It does not mention, however, that Judge Oberdorfer is white and that Judge Edwards and Judge Sullivan are black.<sup>124</sup>

It would, of course, be highly unusual for the Supreme Court to note the racial identity of the judges who issued the decision below. People in many different quarters would regard it as deeply inappropriate for a judicial body even to intimate that a judge's opinion was shaped by his or her race. Yet, making the same intimation repeatedly regarding politicians' views—as occurred in *Georgia v. Ashcroft*—succeeded in raising precious few eyebrows. The contours of racial recognition may not necessarily be coherent, but they are familiar.

## II. PITFALLS

This Part identifies two prominent types of racial recognition that courts should abandon. First, courts should generally avoid issuing opinions that recognize race asymmetrically—both within the confines of a particular opinion (micro-asymmetry) and across opinions of the same ilk (macro-asymmetry). Second, courts should abandon writing opinions that recognize race gratuitously. Both the micro-asymmetry and gratuitous types of racial recognition should be relatively easy for judges to avoid. If courts internalized norms favoring the elimination of such references from opinions, the judicial conventions of racial recognition would be dramatically improved. For its part, macro-symmetry is considerably more difficult to obtain, and may involve at least one serious drawback. Nevertheless, the process of striving toward the macro-symmetrical goal would likely yield beneficial results—even if that goal remains unobtainable.

### A. Asymmetry

1. *Micro-asymmetry*. — A particularly promising method of improving judicial uses of race—one that courts could adopt with relative ease—is to

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122. *Id.* at 29.

123. *Ashcroft*, 539 U.S. at 474–75.

124. See Diversity on the Bench, Fed. Judicial Ctr., <http://www.fjc.gov/servlet/nDsearch?race=African+American> (on file with the *Columbia Law Review*) (last visited Oct. 20, 2011) (listing Judges Edwards and Sullivan as African American). At least one of the black judges who served on the special three-judge panel may not have minded if the Supreme Court had recognized his race for the idea that it provides him with a racialized judicial perspective. See Harry T. Edwards, Race and the Judiciary, 20 *Yale L. & Pol'y Rev.* 325, 329 (2002) (“If I sometimes bring unique perspectives to judicial problems—perspectives that are mine in whole or in part because I am black—that is a good thing. . . . [J]udges’ different professional and life experiences have some bearing on how they confront various problems that come before them.”).



root out the practice of asymmetrical racial recognition within the confines of a single case. Too often courts consider similarly situated individuals and racially identify some, but not all, of those individuals. This shortcoming was, of course, a primary ill that plagued Justice Kennedy's racial recognition of Vincent Lewis in *Ricci*.<sup>125</sup> Such racial asymmetry results in two central defects. First, it provides an incomplete account of the underlying factual dispute. Second, in practice, racial asymmetry often naturalizes whiteness, treating nonwhite actors as deviating from the racial norm. When judges racially identify one person, they should seriously contemplate whether other, similarly situated individuals should also be racially identified. It will be the rare case, indeed, that actually calls for racial asymmetry. And if judges believe that they have such a rare case, they should explain why the case demands asymmetry.

Racial asymmetry has sometimes muted the important message that race-based prejudice against minorities offends both nonwhites and whites. Indeed, the Court missed an opportunity to send precisely that message in *Virginia v. Black*,<sup>126</sup> a 2003 First Amendment decision weighing a Virginia statute that made it a felony "for any person . . . , with the intent of intimidating any person or group . . . , to burn . . . a cross on the property of another, a highway or other public place."<sup>127</sup> The Court in *Black* heard consolidated cases arising from two separate cross-burning incidents. Ill-advisedly, though, *Black* treated the people that had been allegedly "intimidat[ed]" in those two incidents in racially distinct manners.<sup>128</sup>

Regarding the first incident, Justice O'Connor's opinion for the Court expressly recognized the race of the individual targeted for the cross burning. "On May, 2, 1998, respondents Richard Elliott and Jonathan O'Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee," Justice O'Connor wrote.<sup>129</sup> "Jubilee, an African-American, was Elliott's next-door neighbor in Virginia Beach, Virginia."<sup>130</sup> The three cross-burners were apparently spurred to action after Jubilee inquired with Elliott's mother about the sound of gunshots ringing out from the Elliott backyard.<sup>131</sup> As Jubilee pulled out of his driveway the morning after the cross burning, "he noticed the partially burned cross approximately 20 feet from his house" and became "'very nervous' because . . . 'a cross burned in your yard . . . tells you that it's just the first round.'"<sup>132</sup>

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125. See *supra* text accompanying notes 12–22 (describing effect of Justice Kennedy's decision to identify one witness's race while omitting mention of other witnesses' race).

126. 538 U.S. 343 (2003).

127. Va. Code Ann. § 18.2-423 (2009), invalidated by *Black*, 538 U.S. 343.

128. *Black*, 538 U.S. at 367–68.

129. *Id.* at 350.

130. *Id.*

131. *Id.*

132. *Id.* (quoting joint appendix).

Slightly less than five months after the Virginia Beach incident, Barry Black led a Ku Klux Klan rally in Cana, Virginia that culminated in the burning of a cross. But in contrast to Justice O'Connor's treatment of Jubilee's racial identity, *Black* did not overtly designate the race of the person who was alleged to have been intimidated by the Cana cross burning. "Rebecca Sechrist, who was related to the owner of the property where the rally took place, 'sat and watched to see wha[t] [was] going on' from the lawn of her in-laws' house," Justice O'Connor wrote.<sup>133</sup> "She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself."<sup>134</sup> During the rally preceding the cross burning, Sechrist listened as speakers—in her words—"talked real bad about the blacks and the Mexicans," and heard one man say "'he would love to take a .30/.30 and just random[ly] shoot the blacks.'"<sup>135</sup> Sechrist testified at Black's trial that such talk made her feel "'very . . . scared'" and that seeing the cross burning caused her to feel "'awful'" and "'terrible.'"<sup>136</sup>

In *Black*, the Court held that states, without violating the First Amendment, "may ban cross burning carried out with the intent to intimidate."<sup>137</sup> *Black* would have been strengthened, however, had the Court made express what it left implied: whites, too, may find the conduct of white supremacists to be both offensive and intimidating. Even setting aside that the Ku Klux Klan has long despised an eclectic collection of racial and nonracial groups, the Klan burned crosses on the lawns of whites who were believed to support racial equality during the Civil Rights Movement.<sup>138</sup> Yet Justice Thomas's dissenting opinion in *Black* opened by coming perilously close to intimating that nonblacks simply cannot grasp the meaning of a burning cross. "In every culture, certain things acquire meaning well beyond what outsiders can comprehend," Justice Thomas began.<sup>139</sup> Although it is possible that Justice Thomas meant to suggest that geographic lines separate insiders from outsiders with respect to cross burning, the more plausible reading is that he had

133. *Id.* at 348 (quoting joint appendix).

134. *Id.*

135. *Id.* at 348–49 (quoting joint appendix).

136. *Id.* at 349 (quoting joint appendix).

137. *Id.* at 347. *Black* did, however, invalidate the Virginia statute at issue because it deemed unconstitutional the statute's provision that found cross burning served as prima facie evidence of intent to intimidate. *Id.* at 347–48.

138. See, e.g., Klan Active in Mobile: Burns Cross at Home of White Woman Backing Negro Pupil, *N.Y. Times*, Sept. 19, 1956, at 20 ("About 100 horn-blaring, shouting members of the Ku Klux Klan burned a ten-foot cross last night at the home of a white woman who is trying to get a Negro child admitted to a white public school.").

139. *Black*, 583 U.S. at 388 (Thomas, J., dissenting). Justice Thomas's opinion does not always demonstrate this overly circumscribed conception of who may feel threatened by cross burning. See *id.* at 391 ("But the perception that a burning cross is a threat and a precursor of worse things to come is not limited to blacks.").

racial lines in mind.<sup>140</sup> Had the Court noted Sechrist's race, it would have plainly belied the notion that whites lack racial standing to object to speech by white supremacists.<sup>141</sup> It may be no coincidence that the one justice on the Virginia Supreme Court who wrote an opinion that would have validated the statute noted that Sechrist was "a Caucasian female."<sup>142</sup> By racially recognizing Sechrist, that dissenting opinion also recognized that the commitment to racial justice extends to all races.

One might argue that, in noting that the Klan rally occurred on the property of Sechrist's in-laws, *Black* implicitly acknowledged Sechrist's whiteness. It is difficult to believe, this thinking would run, that the son of people willing to host a Klan rally would marry a nonwhite woman. But children often hold quite distinct worldviews from their parents. Apart from leaving some readers only to wonder about Sechrist's racial identity, moreover, the approach in *Black* has the unfortunate consequence of treating whiteness as the default.<sup>143</sup> Not only is there no apparent reason to avoid revealing Sechrist's race, affirmative good could come from noting that she was white.

*Black* thus provides an excellent illustration of why it would be mistaken to limit racial recognition to instances only where it appears required.<sup>144</sup> Treating race symmetrically in *Black*, of course, need not mean revealing Sechrist's race, but instead could result in concealing Jubilee's race.<sup>145</sup> Nothing in either the Virginia statute's text or in the Court's interpretation limited the statute's applicability to protecting people on racial grounds from intimidation. Accordingly, race could conceivably be removed from the equation altogether.

Removing race, however, would often deprive judicial opinions of vital context that illuminates the modern racial landscape. In *Black*, the reader would lose something important by not knowing that it was a black man whom Elliott and his accomplices sought to teach a lesson for overstepping what they perceived as the prevailing racial boundaries. But we

140. For an argument suggesting that Justice Thomas's race caused his colleagues to defer to his views on cross burning in *Black*, see Guy-Uriel Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 *Geo. L.J.* 575, 577 (2005).

141. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 *Harv. L. Rev.* 1745, 1788–1801 (1989) (arguing against legitimacy of racial standing in legal scholarship).

142. *Black v. Commonwealth*, 553 S.E.2d 738, 748 (Va. 2001) (Hassell, J., dissenting).

143. See Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 *N.C. L. Rev.* 635, 671 (2008) ("The norm of whiteness continues to permeate U.S. society.").

