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Strict Scrutiny & The Black Body

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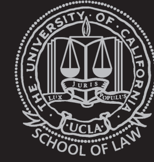
ABSTRACT

When people in law think about strict scrutiny, often they are also thinking about equal protection law's treatment of race. For more than four decades, scholars have vigorously challenged that legal regime. Yet none of that contestation has interrogated the social manifestation of strict scrutiny. This Article does that work. Its central claim is that Black people live under a social regime of strict scrutiny that treats the mere sight of Blackness as a suspect classification. This social regime trades on some of the same racial logics that underwrite the legal regime. Like its legal counterpart, the social version of strict scrutiny includes both "compelling justification" and "narrow tailoring" prongs. And just as these prongs are used to justify, adjudicate, and regulate the use of race in the legal context, they are used to justify, adjudicate, and regulate the presence of race, and more precisely, Blackness, in the social context. The first prong requires a compelling justification for Black presence, enforcing a presumption that Black people should not be wherever they are currently located, that we are a threat or problem everywhere we go. This presumption produces the strict scrutiny Black people experience doing virtually anything while Black, including jogging in their neighborhoods, entering their homes, and picnicking in public parks. The "compelling justification" prong of the social regime of strict scrutiny is disciplinary in another sense as well: It requires a compelling justification to take Black people—and our perspectives and experiences—seriously. While the justifications we offer are deemed sufficient from time to time, the bar is meant to be exceptionally high.

The narrow tailoring prong of the social regime of strict scrutiny imposes further regulatory demands. It exerts colorblind pressure on Black people to "narrowly tailor" our race into nothing more than inert skin color—skin color that is ostensibly without social meaning. More particularly, Black people must negotiate our race so that our Blackness either does not matter to us, is racially irrelevant, or figures at most as "one factor among many" in our self-presentations. The work "narrow tailoring" performs in that regard effectuates a form of governmentality—self-monitoring, self-fashioning, and self-scrutinizing—that is designed to produce "racial comfort" and "racial palatability" in order to manage other people's fears and anxieties about Blackness.

The operation of the legal and social regimes of strict scrutiny dictate that not only are racial remediation efforts that seek to address Black racial inequality presumptively suspect, but so is the Black body itself. Understood through this lens, Black people are suspect both in law and in social life and are thus subject to forms of regulation and adjudication that deny Black freedom and self-possession. In law, the suspect status of Blackness renders us presumptively illegitimate subjects of racial remediation: We are presumptively undeserving of interventions to address Black inequality.



In social life, the suspect status of Blackness renders Black people presumptively non-normative or non-law abiding. Therefore, we are presumptively deserving of surveillance, discipline, and social control. The combined effect of strict scrutiny's social and legal regimes is not only that the dominant ways in which Black people experience marginality—their various trajectories to "premature death"—are pushed beyond the bounds of social and constitutional legibility and legitimacy; it is also that Black people become unspeakable witnesses to this subordinating arrangement.

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> Between me and the other world there is ever an unasked question: unasked by some through feelings of delicacy; by others through the difficulty of rightly framing it. All, nevertheless, flutter round it. They approach me in a half-hesitant sort of way, eye me curiously or compassionately, and then, instead of saying directly, How does it feel to be a problem? they say, I know an excellent colored man in my town; or, I fought at Mechanicsville; or, Do not these Southern outrages make your blood boil? At these I smile, or am interested, or reduce the boiling to a simmer, as the occasion may inquire. To the real question, How does it feel to be a problem? I answer seldom a word.
>
> W. E. B. Du Bois in The Souls of Black Folk (1903)

PROLOGUE

A little after 8:00 AM on Memorial Day, 2020, in the Ramble, a rustic part of Central Park in New York City, Amy Cooper made a decision that could have ended a Black man's life. Ms. Cooper, a white woman, called the police on Christian Cooper (no relation), a Black man, after Mr. Cooper asked her to put her dog on a leash.[1] Mr. Cooper is a Harvard graduate, a board member of the New York City Audubon Society, and a prominent birdwatcher.[2] He is "one of the few male African-Americans who birds the Ramble regularly."[3] He asked Ms. Cooper to leash her "exuberant" dog, as the signs in the Ramble area required.[4] According to Mr. Cooper's Facebook post, the dog was "tearing through the plantings."[5] After Ms. Cooper's refusal to leash her dog, he told Ms. Cooper, "Look, if you're going to do what you want, I'm going to do what I want, but you're not going to like it," calling

1. Sarah Maslin Nir, *White Woman Is Fired After Calling Police on Black Man in Central Park*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/26/nyregion/amy-cooper-dog-central-park.html [https://perma.cc/9KQK-L3PR].
2. *Id.*
3. *Id.*
4. Joanna Walters, *Video of White Woman Calling Police on Black Man in Central Park Draws Outrage*, GUARDIAN (May 26, 2020), https://www.theguardian.com/us-news/2020/may/26/central-park-new-york-white-woman-black-birdwatcher [https://perma.cc/ED9N-B5DS].
5. Christian Cooper, FACEBOOK (May 25, 2020), https://m.facebook.com/story.php?story_fbid=10158742137255229&id=671885228 [https://perma.cc/9JPM-2VQU].

Ms. Cooper's dog and pulling out treats he carried for "such intransigence."[6] He then began recording the incident on his iPhone.[7]

The video begins with Ms. Cooper saying, "Sir, I'm asking you to stop," after which she approaches Mr. Cooper.[8] Mr. Cooper stands in place and replies, "Please don't come close to me."[9] Ms. Cooper again asks Mr. Cooper to stop filming her and instructs Mr. Cooper that if he fails to do so, she will call the police. Mr. Cooper responds, "Please, please call the cops."[10] As Ms. Cooper begins dialing on her phone, Mr. Cooper repeats again, "Please call the cops."[11] Ms. Cooper then continues, "I'm going to tell them there's an African-American man threatening my life."[12] Mr. Cooper then replies, "Please tell them whatever you like,"[13] a response that reflected Mr. Cooper's refusal "to participate in my own dehumanization."[14]

Within seconds, Ms. Cooper is informing the 911 dispatcher that: "I'm in the Ramble, there is a man, African-American, he has a bicycle helmet and he is recording me and threatening me and my dog."[15] She then adds: "I am being threatened by a man in the Ramble, please send the cops immediately!" before hanging up the phone and putting her dog on a leash.[16]

Mr. Cooper experienced Ms. Cooper's conduct as an effort "to racially intimidate"[17] him. There is reason to believe that Ms. Cooper believed that she had succeeded in doing just that. According to Mr. Cooper, after Ms. Cooper hung up with the police, he stopped recording, to which Ms. Cooper commented: "Oh, now that I've called the police, you stopped recording!" "No," responded Mr. Cooper. "Now that you've put your dog on the leash, I stopped recording."[18]

It's hard to describe Ms. Cooper's threat to call the police as anything other than a profound exercise of racial power. Presumably, Ms. Cooper knew that she was committing against Mr. Cooper the very act she claimed he was committing against her—creating endangerment. Against the background of that

6. *Id.*
7. *Id.*
8. *Id.*
9. Maslin Nir, *supra* note 1.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. NYC EPICENTERS 9/11→2021½ (HBO Documentary Films 2021).
15. Cooper, *supra* note 5.
16. *Id.*
17. NYC EPICENTERS 9/11→2021½, *supra* note 14.
18. *Id.*

endangerment, Ms. Cooper might have experienced Mr. Cooper's "Please tell them [the police] whatever you want" as racially exasperating—surrendering on his own terms to the racial ordering a police encounter could produce.

Indeed, we might even assume that Ms. Cooper really did not want to call the police. What is clear, however, is that she ratcheted up her threat's racial content in response to Mr. Cooper's refusal to heel. Her initial threat was formally race-neutral: "I am . . . calling the cops."[19] It was only after Mr. Cooper replied with, "Please call the cops. Please call the cops," that Ms. Cooper escalated her threat with racial specificity: "I'm going to tell them there's an *African-American man threatening my life*."[20]

To borrow from Sherod Thaxton, Ms. Cooper was "leveraging death."[21] She was mobilizing her racial bargaining power in the shadow of state violence that she knew her race and gender could authorize against his. Ms. Cooper's statement that a Black man was threatening a white woman's life created a moment in which the contrary was true. When claiming that a Black man was threatening the life of a white woman, in Central Park no less,[22] Ms. Cooper "knew she could rely on the police to take her side . . . ."[23] That is because against the history of race, gender, and policing in the United States, her gendered signal of racial distress was potentially both exigency-producing and adjudicatory. It carried the power to create a particular kind of state of emergency for which Black men have frequently been killed *within* the boundaries of what the law authorizes

19. Cooper, *supra* note 5.
20. *Id.* (emphasis added).
21. *See generally* Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475 (2013) (describing how prosecutors leverage death in the context of plea bargaining in capital cases).
22. Central Park, of course, was the very site of the Central Park Five case. Following the brutal rape and assault of Trisha Meili—a white woman jogging in Central Park—in 1989, five Black and Latino teenagers from Harlem were wrongly convicted of the highly sensationalized crime. The teens who became known as the Central Park Five—Antron McCray (15), Kevin Richardson (15), Yusef Salaam (15), Raymond Santana (14), and Korey Wise (16)—were exonerated in 2002 after new DNA evidence and a confession came to light. During the height of the tabloid media frenzy surrounding the case, the teenagers, subjected to coercive interrogation techniques by the New York Police Department (NYPD), were frequently described as "animals," "savages," and, "human mutations" who were "wilding." For a discussion of the media coverage of the Central Park Five and its concomitant perpetuation of the myth of the "bestial Black man," see N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004).
23. Stewart Chang, Frank Rudy Cooper & Addie C. Rolnick, *Race and Gender and Policing*, 21 NEV. L.J. 885, 908–09 (2021).

the police to do.[24] Thus understood, we might interpret Ms. Cooper's threat to Mr. Cooper as a way of both saying the names of countless African-American men who have died at the hands of police and pointedly asking Mr. Cooper whether he wanted to be next.[25]

Mr. Cooper's reply, "Please tell them whatever you like," likely caught Ms. Cooper off guard. More than that, Mr. Cooper's decision to stand his ground,[26] to assume the risk that his life would not matter to police who

24. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) (describing how police killings of Black people are considered legal under the current Fourth Amendment doctrine).

25. This is decidedly not the kind of honoring exercise Kimberlé Crenshaw and her coauthors had in mind when they launched the "Say Her Name" campaign to bring attention to the frequency of police violence against African American women. *See* KIMBERLÉ WILLIAMS CRENSHAW, ANDREA J. RITCHIE, RACHEL ANSPACH, RACHEL GILMER & LUKE HARRIS, AFRICAN AM. POL'Y F., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf [https://perma.cc/3BZZ-XZDB].

26. A "stand-your-ground" law is "[a] statute providing that a potential victim of a crime need not retreat before responding with force in self-defense to a threat, even if flight is possible. The stand-your-ground law immunizes the actor against civil suits and criminal charges when force was used justifiably in self-defense." *Stand-Your-Ground Law*, BLACK'S LAW DICTIONARY (11th ed. 2019). While "stand-your-ground" laws have been used to justify the killing of Black people, Black people have had difficulty invoking those laws to protect themselves. *See* U.S. COMM'N ON C.R., EXAMINING THE RACE EFFECTS OF STAND YOUR GROUND LAWS AND RELATED ISSUES 18 (2020), https://www.usccr.gov/pubs/2020/04–06-Stand-Your-Ground.pdf [https://perma.cc/PKF5-H7SP] (concluding that relevant studies "provide a compelling case that there is racial bias in the application of SYG laws that tilt against justice for African American victims, and bias in the application of justice depending on whether you are an African American or white person accused of shooting another white person"). For one of the studies examined by the U.S. Commission on Civil Rights Report, see JOHN K. ROMAN, URB. INST., RACE, JUSTIFIABLE HOMICIDE AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA (2013), https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF [https://perma.cc/QZ2R-WLW9]. Roman's study found that:

> [H]omicides with a white perpetrator and a black victim are ten times more likely to be ruled justified than cases with a black perpetrator and a white victim, and the gap is larger in states with Stand Your Ground laws . . . . Cases with a white perpetrator and a black victim are 281 percent more likely to be ruled justified than cases with a white perpetrator and white victim.

Id., abstract. For scholarly commentary on these disparities, see Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639 (2019); Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179 (2015); Victoria Bell, Note, *The "White" to Bear Arms: How Immunity Provisions in Stand Your Ground Statutes Lead to an*

responded, likely pushed Ms. Cooper to the brink of her own racism. In that regard, the tears Ms. Cooper expressed during her call to the police need not have been inauthentic.[27] Those tears might have evidenced a blend of shock and disbelief, frustration and anger, or regret and anticipatory mourning that because her gendered expression of racial power failed to discipline Mr. Cooper in the way that she had hoped, she was then "forced" to articulate a "racial hoax."[28] Inherent in that hoax was the extraordinary potential to thrust

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Unequal Application of the Law for Black Gun Owners, 46 FORDHAM URB. L.J. 902 (2019); Elizabeth Esther Berenguer, *The Color of Fear: A Cognitive-Rhetorical Analysis of How Florida's Subjective Fear Standard in Stand Your Ground Cases Ratifies Racism*, 76 MD. L. REV. 726 (2017); Cynthia Lee, *(E)racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91 (2014); Anthony Hall, Note, *A Stand for Justice—Examining Why Stand Your Ground Laws Negatively Impact African Americans*, 7 S. REGION BLACK L. STUDENTS ASS'N L.J. 95 (2013).

27. Many commentators have noted the calculated nature of these tears and the shift in Ms. Cooper's demeanor once she was speaking with the 911 dispatcher. *See*, *e.g.*, Zeynep Tufekci, *This Social-Media Mob Was Good: The Online Rage at Amy Cooper Could Prove to Be a Powerful Deterrent*, ATLANTIC (May 28, 2020), https://www.theatlantic.com/technology/archive/2020/05/case-social-media-mobs/612202 [https://perma.cc/D9JP-DP4U] (noting that Cooper "changes her tone" to one of distress once she gets the 911 operator on the call); Terina Allen, *3 Things Amy Cooper Did in Central Park to Damage Her Reputation and Career*, FORBES (May 29, 2020, 11:42 PM), https://www.forbes.com/sites/terinaallen/2020/05/29/3-things-amy-cooper-did-in-central-park-that-destroyed-her-life/#6c1888ad6198 [https://perma.cc/9QMZ-BBLB] ("[T]he video shows Amy Cooper changing the pitch, tone and inflection of her voice while on with a 911 operator so as to send the message that she was being physically assaulted though no one was assaulting her at all."); Zeba Blay, *Amy Cooper Knew Exactly What She Was Doing*, HUFFINGTON POST (May 27, 2020, 11:17 AM), https://www.huffpost.com/entry/amy-cooper-knew-exactly-what-she-was-doing_n_5ecd1d89c5b6c1f281e0fbc5 [https://perma.cc/3XJH-UP8P] ("[Ms. Cooper] understood completely the implications of calling the cops on a Black man. She understood that her faux-breathless screaming and tears could elicit a very specific, historic, racialized response.").

28. Katheryn Russell-Brown has written a compelling account of the ways in which racial hoaxes have played themselves out in American society. *See* KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (2d ed. 2008).

Mr. Cooper into a "zone of distinction,"[29] a biopolitical line between life and death for African-American men.[30]

Mr. Cooper, for his part, might have thought (implicitly or explicitly) that the very fact of their identities—his being a Black man; hers being a white woman—configured a social scene that historically staged legal and extra-legal violence against Black male subjects like him, not white female subjects like her.[31] The tone, uneasiness, and trembling in his voice as he enjoined Ms. Cooper—"Please don't come close to me . . . Please don't come close to me"—had a necrological feel.[32]

29. Note that I am employing "distinction" rather than "indistinction" because I mean to mark the particularity of the blurred boundary between life and death about which I am speaking. *Cf.* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 25 (Daniel Heller-Roazen trans., 1998). *See also* Lucy Burke, *Dementia and the Paradigm of the Camp: Thinking Beyond Giorgio Agamben's Concept of "Bare Life,"* 16 J. BIOETHICAL INQUIRY 195, 198 (2019) (noting Agamben's "highly influential vision of the camp as a liminal 'zone of indistinction,' a place in which people exist in a state of exception, stripped of their legal and political identities in a time and space between life and death"); Anthony Downey, *Zones of Indistinction: Giorgio Agamben's "Bare Life" and the Politics of Aesthetics*, 23 THIRD TEXT 109, 112 (2009) (explaining the "zone of indistinction" as a place "where the dividing line between citizen and outlaw, legality and illegality, law and violence, and ultimately life and death are strategically and at times fatally blurred"). Black women, of course, have their own zones of distinction that converge with and depart from those of African American men. *See, e.g.*, SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY (2016).
30. Ms. Cooper has now sued her employer for racial discrimination for firing her over the incident. Jonah E. Bromwich & Ed Shanahan, *Amy Cooper, White Woman Who Called 911 on Black Birder, Sues Over Firing*, N.Y. TIMES (May 26, 2021), https://www.nytimes.com/2021/05/26/nyregion/amy-cooper-suing-racial-discrimination.html [https://perma.cc/G482-9QD7].
31. The point here, of course, is that, as a historical matter, Black men have been vulnerable to racial violence for transgressing, among other race and gender boundaries, one that demarcated a space between Black men and white women. On the history of this racial violence, see CRYSTAL N. FEIMSTER, SOUTHERN HORRORS: WOMEN AND THE POLITICS OF RAPE AND LYNCHING (2009); ASHRAF H.A. RUSHDY, AMERICAN LYNCHING (2012); PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2003). *See also* Charles M. Blow, Opinion, *How White Women Use Themselves as Instruments of Terror*, N.Y. TIMES (May 27, 2020), https://www.nytimes.com/2020/05/27/opinion/racism-white-women.html [https://perma.cc/4DQW-4RQ5]; Jennifer Rae Taylor, *A History of Tolerance for Violence Has Laid the Groundwork for Injustice Today*, ABA HUM. RTS. MAG. (May 16, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/tolerance-for-violence [https://perma.cc/NX58-FXK2]; Ashley C. Rondini, *White Supremacist Danger Narratives*, 17 CONTEXTS 60 (2018), https://journals.sagepub.com/doi/pdf/10.1177/1536504218792532 [https://perma.cc/J6BT-UBXL].
32. For an articulation of necropolitics, see Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 11, 40 (2003) (stating that "the ultimate expression of sovereignty resides . . . in the power and the capacity to dictate who may live and who must die," and describing how necropolitics and necro-power have created "*death-worlds*, new and unique forms of social existence in which

Mr. Cooper might have thought that the closer Ms. Cooper got to him, the more precarious the ground on which he had to stand to push back against the built-in historical headwinds that were bearing down on his life.

To be clear, I am not arguing that Mr. Cooper had any of the foregoing thoughts. On the one hand, Mr. Cooper has been clear that he experienced Ms. Cooper's conduct as "unmistakably . . . racist."[33] According to Mr. Cooper, Ms. Cooper "pulled the pin on the grenade of race and lobbed it at me."[34] Mr. Cooper has also said, however, that he "suffered no harm, physical or mental" from the encounter,[35] and that "raising the specter of what harm might have come to me as a result of Ms. Cooper's false report carries no weight with me; I don't find speculation useful in this situation, because it's equally possible that, had the police arrived on the scene while I was still there, they would have done their jobs professionally."[36] I take Mr. Cooper at his word.[37]

But the moment in which Mr. Cooper found himself is not his alone. It belongs to Black men's collective consciousness in the sense of shaping our epistemological standpoint[38] and reflecting our "linked fate."[39] To think about the

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vast populations are subjected to conditions of life conferring upon them the status of *living dead*"). For a more recent work, see ACHILLE MBEMBE, NECROPOLITICS (2019).

33. NYC EPICENTERS 9/11→2021½, *supra* note 14.
34. NYC EPICENTERS 9/11→2021½, *supra* note 14.
35. Christian Cooper, Opinion, *Why I Have Chosen Not to Aid the Investigation of Amy Cooper*, WASH. POST (July 14, 2020), https://www.washingtonpost.com/opinions/christian-cooper-why-i-am-declining-to-be-involved-in-amy-coopers-prosecution/2020/07/14/1ba3a920-c5d4–11ea-b037-f9711f89ee46_story.html [https://perma.cc/WBX5-LMUM]; Christian Cooper, *Why I Won't Be a Part of Prosecuting Amy Cooper*, WASH. POST, July 15, 2020, at A23.
36. *Id.*
37. I also agree with Mr. Cooper's decision not to participate in efforts to prosecute Ms. Cooper. At best, that prosecution will function as little more than symbolic antiracism.
38. For an engagement of the relationship between epistemological standpoint and Black feminist thinking, see AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES (1984); BELL HOOKS, AIN'T I A WOMAN?: BLACK WOMEN AND FEMINISM (1981); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984). This body of work has shaped my thinking about standpoint epistemology more generally.
39. *See* MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS (1994) (arguing that despite economic diversification, African Americans perceive a "linked fate" in terms of their racial group interests). *See also* Evelyn M. Simien, *Race, Gender, and Linked Fate*, 35 J. BLACK STUD. 529, 529–30 (2005) ("For African Americans, linked fate stems from a long history of discrimination and segregation in the United States. Black political scientists, namely Tate (1994) and Dawson (1994), posit that linked fate arises from lived experiences, specifically day-to-day encounters with race oppression and class exploitation in public spaces and private domains." (citations omitted)).

matter in Baldwinian terms, Mr. Cooper was bearing witness,[40] whether he wanted to or not. His encounter narrated a longstanding feature of African American life: the *group* representational currency of *individual* Black bodies. At no point during the encounter was Ms. Cooper engaging Mr. Cooper solely as Black-man-as-individual-subject. She was always already engaging him as Black-man-as-group-species as well.[41]

To watch—as a Black man—the encounter between Ms. Cooper and Mr. Cooper is to be drawn into its racially violent potential. It is to be right there, representatively present, in what Monica Bell would call a state of "vicarious marginalization."[42] Thus, irrespective of how Mr. Cooper subjectively experienced the moment, his interaction with Ms. Cooper engendered in at least some Black men the racially liminal and vicarious sensation of feeling "already dead."[43]

It takes me little effort to step into Mr. Cooper's positionality. On the one hand, his experience feels entirely ordinary, part of the "what is" and "what is supposed to be" of Black life. Angela Onwuachi-Willig might call this normalization of racial subordination "the trauma of the routine."[44] On the other hand, articulating Mr. Cooper's experience calls to mind Calvin Warren's notion of "ontological terror."[45] Though that terror can be more or less noisy in our individual and collective consciousness, more or less salient to us as an existential threat, it is a terror for which Black people's bodies are always already keeping

40. I AM NOT YOUR NEGRO, at 23:13 (Magnolia Pictures, 2017) ("My responsibility as a witness was to move as widely and as freely as possible.").

