

# Dignity or Death: The Black Male Assertion of the Fourth Amendment

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*Much of Fourth Amendment jurisprudence and scholarship places abstract principles against unreasonable searches of persons and/or things. But when law enforcement officials inject themselves into the lives of Black men, those interactions extend beyond abstract concepts, and fundamental questions of dignity—or alternatively death—emerge. Every time police officers stop Black men while walking, driving, or, in their homes, Black men are triggered into a prescribed exercise of submission or a rebellious exercise of right. Black men must instantaneously decide between preservation or potential death—because any perceived affront to police dominance is met with a show of force, arrest, imprisonment, brutality, and the possibility of death. This Article challenges the narrative of Fourth Amendment jurisprudence and scholarship as a constitutional right, steeped in discussions of reasonable articulable suspicion, probable cause, pretext, exigency, and consent, and highlights an untapped discussion about what occurs in the mind of one such Black man, me, when forced to deal with the police. Legitimate and illegitimate interactions place Black men on a tightrope where one false move could kill or leave one without dignity, thus dying a thousand deaths.*

*In Part II of this Article, I provide a basic overview of scholarly writings on race and the Fourth Amendment, which will frame the Part to follow. In Part III, I detail three personal incidents where my Fourth Amendment rights were violated by law enforcement. Each incident sketched in my memory, faced with a choice between risking the consequences of asserting my known rights as a college graduate, then lawyer, and then law professor, or letting those rights die at the hands of the police. I discuss the choice Black people living in the United States face: either insisting upon dignity by risking death at the hands of police or electing a spiritual death through submission to a contrary*

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*law enforcement system. In Part IV, I conclude the Article with some thoughts on prescriptions: submission, resistance, and repatriation. This Article is written in the tradition of Critical Race Theory and uses personal narrative to illuminate and explore the lived experience of racial oppression. This Article centers the Black male experience and provides insight into being Black in America, a group, to which I am a member, to whom the Fourth Amendment was never intended to apply.*

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#### I. INTRODUCTION

W.E.B. Du Bois wrote in his classic collection of essays, *The Souls of Black Folk*,<sup>1</sup> a short story entitled “Of the Coming of John,” about a quintessential

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<sup>1</sup> W.E.B. DU BOIS, *Of the Coming of John*, in THE SOULS OF BLACK FOLK 153–66 (Oxford Univ. Press 2007) (1903); see Sandra L. Barnes, *A Sociological Examination of W.E.B. Du Bois' The Souls of Black Folk*, 7 N. STAR 1, 1 (2003) (“*The Souls of Black Folk* serves as testament to Du Bois’ position as one of the foremost scholars on race and religion, in general, and the Black experience, in particular. In just fourteen essays, Du Bois provided keen insight into the social problems of the day. The text is important due to its broad applications for understanding the religious, economic, political, social, and cultural implications of a society precariously structured to garner and measure the success of the one group at the expense of another. Furthermore, Du Bois’ observations and findings are timeless; many of his concerns continue to plague society today. . . . The themes of race and religion were woven through each essay to illustrate life behind ‘the veil’ for the slave, the freed person, and the Negro. This same theme provides insight about ‘double consciousness’ for Blacks today.”).

Hobson's choice<sup>2</sup> that has plagued the Black male existence since the end of American chattel slavery: live with no dignity or die trying to obtain the elusive concept.

"Of the Coming of John" features a young Black man, John, the prize of the Black community,<sup>3</sup> just a decade or two after the American Civil War and the ratification of the Thirteenth Amendment.<sup>4</sup> He was thought of fondly by the white community and loved by the Black people in his small southern town.<sup>5</sup> In the short story, the Black community supported sending John to college to receive an education.<sup>6</sup> The white community members opposed the decision, believing that the education would *ruin their sweet little negro boy*.<sup>7</sup> As the white community predicted, after graduating from college, John returned to his small southern town, discontent, disconnected, angry, and no longer the *sweet little negro boy* he once was.<sup>8</sup> John saw the impact of hundreds of years of slavery and the religious teaching therefrom upon the minds and bodies of Black people within his community.<sup>9</sup> He saw the ways in which white people benefitted from and supported Black oppression.<sup>10</sup> With his education, he yearned to challenge and upend racial hierarchy within his town.<sup>11</sup> He yearned to be human.

After a fiery exchange with white community members and Black supporters of oppression, John's younger sister, in a moment of peace sits next to him by the riverside.<sup>12</sup> She says:

"John, . . . does it make every one—unhappy when they study and learn lots of things?"

He paused and smiled. "I am afraid it does," he said.

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<sup>2</sup> Merriam-Webster defines the Hobson's choice as "an apparently free choice when there is no real alternative." *Hobson's Choice*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/Hobson%27s%20choice> [<https://perma.cc/W6QW-24QN>].

<sup>3</sup> DU BOIS, *supra* note 1, at 154.

<sup>4</sup> *See id.* at 157–58, 160.

<sup>5</sup> *Id.* at 154.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 157, 160–61.

