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## Dan The Xenophobe Rides The A-Train, or The Modern, Unconscious Racist in "Enlightened America"

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# DAN THE XENOPHOBE RIDES THE A-TRAIN, OR THE MODERN, UNCONSCIOUS RACIST IN “ENLIGHTENED AMERICA”

RICHARD SALGADO\*

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## INTRODUCTION

The sort of vile, repugnant overt expressions typically associated with racism—cross burnings, racial epithets, and adamant pronouncements of racial superiority—are on the decline.<sup>1</sup> Such racism still thrives in isolated cases, but it is generally shunned by the population at large.<sup>2</sup> Unfortunately, it is only *that* racism—the easily

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1. See *United States v. Clary*, 846 F. Supp. 768, 779 (D. Mo. 1994) (“[I]ntentional discrimination is unlikely today . . . most Americans have grown beyond the evils of overt racial malice . . .”).

2. Admittedly, even the most overt, repugnant racism still flourishes among certain groups. See, e.g., Kevin Alfred Strom, *If You Tolerate This...Then the Children Will Pay the Price*, (National Vanguard American Dissident Voices radio broadcast Sept. 18-24, 2005), available at <http://nationalvanguard.org/story.php?id=6183> (advocating racial separation, attributing violence and disorder during Hurricane Katrina to Blacks’ “genetic nature” and calling for support for White

identified and readily suppressed strain—that is waning. *Unconscious* racism, less obvious but every bit as destructive, is still rampant.<sup>3</sup> Despite the belief in equality we preach, we are all racist.<sup>4</sup> Our racism

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Katrina victims). However, by and large, and within the parameters of what is typically referred to as mainstream society, such attitudes are rare. See, e.g., John M. Conley, William J. Turnier & Mary R. Rose, *The Racial Ecology of the Courtroom: An Experimental Study of Juror Response to the Race of Criminal Defendants*, 2000 WIS. L. REV. 1185, 1186-87 (“We found no evidence of the sort of knee-jerk racism in which jurors react negatively to a defendant simply because of his color. However, neither were the jurors in our study race-blind. Rather, the outcomes that the jurors reached in our various experimental conditions suggested that they were responsive to the detailed racial dynamics of individual cases—what we came to think of as the racial ecology of the courtroom.”).

3. For perhaps the most prominent discussion of unconscious racism, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987) (“[E]qual protection doctrine must address unconscious racism that underlies much of the racially disproportionate impact of government policy.”). See also Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 559-60 (2003) (proposing a new legal framework addressing race such that “we neither blindly deny the salience of continued racial subordination in our society, nor unconsciously participate in the reification of race and its dehumanizing effects”); Melissa Hart, *Subjective Decision Making and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743 (2005) (discussing unconscious racism in an employment context and arguing that the Title VII can be used to challenge it); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 118 (2000) (calling for individuals to recognize that their judgments are historically and culturally influenced).

4. See Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160 (2005) (“[W]e have all learned stereotypes from our culture and environment.”). For an eloquent treatment of this idea, see Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1371 (2005) (examining racism’s affect on community decision-making in the context of public schools). Lawrence states, “I believe that we are all racists, that we share a common history and culture where racism has played and still plays a central role. This shared experience shapes ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonWhites. None of us is exempt from the wages of America’s racism. We also share a belief in and commitment to racial equality, and for the most part we are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. As our culture has rejected racism as immoral and unproductive, hidden or unconscious prejudice has become the more prevalent form of racism. I have argued that we should think about racism as a disease rather than as a crime. Our conversations about why some of us feel we cannot send our children to Black schools might be easier if we could admit these fears to ourselves and others without fear of judgment and condemnation. If we could talk about our fears of

undermines even the best-intentioned social programs and legal approaches.<sup>5</sup> The overt racism of the past proudly paraded through town at high noon in full regalia, but this modern strain hides, cloaked in shame and fearing detection. This article demonstrates that unconscious racism infects not only policy and justice decisions, but also daily interactions. More provocatively, it argues that existing responses to unconscious racism—such as the disparate impact doctrine<sup>6</sup>—provide only short term relief and ultimately fail because society continues to generate and reinforce destructive stereotypes.<sup>7</sup> Even worse, responses such as affirmative action that are meant to combat racism may actually contribute to the destructive stereotypes that fuel it.<sup>8</sup> If one treats unconscious racism as a disease<sup>9</sup> or

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blackness we might find ways to confront and alleviate them. But these remain forbidden conversations. We cannot speak with friends and neighbors of their fear of blackness because we do not want to call them racists.” *Id*

5. Unconscious racism has been identified in settings ranging from hiring and employment practices to law enforcement and criminal trials. See generally PAUL M. BARRETT, *THE GOOD BLACK: A STORY OF RACE IN AMERICA* (1999) (detailing an African-American attorney’s ultimately unsuccessful lawsuit against his corporate law firm employer for racial discrimination); Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 974 (1993) (noting that a White hiring committee may unconsciously expect all candidates to react to interview questions as a White candidate would and therefore misinterpret a non-White candidate’s responses); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1016-17 (1988) (arguing that unconscious racism creates a blindspot in courts’ reasoning in criminal cases involving race); Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665, 673 (2003) (applying critical race theory to demonstrate structural racism in the War on Drugs).

6. See, e.g., Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 533 (2003) (“The idea that disparate impact doctrine is concerned primarily with subconscious discrimination shares important features with the theory of the doctrine as an evidentiary dragnet for deliberate discrimination . . . both read Title VII to allow for a pattern of discriminatory results to substitute for a direct showing of discriminatory intent, acknowledging the difficulty of proving mental states.”).

7. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (“The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin.”).

8. See *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) (“[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans

infection, it is only by destroying the responsible bacteria—stereotypes—that it will actually be cured.

Legal scholarship has pondered racism for decades and, unfortunately, will probably keep pondering it for decades to come.<sup>10</sup> Similarly, the courts continue to address race with regularity.<sup>11</sup> While

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us all.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.”); *see also Adarand*, 515 U.S. at 240 (Thomas, J., concurring) (“These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society.”). The destructive impact referred to by Justice Thomas includes the perpetuation of stereotypes that the aforementioned racial progress of society would otherwise overcome. Instead, benevolent government intervention unwittingly reinforces those stereotypes.

9. *See* Lawrence, *supra* note 3, at 321 (“Much of one’s inability to know racial discrimination when one sees it results from a failure to recognize that racism is both a crime and a disease.”).

10. Racism is unlikely to abruptly end despite the Supreme Court’s optimism in articulating a “Sunset Clause” in *Grutter v. Bollinger*. *See Grutter*, 539 U.S. at 342 (requiring that race-conscious law school admissions policies be time-limited and suggesting regular assessments to determine whether such policies are still needed to create a racial diverse student body). While eliminating racism is certainly an admirable goal, it strikes many observers as unrealistic in the short term. *See, e.g.,* Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 207 (2004) (declaring unrealistic Justice O’Connor’s prediction in *Grutter* that race-conscious admissions will be unnecessary after 25 years).

11. The U.S. Supreme Court is scheduled to hear arguments in the upcoming term on what measures, if any, public school systems may use to maintain racial balance in individual schools. The Court’s decision in the two cases could not only set the Court’s path with regards to race, but also could shape the climate in which government policies with respect to race will be debated. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 126 S.Ct. 2351 (June 5, 2006) (No. 05-908); *McFarland ex rel. McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, *Meredith v. Jefferson County Bd. of Educ.*, 126 S.Ct. 2351 (June 5, 2006) (No. 05-915). Implicit in both cases—now consolidated—is the long-standing question of whether the Constitution is, or should be, colorblind.

Some argue that not all discrimination is the same and distinguish between “evil” discrimination through which minorities are oppressed and “benign” discrimination that helps those same minorities. *See, e.g.,* *Miller v. Johnson*, 515 U.S. 900, 932 (1995) (Stevens, J., dissenting) (“I do not see how a districting plan that favors a politically weak group can violate equal protection.”). This argument is predicated, however, on the assumption that “politically weak groups,” i.e. minorities, can be

racism may, and often *must*, be discussed in complex legal academic terms, its heart is found in the daily interactions of ordinary people: a White woman who clutches her purse when a black man joins her in the elevator, a driver who locks his car doors when passing through the “black part of town.” The medium of fiction explores such interactions with feeling and immediacy.<sup>12</sup> In order to engage racism at its most basic level while drawing upon legal scholarship, this article is written as a short story but is footnoted like a traditional legal article. The “story” is written in “third person limited,” confined entirely to the protagonist Dan’s perspective. The “narrator” shares not only Dan’s limited perspective on the events that occur, but also

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identified with confidence. In reality, this country’s ethnic, racial, social, and economic diversity renders any such assumption illusory. In large part thanks to the success of the civil rights movement, the United States has entered an era in which economic and political power is shared much more widely among races and ethnic groups. Blacks, for instance, were a majority on the city council of Richmond which enacted the racial preferences challenged before the Supreme Court. See *City of Richmond*, 488 U.S. at 498. Given this welcome shifting of power and demographics, a formula that classifies discrimination based on who it affects (and how it affects them) is woefully inadequate. In such an environment, it may be argued that only a colorblind Constitution suffices.

Allowing the law to look to race at all makes judges the caretakers of the nation’s collective racial well-being. So long as courts hold the power to determine which race-based laws are reasonable and which are not, the possibility always exists that they will make the wrong decision. The jurisprudence of the past demonstrates that what constitutes acceptable racism varies with the pulse of society. See generally *Korematsu v. United States*, 323 U.S. 214 (1944); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Dred Scott v. Sandford*, 60 U.S. 393 (1856). In contrast, a colorblind Constitution demands equality at all times, irrespective of race and the passions and prejudices of popular culture.

12. To be sure, fiction’s value in the discussion of the law is by no means a new idea, as evidenced by the “Law and Literature” movement. The field of Law and Literature emerged, in part, as a response to the perceived inadequacies of the late nineteenth and early twentieth century law school. See Marijane Camilleri, *Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury*, 39 CATH. U. L. REV. 557, 562-63 (1990) (arguing that literature contributes to the substance, interpretation, and rhetoric of law). Many scholars believe that literature offers law students additional information about human nature, invites the use of emotional or intuitive reasoning in addition to abstract reasoning, and provides training in moral decision making. See Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1074 (1999) (classifying law and literature as an enterprise and discussing the connections between them); Gretchen A. Craft, *The Persistence of Dread in Law and Literature*, 102 YALE L.J. 521, 522-23 (1992) (using literature and the law to explore human fear of the future); Michael Pantazakos, *Ad Humanitatem Pertinent: A Personal Reflection on the History and Purpose of the Law and Literature Movement*, 7 CARDOZO STUD. L. & LITERATURE 31, 32 (1995) (providing a historical overview of the law and literature movement).

his perspective on life in general, including his attitudes and beliefs.<sup>13</sup> He is definitely *not* a reliable narrator. In contrast, the footnotes endeavor to be a more omniscient voice, exploring in greater detail the arguments and theories addressed contextually in the main text.<sup>14</sup> Admittedly, this story—like any story—is subject to the author’s own biases.<sup>15</sup> It would be naïve to not recognize that unconscious racism inevitably<sup>16</sup> impacts this work, just as it colors a reader’s unique interpretation of it.<sup>17</sup>

Section II explores the demise of overt racism and the social exorcism of such attitudes in contemporary America, while Section III discusses the prevalence of unconscious racism and its accompanying denial. Section IV focuses on possible approaches to mitigating unconscious racism and the stereotypes that fuel it. Section V offers a

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13. The narrator should be interpreted as representing Dan himself and is only as reliable as Dan is in assessing his own shortcomings (not very). I have chosen this perspective in order to fully inhabit Dan’s limited perspective, including his cultural and social blind spots.

14. Not every incident of racism is footnoted. There are examples of racism, some very subtle, embedded throughout the narrative which are intentionally un-noted, creating somewhat of a “racism-hunt” for the active reader. Can you spot all the racism present here (some of which, admittedly, I might not even be aware of as the author)? Or, instead, do you accept everything mentioned as legitimate observation?

15. My hope is that whatever unintentional biases I infuse into the narrative from my White male perspective may be deconstructed along with those of the protagonist.

16. I say “inevitably” because, while I try to write objectively, I am still vulnerable to the same biases that affect anyone else. As Charles Lawrence articulated, “diagnosis is difficult, because our own contamination with the very illness for which a cure is sought impairs our comprehension of the disorder.” Lawrence, *supra* note 3, at 321. That is one of the more interesting things about unconscious bias: everyone is subject to it in some way, including the person who points it out and *you* as the reader. For example, obvious and immediate criticisms of this article may be the “White perspective,” and the decidedly “male” perspective. (The only female characters are a train passenger who never utters a word and Dan’s girlfriend who is mentioned, but never seen). In short, it would be impossible to accommodate all perspectives while still remaining true to the human perspective, which is inherently limited.

17. The reaction to the “story” will likely vary across racial lines and experiences. That is to be expected. A middle-class White reader may empathize with some of Dan’s feelings, but then be appalled by his or her reaction. The hope is that the reading process will force the reader to examine his or her own attitudes. This experience will likely be very different for a Hispanic or Black reader. I hope that for those readers, this might serve as a revelatory peek at the heart of unconscious White racism. No doubt, unconscious racism exists among Hispanics and Blacks too, but this article can only address one perspective.

brief analysis of the story's ending.

#### I. THE DEMISE OF OVERT RACISM/ *BARBECUE IN INDIAN WELLS*

Ever since Dan was a three foot-tall, OshKosh-clad, Ritalin-munching<sup>18</sup> second grader, Memorial Day meant a trip to Ted and Diane's. Ted and Diane were his grandparents on his father's side. His parents had divorced four years ago when Dan was a senior in high school,<sup>19</sup> but Dan still wound up gnawing on a hot dog in his grandparents backyard only two weeks after the divorce was finalized. Last year, Diane died, but the tradition of the Memorial Day barbecue lived on. In fact, Diane's death—an unexpected stroke at 76—meant Ted finally got to buy the \$2,000 Weber barbecue grill he'd lusted after for years.

Ted and Diane—now just Ted—lived in Indian Wells,<sup>20</sup> near Palm

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18. The reference to Ritalin is not mere characterization. See Lawrence H. Diller, *Controversies in the Diagnosis and Treatment of ADHD: One Doctor's Perspective*, GLOBALRPH, Aug. 20, 2001, <http://globalrph.healthology.com/globalrph/15064.htm> (noting that Ritalin use varies across ethnic lines, and that "African American children are conspicuously absent in the ADHD/Ritalin epidemic . . . . Many African Americans seem especially suspicious of a neurological label of ADHD to account for their children's problems, which may be partly attributed to poor schools and neighborhood environments. African Americans in urban communities are also uneasy about what they perceive to be similarities between Ritalin and crack cocaine, which devastated Black communities in the 1990's [*sic*]. These opinions were expressed by the NAACP Legal Defense Fund when public hearings were held by the DEA over decontrolling Ritalin in the mid-nineties."). In the fictional text, this detail underscores how different the protagonist's upbringing is from that of racial minorities and how unexpected social factors can further widen the racial divide.