144. See Brooks, *supra* note 25, at 2092 (suggesting courts should racially identify "as minimally as possible").

145. Cf. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 *Harv. L. Rev.* 1388, 1436 (1988) (contending remedy for finding capital punishment violated Equal Protection Clause could conceivably require executing more people who claimed lives of black victims, rather than abolishing death penalty).

lose something, too, by not knowing with certainty that it is as a white person that Sechrist found racially-offensive speech intimidating.<sup>146</sup>

2. *Macro-asymmetry*. — Approaching race symmetrically is relatively easy to achieve within the confines of a single case. Assuming that the judge who drafts an opinion has internalized the value of racial symmetry and that no judge within the majority vehemently opposes the practice, it should not prove difficult to eliminate asymmetrical racial recognition within a lone opinion. At one level removed from the individual case, judges should seek to adopt a generally consistent framework for racial recognition across their opinions. Thus, if a judge recognizes race in a particular type of case, that judge should have a strong reason for adopting a different approach in subsequent opinions involving that particular type of case. If the judge does decide to take a different racial tack, that judge should at least consider explaining what motivated the altered approach.

Judges should also contemplate the problems attendant to an asymmetrical approach to race on the macro-level. Such an approach would mean abandoning the highly idiosyncratic and incoherent approach to race that has thus far dominated judicial opinions, and would mean considering whether there are some types of cases that require a consistent approach to racial recognition. This is not to say that courts should lock themselves into an approach going forward that they will adhere to forevermore even in the face of very different racial dynamics. The ossification of racial recognition is likely even less desirable than the current incoherence.<sup>147</sup>

A racially symmetrical approach on a macro-level might be particularly beneficial when courts confront decisionmakers who are responsible for implementing affirmative action programs. In *Croson*, as discussed above, the Court—relying upon Professor Ely’s scholarship—recognized the racial composition of Richmond, Virginia and its majority-black city council in invalidating the program designed to steer more business to minority-owned contracting companies.<sup>148</sup> This racial recognition of the decisionmaker in *Croson* marked a sharp departure from the Court’s standard operating procedure, both when it weighed the constitutionality of affirmative action programs pre-*Croson* and when it has weighed such programs post-*Croson*. Tellingly, the Court in *Fullilove*, which was decided

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146. Justices have previously recognized race in instances where doing so serves, in part, to reveal that whites can be fierce advocates in the cause for racial justice. In a 1961 case arising from an individual’s refusal to testify before the House Un-American Activities Committee, Justice Black—writing for Chief Justice Warren, Justice Douglas, and himself—began his dissenting opinion by noting: “The petitioner in this case . . . has for some time been at odds with strong sentiment favoring racial segregation in his home State of Kentucky. A white man himself, the petitioner has nonetheless spoken out strongly against that sentiment.” *Braden v. United States*, 365 U.S. 431, 438 (1961) (Black, J., dissenting).

147. For a discussion of the dangers of ossification, see *infra* Part III.A.2.

148. See *supra* text accompanying notes 96–102 (discussing *Croson* and Court’s reliance on Professor Ely’s discussion of laws enacted by majority-black legislatures).

some six years after Ely's article appeared, made no mention of Congress's racial composition—the decisionmaking body that instituted the affirmative action program.<sup>149</sup>

There may well be legitimate reasons for recognizing the decisionmakers' race in both *Fullilove* and *Croson*. Conversely, there may be legitimate reasons for omitting the race of decisionmakers in both cases.<sup>150</sup> But it seems awfully difficult to locate legitimacy in the decision to have such racial considerations act as a factor in one case but drop out of the analysis altogether in the other.<sup>151</sup> It is certainly possible, if not especially plausible, that the Court's decision in *Croson* first illuminated the significance of the decisionmaker's race in affirmative action cases. But if *Croson* taught this lesson in 1989, the Court promptly forgot it. Just one year after *Croson*, no express racial recognition of decisionmakers appeared in any of the Court's opinions regarding the affirmative action program at issue in *Metro Broadcasting, Inc. v. FCC*.<sup>152</sup> Nor did the Court address the race of the University of Michigan's decisionmakers when it examined two affirmative action programs in 2003.<sup>153</sup>

In the affirmative action context, identifying the racial composition of the decisionmaking body only when that body is made up of racial minorities is misguided. Doing so suggests that minority officials are particularly prone to issuing legislation that is not public-spirited, and that their acts must be inspected with additional rigor. Adopting an approach to affirmative action that eschewed such macro-asymmetry—which is the principle that Professor Ely actually articulated<sup>154</sup>—would defuse that dangerous suggestion.

149. *Fullilove v. Klutznick*, 448 U.S. 448, 453–54 (1980) (discussing legislative history of statute requiring “minority business enterprises” to receive ten percent of public works grants).

150. Writing a decade before *Croson*, Professor Van Alstyne registered a particularly allergic reaction to this mode of inquiry. See Van Alstyne, *supra* note 28, at 800–01 (“[S]urely it would be objected that it is the worst sort of racism to suppose that a plan inaugurated by a predominantly black elected body is more suspect than an identical plan inaugurated by a predominantly white one.”).

151. Cf. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 *Colum. L. Rev.* 1060, 1104 n.205 (1991) (“If the concern of the Court [in *Croson*] was the ability of minorities to dominate local governing units, it overestimated the power of black officials in a white economy and underestimated the power of minority blocs in Congress (*Fullilove* being a prime example).”).

152. 497 U.S. 547 (1990) (addressing FCC's “minority preference policies”).

153. See *Gratz v. Bollinger*, 539 U.S. 244, 253–57 (2003) (discussing development of undergraduate admissions guidelines); *Grutter v. Bollinger*, 539 U.S. 306, 312–16 (2003) (describing formation of law school admissions policy).

154. Not surprisingly, Professor Ely's article was principally dedicated to exploring instances where white decisionmakers enacted affirmative action programs to the detriment of other whites. See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 *U. Chi. L. Rev.* 723, 727 (1974) (contending “‘special scrutiny’ is not appropriate when White people have decided to favor Black people at the expense of White people”).

In stark contrast to the relative ease of implementing symmetrical racial recognition on a micro level, implementing it on the macro level raises significant problems. Apart from the rather obvious difficulties of coordination arising from the Court being a multimember body,<sup>155</sup> the difficulties associated with achieving a generally consistent approach to racial recognition are enhanced in light of personnel turnover. Complete consistency regarding racial recognition, then, is almost certainly unobtainable. Even if total consistency could be obtained, moreover, when extended over a sufficiently long period it would likely prove undesirable. Practices of racial recognition should enjoy the flexibility to adapt along with society's changing racial realities.

But if racial symmetry cannot and should not be implemented on the broadest scale imaginable, judges should nevertheless consider how earlier courts have recognized race and determine whether they should continue that tradition. The result of such contemplation would be a more reflective, considered approach to racial recognition. Such an approach would represent no meager achievement.

### B. *Gratuitousness*

Judges should also make a concerted effort to avoid recognizing race when doing so is *gratuitous*. By gratuitous, I mean racial recognition that is “[u]ncalled for, unwarranted, unjustifiable; done or acting without a good or assignable reason; motiveless.”<sup>156</sup> Thus, if no legitimate reason exists for recognizing race, courts should make an affirmative effort to excise racial considerations from their opinions.

All instances of racial gratuitousness, however, are not created equal. Judges should be particularly vigilant in guarding against gratuitous racial references that pose an undue risk of confirming injurious racial stereotypes. Reasonable judges could surely disagree regarding whether a particular case involves behavior that may confirm racial stereotypes, and whether racial recognition would be gratuitous or justifiable. Rather than mapping out the myriad gray areas, however, it seems advisable to focus on what should be—but, regrettably, is not—an area of common ground.

One particularly harmful type of gratuitous racial recognition that has, alarmingly, continued into the modern judicial era arises in the context of alleged rapists who are black men.<sup>157</sup> Justice Rehnquist's opinion

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155. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 832 (1982) (“There is no reason why we cannot ask each Justice to develop a principled jurisprudence and to adhere to it consistently. What we cannot do is ask the same of the Court, as an institution.”).

156. 1 *The New Shorter Oxford English Dictionary on Historical Principles* 1135 (Lesley Brown ed., 4th ed. 1993).

157. See, e.g., *Connecticut v. Johnson*, 460 U.S. 73, 76 (1983) (noting “[r]espondent, who is black, remarked that he had ‘never had a white woman before’” prior to sexually assaulting a woman, where underlying case involved jury instructions unrelated to sexual assault (quoting Transcript of Record at 50, 262, *Johnson*, 460 U.S. 73 (No. 81-927))).

for the Court in *New York v. Quarles*, a significant criminal procedure case decided in 1984 which found a “public safety” exception to *Miranda*, contains precisely this sort of harmful racial recognition.<sup>158</sup> Rehnquist’s recitation of the initial facts—including Benjamin Quarles’s race—follows:

On September 11, 1980, at approximately 12:30 a.m., Officer Frank Kraft and Officer Sal Scarring were on road patrol in Queens, N.Y., when a young woman approached their car. *She told them that she had just been raped by a black male*, approximately six feet tall, who was wearing a black jacket with the name “Big Ben” printed in yellow letters on the back. She told the officers that the man had just entered an A & P supermarket located nearby and that the man was carrying a gun.<sup>159</sup>

Upon entering the supermarket, the police officers chased Quarles, cornered him in the back of the store, and frisked him only to discover an empty shoulder holster.<sup>160</sup> After handcuffing the suspect, Officer Kraft inquired about the gun’s location, and Quarles responded: “[T]he gun is over there.”<sup>161</sup> A search behind a nearby display of cartons, toward which Quarles had gestured, revealed a loaded revolver.<sup>162</sup> The Court held that public safety considerations justified Officer Kraft’s failure to issue *Miranda* warnings before he questioned the suspect about the gun.<sup>163</sup>

Justice Rehnquist’s decision to recognize Quarles’s race in the opinion seems gratuitous because it is unclear what work that recognition performs. The complainant provided the officers with a detailed description of the assailant, including his race, approximate height, and the color of his jacket (including the yellow lettering on the back). That detailed description likely aided the officers in the heat of pursuit. But there is no apparent reason that Justice Rehnquist’s opinion must memorialize every single item comprising the complainant’s overall description. In no meaningful sense does *Quarles* turn on the specificity of the complainant’s description. Indeed, even making the dubious assumption that Rehnquist at that time fervently desired to prevent the erosion of *Miranda*,<sup>164</sup> omitting Quarles’s race from the opinion would not have created much danger for an ever-expanding public safety exception.

158. 467 U.S. 649 (1984); see also Barry Friedman, *The Wages of Stealth Overruling* (With Particular Attention to *Miranda v. Arizona*), 99 *Geo. L.J.* 1, 19 (2010) (describing Justice Rehnquist’s approach in *Quarles*).

