

Dan the Xenophobe Rides the A-Train

or

THE MODERN, “SECRET” RACIST: UNCONSCIOUS RACISM IN “ENLIGHTENED AMERICA” AND THE DESTRUCTIVE STEREOTYPES THAT FUEL IT

By Richard Salgado

I. 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.¹ Such racism still thrives in isolated cases, but it is generally shunned by the population at large.² Unfortunately, it is only *that* racism—the easily identified and readily suppressed strain—that is waning. *Unconscious* racism, less obvious but every bit as destructive, is still rampant.³ Despite whatever convictions and belief in equality we preach, we are all racist.⁴ This racism undermines

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

² Admittedly, even the most overt, repugnant racism still flourishes not just among certain demographics, but in certain regions of the country and even in corporate America. See PAUL M. BARRETT, *THE GOOD BLACK: A STORY OF RACE IN AMERICA* (1999). However, by and large, and within the parameters of what is typically referred to a mainstream society, such attitudes are certainly avoided. 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 (2000) (finding no evidence of overt racism):

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.

Id. at 1186. *But see, infra* note 28 (discussing the vulgar racism espoused by groups such as National Vanguard).

³ This equally problematic but more hidden racism was perhaps most prominently discussed by Charles R. Lawrence in *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987), and has been a frequent subject of discussion since then. See, e.g., Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative To Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 560 (2003); Melissa Hart, *Subjective Decision Making and Unconscious Discrimination*, 56 ALA. L. REV. 741, 791 (2005); Reva B. Siegel, *Discrimination in the Eyes of the Law*, 88 CAL. L. REV. 77, 118 (2000).

⁴ See Antony Page, *Batson’s Blind Spot: Unconscious Stereotyping and the Preemptory Challenge*, 85 B.U. L. REV. 155, 160 (2005) (“We have all learned stereotype 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, 1370 (2005):

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

even the best intentioned social programs and legal approaches.⁵ 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 establishes that unconscious racism infects not only policy and justice decisions, but daily interaction as well. More provocatively, it argues that existing responses to unconscious racism—such as disparate impact doctrine⁶—might provide relief in the short term but are ultimately inadequate as society continues to generate and reinforce destructive stereotypes. Treating unconscious racism as a disease⁷ or 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.⁸ Discussion of racism often demands the complexity of traditional legal academic writing, but its heart is found in the daily interactions of ordinary people: the way a white woman might clutch her purse when a black man gets into the elevator with her, and the way people lock their car doors when driving through the “black part of town.” The medium of fiction explores such interactions with greater feeling and immediacy.⁹ In order

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 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.

⁵ In addition to personal interactions, unconscious racism has been identified as potentially problematic in a variety of settings ranging from employment and hiring decisions to criminal trials and law enforcement. *See generally*, 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 (2003); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); 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).

⁶ *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (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. Essentially, disparate impact doctrine allows for a pattern of discriminatory results to substitute for a direct showing of discriminatory intent, acknowledging the difficulty of proving mental states. *Id.* at 533.

⁷ *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.”).

⁸ Racism is unlikely to abruptly end, despite the optimism of the “Sunset Clause” articulated by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). While it is certainly an admirable goal, it also strikes many observers as unrealistically optimistic. *See, e.g.*, Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191 (2004) (arguing the goal to be impractical and unrealistic).

⁹ To be sure, the value of fiction to the discussion of law is by no means a new idea, as attested to 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. Marijane Camilleri, *Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury*, 39 CATH. U. L. REV. 557, 557 (1990). Legal “realists” began to question whether legal principles alone should dictate or explain outcomes, and literature was identified as one field that could be used to supplement, enrich, or correct legal principles. *Id.* 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, e.g.*, Jane B. Baron,

to engage racism at its most basic level, while still drawing upon legal scholarship, this article is written as a short story, but footnoted like a traditional 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 his perspective on life in general, including his attitudes and beliefs.¹⁰ 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.¹¹ Admittedly, this story—like any story—is subject to the author’s own biases.¹² It would be naive to not recognize that unconscious racism inevitably¹³ impacts this work, just as it colors a reader’s unique interpretation of it.¹⁴

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

Law, Literature, and the Problems of Interdisciplinarity, 108 YALE L. J. 1059, 1074 (1999) (classifying law and literature as an enterprise); 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 (1995) (referring to the law and literature movement); William H. Page, *The Place of Law and Literature*, 39 VAND. L. REV. 391, 415 (1986) (book review) (“The modern field of law and literature . . .”); Gretchen A. Craft, *The Persistence of Dread in Law and Literature*, 102 YALE L.J. 521, 523 (1992) (“The development of the law and literature movement . . .”)

¹⁰ The narrator should be interpreted as representing Dan himself—his ideas, beliefs, racism, and embarrassment. The narrator is only as reliable as Dan is in assessing his own shortcomings (not very). In short, it is as if Dan himself is narrating the story. As the author, I have chosen this perspective because of my desire to fully inhabit the limited perspective of Dan, including his cultural and social blind spots, while maintaining a stylistic preference for the third-person narrative style over the first-person style.

¹¹ I should also mention that I have not inserted a footnote everywhere I *could*. There are various examples of racism, some very subtle, embedded throughout the narrative which I’ve intentionally left un-noted, thus 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 it as legitimate observation?

¹² Here, by inhabiting a white male perspective, my hope is that whatever unintentional biases I unwittingly infuse into the narrative may be deconstructed along with those of the protagonist.

¹³ I say “inevitably” because, as much as I might try to write objectively, I’m still vulnerable as an author to the same biases that affect anyone else. As Charles Lawrence described, “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 racism: everyone is subject to it in some way, including even the person who points it out and *you* as the reader. For example, the obvious and immediate criticisms of this article are the “white perspective,” as well as the decidedly “male” perspective (there is nary a single female character, unless you count a female train passenger who never utters a word, or 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.

¹⁴ The reaction to the “story” will likely vary across different racial lines and experience sets. That is to be expected. A middle-class white reader may empathize with some of Dan’s feelings, but then be appalled at the result of those feelings. The hope is that the reading process will then force that reader to undergo introspection about their own attitudes. This experience is likely very different for a Hispanic or Black reader. It is my hope that for those readers, this might serve as a revelatory peek at the heart of white unconscious racism. No doubt, unconscious racism exists among Hispanics and Blacks too, but it is only possible for this article to address one such perspective.

accompanying denial. Section IV focuses on possible approaches to mitigate unconscious racism, and the stereotypes that fuel it. Section V offers a brief analysis of the story's ending.

II. THE DEMISE OF OVERT RACISM/ *Barbecue in Indian Wells*

Dating back to when Dan was a three foot-tall, Osh-Kosh clad, Ritalin-munching¹⁵ 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 divorced four years ago when Dan was a senior in high school,¹⁶ but Dan still wound up gnawing on a hotdog in his grandparents backyard only two weeks after the divorce was finalized. Last year, Diane died. 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—then just Ted—lived in Indian Wells,¹⁷ near Palm Springs. The hour drive from Claremont¹⁸ was always fine. The heat was the problem. Barbecues, by their very

¹⁵ The reference to Ritalin is not mere characterization. There are clear ethnic differences between who does and does not use Ritalin. See Lawrence H. Diller, M.D., *Controversies in the Diagnosis and Treatment of ADHD: One Doctor's Perspective*, Healingwell.com, available at <http://healingwell.healthology.com/healingwell/14911.htm>. While over-diagnosis of ADHD and the subsequent prescribing of Ritalin is an increasing problem, African American children are conspicuously absent in the ADHD/Ritalin epidemic. *Id.* 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. *Id.* 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. 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. *Id.* The inclusion of this detail is meant to underscore one of many details regarding how different the protagonist's own upbringing is from that of racial minorities and how unexpected social factors further widen the racial divide.

