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(E)Racing Trayvon Martin

Cynthia Lee*

INTRODUCTION

As we celebrate the 25th anniversary of Critical Race Theory [CRT], we have much to celebrate and much work ahead. In its early years, Critical Race Theory was a much-criticized and denigrated body of scholarship. By and large, critical race scholars were law professors of color writing about issues of racial subordination and injustice. Their work was criticized as insufficiently rigorous.¹ The use of narrative or storytelling, a prominent feature of much CRT scholarship, was criticized as well.² Many junior law professors of color were warned by more senior professors of color not to write about race before acquiring tenure as doing so might negatively affect their chances of getting tenure.³

Today, CRT, while still viewed negatively by many, has become a much more respected mode of scholarship. Many law schools today offer courses on Critical Race Theory or Race, Racism, and the Law. Law professors teaching courses on legal theory and jurisprudence often include a CRT component in their syllabi. There are several CRT casebooks on the market, so a professor teaching CRT does not have to cobble together her own materials.⁴ CRT scholars are amongst the most widely cited in the profession.⁵

While CRT has come a long way from the days when it was widely disrespected, much work still needs to be done to address the problems of racial subordination that concern critical race scholars, particularly in the criminal justice arena. Our prisons are still filled with Black and Brown

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¹ See generally Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1749 (1989); DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997); Daniel Subotnik, *What's Wrong with Critical Race Theory?: Reopening the Case for Middle Class Values*, 7 CORNELL J.L. & PUB. POL'Y 681 (1998).

² Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 814–19, 835–42 (1993); Subotnik, *supra* note 1, at 687–91.

³ Richard Delgado recounts his experience as a junior professor of color being “told by a number of well-meaning senior colleagues to . . . establish a reputation as a scholar in some mainstream legal area and not get too caught up in civil rights or other ‘ethnic’ subjects,” a story familiar to many professors of color concerned about racial justice issues. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561 (1984). When I was an untenured professor, I was warned by my more senior colleagues—colleagues who wanted to see me succeed and get tenure—that it would be risky for me to write about race. I was told that one of my other colleagues of color had co-authored a paper when she was pre-tenure that had “Critical Race Theory” in the title, and had gotten flak for doing this from senior colleagues who were hostile to writings about race.

⁴ See DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* (6th ed. 2008); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 3d ed. 2013); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012); JUAN PEREA ET AL., *RACE AND RACES, CASES AND RESOURCES FOR A DIVERSE AMERICA* (2d ed. 2007); GLORIA J. BROWNE-MARSHALL, *RACE, LAW, AND AMERICAN SOCIETY: 1607 TO PRESENT* (2007).

⁵ See Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of all Time*, 110 MICH. L. REV. 1483, 1489–93 (2012) (noting that critical race theorists such as Richard Delgado, Mari Matsuda, Charles R. Lawrence, Angela Harris, Neil Gotanda, and Kimberlé Williams Crenshaw are some of the most widely cited legal scholars); Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424–26 (2000) (noting that critical race theorists such as Richard Delgado, Kimberlé Williams Crenshaw, and Angela Harris are some of the most widely cited legal scholars); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 751 (1996) (noting that a high percentage of the most widely cited articles are written by critical race theorists).

inmates.⁶ “More than 60% of the people in prison are racial and ethnic minorities,” and one out of every ten Black men in their 30s is incarcerated on any given day.⁷ These numbers are largely due to socio-economic conditions that encourage criminal behavior, but are also partly due to media focus on Black and Brown men caught up in the criminal justice system, marking them as more vulnerable to police stops and arrests.⁸

In addition to the problem of racial disparity in mass incarceration, another area of concern is the differential treatment of capital defendants, which often turns on the race of the victim. This problem was highlighted in the Baldus study, referenced in the U.S. Supreme Court decision *McCleskey v. Kemp*.⁹ David Baldus, Charles Pulaski, and George Woodworth examined over 2,000 capital murder cases that occurred in Georgia during the 1970s.¹⁰ They found that defendants charged with killing White victims received the death penalty in 11% of the cases, but defendants charged with killing Black victims received the death penalty in only 1% of the cases.¹¹ They also found that jurors imposed the death penalty in 22% of the cases involving Black defendants and White victims, but only 3% of the cases involving White defendants and Black victims, and 1% of the cases involving Black defendants and Black victims.¹² The Baldus study also found that prosecutors sought the death penalty in 70% of the cases involving Black defendants and White victims, but did the same in only 19% of the cases involving White defendants and Black victims.¹³ The race of the victim continues to play a prominent role in capital cases today.¹⁴ The race of the defendant affects jury verdicts as well, with jurors treating Black defendants much more punitively than similarly situated White defendants.¹⁵

The persistence of racial disparity in the treatment of defendants charged with interracial crimes of violence is perplexing in light of the egalitarian attitudes most Americans embrace today. Social science research on implicit social cognition suggests one reason for this seeming inconsistency between the positive egalitarian attitudes most Americans embrace and the differential treatment of Black and White defendants charged with interracial crimes of violence.

⁶ I purposely capitalize the letter “B” in “Black” and “W” in “White” to acknowledge the fact that Black and White are socially constructed racial categories.

⁷ *Racial Disparity*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Oct. 22, 2014) (“For Black males in their thirties, 1 in every 10 is in prison or jail on any given day.”).

⁸ NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 20–23 (Sept. 3, 2014) available at http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf.

⁹ 481 U.S. 279, 286 (1987).

¹⁰ *Id.*; see generally David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 680 (1983); David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 UC DAVIS L. REV. 1375, 1399–1406 (1985).

¹¹ *McClesky*, 481 U.S. at 286.

¹² *Id.*

¹³ *Id.* at 287.

¹⁴ See *Race and the Death Penalty*, ACLU (Feb. 26, 2003), <https://www.aclu.org/capital-punishment/race-and-death-penalty> (finding that 80 percent of all capital cases involve White victims); Catherine M. Grosso et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 525–76 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed.) (noting that twenty-four of thirty-six empirical studies of death penalty systems published after 1990 found race of victim effects).

¹⁵ See DAVID C. BALDUS ET AL., NEBRASKA COMMISSION ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, THE DISPOSITION OF NEBRASKA CAPITAL AND NON-CAPITAL HOMICIDE CASES (1973–1999): A LEGAL AND EMPIRICAL ANALYSIS 108 (2001) (finding that minority offenders were more likely than non-minority offenders to receive more punitive treatment); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012); Grosso et al., *supra* note 14 (noting that 9 of 36 empirical studies of death penalty systems published after 1990 found race-of-defendant effects).

While most Americans think it is wrong to discriminate on the basis of race, they are nevertheless affected by negative racial stereotypes about Blacks.¹⁶ These stereotypes link Blacks with danger, violence, criminality, laziness, welfare, and incompetence, and encourage implicit racial bias in favor of Whites over Blacks.¹⁷ Implicit racial bias is often inversely correlated with our explicit beliefs about race. We may firmly believe that people should be treated equally without regard to their race or ethnicity, but cannot help thinking about crime, violence, or gangs when we see a Black individual.¹⁸ Even if an individual knows that it is improper to stereotype, she may not be able to keep from automatically doing so.¹⁹

Another less obvious reason for the intransigence of racial bias is our adherence to the ideal of colorblindness. Many, possibly most, people in the United States today believe it is good to be colorblind—to not see racial difference—out of a belief that recognizing racial difference leads to discrimination on the basis of race.²⁰ The problem is that ignoring racial difference can actually exacerbate the effects of implicit racial bias. It is when we are not paying attention to race that we are most vulnerable to racial stereotyping. Recent social science research suggests a practical solution to the problem of implicit racial bias: we can minimize the effects of racial stereotypes not by ignoring, but by paying more attention to race.²¹

In Part One of this essay, I will examine one of the most powerful critical race critiques in the criminal justice arena, Devon Carbado's law review article, "(E)Racing the Fourth Amendment," which was published over a decade ago in the *Michigan Law Review* in 2002.²² In this article, Carbado leveled a general critique on the then existing scholarship on race and the Fourth Amendment. He also leveled a more specific critique of Supreme Court Justice Sandra Day O'Connor's colorblind ideology as manifested in her opinion for the Court in *Florida v. Bostick*.²³

¹⁶ See generally Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

¹⁷ See ROBERT M. ENTMAN, YOUNG MEN OF COLOR IN THE MEDIA: IMAGES AND IMPACTS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES BACKGROUND PAPER 13 (2006); Adeno Addis, "Hell Man, They Did Invent Us:" *The Mass Media, Law, and African Americans*, 41 BUFF. L. REV. 523, 555 (1993) ("The image of young black males conveyed by the mainstream media is one associated with drugs, crime, and violence."); Leonard M. Baynes, *A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L. REV. 549, 550 (1997) ("[T]he image of young violent Black men is very prevalent in the media."); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 512 (1994) (noting that Blacks are often depicted as "violent muggers and burglars").