159. *Quarles*, 467 U.S. at 651–52 (emphasis added).

160. *Id.* at 652.

161. *Id.*

162. *Id.*

163. *Id.* at 651.

164. See Daniel M. Katz, *Institutional Rules, Strategic Behavior, and the Legacy of Chief Justice William Rehnquist: Setting the Record Straight on *Dickerson v. United States**, 22 *J.L. & Pol.* 303, 304 (2006) (“*Miranda* had been a pillar of the Warren Court revolution, and Chief Justice Rehnquist previously varied from meek support to outright dissent from the 1966 ruling.”). But see *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (Rehnquist, C.J.) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

While the benefits of racially designating Quarles range somewhere from the negligible to the nonexistent, the costs associated with such designations are considerable. Racial recognition in *Quarles* promotes the perception of black men as sexual predators. I do not mean to suggest that Justice Rehnquist intentionally used race to promote this perception; I mean to suggest only that the racial recognition in *Quarles* has that regrettable consequence. The racial recognition in *Quarles* may well be  *motiveless*, but that does nothing to rescue it from being  *gratuitous*.<sup>165</sup> It hardly seems accidental that Justice Marshall's dissenting opinion in *Quarles* sought to avoid those costs by declining to mention race. "Shortly after midnight on September 11, 1980," Justice Marshall wrote in his factual summary, "Officer Kraft and three other policemen entered an A & P supermarket in search of respondent Quarles, a rape suspect who was reportedly armed."<sup>166</sup>

Five years after *Quarles*, Judge Posner's opinion for the Seventh Circuit in *Wassell v. Adams* contained a similarly gratuitous racial recognition in the context of rape.<sup>167</sup> Apart from the prominence of the opinion's author, the case merits scrutiny because several torts textbooks draw upon *Wassell* to explore the concept of "degrees of negligence."<sup>168</sup> Legal scholars have roundly criticized *Wassell*, primarily for the way that the opinion treats rape victims.<sup>169</sup> Curiously, though, the decision's racial dimensions have gone almost completely unexplored. The lone legal scholar who has examined *Wassell's* racial dynamics in a sustained fashion, moreover, offers an unsatisfying critique that condemns the opinion at length for its theoretically racialized details but dedicates scant attention to the case's overtly gratuitous racial recognition.<sup>170</sup>

In *Wassell*, Judge Posner makes a concerted effort to turn what could have been an upsetting but otherwise generally unremarkable tort case into a gripping narrative. Tapping into his inner Henry James, Judge Posner recounts a story in which the details bring the opinion alive. "The plaintiff, born Susan Marisconish, grew up on Macaroni Street in a small town in a poor coal-mining region of Pennsylvania—a town so small and

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165. See *supra* notes 156–158 and accompanying text (explaining gratuitousness in opinions).

166. *Quarles*, 467 U.S. at 674 (Marshall, J., dissenting).

167. 865 F.2d 849 (7th Cir. 1989).

168. See, e.g., Dan B. Dobbs et al., *Torts and Compensation* 255–59 (6th ed. 2009) (using *Wassell* to examine comparative fault); David W. Robertson et al., *Cases and Materials on Torts* 353–62 (4th ed. 2011) (same).

169. See, e.g., Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 *Colum. L. Rev.* 1413, 1434–37 (1999) (criticizing *Wassell's* implications for rape victims); Neal Kumar Katyal, *Architecture as Crime Control*, 111 *Yale L.J.* 1039, 1114–15 (2002) (contending *Wassell*-type calculations of causation will be "very resource-intensive" and costly, discouraging many victims from suing).

170. Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 *U. Cin. L. Rev.* 269, 282–86, 291 (1994); see *infra* notes 197–201 and accompanying text (critiquing Professor Kastely's argument).



obscure that it has no name,” Posner wrote.<sup>171</sup> In 1985, “Susan, who by now was 21 years old, traveled to Chicago” so that she could witness her fiancé, Michael Wassell, graduate from naval basic training.<sup>172</sup> For her stay in Chicago, Susan checked into the Ron-Ric motel.<sup>173</sup> “The Ron-Ric is a small and inexpensive motel that caters to the families of sailors at the Great Lakes Naval Training Station a few blocks to the east,” Posner explained.<sup>174</sup> “The motel has 14 rooms and charges a maximum of \$36 a night for a double room. The motel was owned by Wilbur and Florena Adams, the defendants in the case.”<sup>175</sup> Posner next described a neighborhood adjacent to Susan’s motel. “Four blocks to the west of the Ron-Ric motel is a high crime area: murder, prostitution, robbery, drugs—the works,” Posner noted.<sup>176</sup> “The Adamses occasionally warned women guests not to walk alone in the neighborhood at night.”<sup>177</sup> The Adamses, however, failed to warn Susan.<sup>178</sup>

After hearing a knock on the door at 1:00 AM, Susan saw no one when she looked through the door’s peephole.<sup>179</sup> “She unlocked the door and opened it all the way, thinking that Michael had come from the base and, not wanting to wake her, was en route to the Adamses’ apartment to fetch a key to the room,” Posner wrote.<sup>180</sup> “It was not Michael at the door. *It was a respectably dressed black man whom Susan had never seen before.*”<sup>181</sup> The stranger then gained access to Susan’s room by asking her for a glass of water, which she retrieved from the bathroom.<sup>182</sup> “When she came out of the bathroom,” Posner recounted, “the man was sitting at the table in the room . . . . He took the water but said it wasn’t cold enough . . . . The man went into the bathroom to get a colder glass of water. Susan began to get nervous.”<sup>183</sup> After he had been in the bathroom for several minutes, “[h]e poked his head out of the doorway and asked Susan to join him in the bathroom, he wanted to show her something. She refused. After a while he emerged from the bathroom—naked from the waist down.”<sup>184</sup> Susan then fled the room and screamed, but the intruder corralled her and forced her back into the room.<sup>185</sup> “There he

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171. *Wassell*, 865 F.2d at 850.

172. *Id.*

173. *Id.*

174. *Id.* at 850–51.

175. *Id.* at 851.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* (emphasis added).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

gagged her with a wash cloth,” Posner wrote.<sup>186</sup> “He raped her at least twice (once anally). These outrages occupied more than an hour.”<sup>187</sup>

Susan filed a negligence lawsuit against the Ron-Ric’s owners seeking \$850,000 for, inter alia, their failure to warn her.<sup>188</sup> A jury found that the Adamases had behaved negligently and assessed Susan’s damages at the requested amount.<sup>189</sup> The jury also found, however, that Susan had behaved negligently, and that her negligence accounted for 97% of the blame for the attack; the Adamases’ negligence, conversely, accounted for 3%.<sup>190</sup> Judge Posner’s opinion affirmed the district court on the decision both to deny Susan’s request for a judgment notwithstanding the verdict, and to deny her request for a new trial.<sup>191</sup>

As with Justice Rehnquist’s opinion in *Quarles*, it is difficult to ascertain any legitimate reason for Judge Posner’s decision to recognize the rapist’s race in *Wassell*. Indeed, nothing significant about the case pivots on the rapist’s identity—racial, or otherwise. As Judge Posner noted, “The rapist was never prosecuted; a suspect was caught but Susan was too upset to identify him.”<sup>192</sup> *Wassell* instead hinged on the conduct of Susan and the Adamases.

If one were forced to concoct an explanation for Judge Posner’s inclusion of the rapist’s race in *Wassell*, it might be argued that when Susan opened the motel’s door to find a black man at 1:00 AM she should have—sartorial respectability notwithstanding—immediately closed the door. Under this theory, Susan’s failure to do so may have heightened her negligence in the jury’s eyes, and the opinion would have been incomplete had it excluded race from the equation. The problem with this explanation, however, is that blackness standing alone—what Posner long ago referred to as “race *per se*”<sup>193</sup>—does not materially alter the analysis of Susan’s conduct. When Susan opened the motel door to find a man of any race who was not her fiancé, it seemed incumbent upon her to end the encounter rather than to retrieve a glass of water for him.<sup>194</sup>

It might also be objected that Posner’s opinion in *Wassell*, like Rehnquist’s in *Quarles*, includes a wide array of facts from the trial record that had little or no effect on either the jury’s deliberations or the appellate decision. The precise name of Susan’s hometown street, it seems safe to say, did not figure prominently in the minds of the jury or the judges. Judge Posner sought to give *Wassell* literary treatment, and such treat-

186. *Id.*

187. *Id.*

188. *Id.* at 852.

189. *Id.*

190. *Id.*

191. *Id.* at 852, 856.

192. *Id.* at 852.

193. Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 *Sup. Ct. Rev.* 1, 8.

194. See *Wassell*, 865 F.2d at 855 (“Everyone, or at least the average person, knows better than to open his or her door to a stranger in the middle of the night.”).

ments rise or fall upon the details. The attacker was not raceless, after all, and it would have amounted to authorial malpractice to leave this particular detail on the editing room floor. Such details, this objection might continue, bring legal opinions alive, and we should be wary of suggestions that would drain that vitality.

I have no desire whatsoever to wring details from judicial opinions. To the contrary, judges should enjoy wide discretion to craft their opinions as they see fit. Nevertheless, judges should treat race with special care and excise gratuitous racial recognition—particularly from judicial opinions that could be read to confirm stereotypes. Judge Posner ought to feel free to inform readers of Susan’s nameless hometown, the name of her childhood street, and just about any other detail that he deems appropriate. But he should not view race as he would merely any other detail.

Some observers may contend that it simply asks too much of judges to avoid mentioning race gratuitously in their judicial opinions. Provided that judges are not invoking racial considerations with actual malice, it seems silly to request them to be conscious of, say, noting a criminal defendant’s race when it is mentioned during a trial and appears in the record. Yet requesting that judges avoid injecting race in situations where it has no legitimate place is a standard that is far from impossible to meet. Indeed, this standard has recently governed the modern political world. In 1988, Lee Atwater’s notorious Willie Horton advertisement in support of George H.W. Bush’s campaign against Michael Dukakis was roundly criticized for violating this precept.<sup>195</sup> Conversely, when Senator John McCain ran against then-Senator Barack Obama for the presidency in 2008, he deliberately refused to dwell on Obama’s relationship with Reverend Jeremiah Wright in order to avoid being perceived as having injected race into the election.<sup>196</sup> If a politician deliberately avoided inserting race into a campaign for the nation’s highest office, it hardly seems too onerous for life-tenured judges to hold themselves to that same standard.