¹⁶ The divorce rate is very similar for blacks and whites. About 36% of blacks have divorced, compared with 34% of whites. See, Karen S. Peterson, *Black Couples Stay the Course*, USA TODAY, March 7, 2000, available at <http://www.divorcereform.org/mel/rdivorceblack.html>. However, divorce and marriage play much bigger economic roles for black children than white children in the United States, according to a recent study. Marianne Page and Ann Huff Stevens, *Understanding Racial Differences in the Economic Costs of Growing Up in a Single Parent Family*, 42 DEMOGRAPHY 75 (2005). In the first two years following a divorce, family income among white children falls about 30 percent, while it falls by 53 percent among black children. *Id.* This difference increases dramatically in the long run. *Id.* "Three 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*, 86, Table 14. in URBAN UNDERCLASS, BROOKINGS INSTITUTION (1991).

¹⁷ Somewhat ironically for a community with the word "Indian" in its name, the city of Indian Wells is the whitest city in Southern California. Dowell Myers & Julie Park, *Racially Balanced Cities in Southern California, 1980-2000*, USC SCHOOL OF POLICY, PLANNING, AND DEVELOPMENT, Appendix B: Racial Composition of Southern California Cities 1980 – 2000 (2001). As of the 2000 Census, Indian Wells' population was 94% white—two percent more diverse than in 1990. *Id.* Less than one-third of one percent of the population is black. *Id.* According to the official website, "the city 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

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 middle of the backyard. The lawn was neater than Dan remembered, back when Ted mowed it himself instead of hiring a Mexican.¹⁹ The Mexican²⁰ invariably did a better job.²¹

Wells, and sponsorship of major cultural and sporting events.” See Indian Wells webpage, at <http://www.ci.indianwells.ca.us/page.cfm?content=7>.

¹⁸ Claremont, in contrast to Indian Wells, is 66% white, 5% black, 13% Asian, and 15% Hispanic. Myers & Park, *supra* note 17. 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, along with Claremont and Keck Graduate Institutes. See, *Welcome to the Claremont Colleges*, available at <http://www.claremont.edu/> (last visited 11/05/05). Given the perceived notion that with education comes greater awareness, it made sense that Dan would be raised in a more evolved and educated community where overt racism would be socially castigated.

¹⁹ This paper, though acknowledging strained race relations among many races, is primarily focused upon the black/white divide, largely for the sake of brevity. An unfortunate affect of this is that in so doing, this paper unwittingly plays into what some have perceived as prioritization of racial disharmony in terms of awareness. Essentially, that the black/white difficulties consume so much attention that other groups, such as Mexicans, are neglected in such treatment. 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 (2003). No such slight, of course, is intended. As Luna points out, however, such a slight is somewhat inevitable and nonetheless problematic.

²⁰ An ongoing theme throughout this short story will be the casual reference to minority racial groups as all ascribing to a singular “type” or “stereotype.” Various ends are served by this. First, for Dan and others like him, the Mexican gardener may be his or her only exposure to a member of that ethnicity (though probably not the case in an area as Latino-centric as Southern California). Second, I endeavor to point out the overly broad classification occurring: simply put, all Latinos and Spanish-speakers are not “Mexican,” yet that erroneous catch-call term becomes the popular term to refer to anyone who fits that category. Finally, it is important to acknowledge that Mexicans, and Latinos, do often occupy positions such as that of a gardener. Unfortunately, this fact leads many to falsely conclude that since most gardeners are Latino, therefore most Latinos are gardeners—the sort of reasoning error one might seek to identify on the LSAT. While a particular role in society might be most visible to those with a limited perspective and exposure to other cultures, that underscores the limitations of that perspective and says little about the culture itself.

²¹ Is this a stereotype? When you, as a reader hear 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* (the “hard working” Mexican, for example, is a positive attribute), all stereotypes are nevertheless destructive as they narrow and constrict the concept for the uninformed of what a minority is. For example, if a Mexican is “hard working,” does that then also connote that they are *not* intelligent? Or that they *have* to be hard-working because they can’t get an office job? Even more troublesome, might such attitudes affect hiring decisions when deciding between a Mexican-American and another race? Suddenly, that “positive” stereotype is destructive (similar to how the Asian-American “model minority” stereotype creates blindness to problems that do exist in the Asian-American community). See, e.g., Selena Dong,

“Yep.” Dan nodded.

“That really what you want to do? Money stuff?” Troy was a bright kid growing up, but then discovered methamphetamine and psychedelic trance music his freshman year, cleaned up as a senior, and enlisted in the Marines nine days after graduation.²² He was a good kid though.²³

“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 gave him at Christmas. She’d be happy to see him wearing it. 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 bought a lifetime supply of apple cinnamon air fresheners.

Too Many Asians: The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action, 47 STAN. L. REV. 1027 (1995).

²² Despite experiencing serious drug problems during his youth with the drug of choice—methamphetamine—Troy was nevertheless eluded criminal punishment and was able to successfully enlist. Would the same be true if he were black and the drug were crack, rather than methamphetamine? Despite similar usage rates, studies have indicated a disproportionate enforcement of drug offenses that works against blacks and favors whites. *See, e.g.*, Floyd D. Weatherspoon, *Racial Profiling of African American Males*, 38 J. MARSHALL L. REV. 439 (2004). Relative to Troy’s career choice, the Marine Corps has the second highest percentage of white enlisted soldiers (67.4%), and the lowest percentage of black soldiers (16.8%). POPULATION REPRESENTATION IN MILITARY SERVICES, OFFICE OF ASST. SECRETARY OF DEFENSE, table 3.3, 1999, *available at* http://www.dod.mil/prhome/poprep97/html/3-race_ethnicity.html. The Marine Corps has experienced slight decreases in Blacks during recent years, paralleling a decrease in the propensity to enlist among black youth. *Id.* Meanwhile, enlistment among white high school graduates with no college education has increased. *Id.*

²³ In what ways do these portrayals of semi-affluent whites *also* reflect stereotypes? Should these stereotypes be distinguished from the stereotypes of minority groups, or are they just as destructive? This question is one which permeates this article: are *all* stereotypes bad, or just the negative ones?

They sat down across from each other in the living room. Ted in the recliner. Dan at the edge of the velvet orange and brown 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 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.²⁴ 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*.²⁵ You know what they did to *him*? They shot him dead.²⁶ Wanted his wallet and he was too slow getting it out. So they killed him.”

²⁴ Indeed, New York has changed considerably in terms of racial complexion. See MITCHELL L. MOSS, ANTHONY TOWNSEND, & EMANUEL TOBIER, *IMMIGRATION IS TRANSFORMING NEW YORK CITY*, Taub Urban Research Center, NYU (1997). Based upon an analysis of data gathered by the U.S. Census, Hispanics have replaced blacks as the second largest racial/ethnic group in the five boroughs. In 1996, there were 1.926 million Hispanics in New York City, an increase of more than 143,000 from the 1.783 million recorded in the 1990 U.S. Census. *Id.* Interestingly, New York is now also considered America's safest big city. See *infra* note 41.