19. The divorce rate is very similar for Blacks and Whites. See Karen S. Peterson, *Black Couples Stay the Course*, USA TODAY, March 7, 2000, available at <http://www.divorcereform.org/mel/rdivorceblack.html> (citing a survey finding that about 36 percent of Blacks and 34 percent of Whites have been divorced). However, divorce has a stronger negative economic impact on Black children than White children in the United States according to a recent study. See Marianne E. Page & Ann Huff Stevens, *Understanding Racial Differences in the Economic Costs of Growing Up in a Single-Parent Family*, 42 DEMOGRAPHY 75, 81-82 (2005) (finding that family income declines by about 30 percent among White children and 53 percent among Black children in the first two years following a divorce). This difference increases dramatically in the long run. *Id.* The authors write, "[t]hree or more years after the divorce, about a third of the loss in Whites' household income is recouped, but the income of Black families barely improves." *Id.* Interestingly, however, "in 1960, 23 percent of Black children were born to unwed mothers. Today the proportion is nearly the same for Whites, and the rate is rising rapidly." Christopher Jencks, *Is the American Underclass Growing*, in URBAN UNDERCLASS 86 (Christopher Jencks & Paul Peterson eds., 1991).

20. Somewhat ironically for a community with the word "Indian" in its name, the



Springs. The hour drive from Claremont<sup>21</sup> was always fine. The heat was the problem. Barbecues, by their very nature, are outdoor events. Indian Wells, by *its* very nature, hit about 110 degrees in the middle of the day when Ted always insisted on firing up the grill. Dan loved seeing his family, but standing around an open flame in 110-degree weather made him feel privy to a sneak preview of the ninth circle of hell. This summer he was finally going to be out of town—a summer intern at Goldman Sachs—but sure enough, fate intervened. Goldman Sachs’ summer program didn’t begin until the Tuesday *after* Memorial Day, condemning Dan to yet another Memorial Day barbecue in Indian Wells.

“Goin’ to New York, huh?” Dan’s cousin Troy asked, nursing a frosty Heineken as they stood in the backyard. The lawn was neater than Dan remembered from back when Ted mowed it himself, instead of hiring a Mexican.<sup>22</sup> The Mexican<sup>23</sup> invariably did a better

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city of Indian Wells is one of the whitest cities in Southern California. See DOWELL MYERS & JULIE PARK, *RACIALLY BALANCED CITIES IN SOUTHERN CALIFORNIA, 1980-2000* app. B (2001) (noting that as of the 2000 census, Indian Wells’ population was 94 percent White—two percent more diverse than in 1990—and less than one-third of one percent of the population was Black); see also City of Indian Wells, <http://www.ci.indian-wells.ca.us/page.cfm?content=7> (“[T]he city [of Indian Wells] offers a blue-chip quality of life, devotion to the arts, inspiring philanthropy, a cohesive city government, world-class resorts, award-winning golf at The Golf Resort at Indian Wells, and sponsorship of major cultural and sporting events.”).

21. In contrast to Indian Wells, Claremont is 66 percent White, 5 percent Black, 13 percent Asian, and 15 percent Hispanic. See MYERS & PARK, *supra* note 20, at app. B. Though still largely a White community, Claremont is at least *more* diverse. More significantly, however, Claremont is home to the Claremont Colleges, a consortium of five undergraduate colleges and two graduate institutions—Pomona College, Scripps College, Harvey Mudd College, Pitzer College, and Claremont-McKenna, as well as Claremont and Keck Graduate Schools. See Welcome to the Claremont Colleges, <http://www.claremont.edu/> (last visited Aug. 31, 2006). Given the notion that education improves awareness, it makes sense that Dan would have been raised in a more evolved and informed community where overt racism would be socially castigated.

22. While acknowledging strained relations among many races, this paper is primarily focused upon the Black/White divide, largely for the sake of brevity. An unfortunate side effect is that, this paper thus falls into what some have perceived as prioritization of Black/White disharmony. See, e.g., Eduardo Luna, *How the Black/White Paradigm Renders Mexicans/Mexican Americans and Discrimination Against Them Invisible*, 14 BERKLEY LA RAZA L.J. 225, 227 (2003) (arguing that focusing only on Blacks and Whites neglects other minorities’ experiences and creates an inaccurate historical picture of race relations). No such slight, of course, is intended.

23. An ongoing theme throughout this story is the casual reference to minority racial groups as all fitting a singular “type” or “stereotype.” This serves various ends.

job.<sup>24</sup>

“Yep.” Dan nodded.

“That really what you want to do? Money stuff?” Troy had been a bright kid growing up, discovered methamphetamine and psychedelic trance music his freshman year of high school, cleaned up as a senior, and enlisted in the Marines nine days after graduation.<sup>25</sup> He was a

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First, for Dan and others like him, the gardener may be his or her only exposure to a Mexican (although probably not in an area as populated by Latinos as Southern California). This parallels the fact that many Americans’ only exposure to certain ethnicities and races is delivered via unreliable media sources—such as Whites in some parts of the country basing their knowledge of African Americans on rap music. Second, I aim to highlight Dan’s overly broad classification. Not all Latinos and Spanish-speakers are “Mexican”—the term is erroneously used as a catch-all. Finally, it is important to acknowledge that Mexicans and other Latinos often do occupy positions such as that of a gardener. Unfortunately, this leads many to falsely conclude that since most gardeners are Latino, most Latinos are gardeners—the sort of reasoning error one might seek to identify on the LSAT.

24. Is this a stereotype? When you, as a reader process this, what is *your* reaction? Does this idea—the hardworking Mexican—do any harm? Is it even a compliment, in much the same way to say that African-Americans are more naturally athletic? While not all stereotypes are necessarily *negative*, all stereotypes are destructive because they narrow and constrict the uninformed’s concept of what a minority is. For example, if a Mexican is “hardworking,” does that connote that he or she is *not* intelligent? Or that Mexicans *have* to be hardworking because they cannot get an office job? Might such misconceptions affect hiring decisions when deciding between a Mexican-American candidate and a non-Mexican candidate? Thus a “positive” stereotype can have harmful effects. Similarly, the Asian-American “model minority” stereotype creates blindness to problems that do exist in the Asian-American community. See, e.g., Selena Dong, “*Too Many Asians: The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*,” 47 STAN. L. REV. 1027, 1030 (1995) (addressing a high school admissions policy that results in higher standards for Chinese applicants than White applicants).

25. Despite serious drug problems during his youth with the drug of choice—methamphetamine—Troy eluded criminal punishment and was able to enlist in the Marines. Would the same be true if Troy were Black and the drug were crack, rather than methamphetamine? Drug laws are disproportionately enforced against Blacks. See, e.g., Floyd D. Weatherspoon, *Racial Profiling of African American Males*, 38 J. MARSHALL L. REV. 439, 442-43 (2004) (arguing that despite the DEA’s facially neutral drug courier profile, Black men are disproportionately detained and searched). Regarding Troy’s career choice, the Marine Corps has the second highest percentage of White enlisted soldiers (67.4 percent), and the lowest percentage of Black soldiers (16.8 percent) among the military branches. See OFFICE OF ASST. SEC’Y OF DEFENSE, POPULATION REPRESENTATION IN THE MILITARY SERVICES 3-4, tbl. 3.3 (1998), <http://www.dod.mil/prhome/poprep97/chapters97.pdf>. The Marine Corps has experienced slight decreases in Blacks during recent years, paralleling a decrease in the propensity to enlist among Black youth. See *id.*

good kid, though.<sup>26</sup>

"I think so, yeah." The sun was burning bright. Dan could feel the skin on his forearm subtly tightening. He was wearing a green long-sleeve shirt his aunt Shirley had given him at Christmas. She'd be happy to see him wearing it. But of course, she sprained her knee, didn't come, and Dan was burning up for no good reason. Rolling the sleeves up only helped so much.

"Man, I could *never* do that." Troy laughed and took a swig of the beer, "I fall asleep reading my bank statement."

"Yeah," Dan nodded, "it can be dry sometimes. But it can be interesting too."

Troy rubbed his fingers together to signify money, mumbled something about "fat cheddar," and Dan saw his grandfather motioning for him in the distance. He tapped Troy's shoulder, said he'd see him around, and shuffled over to the glass door where Ted was standing.

"What's up?"

Ted grinned. "Not much. I just wanted to talk to my only grandson that isn't on probation." Ted slapped him on the back with his wrinkly, vein-ridden hand and ushered him inside. The living room was dark—both in color choice and the absence of light sources—and it seemed even darker as Dan's eyes struggled to adjust from the bright light outside. As always, it smelled like apple cobbler. Sometime in the mid-eighties, Dan imagined, his grandparents had bought a lifetime supply of apple cinnamon air fresheners.

They sat down across from each other in the living room. Ted in the recliner. Dan at the edge of the orange and brown velvet sofa. The room was decorated with family pictures, and Dan could see a fine coat of dust running along the top of the frames and across the glass—something he never would've seen when Diane was alive.

"So . . . New York." Ted said, not as a question, but more as a declaration.

Dan nodded. People were laughing outside—the sort of rambunctious laughter you start to hear soon after the beers get brought out. Inside, you could hear the hum of the refrigerator in the next room over. Dan imagined it was like this a lot since Diane's stroke—except for what was probably the omnipresent sound of the

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26. In what ways do these portrayals of semi-affluent Whites *also* reflect stereotypes? Should these stereotypes be distinguished from stereotypes of minority groups, or are they just as destructive? One question permeates this article: are *all* stereotypes bad, or just the negative ones?

television keeping Ted company. Glancing at the screen, Dan could tell *it* was wiped clean of dust.

"You know, I lived in New York once. Six months. It was back when I was your age."

"Yeah?"

"I wanted the big city. I wanted to walk under the tall buildings. I figured that was where someone went to make it big . . . be someone important." Ted shook his head, "I was naïve."

"I don't think that's where I've *got* to go, or anything. It's just something different. A new challenge," Dan clarified himself.

"That it is." Ted slapped his palms down onto his polyester-clad knees. "But it's different now. Different mix of people.<sup>27</sup> Those people don't care about nothing. Human life? Don't mean a thing." Ted stood up to cross the room.

"It's sad."

"It's more than sad." Ted lifted a Johnston & Murphy shoe box from the counter top and returned to the recliner. "Our neighbors, the Osbornes, their nephew worked down in L.A. by the Coliseum. Youth counselor. He tried helping *them*.<sup>28</sup> You know what they did to *him*? They shot him dead.<sup>29</sup> Wanted his wallet and he was too slow

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27. Indeed, New York has changed considerably in terms of racial composition. See MITCHELL L. MOSS ET AL., TAUB URBAN RESEARCH CENTER, IMMIGRATION IS TRANSFORMING NEW YORK CITY 1 (1997), available at <http://urban.nyu.edu/research/immigrants/immigration.pdf> (reporting that U.S. Census data demonstrated that Hispanics replaced Blacks as the second largest racial/ethnic group in New York City, and that the Hispanic population grew from 1.783 million in 1990 to 1.926 million in 1996).

28. Throughout this story, the word "them" is frequently used to refer to African-Americans as a single collective group. The term is used overtly by Ted—signifying overt racism—and in the narrative reflecting Dan's internal thoughts—a more subtle, unconscious form of racism that typically goes unspoken. Such grouping causes a small group of minorities to be taken as representative of an entire culture. Further, the term "them" depersonalizes other races and increases the racial divide. "Us" includes anyone who is White, while "them" means anyone who is not. This problem manifests itself in a variety of settings, including jury trials when a White jury decides the fate of a Black defendant (or vice-versa). Cf. *United States v. Clary*, 846 F. Supp. 768, 778 (E.D. Mo. 1994) (discussing the early 1980s segregation of high crime areas from the rest of the cities, as well as the public anger when crime was no longer limited to the inner cities). See generally BENJAMIN FLEURY-STEINER, JURORS' STORIES OF DEATH (2004) (demonstrating that race is often a factor in criminal sentencing decisions and that the U.S. justice system can foster an "us versus them" mentality among jurors serving in capital trials).

29. Cf. *Juvenile Center Counselor Killed; Two Teens Arrested*, ST. PETERSBURG TIMES, Nov. 11, 2003, at 3A (chronicling a similar event that took place in Grove City,

getting it out, so they killed him.”

“Awful.”

Ted shook his head. He undid the twine wrapped around the shoebox. “It is a war—that’s what it is. It’s not human. Look at what happened a couple years ago. Burning down their own neighborhoods. Looting their own stores,”<sup>30</sup> Ted said as he tossed the twine off to the side. “Try telling me *that* is human. Look what happened after the hurricane down in New Orleans. Animals. No police, no law and order, and they’re raping each other, killing each other.”<sup>31</sup> Not even to mention looting and stealing. They turned the

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Pennsylvania, where two teens at a youth residence murdered their counselor).

30. See Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 967 (1995) (explaining that “the Los Angeles riots, precipitated by the acquittal of four White police officers who had severely beaten Rodney King, have been characterized as the worst urban riots of the last century”). The significance of the Los Angeles riots is demonstrated by the death of over fifty people and the injury of over 2,400 people during the riots. *Id.* Perea also discusses the media’s inaccurate portrayal of the riots as a Black/White and Black/Korean event. *Id.* “[M]ost of the early victims of crowd violence were Latinos; one-third of the dead were Latino; between twenty and forty percent of the business damaged were Latino owned; and one-half of those arrested were Latino.” *Id.* at 968. The value of property the riots destroyed or damaged was estimated to run in the billions of dollars. *Id.* at 967. See also CORNEL WEST, *RACE MATTERS* 1 (1993) (providing that only 36 percent of those arrested for looting and violence in the Los Angeles riots were Black, which is interesting if one is to assume the arrest rate mirrored actual participation).

31. Despite this article’s assertion that overt racism is on the decline, very strong and appalling racist attitudes still exist and occasionally are expressed. Sadly, the aftermath of Hurricane Katrina in New Orleans, replete with violence and looting, served as a rallying cry for the most repugnant of racial attitudes. One of the most repugnant responses to Hurricane Katrina came from the neo-White supremacist group National Vanguard. See, e.g., Strom, *supra* note 2 (“The aftermath of Katrina is proving every day that we need racial separation . . . .When law and order broke down on the Gulf Coast two weeks ago, we saw vast differences in the reactions of Whites and Blacks. A substantial portion of the Black underclass behaved unbelievably callously and savagely—exhibiting behavior on a large scale that is almost unknown among Whites: Black men with guns raping women and little children, boys and girls, slitting throats and throwing the bodies in ankle-deep human waste—then going back for more. Black warlords firing on rescue workers and ordering elderly nursing home residents out into the floods so they could steal their food and look for drugs. Yes, there are heartless and savage White people, but they’re a vanishingly small percentage of our total population. Among the Africans they’re terrifyingly common. What this means, obviously, is that Africans and Europeans need vastly different kinds of social structures. As Jefferson said, Blacks and Whites cannot live under the same government.”). The attitude and perspective expressed in this National Vanguard broadcast are utterly appalling, disgusting, and hopefully would be condemned by the majority of Americans. Cf. Susannah Rosenblatt & James Rainey, *Katrina Takes a Toll on Truth, News Accuracy*, L.A.

place into their own jungle.”<sup>32</sup>

Whenever Ted went off about this sort of thing, Dan found himself shifting in his seat, looking around to make sure no one else was listening.<sup>33</sup> He had to keep reminding himself that his grandpa was a product of a different time.<sup>34</sup> It was always this way, whenever he

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TIMES, Oct. 4, 2005, available at <http://www.mediaresearch.org/campaign/05/rita.asp> (clarifying that previous news reports were grossly exaggerated, rejecting a Fox News alert issued “a day before the major evacuation of the Superdome began [reporting] ‘robberies, rapes, carjackings, riots and murder’”). The alert claimed that “[v]iolent gangs are roaming the streets at night, hidden by the cover of darkness,” and the article continued to reject assertions of “inflated body counts, unverified ‘rapes, and unconfirmed sniper attacks as among examples of scores of myths about the dome and Convention Center treated as fact by evacuees, the media and even some of New Orleans’ top officials.” *Id.* Mayor C. Ray Nagin falsely told a national television audience on “Oprah” about people “in that frickin’ Superdome for five days watching dead bodies, watching hooligans killing people, raping people.” *Id.* The unfortunate side effect of such reports is the reinforcement of stereotypes regarding the African-American population.