Surprisingly, the only previous legal scholar who has undertaken a substantial examination of *Wassell*’s racial aspects failed to dedicate more than passing attention to the gratuitous racial recognition of Susan’s attacker.<sup>197</sup> Instead of focusing on explicit racial gratuitousness, Professor Amy Kastely directed her ire principally toward what she understood to

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195. See Richard Thompson Ford, *The Race Card: How Bluffing About Bias Makes Race Relations Worse* 9–10 (2008) (referring to “notorious ad campaign that many felt exploited racial bigotry”).

196. See Dana Milbank, *Unleashed, Palin Makes a Pit Bull Look Tame*, *Wash. Post*, Oct. 7, 2008, at A3 (reporting McCain instructed his campaign staff that “racially explosive attacks related to Obama’s former pastor, the Rev. Jeremiah Wright, [were] off limits”).

197. See Kastely, *supra* note 170, at 291 (noting “the particular case of rape of a white woman by a black man has such a powerful history and continuing presence in the narratives of white supremacy that a judge would draw attention to race in cases in which that story could be re-told and re-affirmed”).

be Judge Posner's implicit racialization of the neighborhood bordering the Ron-Ric.<sup>198</sup> "Judge Posner described the neighborhood close to the motel as 'a high-crime area: murder, prostitution, robbery, drugs—the works,'" Kastely writes.<sup>199</sup> "Whatever basis this metonymy may have in the frequency of crime in that neighborhood, Judge Posner did not claim that Wassell had any specific information about a historical record of crime. Instead . . . this description functions to name this neighborhood as black."<sup>200</sup> In addition, Professor Kastely contends that "Judge Posner's dismissive, disrespectful description of the neighborhood is striking" and asserts that he engages in "racist presumptions."<sup>201</sup>

This interpretation of *Wassell* misses the mark. Judge Posner almost certainly emphasizes the neighborhood's criminality near the motel not, as Professor Kastely avows, in order to code it as black. More conceivably, he does so in order to place the Adamses' failure to warn Susan about the surrounding environs in its proper context—a pivotal fact in order to assess the jury's verdict finding that the motel owners were partially responsible for the assault. It is difficult to envision how Judge Posner might go about addressing a high crime rate in this area without, in the eyes of some, implicitly suggesting that the neighborhood is black. The opinion's characterization of the crime problem, after all, uses generic crime terminology ("murder, prostitution, robbery, drugs").<sup>202</sup> One shudders to imagine the outcry had Judge Posner used terminology that carries a much stronger racial whiff. If Judge Posner is accused of "racist presumptions" for using generic terms—had he in *Wassell* substituted, say, *crack* for *drugs*—the response may have ventured beyond apoplectic. But sometimes a cigar is just a cigar,<sup>203</sup> and sometimes a high-crime area is just a high-crime area.

None of the foregoing should be taken as denying either that judicial opinions sometimes implicitly invoke racial considerations or that race and crime are interwoven in the American imagination in myriad ways.<sup>204</sup> Rather than initially beseeching judges to remove the allegedly race-coded references within their opinions, it seems more sensible to begin by asking judges to contemplate their gratuitous usage of explicit

198. *Id.* at 285.

199. *Id.* (quoting *Wassell*, 865 F.2d at 751).

200. *Id.*

201. *Id.* at 283, 286. Professor Kastely is not the only academic who has asserted that Posner suffers from untoward racial bias. See Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 *Minn. L. Rev.* 1637, 1661 (1999) (criticizing what he labels "Judge Posner's racism").

202. *Wassell*, 865 F.2d at 851.

203. John Bartlett, *Familiar Quotations* 570 (Justin Kaplan ed., 16th ed. 1992) (attributing this phrasing to Sigmund Freud).

204. See David Cole, *Can Our Shameful Prisons Be Reformed?*, *N.Y. Rev. Books*, Nov. 19, 2009, at 41, 41 ("The correlation of race and crime in the public's mind reinforces prejudice that affects every African-American.").

racial recognition. Judges should demonstrate that they can crawl before we ask them to sprint.

### III. POSSIBILITIES

This Part identifies and analyzes four different, complementary approaches that courts should consider implementing when they confront a case that presents an opportunity to recognize race. First, and perhaps most importantly, courts should draft a written explanation for their provisional decision to recognize race in a particular opinion, a process that will require judges to dedicate more reflection to a practice that often appears startlingly unreflective. Second, courts should contemplate whether racial equality may be better served by not recognizing race, even if the legal problem has a racial element. Third, courts should consider a technique of racial inversion to determine whether racial recognition may be undesirable. Fourth, courts should bear in mind that being opposed to racial classifications need not mean that one must endorse a colorblind approach to law—a court can articulate a problem’s racial dimensions without violating the anticlassification principle.

#### A. *Explanation*

When courts recognize the racial identity of particular parties or other individuals, they should typically endeavor to explain what work the racial recognition is doing. Openly discussing race, to be sure, can be a freighted and awkward endeavor, and such discussions have led to raw feelings even between judges who otherwise enjoy a close friendship.<sup>205</sup> But having judges attempt to articulate expressly why race is pertinent in the context of particular decisions would result in two broad types of benefits. First, regarding intrinsic benefits, judicial efforts to explain why race matters will increase judges’ cognitive attention to racial recognition, and should result in a lower number of undesirable invocations of race. Second, regarding extrinsic benefits, judicial explanations for racial recognition would guard against racial ossification and speculation as to judicial motivation, while simultaneously increasing the opportunity for more searching racial reform.

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205. The difficulty of talking openly about race is well-illustrated by an unusually testy exchange between Justice Ginsburg and Justice Scalia that reportedly occurred during the Court’s deliberations regarding *Bush v. Gore*. Taking exception to her conservative colleagues’ invocation of the Equal Protection Clause to halt the Florida recount, Justice Ginsburg contended that the 2000 election’s actual Equal Protection Clause violation arose not from the Florida Supreme Court’s opinion. Instead, in a footnote, Justice Ginsburg pointed to press accounts suggesting that the votes of many black Floridians had, in effect, been suppressed. When Justice Scalia read the footnote, he promptly sent his dear friend a strongly-worded memorandum for Justice Ginsburg’s eyes only, contending that the footnote succeeded in “fouling our nest” and amounted to nothing less than “Al Sharpton tactics.” In response, Justice Ginsburg omitted the footnote from her final draft. See Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* 173–74 (2007) (recounting story of Ginsburg’s footnote).

1. *Intrinsic*. — When judges offer written explanations for racial recognition, it will force them to dedicate greater thought to a practice that often seems to occur in an unthinking, even haphazard manner. Consequently, judges would be required to exhibit more thought when they write race-conscious decisions. Increased thought regarding such matters, though not free of potential downsides, could dramatically improve the current state of racial recognition.

The most obvious benefit of judges explaining their invocations of race may not appear on the printed page at all. Indeed, that is precisely the point. When judges put themselves through the disciplining process of consciously determining whether a racial invocation lends itself to a written explanation, they will in some instances conclude that no legitimate reason supports the inclusion of race. If Judge Posner in *Wassell* and Justice Rehnquist in *Quarles*, for instance, had attempted to explain in writing why they disclosed that the rapist in question was black, it seems probable that the racial descriptor would have been omitted.

Not only would judges be less likely to use race gratuitously, but the process of articulating reasons for including race would also almost certainly lead to decreased racial asymmetry. It seems unlikely that a judge would write an opinion explaining why race was relevant with respect to one actor, and then completely ignore (without explanation) the race of similarly situated actors. After judges internalize the habit of eliminating racial asymmetry on a micro level, moreover, they may also begin to adopt some larger framework for racial recognition that could manifest itself in a more symmetrical approach to race on a macro level.

This benefit of increased consciousness is, admittedly, closely connected to a potential cost. Judges may—in an effort to explain more thoroughly their racial references—encounter difficulty, embarrassment, or perhaps some combination of the two feelings. At least some judges could decide simply to eliminate racial considerations from the opinion's text, even though these considerations continue to shape their judicial opinions. Attempting to bring race closer to the surface may, in other words, have exactly the opposite consequence of driving race further subterranean. This drawback is troubling, as are proposals generally that may deprive judicial opinions of some measure of candor.<sup>206</sup> Nevertheless, the benefits of judicial discussion of race, in my estimation, considerably outweigh this potential cost.

2. *Extrinsic*. — Judicial explanations for recognizing race have three primary extrinsic benefits. First, judicial explanations of racial pertinence may help to prevent race from being frozen into the law. Second, having courts explain why race is pertinent may reduce speculation regarding why racial considerations are being invoked. Third, judicial explanations

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206. For a thoughtful examination of frankness from the bench, see Micah Schwartzman, *Judicial Sincerity*, 94 Va. L. Rev. 987, 989–91 (2008) (articulating and defending principle of judicial sincerity).

could increase the likelihood that decisionmakers will engage in broader efforts at racial reform.

Judicial explanations for racial recognition might well prevent race from becoming ossified into legal decisions. One danger of suggesting that courts adopt a more coherent approach to recognizing race is that the increased coherence will lead to a type of racial ossification, whereby courts would settle into a familiar (and comfortable) pattern of invoking race in some cases and ignoring it in others. Articulating the reasons for racial recognition, however, helps to guard against such ossification. If the underlying societal conditions that an opinion cites for recognizing race are altered in meaningful ways, future courts not only would be justified, but may even be required to abandon the old racial recognition framework.

Additionally, if judges explain why they recognize race in particular cases, it may decrease the degree of speculation surrounding racial invocations that commentators suspect are, well, suspect. Judges may have legitimate reasons for recognizing race in cases where those reasons are far from apparent to the reader. Spelling out those reasons would at least provide a justification for the racial recognition. Commentators could still reject the legitimacy of that reason, but at least they would not be forced to impute one to the court. Judicial explanations would not, of course, eliminate speculation regarding the *real* motivation as opposed to the stated one, and may even result in increased allegations of bad faith—at least from certain quarters. Still, having a forthright discussion regarding the reasons for racial recognition would represent a distinct improvement over current uncertainty.