<sup>9</sup> DU BOIS, *supra* note 1, at 159, 161. John told his brethren that,

[t]he age . . . demanded new ideas . . . "[T]he world cares little whether a man be Baptist or Methodist, or indeed a churchman at all, so long as he is good and true. What difference does it make whether a man be baptized in river or wash-bowl, or not at all? Let's leave all that littleness, and look higher."

*Id.* at 161.

<sup>10</sup> *See id.* at 159.

<sup>11</sup> *Id.* at 161–62.

<sup>12</sup> *Id.*

“And, John, are you glad you studied?”

“Yes,” came the answer, slowly but positively.

She watched the flickering lights upon the sea, and said thoughtfully, “I wish I was unhappy,—and—and,” putting both arms about his neck, “I think I am, a little, John.”<sup>13</sup>

In that exchange, John and his sister acknowledged that they would rather be unhappy and human—unhappy with *dignity*—rather than submit.<sup>14</sup> As Bernadette Atuahene explains, dignity is “the notion that people have equal worth, which gives them the right to live as autonomous beings not under the authority of another. . . . [I]ndividuals and communities are deprived of dignity when subject to dehumanization, infantilization, or community destruction.”<sup>15</sup> John’s education made him realize he was an autonomous being but it was his very autonomy that the white community feared, sought to eviscerate, and deprive him from holding.<sup>16</sup> John and his sister knew the risk of attempting to restore their dignity: “potential . . . social ostracism, denied opportunities, physical abuse, or even death.”<sup>17</sup> The short story ends with John’s predictable demise.

In an age-old incident of the slave system, John’s white childhood playmate raped his sister.<sup>18</sup> John saw his humanity, his dignity, dependent upon avenging his sister’s honor.<sup>19</sup> He knew that education, and the knowledge that it had produced and his demand for dignity, would cost him his life.<sup>20</sup> He sacrificed his life by killing the white rapist to restore the dignity of both John and his sister.<sup>21</sup> A white lynching party on horseback found John walking through the woods.<sup>22</sup> John did not run, he did not deny the reality that he faced: his death. As John showed, “resistance to dignity takings can restore one’s sense of dignity and moral agency . . . . [H]owever, [it] is a double-edged sword . . . .”<sup>23</sup> John’s resistance—his decision not to run and to avenge—restored and asserted his

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<sup>13</sup> *Id.* at 162.

<sup>14</sup> *See id.*

<sup>15</sup> Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 L. & SOC. INQUIRY 796, 800–01 (2016).

<sup>16</sup> *See* DU BOIS, *supra* note 1, at 162.

<sup>17</sup> Atuahene, *supra* note 15, at 815.

<sup>18</sup> DU BOIS, *supra* note 1, at 165.

<sup>19</sup> “Of the Coming of John” centered the patriarchal narrative of protecting womanhood and extended the narrative to include John’s Black sister. *Id.* at 165. In accepting the narrative, John knew what he had to do: he restored the dignity of both him and his sister, which led to his physical death. *Id.* at 166.

<sup>20</sup> *See id.* at 165–66.

<sup>21</sup> *Id.* at 165–66.

<sup>22</sup> *Id.* at 166.

<sup>23</sup> Atuahene, *supra* note 15, at 815.

dignity. However, it was a “double edge sword” because his dignity lived and transcended, but he physically died. He asserted his dignity and died but once:

Amid the trees in the dim morning twilight he watched their shadows dancing and heard their horses thundering toward him, until at last they came sweeping like a storm, and he saw in front that haggard white-haired man, whose eyes flashed red with fury. Oh, how he pitied him,—pitied him,—and wondered if he had the coiling twisted rope. Then, as the storm burst round him, he rose slowly to his feet and turned his closed eyes toward the Sea.

And the world whistled in his ears.<sup>24</sup>

Black men today, like me, are faced with the same Dignity Takings John faced every time we interact with police. Dignity Takings as a moral and political concept have been around since the late seventeenth century.<sup>25</sup> The concept of dignity remains a common thread in discussions surrounding holistic freedom in a civilized society.<sup>26</sup> Dignity remains the heart of the “freedom struggle” and repeatedly reveals itself within foundational documents such as constitutions and rights-defining charters.<sup>27</sup> Western legal systems and belief systems recognize the concept of dignity as equal to human worth, as “[e]very man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone’s person and body sacrosanct . . .”<sup>28</sup> More narrowly, in America, judges use and apply dignity as its own constitutional value and through that, the idea of dignity itself survives.<sup>29</sup>

Dignity Takings as discerned in this Article expand upon the constitutional concept of a “taking.” A “taking” of rights may occur any time “a person, entity, or state confiscates, destroys, or diminishes rights to property without the informed consent of the rights holders.”<sup>30</sup> Usually, “[w]hen a traditional taking

<sup>24</sup> DU BOIS, *supra* note 1, at 166.