41. *See* MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE 1975–76, at 243 (Mauro Bertani, Alessandro Fontana & François Ewald eds., David Macey trans., 2003) (suggesting that biopower "is directed not at man-as-body but at man-as-species").

42. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2104, 2107, 2117 (2017) (introducing the theory of "legal estrangement" and suggesting "vicarious marginalization" is one of the prongs of the phenomenon: "There is no better illustration of how vicarious marginalization might operate, and what its repercussions might be, than current events involving police officer maltreatment of African Americans. . . . Some have claimed that the seemingly ceaseless stream of grisly scenes on television and social media are giving birth to a new form of race-based posttraumatic stress.").

43. JAMES CAMERON, A TIME OF TERROR: A SURVIVOR'S STORY (1982) (describing his impending sense of death upon seeing two of his friends lynched).

44. *See* Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma From the Emmett Till Verdict*, 34 SOCIO. THEORY 335 (2016).

45. *See generally* CALVIN L. WARREN, ONTOLOGICAL TERROR: BLACKNESS, NIHILISM, AND EMANCIPATION 4 (2018) (describing "ontological terror" as including "the terror that ontological security is gone, the terror that ethical claims no longer have an anchor, and the terror that inhabiting existence outside the precincts of humanity and humanism.").

score—[46] indexing the instances in which we trigger and are triggered by the realization that "violence is a structural necessity to the constitution of blacks."[47] To put the point the way Alexander Weheliye has, "[b]ecause black suffering figures in the domain of the mundane, it refuses the idiom of the exception."[48]

Black people's realization that violence is a constitutive feature of our lives, that "black suffering figures in the domain of the mundane," is shaped at least in part by what Hortense Spillers calls "pornotroping."[49] To appreciate what Spillers might mean by pornotroping, consider the mass circulation of videos depicting the killing or brutalization of Black people. (How many of them have you seen?) Those images and videos operate not just as iconography; they are, in a very peculiar way, iconic. "Black bodies in pain for public consumption have been an American national spectacle for centuries."[50]

The historical pedigree of pornotroping and its routinization in American culture suggests that the violence against Black people that one frequently sees on various media outlets is consumed less as a denouement than as a release from the anticipation of what the viewer already knows she will see: another violated Black body in death or in pain. Under the guise of representing images that everyone *really* must see, the racial desire for (and normalization of) pornotroping permits the widespread circulation of forms of violence that might otherwise be unconsumable if not unrepresentable.

None of this is to say that the questions of how, when, and whether to represent Black suffering are easy ones. As Jerod Sexton asks: "To put it bluntly, how does one engage with black suffering without simply erasing it—refusing it,

46. *Cf.* BESSEL A. VAN DER KOLK, THE BODY KEEPS THE SCORE (2014).
47. Patrice Douglass & Frank Wilderson, *The Violence of Presence: Metaphysics in a Blackened World*, 43 Black Scholar 117, 117 (2013). *See also A Decade of Watching Black People Die*, NPR: CODE SWITCH (May 31, 2020, 11:15 AM), https://www.npr.org/2020/05/29/865261916/a-decade-of-watching-black-people-die [https://perma.cc/YHF4-JXSA]; Ed. Bd., *A Very Abbreviated History of Police Officers Killing Black People*, L.A. TIMES (June 4, 2020), https://www.latimes.com/opinion/story/2020–06–04/police-killings-black-victims [https://perma.cc/2GMF-XWEH].
48. ALEXANDER G. WEHELIYE, HABEAS VISCUS: RACIALIZING ASSEMBLAGES, BIOPOLITICS, AND BLACK FEMINIST THEORIES OF THE HUMAN 11 (2014).
49. Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 DIACRITICS 64, 67 (1987) ("[T]he captive body translates into a potential for pornotroping and embodies sheer physical powerlessness that slides into a more general 'powerlessness,' resonating through various centers of human and social meaning.").
50. Elizabeth Alexander, *"Can You Be BLACK and Look at This?": Reading the Rodney King Video(s)*, 7 PUB. CULTURE 77, 78 (1994).

absorbing it—in the very same gesture?"[51] Alexander Weheliye speaks to the difficulty and complexity of these issues as well, querying whether the move to expressly articulate a refusal to represent Black bodies in pain is a move that can sometimes participate in a version of the representation it seeks to avoid. As an illustration, Weheliye invokes one of the many powerful moments in Saidiya Hartman's *Scenes of Subjection*: her "refusal to reproduce Aunt Hester's whipping at the beginning of Frederick Douglass's 1845 Narrative of the Life of Frederick Douglass, the locus classicus and primal scene of black female subjection."[52] For Weheliye, this refusal is "never really a refusal, since Hartman cites many other violent incidents in the text and the scene is so familiar that it need not be presented in full, but instead serves as a conceptual caesura that endeavors to disarticulate the commonsensical twining of physical agony and enjoyment through the conduit of the black female body."[53] Whether we agree with Weheliye or not, his analysis invites us to consider the possibility that the "'potential for pornotroping'" vis-à-vis Black people is always already present.[54]

Against the backdrop of pornotroping, I have struggled with my own relationship to this liminal, near-death positionality, or what Achille Mbembe would call "necropower."[55] The same day Ms. Cooper summoned police to threaten Mr. Cooper, Minnesota was already staging another site for pornotroping. The police in Minneapolis kneeled on the neck of George Floyd, killing him after they were called to investigate a counterfeit $20 bill. I told myself that I would not watch that video.

(How can I be Black and look at it?[56] What would watching the video do to me?)

51. JARED SEXTON, AFRICAN AMERICAN STUDIES IN A CONCISE COMPANION TO AMERICAN STUDIES 222 (Carlos Rowe ed., 2010).

52. ALEXANDER G. WEHELIYE, HABEAS VISCUS: RACIALIZING ASSEMBLAGES, BIOPOLITICS, AND BLACK FEMINIST THEORIES OF THE HUMAN 91 (2014).

53. *Id.* at 91–92.

54. *Id.* at 93 (invoking what Hortense Spillers calls "'a potential for 'pornotroping' that persistently adheres to the black subject during and subsequent to enslavement . . .").

55. *See generally* Mbembe, *Necropolitics, supra* note 32, at 25. To foreground the work of death in the life of Black people is not to deny what Kevin Quashie encourages us to think about as "Black aliveness." See KEVIN QUASHIE, BLACK ALIVENESS, OR A POETICS OF BEING (2014). As Quashie explains, "though I don't deny the terribleness of the world we live in, nor its antiblack perpetuity, I am interested in conceptualizing an aesthetic imaginary founded upon black worldness." *Id.* at 9. For a compelling account of how we might view the relationship between social life and social death, see Jared Sexton, *The Social Life of Social Death: On Afro-Pessimism and Black Optimism*, 5 INTENSIONS 1 (2011).

56. Here, I am riffing off the title of Elizabeth Alexander's "Can You Be BLACK and Look at This?", *supra* note 50.

Nevertheless, I watched it—and more than once, participating in the conspicuous racial consumption the video invited. Each time I did so, I carried a trauma that blurred the lines between "look what they did to him"/"this could happen to me"/"this is happening to us"/"this is happening to me."

(If I could write this without pain, I would write this without pain).

(And therein lies its own problem: "'we who are dark' have done precious little talking about pain in this post-civil rights era . . . ."[57]).

It is hard to describe the extraordinary reality of the ordinariness with which the precarity of near-death figures in the psyche of many Black people.[58] Indeed, it is only when one pauses to disrupt the taken-for-granted nature of Black people's intersectional existence between life and death—an overlapping domain fraught with violent uncertainty—that the ordinariness of that extraordinariness becomes articulable.[59]

(What does it mean to occupy a body that is "unable to 'bear to think about' something which is 'always present'" on one's mind?[60])

Soon after the episode with Mr. Cooper and Ms. Cooper ended, Mr. Cooper's sister posted the video on Twitter.[61] The post went viral and has since been watched more than 45 million times on Twitter's platform alone.[62] Within 24 hours, Ms. Cooper was identified, had given up her dog to the rescue group she adopted him from, publicly apologized, and her employer fired her from her job as "a head of insurance portfolio management at Franklin Templeton."[63] In her

57. Jared Sexton, *The Obscurity of Black Suffering in* WHAT LIES BENEATH: KATRINA, RACE, AND THE STATE OF THE NATION 120, 121 (2007).
58. Following David Marriott, one might think of this as what he calls "a fatal way of being alive." DAVID MARRIOTT, ON BLACK MEN 15 (2000).
59. My deployment of intersectionality is consistent with efforts to encourage a reading of that theory as rooted in analyses of power. *See* Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS 811 (2013). My thinking in this respect aligns with Kimberlé Crenshaw's deployment of the theory to contest particular expressions of power in law, political practices, and knowledge production. *See also* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).
60. Alexander, *supra* note 50, at 85.
61. Melody Cooper (@melodyMcooper), TWITTER (May 25, 2020, 10:03 AM), https://twitter.com/melodyMcooper/status/1264965252866641920 [https://perma.cc/LRU6-LW2D].
62. *Id.*
63. Maslin Nir, *supra* note 1. Franklin Templeton is one of the world's largest publicly-traded holding companies and a global investment firm that has over $1.5 trillion dollars worth of assets under managment. About Us, FRANKLIN TEMPLETON, https://www.franklintempleton.com [https://perma.cc/3KFL-BY8P].

apology statement, Ms. Cooper said that she believed she was being threatened, that Mr. Cooper had a right to request her dog be leashed in that area, and that she was aware of the "pain that misassumptions and insensitive statements about race cause" and could not imagine that she "'would be involved in the type of incident that occurred'" with Mr. Cooper.[64]

Since the incident, Mr. Cooper has addressed the public response, noting that "'It's a little bit of a frenzy, and I am uncomfortable with that.'"[65] He added: "'If our goal is to change the underlying factors, I am not sure that this young woman having her life completely torn apart serves that goal.'"[66]

It would be easy to exceptionalize the racial predicament in which Mr. Cooper found himself[67] and to frame Ms. Cooper as a "bad apple civilian," like the figure of the "bad apple cop" on whose shoulders the problem of race and policing is said to rest.[68] But the vulnerable ground on which Mr. Cooper stood was not paved entirely by individual bad behavior. It was paved as well, and to a much greater extent, by a broader racial dynamic that I will call the "social regime of strict scrutiny."

64. Maslin Nir, *supra* note 1.
65. *Id.*
66. *Id.*
67. There is a widespread tendency, especially among many white Americans, to think of racism as an exceptional feature of social life rather than endemic to society. *See, e.g.*, David Simson, *Hope Dies Last: The Progressive Potential and Regressive Reality of the Antibalkanization Approach to Racial Equality*, 30 Wm. & Mary Bill Rts. J. at *11–12 (forthcoming 2022) [perma.cc/7KDV-RXFR] (discussing this "perpetrator perspective" of racial discrimination and racism as well as Critical Race Theory critiques of it); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1126 (2008) (discussing how white Americans are likely to define racial discrimination and racism "primarily as an aberrational form of bad intent"). For a strong articulation of the claim that racism is instead a permanent feature of American society, see DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).
68. For critiques of "bad apple" accounts of police violence, see Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621 (2020); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629; Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio's *Pathway to Police Violence*, 64 UCLA L. REV. 1508 (2017) [hereinafter Carbado, *Stop and Frisk*]; Devon W. Carbado, *Blue-On-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159 (2016); Chiraag Bains, *"A Few Bad Apples": How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine*, 93 IND. L.J. 29 (2018); Judith A.M. Scully, *Rotten Apple or Rotten Barrel?: The Role of Civil Rights Lawyers in Ending the Culture of Police Violence*, 21 NAT'L BLACK L.J. 137 (2009).

INTRODUCTION

When we speak we are afraid our words will not be heard nor welcomed, but when we are silent we are still afraid, so it is better to speak.

Audre Lorde in The Black Unicorn: Poems (1995)

When people in law think about strict scrutiny, they have in mind a doctrinal regime that shapes various areas of constitutional law,[69] including the U.S. Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.[70] A starting point for understanding equal protection law is knowing that every time the government acts—whether by way of a policy, a practice, or a law—it is vulnerable to the claim that this state action violates a person's or a group's equal protection rights because it treats similarly situated people differently without sufficient justification.[71] Courts employ different standards of review, or different levels of scrutiny, to determine whether equal protection has been denied depending on the nature of the distinction on which the government is said to have relied.[72]

Suppose, for example, that the California Legislature passes a law that requires people who drive red cars to pay higher taxes than people who drive cars of other colors. Red-car drivers could sue the state arguing that the law in question violates their right to "equal protection." The red-car drivers' theory would be that red-car drivers are part of the same group as (or at least similarly situated vis-à-vis) people who drive cars of other colors in relation to taxation. Therefore, the California legislature should not be able to treat red-car drivers differently by imposing on that group a higher level of taxation absent sufficient justification for doing so.

Were the case to land in court, the presiding judge would have to decide the level of scrutiny to apply in reviewing the California law. Should the judge presume that the California legislature acted properly and defer to its judgment

69. *See generally* Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (discussing the different doctrinal contexts in which strict scrutiny applies and providing an account of the origins of the regime); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 9.1.2, 9.3 (6th ed. 2019); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5–16, Congressional Power to Enforce the Fourteenth and Fifteenth Amendments, at 930 (3d ed. 2000).

70. U.S. CONST. amend. XIV, § 1. This Article specifically focuses on race and equal protection, which is just one slice of the equal protection landscape.

71. *See* CHEMERINSKY, *supra* note 69; TRIBE, *supra* note 69.

72. *See* Fallon Jr., *supra* note 69; CHEMERINSKY, *supra* note 69; TRIBE, *supra* note 69.

and reasons for imposing higher taxes on red-car drivers? Should the judge instead ask, without presuming one way or another, whether the California legislature had a "good" reason for taxing red-car drivers more heavily than it taxes people who drive cars of other colors? Or should the judge presume that the legislature acted improperly—indeed, unconstitutionally—and rigorously examine the basis for the legislature's disparate treatment of red-car drivers?

These three different sensibilities roughly track the three different standards of review, or levels/tiers of scrutiny, courts employ to determine whether governmental action violates equal protection. Those three standards of review are: (1) rational basis review, a deferential standard, under which the presumption is that the government acted constitutionally, (2) intermediate scrutiny, a prudential standard, under which there is no presumption with respect to constitutionality and the inquiry turns on whether there is a good reason for the government's conduct, and (3) strict scrutiny, a rigorous and nondeferential standard, under which the presumption is that the government acted unconstitutionally.[73] Though the equal protection landscape is slightly more complex than I have described, the takeaway for our purposes is that a "tiers of scrutiny" analysis is central to equal protection law.

As an economic regulation which does not treat people differently based on a group status that receives special constitutional attention, the hypothetical California tax law above would likely be analyzed under rational basis review and thus the law would enjoy a presumption of constitutionality and the California legislature would receive deference with respect to its justification for enacting it.[74] With respect to governmental action that expressly takes race into account, by contrast, courts apply strict scrutiny and treat such conduct as presumptively unconstitutional.[75] To overcome that presumption, the government must offer a "compelling justification" for its decision to rely on race, and the means

73. For a cogent articulation of the tiers of scrutiny framework, see CHEMERINSKY, *supra* note 69; TRIBE, *supra* note 69.

74 *See* Erwin Chemerinsky, CONSTITUTIONAL LAW 689 (6th ed., 2020) ("Since 1937, the Court has made it clear that it will defer to government economic and social regulations unless they infringe on a fundamental right or discriminate against a group that warrants special judicial protection.")

75. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."); Grutter v. Bollinger, 539 U.S. 306, 308 (2003) (citing to *Adarand* for the proposition that all government-imposed racial classifications must be analyzed under strict scrutiny).

the government chooses to effectuate that justification must be "narrowly tailored" in the sense that race should figure as a relatively thin factor in its decision-making.[76] As I discuss in Part I, this doctrinal arrangement applies even if the government is invoking race for benign or remedial purposes—that is, as an effort to counteract racial inequality or to promote racial justice.[77] By way of example, efforts on the part of a state university to racially integrate or diversify its student body would be subject to the same judicial skepticism and presumption of unconstitutionality as efforts on the part of that institution to racially segregate its students. From the Court's perspective, because both integration initiatives and segregation initiatives necessarily rely on race, courts should treat both uses of race as suspect and subject them to strict scrutiny review.[78]

For several decades now, the formalism that all uses of race should receive the same constitutional treatment—strict scrutiny—has shaped constitutional law.[79] The entrenchment of that approach ties the remedial hands of the government, limiting the degree to which governmental actors may expressly take race into account to mitigate the range of inequalities that structure Black life. Motivating the Court's suspect treatment of racial remediation is the normative view that race should not matter.[80]

76. *Adarand*, 515 U.S. at 227.
77. *See infra* Subpart I.B, p. 26.
78. This does not mean that every application of strict scrutiny results in a declaration that the governmental use of race is unconstitutional. For one of the most thoughtful discussions on this point, see Adam Winkler, *Fatal in Theory and Strict in Fact: An Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).
79 *See, e.g.*, David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 654–60 (2019) (tracing rise of this formalist approach from its inception in the 1970s to it becoming settled doctrine in the late 1980s and 1990s).
80. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Because the Fourteenth Amendment protects persons, not groups, all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." (quotations omitted)); Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("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."); *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) ("In the eyes of government, we are just one race here. It is American."); *id.* at 240 (Thomas, J., concurring) ("That these [affirmative action] programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.")

But judicial pronouncements that race should not (or does not[81]) matter can make race matter in very subordinating ways. That is because it is hard if not impossible to meaningfully address *all* of the extant forms of Black inequality, including with respect to education, policing, housing, healthcare, employment, and carcerality, without adopting social practices and policies that explicitly take race into account. Because Black people experience race-specific harms in society, the most efficacious and capacious way to capture those harms often will be to "narrowly tailor" remedial efforts via race conscious interventions.[82]

As this Article will explain, however, race conscious "narrow tailoring" is not the kind of "narrow tailoring" on which equal protection law currently rests. Quite the opposite is true. Time and again, the Supreme Court has deployed "narrow tailoring" as one of several juridical tools to construct a colorblind equal protection wall that blocks or severely restricts the government's ability to improve the material conditions of Black life.[83]

Though this Article includes an interrogation of equal protection law, it is not fundamentally about the *legal* regime of strict scrutiny. My aim is instead to articulate a conceptualization of strict scrutiny beyond the parameters of constitutional doctrine. The central claim the Article advances is that, in different ways and to different degrees, Black people live under a *social* regime of strict scrutiny too. My thinking in that regard is very much a product of being a student of constitutional law. Indeed, it is precisely my knowledge of and engagements with equal protection doctrine that have led me to the conclude that both the discursive and normative terms in which courts articulate the legal regime of strict scrutiny, and the disciplinary effects of that juridical apparatus, can be mobilized to shed light on manifestations of antiblack racism in the social world. To put this point more precisely, what I am calling the social regime of strict

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81 *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1204-07 (2008) (discussing "tendency both in law and public discourse to treat normative claims about race as empirical ones" and explaining how "the dominant analytical framework treats 'should' or 'ought' as 'is' or 'does'").

82 *E.g.* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1243-44 (2002) ("[W]hen the state's purpose is explicitly race-conscious—for example, when it aims to remedy the disadvantages that black businesses suffer due to the continuing legacies of white supremacy—its use of racial means is not only clearly relevant to its purpose, but more narrowly tailored to that purpose than race-neutral means could be.").

83 *Cf.* David Simson, *Most Favored Racial Hierarchy: The Ever-evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. at *25-29 (forthcoming 2022) (on file with author) (arguing that the Supreme Court's equal protection narrow-tailoring rules in relation to race conscious remedies set up something akin to a "least favored nation" status for race conscious remedies and "devalue the interests of those for whom race is a significant force in determining their life circumstances").

scrutiny trades on some of the same racial logics that underwrite the legal regime of strict scrutiny. Like its legal manifestation, the social version of strict scrutiny includes both "compelling justification" and "narrow tailoring" prongs. And just as these prongs are used to justify, adjudicate, and regulate the use of race in the legal context, they are used to justify, adjudicate, and regulate, the presence of race—and more precisely the presence of the Black body—in the social context.

With respect to the "compelling justification" prong, a "compelling justification" for Black presence is required, enforcing a presumption (significantly, not a rule) that Black people should not be present almost anywhere except in cognizable zones of racial subordination—perhaps the quintessential example of which are prisons. Prison is one of the places where our overrepresentation communicates the message that we belong. We are suspicious[84] and presumptively do not belong anywhere else. The currency of that suspicion produces the strict scrutiny we experience when conducting or engaging in almost anything while Black, including jogging in our neighborhoods, entering our homes, and picnicking in public parks.[85]

The "compelling justification" prong of the social regime of strict scrutiny is racially restrictive in another sense: It treats as suspect the voices of Black people and our accounts of inequality. While our perspectives and experiences of discrimination—in workplaces, colleges and universities, and society more generally—are considered and accepted from time to time by the relevant bodies of listeners, those perspectives and experiences must be deemed "compelling" for that acceptance to occur. Making matters worse, the bar for meeting that "compelling" justification standard is meant to be exceptionally high. No matter the context, Black people are expected to suffer an extreme amount or form of subordination. Moreover, they are required to attribute that subordination to an identifiable "bad actor" who engaged in intentional and explicit forms of racial discrimination before Black people can hope for an intervention. In the rare instances where intervention is provided, it is typically directed at punishing the "bad actor" only, rather than (or in addition to) disrupting institutional and social arrangements that structuralize Black inequality.

The "narrow tailoring" prong of the social regime of strict scrutiny imposes its own regulatory demands. It exerts colorblind pressure[86] on Black people to

84 *Cf.* Simson, *supra* note 67 at *23 (noting that under current equal protection rules, consideration of race is treated as "inherently suspicious").

85. *See* discussion *infra* Part II, p. 40.

86. *See* Ian F. Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (offering a powerful articulation of how strict scrutiny in law is intimately bound up with colorblindness).

"work their identity"[87] and "narrowly tailor" it in a way that makes race appear to be merely a matter of differences in skin color. In other words, under "narrow tailoring," Black people are expected to strip ourselves of the very forms of racial consciousness through which our sense of racial solidarity and acts of resistance have been forged. This disciplinary effect of "narrow tailoring" might be understood as a form of governmentality[88] under which Black people self-monitor and self-fashion ourselves to produce "racial comfort"[89] and "racial palatability,"[90] both of which then serve to manage (but never thoroughly displace) other people's fears and anxieties about Blackness.[91] Understood that way, the phenomenon of "narrow tailoring" is a window—albeit a rather narrow one—not only on the erosion for Black people of what Rinaldo Walcott refers to as "bodily sovereignty,"[92] but also on the "fungibility" of Blackness more generally,

87. For an account of the theory of working identity, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) [hereinafter Carbado & Gulati, *Working Identity*]; DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA (2013) [hereinafter CARBADO & GULATI, *ACTING WHITE?*]. For productive applications of the theory, see Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1 (2018); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (2005); Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1 (2014).