¹⁸ See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004). See also CYNTHIA LEE, MURDER AND THE REASONABLE MAN 138–46 (NYU Press 2003) (explaining in detail the "Black-as-Criminal" stereotype); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 402–23 (1996) (examining stereotypes about African Americans, Latinos, and Asian Americans).

¹⁹ See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013).

²⁰ See, e.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

²¹ See generally Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003) (finding that presenting jurors with race relevant voir dire questions in cases involving interracial violence reduced racial bias in White jurors); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000) (finding that in interracial domestic violence cases, White jurors were more likely to treat White and Black defendants the same if the defendant referred to himself as a White or Black man when speaking to his girlfriend than if he simply referred to himself as a man); Samuel R. Sommers & Phoebe C. Ellsworth, "Race Salience" in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009) (summarizing authors' previous research on race salience); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 202 (2001) (noting that "racial norms in society have shifted dramatically").

²² Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

²³ 501 U.S. 429 (1991).

In Part Two, I fast forward to 2013 and draw parallels between Carbado's critique of the colorblind ideology apparent in the *Bostick* decision and my own critique of the colorblind handling of the July 2013 trial of George Zimmerman in the shooting death of Trayvon Martin.

This essay broadens Carbado's analysis in at least two ways. First, whereas Carbado examined the Fourth Amendment as a site for racial construction, my commentary focuses on race construction in the doctrine of self-defense. The Fourth Amendment and the defense of self-defense are two doctrinal sites that most people think have little in common. Both doctrines, however, are connected by reasonableness requirements that enable beliefs and attitudes about race to influence outcomes. Second, while Carbado's critique focused on the Supreme Court as a site where race is constructed, my critique draws attention to the dynamics of race outside the Supreme Court context. Most legal scholarship focuses on Supreme Court cases. My analysis, in contrast, calls attention to the ways in which race is constructed by other actors in the legal system, including the trial judge, the prosecutor, the defense attorney, and the jury. I offer a common-sense solution to the intransigent problem of racial bias: calling attention to race to encourage jurors to consciously combat stereotypical thinking.

I. (E)RACING THE FOURTH AMENDMENT

In *(E)Racing the Fourth Amendment*, Devon Carbado leveled three basic critiques at the then existing scholarship on race and the Fourth Amendment. First, Carbado lamented that the existing scholarship failed to examine the nexus between the development of Fourth Amendment doctrine and ideological notions of what race is and what race should be.²⁴ The heart of the problem, according to Carbado, was that the existing scholarship failed to engage with CRT, and thus failed to recognize the role that courts play in constructing racial ideologies and legitimizing racial inequality.²⁵

Second, Carbado noted that the existing scholarship on race and the Fourth Amendment failed to fully examine the ways in which Fourth Amendment doctrine affected the everyday lives of persons of color.²⁶ In particular, Carbado noted that the existing scholarship failed to recognize that people of color are socialized into engaging in particular kinds of performances for the police.²⁷ These performances include ultra-deferential acts motivated by fear of police violence.²⁸ Since many of the U.S. Supreme Court's tests in the Fourth Amendment arena turn on what the reasonable person would have felt or believed, ignoring racial difference can lead lower courts to draw conclusions that may not reflect the lived realities of many Black individuals. For example, the test for a "seizure" of the person is whether a reasonable person would have felt free to leave.²⁹ A reasonable Black man who has been stopped and harassed by police in the past might not feel free to leave when approached by police officers who start asking questions. If the race of the defendant is not taken into account, however, the decision-maker may decide that a reasonable person (understood as the average White middle class individual who has never had a negative experience with the police) would have felt free to leave.

Third, Carbado argued that the then existing scholarship on race and the Fourth Amendment was under-inclusive, focusing mostly on Blacks and ignoring the fact that race-based policing is a multi-racial phenomenon.³⁰ Latinos, Asian Americans, and other racial and ethnic minorities are

²⁴ Carbado, *supra* note 22, at 965.

²⁵ *Id.* at 965–66.

²⁶ *Id.* at 966.

²⁷ *Id.* ("Few people have noted that people of color are socialized into engaging in particular kinds of performances *for* the police.").

²⁸ *Id.* ("The burden includes, but is not limited to, internalized racial obedience toward, and fear of, the police.").

²⁹ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

³⁰ Carbado, *supra* note 22, at 967.

also the victims of racial profiling by police. Importantly, Carbado pointed out that it is easier to ignore problems of policing if these problems are seen as practices affecting just Black people.³¹ Drawing attention to the ways in which police activity affects people of all races can help bring about reform more easily than narrowly focusing on problems faced by Blacks alone.³²

Carbado's project was to address these deficiencies by examining Fourth Amendment case law as a jurisprudential site where the Supreme Court engages in the production of race.³³ The Supreme Court, according to Carbado, constructs race by providing a particular conception of what race is.³⁴ The Court, Carbado argued, "conceptualizes race primarily through the racial lens of colorblindness."³⁵ While perhaps motivated by good intentions, the Court's colorblind ideology results in persons of color being under-protected and over-policed.³⁶ In other words, the Fourth Amendment is erased for people of color, hence the title of Carbado's article.³⁷ Carbado analyzed several Fourth Amendment cases to demonstrate his claims. In this essay, I focus on Carbado's critique of Justice Sandra Day O'Connor's colorblind ideology as reflected in *Florida v. Bostick*.³⁸

In *Florida v. Bostick*, two Broward County Sheriff's Department officers boarded a bus, which had made a temporary stop in Fort Lauderdale, Florida.³⁹ Without any particularized or articulable reason to believe Terrance Bostick was involved in criminal activity, the officers approached Bostick and asked to see his bus ticket and identification.⁴⁰ Bostick complied.⁴¹ The officers then asked Bostick if they could search his luggage.⁴² There is some dispute over whether Bostick consented.⁴³ Regardless, the officers searched Bostick's luggage and, after finding contraband within, arrested Bostick and charged him with trafficking in cocaine.⁴⁴

While the *Bostick* Court refrained from definitively deciding whether Bostick had been "seized" within the meaning of the Fourth Amendment,⁴⁵ Justice O'Connor, writing for the Court, made clear the Court's skepticism that any such seizure had occurred, writing, "The facts of this case, as described by the Florida Supreme Court, leave some doubt whether a seizure occurred."⁴⁶ If Bostick was not seized, as the Court intimated, this would mean that there was no violation of Bostick's Fourth Amendment rights since the Fourth Amendment only applies when the government searches or seizes persons or property.

The suggestion that Bostick was not seized was surprising because the average bus passenger most likely would not feel free to leave if confronted by law enforcement officers conducting an

³¹ *Id.* at 967.

³² Some have suggested that the reason why the ACLU's lawsuit against the New York City Police Department for its *Terry* stop and frisk policy and practice of racial profiling drew so much sympathy for the plaintiffs was because it highlighted a broad swath of unjustified stops and frisks involving Latinos as well as African Americans, and most Americans could see themselves in the shoes of the person who was stopped and frisked. Miriam Gohara, Senior Attorney, Federal Capital Habeas Project, New Haven, CT, Panel Discussion, *Stop and Frisk as a Policing Tactic: The Situation Post-Floyd*, AALS Annual Meeting, New York, NY (Jan. 3, 2014).

³³ Carbado, *supra* note 22, at 967.

³⁴ *Id.*

³⁵ *Id.* at 968 & n.109.