<sup>25</sup> See, e.g., John Felipe Acevedo, *Dignity Takings in the Criminal Law of Seventeenth-Century England and the Massachusetts Bay Colony*, 92 CHI.-KENT L. REV. 743, 745 (2017) [hereinafter Acevedo, *Dignity*]. Dignity Takings can be defined as “property confiscation that involves the dehumanization or infantilization of the dispossessed.” Atuahene, *supra* note 15, at 796.

<sup>26</sup> Christopher A. Bracey, *Getting Back to Basics: Some Thoughts on Dignity, Materialism, and a Culture of Racial Equality*, 26 CHICANA/O-LATINA/O L. REV. 15, 17 (2006).

<sup>27</sup> *Id.*

<sup>28</sup> John Felipe Acevedo, *Reclaiming Black Dignity*, 99 TEX. L. REV. ONLINE 1, 3 (2020) [hereinafter Acevedo, *Reclaiming*] (quoting JEREMY WALDRON, DIGNITY, RANK, & RIGHTS 34 (Meir Dan-Cohen ed., 2012)).

<sup>29</sup> Bracey, *supra* note 26, at 17 (“[M]odern American courts have come to rely upon dignitary discourse when analyzing Fourth Amendment protections against unlawful searches and seizures, Eighth Amendment protections against cruel and unusual punishments, Fourteenth and Fifteenth Amendment antidiscrimination claims, and Ninth and Fourteenth Amendment issues involving women’s reproductive rights.”).

<sup>30</sup> Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 173 (2016).

occurs, the state condemns the land, assesses the property, and then pays the owner fair market value before seizing the land and putting it to public use.”<sup>31</sup>

In her book, *We Want What's Ours: Learning from South Africa's Restitution Program*, Bernadette Atuahene explored the concept of takings, then expanded the concept to include what she described as a Dignity Taking in her examination of South African land restitution. She defined and explored such takings as instances when “a state directly or indirectly destroys or confiscates property rights from owners or occupiers whom it deems to be sub persons without paying just compensation or without a legitimate public purpose.”<sup>32</sup> Others have applied a similar analysis to identify Dignity Takings in circumstances in international and American history, such as the Tulsa Race Riot of 1921.<sup>33</sup> Such takings have involved real and personal property by state actors, outside the context of a “constitutional taking” or the taking of physical property.<sup>34</sup>

Christopher Bracey in *Getting Back to Basics: Some Thoughts on Dignity, Materialism, and a Culture of Racial Equality* explained that we can understand dignity beyond the traditional “taking” context—as personal and communal.<sup>35</sup> First, personal dignity centers on the individual and can be understood as an aspect of self-worth.<sup>36</sup> Second, communal dignity values inclusion—“[t]o treat another with dignity is to consider another presumptively worthy of full integration into community membership.”<sup>37</sup> Bracey believes that the idea of dignity must be explored in race jurisprudence to broaden opportunities for racial justice and reconciliation.<sup>38</sup> Such an approach would place a tangible and material demand upon the government to make way for racial equality.<sup>39</sup>

John Felipe Acevedo and Jamila Jefferson-Jones explicate both individual and communal Dignity Takings in their respective scholarship. Acevedo in *Reclaiming Black Dignity* argued that discrimination by police against specific individuals constitutes a Dignity Taking.<sup>40</sup> The act and attitudes of racial animus perpetuated by the police dehumanizes people, causing loss to the body and soul—their own property.<sup>41</sup> This stolen dignity is then transferred to the police

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<sup>31</sup> Acevedo, *Reclaiming*, *supra* note 28, at 5.

<sup>32</sup> BERNADETTE ATUAHENE, *WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM* 21 (2014).

<sup>33</sup> Jamila Jefferson-Jones, “Community Dignity Takings”: *Dehumanization and Infantilization of Communities Resulting from the War on Drugs*, 66 U. KAN. L. REV. 993, 996 (2018).

<sup>34</sup> *See id.*

<sup>35</sup> *See* Bracey, *supra* note 26, at 19–21.

<sup>36</sup> *Id.* at 19.

<sup>37</sup> *Id.* at 20 (“Dignity, in this sense, is universal and undifferentiated respect for social value.”).

<sup>38</sup> *Id.* at 18.

<sup>39</sup> *Id.* at 18, 27.

<sup>40</sup> Acevedo, *Reclaiming*, *supra* note 28, at 1.

<sup>41</sup> *Id.* at 4.

through permissible inhumane policies and practices.<sup>42</sup> Jefferson-Jones, in *Community Dignity Takings: Dehumanization and Infantilization of Communities Resulting from the War on Drugs*, enriches the literature by exploring the detrimental effects of criminal justice policies on whole communities as a “Dignity Taking.”<sup>43</sup> She argued that the accumulated Dignity Takings of individuals infect and affect entire communities to cause severe degradation and destruction.<sup>44</sup> In this Article, I build on these scholars to analyze the Dignity Takings upon Black men<sup>45</sup> every time they are confronted by police and are forced to choose between dignity and submission.

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<sup>42</sup> See *id.* at 5–6.

<sup>43</sup> See Jefferson-Jones, *supra* note 33, at 995.