88. Michel Foucault, *Governmentality, in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991).

89. *See* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1665 (2004) ("Part of the difficulty people of color experience working in predominantly white workplaces relates to racial comfort. Because nonwhite identity signifies racial difference and because this difference is perceived to cause grit not grease, people of color have the burden of making whites feel comfortable with their nonwhite identity. The fewer people of color within the organization and the fewer minority success stories, the heavier the racial comfort burden.").

90. *See* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1792 (2003) ("Other things being equal, employers prefer nonwhites whose racial identity is not salient and whose identity performance is inconsistent with stereotypes about their racial group. In other words, employers screen for racial palatability."); Carbado & Gulati, *supra* note 89, at 1676–77 ("[B]ecause of concerns about racial comfort and institutional fit, firms will screen for racial palatability and against performative racial difference. Concretely and employing blacks as an example, firms will hire people who are phenotypically but unconventionally black—that is to say, people who 'look' but do not 'act' black.").

91. *See infra* Subpart II.D, p. 61.

92. RINALDO WALCOTT, THE LONG EMANCIPATION: MOVING TOWARD BLACK FREEDOM 4–5 (2021).

or the ways in which Blackness can be instrumentalized, commodified, and exchanged to further entrench Black people's subalternity.[93]

The work "narrow tailoring" thus performs in the social realm is not unlike equal protection doctrine's "narrow tailoring" requirement in the legal realm. Particularly as articulated in the context of affirmative action policies in higher education, the Supreme Court not only ignores or marginalizes the subordinating features of race and solidaristic configurations of Black community;[94] the Court also constitutionalizes a palatable conception of race under which perhaps the most profound marker of inequality in the United States—race—is treated as "one factor among many."[95]

To be clear, what I am calling the social regime of strict scrutiny does not purport to map the full contours of race and racism in the social world. My account is far from, and certainly does not aspire to be, a "total theory" of race, whatever that might mean.[96] Indeed, if I am confident of anything I say in this Article it is that my account of strict scrutiny leaves out quite a bit. I am using the strict scrutiny frame for two principal reasons. First, I employ it to put into sharp relief some of the social features of race that structure the terms on which Black people navigate society. Here, my effort is to show how the logics and language of strict scrutiny from the legal realm help illuminate racial dynamics in the social realm.

Second, foregrounding the social regime of strict scrutiny makes it easier for people to see how its legal counterpart limits the antiracist potential of equal protection doctrine. In other words, an account of how the *social* regime of strict scrutiny effectuates a "heightened" and "rigid" review of Black bodies makes it easier to see how the *legal* regime of strict scrutiny effectuates a "heightened" and "rigid" review of essentially all forms of antiracist interventions.

93. *See* Shannon Winnubst, *The Many Lives of Fungibility: Anti-Blackness in Neoliberal Times*, 29 J. GENDER STUD. 102 (2020) (explaining the concept of fungibility with reference to the work of, among other scholars, Hortense Spillers and Saidiya Hartman and describing the different ways in which the concept has traveled).
94. *See infra* Subpart I.C, p. 35.
95. *See infra* Subpart I.D, p. 36.
96. One could, for example, contend that the fundamental problem confronting Black people today is one of neglect, not scrutiny, manifested in the state's refusal to see the multiple ways in which Black people are disadvantaged. Even under that framing, however, strict scrutiny remains an important part of the story. That is because though the state routinely engages with Black marginalization—statistic, after statistic, after statistic—it often performs that engagement from a position of scrutiny that pathologizes Black inequality via explicit and implicit claims about social responsibility and agency. That one can fold arguments about neglect into my formulation of strict scrutiny is still not to say that I am offering a "total theory" of race. To repeat: I am not.

Facilitating that awareness is all the more crucial because at some point during law school (typically, the first year), almost every law student studies the legal regime of strict scrutiny. But many of those students will not necessarily appreciate (and might not be encouraged to see) the disciplinary effects of that body of law. Enabling students to confront how the *social* regime of strict scrutiny disciplines Black bodies, including by demanding the "narrow tailoring" of Black people's relationship to (their) race and their aspirations for racial justice, puts those students in a better conceptual and normative position from which to consider how the *legal* regime of strict scrutiny disciplines antiracist policies and practices, including by demanding the "narrow tailoring" of equal protection doctrine's relationship to race and its capacity to fashion or accommodate racial remediation.

In placing the legal regime of strict scrutiny in conversation with the social regime of strict scrutiny, then, my hope is that all readers will come to see that strict scrutiny both enables forms of racial subordination against Black people (by treating the Black body itself as suspect) and simultaneously undermines efforts to address that subordination (by treating remediation efforts that seek to address Black racial inequality as suspect).[97] The combined effect of the social and legal regimes of strict scrutiny creates an overarching racial governance structure that justifies—indeed, legalizes the existence of—Black inequality and treats it as a naturally occurring racial disaster beyond the state's or anyone's control.[98] The end result is that not only are the dominant ways in which Black people experience what Ruth Gilmore calls "premature death"[99] pushed beyond social and constitutional legibility and legitimacy, but so are antiracist efforts that contest those conditions of Black life. Under the social and legal regimes of strict scrutiny, Black people are supposed to be unspeakable witnesses to their own marginalization.

97. In pursuing this effort, the project draws on various literatures, including legal studies (in particular, Critical Race Theory), Black Studies, Cultural Studies, and Social Psychology. This was not motivated by a desire to put these various literatures in conversation with each other. Indeed, I do not claim that I have done that. Rather, works across each of the fields were helpful in expressing the various claims I mean to advance.

98. As I discuss further below, this logic is reflected in the fact that neither de facto racial segregation nor societal discrimination can function as predicates for race conscious equality interventions. *See infra* Subpart I.B, pp. 26–35.

99. *See* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA 247 (2007) (writing that racism is "the state-sanctioned and/or extralegal production and exploitation of group-differentiated vulnerability to premature death").

Before I proceed to map the organization of this Article, a word about my articulation of Blackness is in order. That I am speaking of Blackness and Black people in generalizable terms is not to deny important intraracial differences. Among other theories, Kimberlé Crenshaw's theory of intersectionality exposes the epistemic and representational violence (in knowledge production, law, and community organizing) that can arise from the failure explicitly to grapple with intersectional configurations of power.[100] Accordingly, there are moments in this Article when Blackness will be formulated in more particularized terms, explicitly modified, as it were, to attend to intrablack differences. But, for the most part, the claims I advance in this Article rest upon articulations of Blackness per se, or what Elizabeth Alexander might call "bottom line blackness."[101] That is because both the legal and social regimes of strict scrutiny are triggered by race per se logics through which Black people, and remedial projects that center Black life, are treated as suspect racial classifications—per se—that warrant the application of "heightened" scrutiny.

Part I begins the discussion of that scrutiny by describing the legal regime of strict scrutiny as it applies to race. Its point of departure is a re-reading of Justice Powell's opinion in *Regents of the University of California v. Bakke*[102] through the prism of the Black body—that is to say, through the configurations of Blackness the opinion instantiates and the refusals to acknowledge and remediate Black marginalization it effectively constitutionalized. While that opinion splintered the Supreme Court in a variety of ways,[103] its reasoning

100. See generally, Crenshaw, *Demarginalizing the Intersection*, *supra* note 59.
101. Alexander, *supra* note 50, at 81.
102. 438 U.S. 265 (1978).
103. *Id*. In the opinion, Justices Stevens, Burger, Stewart, Rehnquist, and Powell agreed that the University of California, Davis's medical school's special admissions program, which set aside a certain number of seats for "disadvantaged" minority applicants, violated Title VI of the Civil Rights Act of 1964 in that it unlawfully excluded Bakke because of his race, and ordered the medical school to admit Bakke. *Id.* at 270–71 (Powell, J.); *id.* at 421 (Stevens, J., Burger, J., Stewart, J., & Rehnquist, J., concurring). In contrast, the other four justices found that the medical school's affirmative action program was constitutional. *Id.* at 325–26 (Brennan, J., White, J., Marshall, J., & Blackmun, J., concurring in part and dissenting in part). While Justice Powell disagreed, *id.* at 307, he found that an affirmative action program like Harvard's, which instead considered race as one factor, would be constitutionally permissible. *Id.* at 316–20. Therefore, Powell joined with the other four justices (Brennan, White, Marshall, and Blackmun) to allow race to be used as one factor among many in a university's admissions program. *Id.* at 272. As Justice Powell concluded in his plurality opinion, "[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320. The concurrence by Justices Brennan, White, Marshall, and Blackmun

helped define the doctrinal terrain of not only affirmative action, but also of equal protection law more generally, infecting that body of law with the view that any consideration of race triggers heightened scrutiny.[104] Much more was at stake in Justice Powell's opinion than the constitutionality of affirmative action alone.[105] Examining the suspect classification story on which Justice Powell's opinion rests—and the disposability of Black racial inequality it legitimizes—offers a window into how equal protection law became a doctrinal landscape on which the unequal dimensions of Black life do not matter.

Part II then focuses on the social regime of strict scrutiny. It describes how the "compelling justification" and "narrow tailoring" prongs of that regime collaborate to subject Black people to various forms of public and private surveillance. Perhaps the starkest application of the social regime of strict scrutiny in Black people's lives is through policing, with its surveillance, targeting, and deadly suspicion of Black bodies. But Black people are made suspect and thus vulnerable in other contexts too, all in ways that determine how we conduct ourselves and manage our identities to mitigate our exposure to discrimination and violence—and sometimes quite literally to save our lives.

Compounding that vulnerability is the fact that the application of strict scrutiny to Black bodies is always already an unfinished project. From social moment to social moment, in interaction after interaction, strict scrutiny is reiteratively rolled out in response to the "threat in the air" Black bodies are socially constructed to create.[106] It is precisely this reiterative dimension of strict scrutiny that structures a social reality in which there is no escaping strict scrutiny's gaze. Quite the contrary. Each time Black people survive strict scrutiny is a precursor to the next application of the regime, and it lives on as a

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begins by summarizing these two separate holdings created by Justice Powell's agreement with aspects of the two separate concurring opinions. *See id.* at 324–26.

104. *See infra* Subpart I.A, p. 26. I am not saying that Justice Powell's opinion was the first to apply the modern iteration of strict scrutiny. I am saying that because Powell's application directly engaged the question of whether there should be a difference between benign and invidious uses of race, his answer in the negative created the conditions of possibility for the race-qua-race approach to equal protection to subsequently widely prevail.

105. *See* Haney-López, *supra* note 86, at 1825 (describing *Bakke* as "a case which marks a fateful turning point in contemporary equal protection, for it is in *Bakke* that Powell offered an initial elaboration of contemporary colorblind reasoning").

106. The term "threat in the air" comes from Claude Steele's work on stereotype threat. The notion with respect to Black people, overall, is that the existence of negative racial stereotypes creates a "threat in the air" that can compromise Black people's performance in areas in which Black people are presumed to have a performance deficit. *See* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613 (1997). Quite clearly, I am employing the term in a very different sense.

warning of what we must do—prophylactically and reactively—to manage the various forms of scrutiny the suspect status of Blackness so often triggers.[107]

I. THE LEGAL REGIME OF STRICT SCRUTINY

A. Introduction

This Part describes the legal regime of strict scrutiny as it pertains to race. The discussion is decidedly summary. One of my goals is to ensure that readers are on the same page with respect to understanding the basic doctrinal structure around which the strict scrutiny standard is organized. Another goal is to show that this structure—which includes a trigger, justification, and fit analysis—also shores up the social regime of strict scrutiny. With respect to the legal regime, the racial logics of trigger, justification, and fit analysis render racial remediation projects presumptively suspect and circumscribe the degree to which the government can address racial inequality. With respect to the social regime, those very same logics render Black bodies presumptively suspect and ensure that Black people live their lives[108] encountering various form of surveillance, discipline, and social control.[109] Because, as I explain below, those encounters occur against the backdrop of the possibility of death, the strict scrutiny Black people experience can engender a sense of necrological anxiety.

B. The Trigger

For almost three decades, the Supreme Court has made clear that strict scrutiny is triggered whenever the government relies on race for whatever reason.[110] "Scholars have spilled much ink critiquing this whenever/whatever

107. Strict scrutiny is one of the social processes that reflect and produce the condemnation of Blackness. For a historical account of Blackness as a condemned social category, see KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010).

108. *See* SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA (1997).

109. *See infra* Part II, p. 40. Of course, not all Black people are equally vulnerable to these dynamics. For an understanding as to why, see generally, Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 59.

110. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("[T]his Court[] hold[s] 'benign' state and federal racial classifications to different standards does not square with [this Court's understanding of equal protection]. . . . Accordingly, we hold today that all racial

logic."[111] At the core of those critiques is the view that there is a normative difference between race consciousness in the form of racial remediation (which we might analogize to a "welcome mat"[112]) and race consciousness in the form of Jim Crow politics (which we might analogize to a "closed door").[113] The Supreme Court has explicitly rejected that benign/invidious—good use versus bad use of race—dichotomy. To support that repudiation, the Court has advanced some version of the following claim in various opinions:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.[114]

To be fair, the Supreme Court has offered other reasons for subjecting all uses of race to strict scrutiny, including the claim that race-conscious remedies like affirmative action discriminate against and otherwise harm innocent whites.[115]

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classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.")

111. *See* Devon W. Carbado, Bakke's *Untold Legacy* (draft on file with author). *See also* Theodore M. Shaw, *From* Brown *to* Grutter: *The Legal Struggle for Racial Equality*, 16 WASH. U. J.L & POL'Y 43, 55 (2004). Shaw considers the *Bakke* decision a loss for African Americans for multiple reasons:

> [O]ne, the Court completely ignored the history of the Fourteenth Amendment and refused to acknowledge that its original purpose was to bring the former slaves into all of the benefits of full citizenship. Two, the Court refused to draw a distinction between invidious discrimination and what it called 'benign discrimination,' that is, affirmative action. . . . Three, the Court developed a doctrine—or announced a doctrine in *Bakke* called 'societal discrimination.' It's discrimination for which nobody is responsible and for which there is no remedy, and the Court then began to shove more and more discrimination into that category. . . . Fourthly, the Court, decided the case on the grounds that Justice Powell's opinion articulated: diversity as a compelling state interest, which . . . I support, but it's a second best interest, and in some ways it's historically inaccurate and dishonest.

112. *See Adarand*, 515 U.S. at 245 (Stevens, J., dissenting).
113. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 401–02 (1978) (Marshall, J., concurring).
114. *Adarand*, 515 U.S. at 226 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)). *See also Bakke*, 438 U.S at 298 ("[I]t may not always be clear that a so-called preference is in fact benign"); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting *Croson*, 488 U.S, 469, 493 (1989)); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (quoting *Croson*, 488 U.S. 469, 493 (1989)).
115. *See Adarand*, 515 U.S. at 230 ("Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that

With respect to affirmative action specifically, the Court has argued that present day white Americans are not to be blamed for the history of racism in this country.[116] Nor are they to be blamed for the degree to which Black students are—at least based on a narrow reading of formal academic credentials—less academically qualified than their white counterparts.[117] Who is to blame for that so-called "achievement gap" instead?[118] Black students themselves, or the Black

race may be."); *Grutter*, 539 U.S. at 341 ("We acknowledge that 'there are serious problems of justice connected with the idea of preference itself.' Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.'" (citations omitted) (quoting *Bakke*, 438 U.S. at 298, 308 (1978)).

The Court has also argued that governmental racial consciousness engenders racial balkanization and causes racial tensions and divisions:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. . . . Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

Shaw v. Reno, 509 U.S. 630, 657 (1993). For an account of how these concerns figure in equal protection doctrine, *see* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011). For critiques of analyses of equal protection that focus on balkanization, see Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1 (2015); Simson, *supra* note 67.

116. *See, e.g.*, *Bakke*, 438 U.S. 265, 298, 310 (1978) ("[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making. . . . [T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."). *See also Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part) ("[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race.").

117. For a discussion of the degree to which admissions regimes might be mismeasuring merit, see Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CALIF. L. REV. 1063 (2006).

118. There is a broad interdisciplinary literature that frames differences in academic performance between Black and white students as an "achievement gap." For one of the earliest articulations of this idea, see JAMES S. COLEMAN, ERNEST Q. CAMPBELL, CAROL K. HOBSON, JAMES MCPARTLAND, ALEXANDER M. WOOD, FREDERIC D. WINFIELD & ROBERT L. YORK, U.S. DEP'T HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) [hereinafter Coleman Report], https://files.eric.ed.gov/full

families or Black "culture" in which they are situated?[119] In that regard, to read affirmative action jurisprudence as a Black person is potentially to hear "with piercing familiarity"[120] juridical articulations of white disavowal and absolution: "It wasn't us." "It was so long ago." "It is you!" The end result is that affirmative action jurisprudence reflects a "'competence suspicion'"[121] about Black students—"It is you!"—a suspicion that calls into question both their accomplishments and their abilities.

The existence of the "competence suspicion" fuels the Court's articulation of affirmative action as a racial preference that harms innocent whites. Central to the preference framing of affirmative action is the idea that the policy results in colleges and universities admitting less qualified and capable Black students over more qualified and capable white ones.[122] Drawing

text/ED012275.pdf [https://perma.cc/E656-JKDZ]; *see also* U.S. COMM'N AND C.R., RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967), https://files.eric.ed.gov/fulltext/ED015970.pdf [https://perma.cc/92B4-SWZR]. For commentary on the 50th anniversary of the Coleman Report, see Heather C. Hill, *50 Years Ago, One Report Introduced Americans to the Black-White Achievement Gap. Here's What We've Learned Since*, CHALKBEAT (July 13, 2016, 3:40 PM), https://www.chalkbeat.org/2016/7/13/21103280/50-years-ago-one-report-introduced-americans-to-the-black-white-achievement-gap-here-s-what-we-ve-le [https://perma.cc/7HCE-82CJ]; Matt Barnum, *50 Years Later, What America Still Hasn't Learned From the Coleman Report*, THE 74 (Oct. 16, 2016), https://www.the74million.org/article/50-years-later-what-america-still-hasnt-learned-from-the-coleman-report [https://perma.cc/2K7C-7S2R]. *See also* Symposium, *The Coleman Report and Educational Inequality Fifty Years Later*, 2 RUSSELL SAGE FOUND. J. 1 (Sept. 1, 2016), https://www.rsfjournal.org/content/2/5 [https://perma.cc/H8R7-FH59]; Symposium, *Revisiting the Coleman Report*, 16 EDUC. NEXT (2016), https://www.educationnext.org/revisiting-the-coleman-report [https://perma.cc/S6LM-LRB7].

119. One of the most striking articulations of the claim that Black inequality is a function of Black culture is made by Dinesh D'Souza. *See generally* DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995). The attribution of Black inequality to Black culture is also central to arguments about Asian Americans as the "model minority." *See* Gabriel J. Chin, Jerry Kang & Frank Wu, *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 17 (1996) (critiquing the "model minority" arguments and referring to the notion of a "model minority" as a myth).

120. Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), *reprinted in* 26 U.C. DAVIS L. REV. 835, 839 (1993) ("For years now I have heard the word 'Wait!' It rings in the ear of every Negro with piercing familiarity. This 'Wait' has almost always meant 'Never.' We must come to see, with one of our distinguished jurists, that 'justice too long delayed is justice denied.'").

121. *See* Carbado, *supra* note 111.

122. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277 (1978) ("In both years [1973 and 1974], applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's."); Gratz v. Bollinger, 539 U.S. 244, 262 (2003) ("When [petitioner] Hamacher applied to

from Sylvia Wynter, one might say that affirmative action advances a particular kind of "truth-for" narrative.[123] In that narrative, admissions processes function as level playing fields on which: (a) Black and white students both have a fair shot at admission, but (b) Black students generally are less qualified than their white counterparts. The deeply entrenched ostensible "truth" of that narrative has made it easy for the Court to treat affirmative action as a suspect policy that effectuates a "thumb on the scale" for Black students to the detriment of "innocent whites."[124] The Court's mobilization of that narrative aligns with and legitimizes "'a specific idea of order'"[125]: the overrepresentation of white people in colleges and universities and the underrepresentation of Black people. Put another way, and in

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the University as a freshman applicant, he was denied admission even though an underrepresented minority applicant with his qualifications would have been admitted.").

See also the concurrences and dissents of Justice Thomas for explicit articulations of this view, such as in *Grutter* where he states:

> [N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to 'correct' for black underperformance by using racial discrimination in admissions . . . The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.

Grutter v. Bollinger, 539 U.S. 306, 369–70, 372 (2003) (Thomas, J., concurring in part). Similarly in Fisher v. Univ. of Texas (Fisher 1), Justice Thomas suggests that:

> [R]acial engineering does in fact have insidious consequences. There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race. But I believe the injury to those admitted under the University's discriminatory admissions program is even more harmful. Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. . . . Tellingly, neither the University nor any of the 73 amici briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University.

570 U.S. 297, 331 (2013) (Thomas, J., concurring).

123. *See* Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, 3 CR 257, 269–272 (2003) ("[O]ur varying ontogeny/sociogeny modes of being human, as inscribed in the terms of each culture's descriptive statement, will necessarily give rise to their varying respective modalities of adaptive truths-for, or epistemes, up to and including our contemporary own.").

124. *See* Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 UC DAVIS L. REV. 1117 (2019) (interrogating the thumb-on-the-scale conceptualization of affirmative action).

125. Wynter, *supra* note 123, at 272.

Wynterian terms, affirmative action jurisprudence instantiates the overrepresentation of white people—and the underrepresentation of Black people—as merit *itself*.[126]

Think, for example, about the debate that ensued over President Biden's decision to nominate a Black women to the Supreme Court.[127] The fact that the pool of people President Biden considered was comprised of Black women[128] led various people to raise questions both about the qualifications of the women and about whether president Biden was discriminating against white people, and particularly, white men.[129] Notwithstanding that President Biden named as his nominee Judge Ketanji Brown Jackson of the U.S. Court of Appeals for the District of Columbia Circuit, a person who has the most elite academic and professional credentials,[130] questions about qualifications and merit persisted.[131]

126. *Cf. id.* at 260 (arguing that Man, the Western bourgeois conception of the human, "overrepresents itself as if it were the human itself").

127. *See* Michael D. Shear & Charlie Savage, *Biden Expected to Nominate a Black Woman to the Supreme Court*, N.Y. TIMES (Jan. 28, 2022), https://www.nytimes.com/2022/01/26/us/politics/supreme-court-nominee-black-woman.html [https://perma.cc/F4PV-AJHT]; Eli Stokols, *Biden Vows to Appoint a Black Woman to the Supreme Court as Breyer Makes Retirement Official*, L.A. TIMES (Jan. 27, 2022, 2:06 PM), https://www.latimes.com/politics/story/2022-01-27/biden-embraces-supreme-court-vacancy-as-breyer [https://perma.cc/J3RV-JRMC].