²⁵ Throughout this story, the word “them” is frequently used to refer to individuals of African-American descent as a single collective group. The term is used overtly by Ted—signifying overt racism—and in the narrative which reflects the internal thoughts of Dan—a more subtle, unconscious form of racism that typically goes unspoken. Such grouping causes for a small group of minorities to be taken as representative of an entire culture. Further, the use of “them” essentially serves to depersonalize other races and signify 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,

“Awful.”

Ted shook his head. He undid the twine wrapped around the shoe box. “It’s a war—that’s what it is. Not human. Look at what happened a couple years ago. Burning down their own neighborhoods. Looting their own stores,”²⁷ Ted tossed the twine off to the side. “Try telling me *that’s* 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.”²⁸ Not to even mention looting and stealing. They turned the place into their own jungle.”²⁹

including jury trials where a white jury decides the fate of a black defendant (or vice-versa). See BENJAMIN FLEURY-STEINER, JURORS’ STORIES OF DEATH: HOW AMERICA’S DEATH PENALTY INVESTS IN INEQUALITY (Race is often a factor in sentencing and that the U.S. justice system can foster an “us versus them” mentality among jurors serving in capital trials). See also, *Clary* 846 F. Supp at 778 (discussing “us” and “them”).

²⁶ *Juvenile Center Counselor Killed; Two Teens Arrested*, ST. PETERSBURG TIMES, available at <http://www.sptimes.com/2003/11/11/Worldandnation/shtml>. The closest real-life event that the author could locate paralleling this was in Grove City, Pennsylvania where two teens at a youth residence murdered their counselor. *Id.*

²⁷ 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. JOE R. FEAGIN & HERNAN VERA, WHITE RACISM 83-84 (1995). Over fifty persons died, and over 2,400 persons were injured, during the riots. *Id.* Estimates of the value of property destroyed or damaged during the riots run in the billions of dollars. *Id.* at 97. Interestingly, only 36 percent of those arrested for looting and violence in the riots were black (51 percent of those arrested were Latino, making the riots and looting predominately Latino if one is to assume the arrest rate mirrored actual participation). CORNEL WEST, RACE MATTERS (1993). For a discussion of the media’s mis-portrayal of the riots as a Black/White and Black/Korean event, see Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 967-70 (1995) (“Most of the early victims of crowd violence were Latinos; one-third of the dead were Latino; between twenty and forty percent of the businesses damaged were Latino owned; and one-half of those arrested were Latino. Particularly by the beginning of the second day, the Los Angeles riots were heavily Latino riots, not black-white riots.”).

²⁸ 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. Despite this article’s assertion that overt racism is on the decline, very strong and appalling racist attitudes still exist among some and are occasionally expressed. One of the most repugnant responses to Hurricane Katrina came from the neo-white supremacist group National Vanguard. See, e.g. Kevin Alfred Strom, *If You Tolerate This*, NATIONAL VANGUARD, available at <http://nationalvanguard.org/story.php?id=6183>. In a web article, including pictures of black looters, the organization declared:

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.

Id.

The attitudes and perspective of National Vanguard are utterly appalling, disgusting, and would be condemned by the majority of Americans—at least one would hope. Fox News, a day before the major evacuation of the Superdome began, issued an “alert” with reports of “robberies, rapes, carjackings, riots and murder. Violent gangs are roaming the streets at night, hidden by the cover of darkness.” Susannah Rosenblatt and James Rainey, *Katrina Take a Toll of Truth, News Accuracy*, L.A. TIMES, September 27, 2005, available at <http://www.latimes.com/news/nationworld/nation/la-na-rumors27sep27,0,5492806>,

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.³⁰ He had to keep reminding himself, his grandpa was a product of a different time.³¹ It was always this way, whenever he watched the news and saw a story about a car jacking³² or a rape. It came up watching sports when he'd say things like "look at the little monkey run."³³

full.story?coll=la-home-headlines In retrospect, the reports were grossly exaggerated. Inflated body counts, unverified "rapes," and unconfirmed sniper attacks are 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 told a national television audience on "Oprah" of 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.

²⁹ The political philosopher, Charles W. Mills, effectively describes the causes of racial stereotyping. *See* CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997). Mills theorizes that a contract exists between people of European descent, whereby peoples around the globe are stratified according to their race. *Id.* The lighter a group's skin is, the closer to "civilization" they are. *Id.* Alternatively, darker-skinned peoples are thought to live in a "state of nature." *Id.* 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. Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 *CARDOZO PUB. L. POL'Y & ETHICS J.* 131, 182 (2003).

³⁰ Ted is meant to represent overt racism. While instances of pronounced racism and bigotry still exists, *see e.g., supra* note 28, they are progressively rarer. There is a realization 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." *Clary*, 846 F. Supp. at 779.

³¹ 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. There does appear to be correlation between age and long-held, stubborn racist attitudes. *See e.g.,* 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). These data do 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.

³² In reality, victims identified the offenders' race as white in 32% of all carjackings, black in 49%, and Asian or American Indian in 6%. Michael R. Rand, *Carjacking: National Crime Victimization Survey*, U.S. Department of Justice, *available at* <http://www.ojp.usdoj.gov/bjs/pub/ascii/c.txt>. While the largest share of carjackings were indeed committed by blacks, they did not constitute a majority of all carjackings. *Id.* Further, blacks were twice more likely than whites (.4 and .2 respectively) to be victimized by carjacking, debunking the myth that car jacking is primarily a black on white crime. *Id.*

³³ During a Monday Night Football telecast, 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." Leonard Shapiro, *Cosell Set Sports Journalism Standards, Obituary*, *WASHINGTON POST*, April 25, 1995, *available at* <http://www.washingtonpost.com/wp-srv/sports/longterm/memories/1995/95pass13.htm>. Cosell's lapse of judgment as been discussed as both a watershed event regarding race in America and as an example of when unconscious racism surfaces. Charles Lawrence discussed this in *The Id, The Ego, and Equal Protection* in the context of psychology:

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

“And where you’re going isn’t any better.” Ted propped the shoe box on his knee. “If anything, it’s worse. I saw on the news, little black girl. Her mother wasn’t watching so she stabbed her playmate. Murdered her. She’s nine.³⁴ It’s you or them, Danny. You or them . . .”³⁵

Not really, Dan thought. We’re not in the middle of the L.A. riots³⁶ 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.³⁷ More than anything, watching his grandfather spouting off as if he were the Grand Wizard of the KKK, Dan felt bad for him. Embarrassed even.³⁸ Ted would never hurt anyone,³⁹ at least not intentionally, but his ideas, his thoughts, his entire perspective on life . . . it was just so infected by racism.

more than a few are close friends. After the incident, he initially claimed no memory of it and then, 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.

Wilson, *supra* note 3 at 339-40.