<sup>44</sup> *Id.* at 1004–05.

<sup>45</sup> The Black male experience is not a monolith. There is breadth of diversity in class, education, gender, language, religion, sexual orientation, geography, ability, nationality, political beliefs, life experiences, and more. When I refer to the Black male experience in this Article, I am only referring to my own particular experience as a Black man. To read more about the diverse Black male experience, I recommend *Spectrum: A Journal on Black Men*, published by Indiana University Press. This journal is a “multidisciplinary research journal whose articles focus on issues related to aspects of Black men’s experiences, including topics such as gender, masculinities, and race/ethnicity.” *IU Press to Publish New Journal on Black Male Studies*, IND. UNIV. PRESS (Aug. 3, 2011), <https://iupress.org/connect/blog/iu-press-to-publish-new-journal-on-black-male-studies/> [<https://perma.cc/MM38-2ZLS>]. I want to also highlight that this Article focuses on the Black male experience, but Black women experience equal, and at times harsher, harm when dealing with the police. Here I acknowledge intersectionality. See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 7–8 (2017) (“Intersectionality is about the difference that gender makes for race, and that race makes for gender. It helps us understand the ways that racism and sexism particularly confront women of color. . . . Intersectionality explains why males are frequently perceived as standard bearers for the race in a way that females are not. Things that happen to African American men are identified as “[B]lack” problems in a way that things that happen to African American women would not be. Even if some of the same things that happen to African American men happen to African American women, men are likely to receive the most attention.”). Groups like the African American Policy Forum (“AAPF”) and Center for Intersectionality and Social Policy Studies (“CISPS”) have launched campaigns such as the #SayHerName campaign to highlight what are often invisible names, stories, and experiences of Black women and girls who have been harmed by racist policing practices. #SAYHERNAME, AFR. AM. POL’Y F., <https://www.aapf.org/sayhername> [<https://perma.cc/Q6U8-LFXP>]. As AAPF writes,

Black women and girls as young as 7 and as old as 93 have been killed by the police, though we rarely hear their names. Knowing their names is a necessary but not a sufficient condition for lifting up their stories which in turn provides a much clearer view of the wide-ranging circumstances that make Black women’s bodies disproportionately subject to police violence. To lift up their stories, and illuminate police violence against Black women, we need to know who they are, how they lived, and why they suffered at the hands of police.

*Id.* One of those names that has been a rallying cry and a turning point in the Black Lives Matter movement is Sandra Bland who was a twenty-eight-year-old Black activist arrested

The Supreme Court has also recognized the concept of dignity in its jurisprudence. A review of Supreme Court cases between 1925 and 1982 discovered the use of the term “human dignity” or a similar phrase in 187 opinions, though often in dissenting opinions.<sup>46</sup> Today, the term “dignity” appears in more than 900 Supreme Court opinions.<sup>47</sup> Its meaning and functions are commonly presupposed but rarely articulated. In one standout case, *Lawrence v. Texas*, the Supreme Court constitutionalized the concept of human dignity in its decision-making.<sup>48</sup> The Court described human dignity as “central” to petitioners’ liberty interest stating, “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>49</sup> Notwithstanding the frequent use of the term dignity, the Court has never talked about dignity lost, or takings upon Black men in the context of the Fourth Amendment. This Article will highlight that

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for “suspicion of assaulting [an] officer” during a traffic stop for a minor signaling violation. Molly Hennessy-Fiske, *A Sign for Sandra Bland: ‘Signal Lane Change or Sheriff May Kill You,’* L.A. TIMES (July 24, 2015), <https://www.latimes.com/nation/la-na-sandra-bland-sign-20150724-story.html> [<https://perma.cc/3822-4B7L>]. Three days after her arrest, she was found hanged in a jail cell in Waller County, Texas. David Montgomery, *New Details Released in Sandra Bland’s Death in Texas Jail*, N.Y. TIMES (July 21, 2015), <https://www.nytimes.com/2015/07/21/us/new-details-released-in-sandra-blands-death-in-texas-jail.html?smid=pl-share> [<https://perma.cc/26TF-AZM9>]. Her death was ruled a suicide. *Id.* Many protests ensued disputing the cause of death and alleging racial violence against her. *Id.* Since 2015, her case and her name have resonated with so many for years. Because we knew her name, we were able to create an online petition calling for the Justice Department to investigate, to enact a law in 2017 called the Sandra Bland Act, and to create a documentary about the case. Adeel Hassan, *The Sandra Bland Video: What We Know*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/us/sandra-bland-brian-encinia.html> [<https://perma.cc/M6TN-SWMZ>]. Sandra Bland’s death intensified outrage over the mistreatment and harassment of Black people by white officers. *Id.* To learn and read more about the structural inequality and violence that Black women and girls face, I recommend looking into the work AAPF has done for the Say Her Name movement.