128. Following the retirement announcement of Supreme Court Justice Stephen G. Breyer, president Biden addressed reporters in the Roosevelt Room: "'I've made no decision except one: The person I will nominate will be someone of extraordinary qualifications, character, experience and integrity,' Biden said. 'And that person will be the first Black woman ever nominated to the United States Supreme Court. It's long overdue.'" *See id.*

129. *See* Andrew Zhang, *Ted Cruz Calls Biden's Vow to Nominate First Black Woman to U.S. Supreme Court "Offensive"*, TEX. TRIB. (Feb. 1, 2022, 3:00 PM), https://www.texastribune.org/2022/02/01/ted-cruz-biden-supreme-court [https://perma.cc/WL2N-JWPU]; Danielle Kurtzleben, *Republicans Take Issue With Biden's Pledge to Pick a Black Woman for Supreme Court*, NPR (Feb. 4, 2022, 4:16 PM), https://www.npr.org/2022/02/04/1078358077/republicans-take-issue-with-bidens-pledge-to-pick-a-black-woman-for-supreme-cour [https://perma.cc/2K39-32YN].

130. Ketanji Brown Jackson graduated *magna cum laude* from Harvard College and clerked for Associate Justice Stephen Breyer of the U.S. Supreme Court shortly after graduating *cum laude* from Harvard Law School. In addition to her time spent in private practice, Jackson worked as an assistant federal public defender before serving as a district judge for the U.S. District Court for the District of Columbia from 2013 to 2021, when she was elevated to the U.S. Court of Appeals for the District of Columbia Circuit. *See Ketanji Brown Jackson: Legal Career Timeline*, SOUTHERN POVERTY LAW CENTER (Apr. 7, 2022), https://www.splcenter.org/news/2022/04/07/ketanji-brown-jackson-legal-career-timeline [https://perma.cc/FZF4-CGE6].

131. *See, e.g.*, Charles Blow, *Demanding That Ketanji Brown Jackson 'Show Her Papers'*, N.Y. TIMES (Mar. 6, 2022), https://www.nytimes.com/2022/03/06/opinion/ketanji-jackson-

Meanwhile, there has been virtually no public debate about whether the Supreme Court nomination process has systematically discriminated against Black women inasmuch as no Black woman has ever served on the Court.[132] Implicit in this silence is the view that Black women are supposed to be absent from the Court. That is the natural ordering of things. Or, to articulate a weaker version of this point, Black women's absence (or exclusion) from the Court does not implicate concerns about merit and discrimination. It is the specter of their presence (or inclusion) on the Court that triggers those concerns, which is to say, triggers strict scrutiny: Is there a "compelling" reason to have a Black woman on the Court? Assuming there is, were the means President Biden chose "narrowly tailored" to effectuate that reason?

White men do not trigger anything like the preceding form of strict scrutiny. Their presence—indeed, overrepresentation—is the measure of merit. White men are supposed to be there. Their absence, or even what Luke Harris would call their "diminished overrepresentation,"[133] is taken as a sign that merit is being compromised and that discrimination is afoot.

To bring this back to admissions: Part of what is worrisome about the overrepresentation and underrepresentation problems I have described is that they elide the multiple ways in which admissions processes embed racial preferences for white applicants.[134] If the Court conceived of admissions processes as racially asymmetrical landscapes that by default tilt in ways that benefit white applicants, it could not so easily describe affirmative action policies as racial preferences that disadvantage innocent whites.[135] To put the point the way Noah Zatz has, "When the benefits of discrimination against others are taken as a

tucker-carlson.html (discussing Fox News Host Tucker Carlson's demand that Judge Brown Jackson's LSAT score be made public).

132. To put this point more precisely, in the mainstream media, there is little in the way of exploring whether Black women's absence from the Court is a function of systemic racism.

133. Luke Charles Harris, *Beyond the Best Black: The Making of a Critical Race Theorist at Yale Law School*, 43 CONN. L. REV. 1379, 1404 (2011) (emphasis added).

134. For a more extended discussion of this point, see Carbado & Harris, *supra* note 81.

135. *See id.* at 1158–1162 (suggesting that the preference framing of affirmative action is contingent on a baseline assumption that admissions regimes are level playing fields). Our argument in that paper builds on the work of Luke Harris and Uma Narayan and their critique of affirmative action discourse. *See* Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1 (1994). This is not to say that working class and poor whites are not also disadvantaged in admissions regimes. They are. I am suggesting that the racial advantages of the social world are not exhausted by class privilege.

baseline entitlement, an intervention's remedial character becomes invisible. Instead, that equalizing intervention looks like special treatment, raw redistribution away from members of a dominant group who earned their place at the top."[136] What is pernicious about that dynamic, which transcends affirmative action jurisprudence and extends to antidiscrimination law more generally, is that it "simultaneously shields discrimination's beneficiaries from acknowledgement of their windfall and derogates discrimination's victims as undeserving when they receive relief."[137]

The flipside of white innocence and disadvantage in affirmative action jurisprudence is Black guilt and advantage. Affirmative action jurisprudence implicitly articulates Black students as "guilty" of exploiting the unfair advantage affirmative action affords them, an advantage that produces "reverse discrimination" against whites.[138] The perception of Black students as "unjustly enriched" by affirmative action rests not only on the view that Black students are beneficiaries of and advocates for a policy that is perceived to harm innocent

136. Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155, 1157 (2015).
137. *Id.*
138. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) ("*All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious."); Gratz v. Bollinger, 539 U.S. 244, 271–74 (2003) (describing the "problematic nature" of the University's admission system which automatically awarded 20 points to members of "underrepresented minority" groups). For critiques of notions of "white innocence," *see* Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990); Erin E. Byrnes, Note, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535 (1999); John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419, 423 (2000); Neil Gotanda, *Reflections on* Korematsu, Brown *and White Innocence*, 13 TEMP. POL. & C.R. L. REV. 663 (2004); Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 Mich. J. Race & L. 477 (2006); Christopher A. Bracey, *The Cul De Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1242 (2006); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 481 (2014); Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 608 (2014); Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297 (2015); Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 141–42 (2017); Simson, *supra* note 79; Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CAL. L. REV. 707, 713 (2019); Kim Shayo Buchanan & Phillip Atiba Goff, *Racist Stereotype Threat in Civil Rights Law*, 67 UCLA L. REV. 316, 345 (2020).

whites, but also on the view that this beneficiary status is unearned: It derives from the failure on the part of those students to satisfy the presumptively race-neutral and otherwise legitimate merit criteria around which admissions processes are structured.[139]

Importantly, assumptions about white innocence and Black guilt are not peripheral notions in affirmative action cases.[140] They are core normative ideas that have helped establish and sustain the strict scrutiny trigger—namely, that any time the government relies on race, even to advance racial justice, its decision is "suspect" and thus warrants "the most searching judicial inquiry."[141] As you will soon learn, concerns about white innocence and Black guilt are also central to the operation of the social regime of strict scrutiny. But that is getting ahead of ourselves. For now, we will continue to focus on the legal regime of strict scrutiny and turn our attention to "justification" and "fit."

To remind you, both "justification" and "fit" kick in once strict scrutiny is triggered. The "justification" inquiry turns on whether the government can

139. Justice Thomas has been emphatic on this point. *See* Grutter v. Bollinger, 539 U.S. 306, 370–73 (2003) (Thomas, J., concurring in part and dissenting in part) (suggesting that a majority of Black law students are underqualified and that the University of Michigan needs to decide whether it wants to employ an admissions system based on diversity or merit).

140. The following cases all refer to notions of white innocence in some way: *See Bakke*, 438 U.S. 265, 298, 307, 308 (1978) ("[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making. . . . We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive."); *Grutter*, 539 U.S. at 306, 323–24, 341 (stating that remedial measures "would risk placing unnecessary burdens on innocent third parties 'who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. . . .' [R]emedial race-based governmental action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.'") (quoting *Bakke*, 438 U.S. 265, 310, 308 (1978) (opinion of Powell, J.). As noted by Kim Shayo Buchanan and Phillip Atiba Goff, "While explicit appeals to white 'innocence' have fallen out of fashion and are now rarely invoked, the cases decided on that basis remain good law, so that the presumption of white innocence is now 'baked in' to equal protection doctrine." Buchanan & Goff, *supra* note 138, at 316, 345 n.129.

141. Adarand Constructors, Inc., v. Peña, 515 U.S 200, 227, 236 (1995). *See also generally* Simson, *supra* note 79 at 652–77 (analyzing how white innocence reasoning was crucial to the development of doctrine in relation to all three aspects of what this Article calls trigger, justification, and fit).

articulate a "compelling" reason for its decision to rely on race.[142] What goals does the government seek to accomplish? Constitutionally speaking, are those goals compelling?[143] The "fit" inquiry turns on how the government seeks to advance those goals. Is there is a tight "fit" between the "means" and the "goals"? Asked more doctrinally, are the means the government employs to effectuate its goals "narrowly tailored"?[144]

C. Justification: The Compelling Interest Prong

Perhaps the best case to illustrate how the Supreme Court assesses what passes muster under the compelling justification prong of strict scrutiny is *Regents of the University of California v. Bakke.*[145] There, the Court had to decide whether the University of California Davis's medical school's affirmative action policy was constitutional. Justice Powell's opinion in that case became the foundation for contemporary race and equal protection jurisprudence, including his analysis of what counts and does not count as a compelling state interest.[146]

The medical school advanced four justifications for its affirmative action policy that it viewed as "compelling": combatting societal discrimination, facilitating the delivery of medical services to underserved communities, mitigating the underrepresentation in medical school of students from disadvantaged racial groups, and achieving the educational benefits of diversity.[147] Justice Powell rejected the first three justifications and concluded that achieving diversity was the sole purpose for which a university could employ race as a factor in admissions decisions.[148] Subsequent Supreme Court opinions have affirmed Justice Powell's justification analysis.[149] Thus, under current law, while diversity

142. *Adarand*, 515 U.S at 227, 235 (1995); Fisher v. Univ. Of Tex. (*Fisher I*), 570 U.S. 297, 307–10 (2013); Fisher v. Univ. of Tex. (*Fisher II*), 579 U.S. 365, 380–382 (2016).
143. *Id.*
144. *Adarand*, 515 U.S at 227, 235; *Fisher I*, 570 U.S. at 308–15; *Fisher II*, 579 U.S. at 377, 380, 387–388.
145. 438 U.S. 265 (1978).
146. *See* Carbado, *supra* note 111 (demonstrating the ways in which Powell's opinion in *Bakke* shaped contemporary equal protection doctrine).
147. *Bakke*, 438 U.S. at 305–06 (opinion of Powell, J.); *see also* Jennifer Jones, Comment, Bakke *at 40: Remedying Black Health Disparities Through Affirmative Action in Medical School Admissions*, 66 UCLA L. REV. 522, 563 (2019).
148. *Id.* at 307–11, 314–15.
149. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 324–25 (2003) ("Justice Powell approved the university's use of race to further only one interest: 'the attainment of a diverse student body. . . .' [T]oday we endorse Justice Powell's view that student body diversity is a

may serve as a compelling justification for affirmative action, combating societal discrimination may not.

There is much that one might say about this doctrinal arrangement, including how it pushes "societal discrimination"—which Justice Powell described as an "amorphous" concept[150]—beyond the reach of equal protection doctrine. In Justice Powell's opinion, Black inequality resulting from societal discrimination has no legal cognizability. Indeed, the opinion effectively constitutionalizes societal discrimination, rendering the existence of the phenomenon consistent with rather than anathema to the commands of equal protection. Instead of treating societal discrimination as a pressing racial reality that the government must remedy, Powell refashions it as an "amorphous" concept that the government must ignore.[151]

I will not, in this Article, elaborate on the preceding critique of Powell's opinion, since I am pursuing that project elsewhere.[152] For present purposes, it is enough to understand that: (a) any time the government relies on race for whatever reason it must satisfy the compelling state interest standard, and (b) the Court's application of that standard significantly limits the terms on which the government can promote and defend progressive race conscious interventions. To put a finer point on the preceding two takeaways, whether governmental race consciousness takes the form of affirmative action, voting rights, voluntary integration efforts in K-12 schools, or employment antidiscrimination measures, the Court treats it as presumptively suspect and therefore presumptively unconstitutional.[153]

D. Fit: The Narrow Tailoring Prong

Let's now turn our attention to "fit." To do so, we will assume that the government has a "compelling" reason to incorporate race into its decision-making. Would a court rule that the government's decision to rely on race is thus constitutional? Not necessarily. Recall that under strict scrutiny, the government must satisfy the requirements of not only justification, but also fit. Accordingly,

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compelling state interest that can justify the use of race in university admissions.") (quoting *Bakke*, 438 U.S. 265, 311 (1978)).

150. *Bakke*, 436 U.S. 265, 307 (1978).

151. For one of the most trenchant critiques of racial retrenchment, see Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

152. *See* Carbado, *supra* note 111.

153. *See id.*

the government must demonstrate that the means by which it seeks to advance its "compelling" goals are "narrowly tailored."[154] Once again, *Bakke* is a useful case for demonstrating how the Court employs this prong of strict scrutiny.

In *Bakke*, Justice Powell concluded that the medical school's affirmative action policy was not narrowly tailored because the school used quotas in its admissions policy. Justice Powell reasoned that quotas are not a "narrowly tailored" way to realize the university's "compelling interest" in diversity.[155] According to Justice Powell, in the context of affirmative action, "narrow tailoring" means treating race as one factor among many in deciding which students to admit.[156] Reserving a specified number of seats for particular students on the basis of race violated this race-as-one-factor-among-many standard.[157]

Twenty-five years later, the Supreme Court would affirm Justice Powell's strict scrutiny framework in a pair of cases: *Grutter v. Bollinger*,[158] which implicated the affirmative action plan of the University of Michigan's law school; and *Gratz v. Bollinger*,[159] which implicated the affirmative action policy of the University of Michigan's undergraduate program. With respect to justification, the Court concluded that the affirmative action policies in both *Grutter* and *Gratz* met the compelling state interest requirements of strict scrutiny because both polices were structured to advance diversity.[160] The Court reached a different conclusion with respect to fit, ruling that whereas the plan in *Grutter* satisfied the

154. *Bakke*, 438 U.S. 265, 319 (1978).
155. See *id.* at 288–89, 317–20.
156. *Id.* at 318–19.
157. *Id.*
158. 539 U.S. 306 (2003).
159. 539 U.S. 244 (2003).
160. *See Gratz*, 539 U.S. at 268 (noting that "for the reasons set forth today in *Grutter v. Bollinger*, the Court has rejected [petitioners'] arguments" that "'diversity as a basis for employing racial preferences is simply too open-ended, ill defined, and indefinite to constitute a compelling interest.'"); *Grutter*, 539 U.S. at 333, 355 (holding that "the Law School has a compelling interest in attaining a diverse student body" and that "[t]he Law School has determined . . . that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body").

fit requirement of narrow tailoring,[161] the plan in *Gratz* did not.[162] The Court reasoned that the *Gratz* policy failed to employ race as one factor among many in deciding which students to admit.[163] Instead, it allocated a predetermined number of points to students on the basis of race.[164] That approach, the Court reasoned, did not evidence a close fit between the goals of the affirmative action policy (diversity) and the means the university chose to realize those goals (a racialized point system).[165]

One way to redescribe what the Court is doing when it performs "narrow tailoring" analysis in the context of affirmative action jurisprudence is ascertaining whether the government is relying "too heavily" on race or, to put the point the way David Simson has, whether race is "too much" of a factor.[166] While the Court has not quite said that colleges and universities must employ race only as a last resort to advance diversity—meaning that they should exhaust all formally race neutral

161. The Court found that:

> [T]he Law School's admissions program bears the hallmarks of a narrowly tailored plan. . . . The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. . . . Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. . . . [T]he Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.

Grutter, 539 U.S. at 334, 335–36, 337.

162. *Gratz*, 539 U.S. at 270 ("We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.").

163. The *Gratz* court stated:

> [U]nder the approach Justice Powell described [in *Bakke*], each characteristic of a particular applicant was to be considered in assessing the applicant's entire application. The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an 'underrepresented minority' group . . . . Moreover, unlike Justice Powell's example, where the race of a 'particular black applicant' could be considered without being decisive, the LSA's automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant.

Id. at 271–72 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).

164. *Id.*

165. *Id.*

166. *See* Simson, *supra* note 67 at *21–23 (discussing how in race conscious remedies cases the Court's decisions on whether and how to apply strict scrutiny are driven in significant part by perceptions of whether race was used "too much").

approaches to achieving diversity before implementing race conscious affirmative action—it has grown increasingly concerned with how much of a factor race plays in affirmative action admissions.[167] The Court has defended this concern as an effort to make race "irrelevant."[168] But it is more accurate to say that the Court's "narrow tailoring" approach makes race *relevant* and useful—which is to say, fungible—in a particular kind of way: as a technology through which to elide or delegitimize social relations, or a group-based understanding, of racial power.

Central to "narrow tailoring" is the individual, ostensibly unraced. Over and over again, the Court has insisted that it is the individual who matters, not his membership in a racial group.[169] Indeed, as Justice Scalia argued, "we are just one race here. It is American."[170] This atomizing, colorblind approach to race—an approach that is not race neutral but deeply racially

167. *See* Fisher v. Univ. of Tex. (Fisher I), 570 U.S. 297, 312 (2013) (finding that "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice"); Fisher v University of Tex. (Fisher II), 579 U.S. 365, 381 (2016) (clarifying that the sole compelling interest that justifies the consideration of race in admissions is not "an interest in enrolling a certain number of minority students" but rather the "educational benefits" that flow from diversity) (internal quotation marks omitted).

168. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring) (invoking Alexander Bickel's statement that a racial quota is "a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant"). *See also* Fisher 1, 570 U.S. at 316 (2013) (Thomas, J., concurring) (insisting that the "Constitution abhors classifications based on race" because "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.") (citations omitted).

169. *See Bakke*, 438 U.S. at 318 n.52 (Powell, J.) ("The denial to respondent of this right to *individualized consideration* without regard to his race is the principal evil of petitioner's special admissions program." (emphasis added)). *See also* Miller v. Johnson, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (citations omitted)); Grutter v. Bollinger, 539 U.S. 306, 336–337 (2003) (O'Connor, J.) ("When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an *individual* and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." (emphasis added)); *Id.* at 392–93 (Kennedy, J., dissenting) (reiterating that "an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decision making."). For a discussion of the individualized consideration requirement introduced by Justice Powell in *Bakke* and its subsequent impact on the Supreme Court's decisions in *Grutter* and *Gratz*, see Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006).

170. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part).

invested in ignoring or explicitly dismissing contemporary manifestations of racial injustice—helps to explain two core features of the Court's "narrow tailoring" analysis: (1) why quotas do not satisfy the requirements of "narrow tailoring" (because they are a group-based form of racial remediation); and (2) why the race-as-one-factor-among-many approach does (because it limits the "means" by which the Court may use race as a remedial tool).[171]

As with my discussion of justification (the "compelling state interest" prong of strict scrutiny), there is far more one might say about fit (the "narrow tailoring" prong). But, here, too I have sidestepped broader critiques of "narrow tailoring" to focus your attention on the rough contours of the doctrine.

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Now that you understand how *trigger*, *justification*, and *fit* function under the legal regime of strict scrutiny, you are poised to consider how they function under the social iteration of the regime. That is the matter I take up in Part II.

II. THE SOCIAL REGIME OF STRICT SCRUTINY

A. Introduction

This Part argues that strict scrutiny is applied not only in the legal realm to policies and practices that are designed to mitigate Black inequalities, but also in the social realm to the Black body itself. Under the legal regime of strict scrutiny, racial remediation projects occupy a cramped juridical position in law; under the social regime of strict scrutiny, Black people occupy a cramped social position in life. In that regard, equal protection law's legitimization of a "suspect classification" approach to Black inequality, Black life, and Black people exists beyond the borders of that juridical domain. Indeed, the central claim this Part advances is that the "competence suspicion" and the disposability of Black minds that underwrite the Court's approach in the affirmative action cases I discussed in Part I grow out of the same racial field as the "criminality suspicion" and the disposability of Black bodies that underwrite the surveillance of Black people I describe in this Part. The existence of both forms of suspicion and their entanglement with disposability legitimize the idea that Black people, claims about anti-Black racism, and efforts to address that racism are all presumptively suspect.

171. *See infra* Subpart II.D, p. 61.

Therefore, Black people, claims about anti-Black racism, and efforts to address that racism should each be strictly scrutinized.

In thinking along the preceding lines, I am not saying that the legal regime of strict scrutiny causes the social regime. As I mentioned in the Introduction, I am drawing on the language and logics of strict scrutiny in the legal context to foreground dynamics of race in the social arena and to illustrate how those social dynamics work in tandem with the legal regime to form a broader "strict scrutiny" architecture of racial subordination.[172] Thus understood, the main intervention of this Article goes beyond demonstrating the social life of a legal concept or the legal life of a social concept. I am demonstrating more broadly how the underlying "strict scrutiny" technologies of surveillance, justification, and discipline extend throughout legal and social domains. That demonstration is, in turn, a reminder of the ease with which Black bodies and their associative entailments, including collectivized expressions of Black antiracism, can trigger repressive forms of governance.[173]

As with my discussion of the legal regime of strict scrutiny, I have organized my engagement of the social regime of strict scrutiny along the three axes of trigger, justification, and fit.

B. The Trigger

In a compelling article in the *American University Law Review*, Taja-Nia Henderson and Jamila Jefferson open their analysis of race and space with the following observation:

> In 2018, the powerful combination of high-quality cellphone video and social media brought to light a barrage of incidents involving 911 calls reporting that Black people were occupying spaces that the callers believed they ought not occupy. In nearly all of these cases, the targeted men, women, and children were in places in which they had a legal right to be and engaging in activities in which they had a legal right to engage. Widely circulated and debated on social media, these incidents all went "viral," spawning a series of social media hashtags, most strikingly

172. For an argument about how regimes of power are continuous across various borders, see Devon W. Carbado, *States of Continuity or State of Exception? Race, Law and Politics in the Age of Trump*, 34 CONST. COMMENT. 1 (2019).

173. Fred Moten & Stefano Harney, *Blackness and Governance*, *in* BEYOND BIOPOLITICS: ESSAYS ON THE GOVERNANCE OF LIFE AND DEATH 351 (Patricia Ticineto Clough & Craig Willse eds., 2011) (using the Black radical tradition to reconstruct the governance of Blackness as a product of racial capitalism).