32. The political philosopher Charles W. Mills effectively describes the causes of racial stereotyping. See CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997) (theorizing that a contract exists between White people of European descent, who consequently exploit others by stratifying them according to their race); see also Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 182 (2003) (“The lighter a group’s skin is, the closer to ‘civilization’ they are. Alternatively, darker-skinned peoples are thought to live in a ‘state of nature.’ This explains why poor urban centers, populated with people whose skin is of varying shades of brown, are referred to as ‘urban jungles,’ a description never applied to rural areas, often afflicted with destitute poverty, underground methamphetamine laboratories, domestic violence and guns.”).

33. Ted is meant to represent overt racism. While instances of pronounced racism and bigotry still exist, they are progressively more rare. See *United States v. Clary*, 846 F. Supp. 768, 779 (E.D. Mo. 1994) (realizing that “most Americans have grown beyond the evils of overt racial malice, but still have not shed the deeply rooted cultural bias that differentiates between ‘them’ and ‘us’”).

34. It often seems that the most racist attitudes are expressed by the oldest segment of society, leading to the sometimes popular refrain that “some people just have to die” before racism can be overcome. See generally, Glenn Firebaugh & Kenneth E. Davis, *Trends in Antiblack Prejudice, 1972-1984: Region and Cohort Effects*, 94 AM. J. SOC. 251 (1988); Herbert H. Hyman & Paul B. Sheatsley, *Attitudes Toward Desegregation*, 195 SCI. AM. 35 (1956); A. Wade Smith, *Cohorts, Education, and the Evolution of Tolerance*, 14 SOC. SCI. RES. 205 (1985). The prevalence of racism among the older segments of society does not suggest that White people become more discriminatory as they age, but that, at any time period, the older segment of society consists of people who were more prejudiced throughout their lives. Whatever forces caused prejudice to decline in general over a given time period, they had the least effect on people who had held those views for the longest time.

watched the news and saw a story about a carjacking<sup>35</sup> or a rape. It came up watching sports when he'd say things like "look at the little monkey run."<sup>36</sup>

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35. See MICHAEL R. RAND, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., CARJACKING: NATIONAL CRIME VICTIMIZATION SURVEY (1994), <http://www.ojp.usdoj.gov/bjs/pub/ascii/c.txt> (demonstrating that in reality, "victims identified the offenders' race as White in 32% of all carjackings, Black in 49%, and Asian or American Indian in 6%," leading to the conclusion that while the largest share of carjackings were indeed committed by Blacks, they did not constitute a majority of all carjackings). Further, Blacks were twice more likely than Whites (.4 and .2 respectively) to be victimized by carjacking, debunking the myth that carjacking is primarily a Black on White crime. *Id.*

36. See Leonard Shapiro, *Cosell Set Sports Journalism Standards, Obituary*, WASH. POST, Apr. 25, 1995, available at <http://www.washingtonpost.com/wpshr/sports/longterm/memories/1995/95pass12.htm> (discussing a Monday Night Football telecast, during which popular sportscaster Howard Cosell set off a storm of controversy when he commented, while watching Washington Redskin wide receiver Alvin Garrett elude would-be tacklers, "Look at that little monkey run"). Cosell's lapse of judgment has been discussed as both a watershed event regarding race in America and as an example of when unconscious racism surfaces. See Lawrence, *supra* note 3, at 339-40 ("When, for example, a well-known sports broadcaster is carried away by the excitement of a brilliant play by an Afro-American professional football player and refers to the player as a 'little monkey' during a nationally televised broadcast, we have witnessed the prototypical . . . unintentional slip of the tongue. This sportscaster views himself as progressive on issues of race. Many of his most important professional associates are Black, and he would no doubt profess that more than a few are close friends. After the incident, he initially claimed no memory of it and then, when confronted with videotaped evidence, apologized and said that no racial slur was intended. There is no reason to doubt the sincerity of his assertion. Why would he intentionally risk antagonizing his audience and damaging his reputation and career? But his inadvertent slip of the tongue was not random. It is evidence of the continuing presence of a derogatory racial stereotype that he has repressed from consciousness and that has momentarily slipped past his Ego's censors."). In the context of this story, Ted's use of the term "little monkey" is no doubt less of a manifestation of his subconscious than an overt expression of conscious racism. Ted is so consumed by racism, in contrast to Cosell, that there is no need for a "Freudian slip" to bring such terms to the surface. However, just as Cosell's example was likely his unconscious surfacing, Dan harbors similar sentiments but is socially aware and racially sensitive and would not ordinarily say such a thing. Lawrence cites a similar example through the instance of Nancy Reagan, who appeared before supporters and said that she wished her husband could be present to "see all these beautiful White people." *Id.* at 340. Two more recent and prominent examples of racist attitudes slipping past the Ego's censors might be those of popular actor/director Mel Gibson and U.S. Senator George Allen. After being pulled over late at night for driving while intoxicated, Gibson lashed out at the police officer in a vicious, anti-Semitic tirade, stating that "[t]he Jews are responsible for all the wars in the world," and asked the arresting officer, "Are you a Jew?" *Mel Gibson Admits to Making Anti-Semitic Remarks, Asks for Help*, FOX NEWS, Aug. 1, 2006,

"And where you're going isn't going to be any better." Ted propped the shoebox on his knee. "If anything, it's worse. I saw on the news, this little black girl. Her mother wasn't watching so she stabbed her playmate. Murdered her. She was nine.<sup>37</sup> It's you or them, Danny. You or them..."<sup>38</sup>

Not really, Dan thought. We are not in the middle of the L.A. riots<sup>39</sup> any more. There's no smoke rising up above South Central and no one is beating the crap out of White guys at the intersection of Florence and Normandie.<sup>40</sup> More than anything, watching his grandfather spouting off as if he were the Grand Wizard of the KKK,

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<http://www.foxnews.com/story/0,2933,206560,00.html>. Gibson subsequently apologized to the Jewish community for his statements and insisted that he is not an anti-Semite. *Id.* Only a few weeks after Gibson's comments, Virginia Republican senator George Allen courted controversy by repeatedly referring to a Democratic campaign volunteer of Indian descent as "Macaca" and stating, "Welcome to America." See Tim Craig and Michael D. Shear, *Allen Quip Provokes Outrage, Apology*, WASH. POST, August 15, 2006, at A01. The word "macaca" can mean either a monkey in the Eastern Hemisphere or a town in South Africa. *Id.* In some European cultures, the word is considered a racial slur against African immigrants. *Id.* Senator Allen subsequently apologized, but denied any derogatory intent. *Id.*

37. See *Brooklyn Girl, 9, Admits Killing Playmate*, available at <http://faithelvans.forumsunlimited.com/index.php?showtopic=2493> (announcing that a 9-year-old girl pleaded guilty to second-degree manslaughter, admitting she fatally stabbed her 11-year-old playmate after a game of tug-of-war over a rubber ball went sour).

38. See *supra* note 28.

39. See WEST, *supra* note 30, at 1 (articulating that the L.A. riots are largely seen as a Black-on-Black attack or an encroachment upon the White population, neither of which is very accurate). In reality, the L.A. riots were a racially complex affair with very little harm to the White population. *Id.* But see Perea, *supra* note 30, at 967 (detailing the publicity garnered by the brutal beating of White truck driver Reginald Denny at the riot's flash point, the intersection of Florence and Normandie).

40. The beating of Denny and the other violence that occurred at the intersection invariably terrified White America. Even more problematic was the ensuing unique cultural defense used during the resulting legal trials, which served in some ways to further reinforce stereotypes. See Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 80 GEO. L.J. 2227, 2257-58 (2001) ("The case of Damian Williams and Henry Watson illustrates the color-coded defense of race trials. To defeat charges of attempted murder and aggravated mayhem in the beating of Reginald Denny and others, the Williams-Watson defense lawyers . . . sparked controversy by introducing a 'group contagion' theory of mob-incited diminished capacity. Mounted as an exculpatory defense, the social psychology-based theory intimates that young Black males as a group, and the Black community as a whole, share a pathological tendency to commit acts of violence in collective outings. Both Williams and Watson are young, male, and Black. The defense team supplemented this evidence with defendant-inspired narratives of deviance and defiance.").



Dan felt bad for him. Embarrassed even.<sup>41</sup> Ted would never hurt anyone,<sup>42</sup> at least not intentionally, but his ideas, his thoughts, his entire perspective on life . . . it was just so infected by racism.

Ted lifted the lid off the box and slid it along his thigh towards Dan. Nestled inside the box, surrounded in folded paper towels with a flower print pattern, was a silver revolver.<sup>43</sup>

"It's a .357," Ted began, "but you don't have to shoot that. The ammo I have for it is thirty eight. It works fine and won't kick you onto your butt when you fire it."

"Grandpa . . . I am not taking a gun. I don't need a gun."

"I do not care whether you *think* you need it or not. It *is* something you need. You wouldn't walk onto a battlefield without being armed, but what the hell do you think New York is?"<sup>44</sup> Even here, the middle

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41. See generally Johnson, *supra* note 5 (voicing that shame is just one of several reactions to a loved one expressing socially unacceptable racist attitudes, and that on a subconscious level one might even argue that embarrassment is a natural tendency given that the racist statement may be an outward manifestation of the recipient's own internal racist attitudes which he or she is trying to suppress).

42. We often rationalize the racist attitudes of our friends and relatives by saying "they would not hurt anyone." While it might be true that they will not be physically assaulting a minority any time in the immediate future, the very expression and reinforcement of racism is destructive and harmful. In short, it does hurt someone. It serves to justify racism in future generations, establishes precedents, and desensitizes individuals to such beliefs.

43. See Timothy Egan, *After the Riots; Los Angeles Riots Spurring Big Rise in Sales of Guns*, N.Y. TIMES, May 14, 1992, at A1 (reporting that "Californians are buying firearms at the highest rate since the state began keeping records 20 years ago, and other states are reporting similar surges in gun sales"); see also Bob Sipchen, *Targeting Fear; NRA Ad Uses L.A. Riots to Attack Gun Control and Attract New Members*, L.A. TIMES, Sept. 4, 1992, at B1 (maintaining that the National Rifle Association wasted no time capitalizing on Californians' new-found belief that purchasing guns was a necessity by running national advertisements that painted a picture of law-abiding White citizens, made vulnerable by gun control laws, cowering helplessly before Black armed mobs). Although the mainstream media condemned this appeal to fear, some believed that the Los Angeles riots did indeed demonstrate that people should arm themselves. Cf. Brock Yates, *Guns for the Home*, AM. SPECTATOR, Apr. 1992, at 53 (advocating the use of guns in the home by weighing the advantages and disadvantages for various types of guns).

44. But see NYC & Company, NYC the Safest Large City in U.S., <http://www.nycvisit.com/content/index.cfm?pagePkey=1091> (last visited July 1, 2006) (recognizing that New York City is the safest big city in the country, according to a report from the Federal Bureau of Investigation). The 2002 report titled "Crime in the United States" indicates that while the nationwide crime rate increased, New York City's crime rate actually decreased 5 percent to the lowest level since the 1960s, and its murder rate dropped 9.6 percent in 2002 to reach the lowest level since 1963. *Id.* Cf. Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails as an*

of a desert, it's a war zone. Twenty-four seven. They don't even sleep."

"Grandpa, I don't need a gun. I'll be fine."

"Last week, right down the street at the Petersons' place . . . some gang banger Mexican kid<sup>45</sup> broke into their place at two in the morning. Chuck kept the kid at gun point in the living room until the police arrived."

"Grandpa, I do not need a—"

"It's already registered in your name."

"What?"

"I already registered it in your name. It's your gun now."

"Can you do that?"

"I did." Ted lifted the gun out of the box and held it out to Dan. "Look, just take this. Never use it. I don't want you to ever pull this trigger. But it could save your life. If Chuck wouldn't have had a gun, he and Marilyn might be dead right now. If the Osborne's nephew would've had a gun on him, he'd still be alive."<sup>46</sup>

Cradling the gun in his hands, Dan was sick. Literally, physically, sick. He felt like someone in steel toe boots had walked up and kicked him in the stomach.

"Grandpa..."

Ted shook his head. He wasn't going to hear any of it.

"Take it out to New York with you. That's all I ask." Ted's voice

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*Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 763-64 (2005) (clarifying that although the crime rate has decreased, there has been a steady increase in the number of complaints to the Civilian Complaint Review Board). "In New York City, [t]he level of daily harassment . . . dramatically eroded support for New York City's quality-of-life initiative, especially among African Americans, and sparked demands for tough oversight of police conduct. However, some Black scholars contend that Black-on-Black crime outweighs the harm of police-on-Black crime, and thus believe that the police must have broad discretion in order to combat crime in Black neighborhoods. They criticize police for turning a blind eye toward crime in Black areas, thus failing to ensure the safety of Black residents." *Id.*

45. See *Into the Abyss: The Racial and Ethnic Composition of Gangs*, tbl. 19 (2000), [http://www.faculty.missouristate.edu/m/mkc096f/what\\_I\\_learned\\_about/GANGS/racial\\_co](http://www.faculty.missouristate.edu/m/mkc096f/what_I_learned_about/GANGS/racial_co)

mposition.htm (calculating that 44 percent of gang members are Hispanic, while only 36 percent are Black and a mere 12 percent are Caucasian).

46. See David Kairys, *A Philadelphia Story*, LEGAL AFF., May/June 2003, available at <http://www.legalaffairs.org/printerfriendly.msp?id=387> (enunciating that the guns that people buy in response to fear are left mainly at home and that they are used infrequently in self-defense, but more often in suicides, spousal murders, and school shootings).

took on the urgency and desperation of a man in the final throes of life—which he was nowhere near. He couldn't be.

Dan stared at him. The old man looked hollow in his polo shirt that was a size too big on him. Ted must have lost an easy fifteen or twenty pounds since Diane died that late February night, and he had never been a big man.

"Just don't try taking it through carry-on. Check it. TSA'll have a hay day with you otherwise. Can't even take on a bottle of water nowadays because of the damn Arabs. They'll treat you like a rag head with C-4 stuffed in his sneakers."<sup>47</sup> Ted laughed and rolled his head back, "Your father'll kill me if that happens."