³⁶ *Id.* at 969.

³⁷ *Id.*

³⁸ *Id.* at 975–90.

³⁹ *Florida v. Bostick*, 501 U.S. 429, 431 (1991).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 432.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 437.

⁴⁶ *Id.*

investigative sweep of the bus for narcotics. As Janice Nadler explains, a police officer has no need to shout in order for his request for permission to search to be perceived as a command by the person he has stopped.⁴⁷ Prior to deciding *Florida v. Bostick*, the Court had established a “free to leave” test for determining whether an individual has been seized within the meaning of the Fourth Amendment.⁴⁸ Under this test, a person is “seized” for Fourth Amendment purposes if a reasonable person in his shoes would not have felt free to leave.⁴⁹ The *Bostick* Court, however, modified the “free to leave” test, establishing that in cases where factors not attributable to the police contribute to an individual’s feeling that he is not free to leave, the test for a seizure of the person is “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”⁵⁰ If a reasonable person would feel free to decline the officers’ requests or terminate the encounter, then no seizure within the meaning of the Fourth Amendment has occurred. In *Bostick*, a factor not attributable to the police—the fact that the bus could depart with the passenger’s luggage—might cause the average bus passenger to feel that he was not free to leave the bus.⁵¹ Thus, the appropriate inquiry, according to the *Bostick* Court, was whether a reasonable person in Bostick’s shoes would have felt free to decline the officer’s request or terminate the encounter with the police, not whether a reasonable person would have felt free to leave.⁵²

Carbado notes that in her opinion, Justice O’Connor never mentions the fact that Bostick is Black; nor does she note on the race of the officers.⁵³ Carbado suggests that to say Justice O’Connor ignores race is only partially correct.⁵⁴ To Carbado, “it is more accurate to say that [Justice O’Connor’s] analysis constructs Bostick and the officers with the racial ideology of colorblindness.”⁵⁵ As Carbado explains, “[T]he problem is not that Justice O’Connor does not see race, but rather that she sees race in a particular way.”⁵⁶ The reason Justice O’Connor does not mention race is because she thinks race does not matter.⁵⁷ The race of Bostick and the officers is irrelevant to Justice O’Connor.⁵⁸

The decision to construct race as irrelevant is consistent with Justice O’Connor’s race jurisprudence in other contexts. In her Due Process jurisprudence, Justice O’Connor has opined that racial classifications of any sort are bad, even when intended to remedy past discrimination against racial minorities.⁵⁹

Carbado points out that seeing race as irrelevant is not a race neutral position as many might think. Not mentioning race conveys a particular message about race. Carbado explains:

Describing Bostick as black is no more racially conscious than describing him as a man. Both descriptions send a particular message about race. In the former, that race is relevant. In the latter, it is not. In both instances, attention is being paid to race. Neither description is race neutral.⁶⁰

⁴⁷ Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 180.

⁴⁸ *United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

⁴⁹ *Id.* at 554.

⁵⁰ *Bostick*, 501 U.S. at 436.

⁵¹ *Id.*

⁵² *Id.* at 447.

⁵³ Carbado, *supra* note 22, at 977.

⁵⁴ *Id.* at 977–78.

⁵⁵ *Id.* at 978.

⁵⁶ *Id.*

⁵⁷ *Id.* at 979.

⁵⁸ *Id.*

⁵⁹ *Id.* at 980 (citing *Shaw v. Reno*, 509 U.S. 630, 657 (1993)).

⁶⁰ *Id.* at 979.

In other words, we explicitly invoke race when we think race is or should be relevant.⁶¹ We don't mention race when we think race is or should be irrelevant.

Carbado recognizes that Justice O'Connor's decision to ignore race was likely motivated by good intentions: "From Justice O'Connor's perspective, textually referencing [Bostick and the officers'] respective racial identities would entrench existing negative racial impressions of—that is, stigmatize—both."⁶² Justice O'Connor may have feared that racially identifying Bostick as a Black man would invoke the stereotype of the Black man as criminal and racially identifying the officers as white would invoke the stereotype of the White racist cop.⁶³ To prevent negative stereotypes from having any effect, she chose to speak about Bostick and the officers as simply individuals without reference to race.⁶⁴

The problem, according to Carbado, is that representing Bostick and the officers as race-less denied the social reality these individuals faced.⁶⁵ Bostick was in fact Black and the officers were in fact White,⁶⁶ but under Justice O'Connor's redefinition, Bostick became "a black man without the presumption of criminality and the police [became] white officers without the presumption of a racist identity."⁶⁷ The problem is that "Bostick may have held and acted on a racial presumption that the police officers were racists and the police may have held and acted on a racial presumption that Bostick was a criminal."⁶⁸ Indeed, as Carbado notes, "Most, if not all, black people—especially black men—are apprehensive about police encounters."⁶⁹ African Americans are accustomed to hearing about and experiencing police abuse first-hand.⁷⁰ When a Black man is approached by a police officer, he may reasonably fear being beaten (as Rodney King was beaten by Los Angeles police officers who felt he was a threat to them when he was lying prone on the ground trying to comply with their orders)⁷¹ or shot (as Amadou Diallo was when attempting to show his ID to plainclothes NYPD officers who erroneously thought the West African immigrant was a rape suspect reaching for a gun)⁷² if he does not comply with the officer's every request. Thus, when Bostick was confronted by the Broward County law enforcement officers, it is likely that he did not feel free to leave, terminate the encounter, or decline the officers' requests for identification and consent to search, and it is likely that the average Black man in Bostick's shoes would have felt the same way.⁷³ Under either the traditional test for a seizure of the person or the modified test enunciated in *Bostick*, one should conclude that Bostick was "seized" within the meaning of the Fourth Amendment. The social reality just described, however, is obscured if we

⁶¹ *Id.* at 980.

⁶² *Id.* at 981.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 981–82.

⁶⁶ *Id.* at 982.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 985.

⁷⁰ *Id.*

⁷¹ See Jim Kavanagh, *Rodney King, 20 Years Later*, CNN (Mar. 3, 2011, 8:56 AM), <http://www.cnn.com/2011/US/03/03/rodney.king.20.years.later/>; see also *Rodney King*, BIOGRAPHY., <http://www.biography.com/people/rodney-king-9542141> (last visited Nov. 9, 2014).

⁷² Jane Fritsch, *The Diallo Verdict: The Overview; Four Officers in Diallo Shooting are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1, available at <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html>.

⁷³ For this reason, Tracey Maclin argues that the race of the defendant should be taken into account as part of the totality of the circumstances when a court assesses reasonableness in the Fourth Amendment context. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 360 (1998).

ignore the fact that Bostick was Black and the officers were White. Ignoring race allows one to conclude that the reasonable person in Bostick's shoes would have felt free to decline the officers' requests and therefore Bostick was not seized. Colorblindness can thus result in less racial justice for Black men who are detained by White law enforcement officers.

II. (E)RACING TRAYVON MARTIN'S RACE FROM THE ZIMMERMAN TRIAL

Fast forward to July 2013 when George Zimmerman was tried for murder in the shooting death of Trayvon Martin in Sanford, Florida.⁷⁴ Zimmerman, the neighborhood watch captain for his neighborhood,⁷⁵ was out in his truck one rainy evening when he spotted Trayvon Martin, a young Black male in a hoodie sweatshirt, who was walking and talking on his cell phone after going to the store to get a bag of skittles and a can of Arizona watermelon drink.⁷⁶ Even though Martin was doing nothing to objectively indicate criminal behavior, at least nothing that Zimmerman articulated at that time or more than a year later at his trial, Zimmerman thought Martin looked suspicious and called 911 to report his suspicions.⁷⁷ When Martin noticed Zimmerman following him, he started walking quickly away.⁷⁸ Zimmerman got out of his car and followed Martin.⁷⁹ Apparently, words were exchanged, and a physical confrontation ensued, ending when Zimmerman shot Martin in the chest.⁸⁰

Zimmerman remained on the scene after the shooting and told police he shot Martin in self-defense.⁸¹ Zimmerman claimed that after exchanging words with Martin, as he was walking back to his car, Martin sneaked back to confront Zimmerman and punched him in the face.⁸² According to Zimmerman, Martin threw him to the ground and slammed his head against the concrete several

⁷⁴ For commentary about the shooting, see Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform*, 90 DENV. UNIV. L. REV. 331 (2012); Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271 (2012); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012); Josephine Ross, *The Supreme Court's Invisible Hand in George Zimmerman's Trial for the Murder of Trayvon Martin*, 17 BERKELEY J. AFR.-AM. L. & POL'Y (forthcoming 2015) (manuscript on file with author).