In the context of this story, Ted’s use of the term “little monkey” is no doubt less 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 indeed likely the unconscious surfacing, Dan harbors similar sentiments but is socially aware and racially sensitive and would not ordinarily say such a thing. A similar example is provided by the instance of Nancy Reagan, appearing before supporters, said she wished her husband be present to “see all these beautiful white people.” *Id.*

³⁴ See CNN, *Brooklyn Girl, 9, Admits Killing Playmate*, October 8, 2005, available at <http://www.cnn.com/2005/LAW/10/08/child.slain.ap/> (9-year-old girl pleaded guilty to second-degree manslaughter, admitting she fatally stabbed her 11-year-old playmate after a tug-of-war over a rubber ball went sour).

³⁵ See *supra* note 25.

³⁶ See *supra* note 27 and *infra* note 40. 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, it was a racially complex affair with very little harm to the white population—despite 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.

³⁷ The beating Denny and the other violence that occurred at the intersection invariably terrified White America. Even more problematic, the ensuing defense trail relied a unique cultural defense 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.

Id.

³⁸ Embarrassment (along with shame) is just one of several reactions to a loved one expressing socially unacceptable racist attitudes. 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 recipients own internal racist attitudes which he or she is trying to suppress. See generally Johnson, *supra* note 5.

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.⁴⁰

“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’m not taking a gun. I don’t need a gun.”

“I don’t 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’s New York?⁴¹ Even here, middle of 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, the Petersons’ place . . . Some gang banger Mexican kid⁴² broke into their place at two in the morning. Chuck kept the kid at gun point in the living room until the police arrive.”

³⁹ We often rationalize the racist attitudes of our friends and relatives by saying “they wouldn’t hurt anyone.” While it might be true that they won’t 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.

⁴⁰ On May 14, 1992, the New York Times ran a disturbing article. “In the aftermath of the Los Angeles Riots,” it reported, “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.” Timothy Egan, *After the Riots: Los Angeles Riots Spurring Big Rise in Sales of Guns*, N.Y. TIMES, May 14, 1992, at A1. The National Rifle Association wasted no time capitalizing on this sentiment. It ran national advertisements that painted a picture of law-abiding white citizens, made vulnerable by gun control laws, cowering helplessly before black armed mobs. See 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. The mainstream media condemned this appeal to fear, *Id.*, but some believed that the Los Angeles riots did indeed demonstrate that people should arm themselves. *The American Spectator*, a high-brow conservative magazine, even ran an article recommending the type of gun its readers should select. Brock Yates, *Guns for the Home*, AM. SPECTATOR, April 1992, at 53.

⁴¹ New York City is the safest big city in the country, according to a report from the Federal Bureau of Investigation. See *NYC the Safest Large City in US*, NYC & Company, available at <http://www.nycvisit.com/content/index.cfm?pagePkey=1091>. The FBI’s 2002 “Crime in the United States” indicates that while crime increased nationwide, New York City’s crime rate actually decreased 5% to the lowest level since the 1960s. *Id.* In addition, the city’s murder rate dropped 9.6% in 2002 to reach the lowest level since 1963. *Id.*

Although the crime rate has decreased, however, there has been a steady increase in the number of complaints to the Civilian Complaint Review Board. Liyah Kaprice Brown, *Officer or Overseer? Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 763 (2005). 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.” *Id.* 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. *Id.* They criticize police for turning a blind eye toward crime in Black areas, thus failing to ensure the safety of Black residents. *Id.*

⁴² See *supra* note 13. Unfortunately, a dominant share of youth gang members in the United States are indeed Hispanic. According to a 1998 study, 44% of gang members were Hispanic, 36% Black, and 12% Caucasian. *1998 National Youth Gang Survey*, Table 19, 1998, available at http://www.faculty.missouristate.edu/m/mkc096f/what_I_learned_about/GANGS/racial_composition.htm.

“Grandpa, I don’t 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.”⁴³

Cradling the gun in his hands, Dan was sick. Literally, physically . . . sick. He felt like someone in steel toe boots 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 there with you. It’s all I ask.” Ted’s voice 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’ve 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. . . they’ll treat you like a rag head with C-4 stuffed in his sneakers.”⁴⁴ Ted laughed and rolled his head back, “Your father will kill me if that happens.”

⁴³ The guns that people buy in response to fear are left mainly at home. They’re used infrequently in self-defense, and more often in suicides, spousal murders, and school shootings. David Kairys, *A Philadelphia Story*, Jun. LEGAL AFFAIRS 63 (2003).

⁴⁴ 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. 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. 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. Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUMAN RIGHTS. L. REV. (2002) 1, at 42. Prior to September 11th, profiling was regarded by many as an ineffective policing method that created or reinforced negative stereotypes. *Id.* However, since September 11, it has resurfaced as an apparently acceptable, or even necessary, policing strategy. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 974 (2002) (noting that a Gallup Poll taken prior to September 11 showed that 80% of Americans opposed racial profiling, while one taken shortly afterwards showed almost 60% in favor of ethnic profiling directed at Arabs and Muslims). 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.* Indeed, 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. Leti Volpp,

III. UNCONSCIOUS RACISM, DENIAL, & RATIONALIZATION/ *After a Yankee's Game, 1:30 a.m.*

The game was over for almost an hour by the time Dan left Yankee stadium. In under sixty minutes, 57,000 white people⁴⁵ had vanished back to their homes in mid-town, New Jersey, or Connecticut, leaving behind the considerably less inviting streets of the South Bronx.⁴⁶ 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 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 both.

Dan hated the subway. Everyday he thought about his Honda parked back home in Claremont, waiting for him. And Jennifer, the girlfriend he'd effectively abandoned for three months. Despite luxury boxes, despite free food, and despite 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. With 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.

Critical Race Studies: The Citizen and the Terrorist, 49 UCLA L. REV. 1575, 1586 (2002). The September 11 hijackers were seen as members of particular racial, national and religious groups and those whole groups were implicated by the wrongdoing. *Id.* 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. *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.

⁴⁵ Of course, everyone who attends a Yankee game is not 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.

⁴⁶Prudential Reality puts 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 . . .

Once Shady, Now Trendy: South Bronx, Prudential Reality, available at http://www.elliman.com/MainSite/Company/News_Detail.aspx?ID=989.

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"—the South Bronx is neither the safest place to be, nor the most dangerous. 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. Tim Heffernan, *Close Up on Mott Haven, Bronx*, VILLAGE VOICE, September 28, 2005.

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,⁴⁷ 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'd 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,⁴⁸ Dan switched out the trademark white ear buds for a less descript pair of black ones. He'd 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 . . .

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.⁴⁹ 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.⁵⁰

⁴⁷ This is an actual sign. 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.

⁴⁸ New York authorities have recently noted a rise in subway crime, driven principally by thefts of mobile phones and iPods. Subway felonies were up 14% through March of this year (2005). Ethan Sacks and Pete Donohue, *Music to Their Fears*, NEW YORK DAILY NEWS, available at <http://www.nydailynews.com/front/story/294403p-252061c.html>. One of the first lines of defense against being robbed is to replace the easily recognized white "ear buds" that come with the devices. *Id.* Many have switched to using large, boxy earphones. New York police have recorded dozens of robberies of the players, including a July 2nd incident in which a 15-year old was stabbed to death during an iPod robbery. *Id.* Apple CEO Steve Jobs subsequently called the boy's father to offer his condolences. *Apple Chief Phones iPod Victim's Family*, THE AGE, available at <http://www.theage.com.au/news/world/apple-chief-phones-ipod-victims-family/2005/07/07/1120329533252.html>

⁴⁹ 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. Skin color, the prime marker of race, is the first physical characteristic individuals notice about one another. T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1066 (1991) It is

Over the music, Dan couldn't hear everything they were saying . . . occasional words spoken loudly enough to rise above Stephen Jenkins' whining singing. "Nigga"-this. "Nigga"-that.⁵¹ 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.

essentially an involuntary cognitive response. *Id.* 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." Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 45 (1995).