Finally, when judges explain why they have invoked race in a particular opinion, it increases the likelihood that the judiciary (and other decisionmakers) will contemplate undertaking broader reforms that account for race. The potential benefit that flows from judges articulating their reasons for supporting racial recognition is well illustrated by the Supreme Court's opinion in *Manson v. Brathwaite*.<sup>207</sup> In *Brathwaite*, the Court considered whether pretrial identification evidence must be excluded when it stems from a "suggestive and unnecessary" police procedure.<sup>208</sup> The events giving rise to the case date back to May 1970, when Jimmy D. Glover, an undercover police officer, paid a visit to a third-floor apartment with the intent of buying narcotics from a known drug dealer, "Dickie Boy" Cicero.<sup>209</sup> After purchasing the narcotics from what was believed to be Cicero's residence, Glover told fellow officers that the person who sold the drugs was "'a colored man, approximately five feet eleven

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207. 432 U.S. 98 (1977).

208. *Id.* at 99. For a helpful overview of how *Brathwaite* fits into the suggestive identification doctrine more broadly, see Jennifer E. Laurin, Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure, 110 Colum. L. Rev. 1002, 1038–43 (2010) (analyzing *Brathwaite's* implications).

209. *Brathwaite*, 432 U.S. at 99–100.

inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build.’”<sup>210</sup> Glover’s description prompted an officer to suspect that the seller was not Cicero, but instead was Brathwaite.<sup>211</sup> The officer obtained a copy of Brathwaite’s photograph and left it in Glover’s office. Two days after the drug purchase, Glover discovered the photograph and confirmed that it depicted the man who sold him drugs.<sup>212</sup> In a fleeting but potentially significant moment of racial recognition, Justice Blackmun’s opinion for the Court noted: “Glover himself was a Negro and unlikely to perceive only general features of ‘hundreds of Hartford black males,’ as the Court of Appeals stated.”<sup>213</sup> The Court suggested in sum that Glover, being a black male, would have been less likely to misidentify another black male than a white police officer would have been.

*Brathwaite* is one of the very few instances where the Court has endeavored to explain, even in passing, why race matters. More judges would do well to follow Justice Blackmun’s lead (if not necessarily his reasoning) and offer explanations for their invocations of race. Indeed, his opinion in *Brathwaite* provides a vivid illustration of the potential benefits that could be reaped from judicial explanations. Taking Justice Blackmun’s brief racial explanation seriously could have the dramatic effect of urging a reconceptualization of the law surrounding cross-racial identifications.<sup>214</sup> After all, as *Brathwaite* implicitly acknowledges, misidentifications may be more likely to occur interracially than they are intraracially.<sup>215</sup> That acknowledgment could lend important support for, in at least some circumstances, following the advice of many legal scholars who advocate providing additional safeguards to minimize the risk of erroneous cross-racial identifications.<sup>216</sup> As the absence of such safeguards continues to attest some thirty-five years after *Brathwaite*, judicial discussions of race do nothing to guarantee meaningful racial reform. Discussing race may, however, make that reform more attainable than it otherwise would have been.

## B. *Unrecognition*

Legal scholars who seek to eliminate racial inequality generally insist that the most promising path toward reaching that goal requires govern-

210. *Id.* at 101 (quoting trial transcript).

211. *Id.*

212. *Id.*

213. *Id.* at 115 (quoting *Brathwaite v. Mason*, 527 F.2d 363, 371 (2d Cir. 1975)).

214. See, e.g., Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 *Cornell L. Rev.* 934, 952 n.107 (1984) (identifying *Brathwaite* as “[t]he only reference by the Court to witness-defendant racial congruence”).

215. See *id.* at 942–43 (noting laboratory studies reveal “it was common for the own-race/other-race recognition rates to differ by thirty percent . . . [O]ne study reported that people who tried to identify persons of another race made *four* times as many errors as those who attempted to identify members of their own race.” (citations omitted)).

216. See, e.g., *id.* at 957–85 (discussing potential safeguards).



mental decisionmakers—including judges—to pay ever more attention to race.<sup>217</sup> If decisionmakers fully appreciated the role that race and racial considerations play in American society, scholars often suggest, then racial reform would be realized. In some instances, this strategy likely will prove effective. But it merits emphasizing that focusing attention on race may sometimes retard rather than advance the march toward full racial equality. Instead of permitting racial inequalities to expose larger issues of inequality,<sup>218</sup> judges too often seem to believe that if a racially framed problem does not contain ongoing and overt signs of racial discrimination, then the underlying issue does not require remedy. In some instances, thus, courts may be more likely to resolve legal questions in ways that will have the effect of reducing racial inequality if they conceive of the problem principally along its nonracial dimensions. Unrecognizing race may—counterintuitively—sometimes remedy racial inequality.

It is tempting to believe that this strategy constitutes a recent development on the racial front.<sup>219</sup> But the Court's history of recognizing (and unrecognizing) race reveals that decisions that result in racial relief may be more attainable when the Court does not conceive of legal issues in primarily racial terms. In the election law context, for example, Justice Douglas wrote two opinions for the Warren Court in cases involving state voting restrictions. In 1959, the Court contemplated a challenge to North Carolina's voting literacy requirement in *Lassiter v. Northhampton County Board of Elections*.<sup>220</sup> In 1966, the Court weighed a poll-tax requirement in *Harper v. Virginia Board of Elections*.<sup>221</sup> Although the two cases were decided just seven years apart, Justice Douglas's opinions took divergent racial paths, with him recognizing race in *Lassiter* and unrecognizing race in *Harper*. One might expect that, during the Warren Court era, the Court would have been more likely to grant relief when it recognized race and less likely to grant relief when race went unrecognizing. *Lassiter* and *Harper*, however, confound those expectations.

In *Lassiter*, Justice Douglas's opinion almost immediately recognized the race of Louise Lassiter, a black North Carolinian whose voter registra-

217. See, e.g., Aleinikoff, Context, *supra* note 26, at 328–30 (arguing “focusing on racism can provide a powerful and sensible basis for anti-discrimination doctrine”); Austin, *supra* note 26, at 207 (claiming racial context is essential to courts providing adequate relief); Carbado, *supra* note 25, at 964–66 (arguing recognition of Supreme Court's role in constructing race in Fourth Amendment context would illuminate its complicity with racist police practices).

218. See Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* 11 (2002) (arguing distress of racial minorities offers warning sign of “a danger that threatens us all”).

219. Cf. Heather K. Gerken, Justice Kennedy and the Domains of Equal Protection, 121 *Harv. L. Rev.* 104, 106 (2007) (claiming “it is when Justice Kennedy stops talking directly about race that he says something new about it”).

220. 360 U.S. 45, 45 (1959) (describing constitutional challenge to state literacy test).

221. 383 U.S. 663, 664 (1966) (outlining suit against state's poll tax).

tion was rejected because she declined to take a literacy test.<sup>222</sup> The challenged statute required that aspiring voters “‘be able to read and write any section of the Constitution of North Carolina in the English language.’”<sup>223</sup> This was a straightforward literacy provision, Justice Douglas contended, in that it did not afford unfettered discretion to the voting registrar and, thus, did not act “merely [as] a device to make racial discrimination easy.”<sup>224</sup> The statute, “applicable to members of all races, . . . seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springs for the citizen,” Justice Douglas wrote in finding that literacy served as a decent proxy for being informed on matters of public import.<sup>225</sup> “Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot.”<sup>226</sup>

Justice Douglas’s decision in *Harper* adopted a nonracial frame, and—perhaps not incidentally—reached a different result regarding the disenfranchisement measure under review. In a case consolidated with *Harper*, the brief filed on behalf of one appellant, Evelyn Butts, left no doubt as to her race. “Appellant is an adult Negro resident of Norfolk, Virginia, who was and is qualified to vote but for her financial inability to pay her poll tax,” the brief observed.<sup>227</sup> But Butts’s brief did not leave the matter there: “She is one of many such citizens, both white and non-white, of very poor means, who are discouraged or prevented from voting by the poll tax and its procedural requirements and upon whom payment of the tax creates an economic hardship.”<sup>228</sup> Justice Douglas’s opinion declined to note any appellant’s race. And while he observed the racially-motivated origins of Virginia’s poll tax, he emphasized that the decision in no way rested on the statute’s racial impact.<sup>229</sup> Instead, Justice Douglas hinged *Harper* on its economic discrimination. “Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process,” Justice Douglas wrote.<sup>230</sup> “To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.”<sup>231</sup>

222. See *Lassiter*, 360 U.S. at 45 (identifying *Lassiter* as “a Negro citizen of North Carolina”).

223. *Id.* at 46 (quoting N.C. Gen. Stat. § 163-28 (1957)).

224. *Id.* at 53.

225. *Id.* at 53–54.

226. *Id.* at 54.

227. Brief for Appellant at 3, *Harper v. Harrison*, 383 U.S. 663 (1966) (No. 655), 1965 WL 115352.

228. *Id.* at 3–4.

229. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 n.3 (1966) (“While the ‘Virginia poll tax was born of a desire to disenfranchise the Negro,’ we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end.” (quoting *Harman v. Forssenius*, 380 U.S. 528, 543 (1965))).

230. *Id.* at 668.

231. *Id.*

What explains the divergent results in *Lassiter* and *Harper*? Part of the explanation may stem from the quite distinct ways the Court perceived the fundamental underlying problem at issue in the two cases. In *Lassiter*, it seems clear that the Court went hunting for racial prejudice, a hunt that was signaled at the beginning of the opinion when Justice Douglas recognized Lassiter's race. And overt racial prejudice the Court did not find, as it noted that the literacy requirement was "applicable to members of all races."<sup>232</sup> That meant, effectively, that Lassiter was out of luck. In *Harper*, rather than hunting for racial prejudice, the Court instead searched for economic inequality. Pursuant to its different search, Justice Douglas's opinion omitted mentioning Harper's race. Even though Justice Douglas did not deliver *Harper* in the register of racial equality, there can be little doubt that black Virginians formed a disproportionately large percentage of the group that benefited from the poll tax's elimination. *Lassiter* and *Harper* combine to suggest, then, the effort to have courts view legal problems primarily as racial problems does nothing to guarantee the advance of racial justice. The effort may, in fact, sometimes inadvertently impair that cause.

However, it is essential not to exaggerate the role that racial recognition plays in Supreme Court decisionmaking. Indeed, many factors, apart from the Court's racial framing of the parties, could account for the decision to uphold the literacy requirement in *Lassiter* and to invalidate the poll tax in *Harper*. Among other potential explanations for the two results, the Warren Court may have ascended to the height of its power in 1966, a power that it did not perceive that it held in 1959. Whatever the precise explanation for *Lassiter* and *Harper*, though, it would be foolish to discount wholly the role racial framing played in motivating the Court's two decisions.