> "#LivingWhileBlack." One might see in these incidents a new phenomenon in need of new legal tools. In this Article, we argue that these incidents are not emblematic of anything new, but rather a technology-enhanced incarnation of a much older tradition: the invocation of the property law concepts of nuisance and trespass to exclude Blacks from spaces racialized as "white."

Henderson's and Jefferson's account of "Blackness as nuisance"[174] is very much relevant to the "trigger" prong of the social regime of strict scrutiny. That is because the Blackness as nuisance phenomenon they describe is part of a broader set of fears and anxieties people have of the Black body. Part of what triggers these fears and anxieties is the sense that "black people are dangerous, not only to white individuals because they are prone to criminal behavior, but to the overall well-being of our society."[175] This is not to say that all or even most people *consciously* think about Black people in these terms. But such conscious thinking is not necessary for the social regime of strict scrutiny to be triggered. Extant fears and anxieties about Black people are not simply a function of a belief system based on stereotypes and attitudes that individual people consciously possess and on which they consciously act.[176] Rather, they are part of an epistemological structural arrangement—what Ian Haney López refers to as racial "common sense"[177]—

174. Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863 (2020) (describing the historical usage of nuisance and trespass doctrine to exclude Black people from spaces racialized as "white"). Henderson and Jefferson are exactly right to suggest that, as an historical matter, one of the subordinating dimensions of being Black is that white people have treated Black presence quite literally as a nuisance. Indeed, as Rachel Godsil's work powerfully reveals, in the context of Jim Crow, white plaintiffs actually went to court to argue that Black presence in white neighborhoods constituted a racial nuisance. See Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505 (2006). The point is that not these plaintiffs mostly won these lawsuits, but rather that they litigated Black people presence as nuisances.

175. EDDIE S. GLAUDE, DEMOCRACY IN BLACK: HOW RACE STILL ENSLAVES THE AMERICAN SOUL 74 (2016).

176. *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (distinguishing between attitudes and stereotypes); Carbado & Gulati, *supra* note 89.

177. For a compelling articulation of racial common sense, see Ian F. Haney-López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 225–27 (2001). Haney-Lòpez states that:

> If race is a matter of social beliefs, how do ideas about race operate—how do they arise, spread, and gain acceptance? What is the relationship between race as a set of ideas and racism as a set of practices? How have racial ideas created the structures of inequality that mar our social world? I introduce the notion of race as 'common sense' to answer these questions. I suggest

that exists in law, social policies, everyday discourses, and representational practices, including the media, regardless of whether it is consciously on the forefront of people's minds.[178]

This epistemological arrangement trades on longstanding ideas about Black inferiority, Black non-normativity, and Black insurgency, and on more recent fears and anxieties about how Black people articulate our relationship to race, which is to say, our collective and individual "racial consciousness." Why are Black people so obsessed with race? Why do we see racial injustice when it is simply not there? Why do we insist on viewing racism through a systemic rather than a "bad actor" frame? Why do we not take responsibility for our failings? Why can't we be more like Asian Americans? Why do we not see unfairness in calls for racial justice that take opportunities from white people? Why do we refuse to live by the teachings of Dr. Martin Luther King? Why must we continue to blame innocent people today for the racial sins of the past? Why are we so invested in being victims? And why, with respect to slavery and Jim Crow, will we never let bygones be bygones? Why do we not simply move on?[179]

It is against the backdrop of fears and anxieties about Black people and Black racial consciousness that the social regime of strict scrutiny becomes a necessary and proper disciplinary device. Its purpose: to manage those racial fears and anxieties. Its method: a version of the "compelling interest" and "narrow tailoring" prongs on which the legal regime of strict scrutiny rests.

C. Justification: The Compelling Interest Prong

Central to the compelling interest prong of the social regime of strict scrutiny is the need for Black people to justify our presence, our lives, and our aspirations for racial justice. The need for that justification is evidenced, for

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> that what we think we know often takes the form of common sense—a complex set of background ideas that people draw upon but rarely question in their daily affairs. . . . I argue that racial ideas operate within this sphere of common sense—that we regularly rely on, yet infrequently examine, assumptions about race.

IAN F. HANEY-LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 6 (2003).

178. One way to think about this is through the broad literature on implicit biases. For a summary of this literature and its implications for law, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

179. I have gone back and forth about whether I should provide citations for each of the preceding claims. I decided against it so as not to fully participate in this Article's subjugation to the very "compelling interest" and "narrow tailoring" demands I describe.

example, in the ways Black people are strictly scrutinized for doing this or that—virtually anything and everything—while Black.

We are strictly scrutinized when on foot or in cars on the streets of America; strictly scrutinized having lunch in college cafeterias; strictly scrutinized booking Airbnb lodging; strictly scrutinized in coffee shops; strictly scrutinized in public parks having picnics; strictly scrutinized in our workplaces; strictly scrutinized at the ballot box; strictly scrutinized boarding airplanes; strictly scrutinized teaching our classes; strictly scrutinized providing medical aid; strictly scrutinized hailing cabs and taking public transportation; strictly scrutinized in K-12 schools; strictly scrutinized serving in public office, including as president of the United States; and strictly scrutinized in our own neighborhoods, including when we are jogging, entering our homes, and mowing our lawns.[180]

And even when we are walking.

A little-discussed dimension of the "Walking While Black" phenomenon implicates neighborhood watch signs. I had not thought deeply about such signs prior to my interactions with them while walking in my neighborhood during the height of the COVID pandemic. The signs I encountered, which typically read "We Watch. We Care. We Call the Police," produced a peculiar kind of racial sensation: The feeling of my body turning on itself in an act of compelled self-incrimination.[181] That sensation derives from the fact that, with respect to Black people traversing predominantly white spaces,[182] neighborhood watch signs are both

180. Here, too, I have refrained from providing citations for each of the preceding examples (though an earlier version of this article included them).

181. U.S. CONST. amend. V ("[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . .").

182. One could add here areas undergoing gentrification.

interrogative ("What are you doing here?") and interpellative[183] ("Look, a criminal").[184]

As with other forms of antiblack surveillance, neighborhood watch signs are deeply entangled with law enforcement. The existence of those signs is an indication that on any given day, in any particular moment, Black people can be subjected to a police interaction—or, more accurately, a police interdiction—to "smoke out"[185] whether our reasons for being somewhere are "invidious" rather than "benign."

It is hard to understand the work neighborhood watch signs perform in these ways without reference to the spatialization of race:[186] Because race structures borders around places and not just people, Black people in predominantly white places are out of place—racially trespassing,[187] to borrow from Cheryl Harris. The phenomenon of racial trespassing, and its imbrication in law enforcement, suggests five important points.

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183. The classic example of being interpellated is articulated by Louis Althusser stating:

> There are individuals walking along. Somewhere (usually behind them) the hail rings out: 'Hey you there!' One individual (nine times out of ten it is the right one) turns around, believing/suspecting/knowing that it is for him, i.e., recognizing that 'it really is he' who is meant by the hailing. But in reality these things happened without any succession. The existence of ideology and the hailing or interpellation of individual as subject are one and thus the same thing.

LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 174–75 (Ben Brewster trans., 1971)..

184. Another way to think about what I am suggesting would be to say that the presence of neighborhood watch signs effectively creates on-the-street lineups for Black people that are "necessarily suggestive." *See* Perry v. New Hampshire, 565 U.S. 228, 241–42, 248 (2012) (holding that lineups violate due process when they are "unnecessarily suggestive").

185. *See* Adarand Constructors v. Peña, 515 U.S. 200, 226 (1995) (observing that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race" (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989))).

186. *See* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019); Deborah N. Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 788 (2020); Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Addie C. Rolnick, *Defending White Space*, 40 CARDOZO. L. REV 1639 (2019). For a productive application of the racialization of space in the global arena, see E. Tendayi Achiume, *Racial Borders*, 111 Geo. L.J. (forthcoming 2022).

187. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

First, if one of the structural features of race is that it operates as a kind of passport,[188] white people and Black people traverse the United States with very different documents, permitting very different degrees of freedom of travel.[189] Second, Black people can feel like trespassers or strangers in the very communities they call home.[190] That is because even when Black people are traversing spaces in and around their place of residence, they are vulnerable to neighborhood policing projects, including but not limited to formally organized neighborhood watch groups.[191]

Third, the surveillance practices that underwrite neighborhood policing are never strictly private. One might think of the phenomenon instead as a private-public partnership.[192] That partnership is not so much an instance in which private actors are filling what Melissa Murray productively calls "a regulatory void" in order to advance a particular set of normative values.[193] Rather, it is more akin to the private-public partnership Jennifer Chacón has described as a significant feature of immigration enforcement.[194] As in the immigration context, the problem here is less that the state has "contracted out" the strict scrutiny apparatus to private actors.[195] It is rather that strict scrutiny operates as a racial governance strategy that transcends

188. *See* E. Tendayi Achiume, *Digital Racial Borders*, 115 AJIL UNBOUND 333 (2021); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1530 (2019) ("In a global ranking of passports according to the extent of entitlements to visa-free travel, First World countries dominate the top and Third World countries dominate the bottom. Freedom of movement is, in effect, politically determined and racially differentiated.").
189. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990) (discussing the ways in which the Supreme Court's interpretation of the Fourth Amendment limits Black people's freedom of travel).
190. See Devon W. Carbado and Priscilla Ocen, *At Home a Stranger* (draft manuscript) (on file with authors).
191. For an excellent account of an iteration of this problem, "move-in violence," see generally, JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING (2013).
192. *See, e.g.*, MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 6–28 (2002).
193. *See* Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. UNIV. L. REV. 825 (2019).
194. Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1 (2017) (describing the vast and previously unexplored privatization of immigration enforcement).
195. On the practice of the government "contracting out" functions thought to be quintessentially governmental in nature, see Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005).

and calls into question the very intelligibility of the public versus private distinction.[196] To articulate the point the way Frank Wilderson III might, "White people are, ipso facto, deputized in the face of Black people, whether they know it or not."[197]

Fourth, the racial logic that Black people should be kept out of certain spaces—and kept in others[198]—has for decades helped to create spaces of life and wellbeing for white people ("neighborhoods") and spaces of premature death for Black people ("inner cities"). That is why gentrification projects are underwritten in the name of "renewal" and "revitalization": They seek to transform "inner cities" into new zones of life and opportunity from which Black people are effectively expelled and into which white people are welcomed.[199] This racialized structural adjustment of urban landscapes, in turn, exacerbates the degree to which Black people will be targeted for being "out of place"— in the very areas in which they have lived.

Finally, the greater Black people's sense of being "out of place," the greater their vulnerability to a phenomenon K-Sue Park so powerfully describes as "self-deportation"—"the removal strategy of making life so unbearable for a group that its members will leave a place."[200] Strict scrutiny can operate as that kind of strategy. The "rigorous"[201] and "heightened"[202] forms

196. *See* Murray, *supra* note 193 (explaining the ways that what we might deem "regulatory" is not purely public).
197. Frank Wilderson III, *The Prison Slave as Hegemony's (Silent) Scandal*, 30 SOCIAL JUSTICE 2, 20 (2003).
198. *See* David Card, Alexandre Mas & Jesse Rothstein, *Tipping and the Dynamics of Segregation*, 123 Q. J. ECON. 177, 177 (2008) (finding that once the residential population of people of color reaches a tipping point, usually between 5 to 20 percent, the white population decreases rapidly as they move out of the neighborhood); *see generally* THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 101–02 (2d ed. 2006) (explaining his "tipping" theory that white people move out of a neighborhood after people of color begin moving in).
199. There is far more that one might say about gentrification, including the racialized evictions on which the phenomenon seems to rest. Deena Greenberg, Carl Gershenson & Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115 (2016) (describing racially discriminatory patterns of evictions in one of the first empirical studies of evictions broken down by race and ethnicity of tenants and landlords).
200. K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1879 (2019).
201. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 519 (1989) (Kennedy, J., concurring) (agreeing with the proposition that "any racial preference must face the most rigorous scrutiny by the courts"); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").
202. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 213 (1995) (explaining that a race-based presumption requires a "heightened" level of scrutiny).

of review Black people experience under the regime create an incentive for Black people to remove themselves from, or avoid, places in which that scrutiny is particularly "unbearable."

To bring this back to my neighborhood: Notwithstanding my encounters with neighborhood watch signs, the thought of self-deportation never crossed my mind. Perhaps that is because, as best I can tell, most of the front yards in my neighborhood have never featured neighborhood watch signs of the sort I referenced. Moreover, subsequent to the media coverage of the social movement that emerged in response to the police killings of George Floyd[203] and Breonna Taylor,[204] among other Black people, those signs have virtually disappeared. Presumably, at least some people found it untenable to leave their homes carrying Black Lives Matter signs to protest police violence "out there," only to return to their neighborhoods in which "We Watch. We Care. We Call the Police" signs evinced precisely the kind of police readiness for Black bodies that the various movements for Black lives have been organized to disrupt.

It bears emphasizing nonetheless that the diminished presence of neighborhood watch signs, or even their complete absence, does not mean the disappearance of strict scrutiny review.[205] In the racial ordering of society,

203. George Floyd, 46, was killed on May 25, 2020, in Minneapolis, Minnesota when he was handcuffed and pinned to the ground by a white police officer who pressed his knee onto Mr. Floyd's neck for almost nine minutes despite Mr. Floyd's desperate pleas that he could not breathe. *See* Christine Hauser, Derrick Bryson Taylor & Neil Vigdor, *'I Can't Breathe': 4 Minneapolis Officers Fired After Black Man Dies in Custody*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/05/26/us/minneapolis-police-man-died.html [https://perma.cc/XV7Z-GRY7]; Brittany Shammas, Timothy Bella, Katie Mettler, & Dalton Bennett, *Four Minneapolis Officers Are Fired After Video Shows One Kneeling on Neck of Black Man Who Later Died*, WASH. POST (May 27, 2020, 6:25 PM), https://www.washingtonpost.com/nation/2020/05/26/minneapolis-police-death-custody-fbi [https://perma.cc/9H5N-BQDJ]; N.Y. Times Staff, *What We Know About the Death of George Floyd in Minneapolis*, SEATTLE TIMES (Sept. 8, 2020), https://www.seattletimes.com/nation-world/what-we-know-about-the-death-of-george-floyd-in-minneapolis [https://perma.cc/DU2Z-YKJZ].

204. *See* Nicholas Bogel-Burroughs, *Months After Louisville Police Kill Woman in Her Home, Governor Calls for Review*, N.Y. TIMES (Oct. 30, 2020, 12:34 PM), https://www.nytimes.com/2020/05/14/us/breonna-taylor-louisville-shooting.html [https://perma.cc/N2MG-UMD6]; Alisha Haridasani Gupta, Op.-Ed., *Why Aren't We All Talking About Breonna Taylor?*, N.Y. TIMES (June 9, 2020), https://www.nytimes.com/2020/06/04/us/breonna-taylor-black-lives-matter-women.html [https://perma.cc/X4EW-45JF]; Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs *What to Know About Breonna Taylor's Death*, N.Y. TIMES (April 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/2NMU-BBG6].

205. A corollary point is that the absence of the express articulation of race does not mean the absence of race. Indeed, that precise insight is why Cheryl Harris and I describe colorblindness as a particular kind of racial ideology. *See* Carbado & Harris, *supra* note

neighborhood watch signs are epiphenomena—the effect of a broader set of social understandings of Blackness. With or without neighborhood watch signs, those understandings produce a panopticon-like effect, but from everywhere,[206] that engenders what Phillip Brian Harper refers to as "speculative rumination[s]," the constant uncertainty about whether "even the most routine instances of social activity and personal interaction" are forms "of invidious social distinction or discriminatory treatment."[207] That uncertainty can weigh on the minds of Black people, even in their own neighborhoods. That is because Black people will rarely know in what form or from what perch neighbors are essentially operating as informants for policing. That lack of knowledge will cause at least some Black people to ponder whether they will find themselves effectively as a mugshot on neighborhood applications, such as Nextdoor or Citizen.[208]

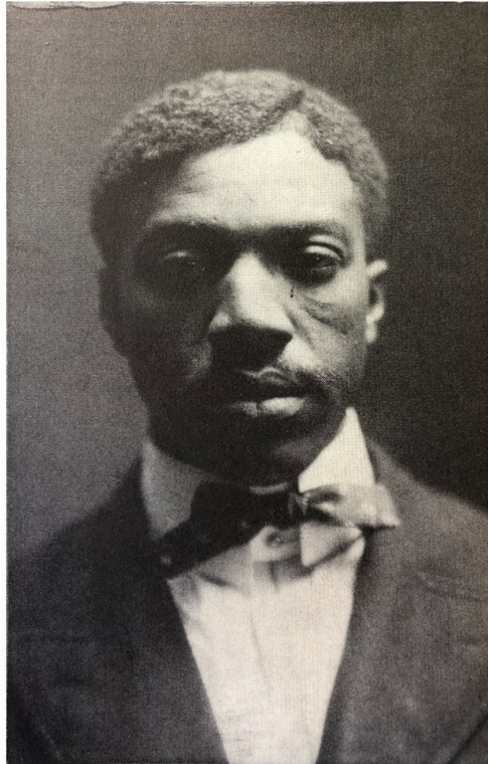
81. For one of Critical Race Theorists' classic critiques of colorblindness, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991). *See also* Ian Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007).

206. The "panopticon" was originally conceived of as a principle for prison design by 18th century English philosopher and social reformer Jeremy Bentham, in which the prisoners are visible at all times to the guards but are not able to tell whether they are being watched or not. See generally, JEREMY BENTHAM, PANOPTICON, OR THE INSPECTION HOUSE (1791). For further elaboration of the panopticon as an element of surveillance theory, see MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1979); BEYOND FOUCAULT: NEW PERSPECTIVES ON BENTHAM'S PANOPTICON (Anne Brunon-Ernst ed., 2012); THEORIZING SURVEILLANCE: THE PANOPTICON AND BEYOND (David Lyon ed., 2006); SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS (2015); Simone Browne, *Race and Surveillance*, *in* ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES 72 (Kirstie Ball, Kevin D. Haggerty & David Lyon eds., 2012).

207. *See* Phillip Brian Harper, *The Evidence of Felt Intuition: Minority Experience, Everyday Life, and Critical Speculative Knowledge*, 6 GLQ 641, 643 (2000).

208. *See* Makena Kelly, *Inside Nextdoor's 'Karen Problem': Can Nextdoor Really Be a Social Network for Communities if Black People Don't Feel Safe on It?*, VERGE (June 8, 2020, 4:45 PM), https://www.theverge.com/21283993/nextdoor-app-racism-community-moderation-guidance-protests [https://perma.cc/G9RZ-V8N9]; Allyson Waller, *Nextdoor Removes App's 'Forward to Police' Feature*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/23/us/nextdoor-forward-to-police-.html [https://perma.cc/RY3U-CEGR].

Against the backdrop of strict scrutiny, avoiding the existential position of a mugshot as a Black person is not as easy as you might think. Before I elaborate, consider the image below of Benjamin Rutledge, taken in 1901.



Who is this man? We know his name. But what exactly is his life's story? The year is 1901. We know that the violence of "separate but equal," a particularly insidious "afterlife of slavery,"[209] is in full swing. Only a few years before the photograph was staged, the Supreme Court had constitutionalized de jure racial segregation via, inter alia, the contention that "'[i]t would be running the slavery question into the ground'"[210] to frame Jim Crow as a badge and incident of slavery. The Court reasoned that:

209. SAIDIYA HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6 (2007).

210. Plessy v. Ferguson, 163 U.S. 537, 543 (1896) (quoting The Civil Rights Cases, 109 U.S. 3, 24 (1883)).

> A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races or re-establish a state of involuntary servitude.[211]

Precisely how was Mr. Rutledge situated with respect to this "legal distinction" of race? What was his line of work? Where did he live? Did he have a partner? What about children?

And what exactly occasioned the photograph? What encounter does it bespeak? As Claudine Brown observes, "the stately demeanor of the subject" in the image would lead one to believe that the picture constitutes "a portrait."[212] One would be wrong in that conclusion. The encounter the image stages is a mugshot.

Yet, even—or perhaps especially—as a mugshot, the picture remains a battle over recognition. How are we to perceive Rutledge? How should we regard and remember him? If we thought the picture constitutes a portrait, why are we surprised that the image is a mugshot? Is there some figure of Blackness whose presence in the frame would not have engendered that surprise? What are we to make of the fact that the image's "visual violence" is not readily available to us?[213]

Noting precisely some of the preceding representational tensions, Brown maintains that: "While to my eye he appears to be well-dressed and responsible-looking, clearly the police and some of his contemporaries perceived him to be 'suspicious.'"[214]

What does it mean that had Rutledge not appeared "well-dressed and responsible-looking" and "stately [in] demeanor," he might not have been the subject of my (or Brown's) interrogation? Mr. Rutledge himself seems to be contesting his mugshot's subjectivity. What is he saying here? Any effort to ventriloquize—to speak in his voice—would be unavoidably fraught. Still, it is difficult to view the photograph and not wonder: Are we to read this image as one in which Rutledge's racial posture is asking the frame of the mugshot to answer or account for Rutledge's presence in it? While there are multiple interpretational frames one might bring to bear on the picture, the one I reproduce here

211. *Id.*

212. Claudine K. Brown, *Mug Shot: Suspicious Person*, *in* PICTURING US: AFRICAN AMERICAN IDENTITY IN PHOTOGRAPHY 137 (Deborah Willis ed., 1994).

213. MAURICE O. WALLACE, CONSTRUCTING THE BLACK MASCULINE: IDENTITY AND IDEALITY IN AFRICAN AMERICAN MEN'S LITERATURE AND CULTURE, 1775–1995, at 136 (2002) (employing the term "visual violence").

214. Brown, *supra* note 212, at 137.

foregrounds a particular dimension of the social regime of strict scrutiny: Mr. Rutledge's detention as a figure in the mugshot might suggest that, even in his "stately demeanor," even "well-dressed and responsible-looking," Rutledge remained "unruly," to borrow from Khiara Bridges,[215] and thus failed the "compelling justification" prong of the strict scrutiny regime that plausibly put him there.[216]

To put my reading of Rutledge's image into sharper relief, it is helpful to know why Rutledge was arrested. The arresting officer reported that he arrested Rutledge for the "crime" of being a "Susp. Person."[217] It was that suspect classification—being a "Susp. Person"—that triggered the strict scrutiny Rutledge experienced, a standard of review that Black people are almost always already socially positioned to "fail."