⁷⁵ Dan Barry et al., *In the Eye of a Firestorm: In Florida, an Intersection of Tragedy, Race, and Outrage*, N.Y. TIMES, Apr. 2, 2012, at A1; Chris Franciscani, *George Zimmerman: Prelude to a Shooting*, REUTERS (Apr. 25, 2012, 5:20 PM), <http://www.reuters.com/article/2012/04/25/us-usa-florida-shooting-zimmerman-idUSBRE83O18H20120425>.

⁷⁶ Barry et al., *supra* note 75; Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (May 23, 2012, 10:48 AM), <http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/>. Although the drink that Martin was carrying was widely reported by the media as an Arizona iced tea, the drink was actually a can of Arizona watermelon drink. LISA BLOOM, *SUSPICION NATION: THE INSIDE STORY OF THE TRAYVON MARTIN INJUSTICE AND WHY WE CONTINUE TO REPEAT IT* 49 (2014) (noting that the Arizona watermelon drink Martin was carrying is "often mistakenly referred to as an iced tea because the police logged it incorrectly in their crime scene records"); Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Killing of Trayvon Martin*, N.Y. TIMES, July 14, 2013, at A1, *available at* <http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?pagewanted=all>.

⁷⁷ Barry et al., *supra* note 75, at A12 (noting that when Zimmerman called 911, he said, "Hey, we've had some break-ins in my neighborhood . . . [and] there's a real suspicious guy").

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Sari Horwitz, *Zimmerman Claims Martin Started Confrontation*, WASH. POST, Mar. 27, 2012, at A2.

⁸¹ See Jason Hanna, *Sanford, Florida, Police Answer Questions About Teen's Shooting Death*, CNN (Mar. 21, 2012, 1:50 PM), <http://news.blogs.cnn.com/2012/03/21/sanford-florida-police-answer-questions-about-teens-shooting-death/>.

⁸² *Id.* See also Frances Robles & Mark Caputo, *Tapes Show Sanford Police Grew Skeptical of Zimmerman's Story*, MIAMI HERALD, (June 21, 2012) <http://www.miamiherald.com/2012/06/21/2860569/zimmerman-told-police-trayvon.html>.

times.⁸³ Zimmerman told police he shot Martin only after Martin pinned him to the ground, called him a mother f---er, said he was going to die that night, and reached for Zimmerman's gun.⁸⁴

Even though the detectives who initially interviewed Zimmerman thought Zimmerman should be arrested on suspicion of manslaughter, the Florida State Attorney's Office instructed the police not to arrest Zimmerman.⁸⁵ When word got out that Zimmerman was released without arrest after shooting the unarmed teenager, thousands took to the streets to protest what was widely perceived as a racially biased decision not to prosecute.⁸⁶ The public protests led the Florida State Attorney's Office to reverse its initial decision not to charge Zimmerman with any crime.⁸⁷ The State of Florida ultimately charged Zimmerman with second-degree murder,⁸⁸ and his trial began in June of 2013.⁸⁹

A. *The Role of the Zimmerman Trial Court in Constructing Race as Irrelevant*

While race was clearly a focus of the public protests and media commentary about the case in 2012 after the shooting, race was conspicuously absent from the trial proceedings a little over a year later.⁹⁰ In an early ruling, Judge Debra Nelson, who presided over Zimmerman's murder trial, made it clear to both sides that she intended to run a colorblind trial and did not want either side to call attention to race. In response to a defense motion to preclude the prosecution from referring to Zimmerman's activities as "racial profiling," Judge Nelson ruled that prosecutors could not use the term "racial profiling" when referring to Zimmerman's activities the night of the shooting.⁹¹ Judge Nelson's ruling may have been motivated by a desire to strike a balance between what the defense wanted (no reference to either "racial profiling" or "profiling") and what the prosecution wanted (the ability to use both terms). Whatever the motivation, Judge Nelson's ruling

⁸³ See David K. Li, *Zimmerman Tells Cops Trayvon Martin Reached for His Gun as Police Tapes Released*, N.Y. POST (June 21, 2012, 2:20 PM), http://www.nypost.com/f/news/national/zimmerman_tells_cops_trayvon_martin_McSJd59PkDJfTcZP3CYVzH#axzz2IIVK6rmY.

⁸⁴ *Id.* Lisa Bloom questions Zimmerman's account. She points out that Zimmerman's gun was holstered in the back of his pants, so if Zimmerman was on the ground with Martin on top of him, Martin could not have seen Zimmerman's gun. See BLOOM, *supra* note 76, at 60.

⁸⁵ Matt Gutman, *Trayvon Martin Investigator Wanted Manslaughter Charge*, ABC NEWS (Mar. 27, 2012), <http://abcnews.go.com/US/trayvon-martin-investigator-wanted-charge-george-zimmerman-manslaughter/story?id=16011674#.T3NhR811P6K>. See also Madison Gray, *Report: Police Initially Wanted to Make Arrest in Trayvon Martin Case*, TIME (Mar. 29, 2012), <http://newsfeed.time.com/2012/03/29/report-police-initially-wanted-to-make-arrest-in-trayvon-martin-case/> (noting that police investigators did not believe Zimmerman's story and wanted to arrest him on the night of the shooting, but State Attorney Norm Wolfram refused to authorize an arrest).

⁸⁶ NAACP *Leads March on Sanford*, WASH. POST, Apr. 1, 2012, at A3 (reporting that thousands joined a march through Sanford demanding that Zimmerman be arrested); Ovetta Wiggins, *A Rallying Cry for Justice in Teen's Death*, WASH. POST, Mar. 25, 2012, at A3 (reporting that thousands have demonstrated in major cities across the country wearing hoodies to show solidarity with Martin, who was wearing a hoodie the night he was killed).

⁸⁷ See Madison Gray, *Trayvon Martin Case: George Zimmerman Charged with Second-Degree Murder*, TIME (Apr. 11, 2012), <http://newsfeed.time.com/2012/04/11/trayvon-martin-case-george-zimmerman-charged-with-second-degree-murder/>.

⁸⁸ Sari Horwitz, *Charge Filed in Martin Killing*, WASH. POST, Apr. 12, 2012, at A1; Matt Gutman et al., *George Zimmerman Case: Should Charges Be Dropped?*, ABC NEWS (Mar. 21, 2012), <http://abcnews.go.com/US/george-zimmerman-case-charges-dropped/print?id=16392466>.

⁸⁹ Lizette Alvarez, *Clash of Styles in Court Opens Trial in Trayvon Martin's Death*, N.Y. TIMES (June 24, 2013), http://www.nytimes.com/2013/06/25/us/zimmerman-trial.html?_r=0.

⁹⁰ See Cynthia Lee, *Denying the Significance of Race: Colorblindness and the Zimmerman Trial*, in TRAYVON MARTIN, RACE, AND "AMERICAN JUSTICE": WRITING WRONG (Kenneth J. Fasching-Varner et al. eds.) (forthcoming 2014).

⁹¹ Manuel Roig-Franzia, *Race is Playing Minor Part in Zimmerman Prosecution*, WASH. POST, July 3, 2013, at A1 (noting that the role of race in the Zimmerman trial was limited early on by Judge Debra Nelson when she ruled that prosecutors could not say that Zimmerman "racially profiled" Martin).

significantly curtailed the government's ability to discuss the racial implications of Zimmerman's initial decision to follow and his subsequent decision to shoot Martin.⁹² Just as Justice O'Connor constructed race as irrelevant in *Florida v. Bostick* by ignoring the racial identities of Bostick and the law enforcement officers who confronted him, Judge Nelson constructed race as irrelevant in the Zimmerman trial by barring the prosecution from referencing the fact that Martin's race may have played a role in triggering Zimmerman's initial suspicions and his subsequent actions. Jurors were encouraged to view Zimmerman and Martin as simply individuals—or, more accurately, as simply men—without regard to their racial identity.