Even if one remains skeptical of this frame's ability to account for the Court's decisions in *Lassiter* and *Harper*, the way in which legal problems are (and are not) racially framed retains vital significance in the modern legal context. Today, when observers generally agree that racial prejudice is far more subtle and therefore far more difficult to detect than it was five decades ago,<sup>233</sup> it may be wise to avoid sending judges and justices on quests for overt racial prejudice that they may not discover. Many persistent problems of inequality that have disproportionately large impacts on racial minorities may not be alleviated even by the eradication of racial

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232. *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53 (1959). *Lassiter* did, however, allow that a literacy requirement could conceivably afford the decisionmaker so much discretion in its application as to make it vulnerable to racial challenge. *Id.* (distinguishing from literacy test found in earlier case to be "merely a device to make racial discrimination easy" due to "the great discretion it vested in the registrar" (citing *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949) (per curiam))).

233. See Ford, *supra* note 195, at 33 (noting "greater disagreement as to what counts as racism" after civil rights movement).

prejudice.<sup>234</sup> Accordingly, individuals who remain concerned about racial inequality may be well advised to contemplate advocating nonracial remedies.

### C. *Inversion*

Even if racial considerations have drawn the judiciary's attention to a particular legal problem, that does not mean that a court must expressly recognize race in its decision addressing that problem. As judges write opinions today, it may be helpful for courts to contemplate *racial inversion*, whereby judges consider whether substituting a hypothetical white person in the place of a person of color (or vice versa) would lead to a different result.<sup>235</sup> If racial inversion would not alter the legal result in any way, then the Court might consider omitting race from the analysis. In other words, implementing the racial inversion technique [may sometimes lead a court to unrecognize race.

A stark illustration of how racial inversion plays out on the ground is provided by revisiting the Court's racial recognition in *Miranda*.<sup>236</sup> There, as noted above, the Court recognized the race of minority defendants in establishing custodial interrogation's potentially coercive atmosphere: "The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of high school in the sixth grade."<sup>237</sup> On one level, it seems perfectly appropriate—commendable, even—that the Court recognized race, given both the greater public discourse regarding race during the 1960s and the way that many observers understood criminal justice issues as integrally related to racial equality.<sup>238</sup> On another level, though, it

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234. See William Julius Wilson, *More than Just Race: Being Black and Poor in the Inner City* 3–4 (2009) (arguing social structure and culture are two important factors in persistence of racialized underclass); William Julius Wilson, *Race-Specific Policies and the Truly Disadvantaged*, 2 *Yale L. & Pol'y Rev.* 272, 275 (1984) ("[T]he factors associated with the growing woes of low-income blacks are exceedingly complex and go beyond the narrow issue of contemporary discrimination.").

235. This method of racial inversion owes a debt to the "reversing the groups" test proposed by Professor Strauss as a method of exposing discriminatory intent under the Equal Protection Clause. See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 *U. Chi. L. Rev.* 935, 956–59 (1989) ("A court applying the discriminatory intent standard should ask: suppose the adverse effects of the challenged government decision fell on whites instead of on blacks, or on men instead of on women. . . . If [the decision would have been different], then the decision was made with discriminatory intent.").

236. See *supra* text accompanying notes 88–94 (discussing racial recognition in *Miranda*).

237. *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

238. See *supra* note 89 and accompanying text (discussing scholars' connection between criminal justice issues and racial equality). Suggesting that race was more salient in the 1960s than it is today should not, of course, be confused for suggesting that racial considerations now lack all salience.

seems worth wondering what precisely would change if Miranda and Stewart were both white, rather than Latino and black? Would the risk of compulsion, in other words, be meaningfully lowered if the police were interrogating two “indigent” white people, one “seriously disturbed” and the other a sixth-grade dropout? It seems difficult to believe that—even if the hypothetically white Miranda and Stewart felt *marginally* more able to resist police interrogations than identically situated people of color—a different legal result would apply.<sup>239</sup> Indeed, in establishing a per se rule in *Miranda*, the Court may have been partially motivated by an understanding that racial differences would not dramatically alter the ability to resist police interrogation without the benefit of warnings.<sup>240</sup>

It is distinctly possible that an inchoate conception of racial inversion played a role in motivating one of the most well known cases in which a court declined to recognize race. In *Williams v. Walker-Thomas Furniture*

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239. This same set of questions merits being posed with respect to several criminal cases involving confessions during the 1960s. In *Sims v. Georgia*, for instance, the Court in 1967 recognized Isaac Sims Jr.’s race in a case alleging that he, a black man, had raped a white woman. 385 U.S. 538, 538 (1967). Although Sims had confessed to the crime, he had done so only after “he was knocked down, kicked over the right eye and pulled around by his private parts” with sufficient force that even 2–3 weeks after the incident he was, in his words, “‘paining a right smart.’” *Id.* at 540–41 (quoting petitioner).

In *Beecher v. Alabama*, also decided in 1967, the Court recognized race when it invalidated a confession that had been elicited under perhaps even more dire circumstances than those that had plagued Sims. 389 U.S. 35 (1967) (per curiam). Beecher, “a Negro convict in a state prison, escaped from a road gang in Camp Scottsboro, Alabama,” and was suspected in the murder of a woman whose body was discovered close to the camp the day after Beecher escaped. *Id.* at 35. The lower court had admitted Beecher’s confessions in the face of truly stunning (and uncontradicted) facts. *Id.* at 36–38. Beecher orally confessed after being shot in the leg, having a loaded pistol pointed at his face while a rifle was pointed at his head, and a gunshot being discharged next to his ear. *Id.* at 36. Beecher’s written confessions came during the course of a “90-minute ‘conversation’” that occurred while Beecher was in a morphine-induced haze. *Id.* at 36–37. *Beecher* also reveals the fascinating way in which subsequent judges sometimes echo an earlier opinion’s racial recognition—perhaps unthinkingly. In 2004, nearly forty years after the Court decided *Beecher*, the Sixth Circuit issued an opinion recounting the case which retained the racial salience, even though its inquiry centered on whether the defendant experienced similar pain before confessing. See *Abela v. Martin*, 380 F.3d 915, 928 (6th Cir. 2004) (“*Beecher* involved an African-American petitioner accused of raping and killing a white woman.”).

240. The Court was probably mainly motivated to issue a per se rule in *Miranda* by administrative ease. For an argument laying out the benefits of judicially articulated rules, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178–79 (1989) (contending uncertainty surrounding judicial standards makes rules-based approach preferable). It may, alas, be more accurate to describe *Miranda* as offering an equally feeble rule for protecting individuals of all different races and economic backgrounds. See David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 Va. L. Rev. 1229, 1259–60 (2002) (“It was apparent from the outset that the *Miranda* warnings . . . are at best an imperfect solution to the problem of involuntary confessions.”).

*Co.*,<sup>241</sup> a case that has become a staple of law school curricula,<sup>242</sup> Judge J. Skelly Wright wrote an opinion for the D.C. Circuit finding that the courts below had improperly concluded that they were powerless to refuse enforcement of an extraordinarily one-sided contract.<sup>243</sup> Over a five-year period stretching between 1957 and 1962, Ora Lee Williams purchased several items from Walker-Thomas under an installment plan.<sup>244</sup> The disputed contractual terms provided that, in the event Williams defaulted, Walker-Thomas could repossess every item that it had ever sold to Williams—regardless of the amount she had paid toward the various purchases at the time at the default.<sup>245</sup> Judge Wright’s opinion held that, though courts typically enforce even extremely lopsided contracts, courts need not do so if they deem the agreement unconscionable.<sup>246</sup> “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party,” Judge Wright noted.<sup>247</sup> “Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.”<sup>248</sup> Among other considerations, Judge Wright instructed that a choice’s meaningfulness is often “negated by a gross inequality of bargaining power”<sup>249</sup> and required courts to ask: “Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?”<sup>250</sup>

Judge Wright’s opinion disclosed some of the salient facts about Williams’s difficult circumstances. “Significantly, at the time of this and the preceding purchases, [Walker-Thomas] was aware of [Williams]’s financial position,”<sup>251</sup> Judge Wright observed. “The reverse side of the stereo contract listed the name of [Williams]’s social worker and her \$218 monthly stipend from the government. Nevertheless, with full knowledge that [Williams] had to feed, clothe and support both herself and seven

241. 350 F.2d 445 (D.C. Cir. 1965).

242. See, e.g., John P. Dawson et al., *Contracts: Cases and Comment* 693–97 (9th ed. 2008) (discussing unconscionability in *Williams*); E. Allan Farnsworth et al., *Contracts: Cases and Materials* 497–501 (7th ed. 2008) (introducing section on unconscionability with discussion of *Williams*).

243. *Williams*, 350 F.2d at 448 (“We do not agree that the court lacked the power to refuse enforcement to contracts found to be unconscionable.”).

244. *Id.* at 447.

245. *Id.*

246. *Id.* at 448.

247. *Id.* at 449.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 448 (quoting *Williams v. Walker Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964)).

children on this amount, [Walker-Thomas] sold her a \$514 stereo set.’”<sup>252</sup> But the opinion nowhere expressly mentioned Williams’s race.

*Williams* has inspired many anguished academic commentaries suggesting that Judge Wright should have expressly recognized that the exploited consumer was black.<sup>253</sup> Failing to disclose racial identity, some scholars have suggested, omits a crucial detail from the unconscionability inquiry in *Williams*, given that these events occurred at a time when Washington, D.C. had only recently begun to dismantle its Jim Crow order.<sup>254</sup> These scholars are not wholly off-base. It would hardly be astonishing, after all, if black people generally within that place and time felt particularly disempowered regarding the negotiation of contractual terms. But the amount of work that Williams’s race would perform in an unconscionability determination would seem to be of trifling significance. Can it really be suggested with a straight face that an identical contractual provision involving a white welfare recipient raising seven children would be appreciably less unconscionable, allowing the court to enforce the provision against a white woman but not a black woman?

Judge Wright, it bears mentioning, was intimately familiar with the salience of race in American society. Indeed, one of the reasons that Wright became a judge on the federal court of appeals in Washington, D.C. was because his decisions supporting school desegregation as a district court judge in New Orleans, Louisiana brought unwanted attention from hardcore defenders of Jim Crow.<sup>255</sup> In 1969, four years after the D.C. Circuit decided *Williams*, Judge Wright wrote an article for the *New York Times Magazine* making it quite clear that he grasped the interwoven

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252. *Id.* (quoting *Williams*, 198 A.2d at 916). In 2011 dollars, Williams’s stereo would cost approximately \$3650.