<sup>46</sup> Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 148–62 (1984) (addressing human dignity as both a “constitutional and international” legal principle, focusing on the use of the phrase “human dignity” and similar terms by the United States Supreme Court, the frequency of such usage, and which Justices used “human dignity” as a concept in constitutional law through 1982); see also Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 756 (2006).

<sup>47</sup> A search of the term “dignity” in Westlaw shows these references.

<sup>48</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down the Texas sodomy law, preserving liberty interest and human dignity). Justice Kennedy, writing for the Court, explained: “Still, it remains a criminal offense with all that imports for the dignity of the person charged. . . . The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” *Id.* at 575, 578. The Court also affirmed that “adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.” *Id.* at 567.

<sup>49</sup> *Id.* at 574.



particular Dignity Taking through examples from my personal experience as a Black man.

I came of age in inner city South Los Angeles in exclusively Black and Brown communities where confrontational police interactions were and still are commonplace. I have had to make the choice of attempting to maintain some sense of dignity within my forty-five years of living during Fourth Amendment intrusions by police. A dignity dilemma ensues at every interaction with police: whether to allow my dignity to die several times in order to physically survive or to preserve and assert dignity, through the protections of the Fourth Amendment, which allows my dignity to survive, but at the potential cost of my life. This Article highlights my experience in asserting the Fourth Amendment and explores the potential violence<sup>50</sup> that ensues as Dignity Takings.

In Part II of this Article, I provide a basic overview of scholarly writings on race and the Fourth Amendment, which will frame the Part to follow. Scholars have written extensively about the evisceration of Fourth Amendment protection, specifically where applicable to Black men, the discriminatory impact of stop and frisk practices, and the unrivaled expansion of the modern carceral state resulting from a court created doctrine of reasonable articulable suspicion.<sup>51</sup> This Article attempts to center a largely underexplored aspect of the Fourth Amendment—Dignity Takings. Specifically, this Article challenges the narrative found in jurisprudence and scholarship of the Fourth Amendment as a constitutional right for all, discusses reasonable articulable suspicion, probable cause, pretext, exigency, and consent, and highlights an emerging discussion about what occurs in the mind of one such Black man, me, when forced to deal with police.<sup>52</sup>

Part III explores my inner-city Black male, first-generation college student, lawyer, and law professor's experience with the Fourth Amendment of the United States Constitution and the forever presence of four hundred years of chattel slavery. With this Article, I begin a conversation about the Dignity Takings that occur each time Black men interact with the police and unpack whether dignity through the law is even possible for Black men in America. I apply a critical lens to understand the Fourth Amendment and Black male dignity more accurately. This Article is written in the tradition of Critical Race Theory and uses personal narrative to illuminate and explore the lived

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<sup>50</sup> See Devin W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 163 (2017) ("Fourth Amendment law is one of several variables that facilitate contact between African Americans and the police; and the facilitation of police contact is one of several dynamics that enables and legitimizes police violence.").

<sup>51</sup> See *infra* notes 59–66.

<sup>52</sup> See Carbado, *supra* note 50, at 129 ("Because every encounter police officers have with African Americans is a potential killing field, it is crucial that we understand how Fourth Amendment law effectively 'pushes' police officers to target African Americans and 'pulls' African Americans into contact with the police. Racial profiling is an important part of the story.").

experience of racial oppression.<sup>53</sup> In this Article, I highlight three personal incidents that implicate the Fourth Amendment, a Dignity Taking, and my attempts at dignity restoration that could have easily cost me my life. Incident one involves a *Terry* stop,<sup>54</sup> when entering my home, I was accosted by the police. I attempted to assert my right to walk away from what under the law was a consensual interaction. That attempt was met with physical abuse. The first incident's discussion will challenge the Court created doctrine of reasonable articulable suspicion<sup>55</sup> and argue that under existing law and racial practice, as a Black man, I am always subjected to an accosting, pat down, and search.

Incident two involves a *Whren* pretextual stop of my car based on an officer's falsely created basis for probable cause that a traffic infraction had occurred.<sup>56</sup> The discussion of the incident will challenge the legitimacy of the probable cause doctrine based on officer testimony, where only the word of a Black man—my word—contradicts the officers' version of the facts. The

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<sup>53</sup> Critical Race Theory ("CRT") is an "academic framework centered on the idea that racism is systemic." Marisa Iati, *What Is Critical Race Theory, and Why Do Republicans Want to Ban It in Schools?*, WASH. POST (May 29, 2021), <https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/#LRM3F7NVEZBNREQT2IV7RD3BGI> [<https://perma.cc/5WAG-5EQY>]. It gained traction as an academic theory and social movement beginning in the 1970s. *See id.*; *see also* John O. Calmore, *Critical Race Theory*, *Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2137 (1992) ("[C]ritical race scholarship . . . reflects our distinctive experiences as people of color."). CRT scholarship addresses the following themes: "(1) Critique of liberalism; . . . (2) Storytelling/counterstorytelling and 'naming one's own reality;' . . . (3) Revisionist interpretations of American civil rights law and progress; . . . (4) A greater understanding of the underpinnings of race and racism; . . . (5) Structural determinism; . . . (6) Race, sex, class, and their intersections; . . . (7) Essentialism and anti-essentialism; . . . (8) Cultural nationalism/separatism; . . . (9) Legal institutions, Critical pedagogy, and minorities in the bar; [and] . . . (10) Criticism and self-criticism." Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462–63 (1993). I have tremendous gratitude to the critical legal scholars that came before me. *See generally, e.g.*, DERRICK BELL, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); ALAN D. FREEMAN, *LEGITIMIZING RACIAL DISCRIMINATION THROUGH ANTIDISCRIMINATION LAW: A CRITICAL REVIEW OF SUPREME COURT DOCTRINE in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); KIMBERLÉ W. CRENSHAW, *RACE, REFORM, AND RETRENCHMENT: TRANSFORMATION AND LEGITIMATION IN ANTI-DISCRIMINATION LAW in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* (2d ed. 2012); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); MARI MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND LAW* (1996); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991).