## II. UNCONSCIOUS RACISM, DENIAL, & RATIONALIZATION/ AFTER A

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47. In a particularly offensive way, Ted's comment nevertheless points out succinctly the definite bias which exists in the implementation of airport security and terrorism prevention: racial profiling. See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 42 (2002) (explaining that profiling is not based on the assumption that all terrorists who wish to attack the United States are Arabs or Muslims, or that all Arabs and Muslims are terrorists, but rather, it is based on an assessment of the likelihood of people with particular characteristics committing particular crimes). Creating profiles based on factors such as race and nationality is inevitably going to be both over- and under-inclusive. *Id.* Joo explains that prior to September 11th, many people regarded profiling as an ineffective policing method that created or reinforced negative stereotypes. *Id.* However, since September 11th, it has resurfaced as an apparently acceptable, or even necessary, policing strategy. *Id.*; see also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 974 (2002) (noting that a Gallup Poll taken prior to September 11th showed that 80 percent of Americans opposed racial profiling, while one taken shortly afterwards showed almost 60 percent in favor of ethnic profiling directed at Arabs and Muslims); Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586 (2002) (indicating that the September 11 hijackers were seen as members of particular racial, national, and religious groups and those whole groups were implicated by the wrongdoing. The hijackers were all men yet their crime was not seen to implicate all men, but the fact that they were all Arabs or Muslims was sufficient to implicate those groups). See generally MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR RACIAL PROFILING IN WORLD WAR II AND THE WAR ON TERROR 2004 (arguing that the Japanese internment was a necessary precaution during World War II and that racial profiling is necessary now in the war on terror). One factor making this shift possible is that the current profiling does not implicate large groups previously discriminated against in America, such as African Americans, Latino Americans, or Japanese, so it has not directly inflamed old ethnic wounds. *Id.* at 976. Previously "othered" groups—the "them" often referred to—are being welcomed into the fold of being "American," which is defined in opposition to a new "other" of Arab and Muslim extremists. *Id.* In many ways, the treatment of those of Middle-Eastern descent post-9/11, though falling short of actual internment, can be seen as paralleling the treatment of Japanese-Americans during World War II. *Id.*

*YANKEE'S GAME, 1:30 A.M.*

The game was over for almost an hour by the time Dan left Yankee stadium. In less than sixty minutes, 57,000 White people<sup>48</sup> had vanished back to their homes in mid-town, New Jersey or Connecticut, leaving behind the considerably less inviting streets of the South Bronx.<sup>49</sup> Of course, in all fairness, the game had really been over for two hours. Giambi hit a three-run homer in the seventh to make it six nothing. Dan sat in Goldman Sachs' luxury box for most of the game, stuffing himself with free hot dogs, beer, and gooey chocolate chip cookies. In the eighth inning, he spotted a friend from school sitting a few boxes down with guys from JP Morgan. A couple of hours later, Dan was alone in the Bronx, waiting for the southbound D train to stop along the 167th Street platform. It smelled like urine. Or maybe spoiled milk. Or maybe it smelled like both, the smells blending together in the warm, moist air of the subway tunnels.

Dan hated the subway. Everyday he thought about his Honda parked back home in Claremont, waiting for him, as well as Jennifer, the girlfriend he had effectively abandoned for three months. Despite luxury boxes, free food, and a big paycheck every two weeks, Dan cursed coming to New York. All the niceties were just opiates for the fact that he lived in a big, dirty, ugly blob of concrete. There were

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48. Of course, not everyone who attends a Yankee game is White. However, for Dan, everyone who attends the game is "safe." Consequently, use of the term "White" makes sense. This is one of the first fissures we see in Dan's external identity as an evolved, enlightened, and non-racist individual. Despite his adamant belief in equality, however, he perceives the people who attend the game with him—his people—as being White, even if they are not.

49. See David M. Levitt, *Once Shady, Now Trendy: South Bronx*, HOUS. CHRON., Sept. 3, 2005, available at [http://www.elliman.com/MainSite/Agents/News\\_Detail.aspx?BID=W](http://www.elliman.com/MainSite/Agents/News_Detail.aspx?BID=W)

AM&ID=989 (quoting Prudential Realty, which put this spin on the South Bronx: "New York's South Bronx, known in the 1970s for such violent crime and decay that one area police station was nicknamed 'Fort Apache,' is becoming a hot real estate market, with brownstones approaching \$500,000. Mott Haven, a neighborhood just south of Yankee Stadium, is the most sought-after area, with long blocks of brick townhomes and brownstones"). Whatever the validity (or invalidity) of Prudential's claims, realtors have now coined the term "SoBro" to increase interest in the area, mirroring trendy areas like "SoHo." *Id.*; cf. Tim Heffernan, *Close-Up on Mott Haven, Bronx*, VILLAGE VOICE, Sept. 28, 2005 available at [http://www.villagevoice.com/generic/show\\_print.php?id=68322&page=heffernan&issue=0](http://www.villagevoice.com/generic/show_print.php?id=68322&page=heffernan&issue=0) (asserting that the South Bronx is neither the safest place to be, nor the most dangerous, and that the "40th Police Precinct reported eight murders in 2004, down from 18 in 2001; 38 rapes, down from 55; 454 felonious assaults, down from 648; and 281 burglaries, down from 656").

way too many people, shoulder-to-shoulder, shouting and honking at each other. Stifling. Riding the subway each day was stifling. Shopping for groceries was stifling. Dan wanted to drive again. He wanted to roll the windows down, crank the stereo, and drive along the Pacific Coast Highway. He wanted authentic Mexican food.

Dan heard the rumble from deep inside the tunnel. The light began to emerge in the haze of dust. The wind blew over the subway platform, swirling dust up in the air, and Dan squinted. The downtown D train squealed, slowing down, and finally stopping. Plastered on the side was a sign warning passengers to not try riding on the outside of the train, depicting a black guy,<sup>50</sup> his arms and legs spread wide as he gripped the edges of the closed doors, hanging on for dear life.

The train car was mostly empty, except for an Asian lady at the far end reading a tattered copy of *People* with Tom Cruise and Katie Holmes on the cover, and an elderly black man who had fallen asleep, his face partially hidden by a brown velvet fedora.

Dan sat with his back to the line map. He leaned back and crossed his arms. The Yankee crowd was completely gone. He reached into his pocket and slid out his iPod. After hearing about people getting mugged for their iPods,<sup>51</sup> Dan switched out the trademark White ear buds for a less descript pair of black ones. He would wear the White ones again back in California. He chose “shuffle” and closed his eyes. Third Eye Blind’s “Jumper” began:

*I wish you would step back from that ledge my friend...*

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50. This is an actual sign I have observed. The motive for choosing a Black model for the image can only be speculated about. The two most logical conclusions are: (1) the transit authority is attempting to target the demographic they believe most likely to engage in such hazardous behavior, or (2) the transit authority is attempting to portray the demographic they believe most people would expect to see engaging in such activity.

51. See Ethan Sacks & Pete Donohue, *Music to Their Fears*, N.Y. DAILY NEWS, Mar. 29, 2005, available at <http://www.nydailynews.com/front/story/294403p252061c.html> (citing New York authorities that have recently noted a rise in subway crime, driven principally by thefts of mobile phones and iPods, and subway felonies were up 14 percent through March of 2005). One of the first lines of defense against being robbed is to replace the easily recognized White “ear buds” that come with the devices, so many have switched to using large, boxy earphones. *Id.*; see also *Apple Chief Phones iPod Victim’s Family*, THE AGE, July 7, 2005, <http://www.theage.com.au/news/world/apple-chief-phones-ipod-victims-family/2005/07/07/1120329533252.html> (noting that New York police have recorded dozens of robberies of the players, including a July 2, 2005, incident in which a 15 year old was stabbed to death during an iPod robbery). Apple CEO Steve Jobs subsequently called the boy’s father to offer his condolences. *Id.*

*You could . . . cut ties with all the lies you've been livin' in...*

Right as the doors slid shut, another group boarded, prying open the doors and squeezing through. They laughed loudly enough that Dan could hear them over the music. His eyes fluttered open.

Three black guys.<sup>52</sup> Two were clad in basketball jerseys and the other was wearing a grey hooded *Sean Jean* sweatshirt. The tallest of the three flopped down onto a seat and flailed out his arms. He cursed loudly before bursting out laughing like a hyena.<sup>53</sup> Over the music, Dan couldn't hear everything they were saying . . . occasional words spoken loudly enough to rise above Stephen Jenkins' whining.

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52. Yet another fissure in Dan's race-consciously evolved exterior appears. It can be assumed safely that had three White youth boarded the train, he would merely have noticed "three youth." Instead, he makes the racial distinction. See T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1066 (1991) (proffering that race does matter, as is evidenced by the fact that when people meet others race is one of the first characteristics noticed); see also Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 44 (1995) (clarifying why people notice race so early on in a relationship, stating, "It is essentially an involuntary cognitive response. But in noticing race, we perceive much more than simply color. We perceive, and thereby project, a set of qualities. This is not simply a perceptual path employed by Whites against non-Whites, rather it is a necessary heuristic practice that helps us to tentatively organize our reactions to safe and dangerous situations").

53. The conception of Blacks as uncivilized animals perseveres. Just as it did during times when explicit racism was more acceptable, these images have infiltrated the courts. Indeed, lawyers' in-court use of animal imagery to describe Black men in the post-civil rights movement era has not been uncommon. See N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1342 (2004) (reiterating that "lawyers have referred to Black male defendants as 'laughing hyenas out to kill someone,' 'vultures,' 'tigers,' 'mad dogs,' and 'animals in the jungle'" (quoting Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97, 136-37 (1997))); see also, Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1753 (1993) (condemning the use of animal imagery to portray the race of an individual). Cf. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 404-06 (1996) (maintaining that ambiguous behavior, when committed by a Black person, is perceived as more threatening than similar behavior committed by a White person). In a recent study, students were asked to observe arguments between two people during which one eventually pushed the other. *Id.* at 405. Different students were assigned to observe different mock altercations in which the people portraying the arguers were of different races. *Id.* Where the person who did the pushing was Black and the recipient was White, 75 percent of observers considered the push to be "violent" rather than an episode of "playing around." *Id.* at 405-06. In sharp contrast, when the pusher was White and the recipient was Black, 17 percent of observers perceived the push as "violent." *Id.* at 406.

“Nigga”-this. “Nigga”-that.<sup>54</sup> Everything they said was accompanied by broad gestures and laughter.

The pre-recorded conductor voice came over the speakers, reminding everyone to “stand clear of the doors while the train is in motion.” It was such a cheerful *White* voice. Dan never saw anyone but Blacks operating the trains. Maybe the New York transit authority thought the happy Anglo voice could put White passengers at ease while riding through the outer boroughs.

The train started to rumble along, accelerating down through the tunnel. Inside the train, it smelled like fried food and dirty grease.

Their gestures were severe, their long limbs rising and falling for emphasis.<sup>55</sup> They laughed, and Dan could see the flash of White and gold in their mouths. He couldn’t help but wonder what these boys<sup>56</sup>

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54. See Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 TEMP. L. REV. 129, 130, 191 (2003) (noting that the term “nigger” inspires fear, shame, guilt, anger, and even hate). “For many African Americans, the word evokes memories of subordination supported by and arguably ‘under-written’ by the law, including Jim Crow lynchings, lack of accommodations, and denial of civil liberties. The word is potent, with a vicious and negative connotation. Yet, the word—or derivations of it—has been embraced by popular culture and particularly rap music. Clearly, not all rap artists use the N-word, and even some that choose to do so appear to limit its reference. However, others embrace the term, suggesting that it is a term of endearment and connotes a brotherly connection . . . [M]usic is often passionately angry, intensely sexual, in a most brutal fashion, and speaks to money, sex and cars being demonstrative of power, and that power is conveyed in videos boasting of available sex, bouncing automobiles, and jewelry studded with diamonds and other stones. In a recent sampling of lyrics, one notices not only the anger and violence, but also sexual subordination and violence against women . . . In this light, contemporary artists who strongly embrace the use of ‘nigger’ appear more in profitable minstrelsy than independent artistry. Rap is a billion dollar industry, and sadly those who purchase ‘nigger’ in the newly redesigned Black signature, are perhaps buying the same old image, only now Blacks themselves dress it up. According to some statistics, over sixty percent of those who purchase this brand of rap music are Whites. Further, rap is not an exclusively Black enterprise as music moguls, most of those who successfully marketing rap music happen to be White.” *Id.*

55. See Duru *supra* note 53, at 1342 (conceptualizing the treatment of African-Americans in some criminal prosecutions as animalistic in nature).

56. Dan’s use of the term “boy” is significant in several ways. First, there is no indication that the “youth” are significantly younger than Dan himself. Further, the term is loaded with meaning from the vernacular of racism. The Supreme Court recently held that an employer’s use of the term “boy,” alone, may be sufficient evidence of racism. *Ash v. Tyson Foods, Inc.*, 126 S.Ct. 1195, 1198 (2006). The Court stated: “Although it is true the disputed word [‘boy,’] will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that

did. Did they have jobs? Maybe they all worked as vendors at Yankee stadium, selling cotton candy and peanuts, or maybe they worked making sandwiches at Au Bon Pain.<sup>57</sup> Whatever it was, they were

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modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous." *Id.* at 1197.

57. As Dan watches the African-American youth on the train with him, his perception of their possible employment ranges from minimum wage jobs—serving White people no less – to peddling drugs. In addition to the obvious bias of this, such attitudes sometimes manifest themselves in unexpected ways. For example, in the employment context, might Dan automatically discount the qualifications of a Black job applicant? While he certainly wouldn't refuse to hire someone because they are Black, he would likely perceive them as being less qualified. While the world has changed dramatically since 1964 when Title VII of the Civil Rights Act was enacted and made it illegal to discriminate in employment practices on the basis of race or gender, discrimination is still pervasive now more often in the form of stereotyping or unconscious bias. *See* Hart, *supra* note 3, at 741 (finding that the removal of explicit barriers to employment has not fully resolved equal opportunity concern, and that a decision making process where the subjective judgments of the selecting officials are the primary criteria is particularly at risk for this type of discrimination); *see also* Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d. 1303, 1309 (M.D. Ala. 2004) (noting that "[s]uch subjective decision-making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of—hence the difficulty of ferreting out discrimination as a motivating factor"). This problem is further illuminated by studies which have been conducted. *See, e.g.,* Hart, *supra* note 3, at 748 (writing that "[s]tudies of 'aversive racism' are especially interesting and potentially problematic for employment discrimination law, as they focus on the unconscious behavior of people for whom being unbiased is an important part of their self-concept . . . These studies suggest that aversive racists will not discriminate in situations where the discrimination would be obvious, but that because aversive racists do possess negative feelings, often unconsciously, discrimination occurs when bias is not obvious or can be rationalized on the basis of some factor other than race. In a particularly interesting study illustrating this point, researchers simulated an interview process in which job candidates ranged along a spectrum from unqualified to very qualified and included both Black and White applicants. White participants were asked to select from among groups of these job candidates. The self-described 'non-racist' study participants made apparently unbiased choices when Black candidates were either plainly qualified or plainly unqualified. But when these participants were presented with a marginally qualified Black candidate, they gave that candidate significantly weaker recommendations than they gave a comparably qualified White candidate").

Since Title VII liability demands conscious discrimination, a number of academics thus argue that Title VII falls short of its goals and should be revised so that it will explicitly cover instances of unconscious discrimination. *See generally* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 752 (2001) (arguing that "current legal doctrines are inadequate to handle contemporary manifestations of bias against women, racial minorities, and other disfavored social groups"); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal*



doing something to make money. Their throwback jerseys cost a couple hundred each when Dan checked them out at Nike Town a couple weeks before with his friend James. Sadly, the truth was that they were probably peddling baggies of marijuana on the corner. Maybe crack.<sup>58</sup>

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*Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (articulating frustration with Title VII due to the difficulty in proving unconscious racism); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2014-15 (1995) (theorizing that the difference between overt and unconscious racism often is the difference in a successful Title VII claim. Racist behavior, including employment discrimination, can in such cases be ascribed to the failure of decision-makers to reflect upon, and cleanse their decisions of, the unconscious bias underlying their decisions. In short, it is important that since the current law seeks conscious racism, and since unconscious racism can be just as – if not more – destructive, the law should be modified to accommodate this problem.