Race, however, was closely connected to the events that transpired the night Zimmerman fatally shot Martin. Just as Terrance Bostick's racial identity as a Black man likely influenced the way he perceived the White officers who confronted him on the bus as well as the way they perceived him, Trayvon Martin's identity as a young Black male likely influenced the way Zimmerman perceived Martin and the way Martin perceived Zimmerman. Zimmerman didn't see a raceless and genderless person walking in his neighborhood. He saw a young Black male in a hoodie, and thought Martin was suspicious most likely because our society associates young, Black, and male with crime.⁹³ The rash of burglaries and attempted break-ins of homes in the neighborhood by young Black males in the weeks preceding the shooting only strengthened the association Zimmerman made between young Black men and crime.⁹⁴

Zimmerman's racial identity was also significant. Martin saw a heavy-set, light-skinned man, and may have assumed that Zimmerman was White.⁹⁵ This man was suggesting that Martin had no right to be walking in the neighborhood, which likely rubbed Martin the wrong way. In the pre-

⁹² Michael Muskal, *Judge in Zimmerman Trial Limits Racial References*, L.A. TIMES, June 22, 2013, at A12 (noting that Judge Debra Nelson ruled just before opening statements that prosecutors could use words like "vigilante" and "profile," but could not tell jurors that Zimmerman racially profiled Martin); Lisa Lucas & Corky Siemaszko, *George Zimmerman's Trayvon Martin Murder Trial Will Not Open with Discussion of Race*, N.Y. DAILY NEWS (June 21, 2013, 11:04 AM), <http://www.nydailynews.com/news/national/trayvon-martin-trial-won-open-race-article-1.1378952> (noting that Judge Debra Nelson would not permit prosecutors to say that Zimmerman "racially" profiled Martin).

⁹³ See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003) (explaining the Black-as-Criminal stereotype). Many, if not most, people would have made the same or similar assumptions, although they probably would not have acted upon those assumptions as Zimmerman did nor admit to making such assumptions in public. Dallas Mavericks owner Mark Cuban received a huge amount of criticism when he spoke candidly about race, bigotry and fear during an interview about former Clippers owner Donald Sterling's comments to his personal assistant, V. Stiviano, asking her not to bring African Americans to Clippers' home games. Dan Devine, *Mavericks Owner Mark Cuban on Race and Bigotry: 'We're All Prejudiced in One Way or the Other'*, YAHOO! (May 22, 2014 11:39 AM), <http://sports.yahoo.com/blogs/nba-ball-dont-lie/mavericks-owner-mark-cuban-on-race-and-bigotry--we-re-all-prejudiced-in-one-way-or-the-other-153950475.html>. Cuban received criticism for saying, "If I see a black kid in a hoodie and it's late at night, I'm walking to the other side of the street." *Id.*

⁹⁴ See Chris Francescani, *George Zimmerman: Prelude to a Shooting*, REUTERS (Apr. 25, 2012, 5:20 PM), <http://www.reuters.com/article/2012/04/25/us-usa-florida-shooting-zimmerman-idUSBRE83O18H20120425> (reporting that one Black woman who lived in the neighborhood told him, "I'm black, OK?" . . . "There were black boys robbing houses in this neighborhood," . . . "That's why George was suspicious of Trayvon Martin").

⁹⁵ Although Zimmerman is mix-raced, see *infra*, Martin may have thought Zimmerman was White given his complexion. On how Zimmerman's race could be read, see Suzanne Gamboa, *Trayvon Martin Case: George Zimmerman's Race is a Complicated Matter*, HUFFINGTON POST (Mar. 29, 2012, 7:16 AM), http://www.huffingtonpost.com/2012/03/29/trayvon-martin-case-georg_n_1387711.html (describing the confusion about Zimmerman's race and noting that responding police described Zimmerman as white). Initial media reports referred to Zimmerman as a White man. See, e.g., Mike Schneider, *Family Wants Answers in Fla. Teen's Death*, YAHOO! (Mar. 8, 2012, 1:43 PM), <http://news.yahoo.com/family-wants-answers-fla-teens-death-162019527.html> ("The neighborhood watch leader is white."). Zimmerman's family protested, saying Zimmerman was actually a minority since his mother was of Peruvian descent. See Renee Stutzman, *George Zimmerman's Father: My Son is Not a Racist, Did Not Confront Trayvon Martin*, ORLANDO SENTINEL (Mar. 15, 2012, 10:42 PM), http://articles.orlandosentinel.com/2012-03-15/news/os-trayvon-martin-shooting-zimmerman-letter-20120315_1_robert-zimmerman-letter-unarmed-black-teenager (noting that George Zimmerman's father delivered a one page letter to the Orlando Sentinel, stating that his son is Hispanic and grew up in a multi-racial family). Subsequent media reports acknowledged Zimmerman's mixed race background. See Francescani, *supra* note 94.

Civil War era, Blacks had to carry proof that they were free men, not slaves.⁹⁶ Many Blacks today are reminded of this dark history when they are pulled over by police and asked to show identification.⁹⁷ This history might explain in part why Martin may have taken offense at Zimmerman's actions—and, if we believe Zimmerman's account, why Martin might have thrown the first punch.⁹⁸

Martin may have also perceived Zimmerman's actions as a challenge to his masculinity. As Angela Harris has explained, men of color who lack power over others sometimes resort to hyper-masculine shows of physical aggression to demonstrate their masculinity.⁹⁹ Martin was not a wealthy African-American adult male. He was an African-American male teenager from a family of modest means.¹⁰⁰ Camille Gear-Rich explains that Martin's resort to physical violence may have been a way for him to demonstrate his masculinity.¹⁰¹

The prosecution not only acquiesced in the judge's decision to run a colorblind trial, they embraced a colorblind trial strategy.¹⁰² At the hearing on the pretrial motion on whether the prosecution could use the term "racial profiling" to describe Zimmerman's actions the night of the shooting, prosecutor John Guy told Judge Nelson, "[Profiling] is not a racially charged term unless it's made so, and we do not intend to make it a racially charged term."¹⁰³ The prosecution team was very careful not to call attention to race throughout the rest of the trial.

The prosecution may have been worried that if they called attention to race, jurors would think they were "playing the race card." "Playing the race card" is a term of art used to accuse a person of lying when they claim to have suffered differential treatment on the basis of race.¹⁰⁴ Someone

⁹⁶ See Bernie D. Jones, *Southern Free Women of Color in the Antebellum North: Race, Class, and a "New Women's Legal History"*, 41 AKRON L. REV. 763, 779 (2008) (noting that Ohio's Black Laws of 1804 & 1807 required any Black person traveling to Ohio to prove through a certificate of freedom that they were free and not a slave).

⁹⁷ Paul Butler, *Walking While Black: Encounters With the Police on My Street*, LEGAL TIMES, Nov. 10, 1997, at 23.

⁹⁸ At his trial, Zimmerman claimed that Martin threw the first punch. Even though there was no evidence corroborating Zimmerman's account of who started the physical confrontation, during closing arguments, the defense was permitted to show the jury an animated video of the events, which depicted Martin throwing the first punch. Patrik Jonsson, *Zimmerman Trial: For Jury, Anguished Task to Resolve Death of Trayvon Martin*, CHRISTIAN SCIENCE MONITOR (July 12, 2013) <http://www.csmonitor.com/USA/Justice/2013/0712/Zimmerman-trial-For-jury-anguished-task-to-resolve-death-of-Trayvon-Martin> ("An animated video shown by the defense showed Martin, in a hoodie, walking up to Zimmerman, and punching him.").

⁹⁹ Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 785 (2000).