⁵⁰ The conception of blacks as uncivilized animals perseveres. And 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. N. Jeremy Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1342 (2004); *see also*, Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1753 (1993). Lawyers have referred to black male defendants as "laughing hyenas out to kill someone," "vultures," "tigers," "mad dogs," and "animals in the jungle." Duru at 1342 (quoting Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97, 136-37 (1997)). Studies reveal that ambiguous behavior, when committed by a black person, is perceived as more threatening than similar behavior committed by a white person. *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 404-06 (1996). In a recent study, students were asked to observe arguments between two people in 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% 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% of observers perceived the push as "violent." *Id.* at 406.

⁵¹ 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." Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 TEMP. L. REV. 129, 130 (2003). For sure, the word is a potent one with a vicious and negative connotation. Yet, the word—or derivations of it—has been embraced by popular culture and particularly rap music. Goodwin explains:

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. . . . Music 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. at 191 (citations omitted).

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 so severe, their long limbs rising and falling for emphasis.⁵² They laughed and Dan could see the flash of white and gold in their mouths. He couldn't help but wonder what these boys⁵³ 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 . . .⁵⁴ Whatever it was, they were doing something to make money. Their throwback jerseys

⁵² *Supra* note 50.

⁵³ Dan's use of the term "boy" is significant in several ways. First, there is no indication that the "youth" are significantly younger than himself. Further, the term is loaded with meaning from the vernacular of racism.

⁵⁴ As he looks at the African-American youth on the train with him, Dan's 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 manifest themselves in sometimes 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, making 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. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741 (2005). 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. *Id.* "Such subjective decision-making processes," explained a federal district court in *Thomas v. Troy City Board of Education*, "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." 302 F. Supp. 2d. 1303, 1309 (M.D. Ala. 2004). This problem is further illuminated by studies which have been conducted:

Studies 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.

Hart, *Subjective Decisionmaking*, at 748.

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, e.g., Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 752 (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L. J. 2009, 2014-15 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 901 (1993); see also Rebecca Hanmer White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 498 n.22, 498-99 (2001). 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.

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.⁵⁵

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?⁵⁶ The first one

⁵⁵ Despite Dan's belief that this is "the truth," the media-encouraged image of every black youth as a crack dealer is a myth. "The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society." *Clary*, 846 F. Supp. at 783. 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. *Id.* Yet, blacks are four times as likely as whites to be arrested on drug charges. *Id.* at 786 (citations omitted). See also John 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). For a more thorough discussion of the destructive stereotype of black youth as crack dealers, see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 85-88 (1991).

In fairness, however, the stereotype of the black crack dealer has been well established and continues to be perpetuated in media, particularly hip-hop music. Rapper 50 Cent has used his past as a crack dealer to acquire street credibility and sell more records. In an interview with Rolling Stone, 50 Cent frequently alluded to his past unapologetically: "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." Toure, *The Life of a Hunted Man*, 919 ROLLING STONE (April 3, 2003) available at http://www.rollingstone.com/news/story/_/id/5939379?rnd=1131312527823&has-player=true&version=6.0.12.872.

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. Joan Howarth examines some of the broader social effects of the drug war's uses of gang lists and racial profiling. Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97 (1997) (utilizing both cultural studies and critical race theory to analyze criminal conviction) 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 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.* 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 as "frightening," *Id.* at 103, "associated with crime," *Id.*, and associated with gang membership. *Id.* at 113. The prosecutor used those popular articulations of Black male identity during voir dire to distance the all-White jury from Blacks. *Id.* at 140. 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.*

⁵⁶ 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, the distressingly limited scope of his perception, they can be either low-wage service employees, drug dealers, or athletes or rappers. In the position of appraising job applicants, consequent, Dan would no doubt discount the qualifications of a black applicant because of this presumption. *Supra note 47*. Most unfortunate, many black youth accept this idea as well. As one author explains, "[m]illions 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." RICHARD E. LAPCHICK & JOHN BROOKS, *SLAUGHTER, THE RULE OF THE GAME: ETHICS IN COLLEGE SPORT* 17 (1989). Statistics

who'd flopped down on the seat was tall and lanky. Athletic looking. He might already have a basketball scholarship somewhere.⁵⁷ Allen Iverson dresses like a thug.⁵⁸ 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 spilt 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 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.

from the early 1990s show that a black, high school football player had a one in forty-three chance of playing Division I football, and that single player stood a one in 6318 chance of playing in the NFL. See 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 144 (1993). For the young basketball players, the outlook was even more bleak. 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 the truth remains, they see the "one" on SportsCenter every night, and they never see the other 10,344, so what should we expect them to think? Unless they are convinced that academic success is the road to prosperity, the troubling statistics will continue.

⁵⁷ The most positive possibility Dan can think of plays directly into 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.

⁵⁸ The NBA recently implemented (effective this season) a dress code for all players which required business casual attire. Earl Ofari Hutchinson, *The NBA Dress Code: It's Not the Dress, It's the Stereotypes*, BLACK ATHLETE SPORTS NETWORK, October 27, 2005, available at http://www.blackathlete.net/artman/publish/article_01201.shtml. The dress code, seen by many as a reaction to the increasingly "thug-like" attire and the negative publicity stemming from the Indiana Pacer/Detroit Pistons brawl last season, has been both 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 don't make the millions that NBA superstars are paid still must bear the consequences of negative racial typecasting. *Id.*

The old black man was still asleep. Dan wondered if maybe 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 song⁵⁹ came on. Dan turned it off.

⁵⁹ Rap music, in many ways, serves to perpetuate stereotypes about black culture, reinforcing the worst possible goals for black youth while further establishing the myth for whites that blacks are all crack dealers, gang bangers, pimps, or all three. For example, the following are lyrics from rapper Jay-Z's song, "Rap Game, Crack Game." Jay-Z has sold more than 33 million albums.

"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

Jay-Z (Shawn Carter), *Rap Game/Crack Game*, from *IN MY LIFE, VOL. 1* (1997).

While some might argue whether or not the song actually endorses crack dealing, the effect is obvious: youth, looking to Jay-Z as a role model, may perceive such lyrics as an endorsement. The majority of rap listeners are white. Barbara F. Meltz, *Rap Music is Parents' Proof Their Teens Need Their Help*, *BOSTON GLOBE*, July 22, 2004, H1, also available at 2004 WLNR 3598230 (stating that 70% of white teens listen to rap). White listeners might consciously separate lyrics from reality, but the unconscious will nevertheless reinforces beliefs that blacks are crack dealers. Rappers themselves likely realize this effect, yet persist in recording violent and misogynistic lyrics which reinforce the worst stereotypes about African-Americans. The record companies in turn market these lyrics in pursuit of the all important dollar. At least one commentator has drawn upon literature for a fit analogy:

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 "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.

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). The same parallels can be drawn with violent rap music.