58. Despite Dan's belief that this is "the truth," the media-encouraged image of every Black youth as a crack dealer is a myth. See *United States v. Clary*, 846 F. Supp. 768, 783-86 (E.D. Mo. 1994) ("The media created a stereotype of a crack dealer as a young Black male, unemployed, gang affiliated, gun toting, and a menace to society."). Thanks to the racial disparity caused by the "100 to 1 ratio" and the mandatory minimum sentencing practices in the country, Blacks accounted for forty-two percent of all drug arrests in 1991 though they comprise only twelve percent of the population. *Id.* Blacks comprise 1.6 million of the illegal drug users while 8.7 million Whites admit to illegal drug use, yet Blacks are four times as likely as Whites to be arrested on drug charges. *Id.*; see also John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 599-616 (1991) (discussing racial aspects of the war on drugs); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 85-88 (1991) (providing a more thorough discussion of the destructive stereotype of Black youth as crack dealers). The stereotype of the Black crack dealer has been established and perpetuated in the media, particularly in hip-hop music. Rapper 50 Cent has used his past as a crack dealer unapologetically to acquire "street credibility" and sell more records. See Toure, *The Life of a Hunted Man*, ROLLING STONE, Apr. 3, 2003, available at [http://www.rollingstone.com/news/story/5939379/the\\_life\\_of\\_a\\_hunted\\_man/1](http://www.rollingstone.com/news/story/5939379/the_life_of_a_hunted_man/1) ("Consistency is the key to all success. If you can consistently sell crack without the cops comin', you gonna be successful. If you consistently put out quality material in your mix tape, it'll build anticipation for your album.").

As clear as the problem of stereotyping is in terms of intrapersonal discrimination, however, the problem also serves to further aggravate racism that occurs in the justice system. See Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97, 97 (1997) (utilizing both cultural studies and critical race theory to analyze criminal convictions and the broader social effects of the drug war's uses of gang lists and racial profiling). Analysis of patterns of law enforcement reflected in the conviction of a Black male shows how those patterns rely on the attributed identity of Black manhood. *Id.* The survey's goal was to "reveal and explain the very ordinary way that honest, careful people interpreted competing narratives presented to them, using the powerful constructed identity of a Black gang leader to take them

Dan felt bad thinking these thoughts. These guys weren't doing anything wrong. Just having a good time. Laughing and goofing around. And what was the difference between these guys and the NBA players and rappers Dan paid money to watch or listen to?<sup>59</sup>

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past reasonable doubt." *Id.* at 100. The jurors did not have to be explicitly racist; they simply had to accept the common sense meaning of Black identity. *Id.* at 101. Howarth demonstrates that the term "Black male gang member" prevents a defendant associated with that identity from being acquitted, regardless of actual innocence. *Id.* at 100-01. The popular construction of Black male identity is "frightening" and associated with gang membership. *Id.* at 105, 113. The prosecutor used those popular articulations of Black male identity during voir dire to distance the all-White jury from Blacks. *Id.* at 126. The jurors demonstrated their acceptance of those articulations of the meaning of Black male identity by accusing a Black police officer of being a spy for the defendant's gang. *Id.* Howarth connects those individual articulations to her overall conclusion that the content of the attributed identity "Black male gang member" brought about the convictions and death penalty in this case. *Id.* at 140.

59. Sadly, the success of African-Americans in the realms of sports and music often reinforces the belief that such avenues are the only way to escape a life of either minimum wage employment or criminal activity. Dan doesn't contemplate that they could be law students, medical students, or some other aspiring professionals. Instead, given the distressingly limited scope of his perception, they can only be low-wage service employees, drug dealers, athletes, or rappers. In the position of appraising job applicants, consequently, Dan no doubt would discount the qualifications of a Black applicant because of this presumption. See Hart, *supra* note 3, at 745 (discussing studies linking subconscious racism to the failure to hire qualified Blacks). Former Secretary of Labor Robert B. Reich explained that "subtle but pervasive patterns of discrimination dominate the public, private and nonprofit sectors of society because of a 'myopia' on the part of many White male managers who 'unthinkingly discriminate' without having any idea they are doing so." Catherine S Manegold, *"Glass Ceiling" is Pervasive, Secretary of Labor Contends*, N.Y. Times, Sept. 27, 1994, at B9, available at 1994 WLNR 3555677.

Unfortunately, many Black youth accept this idea as well. See, e.g., Richard E. Lapchick, *The High School Student-Athlete: Root of the Ethical Issues in College Sports*, in *THE RULE OF THE GAME: ETHICS IN COLLEGE SPORTS* 17 (Richard E. Lapchick & John Brooks Slaughter eds., 1989) ("Millions of America's youth surrender their opportunity for a meaningful education because they have bought the dream that they will beat the 10,000-to-1 odds of becoming a pro. Too many waste their shot at an education by pursuing eligibility and not educational skills."); Robert M. Sellers, *Black Student-Athletes: Reaping the Benefits or Recovering from the Exploitation*, in *RACISM IN COLLEGE ATHLETICS: THE AFRICAN AMERICAN ATHLETE'S EXPERIENCE* 143, 144 (Dana Brooks & Ronald Althouse, eds. 1993) (using statistics from the early 1990s to show that a Black high school football player had a one in forty-three chance of playing Division I football, and that player stood a one in 6318 chance of playing in the NFL). For young basketball players, the outlook was even bleaker. *Id.* A Black male high school basketball player had a one in 130 chance of playing Division I basketball. *Id.* The odds that he would eventually play in the NBA were 10,345 to one. *Id.* But, these high school kids see the "one" on television every night, and

The first one who'd flopped down on the seat was tall and lanky. Athletic looking. He might already have a basketball scholarship somewhere.<sup>60</sup> Allen Iverson dresses like a thug.<sup>61</sup> Who's to say one of these kids, especially the tall one, isn't the next Iverson with a million dollar shoe contract?

Something else had the group rolling with laughter. The one in the jersey still standing grabbed his crotch and started cackling and pointing at the one in the Sean Jean sweatshirt. He kept jumping up and down as the train continued along the tracks, slowing into the next platform. 155th Street. Looking around, Dan saw a bucket of fried chicken spilled across the floor. Judging from the smell, it had been there for awhile.

Dan shook his head and looked down. He needed something to read. Even a tattered, yellow copy of the *Village Voice* or *Metro* would do. He unclipped his Blackberry from his belt and started clicking through to whatever games he had on it. As the train trembled to a stop, however, he decided that using the Blackberry was like holding up a sign advertising he'd be a great person to rob. He clipped the Blackberry back into place along his belt. He pulled his shirt down to cover it, re-crossed his arms, and leaned back against the map behind him.

The train doors opened.

The Asian woman carefully rolled up her copy of *People* and

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never see the other 10,344. What should we expect them to think? Unless they are convinced that academic success is the road to prosperity, the troubling statistics will continue.

60. The most positive possibility Dan can think of plays directly into the cliché explored in the previous footnote. He never even contemplates the possibility that the student might be valedictorian of his high school or have an academic scholarship. See Sellers, *supra* note 59, at 144 (showing the very long odds of becoming an NBA player).

61. See Earl Ofari Hutchinson, *The NBA Dress Code: It's Not the Dress, It's the Stereotypes*, BLACK ATHLETE SPORTS NETWORK, Oct. 27, 2005, available at [http://www.blackathlete.net/artman/publish/article\\_01201.shtml](http://www.blackathlete.net/artman/publish/article_01201.shtml) (discussing the NBA's policy, effective November 1, 2005, implementing a dress code for all players that requires business casual attire whenever they are engaged in league or team business). The dress code, seen by many as a reaction to the increasingly "thug-like" attire and the negative publicity stemming from the Indiana Pacers/Detroit Pistons brawl last season, has been praised and criticized within the Black community. *Id.* Some have gone so far as to describe the policy as racist. *Id.* Others, however, including Charles Barkley, praised the policy and acknowledged that many Black youth who do not make the millions of dollars that NBA superstars still must bear the consequences of negative racial typecasting. *Id.*

tucked it neatly into her big fake Prada bag. She paused, making sure the train was at a complete stop and wouldn't suddenly surge forward and knock her over, then stood up and stepped out.

The old black man was still asleep. Dan wondered if he was supposed to get off five stops ago but fell asleep instead, maybe drunk, destined to wake up confused somewhere in Brooklyn without his wallet.

The black guys stayed where they were.

No one else got on.

The doors slid shut and the train rumbled along again.

Alone with the black guys—the sleeping old man didn't count—Dan felt different. He wasn't comfortable. The subway didn't feel the same way as rush hour in mid-town. He didn't like being the only White guy onboard.

On the iPod, the song switched. A Jay-Z song<sup>62</sup> came on. Dan

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62. Rap music, in many ways, serves to perpetuate stereotypes about Black culture, reinforcing negative goals for Black youth while further establishing the myth for Whites that Blacks are all crack dealers, "gang bangers," pimps, or all three. See, e.g., JAY-Z, *Rap Game/Crack Game*, on *IN MY LIFETIME*, VOL. 1 (Roc-a-Fella Records 1997). ("See that rap s— is really just like sellin smoke / We treat this rap s— just like, handlin' weight / What they want we give it to em, what they abandon we take / Hit a rapper with consignment, let him know it's at stake / Put his ass in the studio, let him cook up a cake / . . . / But first we scope s—, advertise in every area / Let the fiends know hey, we got some dope s— / Gon' need a middle man, so we look to radio / Let em test the product, give 'em a promo show / Just a breeze, not enough to catch a real vibe / Then we drop a maxi single and charge 'em two for five / Ain't tryin to, kill 'em at first just, buildin' clientele."). The song arguably endorses crack dealing, and the effect is obvious: youth — primarily Whites — looking to Jay-Z as a role model, may perceive such lyrics as an endorsement. See Barbara F. Meltz, *Rap Music is Parents' Proof Their Teens Need Their Help*, *BOSTON GLOBE*, July 22, 2004, at H1, also available at 2004 WLNR 3598230 (stating that 70 percent of White teens listen to rap).

White listeners might consciously separate lyrics from reality, but the subconscious nevertheless reinforces beliefs that Blacks are crack dealers. Rappers themselves likely realize this effect, yet persist in recording violent and misogynistic lyrics that reinforce the worst stereotypes about African-Americans. The record companies in turn market these lyrics in pursuit of the all important dollar. Drawing on literature provides a fit analogy. See Christian D. Rutherford, *"Gangsta" Culture in a Policed State: The Crisis in Legal Ethics Formation Amongst Hip Hop Youth*, 18 NAT'L BLACK L.J. 305, 328 (2004-05) ("The sickening corporate promotion of violence is reminiscent of the famous first chapter of the novel *Invisible Man* by the late Ralph Ellison. The book's hero describes something called the 'battle royal,' in which bankers, judges, lawyers, merchants and other respectable types round up 10 Black boys and place them, blindfolded, in a makeshift boxing ring set up in a ballroom. While the city fathers laugh, drink, smoke and curse, the boys blindly pummel each other bloody in a nightmare of degradation. At the end of it all, the men throw a few coins to the

turned it off.

Signs warn against it, but you can walk between train cars while they're moving. Dan remembered once during rush hour when a black guy and his son—the son was about seven but the father couldn't have been older than twenty-three or so—literally moved car to car, performing a dance routine to a hip-hop mix played on their boom-box, trying to score cash. Dan liked that the guy was doing something other than robbing or dealing drugs to make money,<sup>63</sup> but it still made him nervous. That day, Dan actually got up and moved between train cars to avoid the dance routine. There was nothing to stop him from switching cars again now. Except that it'd be obvious to them that he was trying to get away. And what if they followed him?

The two standing were still laughing. The tall one was more somber looking, gazing blankly ahead, his head bobbing up and down so slightly. His eyes were reddish, maybe from smoking pot. Dan noticed White wires running up to his White ear buds. *He* wasn't afraid of people knowing he had an iPod. The tall one had tattoos down the side of his neck. Lettering. It was hard to tell because the ink didn't stand out much from his chocolate colored skin.

Dan suddenly realized he was staring at them. Even worse, he realized that they'd noticed. The one in the Sean Jean sweatshirt cast a glare towards him.

It had been hard for Dan to come to terms with the fact that black people scared him.<sup>64</sup> A fat woman with cornrows sitting a few feet

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'winners'—and in a final spasm of humiliation, the coins are tossed onto an electric rug that delivers paralyzing shocks to the boys as they grab for the money, thrashing and howling in pain."). One can draw the same parallels with violent rap music. Similar parallels can also be drawn between modern rap music and the minstrel shows that enjoyed popularity many decades ago.

63. See Hart, *supra* note 3, at 741 (discussing how the removal of explicit racial barriers has not solved the problem of discrimination in employment contexts). In some unfortunate ways, merely seeing such an event might reinforce stereotypes that African-Americans lack other job skills.

64. Dan's denial of his internal racism and fear of "the other" is representative of the denial of racism that takes place both on the individual level and on the macro/legal level. See Lawrence, *supra* note 4, at 1370 ("It is difficult to speak about this fear because it requires us to think about racism in its crudest, most elemental form. If we fear for our child because most of the other children in her school are Black, it is likely that this fear is caused, at least in part, by a fear of blackness. . . . We are all frightened to some degree of things and people we do not know, but racism involves a particularly invidious form of fear of the other. None of us wants to think of himself as capable of this kind of thinking, much less admit that he would allow such thoughts to affect his behavior. Our natural inclination is to deny these beliefs and thus deny the fear of blackness."). Efforts to remedy institutional racism have

away during rush hour reading a Terry McMillan novel made him nervous. A lanky kid in Adidas sweats standing next to him at eight in the morning scared him. Three black youth, alone with him on a train in the Bronx after midnight absolutely terrified him. But this didn't make him racist.<sup>65</sup>

Dan loved rap. Kanye West's second album was genius.<sup>66</sup> One of

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become lost in White society's insistence that individual racism is no longer a problem. So long as people and institutions refuse to acknowledge the unconscious racism that exists, it is impossible to cure it. See Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 69 (1999) ("[E]xperiences tell me racism is beyond my comprehension, in part because I am not Black; in part because it is so irrational. I can state unequivocally, however, that if Whites were to cross the color line and develop meaningful and caring relationships with Blacks, racial justice would happen."). In terms of equal protection law, the intent standard actually serves as a mechanism to further deny ongoing racism. See generally Neil Gotanda, *A Critique of "Our Constitution In Color-Blind"*, 44 STAN. L. REV. 1 (1991) (arguing that the "colorblind" equal protection doctrine uses the intent standard as a subterfuge for avoiding acknowledging continuing racism); Lawrence, *supra* note 3 (arguing that equal protection's intent standard fails because of psychological instincts not to consider oneself racist). In the criminal context, unconscious racism proves to be just as problematic. See Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 264 (1996) (asserting that unconscious racism can influence perceptions of witness credibility). A manifestation of the subtle and often unconscious racial stereotypes judges hold is when judges make credibility decisions based on their life experiences and unconscious stereotypes of witnesses and parties. For example, a judge who subconsciously distrusts Black people may tend to disregard their testimony as unreliable and use the hearsay rule to keep it out. See, e.g., Andrew Elliot Carpenter, *Chambers v. Mississippi: The Hearsay Rule and Racial Evaluations of Credibility*, 8 WASH. & LEE RACE & ETHNIC ANC. L.J. 15, 15 (2002) ("[I]f a Black witness is testifying for a Black defendant, the judge may be more likely to exclude the testimony on the basis that it lacks probative value or is unreliable.").

65. See Johnson, *supra* note 5, at 1029-31 (explaining that for most people, an acknowledgment of their own racism diminishes their self image). The effect of diminished self-image is "particularly true for a person accustomed to thinking of racism as immoral, even criminal (which in its conscious forms, it certainly is), rather than as sick." *Id.* at 1030. One of the ways unconsciously racist people avoid thinking of themselves as "passive recipient[s] of a culturally pervasive illness" is to rationalize their opposition to racial change by coming up with nonracial reasons for their actions. *Id.* Significantly, "[i]n the context of criminal procedure decisions, finding a nonracial reason is particularly easy to do: one cites the guilt of the suspect." *Id.* at 1030-31.