¹⁰⁰ Yamiche Alcindor, *Trayvon Martin: Typical Teen or Troublemaker?*, USA TODAY (December 11, 2012, 7:13 PM) <http://www.usatoday.com/story/news/nation/2012/12/11/trayvon-martin-profile/1761373/> (noting that Trayvon Martin's father was a Miami truck driver); Mary C. Curtis, *What Chance Did Trayvon Martin, the 'Suspect' Have in Court?*, WASH. POST (July 15, 2013), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/07/15/what-chance-did-trayvon-martin-the-suspect-have-in-court/> (describing Martin as a "middle-class minor"); Daniel Trotta, *Trayvon Martin: Before the World Heard the Cries*, REUTERS (April 3, 2012, 6:07 PM), <http://www.reuters.com/article/2012/04/03/us-usa-florida-shooting-trayvon-idUSBRE8320UK20120403> (noting that Trayvon Martin's father worked as a truck driver in Miami).

¹⁰¹ Camille Gear Rich, *Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. 1027, 1048 (2014). See also Harris, *supra* note 99.

¹⁰² The prosecution embraced a colorblind strategy on the surface, but behind the scenes, they were very aware of race and gender dynamics. During jury selection, the prosecution used six or seven of their ten peremptory challenges to strike White females from the jury, prompting a *Batson* objection from the defense. The judge disallowed two of these challenges, essentially finding that the prosecution had impermissibly relied on race and/or gender in utilizing their peremptory challenges. As I note in a forthcoming book chapter, apparently someone on the prosecution team thought race and gender mattered or they would not have tried so hard to keep White females from sitting on the jury. See Lee, *supra* note 90.

¹⁰³ Roig-Franzia, *supra* note 91, at A1.

¹⁰⁴ Christopher A. Bracey, *The Color of Our Future: The Pitfalls and Possibilities of the Race Card in American Culture*, 5 STAN. J. C.R. & C.L. 89, 91 (2009) (reviewing RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING*

who “plays the race card” is understood to be inappropriately claiming racial disadvantage.¹⁰⁵ The race card accusation has been used so often by individuals who are hostile to discussions on race that many people today will not call attention to race out of fear of being accused of “playing the race card.”¹⁰⁶

The prosecution had reason to be worried that they would attract criticism if they called attention to race. Some trial observers firmly believed the case had nothing to do with race.¹⁰⁷ Some thought it was unfair to prosecute Zimmerman and make him “pay for generations of racial inequities.”¹⁰⁸ Others believed Zimmerman was prosecuted “to placate angry African-American voters and others who rallied to make the killing a cause.”¹⁰⁹

Defense attorney Mark O’Mara provided further support for the critics opposed to the prosecution of Zimmerman, repeatedly opining that if Zimmerman had been Black, “he never would have been charged with a crime.”¹¹⁰ Actually, studies suggest that if Zimmerman had been Black and had shot and killed a White male, it is very likely he would have been arrested, prosecuted, convicted, and possibly sentenced to death.¹¹¹ Blacks who kill Whites are far more likely to be prosecuted and sentenced to death than Whites who kill Blacks.¹¹²

Aware that members of the community viewed the prosecution of Zimmerman as unfair scapegoating, the prosecution decided to try the case without referencing race—to take the colorblind high ground. The problem is that by not calling attention to the possibility that Zimmerman thought Martin looked suspicious because of deeply entrenched stereotypes about young Black men as criminals, the prosecution encouraged jurors to see Zimmerman and Martin as just two young men who got into a fight that tragically, but understandably, ended in death. By deliberately avoiding any discussion of race, they erased Trayvon Martin’s race from the trial even though race likely played a significant role in why Zimmerman thought Martin looked suspicious from the start and why the jury may have found Zimmerman’s account of what happened that night credible.¹¹³

Trayvon Martin’s race, however, could not be completely eliminated from the jury’s consciousness. Jurors needed only to look at the autopsy photos of Trayvon Martin or observe his parents in the courtroom to be aware of his race. In deciding whether Zimmerman honestly and reasonably feared Martin, a necessary component of his self-defense claim, jurors quite possibly, even if subconsciously, considered Martin’s race, and made the implicit association between black males, criminality, and violence.

ABOUT BIAS MAKES RACE RELATIONS WORSE (2008)) (“The pejorative meaning we ascribe to the race card is sourced from our collective perception that those who play the race card are abusing the rhetoric and legacy of racism and racial injustice . . .”).

¹⁰⁵ *Id.*

¹⁰⁶ For more on the “race card,” see RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008); Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Times*, 35 WASHBURN L.J. 225, 229 n.10 (1995); Margaret M. Russell, *Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 773, 788–93 (1997).

¹⁰⁷ See, e.g., Joshu Harris, *The Real Reasons the Trayvon Martin Case Should Be a Criminal Justice Poster Child*, 61 DRAKE L. REV. DISCOURSE 46, 48 (2013) (opining that “the available evidence strongly suggests that race had little to do with the deadly confrontation”).

¹⁰⁸ See, e.g., Tom Foreman, *Analysis: The Race Factor in George Zimmerman’s Trial*, CNN (July 15, 2013, 9:10 AM), <http://www.cnn.com/2013/07/14/justice/zimmerman-race-factor/>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Kang et al., *supra* note 15. See also text accompanying notes 14–15.

¹¹² *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987) (finding that jurors imposed the death penalty in 22% of cases involving Black defendants and White victims, but did the same in only 3% of cases involving White defendants and Black victims). See also *supra* notes 14–15.

¹¹³ See Lee, *supra* note 74 at 1570–72 (discussing Implicit Association Test and shooter bias studies).

By ignoring race, prosecutors may have unwittingly exacerbated the effects of implicit bias. A substantial body of research suggests that ignoring race leads jurors to assess Black defendants more harshly than similarly situated White defendants, but these racially disparate results are reduced when race is made salient.¹¹⁴ If prosecutors had confronted race head on by making race a salient feature of their trial strategy, they might have been able to convince the jury to see Martin in a more sympathetic light.

B. Florida's Stand Your Ground Law

The second critique Carbado leveled at the then existing scholarship on race and the Fourth Amendment was its failure to fully examine the ways in which the Supreme Court's Fourth Amendment jurisprudence affected the everyday lives of persons of color.¹¹⁵ In contrast, much of the existing scholarship on the shooting of Trayvon Martin reflects concern about the problem of implicit racial bias and some scholarship is specifically focused on the impact of Stand Your Ground laws on persons of color.¹¹⁶

In 2005, Florida amended its self-defense statute, which previously required an individual to retreat before using deadly force in self-defense if a safe retreat was known and available to the individual.¹¹⁷ Under Florida's revised self-defense statute, dubbed Florida's Stand Your Ground law, individuals in Florida no longer have to retreat before using deadly force in self-defense.¹¹⁸ Even if a safe retreat is known and available, an individual who is attacked while in a place where he (or she) has a lawful right to be may use deadly force to repel the attacker. An individual has no duty to retreat before using such force as long as "he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony."¹¹⁹ The shooting of Trayvon Martin called attention to Florida's Stand Your Ground law because the Sanford Police Department referred to this law as the reason why they did not arrest Zimmerman the night of the shooting.¹²⁰

While English common law required individuals to retreat to the wall before using deadly force in self-defense if a safe retreat was known and available,¹²¹ a no-duty-to-retreat rule has long

¹¹⁴ *Id.* at 1586 (discussing race salience studies); Sommers & Ellsworth, *How Much Do We Really Know About Race*, *supra* note 21, at 1027–28 (finding that presenting jurors with race relevant voir dire questions in cases involving interracial violence reduced racial bias in White jurors); Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 21, at 1367 (finding that in interracial domestic violence cases, White jurors were more likely to treat White and Black defendants the same if the defendant referred to himself as a White or Black man when speaking to his girlfriend than if he simply referred to himself as a man); Sommers & Ellsworth, "Race Salience" in *Juror Decision-Making*, *supra* note 21, at 600–03 (summarizing authors' previous research on race salience); Sommers & Ellsworth, *White Juror Bias*, *supra* note 21, at 202 (noting that "racial norms in society have shifted dramatically," and that White jurors were more likely to treat White and Black defendants equally if a defense witness spoke about the White or Black defendant being the subject of racial slurs). While the social science studies on race salience have focused on whether making race salient encourages jurors to treat similarly situated Black and White defendants the same way, it is likely that calling attention to race can encourage jurors to treat similarly situated Black and White victims the same way as well.