<sup>54</sup> *See Terry v. Ohio*, 392 U.S. 1, 27 (1968).

<sup>55</sup> *See id.* at 19–20.

<sup>56</sup> *See Whren v. United States*, 517 U.S. 806, 813–16 (1996).

discussion will demonstrate that the Black man's word will always be met with skepticism and disbelief because of his status as a Black man.

Next, this Article will explore the Fourth Amendment's stated purpose of security in the home and how as a Black man, the home has never provided sanctity. This Part will discuss a third incident where I met officers at my front door, refused them entry into my home, and prompted them to get a warrant to enter—and how those officers ignored the Fourth Amendment and forcibly entered my home using the *Brigham City v. Stuart* exigency and probable cause for a warrantless search of a home doctrine. This Article discusses the choices Black people living in the United States constantly face between insisting upon dignity by risking death at the hands of police or electing a spiritual death through submission to a racist law enforcement system. Each example highlights the import of four hundred years of the chattel slave system, the lingering implications of race upon the Fourth Amendment, and the always constant challenge to accept submission, demand dignity, and/or be prepared for death. In Part IV, I conclude the Article with some thoughts on prescriptions: submission, resistance, and repatriation.

## II. SCHOLARLY WRITINGS ON RACE AND THE FOURTH AMENDMENT

Fourth Amendment issues largely fall into two major categories: (1) substantive issues surrounding what constitutes an illegal search or seizure, with or without a warrant, and (2) remedial issues regarding whether, assuming there was a constitutional violation, the prosecution is precluded from using the illegally seized evidence.<sup>57</sup> It is well established law that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”<sup>58</sup> This Article is only concerned with the substantive issues—the government's violation of Fourth Amendment rights—rather than remedial questions.

Scholars have written extensively about these well-delineated exceptions and the evisceration of Fourth Amendment protection where applicable to Black men. They have explored the discriminatory impact of stop and frisk practices and the unrivaled expansion of the modern carceral state, based in a court created doctrine of reasonable articulable suspicion.<sup>59</sup> Scholars have entered and elevated this doctrinal discussion by providing critical perspective.<sup>60</sup> They have begun to look more closely at the implications of race and the Fourth

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<sup>57</sup> See, e.g., Brent E. Newton, *The Supreme Court's Fourth Amendment Scorecard*, 13 STAN. J. C.R. & C.L. 1, 6 n.22 (2017).

<sup>58</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967) (citations omitted).

<sup>59</sup> See generally, e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 290–91 (1999); Adero S. Jernigan, Note, *Driving While Black: Racial Profiling in America*, 24 LAW & PSYCH. REV. 127 (2000).

<sup>60</sup> See, e.g., Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 57–58 (2014).

Amendment and center the import of policing policies upon Black people.<sup>61</sup> They have challenged and demonstrated the illegitimacy of Fourth Amendment jurisprudence and scholarship that focus only on constitutional rights,<sup>62</sup> reasonable articulable suspicion,<sup>63</sup> probable cause,<sup>64</sup> pretext, and exigency<sup>65</sup> within a vacuum that does not acknowledge the implication of racist police practices.<sup>66</sup> These scholars have centered the unique impact of racist police enforcement on Black males. This Article builds on their work and addresses the unexplored aspect of Fourth Amendment scholarship: what occurs in the mind of one Black man, me, when forced to deal with police.

One of the most controversial and criticized Fourth Amendment cases is the Supreme Court's decision in *Terry v. Ohio*.<sup>67</sup> *Terry* has been analyzed, challenged, confirmed, and rejected from the left and right for its furthering of racist police practices.<sup>68</sup> *Terry* pivots from the Warren Court's emphasis on heightened protection of individual constitutional rights, specifically those of Black Americans, from police abuse of power to the empowerment of police

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<sup>61</sup> See generally, e.g., Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 967–68 (2002); L. Darnell Weeden, *It Is Not Right Under the Constitution to Stop and Frisk Minority People Because They Don't Look Right*, 21 U. ARK. LITTLE ROCK L. REV. 829 (1999).