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 money⁶⁰, 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.⁶¹ A fat woman with cornrows sitting a few feet away during rush hour reading a Terry McMillan

⁶⁰ See *supra* notes 54-56. In some unfortunate ways, merely seeing such an event might reinforce stereotypes than African-Americans lack other job skills.

⁶¹ Dan's denial of his internal racism and fear of "the other" is representative both of the denial of racism that takes place on the individual level, and on the macro/legal level. As Charles Lawrence has said, "it is difficult to speak about this fear because it requires us to think about racism in its crudest, most elemental form." 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, 1370 (2005).

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.

Id.

Efforts to remedy institutional racism have become lost in White society's insistence that individual racism is no longer a problem. Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1 (1999). So long as people and institutions refuse to acknowledge the unconscious racism that exists, it is impossible to cure it.

In terms of equal protection law, the intent standard actually serves as mechanism to further deny ongoing racism. See generally Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1 (1991) (arguing "colorblind" equal protection doctrine uses intent standard as subterfuge for avoiding acknowledging continuing racism); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (arguing that equal protection's intent standard fails because of psychological instincts not to consider oneself racist).

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.⁶²

Dan loved rap. Kanye West's second album was genius.⁶³ One of his best friends was black.⁶⁴ James. 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.⁶⁵ He grew up in Costa Mesa. His dad was an accountant for Ernst & Young. Dan's

In the criminal context, unconscious racism proves to be just as problematic. Unconscious racism often influences the perception of witness credibility. Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 264 (1996). Judges and lawyers bring preconceived and unconscious stereotypes to trials, and this subtle bias can influence a trial's course and outcome. *Id.* One manifestation of this subtle bias 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. Andrew Eliot Carpenter, *Chambers v. Mississippi: The Hearsay Rule and Racial Evaluations of Credibility*, 8 WASH. & LEE RACE & ETHNIC ANC. L. J. 15, 15 (2002). "Specifically, if 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." *Id.*

⁶² Viewing "[d]enial . . . as a property of unconscious racism" Sheri Lynn Johnson explained that for most people, including decisionmakers, an acknowledgment of their own racism diminishes their self image. Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1029-30 (1988). 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.* at 1030. According to Johnson, one of the ways such unconsciously racist people avoid thinking of themselves as the "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, Johnson pointed out that "[i]n the context of criminal procedure decisions, finding a nonracial reason is particularly easy to do, one only needs to cite the guilt of the suspect." *Id.* at 1030-31.

⁶³ Dan's 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," as discussed in the next footnote.

⁶⁴ Fully 86% of all white adults in a 1997 national survey said they had black friends, and 54% of whites reported having five or more. See *Views on Race in America*, BOSTON GLOBE, Sept. 14, 1997, at A31 (presenting the results of a June 1997 poll by KRC Communications). Nationally, 73% of whites surveyed in 1994 said that they had "good friends" who were African American. STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 520 (1997). However, merely having black friends does not automatically acquit someone of possessing any racial attitudes. The court in *U.S. v. Clary*, 846 F. Supp. 768, 779 (1994) discussed this phenomenon: "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." In fact, 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.

Although 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 41 (1991) (citing studies that indicate that whites who have Black friends may still not be aware of the prejudice and discrimination Blacks face).

⁶⁵ The differentiation referred to by Dan is sadly not unusual. "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." *Clary*, 846 F.Supp at 779. What defines being "really black" is fraught with stereotypes and concepts of what "black" is supposed to be. Kimberly Jade Norwood addresses the phenomenon of de-blackening as follows:

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.⁶⁶ 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.⁶⁷ Dan couldn't imagine not hiring someone because they're black.⁶⁸ He couldn't fathom being on an all-white, lynch-mob jury that convicted someone based on skin color rather than evidence.⁶⁹ 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.

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.

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).

Transracial adoption serves an extreme example of being black, but not “black.” See SANDRA PATTON, *BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA* (2000) 62-98 (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* (2d ed. 2002) (“Black adoptees stressed their comfort with their Black 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.”).

⁶⁶ This thought is meant to underscore the socio-economic factors which 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) (“it is not readily apparent how the deepening economic divisions between the haves and have-nots in the black community can be accounted for”).

⁶⁷ This perspective is not without its advocates. In his book discussing the Bernhard Goetz trial, George Fletcher states:

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?

GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 203-04 (1989).

⁶⁸ *See supra* note 54 (discussing employment discrimination).

⁶⁹ *See supra* notes 25 and 55 (discussing unconscious racism's affect on criminal justice).

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.⁷⁰ He felt his heart beat getting faster. Harder. His grandfather's words echoing. *It's you or them, Danny. You or them . . .*⁷¹

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 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.⁷²

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.⁷³

⁷⁰ For a discussion of likening blacks to animals (such as the idea they can "sense fear" akin to a dog or wild animal), see note 50. This is a further manifestation of Dan's deeply held attitudes, as well as the consequence on the pervasive reinforcement of stereotypes.

⁷¹ See *supra* note 25 (discussing "us" versus "them"). It's also worth noting here the relative harmlessness of what's 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.

⁷² Since Dan does not note the officer's race, we can safely assume he is white (otherwise, he'd be a "black cop," a "Mexican cop," or so forth.

Also significant here is the fact that Dan perceives the officer as signifying safety. This is in contrast to the perception of police held by many minorities. ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 205 (1990). Fifty-three percent of blacks, compared to 28% of whites, believe that there is police brutality in their area. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, at 122 (2001). Fifty-eight percent of blacks, compared to 20% of whites, believe that police do not treat all races fairly. *Id.* at 119. Thirty-six percent of blacks, compared to 14% 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).

⁷³ Dan fleeing the train, hoping the black youth won't 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. Studies find that white homeowners flee once a certain (often small) percentage of nonwhite residents move into the neighborhood and it "tips" from nonminority 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 may range from twenty-five to sixty percent); Sheryll D. Cashin, *Middle-*

IV. 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 at the different options getting to the airport without luck. A cab would cost fifty bucks and he couldn't get the Airport Shuttle website 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 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 terrorist⁷⁴ to board with a box full of explosives and kill everyone on board, trapped beneath the river.

Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America, 86 CORNELL L. REV. 729, 744-45 (2001) (suggesting tipping point is forty percent). Though the exact tipping point is unclear, data suggest that school integration consistently fails largely because of neighborhood resegregation. *Id.* Some commentators suggest that 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 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). Similarly, whites may prefer to live near other whites because "whiteness" connotes safe, stable, employed, and educated neighbors. Martha R. Mahoney, *Shaping American Communities: Segregation, Housing and the Urban Poor*, 143 U. PA. L. REV. 1659, 1661 (1995).

Upper- and middle-income homeowners are also said to flee integrating neighborhoods because they fear that lower-income minority neighbors will take advantage of the lower housing prices that typically follow white flight. See Cashin, *supra* this note, at 742. They fear that lower-income residents will increase taxes because the higher rates of drug use, crime, and out-of-wedlock births associated with those groups will increase the demand for social and public services. See Harris, *supra* this note, at 464.