¹¹⁵ Carbado, *supra* note 22, at 966.

¹¹⁶ BLOOM, *supra* note 76 at 193–265, 279–93; Beety, *supra* note 74; Lee, *supra* note 72; Lawson, *supra* note 72; Richardson & Goff, *supra* note 72.

¹¹⁷ *Florida Legislation—The Controversy Over Florida's New "Stand Your Ground" Law—Fla. Stat. § 776.013 (2005)*, 33 FLA. ST. U. L. REV. 351, 353–54 (2005).

¹¹⁸ FLA. STAT. § 776.012 (2013).

¹¹⁹ FLA. STAT. § 776.013(3) (2013).

¹²⁰ Hanna, *supra* note 81 (Letter from Norton N. Bonaparte, Jr., ICMA-CM, City Manager (Mar. 19, 2012) citing the immunity provision of Florida's self-defense statute as support for its decision not to arrest Zimmerman). *See also* Gray, *supra* note 87.

¹²¹ Lydia Zbrzezny, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FLA. COASTAL L. REV. 231, 234–35 (2012).

been a part of American self-defense doctrine.¹²² In 1921, the U.S. Supreme Court approved of the no-duty-to-retreat rule, noting that “[d]etached reflection cannot be demanded in the presence of an uplifted knife.”¹²³ Today, thirty-three states allow individuals to use deadly force in self-defense without requiring retreat.¹²⁴ In these states, an individual can use deadly force in self-defense against another individual even if a safe retreat is known and available. Seventeen states require retreat if a safe retreat is known and available.¹²⁵ In these states, if a safe retreat is known and available to the defendant and he uses deadly force without retreating, he loses his right to act in self-defense. Some states do not require retreat but allow the jury to consider whether a safe retreat was known and available in assessing the reasonableness of the defendant’s belief in the need to act in self-defense.¹²⁶ In these jurisdictions, if a safe retreat was known and available to the defendant, the jury may conclude that it was not reasonable for the defendant to believe he needed to use deadly force to protect himself from imminent death or serious bodily injury.¹²⁷

The Florida legislature went beyond simply eliminating the duty to retreat from its previous law of self-defense. It also enacted a controversial immunity provision, which gives an individual who reasonably believes in the need to use deadly force in self-defense immunity from arrest and criminal prosecution. Florida’s immunity provision provides:

¹²² Garrett Epps, *Any Which Way but Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American “Retreat Rule”*, 55 LAW & CONTEMP. PROBS. 303, 305 (1992).

¹²³ *Brown v. United States*, 256 U.S. 335, 343 (1921).

¹²⁴ For a helpful chart with detailed information on stand your ground laws by state, see Tamara F. Lawson, *Stand Your Ground Laws 50 State Table* (March 21, 2014) (unpublished manuscript) (on file with author). ALA. CODE § 13A-3-23(b) (2006); ALASKA STAT. § 11.81.335(b) (2012); ARIZ. REV. STAT. ANN. § 13-405(B) (2010); *California v. Zuckerman*, 132 P.2d 545, 549 (Cal. Dist. Ct. App. 1942); *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000); FLA. STAT. § 776.013(3) (2013); GA. CODE ANN. § 16-3-23.1 (2006); *State v. McGreevey*, 105 P. 1047, 1051 (Idaho 1909); *People v. Hughes*, 360 N.E.2d 1363, 1369–70 (Ill. App. Ct. 1977); IND. CODE § 35-41-3-2(c)(2) (2013); KAN. STAT. ANN. § 21-5230 (2011); KY. REV. STAT. ANN. § 503.055(3) (2006); LA. REV. STAT. ANN. § 14:20(C) (2006); MICH. COMP. LAWS § 780.972 (2006); MISS. CODE ANN. § 97-3-15(4) (2006); *State v. Bingman*, 745 P.2d 342, 348 (Mont. 1987); NEV. REV. STAT. § 200.120(2) (2011); N.H. REV. STAT. ANN. § 627:4 (2011); *State v. Horton*, 258 P.2d 371, 373 (N.M. 1953); N.C. GEN. STAT. § 14-51.3(a) (2011); OKLA. STAT. tit. 21, § 1289.25 (2011); *State v. Sandoval*, 156 P.3d 60, 64 (Or. 2007); 18 PA. CONS. STAT. § 505(b)(2.3) (2011); S.C. CODE ANN. § 16-11-440(C) (2006); S.D. CODIFIED LAWS § 22-18-4 (2006); TENN. CODE ANN. § 39-11-611(2) (2012); TEX. PENAL CODE ANN. § 9.32(c) (West 2012); UTAH CODE ANN. § 76-2-401 (West 2013); *State v. Hatcher*, 706 A.2d 429, 435 (Vt. 1997); *Foote v. Commonwealth*, 396 S.E.2d 851, 855 (Va. Ct. App. 1990); *State v. Redmond*, 78 P.3d 1001, 1003 (Wash. 2003); W. VA. CODE § 55-7-22 (2008); WIS. STAT. § 939.48 (2011). At the time this article was being written, the Ohio State legislature was considering legislation that would eliminate the duty to retreat. Jackie Borchardt, *Concealed Carry Bill with ‘Stand Your Ground’ Provision: How They Voted*, CLEVELAND.COM (Mar. 21, 2014, 2:13 PM), http://www.cleveland.com/open/index.ssf/2014/03/concealed_carry_bill_with_stan.html (noting that the Ohio State House passed HB 203, eliminating the duty to retreat, which is pending in the Ohio State Senate).

¹²⁵ ARK. CODE ANN. § 5-2-607(b)(1)(A) (2009); CONN. GEN. STAT. ANN. § 53a-19(b) (West 2012); DEL. CODE ANN. tit. 11, § 464(e)(2) (West 2012); HAW. REV. STAT. § 703-304(5)(b) (West 2012); *State v. Sedig*, 16 N.W.2d 247, 250 (Iowa 1944); ME. REV. STAT. ANN. tit. 17-A, § 108(2)(C)(3)(a) (2007); *Redcross v. State*, 708 A.2d 1154, 1157–58 (Md. Ct. Spec. App. 1998); *Commonwealth v. Toon*, 773 N.E.2d 993 (Mass. App. Ct. 2002); *State v. Edwards*, 717 N.W.2d 405, 413 (Minn. 2006); *State v. Miller*, 653 S.W.2d 222, 224 (Mo. Ct. App. 1983); NEB. REV. STAT. ANN. § 28-1409(4)(b) (West 2012); N.J. STAT. ANN. § 2C:3-4(b)(2)(b) (West 2012); N.Y. PENAL LAW § 35.15(2)(a) (McKinney 2004); N.D. CENT. CODE § 12.1-05-07(2)(b) (2007); *State v. Walker*, 598 N.E.2d 89, 90 (Ohio Ct. App. 1991); *State v. Silvia*, 836 A.2d 197, 200 (R.I. 2003); *State v. Jackson*, 681 S.E.2d 17, 21 (S.C. Ct. App. 2009); *Baier v. State*, 891 P.2d 754, 760 (Wyo. 1995).

¹²⁶ *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979) (holding that the law of the District of Columbia “does not impose a duty to retreat but does allow a failure to retreat, together with all the other circumstances, to be considered by the jury in determining if there was a case of true self-defense”); *State v. Wenger*, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999) (noting that under Wisconsin law, the ability to retreat “goes to the reasonableness of the defendant’s conduct”).

¹²⁷ See, e.g., *Wenger*, 594 N.W.2d at 471 (noting that “whether the opportunity to retreat was available may be a consideration regarding whether the defendant reasonably believed the force used was necessary to prevent or terminate the interference”).