<sup>62</sup> The Fourth Amendment to the Constitution provides the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. The Supreme Court held that the remedy for violating the Fourth Amendment—exclusion of evidence illegally obtained—applied to the states via the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 659–60 (1961).

<sup>63</sup> The Court laid out a two-pronged test in the landmark decision *Terry v. Ohio*, which asks “[1] whether the officer’s action was justified at its inception, and [2] whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968). The Court approved what has now come to be called a “*Terry* stop,” or the police practice of “stop-and-frisk,” where if a police officer has a reasonable articulable suspicion to justify the stop—something more than a gut feeling that crime is afoot, but less than probable cause—the officer may pat down an arrestee for weapons in the interest of the officer’s safety. *Id.* at 27.

<sup>64</sup> See *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (“Probable cause exists where ‘the facts and circumstances within [the officer’s] knowledge and of which they have reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” (alterations in original) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925))).

<sup>65</sup> *Payton v. New York*, 445 U.S. 573, 579 n.4 (1980) (noting that exceptions to the warrant requirement for exigency include: (1) hot pursuit, (2) imminent destruction of evidence, (3) need to prevent escape, and (4) risk of danger).

<sup>66</sup> See, e.g., Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 375–76 (1998) [hereinafter Maclin, *Race*].

<sup>67</sup> See, e.g., Harris, *supra* note 59, at 290–91; Jernigan, *supra* note 59, at 136; Butler, *supra* note 60, at 57–58; Carbado, *supra* note 61, at 967–68; Weeden, *supra* note 61, at 830.

<sup>68</sup> See, e.g., Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1286–87 (1998) [hereinafter Maclin, *Terry*].

and the expansion of police power in the streets.<sup>69</sup> The result of *Terry* was the stripping of Black and Brown communities of much needed Fourth Amendment legal protections and leaving these communities to be subject to constant seizures at the hands of police.<sup>70</sup>

Scholars Tracey Maclin and Thomas B. McAfee have written about the disastrous impact of *Terry* on predominantly inner-city, young Black men. Maclin contends in *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, that *Terry* was wrongly decided for three reasons.<sup>71</sup> One, before *Terry*, the standard of proof for a warrantless search was settled law.<sup>72</sup> A series of car search case opinions clearly articulated that before police officers could search the inside of a vehicle, the Fourth Amendment required probable cause of criminal conduct.<sup>73</sup> Two, defining the issue in *Terry* as tension between “police safety” and individual freedom inaccurately describes police conduct on the streets.<sup>74</sup> Maclin surmised, regardless of the Court’s ruling in *Terry*, police officers would continue to frisk people they determined to be a threat to their safety.<sup>75</sup> Third, the *Terry* Court yielded to pressure emanating from the Court’s prior rulings that extended meaningful constitutional protections to our nation’s most vulnerable: racial minorities and those perceived suspect of criminal behavior.<sup>76</sup> In the end, *Terry* was a win for the police and a defeat for the people to be secure against unreasonable searches and seizures.

McAfee, in *Setting Us Up for Disaster: The Supreme Court’s Decision in Terry v. Ohio*, expanded on the clear linkage between the *Terry* decision and how it’s lent to the powerful use of race-based enforcement of the nation’s laws.<sup>77</sup> The police can stop and frisk anyone they consider “suspicious,” “without any evidence that they are armed or dangerous, just because . . . [of] the neighborhoods in which they work or live.”<sup>78</sup> This approach to policing, reaffirmed in *Terry*, stems from deep roots in racial stereotyping.<sup>79</sup>

Since *Terry*, other Supreme Court decisions have continued to water down the reasonable articulable suspicion standard. Maclin, in *Race and the Fourth*

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<sup>69</sup> Compare generally, e.g., Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423 (2004) (challenging the *Terry* decision), with Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN’S L. REV. 911, 952–57 (1998) (describing *Terry* as “practically perfect” as Fourth Amendment rules come).

<sup>70</sup> See Maclin, *Terry*, *supra* note 68, at 1286–87.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1286.

<sup>73</sup> See *id.*

<sup>74</sup> *Id.* at 1287.

<sup>75</sup> *Id.*

<sup>76</sup> Maclin, *Terry*, *supra* note 68, at 1287.

<sup>77</sup> Thomas B. McAfee, *Setting Us Up for Disaster: The Supreme Court’s Decision in Terry v. Ohio*, 12 NEV. L.J. 609, 614–16 (2012).

<sup>78</sup> *Id.* at 615 (alteration in original) (emphasis omitted) (quoting David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 44 (1994)).

<sup>79</sup> *Id.* at 614.