⁷⁴ 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're not alone. Even before the events of September 11th, 2001, Arab Americans were frequently confronted by the terrorist stereotype. Even though white American terrorists were quickly identified as prime

When Dan got on, the train was populated with young men headed to work in the financial district⁷⁵—the early risers at 3:30. There weren't many of them, but there were a couple, wearing French-cuff shirts, tagged with the Blackberries. One clutched a cup of coffee. They all got off at Fulton Street, leaving Dan and a sleepy middle-aged Mexican⁷⁶ lady in a nurse's uniform, probably heading home from 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 off 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.⁷⁷

suspects in the Oklahoma City bombing, Arab Americans across the United States reported a surge of harassment and intimidation in the following weeks. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress And The "Racing" of Arab Americans as "Terrorists"*, 8 ASIAN LAW JOURNAL 1, 11-17, 24-26 (2001). 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. *Id.* at 12. September 11th exacerbated the problem. While comprehensive and reliable national statistics are not available, Arab and Muslim groups report more than two thousand September 11-related backlash incidents. *We Are Not the Enemy*, HUMAN RIGHTS WATCH 3 (2002) available at <http://www.hrw.org/reports/2002/usahate/usa1102.pdf>. 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.*

⁷⁵ Again, the assumption here is that they're all white. Otherwise, Dan would no doubt note their race. *Supra* note 64. However, this serves as a secondary test of sorts for the reader: as you read the description, "wearing French-cuff shirts, tagged with the 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.

⁷⁶ In reality, in New York, she's probably not Mexican. More than likely, a Hispanic in New York would more accurately be classified as either Puerto Rican or another national origin. While 27% of the New York population was Hispanic, as of the 2000 Census, only 2.33% of the population was Mexican, compared to 9.85% Puerto Rican and 14.28% other Hispanic. *New York Statistics and Demographics* (US Census 2000), available at <http://newyork.areaconnect.com/statistics.htm>.

⁷⁷ See *supra* note 41 (discussing safety in New York). But see also, *supra* note 48 (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.

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.⁷⁸

Dan had intentionally left his iPod back in the apartment but now 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 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 a mic in his right.⁷⁹

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 flat,⁸⁰ giving him a dumb look. Dan reminded himself, that didn't necessarily mean that he was

⁷⁸ 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?

⁷⁹ The poster, for “Get Rich or Die Tryin,” a film largely based on rapper 50 Cent's own life story, sparked controversy recently for the violent message and poster locations near schools and in high crime areas. See Eric Malnic, *Studio Cuts Back 'Get Rich Billboards,'* LOS ANGELES TIMES, October 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.” *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. Jonathan D. Silver, *Fatal Shooting at Waterfront Theater Leaves a Trail of Blood,* Pittsburgh Post-Gazette, November 11, 2005, available at <http://www.post-gazette.com/pg/05315/604747.stm>. AMC reported that a couple of fistfights had broken out in its theaters showing “Get Rich” as well. See “‘Get Rich’ Pulled After Shooting,” CNN.com, available at <http://www.cnn.com/2005/SHOWBIZ/Movies/11/11/film.get.rich.reut/index.html>. When news stories such as this one as seen or read by a white audience, what is the affect?

⁸⁰ Dan's observations of the bone structure recall the concept/pseudoscience of phrenology. Scientific racism was long accepted to justify enslavement and disparate treatment of African Americans. Before the Civil War, 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). Scientists were convinced of the innate inferiority of the slaves. They were able to buttress their beliefs by drawing support from the latest research and most authoritative speculation in anthropology, anthropometry, phrenology, and egyptology. I.A. NEWBY, *CHALLENGE TO THE COURT* 8-9 (1967). These scientific attitudes regarding the inferiority of blacks were not significantly altered by the Civil War or America's ensuing period of Reconstruction. The mainstream of scientific

dumb. Just that he *looked* dumb. He was wearing a baggy, dark red shirt and his hair was pulled back in tight corn rows.⁸¹ 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 of 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,⁸²

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). At the core of such practices, phrenology suggested that the shape of one's head, size of forehead, and so forth, correlated with intelligence. *Id.* The theory was embraced by the scientific community and endorsed by scientific luminaries including Thomas Edison. *Id.* While modern science largely debunked the theory, it has persisted among some who still, even without scientific or medical support, believe the shape of one's head correlates with intelligence. Phrenology also recalls arguments advanced by Eugenicists of the early twentieth century. CHARLES CARROLL, THE NEGRO A BEAST (1900) (arguing that blacks were not only inherently inferior, but lacked a soul or kinship with God and thus were not even fully human).

While phrenology and eugenics have largely been dismissed, new theories persist in correlating race and intelligence. Richard Herrnstein and Charles Murray famously argued that the social ills of welfare, poverty, and underclass were a function of biologically determined intelligence, thereby implying that minorities, disproportionately represented in the lower-echelons of society, were genetically inferior to whites. *See generally* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE (1994). *But see* THE BELL CURVE WARS (Steven Fraser ed., 1995) (offering an expansive refutation of the claims advanced by Herrnstein and Murray).

⁸¹ 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 is racist to forbid them in the workplace—has been litigated. In *Rogers v. American Airlines*, a black flight attendant was denied by the Southern District Court of New York, which held that corn rows were not race specific. 527 F.Supp. 229 (S.D.N.Y. 1981). *See also*, 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 (2001); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991) (discussing Rogers and the implications of the judge's ruling).

⁸² 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 isn't 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 acts of violence, such as the beating of a Pakistani cab driver in Chicago two days after the attacks. *See World Trade Center and Pentagon Attacks: The Anti-Asian American Backlash*, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, available at <http://www.refuseandresist.org/imm/102101attacksasian.html>. For an interesting discussion of the struggles of middle-eastern cab drivers in the wake of September 11th, *see* Judd Handler, *An Interview with Afghan Cab Drivers*, available at <http://www.juddhandler.com/articles/afghancab.php>.

but that wouldn't affect anything. Immediately, Dan scolded himself for having that thought. It was such a stupid a stereotype.⁸³ 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.⁸⁴

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.⁸⁵

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 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.⁸⁶ That was crazy. But if they came and started something, he had protection. That's all it meant.

⁸³ 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. The difficulty comes in parsing out the other shades of racism that are not so readily identified.

⁸⁴ 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*, ESQUIRE, August, 2005 (an essay in which lofty and noble expectations for others, based on first impressions, are lewdly violated).

⁸⁵ The embedded racism in this statement is somewhat obvious. Even in a best case scenario, Dan is imagining the youth as unwed teenage parents. At best, he sees them as responsible enough to pay child support.

⁸⁶ In 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*, 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 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; 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. Two youths, initially listed in critical condition, fully recovered but Cabey was paralyzed and suffered some degree of brain damage. *Id.*

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 guys riding home. Probably been working. Probably tired. No big 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, every black youth in New York was not 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,⁸⁷ as embarrassing as it was, he was almost as bad as his grandfather.⁸⁸ But at least Ted didn't try hiding it. At least he wasn't a hypocrite. Everything seemed so different.⁸⁹ The guys on the train weren't out to get him. They weren't crack dealers.

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. She 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. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 76 (1991). 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 supra* note 3. It is this realization, at this juncture in the story, that Dan is making.

⁸⁷ According to Sheri Lynn Johnson, for most people, including decision makers, an acknowledgment of their own racism diminishes their self image. Johnson, *supra* note 5 at 1029. 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.

⁸⁸ 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 segregate ourselves 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.

⁸⁹ According to Professor Charles Lawrence:

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.⁹⁰ Just because he's black.