66. Dan citing his love of rap is a clear attempt to deflect any introspection that might reveal him as a racist, akin to claiming "Black friends." See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 520 (1997).

his best friends, James, was black.<sup>67</sup> But he wasn't *black*. His *skin* was black, sure. He wore dark baggy jeans. The same throwback jerseys, Ecko, and Sean Jean stuff as the guys on the subway. But he wasn't *really* black.<sup>68</sup> He grew up in Costa Mesa. His dad was an accountant

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67. See *Views on Race in America*, BOSTON GLOBE, Sept. 14, 1997, at A31 (presenting the results of a national survey finding that 86 percent of all White adults said they had Black friends, and 54 percent of Whites reported having five or more); see also THERNSTROM & THERNSTROM, *supra* note 66, at 521 (citing a study showing that 73 percent of Whites surveyed in a national poll in 1994 said that they had "good friends" who were Black). However, merely having Black friends does not automatically acquit someone of possessing any racial attitudes. See *United States v. Clary*, 846 F. Supp. 768, 779 (E.D. Mo. 1994) ("In the 'enlightened and politically correct 90s, Whites have become indignant at the suggestion that they harbor any ill-will towards Blacks or retain any vestiges of racism. After all, they have Black friends. They work with Black people everyday. They enjoy Black entertainers on their favorite television programs every night."). While Whites may indeed have "Black friends," those friends are likely as culturally "White" as possible, allowing individuals to assuage fears of harboring racism while still maintain social comfort. *Id.* Moreover, though some White Americans' close relationships with Blacks as spouses, lovers, or friends give them the opportunity to observe and gain a greater understanding of racism, empirical data does not conclusively indicate whether personal interaction with Blacks increases Whites' sensitivity to the Black experience. See LEE SIGELMAN & SUSAN WELCH, *BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY: THE DREAM DEFERRED* 41 (1991) (indicating that Whites who have Black friends may still not be aware of the prejudice and discrimination Blacks face).

68. The differentiation referred to by Dan is sadly not unusual. See *Clary*, 846 F. Supp. at 779 ("As more well-educated blacks flowed into America's mainstream, Whites even began to differentiate between the kind of blacks who reflected White values and who were not like 'those other' blacks akin to the inner city stereotype."). What defines being "really Black" is fraught with stereotypes and concepts of what "Black" is supposed to be. See Kimberly Jade Norwood, *The Virulence of Blackthink and How Its Threat of Ostracism Shackles Those Deemed Not Black Enough*, 93 KY. L.J. 143, 149 (2004) ("De-blackening is both dehumanizing and offensive because it attacks the target's very existence. It attempts to deny the target's racial identity and cultural heritage. This phenomenon is in stark contrast to what happens in other seemingly similar contexts. For example, if a particular woman believes that women are not equal to men and that a woman's place is to be barefoot and pregnant at home, that woman may rightly be questioned and challenged for those views by other women. But she is not accused of not really being a woman, or of really being a man . . . There are a myriad of ways a person can be de-blackened. Proxies used to de-Black can be based on skin color, hair texture, wealth, academic success, where the target lives, how the target speaks, or the target's music preferences."). Transracial adoption serves an extreme example of being Black, but not "Black." See SANDRA PATTON, *BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA* 62-98 (2000) (discussing the range and complexity of racial identities among Black transracial adoptees and that many feel they have little knowledge or experience of Black culture and some even identify as White). But see RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION, RACE & IDENTITY: FROM INFANCY TO YOUNG ADULTHOOD* 222 (Transaction Publishers 2002) (1992) ("Black adoptees stressed their comfort with their Black

for Ernst & Young. Dan's was a tax lawyer. James was a finance major at UCLA. It was all the same species. Dan knew James bought the clothes with money his dad gave him – not cash scored peddling crack.<sup>69</sup> Or robbing White guys stupid enough to ride the subway late at night.

Being afraid didn't make Dan racist. It simply meant that he was smart enough to recognize a danger.<sup>70</sup> Dan couldn't imagine not hiring someone because they're black.<sup>71</sup> He couldn't fathom being on an all-White, lynch-mob jury that convicted someone based on skin color rather than evidence.<sup>72</sup> This was purely a matter of safety.

"You got a problem?" The one in the sweatshirt asked loudly. With his music turned off, Dan heard him clearly.

He swallowed.

The two standing had taken a couple steps towards him. The third was still seated, still bobbing his head with the music.

Dan shook his head. He thought, don't let them sense fear.<sup>73</sup> He felt his heart beat getting faster. Harder. His grandfather's words

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identity and their awareness that they may speak, dress and have different tastes in music than inner-city blacks—but that the Black experience is a varied one in this society, and they are not less Black than are children of the ghetto.").

69. This thought underscores the socio-economic factors that serve as a common denominator to bridge racial differences, while further heightening racial tensions among those of different economic classes. Dan's friend James might be Black, but he's "wealthy Black" as opposed to "poor Black." Wealthy Black is closer to Dan's own reality, whereas poor Black is something different, foreign, and frightening. See, e.g., WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 10-11 (1987) ("[I]t is not readily apparent how the deepening economic divisions between the haves and have-nots in the Black community can be accounted for.").

70. This perspective is not without advocates. See, e.g., GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 203-04 (1988) ("Given the tragic disproportion of crimes committed by Black youth, ordinary sensible people cannot avoid considering race, along with youth, gender, dress, and apparent educational level, in making a judgment about whether a group of youths on the subway bespeaks danger. . . . This is, of course, a form of racial stereotyping . . . We might all be fairer to each other if there were no such cues based on generalized experience, but how much can we expect of the ordinary person when he picks his seat on the subway?").

71. See Hart, *supra* note 3, at 741 (discussing employment discrimination).

72. See Powell & Hershenov, *supra* note 58, at 599-616 (discussing unconscious racism's affect on criminal justice).

73. See Duru, *supra* note 53, at 1342 (analyzing the likening of Blacks to animals). This is a further manifestation of Dan's deeply held attitudes, as well as the consequence of the pervasive reinforcement of stereotypes.



echoing. *It's you or them, Danny. You or them...*<sup>74</sup>

The train bucked a little and started to squeal pulling into the next station. The train was slowing and instead of the signs being a blur, they gradually became readable. It wasn't Dan's stop yet. Not even close. It was Harlem. 145th Street. Dan lived down in Greenwich. West 4th Street Station. A hundred and forty blocks away.

The platform was desolate. This was where the D, A, and C lines all slammed together but there were only a few people walking around. A couple of teenage girls out for a night of partying. Some guys dressed in janitor uniforms, either heading home to sleep or on their way to work the graveyard shift somewhere. They were all black.

Dan looked back over. The sweatshirt guy was still watching him. A smirk emerged.

As the doors opened, Dan stared out across the platform.

A cop leaned against the stairs a hundred yards down, smoking a cigarette.<sup>75</sup>

Dan quickly stepped off the train onto the platform. He didn't look back but listened to make sure he didn't hear footsteps following him. Finally, he heard the train roar away, leaving a swirl of dust in its path. He turned around to make sure they hadn't gotten off too. They hadn't.<sup>76</sup>

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74. See *United States v. Clary*, 846 F. Supp. 768, 778 (E.D. Mo. 1994) (discussing "us" versus "them"). It is also worth noting the relative harmlessness of what is actually occurring. As mentioned in the introduction, the narrator is *not* a reliable one. Here, a fairly insignificant event is incurring tremendous weight and meaning for both Dan and the narrator.

75. Since Dan does not note the officer's race, we can safely assume he is White. Otherwise, he would be a "Black cop," a "Mexican cop," or so forth. Also significant is the fact that Dan perceives the officer as signifying safety. See ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 205 (1990) (contrasting the negative perception of police held by minorities with the positive view held by Whites); see also U.S. DEPT. OF JUST., DEPT. OF JUST. STAT., *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 2000 124 (2001) (explaining that 53 percent of Blacks, compared to 28 percent of Whites, believe that there is police brutality in their area). Fifty-eight percent of Blacks, compared to 20 percent of Whites, believe that police do not treat all races fairly. *Id.* at 119. Thirty-six percent of Blacks, compared to 14 percent of Whites, express fear that police will arrest them when they are innocent. *Id.*; see also Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000) (examining empirical data regarding minorities' perceptions of fairness in the criminal justice system).

76. Dan fleeing the train, hoping the Black youth will not follow him, represents the problem of "White flight" from urban, racially mixed areas to more homogenous, White suburbs. Whites flee and look back hoping the minorities didn't follow.

III. OVERCOMING UNCONSCIOUS RACISM / *RIDING THE A TRAIN TO JFK, 3:30 A.M.*

Jet Blue red-eye flights are great, unless you find yourself heading to JFK at 3:30 in the morning to pick someone up. Still, Dan couldn't wait to see Jennifer. More than a month of separation was killing him. He'd looked into the different options getting to the airport without luck. A cab would cost fifty bucks and he couldn't get the Airport Shuttle web site to load. So Dan got on the Brooklyn-bound A Train at 3:30 in the morning. It was ironic. They had reservations that night at a restaurant where dinner for two would cost two hundred dollars, but there he was, alone, potentially risking his life to save forty bucks.

It'd take an hour and a half to get from West 4th to the Jet Blue terminal at JFK, including twenty minutes on the Air Train. He'd get there just in time to greet Jennifer as she got off the plane. Riding the subway at 3:30 a.m. was possibly the dumbest thing he'd ever done, but he did have the presence of mind to grab his grandfather's gun and tuck it into his waistband before leaving the apartment. After his last experience coming back from the game, maybe his grandfather wasn't completely wrong after all.

After West 4th, the A train made another four stops before

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Studies find that White homeowners flee once a certain (often small) percentage of nonwhite residents move into the neighborhood and it "tips" from non-minority to minority. See Bruce L. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 251-60 (1974) (suggesting that the tipping point ranges from twenty-five to sixty percent); Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 744-45 (2001) (suggesting the tipping point is forty percent). The reason for the "tipping point" is complex. See David R. Harris, "Property Values Drop When Black Move In, Because . . .": *Racial and Socioeconomic Determinants of Neighborhood Desirability*, 64 AM. SOC. REV. 461, 461 (1999) (suggesting that the tipping point may exist because some Whites simply dislike minorities and prefer not to be with or live near them, or that they dislike integration because they fear that it will cause White flight and, ultimately, force them to live in a predominately minority neighborhood); see also Cashin, *supra* note 76, at 742 (asserting that upper- and middle-income homeowners may flee integrating neighborhoods because they fear that lower-income minority neighbors will take advantage of the lower housing prices that typically follow White flight); Harris, *supra* note 76, at 464 (articulating the fear of upper- and middle-income homeowners that lower-income residents will cause a rise in taxes—increasing the demand for social and public services—because of higher rates of drug use, crime, and out-of-wedlock births associated with lower-income groups); Martha R. Mahoney, *Shaping American Communities: Segregation, Housing & The Urban Poor*, 143 U. PA. L. REV. 1659, 1661 (1995) (arguing that Whites may prefer to live near other Whites because "whiteness" connotes safe, stable, employed, and educated neighbors).

dropping down and going under the East River to Brooklyn. Dan had only ridden under the river once before—in the quest to eat what some claimed to be New York’s best pizza at Grimaldi’s—and it had unnerved him then and he walked over the Brooklyn Bridge to get home. It would be too easy for a terrorist<sup>77</sup> to board with a box full of explosives and kill everyone on board, trapped beneath the river.

When Dan got on, the train was populated with young men headed to work in the financial district<sup>78</sup>—the early risers at 3:30. There weren’t many of them, but there were a few, wearing French-cuff shirts, tagged with Blackberries. One clutched a cup of coffee. They all got off at Fulton Street, leaving Dan and a sleepy, middle-aged Mexican<sup>79</sup> lady in a nurse’s uniform, probably heading home from

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77. No race is specified here, but what is the natural assumption that you, as a reader, make? Do you envision a White terrorist? A Black terrorist? More likely than not, you envision a terrorist of Middle-Eastern descent. You are not alone. Even before the events of September 11, 2001, Arab Americans were frequently confronted by the terrorist stereotype. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN LAW J. 1, 13 (2001) (“Even though White American terrorists were quickly identified as prime suspects in the Oklahoma City bombing, Arab Americans across the United States reported a surge of harassment and intimidation in the following weeks.”). In Oklahoma City, a mosque was fired upon and a young Iraqi woman had a miscarriage after men shouting anti-Muslim epithets shattered the windows in her home. HUMAN RIGHTS WATCH, “WE ARE NOT THE ENEMY”: HATE CRIMES AGAINST ARABS, MUSLIMS, AND THOSE PERCEIVED TO BE ARAB OR MUSLIM AFTER SEPTEMBER 11 13 (2002), <http://www.hrw.org/reports/2002/usahate/usa110>

2/pdf. September 11th exacerbated the problem. While comprehensive and reliable national statistics are not available, Arab and Muslim groups report more than two thousand September 11th-related backlash incidents. *Id.* at 15. The Federal Bureau of Investigation reported a seventeen-fold increase in anti-Muslim crimes nationwide during 2001. *Id.* In Los Angeles County and Chicago, officials reported fifteen times the number of anti-Arab and anti-Muslim crimes in 2001 compared to the preceding year. *Id.*

78. Again, the assumption here is that they’re all White. Otherwise, Dan would no doubt note their race. See *supra* note 67. However, this serves as a secondary test of sorts for the reader: as you read the description, “wearing French-cuff shirts, tagged with Blackberries. One was clutching a cup of coffee . . .” and the fact they’re headed to the financial district to work, do you envision Whites? Blacks? Spot checks such as this can be particularly revelatory to evaluate one’s own harboring of racism.

79. In reality, she’s probably not Mexican in New York. More than likely, a Hispanic in New York would more accurately be classified as either Puerto Rican or another national origin. While 27 percent of the New York population was Hispanic, as of the 2000 Census, only 2.33 percent of the population was Mexican, compared to 9.85 percent Puerto Rican and 14.28 percent other Hispanic. U.S. Census Bureau, State and County Quick Facts: Manhattan, New York (2000), <http://quickfacts.census.gov/qfd/states/36/3651003.html>.

the night shift at the hospital. No one got on and Dan felt the pressure change slightly as they passed beneath the river.

Dan was dressed for work—after leaving Jennifer at his apartment so she could sleep off her red eye flight, he'd go to work for most of the day. He had on a pair of dark gray pinstripe pants from Banana Republic, one of the shiny, metrosexual belts that are so popular, a blue shirt, and a black nylon jacket that mainly served to hide the .357 revolver tucked into his waistband.

He tried to go to sleep early the night before, but couldn't manage to get his eyes shut before 11:30. He didn't get enough sleep to actually be *sleepy*. Instead, adrenaline kicked in and he was wide awake, but knew that he'd be borderline comatose in another couple hours. He definitely wasn't going to let himself fall asleep on the subway—not if he wanted to still have his wallet when he got to the airport. Dan felt his pocket, making sure it was still there. Back in California, he kept a thick wallet stuffed with his entire life—credit cards, IDs, social security card, photos, cash, everything—but gave it up for the summer in lieu of a more slender wallet he could keep in his front pocket, making it harder to swipe.<sup>80</sup>

The train slowed into the next stop. High Street. The doors slid open. No one got on. The Mexican lady got off, leaving Dan alone. The doors closed.

Dan leaned back, taking a deep breath and quickly exhaling.

Between lower Manhattan and the airport, there were a lot of scary Brooklyn neighborhoods. A lot of neighborhoods that aren't safe to ride through at three in the morning.<sup>81</sup>

Dan intentionally left his iPod back in the apartment, but now he wished he had it. An hour and a half was a long time. He'd picked up a free copy of *The Onion* by the subway entrance, but now he didn't feel like reading. He glanced around the train, looking for anything to amuse him. The train moved again, and he saw movie posters plastered against the wall at the subway entrance. One was for the new 50 Cent movie—a picture of the rapper's tattooed, bullet-scarred back with his arms out to the sides, a gun in his left hand and

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80. See NYC & Company, *supra* note 44 (discussing safety in New York). *But see* Sacks and Donohue, *supra* note 51 (discussing iPod thefts). To an extent, one must wonder whether New York is indeed less dangerous than often believed, or if the lower crime rate is more a product of people being particularly cautious.