253. See, e.g., Julian S. Lim, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 *Calif. L. Rev.* 579, 594 (2003) (criticizing Judge Wright’s opinion for unrecognizing race because “[i]t effectively extinguishes the relevance of race, with the associated influences of racial perceptions and racist intents, from contract-law discourse”); Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 *New Eng. L. Rev.* 889, 929 (1997) (suggesting Court should have recognized Williams’s race because it “may have contributed to the company’s decision to tender the burdensome installment contract” (emphasis omitted)). But see Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 *Conn. L. Rev.* 1, 39 (1995) (lamenting inclusion of *Williams* in contract law canon because doing so “equat[es] African-Americans with the ‘irresolute, feeble, or weak’ and impl[ies] that the condition of blackness creates a need for protection by the paternalistic white power structure” (quoting Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J.L. & Econ.* 293, 303 (1975))).

254. See Philip Elman, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 *Harv. L. Rev.* 817, 823 (1987) (“You have to remember that in 1952 the District of Columbia was a southern city; it had separate black and white school systems. Negroes were barred from eating in downtown restaurants. The only places they could eat were in the black ghettos.”).

255. James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* 107 (2001) (noting some local whites referred to J. Skelly Wright as “Judas Wright” and as “a traitor to his class”).

relationship between race and class. “The twin problems of racism and poverty have converged in our society to become the problem of the inner city itself,” Wright began the article.<sup>256</sup> Attuned as Wright was to the issue of racial justice, it seems improbable that he simply neglected to disclose Williams’s race either unthinkingly or out of a premature desire to impose anticlassification norms. Instead, Judge Wright may have understood that recognizing Williams’s race would have invited courts to cabin unconscionability’s doctrinal impact in an artificial manner.<sup>257</sup> Judge Wright, in other words, may have concluded that recognizing Williams’s race would have impeded rather than advanced the cause of justice. And it would be difficult to fault him for doing so.

It is crucial, though, neither to boo *Miranda*’s racial recognition too vigorously nor to cheer *Williams*’s racial unrecognition too lustily. A considerable amount of difficulty can arise when examining judicial practices of recognizing race from bygone eras through modern spectacles. What may have been appropriate at that time may be undesirable in the current racial climate. Contrary to some legal scholars’ dogged assertions, racial conditions in America today differ dramatically from those that existed five decades ago when Chief Justice Warren wrote *Miranda* and Judge Wright wrote *Williams*.<sup>258</sup> It is this dynamic quality of racial conditions that makes it all the more urgent that courts going forward offer explanations for recognizing race. Assessing older judicial decisions in order to appreciate racial inversion is helpful, then, not primarily to condemn past court practices, but instead to illuminate the judicial future.

#### D. *Anticlassification* ≠ *Colorblind*

One technique that judges might increasingly employ in the future when they wish to analyze racial considerations would capitalize upon a potential distinction between the anticlassification principle, on the one hand, and the colorblind principle, on the other. Many prominent legal scholars portray these two concepts as being synonymous, even indistin-

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256. J. Skelly Wright, *The Courts Have Failed the Poor*, N.Y. Times Mag., Mar. 9, 1969, at 26.

257. Judges, it turned out, required no invitation at all to constrain contractual unconscionability. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203, 1290 (2003) (arguing for modifications to unconscionability doctrine that would “result in greater social welfare . . . than the doctrine as it is currently applied by courts”).

258. For a critique of legal scholars who are insufficiently sensitive to the racial transformation that has occurred during recent decades, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 Nw. U. L. Rev. 149, 171–73 (2011) (“Contending that the existence of blacks today can be analogized to people who were literally (not metaphorically) denied their freedom or to people who had their liberty thoroughly circumscribed by Jim Crow minimizes the suffering of individuals who endured the yoke of unrelenting racial oppression.”).



guishable.<sup>259</sup> Contrary to this received wisdom, however, the two notions are conceptually distinct. Under the anticlassification principle, the government can be understood as forbidden from racially categorizing *individuals*.<sup>260</sup> The colorblindness principle, in contrast, can be construed as forbidding the government from taking account of racial considerations among not only individuals, but within *society* as a whole.<sup>261</sup> Colorblindness, thus, can sensibly be construed as a broader concept than anticlassification, and it circumscribes a broader range of government activity. Although an advocate of colorblindness is necessarily an anticlassificationist, an anticlassificationist need not be colorblind.

Emphasizing the difference between these two concepts does not amount to analytical fastidiousness. It is a difference that one can actually detect in the real world of judicial opinion writing. Indeed, Supreme Court Justices have, on occasion over the years, written opinions that do not classify individuals according to race, but nevertheless acknowledge the racial dynamics that exist in society. Accordingly, these opinions abide by anticlassification norms, but also exercise a form of color consciousness. These opinions are, in other words, simultaneously anticlassification *and* anticolorblind. Highlighting the distinction be-

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259. See Jack M. Balkin, *Brown v. Board of Education—A Critical Introduction*, in *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* 3, 11 (Jack M. Balkin ed., 2001) (discussing what he refers to as “the ‘anticlassification’ or ‘color-blindness’ principle”); *id.* (noting Justice Harlan’s celebrated dissent in *Plessy v. Ferguson* “contains two distinct claims: first, that the Constitution is opposed to the maintenance of racial caste, group subordination, or second-class citizenship, and second, that the Constitution is colorblind and prohibits racial classifications”); Gerken, *supra* note 219, at 119 (referring to “concern[ ] with the injury associated with racial classifications” as “the colorblindness view”); Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 *Stan. L. Rev.* 985, 988 (2007) (“By reactionary colorblindness I mean an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility.”); Reva B. Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 *Yale L.J.* 1278, 1281 (2011) (referring to “a colorblind anticlassification principle”). The very first sentence of Professor Andrew Kull’s book—entitled *The Color-Blind Constitution*—goes a long way toward demonstrating how legal academia has tended to merge anticlassification and colorblindness. See Andrew Kull, *The Color-Blind Constitution*, at vii (1992) (“My object in this book is to discover the history of the argument that the United States Constitution prohibits (or should prohibit) racial classification by the agencies of government.”).

260. See, e.g., Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*, 117 *Harv. L. Rev.* 1470, 1472 (2004) (noting “anticlassification embodies the tradition’s fundamental value, the value of individualism”); see also *infra* text accompanying notes 272–273 (discussing Justice Kennedy’s views of dangers of racial classification).

261. See, e.g., Suzanna Sherry, All the Supreme Court Really Needs to Know It Learned from the Warren Court, 50 *Vand. L. Rev.* 459, 479–80 (1997) (describing aspiration for “colorblind society”). The term “color-blind,” of course, stretches back at least as far as Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 *U.S.* 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind . . .”).

tween these two concepts could offer a valuable strategic move for advocates who wish the Court to continue—at least periodically—acknowledging the racial dimensions of particular legal problems.

Justice Stevens's opinion partially dissenting from *Illinois v. Wardlow* adopted an approach that avoided racially classifying the criminal defendant, but simultaneously avoided colorblindness. In that significant Fourth Amendment case decided in 2000, the Court held that when Sam Wardlow, a citizen in a high-crime neighborhood, ran away upon seeing police officers, his flight provided the officers with reasonable suspicion.<sup>262</sup> Although Wardlow's brief declined to mention race, the NAACP Legal Defense & Educational Fund's amicus brief disclosed that he was "a middle-aged African-American male."<sup>263</sup> Chief Justice Rehnquist's straightforward opinion for the Court failed to address the case's racial dynamics. Although Justice Stevens did not classify Wardlow by race, neither did he adopt the Court's colorblind approach. Instead, Justice Stevens addressed the larger question of how race should enter into the Fourth Amendment's reasonableness calculus. "Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but . . . believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence," Justice Stevens explained.<sup>264</sup> "For such a person, unprovoked flight is neither 'aberrant' nor 'abnormal.'"<sup>265</sup>

On some occasions, legal scholars who urge the Court to demonstrate greater racial awareness in its criminal procedure jurisprudence criticize the Court for not revealing a party's race.<sup>266</sup> In this vein, Professor Devon Carbado condemned the decision to omit the criminal defendant's race in *Florida v. Bostick*, where the Court found, within the meaning of the Fourth Amendment, that a person traveling on an interstate bus should be assessed by a reasonable person's "free to decline" standard when police officers ask to inspect his belongings.<sup>267</sup> The Court

262. *Illinois v. Wardlow*, 528 U.S. 119, 121, 125 (2000).

263. Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Respondents at 2, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 606996.

264. *Wardlow*, 528 U.S. at 132 (Stevens, J., concurring in part and dissenting in part).

265. *Id.* at 132–33.

266. See, e.g., Maclin, *Black and Blue*, supra note 25, at 265 (criticizing Court in *Tennessee v. Garner*, 471 U.S. 1 (1985)—a case considering police officer's use of deadly force—for "never mention[ing] that Garner was black"). In subsequent writings, Professor Maclin has espoused a more robust view of the Court's ideal approach to recognizing race. Nevertheless, he has continued to portray racial classification as a foundational box to be checked, before courts perhaps move on to contemplate a case's broader racial implications. See Maclin, *Race*, supra note 25, at 339–40 ("The majority opinion did not even acknowledge that Edward Garner, who was shot in the back of the head by a Memphis officer as he fled the scene of a burglary, was a skinny, unarmed black teenager.").

267. 501 U.S. 429, 436–37 (1991). Professor Janice Nadler has cast doubt on whether intercity bus passengers generally give consent voluntarily to police officers to search during bus sweeps. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology*

erred, Carbado suggested, in its “decision to see *Bostick* as a man and not as a black man.”<sup>268</sup>

This phrasing may, however, improperly focus upon an exceedingly circumscribed inquiry. Instead of emphasizing the narrower question of whether the Court recognizes the race of a particular individual, it may prove wiser to examine the broader question of whether the Court recognizes the racial dimension of a particular issue. Like the Court’s opinion in *Bostick*, Justice Marshall’s dissenting opinion in the case also refrained from mentioning the criminal defendant’s race. But he nevertheless addressed the way in which police searches at bus depots—although purportedly random—likely have a disproportionate impact on racial minorities.<sup>269</sup> Along these same lines, the amicus brief filed in *Bostick* by the American Civil Liberties Union stated that “[i]nsofar as the facts of the reported bus interdiction cases indicate, the defendants all appear to be Black or Hispanic.”<sup>270</sup> Assuming that this statement is true, had the Court—in some statistically freakish event—decided to resolve the question presented in *Bostick* in the first-ever reported bus interdiction case involving a white person, it would be no less pertinent for the Court to contemplate the legal doctrine’s potential racial implications.