They weren't too far from the next stop.

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.⁹¹ 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.

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.

Lawrence, *supra* note 3 at 321.

⁹⁰ See LEE SIGELMAN & SUSAN WELCH, BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY 41 (1991) (citing studies that indicate that whites who have Black friends may still not be aware of the prejudice and discrimination Blacks face).

⁹¹ See *supra* note 64. Partly 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. A recent CLE article 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." Sean Carter, *Forget the Oxymoron Jokes- Legal Ethics is a Very Legal Issue*, 3 NO. 3 A.B.A. J. E-Report 7 (2004).

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.

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 .357.⁹² 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 . . .

⁹² The oft cited article, *Protection or Peril? An Analysis of Firearms Related Deaths in the Home*, found a homeowner’s gun was 43 times more likely to kill a family member, friend, or acquaintance, than it was used to kill someone in self-defense. Arthur Kellermann and Don Reay, *Protection or Peril? An Analysis of Firearms Related Deaths in the Home*, 314 NEW ENGL. J. MED. 1557-60 (1986). The 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.

V. CONCLUSION

To end the story with black youth killing Dan was 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 and, as one moves towards him, pulls out the gun and shoots them, only to discover they were unarmed.⁹³ 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.”⁹⁴ However, racism is more complex than that. Sometimes, blacks *do* kill whites.⁹⁵ Whether we like to admit it or not, riding the subway through Brooklyn at three a.m. probably isn’t a wise decision.⁹⁶ 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.⁹⁷

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 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

⁹³ This was, in fact, the original ending. However, as the author, I felt it presented an over-simplified view of race relations, for the reasons set forth here (and the next couple paragraphs). 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”—but, again, avoided the full complexity of race in America and would have simply been an ironic ending but little more than that.

⁹⁴ This was one of the major lessons that *could* have been learned from the Bernhard Goetz incident, *supra* note 84, but that somehow was largely ignored. Indeed, this is also one of the principle ideas conveyed in writer/director Paul Haggis’ film *Crash*. Lions Gate Film (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 (Larenz Tate) he fears, only to realize afterwards that he was unarmed.

⁹⁵ Just as whites kill blacks, and white kill whites, and whites kill Hispanics, and Hispanics kill blacks. In short, the world is a violent place.

⁹⁶ 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.

⁹⁷ 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.

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 infected that we interpret events that actually say very little about "race" to serve as evidence supporting our biases. In real life, seemingly racially-charged events *will* occur: when they do, what will our reaction be?

Revisiting the story's end, did race really matter, or was it ultimately incidental? For one thing, it was likely that Dan's socio-economic status, rather than his race, made him a potential robbery target. Simply put, some guys on a train wanted money and approached a passenger. They then realized he was armed and, in what *they* might perceive as self-defense, shot him.⁹⁸ Race was not a factor. Yet a white reader will likely process this story in a very race-conscious way.⁹⁹ The stereotype of "blacks-as-criminals" is reinforced. 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?" They probably would not. What if Dan was white, but the killers Asian-American? This is a more complex question, 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 have: 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 stereotype would trump the violent portrayal.¹⁰⁰ However, we *do* think this when the assailants are black: it fits the stereotype that we've been taught and internalized and thus reinforces it. It doesn't matter that a white person hasn't been murdered by an African-American on the New York transit system in more than ten years¹⁰¹: one violent occurrence—likely publicized with the media's help—outweighs a decade of safety in the public's mind, and the exception is immediately perceived as the rule.¹⁰²

⁹⁸ Of course, under the law, their actions would more likely be treated as Felony Murder.

⁹⁹ 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. To imply otherwise would be a great error.

¹⁰⁰ 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 influenced by broad brush strokes and sometimes dueling stereotypes.

¹⁰¹ To be sure, the last instance of such racially charged violence was particularly severe. Colin Ferguson opened fire on the Long Island commuter train, killing six white passengers and injuring nineteen others. *Colin Ferguson, profile, available at* <http://crime.about.com/od/murder/p/frguson.htm> (last visited 12/12/05).

¹⁰² For example, look at the swift media reaction to other acts of black violence committed against whites, as described in N. Jeremy Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1342 (2004).

No matter what we do to respond to unconscious racism, it is going to survive so long as racial stereotypes survive. Returning to the discussion of racism as a disease, 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 still remains, fueled by persistent stereotypes that are perpetuated in the media and by society in general.¹⁰³

The destruction of such stereotypes is difficult and demands a collective societal effort drawing not only upon the usual resources—social programs, education, and affirmative action—but also 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.¹⁰⁴ Popular music—specifically rap and hip-hop, revel in glorified violence, further exacerbating the problems of stereotypes in exchange for immediate wealth.¹⁰⁵ Even seemingly positive and innocuous portrayals of African-Americans in popular media are fraught with racial stereotypes.¹⁰⁶ In a society self-segregated by socio-economic boundaries

¹⁰³ 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.

¹⁰⁴ A 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 74 percent longer than stories about black victims. Peter Downs, *Paying More Attention to White Crime Victims*, AMERICAN JOURNALISM REVIEW 1995, available at <http://www.ajr.org/Article.asp?id=2016>. The total time given to white victims was 2.8 times more than the total time devoted to both black and Hispanic victims. *Id.* Six out of seven studies that clearly identify the race of victims found more attention was paid to white victims than to black victims. See *Off Balance: Youth, Race and Crime in the News*, Building Blocks for Youth, available at <http://www.buildingblocksforyouth.org/media/exec.html>. Homicides of white victims not only resulted in more articles, but also longer articles than black victims. *Id.* 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.*

¹⁰⁵ See *supra* note 59.

¹⁰⁶ For example, “Jerry Maguire” and “Independence Day” were blockbusters in 1996 for actors Cuba Gooding Jr. and Will Smith. Look closely at the characters portrayed by the African-American actors, however, and you’ll see that stereotypes persist. ANDREW ROJECKI AND ROBERT ENTMAN, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* (2000). Gooding’s football star character has talent, but also an ego and little financial knowledge. *Id.* Smith’s courageous fighter pilot dates a stripper with an illegitimate child. *Id.* Alas, even seemingly positive portrayals are often infected by unconscious racism.

dictated by white flight¹⁰⁷, this scant exposure to other cultures can easily establish and reinforce damaging stereotypes.¹⁰⁸

For example, as previously noted, most rap music is bought by white teenagers.¹⁰⁹ If those teenagers live otherwise isolated from African-Americans—perhaps because of the white flight on the part of their parents—and such music is their only exposure to that culture, what is the effect when that exposure is fraught with references to drugs and violence?¹¹⁰ The hope is that by targeting those teenagers (and others like them) from all angles—affirmative action programs to expose them to minorities, 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 eventually be dismantled. 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.

According to the Supreme Court, we're only a few decades from this success.¹¹¹ 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 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.¹¹² 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. But, 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.

¹⁰⁷ See *supra* note 73.

¹⁰⁸ 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 the product of that racism. Regardless, it make sense to attack what we can—stereotypes—in the hope that such action will also serve to weaken the unconscious racism pulsating through society.

¹⁰⁹ See *supra* notes 51 and 59.

¹¹⁰ See *supra* note 59.

¹¹¹ See *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003).

¹¹² See *supra* note 103, accompanying text.