81. The inference of “scary neighborhoods,” of course, is that the neighborhoods are “Black neighborhoods.” That said, at three in the morning, might Dan be somewhat justified in being concerned? Is that a racist fear?

a mic in his right.<sup>82</sup>

The train accelerated down into the tunnel, leaving the light of the platform behind. Dan looked up and saw the door between his train car and the next opening. Two young black men entered into the train car. Neither one looked happy—they looked more tired than anything. Dan slid his hand inside his jacket, feeling the gun nestled under his belt.

The first one who entered was shorter and heavy-set. His forehead was low and his nose was flat,<sup>83</sup> giving him a dumb look. Dan

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82. The poster for "Get Rich or Die Tryin,'" a film largely based on rapper 50 Cent's own life story, sparked controversy for the violent message and poster locations near schools and in high crime areas. See Eric Malnic, *Studio Cuts Back 'Get Rich Billboards,'* L.A. TIMES, Oct. 29, 2005, available at <http://www.calendarlive.com/movies/cl-me-billboards29oct29,2,481773.story> ("That sign is glorifying a dope dealer and the gang culture," said Royce Esters, president of the National Assn. for Equal Justice in America, a civil rights group. "They're recruiting wannabe gangbangers.""). AMC also reported that a couple of fistfights had broken out in its theaters showing "Get Rich." *Id.* Unfortunately, controversy continued once the film opened. The Loews theater chain pulled the film from a theater near Pittsburgh after a man was shot to death in the lobby the night of the film's premiere. See Jonathan D. Silver, *Fatal Shooting at Waterfront Theater Leaves a Trail of Blood,* PITTSBURGH POST-GAZETTE, Nov. 11, 2005, available at <http://www.postgazette.com/pg/05315/604747.stm>; see also "Get Rich" Pulled After Shooting, available at <http://www.cnn.com/2005/SHOWBIZ/Movies/11/11/film.get.rich.reut/index.html>. When news stories such as this one are seen or read by a White audience, what is the effect?

83. Dan's observations of the bone structure recall the pseudoscience of phrenology. Scientific racism was used to justify enslavement and disparate treatment of African Americans for a long time, particularly before the Civil War, when science provided a major justification for pro-slavery thinking. See, e.g., WILLIAM STANTON, *THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA 1815-1859* (1960) (outlining the principles of phrenology). Scientists were convinced of the innate inferiority of the slaves. *Id.* They were able to buttress their beliefs by drawing support from the latest research and most authoritative speculation in anthropology, anthropometry, phrenology, and egyptology. See I.A. NEWBY, *CHALLENGE TO THE COURT 8-9* (1967). These scientific attitudes regarding the inferiority of Blacks were not altered significantly by the Civil War or America's ensuing period of Reconstruction. *Id.* The mainstream of scientific thought after 1865 continued to articulate a belief in racial inequality. See, e.g., THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA 253-86* (1963) (explaining societal attitudes towards racism in the period from 1815 to 1915 in which science justified racism). The theory was embraced by the scientific community and endorsed by scientific luminaries including Thomas Edison. *Id.* While phrenology and eugenics largely have been dismissed, new theories persist in correlating race and intelligence. See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994) (arguing that the social ills of welfare, poverty, and underclass are a function of biologically determined intelligence, thereby implying that minorities, disproportionately represented in the

reminded himself that didn't necessarily mean that he *was* dumb. Just that he *looked* dumb. He was wearing a baggy, dark red shirt and his hair was pulled back in tight corn rows.<sup>84</sup> The other one that followed him in was taller and lankier. He wore a black, ribbed wife beater but definitely wasn't what anyone would describe as muscular. His arms were skinny, like long, dark ropes dangling from his shoulders. Tattoos ran down his arms. Letters. A picture of a gun. His head was shaved clean. The only jewelry he wore were big diamond studs in each ear. A red bandana stuck out the back pocket of his baggy charcoal jeans.

They didn't look towards Dan, but lingered at the front of the train where they entered. They didn't sit down, holding the metal pole instead. Traveling through the underground, it was them and Dan. For all Dan knew, there wasn't even a conductor operating the train. New York was experimenting with computer-operated trains that ran themselves.

Dan kept his eyes down, not wanting to draw their attention like the last time. This was such a stupid idea. Such an incredibly, outrageously stupid idea. For another forty bucks, he could be riding out to JFK in the backseat of a cab. Granted, the cab driver might be a terrorist,<sup>85</sup> but that wouldn't affect anything. Immediately, Dan

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lower-echelons of society, are genetically inferior to Whites). *But see* THE BELL CURVE WARS (Steven Fraser ed., 1995) (offering an expansive refutation of the claims advanced by Herrnstein and Murray).

84. Corn rows, as a hair style, are strongly identified with African-Americans and, in this context, further widen the chasm of "difference" in Dan's mind. Interestingly, the issue of corn rows—specifically whether it is racist to forbid them in the workplace—has been litigated. A Black flight attendant was denied relief by the Southern District Court of New York, which held that corn rows were not race specific. *See* Rogers v. American Airlines, 527 F. Supp. 229, 234 (S.D.N.Y. 1981); *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 366 (discussing *Rogers* and the implications of the ruling in perpetuating racial stereotypes while arguing that race is not a factor in the decision); Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN'S L.J. 115, 147-54 (2001) (discussing the value of hair in determining personal identity, the legal implications of restricting employee's hairstyles, and the emotional and psychological impact of the arguments posited in *Rogers v. American Airlines*).

85. This statement is a double-edged dose of racism. First, it is based on the assumption that taxi-drivers are of middle-eastern descent which is not automatically problematic. The greater evil comes in the implicit reasoning that ensues: all middle-easterners are hence cab drivers, and unable to do anything "better." Further, the second edge of racism is the implication that middle-easterners, already relegated to the lowly status of cab driver, are also terrorists. This attitude has manifested itself in

scolded himself for having that thought. It was such a stupid a stereotype.<sup>86</sup> The Arab terrorist... Instead, it was more likely that the Middle-Eastern taxi driver was working eighteen hours a day to put food on the table for his family. He probably had four kids and a wife he loved and did everything to support them.<sup>87</sup>

Looking at the two black guys at the front of the train, Dan reminded himself that the stereotype about the taxi driver was no more outrageous than the stereotype about them. For all he knew, they were law abiding young men who worked hard for everything they got, who treated their women right and supported their children.<sup>88</sup>

Still, it bothered Dan that they hadn't sat down yet. The train wasn't due to stop again until Lafayette Avenue, five more minutes according to the subway map. Why didn't they sit down?

Dan kept his hand on the gun, rubbing the barrel with his left index finger. Stereotype or not, there's nothing wrong with self-preservation. It's not like he was planning to gun them down like the psycho guy in the '80s.<sup>89</sup> That was crazy. But if they came and started

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acts of violence, such as the beating of a Pakistani cab driver in Chicago two days after the attacks of September 11, 2001. See ASIAN AM. LEGAL DEF. AND EDUC. FUND, REFUSE & RESIST, WORLD TRADE CENTER AND PENTAGON ATTACKS: THE ANTI-ASIAN AMERICAN BACKLASH (Oct. 5, 2001), <http://www.refuseandresist.org/imm/102101attacks/asian.html> (parenthetical needed); Judd Handler, *An Interview with Afghan Cab Drivers*, available at <http://www.juddhandler.com/articles/afghancab.php> (providing an interesting discussion of the struggles of middle-eastern cab drivers in the wake of September 11th).

86. Dan's recognition of the stereotype as such represents a significant stride to realize the broad implication of what he's thinking. Unfortunately, this is still an obvious example. Likening cab drivers to terrorists is a stereotype. Everyone knows that. See Handler, *supra* note 85. The difficulty comes in parsing out the other shades of racism that are not so readily identified.

87. A common mistake we make when trying to avoid racism is to push too hard in the opposite direction. Rather than vilifying them or portraying them as terrorists, criminals, and so forth, we instead anoint them as heroes. The hard working foreigner is just one such example. This is destructive not only because it perpetuates yet another stereotype, but that it sets up impossibly high, unrealistically noble expectations that we then impose upon others. For a particularly vulgar but intriguing example of this, see David Sedaris, *Town and Country*, GQ, Aug. 2005, at 100-03, an essay in which lofty and noble expectations for others, based on first impressions, are lewdly violated.

88. The embedded racism in this statement is somewhat obvious. Even in a best case scenario, Dan imagines the youth as unwed teenage parents. At best, he sees them as responsible enough to pay child support.

89. On the afternoon of December 22, 1984, four Black youth boarded an express subway train in the Bronx and headed south towards Manhattan. *People v. Goetz*,

something, he had protection. That's all it meant.

Dan peeked up at them. The short one was looking at him, but quickly glanced away.

Dan's first impulse was to grip the gun tighter, to grab it and take the safety off, but he didn't. This was silly. He was becoming his grandfather, driven to paranoia by tired stereotypes. Blacks are going to mug him, Mexicans'll steal his car, Jews will rip him off, and the Arab is gonna blow them all up with the C-4 strapped to his chest. So the guy was looking at him... So what? A week before, he got caught looking at the black guys coming back from Yankee Stadium. What was the difference?

He looked straight ahead and arched his back. Just a couple of guys riding home. Probably been working. Probably tired. No big

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497 N.E.2d 41, 43 (N.Y. 1986). The four youths rode together near the back of the seventh subway car. *Id.* Two of the four youths had screwdrivers inside their coats, which they said were to be used to break into video machine coin boxes. *Id.* Bernhard Goetz boarded this subway train in Manhattan and took a seat towards the rear of the same car occupied by the youths. *Id.* Goetz was carrying an unlicensed .38 caliber pistol with five rounds of ammunition in a waistband holster. *Id.* One of the youth approached Goetz and stated, "give me five dollars." *Id.* None of the youths displayed a weapon, but Goetz responded to the youth's demand by standing up, pulling out his handgun, and firing four shots in rapid succession. *Id.* The first shot hit a youth in the chest, the second struck another in the back, the third went through another's arm and into his left side, and the fourth missed, deflecting instead off of a wall of the conductor's cab. *Id.* After surveying the scene around him, Goetz approached one youth, Daryl Cabey, who was sitting on the end bench of the car and said, "You seem to be [doing] all right; here's another," and fired the last of five shots. *Id.* The bullet entered the rear of Cabey's side and severed his spinal cord. *Id.* at 44. Goetz told the conductor that the four youths had "tried to rip him off." *Id.* While the conductor was aiding the youths, Goetz jumped onto the tracks and fled. *Id.* Two youths, initially listed in critical condition, fully recovered but Cabey was paralyzed and suffered some degree of brain damage. *Id.* Goetz, hailed by many White New Yorkers as a vigilante hero, successfully argued self defense and was acquitted. Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 413 (2002). Goetz unsuccessfully ran for mayor of New York in 2002. *Id.* Patricia J. Williams provides a unique and provocative spin on the events of the Bernhard Goetz case. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 76 (1991). Williams offers to the reader a vignette about a "lone Black man" who shoots several young White students on an elevator, intending, he says, to murder them because he claims that he could tell from the students' "body language" and "shiny eyes and big smiles" that they meant to hurt him. *Id.* The vignette, of course, is really about Goetz. By reversing racial roles, Williams demonstrates how race affects people's interpretation of the event. This exercise inevitably forces one to confront his or her own racism, supporting the concept that—whether we like it or not—we are all racist. See generally Lawrence, *supra* note 3. Dan makes this realization at this juncture of the story.



deal.

Dan took his hand off the gun and set it at his side.

He laughed a little to himself. It was silly really. He had been so ridiculously scared. Terrified really. But the simple fact was, not every black youth in New York was walking around looking for a White guy to rob. And for that matter, they weren't necessarily all crack dealers either. As much as Dan hated to admit it,<sup>90</sup> as embarrassing as it was, he was almost as bad as his grandfather.<sup>91</sup> But at least Ted didn't try hiding it. At least he wasn't a hypocrite. Everything seemed so different.<sup>92</sup> The guys on the train weren't out to get him. They weren't crack dealers. For that matter, they weren't necessarily aspiring athletes, rappers, or day-laborers either. For all Dan knew, they could be NYU students. Dan couldn't help but think how often people who didn't know James might mistake *him* for a ghetto thug, decked out in the White sneakers and throwback jerseys.<sup>93</sup> Just because he's black.

They weren't too far from the next stop.

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90. See Johnson, *supra* note 5, at 1030 (noting that, for most people, including decision makers, an acknowledgment of their own racism diminishes their self image). This is "particularly true for a person accustomed to thinking of racism as immoral, even criminal (which in its conscious forms, it certainly is)—rather than as sick." *Id.* Consequently, coming to grips with one's own racism can be a difficult and even frustrating experience. *Id.*

91. In many ways, in fact, it might be said that Dan's racism has been partly inherited from his grandfather and family. It should be remembered that White ignorance of Black people, a simple lack of experience, not only fuels racism but is fueled by it. Segregation "is a basic part of the social process whereby systemic racism is reproduced from one generation to the next . . . [breeding] significant social and mental isolation." JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPRESENTATIONS* 132 (2000). Of course, Dan attended an integrated school and had "Black friends," but everything was filtered through the prism of Dan's family's unique socio-economic structure. We are segregated on a familial basis, as well as a geographic basis (Indian Wells or Claremont, rather than more diverse areas), thus fostering racism. Our predominant exposure to other cultures and races is delivered via mass media, which carries its own inherent biases.

92. See Lawrence, *supra* note 3, at 321 ("Much of one's inability to know racial discrimination when one sees it results from a failure to recognize that racism is both a crime and a disease. This failure is compounded by a reluctance to admit that the illness of racism infects almost everyone. Acknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure. But the diagnosis is difficult, because our own contamination with the very illness for which a cure is sought impairs our comprehension of the disorder.").

93. See SIGELMAN & WELCH, *supra* note 67, at 41 (citing studies that indicate that Whites who have Black friends may still not be aware of the prejudice and discrimination Blacks face).

Dan looked over towards the guys at front of the train. He made eye contact with the short one. Dan smiled.

The short one grinned back. His teeth were capped in gold. To Dan, it was still an uncomfortable look. It made him a little nervous still. James didn't have gold capped teeth.<sup>94</sup> That just seemed a few extra degrees more ghetto. Then again though, it was a popular look. It meant nothing. Nothing.

Dan closed his eyes and leaned back. Not a bad morning, really. Self revelation's not bad. Neither is overcoming something that's subtly plagued you for your entire life.

Nearing the station, Dan heard the guys walk closer to him, probably sitting down for the ride to wherever they were going. Maybe they were headed to meet somebody at the airport too.

"What you got for me?"

Dan opened his eyes. "What?"

"You heard me, White boy. What you got?" The short one was standing just a few inches in front of Dan, his arms at his side, glaring at him. "Me and my friend, we need some cash and you lookin' like a ATM to me."

"I don't understand..." This wasn't happening. This couldn't be happening.

The short one reeled back and knocked Dan across the mouth with the back of his hand. "What's not to understand?" He reached into his pocket and took out a small black handgun that he pointed at Dan, nudging it against his forehead.

Dan could feel his heart beating. His pulse accelerating. He couldn't breathe. Gasping for air, he tapped his pockets. Feeling for the wallet. Just give them the wallet. They want the wallet. Give them that and they'll leave. Reaching for his wallet, his forearm brushed the nylon jacket, pushing it back.