(1) A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force . . . unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.¹²⁸

Many commentators have opined that media attention on Florida’s Stand Your Ground law was misplaced since Zimmerman’s self-defense claim would have been the same in a non-Stand Your Ground state. For example, conservative commentator Ann Coulter told the press, “[T]his . . . has nothing to do with ‘Stand Your Ground.’”¹²⁹ Coulter explained that if Zimmerman was on the ground being beaten by Martin, there was no safe retreat available to him just before the shooting.¹³⁰ Therefore, even in a jurisdiction that requires retreat if a safe retreat is known and available to the defendant, Zimmerman would have had the right to use deadly force in self-defense provided he met the other, usual requirements of the state’s self-defense law. Moreover, Zimmerman did not claim immunity from prosecution as he could have under Florida’s immunity provision.¹³¹

While Zimmerman did not claim immunity and arguably could not retreat while he was on the ground, Stand Your Ground nonetheless was a part of the Zimmerman case. For one thing, the jury was instructed on Florida’s Stand Your Ground law. They were specifically told:

If George Zimmerman was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a forcible felony.¹³²

Moreover, it is not clear that a safe retreat was not available to Zimmerman. Perhaps no safe retreat was available to Zimmerman once he was on the ground with Martin on top of him, but Zimmerman may have had the opportunity to retreat before the encounter got physical. Additionally, even under Florida’s Stand Your Ground law, Zimmerman would have had a duty to retreat if he was the initial aggressor.¹³³

¹²⁸ FLA. STAT. §776.032(1) (2013).

¹²⁹ Jeff Poor, *Coulter Argues Trayvon Martin Controversy Has Nothing To Do With the ‘Stand Your Ground’ Law*, THE DAILY CALLER (April 1, 2012, 1:19 PM), <http://dailycaller.com/2012/04/01/coulter-argues-trayvon-martin-controversy-has-nothing-to-do-with-the-stand-your-ground-law/> (noting that Coulter opined, “The ‘Stand Your Ground’ law is only relevant if someone had the opportunity to retreat . . . In neither [the defense’s nor the prosecution’s] narrative is retreating an option. . . . This is simple self-defense.”).

¹³⁰ *Id.*

¹³¹ Richard Luscombe, *George Zimmerman’s Lawyer Makes a Shocking Change to His Defense Strategy*, BUSINESS INSIDER (May 6, 2013, 8:51 AM), <http://www.businessinsider.com/george-zimmerman-drops-stand-your-ground-2013-3>.

¹³² Jury Instructions at 12, Florida v. Zimmerman, No. 12-CF-1083-A (Fla. Cir. Ct. July 13, 2013).

¹³³ FLA. STAT. § 776.041 (2014) (The justification for using force in self-defense is not available to one who: Initially provokes the use or threatened use of force against himself or herself, unless . . . [i]n good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.).

What makes one an “initial aggressor” for purposes of self-defense is not very clear even in states that have attempted to define the term.

The Zimmerman case focused the nation's attention on Stand Your Ground laws. This scrutiny reveals that Stand Your Ground laws are not applied in an even-handed way. Just as the race of the victim seems to affect outcomes in capital cases, the race of the victim seems to affect outcomes in Stand Your Ground cases. A study of cases involving claims of self-defense in Florida after passage of Florida's Stand Your Ground law is instructive. The *Tampa Bay Times* studied 192 cases involving Floridians charged with crimes of violence who claimed self-defense under Florida's Stand Your Ground law and found that individuals who killed a Black person walked 73 percent of the time, while those who killed a White person went free 59 percent of the time.¹³⁴

Similarly, an empirical study by John Roman of the Urban Institute found that in both Stand Your Ground and non-Stand Your Ground states, "[w]hite-on-black homicides [are] most likely to be ruled justified (11.4 percent), while black-on-white homicides are least likely to be ruled justified (1.2 percent)."¹³⁵ When he focused just on Stand Your Ground states, Roman found that "controlling for all case attributes [other than race], the odds a white-on-black homicide [will be] found justified [in a Stand Your Ground jurisdiction] is 281 percent greater than the odds that a white-on-white homicide [will be] found justified."¹³⁶ In contrast, "a black-on-white homicide has barely half the odds of being ruled justifiable relative to [a] white-on-white homicide."¹³⁷ These studies indicate that Stand Your Ground laws are not being applied in a racially even-handed way.

C. Most of the Racial Critiques of the Case Have Ignored Zimmerman's Mixed Race Identity

Carbado's third critique was that the then existing scholarship on race and the Fourth Amendment was under-inclusive because it focused primarily on Blacks and ignored other persons of color affected by race-based policing.¹³⁸ A slightly different critique might be leveled at the existing commentary on the Zimmerman case, most of which has focused on the fact that Trayvon Martin was Black while ignoring or paying little attention to Zimmerman's racial identity. Initial news reports about the shooting either failed to mention Zimmerman's race or referred to Zimmerman as White.¹³⁹ Usually when a person's race is not mentioned, it is because the person is White and the speaker assumes that the reader will understand this.¹⁴⁰ Rarely is the race of the individual mentioned when the person in question is White because White is the default or assumed race.¹⁴¹

When it became clear that the public thought Zimmerman had racially profiled Martin, Zimmerman's father wrote a letter to the *Orlando Sentinel*, announcing that his son was not a racist and was himself an ethnic minority since his mother was from Peru.¹⁴² In declaring Zimmerman's

¹³⁴ Susan Taylor Martin, Kris Hundley & Connie Humburg, *Race Plays Complex Role in Florida's 'Stand Your Ground' Law*, TAMPA BAY TIMES (June 2, 2012, 1:00 PM), <http://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152>.

¹³⁵ John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data*, URBAN INSTITUTE 6 (July 2013).

¹³⁶ *Id.* at 9.

¹³⁷ *Id.* ("[B]lack-on-black homicides have the same odds of being ruled justifiable as white-on-white homicides."). See also Martin et al., *supra* note 134 (In keeping with the last observation, the Tampa Bay Times study found no bias in the way Black and White defendants in Florida are treated overall, perhaps because most crimes of violence are intra-racial. Whites who invoked Florida's Stand Your Ground law were charged at about the same rate as Blacks. Whites who went to trial were convicted at about the same rate as Blacks who went to trial. Black homicide defendants went free 66 percent of the time compared to 61 percent of White defendants, a difference that could be attributed to the intra-racial nature of most homicides.).

¹³⁸ Carbado, *supra* note 22, at 967.

¹³⁹ See Schneider, *supra* note 95 ("The neighborhood watch leader is white."); Gamboa, *supra* note 95.

¹⁴⁰ See Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 973 (1993).

¹⁴¹ See *id.* at 973 n.86.

¹⁴² Stutzman, *supra* note 95.

ethnic minority status as Hispanic and linking this status to the assertion that his son was not a racist, Zimmerman's father was relying on an assumption that (non-Hispanic) White equals racist and minority equals non-racist. It is a fallacy to assume that only Whites can be racist. Whites do not hold a monopoly on racial bias against Blacks. People of all races and ethnicities can be and often are racially biased in favor of Whites and against Blacks.¹⁴³ As Tanya Hernandez points out, "Racism, in particular anti-Black racism, is a pervasive and historically entrenched fact of life in Latin America and the Caribbean."¹⁴⁴ Similarly, Jerry Kang has noted that "Asian Americans generally have implicit biases against African Americans that are almost as strong as those held by Whites."¹⁴⁵ The fact that Zimmerman was himself of mixed race identity and thus an ethnic minority therefore does not mean he could not engage in racial stereotyping. Zimmerman could have and most likely did rely on racial assumptions when he saw Martin and thought Martin looked suspicious. Any one of us, myself included, could have had similar thoughts and beliefs.

CONCLUSION

We have come a long way from the days when it was risky business to write about race. Nonetheless, the deeply entrenched belief that it is best to ignore race and racial difference—the belief in colorblindness as an ideal—along with the specter of being accused of playing the race card continues to hinder open race talk. From Justice O'Connor's 1991 opinion in *Florida v. Bostick* to George Zimmerman's 2013 murder trial, we can see the ideal of colorblindness at work. Being blind to race, however, can prevent the gears of the criminal justice system from working the way they should. If we truly want to get beyond race, we need to stop erasing race from the discussion.

¹⁴³ Justin D. Levinson, Danielle M. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 9, 19–24 (Justin D. Levinson & Robert J. Smith eds., 2012).

¹⁴⁴ Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the "Diversity" Defense*, 42 *HARV. C.R.-C.L. L. REV.* 259, 268 (2007).

¹⁴⁵ Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489, 1538 (2005).