In some ways, the fact that the officer viewed Rutledge as a suspicious person is a reminder that to be seen as a Black person through the prism of strict scrutiny is to be subject to a particular form of "perceptual subordination."[218] Drawing on Russell Robinson's work, by perceptual subordination I mean not only the violent act of seeing people as inferior[219] in ways that presuppose, justify, and normalize their marginality,[220] but also

215. Khiara M. Bridges, *Chapter Three: The Production of Unruly Bodies*, *in* REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 74 (2011).
216. For discussions of the "politics of respectability"—the idea that members of a minority group attempt to police other members of that group whom they view as exhibiting "undesirable" behaviors that negatively affect majority perceptions of the group, and also that minority group members can attempt to avoid discrimination by performing "respectability"—see, e.g., Frederick C. Harris, *The Rise of Respectability Politics*, DISSENT (2014), https://www.dissentmagazine.org/article/the-rise-of-respectability-politics [https://perma.cc/3WTM-M2TQ]; Paisley J. Harris, *Gatekeeping and Remaking: The Politics of Respectability in African American Women's History and Black Feminism*, 15 J. WOMEN'S HIST. 212 (2003); Hedwig Lee & Margaret Takako Hicken, *Death by a Thousand Cuts: The Health Implications of Black Respectability Politics*, 18 SOULS 421 (2016); Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541 (2016).
217. Brown, *supra* note 212 at 138.
218. *See* Robinson, *supra* note 67 (introducing the concept of perceptual segregation, or the degree to which white people and Black people view the world through different racial lenses).
219. See *id.* As Maurice Wallace reminds us, perceptual subordination can produce social moments in which "black male bodies in public spheres go phantasmatically misrecognized." WALLACE, *supra* note 213, at 33.
220. That normalization trades on racial stereotypes of Black people, including those that frame Black men as criminal, violent, and dangerous. There is a broad empirical literature demonstrating the perceived nexus between Blackness and criminality. *See* Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime,*

the distortions of the body that the strict scrutiny gaze can engender. Consider, for example, Frantz Fanon's account of how his encounter with perceptual subordination "returned" his body to him "spread-eagled, disjointed, [and] redone . . ."[221]

One can query, as Frank Wilderson III has, whether perceptual subordination is a departure from otherwise non-subordinating ways of seeing Black people. Wilderson suggests there is no such departure. For Wilderson, perceptual subordination is the dominant social lens through which Black people are seen: "to see a Black is to see the Black, an ontological frieze that waits for a gaze, rather than a living ontology moving with agency in the field of vision."[222] That state of "ontological frieze" exists within the context of longstanding economies in which Black bodies become cognizable—and Black people become knowable—precisely through our non-normativity, a non-normativity that, as Dorothy Roberts reminds us, is gendered in important but often overlooked ways.

According to Roberts, the state's regulation of Black women's reproduction has historically been a crucial mechanism through which to regulate and construct social meanings about Black people en masse.[223] Roberts reasons that part of what has enabled that broader regulation is the

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and Visual Processing, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004); Kang, *supra* note 178; Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406 (2017); Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019); Franklin D. Gilliam, Jr., Shanto Iyengar, Adam Simon & Oliver Wright, *Crime in Black and White: The Violent, Scary World of Local News*, 1 HARV. INT'L J. PRESS/POL. 6 (1996); Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560 (2000); Franklin D. Gilliam, Jr., Nicholas A. Valentino & Matthew N. Beckmann, *Where You Live and What You Watch: The Impact of Racial Proximity and Local Television News on Attitudes About Race and Crime*, 55 POL. RSCH. Q. 755 (2002).

221. FRANTZ FANON, *The Fact of Blackness, in* BLACK SKIN, WHITE MASKS 93 (Charles Lam Markmann trans., Grove Press 1967) (1952).

222. Frank B. Wilderson III, *Biko and the Problematic of Presence*, *in* BIKO LIVES!: CONTESTING THE LEGACIES OF STEVE BIKO 98 (Amanda Alexander & Andile Mngxitama, N. Gibson eds., 2008).

223. DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY (Vintage Books ed. 2017) (1997); Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426 (2014); Dorothy E. Roberts, *Prison, Foster Care, and the Systematic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938 (1997); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

claim "that Black mothers transfer a deviant lifestyle to their children that dooms each succeeding generation to a life of poverty, delinquency, and despair."[224] Sarah Haley advances a similar point, observing that Black women have long labored under the racially gendered perception that "[t]he condition of the criminal follows that of the mother, culpability brought forth from the womb of Black women."[225] Roberts's and Haley's observations suggest that the backend regulation of Black people in the form of surveillance, social control, and punishment is, at least in part, a response to the perceived frontend failures of the state to properly surveil, socially control, and punish Black women's reproductive autonomy and motherhood.[226] Viewed in that light, the long history of racialized gendered violence against Black women has been both "particularly damaging to Black women"[227] and generally damaging to Black people.[228]

Taking the preceding points seriously helps reveal that the potential threat Black men are presumed to pose to society—the narrative of violence our bodies are construed to speak—is naturalized through, among other discursive frames, the perceived dysfunctionality of Black motherhood. From that vantage point, Black women's wombs are a "most dangerous place" from a racialized anti-

224. ROBERTS, KILLING THE BLACK BODY, *supra* note 223, at 8–9.

225. Sarah Haley, *Chapter Six: Flesh Work and the Reproduction of Black Culpability*, *in* ANTIBLACKNESS 132, 134 (2021). Haley also contends that the "project of disfiguring Black maternity as a mode of entrenching slavery and mass incarceration has been a consistent, performed, repeated process." *Id.* at 134. Roberts's and Haley's analyses call to mind *partus sequitur ventrum*, the legal mechanism through which a child's condition as free or enslaved followed that of the mother. For a discussion of this legal regime and its relationship to Black women's labor, see Saidiya Hartman, *The Belly of the World: A Note on Black Women's Labors*, 18 SOULS 166, 168–69 (2016). Hartman productively draws on the work of Christina Sharpe, who maintained that slavery transformed "'[black women's] womb[s] into a factory reproducing blackness as abjection and turning the birth canal into another domestic middle passage.'" *Id.* at 169 (quoting Christina Sharpe, *Black Studies: In the Wake*, BLACK SCHOLAR, Summer 2014).

226. *See generally* LAURA E. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997) (exploring how race, gender, and class intersected to shape the carceral ways in which the state has historically responded to pregnant Black women who suffered from drug addiction).

227. ROBERTS, KILLING THE BLACK BODY, *supra* note 223, at 10.

228. *See id.* at 8 (arguing that "[t]he degrading mythology about Black mothers is one aspect of a complex set of stereotypes that deny Black humanity in order to rationalize white supremacy"); *see also id.* ("Blaming Black mothers, then, is a way of subjugating the Black race as a whole.").

abortion perspective,[229] a racialized antiblack motherhood perspective,[230] and a racialized antiblack perspective writ large. Discourses about Black motherhood regularly invoke the "failures" and "pathologies" of Black boys and young Black men as a demonstrative sign of failed Black motherhood—a failing that justifies the regulation of Black women's sexual autonomy and the circumscription of Black people's freedom.[231] The representativeness of Black women's experiences in that regard is a reminder that the perceptual subordination of Black women and the perceptual subordination of Black men have been co-constitutive, effectuating one another.[232] Both racial gazes reflect and reproduce the very negative social meanings of Blackness that trigger strict scrutiny review and its "compelling justification" and "narrow tailoring" demands.

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That the social regime of strict scrutiny so thoroughly trades on and is itself constitutive of negative social meanings of Blackness encourages Black people to think about whether and to what extent we should engage in efforts to "dress down" our race to escape those negative tropes. I will say more about this dynamic further along in the Article. The spoiler alert is that counter-stereotypical

229. ROBERTS, KILLING THE BLACK BODY, *supra* note 223 at xiv, xv (describing the controversial billboard stating that "THE MOST DANGEROUS PLACE FOR AFRICAN AMERICAN IS IN THE WOMB"); *see also id.* (observing that "[t]he billboards' statements declaring Black women's wombs unsafe recalled eugenicist rhetoric advocating sterilization of women deemed unfit to bear children.").

230. For discussions of the ways in which Black motherhood has been pathologized, see Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2215–17 (2018) (describing how incarceration is used to regulate maternal unfitness and against Black women as mothers who are deemed responsible for social problems like unemployment, criminality, and poverty); *see also*, GÓMEZ, *supra* note 226, at 117–20 (explaining how the news media played a role in creating panic around the "crack baby" that served as a warning to women of color who were more likely to be viewed as "unfit mothers"); Khiara M. Bridges, *Race, Pregnancy and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 815–17 (2020) (describing how mostly Black women were prosecuted for using drugs while pregnant during the 1980s and portrayed as "ruining" their fetuses, thus burdening society with future "delinquents, criminals, welfare queens and budget drains").

231. *See, e.g.*, Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246 [https://perma.cc/CS23-UKG5]; *see also* Ocen, *supra* note 230, at 2196–97, 2196 n.18 (describing how Black mothers are seen as "propagators of disorder and social depravity" through their ability to procreate "crack dealers, addicts, muggers, and rapists").

232. *See generally* Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 59 (suggesting that both feminist and antiracist practices have insufficiently interrogated the ways in which Black women's stories can illuminate how we understand gender subordination writ large and Black racial subordination writ large).

strategies will not always work. Moreover, to the extent that such strategies do work, they are not particularly sticky.[233] Inevitably, there will be a moment of falsification, a moment of "*race ipsa loquitur*,"[234] in which a person's Blackness ostensibly speaks for itself.

Like other Black people, I have consciously considered ways of navigating my own relationship to *race ipsa loquitur*. To begin, and to return to my earlier discussion of neighborhood watch signs, what if I produced one of my own that aspired to be counterhegemonic? Consider, for example, this: "We're here. We're Black. Don't Call the Police."[235] Such a sign would reveal not only the racial investments and police entanglements of the more conventional neighborhood watch signs, but also my neighbors' collaboration in that arrangement.

I have also considered more oblique but no less pedagogical interventions: a picture of my family that I, not one of my neighbors, would put on a neighborhood application—"this is us." That approach has the potential not only to avoid the particularly negative trope of "the mugshot," but also to trade on the particularly "compelling" trope of "the family," a social institution whose normative boundaries have historically refused Black configurations of kinship.[236]

233. Social psychologists have long argued that efforts to debias people at best produce short-term benefits. *See* Scott O. Lilienfeld, Rachel Ammirati & Kristen Landfield, *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSPS. PSYCH. SCI. 390 (2009); Marko Kovic, *Debiasing in a Minute or Less, or Too Good to Be True? The Effect of Micro-Interventions on Decision-Making Quality*, 1 PSYCH 220 (2019); Alex Madva, *Biased Against Debiasing: On the Role of (Institutionally Sponsored) Self-Transformation in the Struggle Against Prejudice*, 4 ERGO 145 (2017).

234. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (emphasis added).

235. For a discussion of the emergence of one progressively-oriented use of neighborhood signs, see Amanda Hess, *'In This House' Yard Signs, and Their Curious Power*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/arts/in-this-house-yard-signs.html [https://perma.cc/DMT5-UDGX].

236. *See, e.g.*, Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 391–92 (2008) ("Within the African-American community, for example, parents frequently share caregiving responsibilities and material resources with community members in an arrangement known colloquially as 'other-mothering.'"); Angela Onwuachi-Willig, *Extending the Normativity of the Extended Family: Reflections on* Moore v. City of East Cleveland, 85 FORDHAM L. REV. 2655, 2656 (2017) (analyzing "the ways in which Justice Brennan could have truly uplifted African American families and other families of color by identifying and explicating the strengths of extended or multigenerational family forms among people of color and by showing how such family forms can be a model . . . for all families"); Nefertiti Austin, *Grandparents, Kin and Play Cousins: The Soul and Survival of Black Families*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/07/parenting/black-families-children-kin-grandparents.html [https://perma.cc/G3KL-LTW7] ("Regardless of what it is called—kinship care, relative care giving or grandfamilies, communal living and

I am sure many of my neighbors would be distressed to learn that their efforts to create safe spaces for themselves have helped produce unsafe spaces for Black people. I am sure that they would say that they do not intend to structure the neighborhood to produce the forms of strict scrutiny I have described. But problems of race and racial inequality in the United States are not only about matters of intent.[237] The height of the COVID-19 pandemic made that perfectly clear.[238] Focusing particularly on the onset of the pandemic, Black people were disproportionately dying from the virus not only because of other people's conscious racial intentionality,[239] but also because of preexisting conditions. I do

loving is a strength of the Black community and I am one of its beneficiaries."); R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2075 (2017) (contesting race neutral formulations of kinship and arguing that "kinship has a color").

237. Critical Race Theorists have long critiqued the instantiation of intent-based models of discrimination. *See* Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment, supra* note 165; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Haney-López, *Intentional Blindness*, *supra* note 77.

238. The current pandemic began in Wuhan, China, in December of 2019 and has since spread around the world, infecting 501 million people and causing 6.18 million deaths as of April 2022. *See Coronavirus World Map: Tracking the Global Outbreak*, N.Y. TIMES (Apr. 13, 2022), https://www.nytimes.com/interactive/2021/world/covid-cases.html [https://perma.cc/G9HE-JRN5]. On February 11, 2020, the World Health Organization gave the disease caused by the coronavirus its official name: Covid-19, which stands for "coronavirus disease 2019." *See* Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/article/coronavirus-timeline.html [https://perma.cc/8WAQ-RC7V].

239. There is little dispute that Black people are overrepresented both in terms of being victims of the coronavirus and with respect to being killed by the virus. For an excellent resource demonstrating these stark disparities, see *The COVID Racial Data Tracker*, COVID TRACKING PROJECT, https://covidtracking.com/race [https://perma.cc/JR9F-YRLK], a collaboration between The Atlantic's *COVID Tracking Project* and the *Boston University Center for Antiracist Research*, directed by Dr. Ibram X. Kendi. *See also* Richard A. Oppel, Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html [https://perma.cc/7YR6-9ARF] ("Latino and African-American residents of the United States have been three times as likely to become infected as their white neighbors . . . . And Black and Latino people have been nearly twice as likely to die from the virus as white people, the data shows."); Rong-Gong Lin, *Virus' Threat Deadlier for Some: L.A. County's Black and Latino Groups Have Double the Mortality Rate of White Residents*, L.A. TIMES, June 27, 2020, at B1; Maria Godoy & Daniel Wood, *What Do Coronavirus Racial Disparities Look Like State by State?*, NPR (May 30, 2020, 6:00 AM), https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state [https://perma.cc/3K8G-7BLR]; Eboni G. Price-Haywood, Jeffrey Burton, Daniel Fort & Leonardo Seoane, *Hospitalization and Mortality Among Black Patients and White Patients With Covid-19*, NEW ENG. J. MED. 2534 (2020), https://www.nejm.org/doi/full/10.1056/NEJMsa2011686; Ibram X. Kendi, *Stop Blaming Black People for Dying of Coronavirus*, ATLANTIC (Apr. 14, 2020),

not mean that in the narrow medical sense. In other words, my point is not simply that because Black people have poorer health outcomes than whites, they have been more vulnerable to the virus. By preexisting conditions, I mean the preexisting structures of racial inequality—or the domains in which racism has long sheltered in place—in, for example, housing insecurity,[240] occupational segregation,[241] food apartheid,[242] income and wealth,[243] and incarceration.[244] The

https://www.theatlantic.com/ideas/archive/2020/04/race-and-blame/609946 [https://perma.cc/N9MW-6WUW].

240. *See, e.g.*, THE DREAM REVISITED: CONTEMPORARY DEBATES ABOUT HOUSING, SEGREGATION, AND OPPORTUNITY IN THE TWENTY-FIRST CENTURY (Ingrid Gould Ellen & Justin Peter Steil eds., 2019); ANDREA GIBBONS, CITY OF SEGREGATION: 100 YEARS OF STRUGGLE FOR HOUSING IN LOS ANGELES (2018); JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING (2013); JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005)*; see also* Gilda Graff, *The Enormous Price We Have Paid for Allowing the Explicitly Racist Policies of Federal and Local Governments to Segregate America*, 47 J. PSYCHOHISTORY 37 (2019); Elizabeth Korver-Glenn, *Compounding Inequalities: How Racial Stereotypes and Discrimination Accumulate Across the Stages of Housing Exchange*, 83 AM. SOCIO. REV. 627 (2018); Douglas S. Massey, *Residential Segregation Is the Linchpin of Racial Stratification*, 15 CITY & CMTY. 4 (2016); DANYELLE SOLOMON, CONNOR MAXWELL & ABRIL CASTRO, SYSTEMATIC INEQUALITY: DISPLACEMENT, EXCLUSION, AND SEGREGATION: HOW AMERICA'S HOUSING SYSTEM UNDERMINES WEALTH BUILDING IN COMMUNITIES OF COLOR (2019), https://cdn.americanprogress.org/content/uploads/2019/08/06135943/StructuralRacismHousing.pdf [https://perma.cc/RCX8-T75R]; Dima Williams, *A Look at Housing Equality and Racism in the U.S.*, FORBES (June 3, 2020, 11:17 AM), https://www.forbes.com/sites/dimawilliams/2020/06/03/in-light-of-george-floyd-protests-a-look-at-housing-inequality/#33089df739ef [https://perma.cc/58GS-8M9Y].

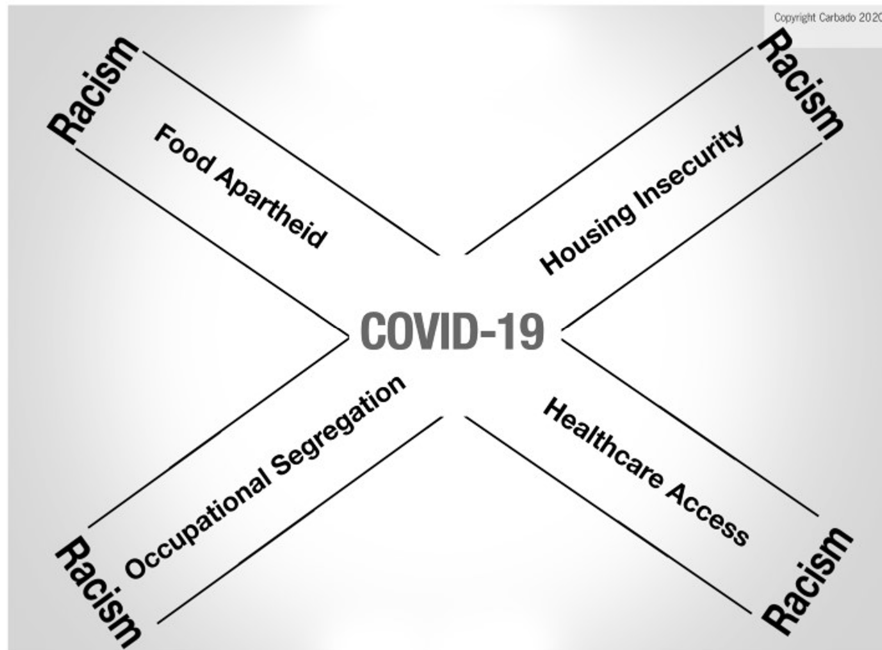
241. *See generally* Devan Hawkins, *Differential Occupational Risk for COVID-19 and Other Infection Exposure According to Race and Ethnicity*, 63 AM. J. INDUS. MED. 817 (2020) (finding that people of color, especially Black workers, are more likely to be employed in essential industries in occupations that work in close proximity to others and had frequent exposure to COVID-19 infections, suggesting that occupational segregation may be at least partly responsible for racial risk for COVID-19).

242. For a discussion of the phenomenon of food apartheid, see Etienne C. Toussaint, *Black Urban Ecologies and Structural Extermination*, 45 HARV. ENV'T L. REV. 447, 450–51 (2021) ("Black urban geographies . . . are frequently characterized as food deserts and food swamps, but are more appropriately referred to as 'food apartheid' neighborhoods replete with abandoned lots.").

243. *See, e.g.*, MELVIN L. OLIVER & THOMAS SHAPIRO, BLACK WEALTH /WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995); WILLIAM DARITY JR., DARRICK HAMILTON, MARK PAUL, ALAN AJA, ANNE PRICE, ANTONIO MOORE & CATERINA CHIOPRIS, WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP (2018), https://socialequity.duke.edu/wp-content/uploads/2019/10/what-we-get-wrong.pdf [https://perma.cc/2V5Y-3RL8]; WILLIAM A. DARITY & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY (2020).

244. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

image below is a simple way of capturing that point, featuring a limited selection of these preexisting conditions.



Note how racism structures multiple pathways along which COVID-19 can travel to Black bodies. And even this image is decidedly incomplete. It does not reveal, for example, that Black health vulnerabilities are a function of *all* of the pathways the image depicts (and others the image does not reference). Which is to say, Black people's poor health outcomes are structured by the kind of work, the kind of healthcare, the kind of housing, and the kind of food to which Black people historically have had access. It is precisely because Black people's access across *each* of those domains is and historically has been structured by racism that it is fair to describe Black health disparities as symptoms of racism (rather than out-of-nowhere racial differences, or worse: differences that derive from Black people's choices about where to live and what to eat, etc.). From that vantage point, and to borrow from Kimberlé Crenshaw, racism itself "should surely count as a preexisting condition."[245] It is not particularly helpful, then—and is perhaps even

245. Kimberlé W. Crenshaw, *When Blackness Is a Preexisting Condition: How Modern Disaster Relief Has Hurt African American Communities*, NEW REPUBLIC (May 4, 2020),

dangerous—to say that COVID-19 knows no (racial) boundaries.[246] Racism is one of several social forces that structure the boundaries along which the virus travels, even as whiteness is clearly not an immunity. To end where I began a few pages ago: None of what I have just said is principally about conscious racial intentionality.[247]

This brings us back to my neighbors: Their good intentions do not change the fact that my body in the space of my own neighborhood is suspect in a way that a white body in that space is not. The signs "We Watch. We Care. We Call the Police." (and neighborhood watch signs with equivalent messaging) do not "hail" white people and Black people in the same way. White people are hailed as the agents of strict scrutiny (the people who should strictly scrutinize); Black people are hailed as its targets (the people who should be strictly scrutinized). To borrow from the late Toni Morrison, "the power of looking" is white.[248] Within that visual economy, my white neighbors and I are never doing the same thing—and are never seen in the same way—when we walk through our neighborhoods. This difference in subject position is not simply a matter of the individual consciousness of individual people. It is a structural arrangement that derives from the historical racial projects, including slavery and Jim Crow, through and on which crime was

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https://newrepublic.com/article/157537/blackness-preexisting-condition-coronavirus-katrina-disaster-relief [https://perma.cc/7TZ4-6AXR].