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94. See *id.* Partially as a result of his limited exposure to other races, Dan has based his concept of the civilized Black man entirely on his friend, James. Whatever James does—since James is safely located within his same socio-economic class—is normal. Anything that deviates from that ideal model, however, is different, and thus dangerous and scary. Of course, the trend of wearing gold teeth is a trend isolated far from the comfortable economic realm Dan ordinarily occupies. To be sure, other people perceive gold teeth as signifying trouble. See Sean Carter, *No Question of Ethics: Forget the Oxymoron Jokes, Legal Ethics is a Very Legal Issue*, 3 NO. 3 A.B.A. J. E-Rep. 7 (Jan. 23, 2004) (quoting a 2004 CLE article which concluded with the racially disconcerting advice, "And when all else fails, simply remember the Golden Rule: 'Never take on a client with one or more gold teeth.' You'll just have to trust me on that one").

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He immediately reached back to grab the jacket and pull it forward again. Too slow.

"Whoa. White boy's strapped! White boy's strapped!" The taller one shouted out loud and fast, taking a step back. The tall one was freaking out, scrambling backwards.

Dan glanced down and saw light reflecting off the barrel of the .357.<sup>95</sup> Too late to grab it.

At first it felt like a thickness in the side of his head. No pain really. Just thickness. Then a sudden deep pain. Deeper than anything he'd ever imagined. Everything felt warm. Hot even.

So hot.

He never heard the bang, maybe because the bullet passed through his ear drum, or maybe because it shattered his cerebral cortex and his central nervous system mercifully collapsed in an instant.

The air in his throat froze. Not going up or down. His chest contracted.

Sinking.

The short one moved in front of him, grabbing something. The gun? The wallet?

Didn't matter.

Still sinking.

The thickness increased. All his neurons began to fire at once.

He remembered third grade. Kicking a red ball.

Just a little kid.

The light got brighter.

And brighter...

#### CONCLUSION

To end the story with black youth killing Dan is a very deliberate decision, but not an easy one. Certainly, the more palatable and politically correct ending might have been as follows: Dan grows increasingly convinced that the black youth are going to hurt him

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95. See Arthur Kellermann and Don Reay, *Protection or Peril? An Analysis of Firearms Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557-60 (1986) (finding a homeowner's gun was forty-three times more likely to kill a family member, friend, or acquaintance, than it was used to kill someone in self-defense). The New England Journal of Medical study stated, "for every case of self-protection homicide involving a firearm kept in the home, there were 1.3 accidental deaths, 4.6 criminal homicides, and 37 suicides involving firearms." *Id.* While it is ultimately not Dan's gun that fires a lethal shot, its sheer presence serves to aggravate the situation and ultimately lead to violence.

and, as one moves towards him, pulls out the gun and shoots them, only to discover they were unarmed.<sup>96</sup> With that ending, the point would be clear: “look at how false the stereotypes are, and the horrible things that happen as a result of unconscious racism.”<sup>97</sup> However, racism is more complex than that. Sometimes, Blacks *do* kill Whites.<sup>98</sup> Whether we like to admit it or not, riding the subway through Brooklyn at three in the morning probably is not a wise decision.<sup>99</sup> Ultimately, I chose to end this story the way I did because of that ending’s value as a litmus test of sorts for the reader.<sup>100</sup>

The question is, when the black youth shoot Dan—making manifest his grandfather’s warning and his own fears—what is *your* reaction as a reader? Does the shooting serve to confirm your own fears and acknowledge that *yes*, black youth on the subway are indeed

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96. This was, in fact, the original ending. However, as the author, I felt it presented an over-simplified view of race relations. Another possible ending involved Dan being shot not by Black youth, but by White youth. This ending was more in keeping with my own experiences riding the subway—the scariest person I ever saw on a subway was a White guy, heavily tattooed, who kept yelling incessantly to his friends about how he was going to “cap that punk.” Unfortunately, that ending also avoided the full complexity of race in America and would have been an ironic ending and nothing more than that.

97. This was one of the major lessons that *could* have been learned from the Bernhard Goetz incident, but that somehow was largely ignored. See generally *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986). Indeed, this is also one of the principle ideas conveyed in writer/director Paul Haggis’ Academy Award winning film *Crash*. *CRASH* (Lions Gate Films 2005). Towards the film’s conclusion, an off-duty police officer (played by Ryan Phillippe), socially evolved and appalled by the overt racism exhibited by his partner, nevertheless shoots and kills a Black hitchhiker (played by Larenz Tate) he fears, only to realize afterwards that he was unarmed. *Id.*

98. Just as Whites kill Blacks, and Whites kill Whites, and Whites kill Hispanics, and Hispanics kill Blacks. In short, the world is a violent place.

99. Despite the oft-heard references to New York being the safest big-city in the United States, the question persists whether that status is attained not by a powerful police presence or lack of criminal element, but rather, by a general population that is wise to the ways of criminals and aggressively protect themselves by not displaying valuables in public and by avoiding certain areas after dark. See, e.g., *Guide to Safety in New York*, available at [http://www.nyctourist.com/nycinfo\\_safety.htm](http://www.nyctourist.com/nycinfo_safety.htm) (offering safety advice to people visiting New York City in order to prevent crime).

100. The ending’s purpose is more to trigger further introspection on the part of the reader, rather than to stand for any proposition independently. The point is definitely not that Blacks are criminals. Rather, the point is that the reader will interpret it that way. I should also note that the ending I chose effectively precludes ever publishing the story independently as a work of fiction. Without the guiding influence of the conclusion and footnotes, it would merely reinforce the stereotypes that I’m trying to challenge.

dangerous? Does this ending serve to strengthen and further embed fears or anxieties you might have already had? If the answer to any of these questions is yes, it serves to underscore the problem of unconscious racism. Even when we're acutely aware of it—after reading a lengthy discussion and deconstruction of it—we still are not immune from racism's influence. We are so thoroughly and completely infected that we interpret events that actually say very little about "race" to support our biases. Our perspective, particularly with regards to race, is skewed and we're inclined to shoe horn anything and everything that happens into our pre-existing concept of "how things are." In real life, ambiguous events will occur: when they do, what will our interpretation be?

Revisiting the story's end without forcing it to harmonize with our expectations, race was not actually a significant factor. For one thing, Dan's socio-economic status, not his race, likely made him a potential robbery target. Simply put, some guys on a train wanted money and approached a passenger. More than likely, they didn't care if he was White, black, or any other race: only that he had money on him. When they realized he was armed, they panicked and, in what *they* might perceive as self-defense, shot him. Race was never a factor. Yet many White readers will likely process this story in an overly simplistic and predictably race-conscious way: the Black guys murdered a White guy.<sup>101</sup> In doing so, they reinforce the stereotype of "Blacks-as-criminals."

If the roles were reversed—if Dan were black and his assailants White—would the reader walk away thinking that "Whites are criminals and killers?" The answer, in all likelihood, is a resounding no. If anything, they'd be surprised and perceive it as a stunning reversal of "what usually happens." The analysis is slightly less clear if Dan were White, but the killers Asian-American, but the answer is still "probably not." The idea of Asian-Americans as rogue thieves and killers on the subway would simply contrast too much with the stereotype we already embrace: the model minority that might belong in a physics lab at Columbia or NYU, but definitely not brandishing a gun on the subway. The already existing, established stereotype trumps the violent portrayal that conflicts with our expectations.<sup>102</sup>

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101. Readers of other races will also likely attach racial meaning to the story, but their interpretations will likely diverge in a variety of ways too extensive to discuss here. Similarly, not all Whites would interpret this story the same way.

102. This is by no means meant to suggest that the "model minority" stereotype is a good thing. Instead, it is meant to underscore the way that our perceptions are

However, we *do* think this when the assailants are black: it fits the stereotype that we have been taught and internalized, thus reinforcing it. It does not matter that a White person hasn't been murdered by an African-American on the New York transit system in more than ten years.<sup>103</sup> one violent occurrence—magnified by the media—outweighs a decade of safety in the public's mind and the exception is immediately perceived as the rule.<sup>104</sup>

No matter what we do to respond to unconscious racism, it is going to persist so long as racial stereotypes survive. Returning to the discussion of racism as a disease, the disparate impact doctrine is really just a topical remedy that lessens the symptoms without curing anything. To be sure, it is needed and can accomplish some good—protecting the fairness of a trial or hiring practice in the same way that Tylenol alleviates a sore throat. But the disease remains, fueled by persistent stereotypes that are perpetuated in the media and by society in general.<sup>105</sup>

The destruction of such stereotypes is difficult and demands a collective societal effort drawing upon unexpected resources such as the popular media. The news media revels in reporting racially-charged violence and White victims are generally considered “more sympathetic” than minorities.<sup>106</sup> Popular music—specifically rap and

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influenced by broad brush strokes and sometimes dueling stereotypes.

103. To be sure, the last instance of such racially charged violence was particularly severe. In 1993, Colin Ferguson, a young Black man, opened fire on the Long Island commuter train, killing six White passengers and injuring nineteen others. Charles Montaldo, Profile of Colin Ferguson, <http://crime.about.com/od/murder/p/frguson.htm> (last visited Sept. 1, 2006) (noting that Ferguson suffered from extreme paranoia that White people were “out to get him”).

104. See Duru, *supra* note 53, at 1342 (describing incidents in which the community was outraged when Blacks committed violence against Whites).

105. It might be argued that in the same way, this story perpetuates such stereotypes. That is a valid criticism and is a significant part of why this story will not be published independently as a story. The point is that, yes, the ending of this story does reinforce that stereotype, and that's the problem. An ending in which youth shoot and kill a train passenger should be unsettling and tragic. However, it should not suggest *anything* about race. The fact that the killers are Black and the victim White *should* be irrelevant. Unfortunately, that is not the case in contemporary society. While we should not extract from this story the thematic idea that “Blacks are criminals,” we do.

106. See Peter Downs, *Paying More Attention to White Crime Victims*, AM. JOURNALISM REV., Dec. 1995, available at <http://www.ajr.org/Article.asp?id=2016> (“A 1994 Chicago study on violence in television news and ‘reality’ programming . . . by Robert Entman, then an associate professor of communications at Northwestern University, found that, on average, stories about White victims of violent crimes lasted

hip-hop, revel in glorified violence, further exacerbating stereotypes in exchange for immediate wealth.<sup>107</sup> Black performers were often willing participants in minstrel shows of the 1920s and earlier that portrayed their race as stupid or lazy,<sup>108</sup> establishing stereotypes society has labored for decades to erase. Sadly, those minstrel shows have given way to today's rappers who willingly portray themselves as violent, carnal, weapon-brandishing, drug-dealers, establishing and reinforcing new stereotypes that will prove just as formidable to overcome.<sup>109</sup> Even seemingly positive and innocuous portrayals of African-Americans in popular media are fraught with racial stereotypes.<sup>110</sup> In a society self-segregated by socio-economic boundaries dictated by White flight,<sup>111</sup> this scant exposure to other cultures can easily establish and reinforce damaging stereotypes.<sup>112</sup>

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74 percent longer than stories about Black victims. The total time given to White victims was 2.8 times more than the total time devoted to both Black and Hispanic victims."); LORI DORFMAN & VINCENT SCHIRALDI, BUILDING BLOCKS FOR YOUTH, OFF BALANCE: YOUTH, RACE AND CRIME IN THE NEWS 7 (2001), <http://www.buildingblocksfor youth.org/media/mediaexec.pdf> ("Six out of seven studies that clearly identified the race of victims found more attention was paid to White victims than to Black victims."). "This prompted one researcher to coin the term 'worthy victims' to describe the greater coverage received by White crime victims compared to people of color." *Id.*

107. See, e.g., JAY-Z, *supra* note 62.

108. In the early twentieth century, several of the most famous minstrels were actually Black men who wore makeup—the most famous being Bert Williams, who performed in blackface into the 1920s. See George Mason Univ. Ctr. For History and New Media, The Minstrel Show, <http://chnm.gmu.edu/courses/jackson/minstrel/minstrel.html> (last visited Sept. 1, 2006). Williams performed for a time with a partner as "The Two Real Coons," a means of distinguishing themselves from the large number of blackface acts performed by White actors in burnt cork." See The Ca. Historical Jazz Dance Found., Bert Williams and George Walker, <http://www.caljazzdance.com/bert.htm> (last visited Aug. 15, 2006).

109. See JAY-Z, *supra* note 62.

110. ANDREW ROJECKI AND ROBERT ENTMAN, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 182-204 (2000) (noting that, for example, "Jerry Maguire" and "Independence Day" were blockbusters in 1996 for actors Cuba Gooding Jr. and Will Smith, and that looking closely at the characters portrayed by the African-American actors reveals that stereotypes persist. Gooding's football star character has talent, but also an ego and little financial knowledge. Smith's courageous fighter pilot dates a stripper with an illegitimate child. Even seemingly positive portrayals are often infected by unconscious racism).

111. See Harris, *supra* note 76, at 461 (offering observations on the trend of Whites avoiding living in the same neighborhoods as Blacks).

112. Admittedly, this introduces a bit of a "chicken or the egg" argument, as to whether the stereotypes fuel the unconscious racism, or whether the stereotypes are

As previously noted, most rap music is bought by White teenagers.<sup>113</sup> If those teenagers live otherwise isolated from African-Americans—perhaps because of the White flight on the part of their parents—such music may be their only exposure to that culture. When that exposure is fraught with references to drugs and violence, and in the absence of any positive, contrasting portrayals, the teenager inevitably will conceptualize African-Americans as violent and drug consuming.<sup>114</sup> The hope is that by targeting those teenagers (and others like them) from all angles—including education to teach them about racism, and greater social accountability on the part of the giant media corporations that profit from that music—those stereotypes can be dismantled.<sup>115</sup> Then, hopefully, it will be possible for someone to read stories or news accounts about a White man killed by black youth on the subway and interpret it as an isolated tragedy, rather than confirmation of their most racist beliefs.

The United States Supreme Court has famously claimed that we're only a few decades from this success.<sup>116</sup> However naïve that assessment might be, it at least provides a goal to work towards. But that assessment also carries risk as well: specifically, twenty years down the road, society will check its temperature, note the absence of

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the product of that racism. Regardless, it make sense to attack stereotypes in the hope that such action will also serve to weaken the unconscious racism pulsating through society.

113. See, e.g., Goodwin, *supra* note 54, at 191 (citing estimates that over sixty percent of consumers who purchase rap music are White).

114. See generally JAY-Z, *supra* note 62 (including lyrics which arguably glorify violence and crime).

115. In this regard, affirmative action, despite being well intentioned and encouraging the sort of diversity that could provide positive contrasts to the negative stereotypes put forth in the media, is self defeating. As Justice Thomas declared, "there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring). It is classification and judgment that gives rise to the divisiveness of racism. "A solution to the first problem that aggravates the second is no solution at all." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring).

116. See *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (explaining the need for diversity in academia and the Court's goal of eliminating racism).



obvious symptoms, and declare that racism has been cured while the disease still infects the very heart of society. The absence of burning crosses, White hooded infantrymen, and swastikas might convince some that racism is dead, while it is actually as well entrenched in our society as it has ever been. As discussed earlier, many of the techniques for addressing unconscious racism amount to little more than topical remedies. Other than alluding to a few possible solutions, the main purpose of this article is diagnostic—not prescriptive. The hope is to trigger introspection on the part of the reader and reveal unconscious racism. Simply recognizing it is not going to eliminate it. However, as long we know unconscious racism exists—even within ourselves—we'll keep working against it, rather than mistakenly believing it's already gone because no one is burning a cross on our neighbor's front lawn.