In other words, the party in a particular case need not be a racial minority in order for judges to consider how a particular doctrine might impact people who are racially subordinated. Resisting racial classifications could help to avoid such dilemmas. A particular legal problem may have a significant racial dimension, even if the case on which the Court grants certiorari does not involve a member of the racial group most com-

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of Coercion, 2002 Sup. Ct. Rev. 153, 155 (observing empirical evidence suggests consent to search is often not voluntarily given in bus sweep situation “because a reasonable person would not be, under the totality of the circumstances, in a position to make a voluntary decision about consent”).

268. Carbado, *supra* note 25, at 978; *id.* at 981 (criticizing *Bostick* for depicting defendant and police officers “without explicit racial reference”); *id.* at 984–85 (“The more fundamental problem with Justice O’Connor’s analysis is that it does not explicitly engage race. Throughout her opinion, race remains unspeakable. A more careful analysis would, at the very least, have racialized *Bostick*’s interaction with the officers.”). It seems worth noting here that racial recognition can sometimes perform multiple meanings for multiple audiences. Carbado wants *Bostick* to recognize race because he believes the racial context is pertinent and that doing so will ultimately serve the cause of racial equality. Some proponents of racial equality, however, could conceivably oppose racial recognition in *Bostick* on the ground that it would be gratuitous, furthering the association of blacks with drug dealing. In the context of racial recognition, thus, one person’s pertinence can be another person’s gratuitousness.

269. See *Bostick*, 501 U.S. at 441 n.1 (Marshall, J., dissenting) (“[T]he approach of passengers during a sweep [may not be] completely random. Indeed, at least one officer who routinely confronts interstate travelers candidly admitted that *race* is a factor influencing his decision whom to approach.”); *id.* at 450 n.4 (“Insisting that police officers explain their decision to single out a particular passenger for questioning would help prevent their reliance on impermissible criteria such as race.”).

270. Brief for ACLU et al. as Amici Curiae Supporting Respondents at 18 n.19, *Bostick*, 501 U.S. 429 (No. 89-1717), 1990 WL 10013128.

monly identified with that problem. On such occasions, the Court need not turn a blind eye to that matter's racial considerations. Instead, by exploring race at a higher level of generality, the Court may acknowledge the role that race plays. Far from being merely a law professor's hypothetical, Justice O'Connor's dissenting opinion in *Atwater v. City of Lago Vista*—a case regarding a police officer's power to arrest during a traffic stop—raised the issue of racial profiling even though there was no indication in any materials before the Court that Gail Atwater was a racial minority.<sup>271</sup>

A racial recognition approach that embraces anticlassification but simultaneously rejects colorblindness may hold particular attraction for the person located at the center of many controversies before today's Court: Justice Anthony Kennedy. Justice Kennedy has repeatedly and passionately articulated the dangers he associates with the government determining an individual's racial identity. Recently, however, Justice Kennedy has also concluded that strict colorblindness sometimes affords decisionmakers too little flexibility to remedy racial problems. This technique may thus enable Justice Kennedy to honor his commitments both to the anticlassification ideal and to the race-conscious reality. Navigating the narrow space between these two commitments could make a profound difference in determining whether the Court issues decisions that appropriately acknowledge the role of race in society.

Justice Kennedy has written forcefully about the dangers of racial classification. Indeed, eleven years ago in *Rice v. Cayetano*, Justice Kennedy stated that the practice “demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”<sup>272</sup> And while Justice Kennedy has sometimes voiced his aversion to racial considerations in a way that may seem somewhat inclined toward colorblindness,<sup>273</sup> he has never written an opinion unreservedly embracing that terminology. The absence of such an opinion may be significant.

Justice Kennedy's concurring opinion five years ago in *Parents Involved in Community Schools v. Seattle School District No. 1*, regarding voluntary school integration programs, managed to be both anticlassification and anticolorblindness.<sup>274</sup> Kennedy undeniably expressed vehement op-

271. See 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) (“[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.” (citing *Whren v. United States*, 517 U.S. 806 (1996))).

272. 528 U.S. 495, 517 (2000); see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *Yale L.J.* 1694, 1736–45 (2008) (contending dignity is one of Justice Kennedy's core constitutional values).

273. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part) (“The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”).

274. 127 S. Ct. 2738, 2788 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (calling classification “inconsistent with the dignity of individuals in our

position to having school districts classify students on the basis of race. “Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin,” Justice Kennedy wrote.<sup>275</sup> “To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change.”<sup>276</sup>

But Justice Kennedy further made clear that he also rejected the notion that decisionmakers must never contemplate racial considerations. Indeed, Justice Kennedy expressly disavowed Justice Harlan’s much-celebrated line from the *Plessy* dissent contending: “Our Constitution is color-blind . . . .”<sup>277</sup> “[A]s an aspiration, Justice Harlan’s axiom must command our assent,” Justice Kennedy suggested. “In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”<sup>278</sup> Justice Kennedy emphasized that school districts may take account of race in several different ways without even drawing strict scrutiny from the bench.<sup>279</sup> School districts could, Kennedy explained, permissibly consider racial demographics in decisions regarding where to build new schools and how to draw school attendance zones, among other contexts.<sup>280</sup> Although Justice Kennedy certainly never phrased the thrust of his *Parents Involved* argument in a vocabulary that acknowledged the distinction between anticlassification and colorblindness, that distinction nevertheless seemed to animate the opinion implicitly. “If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal education opportunity to all of their students,” Justice Kennedy wrote, “they are free to devise race-conscious measures to address the problem in a general way and without treating each student in a different fashion solely on the basis of a systematic, individual typing by race.”<sup>281</sup>

Scholars and advocates who desire the Court to acknowledge racial dynamics if they play an important role in particular doctrinal areas need not agree with Justice Kennedy’s resolution of the dispute in *Parents*

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society” while also claiming colorblindness “cannot be a universal constitutional principle”).

275. *Id.* at 2797.

276. *Id.*

277. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). For an argument that the celebration of Harlan’s *Plessy* dissent has been wildly excessive, see Neil Gotanda, A Critique of “Our Constitution is Color-Blind,” 44 *Stan. L. Rev.* 1, 2–3 (1991) (“A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.”).

278. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

279. *Id.* at 2791–92.

280. *Id.* (identifying school siting decisions, drawing of school attendance zones, targeted recruiting of students and faculty, and tracking of enrollment and performance statistics by race as such measures).

281. *Id.*

*Involved*. Indeed, I cast my own lot with many others who contend that Justice Breyer's dissenting opinion in *Parents Involved* offered a far more persuasive vision of the Equal Protection Clause than those advanced in the opinions written by Justice Kennedy, Chief Justice Roberts, and Justice Thomas.<sup>282</sup> But allowing colorblindness to be conflated with anticlassification runs an unnecessarily high risk that the current Court will ignore racial realities when it might otherwise grapple with them.

#### CONCLUSION

In 1926, Langston Hughes published what would become a renowned essay in *The Nation* called "The Negro Artist and the Racial Mountain."<sup>283</sup> Black artists, Hughes insisted, should produce work that is both rooted in and explorative of the black American experience. Hughes memorably opened the essay by establishing as its foil an unnamed artist who aspires (foolishly, in Hughes's estimation) to have his work received in nonracial terms: "One of the most promising of the young Negro poets said to me once, 'I want to be a poet—not a Negro poet.'"<sup>284</sup>

This freighted question of racial identity, as this Essay has demonstrated, is far from limited to black artists writing during the Harlem Renaissance.<sup>285</sup> Judges of all different races—whether they consciously realize it or not—regularly confront strikingly similar questions of racial identity. Writing eight decades after Hughes's essay appeared, one legal scholar criticized the Supreme Court for its decision imposing the nonracial frame that the young poet desired for himself, its decision—that is—to portray a criminal defendant "as a man and not as a black man."<sup>286</sup> The young poet's request haunts many of the opinions analyzed above, ranging from Judge Posner's portrayal of a rapist as "a respectably dressed black man" rather than as "a respectably dressed man,"<sup>287</sup> to Justice Douglas's labeling Louise Lassiter "a Negro citizen of North Carolina" rather than "a citizen of North Carolina,"<sup>288</sup> to Justice

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282. See Lani Guinier, *The Supreme Court, 2010 Term—Forward: Demosprudence Through Dissent*, 122 *Harv. L. Rev.* 4, 35–39 (2008) (extolling Justice Breyer's oral and written dissents); Goodwin Liu, *The First Justice Harlan*, 96 *Calif. L. Rev.* 1383, 1383 (2008) (referring to Justice Breyer's dissent as "eloquent"); Owen Fiss, *A Compelling Basis for Integration*, *Louisville Courier-J.*, Sept. 16, 2007, available at <http://www.law.yale.edu/news/5617.htm> (on file with the *Columbia Law Review*) (praising Justice Breyer's dissent as one for the ages). I should disclose here that I served as a law clerk to Justice Breyer during the Term when *Parents Involved* was decided.

283. Langston Hughes, *The Negro Artist and the Racial Mountain*, *The Nation*, June 23, 1926, at 692.

284. *Id.*

285. For a compelling overview of this period, see David Levering Lewis, *When Harlem Was in Vogue* (1981).

286. Carbado, *supra* note 25, at 978.

287. *Wassell v. Adams*, 865 F.2d 849, 851 (7th Cir. 1989).

288. *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 45 (1959).

O'Connor's depiction of a woman intimidated by a cross-burning as a person "who was related to the owner of the property where the rally took place" rather than "a white woman who was related to the owner of the property where the rally took place."<sup>289</sup>

That judges are making racial determinations regarding individuals other than themselves, of course, adds a significant layer of complexity that did not confront Hughes's young poet. But it will no longer do to allow that additional complexity to prevent us from analyzing judicial decisions to recognize race. Nor, however, will it do to insist broadly that courts increase racial recognition without acknowledging the serious potential downsides that could accompany such recognition. The contemporary racial climate demands that courts approach racial matters with nuance and reflection and—perhaps, above all—explanation. Judicial recognitions of race evincing these three qualities have not been much in evidence, even in the recent past. Embracing these qualities, however, is essential to charting the racial path ahead.

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289. *Virginia v. Black*, 538 U.S. 343, 348 (2003).

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