246. Brian Williams, Opinion, *In COVID-19, U.S. Battles More Than a Virus—Legacy of Jim Crow Explains Much About the Pandemic's Impact on Chicago's Black Communities*, MEDPAGE TODAY (July 13, 2020), https://www.medpagetoday.com/infectiousdisease/covid19/87536 [https://perma.cc/4TA6-TKQP]; Sharon Begley, *To Understand Who's Dying of Covid-19, Look to Social Factors Like Race More Than Preexisting Diseases*, STAT NEWS (June 15, 2020), https://www.statnews.com/2020/06/15/whos-dying-of-covid19-look-to-social-factors-like-race [https://perma.cc/2JM5-8WCM]; Isaac Chotiner, *The Interwoven Threads of Inequality and Health*, NEW YORKER (Apr. 14, 2020), https://www.newyorker.com/news/q-and-a/the-coronavirus-and-the-interwoven-threads-of-inequality-and-health [https://perma.cc/J3GQ-UZW7]; Blake Farmer, *Long-Standing Racial and Income Disparities Seen Creeping Into COVID-19 Care*, KAISER HEALTH NEWS, (Apr. 6, 2020), https://khn.org/news/covid-19-treatment-racial-income-health-disparities [https://perma.cc/ZY5G-M86N].

247. I am not saying, therefore, that intentional racial discrimination no longer exists and that we need not be worried about it. I am saying: Even if president Obama had succeeded in ridding the nation of every consciously racially motivated actor before president Trump took office, Black people would still, during the Trump presidency, have been more harmed by COVID-19 than whites. Eduardo Bonilla-Silva's arguments about racism without racists capture this point. *See generally* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2d ed. 2003).

248. TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 73 (1992).

written into Blackness.[249] Against the backdrop and lineage of that particular "condemnation,"[250] to keep one's neighborhood safe is, presumptively, to keep Black people out. It is precisely the currency of that presumption that imposes the requirement of a "compelling" justification for Black presence.

D. The Narrow Tailoring Prong

Like the legal regime of strict scrutiny, the social regime of strict scrutiny has a narrow tailoring prong as well. It requires Black people to narrowly tailor to whom we speak; narrowly tailor when we speak; narrowly tailor what we say; and narrowly tailor how we say it. Narrow tailoring in this context requires Black people to be mindful not only of what we are saying but also of the fact that we are saying it.[251] In those regards, narrow tailoring subalternizes Black people in the Gayatri Spivak sense of inviting the question: Can the Black person "speak"?[252]

At first blush, the speech-constraining dimensions of narrow tailoring—the fact that it circumscribes how Black people say what they say and to whom—may seem to undermine, rather than shore up, articulated commitments to diversity. But Justice Powell's opinion in *Bakke* rested on a decidedly thin conception of diversity. According to Justice Powell, racial diversity can serve as a "compelling state interest" for affirmative action only to the extent that it operates alongside other forms of diversity.[253] This positioning of race in equipoise—or even in competition—with other admissions factors (such as one's mastery of a musical instrument), dematerializes the subordinating dimensions of race and creates a false equivalency between being Black and playing the cello.[254] This thin

249. *See* GIBRAN MUHAMMAD, *supra* note 107.
250. *See id.*
251. What I am suggesting here is very much in line with what Derrick Bell expressed as "the rules of racial standing," a set of regulatory norms that structures the terms on which Black people can speak their truths. DERRICK BELL, *The Rules of Racial Standing, in* FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 109 (1992).
252. *See generally* Gayatri Spivak, *Can the Subaltern Speak*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271, 294 (Cary Nelson & Lawrence Grossberg eds., 1988). Needless to say, this is not literally about whether people can "talk." It is about structural conditions that shape voice and voicelessness, including the capacity to be heard both in political discourse and in archives. *See Subaltern Talk: Interview With the Editors*, *in* THE SPIVAK READER, 287, 287–92 (Donna Landry & Gerald Maclean eds., 1993–94).
253. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–19 (1978).
254. In the context of rewriting the *Bakke* opinion, political scientist Luke Harris puts the point this way: The use of the diversity rationale alone would make it virtually impossible to distinguish students who have faced institutional bias from those who have never been exposed to it. The injuries of systemic forms of racism would appear on par with talents such as being a good athlete or musically gifted, or they would seem no different than contingencies such as being

conception of racial diversity is thoroughly consistent with, and indeed is demanded by, the "narrow tailoring" of Blackness I am describing.

Asad Rahim's compelling work on Justice Powell provides another way to understand the relationship between the narrow tailoring of Blackness and thin conceptions of diversity. According to Rahim, Justice Powell might have set forth his diversity rationale to discipline what he perceived to be the growing radicalism on college campuses across the United States during the 1960s and 70s. More precisely, Rahim states:

> [Justice] Powell was concerned foremost with preventing the radicalization of students who would soon preside over American institutions. Beginning in the mid-1960s, when he was an education official in Virginia, Powell became consumed by a suspicion that White and Black radicals, influenced by communists, had teamed up to plot a revolution that would dismantle capitalism and overthrow American democracy. According to Powell, the effort to foment insurrection was being executed on two fronts. Black "militant leaders" like Martin Luther King and the Black Panthers used civil disobedience to sow discord in the streets, and White militants—represented by the New Left—sought to radicalize "an ever-increasing number of white middle-class Americans" by corrupting the intellectual climate of the nation's universities. Powell specifically warned audiences that left extremists aimed to "establish the campus as their principal base of revolution."[255]

If Rahim is right, Justice Powell's diversity rationale was not intended to create institutional space for expressions of Black radicalism, oppositionalism, or counter-hegemonic speech, but rather to displace those insurgent voices with more racially palatable speech.[256] In this sense, the diversity rationale that Justice Powell propounded—the deradicalizing ideas he might have hoped that this rationale would generate on college campuses—could have been designed to socialize Black students to enact precisely the forms of subdued Blackness—a particular kind of being for whiteness—that the social regime of strict scrutiny

from a part of the country underrepresented in a particular institution. Instead of membership in a racial minority group appearing as a personal characteristic that might circumscribe fair access for some individuals, a person's racial identity could be constructed as a characteristic that simply makes her presence "institutionally interesting" for the purposes of diversity. *See* Luke Charles Harris, *University of California v. Bakke: Rewritten, in* CRITICAL RACE JUDGMENTS (Bennett Capers et al. eds., forthcoming 2022).

255. Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1426–27 (2020).

256. Rahim is careful not to attribute intentionality to Justice Powell. Rahim's overarching aim is to provide another way of thinking about where Justice Powell might have landed on the diversity rationale. *See id.*

seems to require. To the extent that the diversity rationale has performed that racial socialization function, it has staged pedagogical scenes on which at least some Black students have been directed to rehearse in school a way of being Black that subsequently they would practice in life.

More broadly, narrow tailoring in this context operates as a form of governmentality[257] that disciplines how Black people perform and manifest our Blackness and limits our capacity for self-possession. Central to this governmentality is an incentive for us to self-monitor, self-regulate, and self-manage our identities so as to render ourselves racially palatable.[258] These acts of self-fashioning do not put Black people on a trajectory to freedom; they function instead as a particular form of capture.

Consider, for example, two performative forms the "narrow tailoring" of Blackness might take. A Black person might endeavor to prove that stereotypes about Black people are false, quintessential examples of racial misrepresentations. Alternatively, that person might try to demonstrate that racial stereotypes about Black people do not apply to them.[259] The former "narrow tailoring" of Blackness entails repudiating the "facts of Blackness" writ large ("that is not who *we are*").[260] That attempted repudiation is doomed to fail (and indeed has failed) against the backdrop of what Anthony Farley refers to as the "white-over-black to white-over-black to white-over-black to white-over-black" permanence of racism from "slavery-to-segregation-to-neosegregation."[261] Indeed, the ongoing material conditions of Black subordination that circulate in the form of free-floating "racial disparities" function as proof that the "facts of Blackness" are true. Which is to say, the ubiquitous nature of those disparities helps make Black bodies evidentiary in the following sense: Why would the state incarcerate so many Black people if those people were not criminally culpable? Why would Black people be so underrepresented in colleges and universities if they were qualified to be there?

257. Foucault, *supra* note 90.
258. For articulations of the relationship between identity performance, racial comfort, and racial palatability, see Carbado & Gulati, *Working Identity*, *supra* note 87; Carbado & Gulati, *supra* note 90. For a compelling articulation of identity performance via the framework of "covering," See Kenji Yoshino, "Covering," 111 *Yale L.J.* 769 (2002)
259. Needless to say, versions of this dynamic are at play with respect to other social groups' dynamics as well. *See* Sunita Patel, *Performative Aspects of Race: "Arab, Muslim, and South Asian" Racial Formation After September 11*, 10 UCLA ASIAN PAC. AM. L.J. 61 (2005) (discussing the performative pressures imposed on Arab, Muslim, and South Asian identities post-9/11).
260. FANON, *supra* note 221, at 109.
261. Anthony P. Farley, *Chapter Four: Toward a General Theory of Antiblackness*, *in* ANTIBLACKNESS 87 (2021).

And why, if Black people were committed to work and to exploiting the opportunities the United States affords everyone, would they be overrepresented among the houseless and the poor?[262]

Repudiating the "facts of Blackness" is likely to fail in another sense. The very burden of the demonstration— "Look, we are human too!"—carries with it its own epistemological refusal: the default that Black people are not (fully) human. To bear the burden of articulating one's humanity is to speak from the position of the non- or sub-human.

A second way that "narrow tailoring" might be performed involves instances in which the performer trades on the ostensible "facts of Blackness" and employs them as a baseline against which to position themselves as a racial exception ("That is not who *I am.*"). This move, too, reflects capture rather than freedom, acquiescence rather than escape, in two senses. First, the fungibility of Blackness anticipates (indeed, creates an incentive for) disidentifying representative strategies of the foregoing sort. Those strategies construct performers who at best become a "credit" to a presumptively deficit race.[263] Second, to be a "credit" to one's race renders one a "good Black" against the background assumption that Black people as a group are "bad." The existence of that presumption—"the Negro is bad"[264]—structuralizes a form of racial insecurity that exerts pressure on all Black people to prove—via "narrow tailoring" techniques—that we are "good." To put this point the way Jerod Sexton might, the project of repudiating racial stereotypes "requires adjudication in the order of morality."[265] But precisely because that adjudication is premised on the presumption of Black criminality—and not just with respect to formalized criminal codes, but also with respect to Blackness qua Blackness—"the upstanding race man is *on the same side* as the badman, an ontological outlaw."[266]

262. *See generally* Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949 (2014) (demonstrating that exposing white voters to racial disparities can actually diminish their commitment to racial justice and increases the likelihood that they will blame Black people for their own marginality). For a discussion on the implications of Hetey and Eberhardt's study, see Jonathan P. Feingold, *Deficit Frame Dangers*, 37 GA. ST. U. L. REV. 1235, 1254–58 (2021).

263. For a critique of racial discourses that traffic in the language of "credit to your race," see Eden B. King, Dana G. Dunleavy, Eric M. Dunleavy, Salman Jaffer, Whitney Botsford Morgan, Katie Elder & Raluca Graebner, *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCH. PUB. POL'Y & L. 54, 56 (2011).

264. FANON, *supra* note 221, at 113.

265. JARED SEXTON, "LIFE WITH NO HOOP": BLACK PRIDE, STATE POWER IN COMMODIFIED AND CRIMINALIZED 223, 232 (David J. Leonard and C. Richard King eds, 2010).

266. Jared Sexton, *Reviews*, 46 AFR. AM. REV. 171, 172 (2013) (emphasis in the original). In this review, Sexton provides a concise analysis of *Under a Bad Sign: Criminal Self-Representation*

One might better appreciate the dynamic I am describing by historicizing it with reference to the figure of the "free person." The social intelligibility of the "free person" was linked to what Cheryl Harris describes as the conflation of Blackness with "enslaveability."[267] Because that conflation carried with it the presumption that all Black people were slaves, a "free person's" claim to freedom was always already in doubt in the sense of being both vulnerable to falsification ("You are Black and therefore a slave.") and in need of proof ("Where are your freedom papers?").[268]

Significantly, the contemporary performative demands that "narrow tailoring" imposes on Black people do not disappear in contexts where our numbers are small. Even, or perhaps especially, in our one-Black-person-among-many-non-Black-people presence we are potentially too much, racially excessive, and spectacularized by our hyper-visibility: "Look a Black person," to paraphrase Franz Fanon.[269] This hyper-visibility of Blackness derives in part from the fact that Black people are seen to embody potential threats, threats that Etienne Toussaint suggests render Black bodies "fighting words."[270] Structurally antagonistic, the speech acts of Black bodies bring into the room contestations over race, including slavery and Jim Crow, racial profiling and mass incarceration, and the inferiorization of Blackness "from the beginning."[271] Because the Black body itself—our Blackness per se—triggers these controversies, Black people are expected to suppress, diffuse, or otherwise manage them.[272] This "undue burden"[273] to diminish racial tension, prevent racial animosity, and avoid racial

in African American Culture by Jonathan Munby and *If We Must Die: From Bigger Thomas to Biggie Smalls* by Aimé J. Ellis.

267. *See* Harris, *supra* note 187, at 1717.
268. For a discussion of the vulnerability of the "free person" and the inherent insecurity of that subjection, see WARREN, *supra* note 45, at 100–01. For a discussion of how the very idea of "freedom" has historically been racialized, see TYLER STOVALL, WHITE FREEDOM: THE RACIAL HISTORY OF AN IDEA (2021)
269. FANON, *supra* note 221. *See also* Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997).
270. Etienne C. Toussaint, *Blackness as Fighting Words*, 106 VA. L. REV. ONLINE 124 (2020). See also Nina Farnia, *Black Dissent*, STAN. L. REV. (forthcoming) (discussing the degree to which, as an historical matter, Black dissent often has not benefitted from the protections of the First Amendment).
271. IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2017).
272. This expectation is analogous to the expectation that we deescalate police encounters.
273. Debates about reproductive autonomy are a crucial, but not the only, context in which one might consider the right to choose what to do with one's body and the "undue burdens that can be imposed on that right." *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); *see also* Dorothy E. Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*,

antagonism is an undue burden the legal regime of strict scrutiny imposes on racial remediation and racial justice projects as well.[274]

Nowhere are the burdens of representation and the identity management strategies they engender more fraught and more salient than in the context of policing. Many Black Americans—at too early an age—learn exactly how to submit to police authority to quite literally save their lives. If, to paraphrase W.E.B. Du Bois, riding Jim Crow was a sign of Blackness in 1930s America,[275] learning to be what Nikki Jones calls a "professional suspect,"[276] a particular form of narrow tailoring, is a formative part of the Black experience today.

On any given day, countless Black Americans stage their own submission to the strict scrutiny of police authority before a police officer even directs it. "Hands-up-don't-shoot," for example, is just one part of a much broader set of self-governance practices in which Black Americans regularly engage to survive police encounters: Emptying pockets and purses, placing hands on the dashboard, lifting up shirts, yes sirs, no sirs, spreading legs apart, and folding arms behind the back are all part of a social script Black Americans learn to perform—after multiple rehearsals—without specific law enforcement guidance or instruction. The epistemology behind these "dos and "dont's" is an injunction to Black people to use our bodies as a prophylactic tool—via a range of "narrow tailoring techniques"—against the social fears and the presumption of dangerousness that Blackness engenders. All of these self-governance practices suggest that police

14 WOMEN'S RTS. L. REP. 305 (1992). Quite clearly, however, the stakes are much higher in the reproductive autonomy context.

274. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298–99 (stating that racial "preferences" in Equal Protection may exacerbate racial antagonisms rather than alleviate them); *see also* City of Richmond v. J.A Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 229 (1995) (explaining that when racial classifications are used by the government, they must be carefully scrutinized because the perception that only race matters "can only exacerbate rather than reduce racial prejudice, [and] it will delay the time when race will become a truly irrelevant, or at least insignificant, factor"). For an in-depth analysis of how current equal protection doctrine, including strict scrutiny, is structured around managing the perceived relationship between race consciousness and racial justice projects on the one hand, and racial tension, hostility, and resentment (especially among white Americans) on the other, and how this doctrinal arrangement misunderstands the social dynamics of racial hierarchy and places inappropriate limits on racial remediation and racial justice projects, see Simson, *supra* note 67.

275. W. E. B. DU BOIS, *The White World*, *in* DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT 153 (Transaction Publishers 2011) (1940).

276. Nikki Jones, *"The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men*, 143 NEW DIRECTIONS CHILD & ADOLESCENT DEV. 33, 43–45 (2014).

interactions can function as racially subordinating pedagogical scenes. Structuring those scenes is a curriculum that disciplines Black people to instrumentalize their bodies to do precisely the kind of work that historically neither law nor public policy has instrumentalized police officers to do with their power: signal and perform acts of de-escalation.[277]

Am I saying that Black de-escalation strategies, and the self-governance acts of submission and acquiescence that underwrite them, will always save lives? No. Indeed, submitting to police authority is, to borrow from Saidiya Hartman, one of the "scenes of subjection"[278] through which Black people not only die, but die a particular kind of natural death. As Rinaldo Walcott observes, Black people's "deaths at the hands of the police and other state and substate actors are so frequent and so numerous as to be [a] natural part of Black life."[279]

Hands up. Bodies down.

Bodies down.

Knees. Chokeholds. Concrete.

It is precisely because police interactions force Black people to confront the perceived dangerousness of our body and its structural relationship to death that the mobilization of de-escalation strategies can feel like an existential imperative. Those strategies derive from a particular kind of Black consciousness—that with respect to our vulnerability to private and state violence, the Black body exists in a state of capture. That state of capture means, as Christina Sharpe explains, that to be a Black person is to inhabit a body "to which anything and everything can be done."[280] That "anything and everything" includes all of the "reasonable" ways in which the police may kill us.

But police encounters decidedly are not just scenes of death. They are scenes that structure ways of Black living as well. Surviving, or living through, police

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277. *See* Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159 (2014). Justice and Meares note that:

> Through overt and hidden curricula, the criminal justice system educates citizens on the proper relationship they should have with the state. . . . The fact that nothing in the overt curriculum of policing requires police to treat those who they stop with dignity and respect—numerous complaints about incivility suggest that police do not—compounds the problem that police practice is incongruent with procedural justice principles. Poor, urban-dwelling people of color bear the brunt not only of privacy and autonomy intrusions, but also of the constant stream of official messaging they could easily interpret—and appear to interpret—as insulting.

Id. at 166, 172–73.

278. *See generally* HARTMAN, *supra* note 108.

279. WALCOTT, *supra* note 92, at 12.

280. CHRISTINA SHARPE, IN THE WAKE: ON BLACKNESS AND BEING 11 (2016).

interactions is part of Black people's social reality. That experience produces what I will call "police encounter afterlives," remembrances of the potentiality of death those encounters portend, remembrances of our survival through submission, resistance, or escape. Patricia Williams might think of this survival as an instance of "spirit murder,"[281] a form of killing whose violence presupposes an afterlife of further racial injury.

Importantly, police encounter afterlives occur both for the individual and through collective memory—transmitted in a range of ways from Black parents instructing their children about how to survive police interactions to the mass circulation of images of police violence—and thus constantly reiterate Black people's expectation of precarity and need for survival strategies. Viewed in that way, that we survive the strict scrutiny of police interactions but are socially controlled by them is a crucial window on the relationship between the racial ordering of policing and the governmentality of Black bodies.

As I have already suggested but want to stress here, police officers are *not* required to "narrowly tailor" how they engage Black people because police practices are not subject to anything like a strict scrutiny analysis. Police never need a "compelling justification" to target and engage Black people along the lines I have described. This is so for at least two reasons.

The first relates to "mass criminalization,"[282] or the substantive penal law's criminalizing of various nonserious activities. State legislatures are free to criminalize all sorts of conduct,[283] including under the rubric of "disorderly conduct," as Jamelia Morgan's impressive study of disorderly conduct statutes make clear.[284] A state legislature's power in that regard is rarely subject to more than rational basis review.

The broad latitude legislatures have to engage in mass criminalization is relevant to my analysis in the following sense: The more legislatures criminalize conduct in which people routinely engage, including convening in public spaces, the more power and discretion police officers have to stop or arrest anyone. That

281. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 163 (1991).
282. *See* Carbado, *Blue-On-Black Violence*, *supra* note 68, at 1487–91; Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545 (2017) (describing the interaction between predatory policing and mass incarceration).
283. Carbado, *Blue-On-Black Violence*, *supra* note 68, at 1487–88 (listing examples of nonserious behaviors and activities that local governments have criminalized, including "loitering," "spitting in public places," "jaywalking," and "removing trash from a bin").
284. Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 Calif. L. Rev. 1637 (2021).

is, they do not need a "compelling" justification to do so.[285] Because Black people are "ontological outlaws,"[286] and because disorderly conduct statutes are notoriously vague, the mere presence of Black people in public spaces can render them vulnerable to being stopped or arrested for one form of disorderly conduct or another.[287]

The second reason police officers do not need a "compelling" justification to stop Black people is because their decision to target us "rationally" stems from the presumption of criminality that attaches to our bodies. I am not here referring to the law "on the books"—that the law expressly authorizes police officers to stop Black people on the view that all Black people are inherently suspect. No formal legal rule articulates that position. I am describing, instead, an "off the books," or "law on the ground," social reality that also is a function of Black people's status as "ontological outlaws."[288]

Compounding the preceding criminalization problems (at the levels of both the law and the body) is the fact that the most significant restraint the Constitution imposes on police investigation practices—Fourth Amendment law—is effectively structured around rational basis review.[289] Recall from the Introduction: "Rational basis" review is a weak, largely deferential standard. That deference is precisely what one sees when courts are called upon to determine the constitutionality of troubling forms of police conduct.

More specifically, the constitutionality of pedestrian checks, traffic stops,[290] "stops and frisks,"[291] and the use of deadly force, all turn on an inquiry that

285. For a powerful explanation of why police officers' powers to arrest should be curtailed, see Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 307–364 (2016).

286. *See* Sexton, *supra* note 265, at 172.

287. *See generally* Morgan, *supra* note 284.

288. *See* Sexton, *supra* note 265, at 172. *See also* I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 7–8 (2006) (introducing the concept of "white-letter law" and employing it "to suggest societal and normative laws that stand side by side with, and often undergird, black-letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye.")

289. For racial critiques of Fourth Amendment law, see DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022). *See also* Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245 (2010); Cynthia Lee, *Probable Cause With Teeth*, 88 GEO. WASH. L. REV. 269 (2020); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); Carbado, *Stop and Frisk*, *supra* note 68; Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C. R.-C. L. L. REV. 1 (2011).

290. Carbado, *supra* note 24.

291. Carbado, *Stop and Frisk*, *supra* note 68.

approximates rational basis review—reasonableness. In particular, the Supreme Court has drawn on the Fourth Amendment's prohibition against "unreasonable searches and seizures"[292] to explicitly state that the central Fourth Amendment question is not so much whether an officer has a warrant, probable cause, or reasonable suspicion; it is whether, under the totality of the circumstances, the officer's conduct in a given context is reasonable.[293] Of course, the existence of reasonable suspicion, probable cause, or a warrant matters to those inquiries. But particularly with respect to reasonable suspicion and probable cause, those hurdles are very easy for police officers to overcome.[294]

Consistent with the deferential standard of rational basis review, the Supreme Court has also said—in case after case—that courts should not "second guess" police officers:[295] Police officers should be given "broad discretion" to do their jobs[296] and should not incur legal sanctions for making reasonable mistakes.[297] Against the ways in which policing has functioned as a mechanism through which the state has governed through race,[298] the frequency of those juridical articulations calls to mind Robert Cover's observations about law and violence:

> Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the

292 U.S. CONST. amend. IV.

293. *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 270 (2011); Maryland v. Pringle, 540 U.S. 366, 370 (2003); Illinois v. Gates, 462 U.S. 213, 230–31 (1983).

294. For critiques of the ways in which Fourth Amendment law fails to meaningfully constrain police officers, see Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. MIA. L. REV. 425 (1997); Butler, *supra* note 289; Gabriel J. Chin & Charles J. Vernon, *Reasonable But Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882 (2015); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133 (2012); L. Song Richardson, *Police Efficiency*, *supra* note 289.

295. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (refusing to consider the constitutionality of an officer's actions with "20/20 vision of hindsight"); *see also* Illinois v. Lafayette, 462 U.S. 640, 648 (1983); Saucier v. Katz, 533 U.S. 194, 216 n.6 (2001) (Ginsburg, J., concurring); White v. Pauly, 137 S. Ct. 548, 551 (2017).

296. Carbado, *supra* note 24; *see also* Whren v. United States, 517 U.S. 806 (1996) (rejecting plaintiffs' arguments to prohibit pretextual stops because of the broad discretion these stops provide police).

297. *See, e.g.*, Heien v. North Carolina, 574 U.S. 54, 67 (2014) (stating that the Fourth Amendment tolerates reasonable mistakes); Maryland v. Garrison 480 U.S. 79, 87 (1987) (stating that the Supreme Court has "recognized the need to allow some latitude for honest mistakes that are made by officers").

298. *Cf.* Jonathan Simon, *Governing Through Crime, in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 171–90 (George Fisher & Lawrence Friedman eds., 1997).

> imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.[299]

Fourth Amendment law exemplifies this problem of law and violence. Fourth Amendment law is a field of death and pain. Fourth Amendment law promotes the killing and violation of Black bodies.[300] Fourth Amendment law creates a constitutional domain in which Black people's deaths at the hands of the police have precedential life as "reasonable mistakes."[301]

One important implication of the point I am advancing about race, policing, and standards of review is that the strict scrutiny review to which Black people are subjected and the rational basis review under which various forms of police power are constitutionalized are directly related to the social construction of Blackness as a suspect classification. That suspect status presupposes not only that Black people will be subject to "rigid"[302] or "heightened"[303] standards of review, but also that we should defer to the mobilization of those more "rigorous"[304] forms of scrutiny because, consistent

299 Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601, 1601 (1986).

300. *See generally* Carbado, *supra* note 24.

301. Consider, for example, the doctrine of excessive force. This justificatory regime, structured around whether an officer's use of force was reasonable, has functioned juridically to map reasonableness onto dead Black bodies. *See* Tennessee v. Garner, 471 U.S. 1 (1985). *See also* ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS (2021) (discussing the degree to which it is difficult to hold police officers accountable for the acts of violence in which they engage); JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (forthcoming 2023); Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257 (2020) (offering strategies for overcoming the structural barriers to suing the police for their acts of violence).

302. *See* Adarand Constructors v. Peña, 515 U.S. 200, 217 (1995) (describing strict scrutiny as the "most rigid" form of judicial review); *Fisher 1*, 570 U.S. 297, 310 (2013).

303. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 473 (1989) (describing strict scrutiny as a "heightened" form of judicial review); Johnson v. California, 543 U.S. 499, 506 (2005).

304. *See* Parents Involved in Cmty. Schools. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736 (2007) (describing strict scrutiny as a "rigorous" standard of review); Miller v. Johnson, 515 U.S. 900, 920 (1995).

with rational basis review, those mobilizations are "rationally related to a legitimate state interest"[305]—namely, the policing of Black bodies.

This is a good place to bring the *legal* regime of strict scrutiny back into focus. Remember that undergirding that regime is the idea that courts lack the competence to distinguish between benign uses of race and invidious uses of race, and thus all race-based governmental decisions should be subjected to strict scrutiny.[306] Under the *social* regime of strict scrutiny, people, including police officers, are presumed to lack that "epistemic competence" as well.[307] The presumption is that there is no way ex ante to know whether a Black person is benign or invidious. The social regime of strict scrutiny is necessary to perform that racial work. It has the capacity to "smoke out" the invidious Black people from the benign ones. It is precisely that detection function of strict scrutiny that creates an incentive for Black people to self-fashion themselves—and self-scrutinize and self-regulate—to demonstrate that they have a benign racial subjectivity.

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On one level, the "narrow tailoring" prong of the social regime of strict scrutiny is an injunction to Black people to render our race entirely epidermal. Narrowly tailored down to mere skin color, our Blackness should become a corporeal embodiment of colorblindness. That embodiment should then labor to de-racialize Blackness in a very particular way: by eliding the racial subordination Black people have experienced and delegitimizing the community formations, cultural practices, and race conscious associations we have historically employed to contest, resist, and survive that subordination. Under "narrow tailoring," our race as Black people should not matter to us—or it should matter at most as "*one* factor among many" in our sense of self and enactments of identity.[308]

305. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).
306. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290–91, 294 n.34 (1978).
307. *See* Jennifer L. Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 BROOK. L. REV. 1009, 1014 (2009) (describing epistemic competence as subject matter expertise on the part of a jury, allowing the jury to independently evaluate the substance of an expert's testimony).
308. Remember again Justice Powell's conclusion that to satisfy the demands of narrow tailoring, affirmative action policies must treat race as "one factor among many" in deciding which students to admit. *Bakke*, 438 U.S. at 318–19. This "one factor among many" dimension of "narrow tailoring" calls to mind the "one drop" rule of hypodescent, a blood quantum regime that "narrowly tailored" the borders of whiteness to ensure that the category "white people" was not "racially contaminated" by people

The "narrow tailoring" concern about "too much" Blackness under the social regime of strict scrutiny approximates the concern in the juridical arena about race being "too much" of a factor in race conscious remediation efforts.[309] Indeed, drawing from the legal regime of strict scrutiny, one might say that part of what is at stake in the social context is whether Black people are invoking our race as a last resort—as the "least restrictive means"[310]—to advance "compelling" ends that inevitably focus on diversity[311] rather than on structural forms of racism and white supremacy.[312]

The "narrow tailoring" demands of the social regime of strict scrutiny can function in another way as well: They can install the requirement that Black people "tone down" their race to "tone down" the fear that people have of us. Part of this demand's insidiousness is that it imposes on Black people the burden of controlling the very racial gaze that structures and controls how we are seen. To return once more to Fanon, "Look, a Negro."[313] The power of that interpellation both precedes and creates incentives for palatable acts of Black self-presentation, including those that—intraracially—differentiate, disidentify, and disassociate in ways that implicitly signal not only that "I am not like other Black people," but also that "I am not too Black." These signals provide racial assurances that the Black person in question will not cause the very dynamics which Blackness has been socially constructed to produce: racial tensions, racial antagonism, and racial balkanization.

None of this means that the "authorized" forms of Blackness that "narrow tailoring" demands, and the "unauthorized" forms of Blackness it

who had "too much" Black blood. "Narrow tailoring" under the social regime of strict scrutiny instantiates a version of hypodescent—"hyperdescent"—but the focus is on racial salience, not blood quantum. The question under hyperdescent is whether particular manifestations of Blackness are "hyper Black" and as such threaten the racial integrity of historically white institutions and professions or are racially "too much" for those institutions and professions to manage.

309. *See also* Simson, *supra* note 67 at *21-23 (discussing operation of juridical concerns about "too much" use of race in race conscious government action).

310. *See supra* Subpart I.D, p. 36. As I mentioned earlier, this does not mean that every application of strict scrutiny results in a declaration that the governmental use of race is unconstitutional.

311. As Mitu Gulati and Patrick Shin have argued, this approach to race enables institutions to "showcase" diversity without fundamentally changing their institutional cultures. *See generally*, Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017 (2011).

312. For a thoughtful discussion of the degree to which the Supreme Court barely mentions—let alone meaningfully engages—white supremacy, *see* Alanna Kane, *Doctrinal White Supremacy* (unpublished manuscript) (on file with author).

313. FANON, *supra* note 221, at 91.

seeks to disappear, portend the total elision of racial difference.[314] Borrowing from Homi Bhabha, one might say that "narrow tailoring" promotes a form of racial difference that is "almost the same, but not quite."[315] Thus understood, "narrow tailoring" does not demand that we effectuate a complete annexation from our race. (Blackness is too fungible for that.) The Black being (for captor[316]) that narrow tailoring demands is that we navigate the terrain between "resemblance and menace."[317]

The existence of that terrain suggests that it is not just that Black people view themselves through a double vision comprised of "two warring ideals," to borrow from Du Bois.[318] It might be that other groups surveil Black people through a double vision that reflects "two warring ideals" as well. Against the backdrop of the dialectic of "resemblance and menace," other groups sometimes demand to see Black people primarily (though not entirely) through the racial economy of sameness, and sometimes they demand to see us primarily (though not entirely) through the racial economy of difference. At a minimum, these demands on Blackness put Black people in a "racial double bind,"[319] a position in which we are made to feel that we are social or institutional problems for being viewed as either racially "too much" or racially "too little."

CONCLUSION

This Article has described the relationship between the legal regime of strict scrutiny and the social manifestation of that phenomenon. Both regimes function to diminish the value and the quality of Black life. The legal regime of strict

314. HOMI BHABHA, THE LOCATION OF CULTURE 88 (1994).
315. *Id.* at 86.
316. *See* Spillers, *supra* note 49 (describing "*being* for captor") (emphasis in the original).
317. BHABHA, *supra* note 314, at 86. Though I have focused on the injunction "narrow tailoring" imposes on Black people to "turn down" our race, there are also expectations that we "turn up" our race in certain contexts as well. The demand for racial comfort and racial palatability sometimes includes the expectation that the supply will be in the form of racial salience, performed to rehearse stereotypical scripts about who Black people are supposed to be. This is exemplified by the quintessential Jim Crow images of smiling Black faces, and dancing Black bodies, living the color line under conditions of white domination. *See* Gordon Parks' Photographs, *in Segregation in the South, 1956*, GORDON PARKS FOUND., https://www.gordonparksfoundation.org/gordon-parks/photography-archive/segregation-in-the-south-1956?view=slider#7 [https://perma.cc/T4ZQ-3LEA] (displaying photos taken by Gordon Parks of segregation in the South in the Jim Crow era).
318. W. E. B. DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 2 (1903).
319. CARBADO & GULATI, *ACTING WHITE?*, *supra* note 87, at 170.

scrutiny treats racial remediation projects designed to address Black inequality as presumptively suspect; the social regime treats the Black body itself as presumptively suspect.

Neither the legal regime of strict scrutiny nor its social counterpart is supported by a "compelling" justification. Presumably, few people would argue that there are compelling reasons to support legal frameworks or social practices that facilitate and legitimize Black subordination.[320] Nor are there compelling reasons why white American concerns about (and arguments against) racial remediation should trump Black American concerns about (and arguments against) racial inequality.

Yet for more than four decades, equal protection law has taken sides, racially preferring white claims about "reverse discrimination" over Black claims about substantive racial inequality.[321] Given the indisputable histories of racial violence against Black people in this country, including slavery and Jim Crow,[322] it is all the more distressing that the Supreme Court has effectively "narrowly tailored" equal protection law in two antiblack ways: (1) to target racial remediation—whether in education, employment, voting, or other contexts—for moral and juridical opprobrium in the sense of rendering them normatively and constitutionally suspect; and (2) to recast those antiracist countermeasures as racial preferences that harm innocent whites.[323]

Though my arguments about the social regime of strict scrutiny have focused mostly on its treatment of Black bodies, I should note as well that, like its legal counterpart, the social regime of strict scrutiny also treats antiracist initiatives as presumptively suspect. A salient example of what I mean is the ongoing backlash against Critical Race Theory (CRT), a body of work that emerged in the late 1980s in American law schools to challenge the role law has played in authorizing and entrenching racial inequality.[324] Part of the backlash

320. I recognize, of course, that some scholars would quarrel with my characterization of the legal regime of strict scrutiny as mechanism that facilitates and legitimizes the racial subordination of Black people.

321. *See* Darren Lenard Hutchinson, "*Unexplainable on Grounds Other Than Race*": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 ILL. L. REV. 615, 671 (2003).

322. For one of the most compelling accounts of the law's role in violence against Black people in this country, see DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW (6th ed. 2008).

323. See sources cited *supra*, notes 154–160, and accompanying text.

324. For an articulation of the genesis of CRT and the core ideas around which it is structured, see Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011). *See also* Sumi Cho & Robert Westley,

against CRT is the framing of that literature as a "suspect" and "invidious" body of work that effectuates racism against whites and creates racial tensions, racial antagonism, and racial balkanization in society.[325] It is precisely these critiques of CRT that the African American Policy Forum launched its #Truthbetold Campaign to contest.[326]

But it is also true that the attack on CRT is less about CRT per se. It is about a longstanding opposition to, and campaign against, antiracist thinking, teaching, and organizing. This is one of the central insights of the #Truthbetold Campaign.[327] Indeed, so broad are the attacks on CRT that even mainstream equity, diversity, and inclusion programs within universities and workplaces have been subject to critique and contestation.[328] The scope of these ongoing efforts to delegitimize various forms of antiracism is one example of how the social regime of strict scrutiny targets both bodies of antiracism and bodies of Black people.

Still, against the backdrop of the current moment of "racial reckoning,"[329] it is reasonable to query whether the attack on CRT is something of an aberration, a

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Critical Race Coalitions: Key Movements that Performed the Theory, 33 U.C. DAVIS L. REV. 1377 (2000).

325. *See, e.g.*, Lance Morrow, Opinion, *Can Freedom Survive the Narratives?*, WALL ST. J., May 17, 2021, at A19 ("The left's narrative now rules the land in the form of 'critical race theory,' 'antiracism' and invidious variations.'"; "The New York Times's '1619 Project,' now taught in schools all over the country, is, in its essence, racist propaganda."); Adam Harris, *The GOP's 'Critical Race Theory' Obsession*, ATLANTIC (May 7, 2021), https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828 [https://perma.cc/W5YP-SCX4] ("[Critical race] theory soon stood in for anything resembling an examination of America's history with race. Conservatives would boil it down further: Critical race theory taught Americans to hate America.").

326. *See Welcome to the #TruthBe Told Campaign*, AFRICAN AMERICAN POLICY FORUM, https://www.aapf.org/truthbetold [https://perma.cc/H7LC-KATC].

327. *See generally*, *id.*

328. *See, e.g.*, Christopher Caldwell, *The Inequality of 'Equity'*, NAT'L REV. (May 17, 2021), https://www.nationalreview.com/magazine/2021/05/17/inequality-of-equity/ [https://perma.cc/B2WP-W9BH].

329. *See, e.g.*, John Eligon & Audra D.S. Burch, *After a Summer of Racial Reckoning, Race is on the Ballot*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/2020/10/30/us/racial-justice-elections.html?searchResultPosition=4 [https://perma.cc/LD8S-ZFVF]; Joshua Ferrer & Joyce Nguy, *Did Last Year's Black Lives Matter Protests Push Cities to Defund Police? Yes and No.*, WASH. POST (June 14, 2021), https://www.washingtonpost.com/politics/2021/06/12/did-last-years-black-lives-matter-protests-push-cities-defund-police-yes-no [https://perma.cc/XGA7-Z22R] ("[T]he largest mass protest movement in American history forced what many called a national racial reckoning."); L.A. Times Ed. Bd., Opinion, *Kenosha Police Shooting Yet Another Reason That America's Racial Reckoning Can't Be Shrugged Off*, CHATTANOOGA TIMES FREE

project of the extreme right that should not obscure the profound ways in which George Floyd's death and the movements for Black lives have shifted the racial landscape. Under this view, the regimes of strict scrutiny I have described are being relaxed. To support this claim, one might point to the fact that many people would agree with the proposition that there are "compelling" reasons to hear what Black people are saying about the subordinating conditions of Black life.[330] One might also note that across the United States, even school children can be heard articulating some version of the mantra "Black Lives Matter.[331] These developments suggest that meaningful spaces exist for Black people to articulate and realize their aspirations for racial justice. On some level, all of that might well be true.

But it might also be true that the moment of "racial reckoning" in which we find ourselves exists within, rather than outside of, the racial economy of strict scrutiny. From that vantage point, the answers people have offered to the question—"how should we make Black lives matter?"—have not escaped the reach of strict scrutiny. Instead, they have triggered that "heightened" standard of review and its "means" and "ends" disciplinary apparatus. Thus, even assuming, as I did earlier, that consensus is emerging across society that there are "compelling" reasons to make Black lives matter, those "compelling" reasons exist within the framework of strict scrutiny; moreover, they say

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PRESS (Aug. 25, 2020), https://www.timesfreepress.com/news/opinion/times-commentary/story/2020/aug/25/editorial-los-angeles-times/530762 [https://perma.cc/6QXZ-V2RV].

330. In June of 2018, approximately 39 percent of registered voters supported Black Lives Matter. As of July 21, 2021, that number has risen to 46 percent, according to polls conducted by Civiqs. *Do You Support or Oppose the Black Lives Matter Movement?*, CIVIQS, https://civiqs.com/results/black_lives_matter?uncertainty=true&annotations=true&zoomIn=true [https://perma.cc/T68A-6FJ3]; *see also* Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html [https://perma.cc/52KB-Z874] (charting an exponential two-week increase in support of Black Lives Matter following the murder of George Floyd).

331. For examples, see the Black Lives Matter at School Movement, https://blacklivesmatteratschool.com [https://perma.cc/722M-YJY3]; Nat'l Educ. Assoc., *Black Lives Matter at School,* EDJUSTICE, https://neaedjustice.org/black-lives-matter-at-school [https://perma.cc/KUQ4-FB4J]; *Nat't Educ. Assoc., Black Lives Matter at School—Resources*, EDJUSTICE, https://neaedjustice.org/black-lives-matter-school-resources [https://perma.cc/6RJX-SSHM] (discussing its list of resources for the classroom). *See also* Anya Kamenetz, *Q&A: How to Talk to Kids About Black Lives and Police Violence*, NPR (June 4, 2020, 7:03 AM), https://www.npr.org/2020/06/04/868600478/q-a-how-to-talk-to-kids-about-george-floyd [https://perma.cc/4S4Y-5LRQ] (interviewing Jesse Hagopian, the coeditor, along with Dyan Watson and Wayne Au, of Teaching for Black Lives (2018)).

nothing about the "narrow tailoring" of permissible "means" by which we might pursue those "compelling" "ends."

Think back to the height of discussions about "Black Lives Matter" in 2020. It was in that context that Californians voted against repealing Proposition 209, an amendment to the California State Constitution that eliminated race-based affirmative action within the state.[332] That outcome suggests that many Californians who support the idea that "Black Lives Matter"[333] nonetheless voted against expanding educational opportunities to Black people.[334]

Reparations present another example of how the social regime of strict scrutiny is implicated in the current moment. Across the United States, debates are being had about whether and to what extent Black Americans are entitled to reparations.[335] That controversy can be mapped onto the "means" and "ends" prongs of the social regime of strict scrutiny in this sense: Many people would reject either the claim that there are "compelling" reasons for the government to issue reparations to Black Americans or the claim that reparations are a "narrowly tailored" mechanism through which to make Black lives matter.[336] From this

332. Alexander Nieves, *California Voters Reject Affirmative Action Measure Despite Summer of Activism*, POLITICO (Nov. 4, 2020), https://www.politico.com/states/california/story/2020/11/04/california-voters-reject-affirmative-action-measure-despite-summer-of-activism-9424555 [https://perma.cc/W699-F7QH].

333. According to polls, approximately two-thirds of Californians support the idea that Black lives matter. Mark Baldassare, Dean Bonner, Alyssa Dykman & Rachel Lawler, *Two in Three Californians Support Black Lives Matter*, PUB. POL'Y INST. CAL. (July 30, 2020), https://www.ppic.org/blog/two-in-three-californians-support-black-lives-matter [https://perma.cc/HQN7-N5ZA]. For a brilliant historical treatment of how the practice of amending the California Constitution by way of propositions has been deeply invested in promoting racism, see DANIEL MARTINEZ HOSANG, RACIAL PROPOSITIONS: BALLOT INITIATIVES AND THE MAKING OF POSTWAR CALIFORNIA (2010).

334. Roughly 57 percent of Californians voted against repealing Proposition 209. *California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_16,_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020) [https://perma.cc/9PXE-9DBZ].

335. *See, e.g.*, Nicholas Fandos, *House Panel Advances Bill to Study Reparations in Historic Vote*, N.Y. TIMES, April 15, 2021, at A17; Julie Bosman, *Chicago Suburb Shapes Reparations for Black Residents: 'It Is the Start'*, N.Y. TIMES (Mar. 22, 2021), https://www.nytimes.com/2021/03/22/us/reparations-evanston-illinois-housing.html [https://perma.cc/U952-CUBA]; Dan Balz, *The Politics of Race are Shifting, and Politicians are Struggling to Keep Pace*, WASH. POST (July 5, 2021), https://www.washingtonpost.com/graphics/2020/politics/race-reckoning [https://perma.cc/L466-U9DH].

336. Of course, one can raise similar questions about the courts. Indeed, the juridical problem might even be worse. That is because the notion that courts would conclude that there are "compelling state interest" reasons to make Black lives matter is highly doubtful. Courts would

perspective, the current moment of "racial reckoning" does not necessarily mark a departure from the social regime of strict scrutiny. Instead, it might mark the mobilization of that scrutiny to ask whether there are "compelling reasons" to support Black people's pursuit of justice and liberation, and whether the "means" chosen to effectuate those "ends" are "narrowly tailored."[337] In that regard, and to borrow from Robin D. G. Kelley, the current moment in which we find ourselves is not structured to accommodate Black people's "freedom dreams."[338] It is structured to manage and discipline them. That is why now, as in the past, freedom dreaming on the part of Black people requires not only radical imagination and courage, but also hope.

likely dismiss any such claims via *Washington v. Davis*-like arguments, 426 U.S. 229 (1976) (racial disparities standing alone do not give rise to an equal protection claim), or Justice Powell-like arguments in his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (societal discrimination is too "amorphous" to function as a predicate for race-based remediation).

337. Another way to think about this would be to say that the politics of racial reckoning are not a departure from what Rinaldo Walcott calls "the long emancipation," but rather an iteration of it. *See generally* WALCOTT, *supra* note 92.

338. *See generally*, ROBIN D.G. KELLEY, FREEDOM DREAMS (2002).