*Amendment*, wrote about another seminal case, *Whren v. United States*, which made clear that the Fourth Amendment does not protect against pretextual stops.<sup>80</sup> The Court held that, regardless of any subjective reason motivating a stop, such as racism, is irrelevant if any objective reason giving probable cause of a traffic violation permits the stop under the Fourth Amendment.<sup>81</sup> Maclin argued that “by requiring only probable cause of a traffic offense to justify pretextual seizures, the Court [] ignores racial impact when marking the protective boundaries of the Fourth Amendment.”<sup>82</sup>

These scholars have shown that the evisceration of Fourth Amendment protections to Black and Brown communities through seminal cases such as *Terry v. Ohio* and *Whren v. United States* disproportionately impacted young Black men and exacerbated tensions between the police and Black and Brown communities. Maclin concluded that the Court signaled to police officers everywhere that it’s perfectly reasonable and rational to stop and frisk anyone they deem “suspicious,”<sup>83</sup> a word coded to target Black men.<sup>84</sup> Though the Court may have once been sympathetic to this problem, they’ve signaled that they would rather maintain control over Black persons by “exposing them, without legal protection to the same police harassment that [B]lack men had historically faced in their dealings with police dating to the time of slavery.”<sup>85</sup>

Devon Carbado’s article *From Stopping Black People to Killing Black People* adopted many of the other scholars’ arguments<sup>86</sup> but extended the discussion to address the disproportionate killing of Black people when interacting with the police.<sup>87</sup> He provided a theoretical framework for the Dignity Takings that this Article highlights. Carbado moved beyond proving the racist nature of police enforcement and practices and demonstrated the life and death consequences placed upon Black people through interactions with the police. Specifically, Carbado argued that “[b]ecause every encounter police officers have with African Americans is a potential killing field, it is crucial that we understand how Fourth Amendment law effectively ‘pushes’ police officers to target African Americans and ‘pulls’ African Americans into contact with the police.”<sup>88</sup> He continued, the “Fourth Amendment doctrine expressly authorizes

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<sup>80</sup> Maclin, *Race*, *supra* note 66, at 386–92.

<sup>81</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996); *see also* Maclin, *Race*, *supra* note 66, at 343.

<sup>82</sup> Maclin, *Race*, *supra* note 66, at 331.

<sup>83</sup> Maclin, *Terry*, *supra* note 68, at 1320.

<sup>84</sup> *See* Priscilla Layne, *Suspicious: On Being Policed in an Anti-Black World*, in *ON BEING ADJACENT TO HISTORICAL VIOLENCE* 41, 41 (Irene Kacandes ed., 2022) (defining “suspicion” as “policing that is directed towards *all* Black bodies, not to determine whether they have transgressed some law, but because their very presence is understood to be an act of transgression”).

<sup>85</sup> Katz, *supra* note 69, at 457–58.

<sup>86</sup> Carbado, *supra* note 50, at 130 n.21.

<sup>87</sup> *See id.* at 125.

<sup>88</sup> *Id.* at 129.

or facilitates the very social practice it ought to prevent: racial profiling. This authorization and facilitation exposes African Americans not only to the violence of frequent police contact but also to the violence of police killings and physical abuse.”<sup>89</sup>

I accept Carbado’s proposition and build upon his and those of other scholars to include the Dignity Taking that occurs prior to physical abuse and/or death of Black men. I assert that Black men exercise dignity when they elect not to submit to unjustified police searches and seizures of their person, places, or things. When interacting with police, Black men are conscious of potential death, yet oftentimes elect dignity by asserting their right, knowing the potential consequence of their election. The Black man’s assertion of Fourth Amendment rights is done with an appreciation of the potential consequence. The age-old approach of resistance, rooted in our enslaved ancestors’ rebellious spirit, is on full display when Black men object to searches or seizure, especially where not justified. The same way enslaved Africans refused to submit to the institution of chattel slavery—which never existed in this country without potential rebellion—Black men today insist on their rights under the Fourth Amendment as an act of rebellion. Like those who came before us, we play Russian Roulette<sup>90</sup> with police by preserving our dignity and proving to ourselves and others that we deserve the protection of the United States Constitution and all its privileges. It is an exercise of dignity when Black men say, “no,” “you can’t search my pockets,” “you can’t search my trunk,” “you can’t enter my house,” “I will not come to you,” and “I do not consent.”

### III. FOURTH AMENDMENT, RACE, AND THREE EXAMPLES OF DIGNITY TAKINGS IN MY LIFE

Like in “Of the Coming of John,” Black men today are faced with potential Dignity Takings every time a police intrusion occurs within their person, place, things, or home in violation of the Fourth Amendment. The Fourth Amendment provides that any warrantless police intrusion is categorically unreasonable but for a particularized exception to the warrant requirement.<sup>91</sup> For similarly situated Black men, like me, a combination of blackness, masculinity, and/or an attempt at preserving dignity, provides an unwritten but clearly established exception to the warrant requirement. Historical records clearly establish that the Fourth Amendment and its warrant requirement were not intended for Black

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<sup>89</sup> *Id.* at 131.

<sup>90</sup> *Kennedy v. Washington Nat’l Ins. Co.*, 401 N.W.2d 842, 845 (Wis. Ct. App. 1987) (“One engaging in such a bizarre act as Russian Roulette knows that he is courting death or severe injury, and will be held to have intended such obvious and well known results if he is killed or injured.”).

<sup>91</sup> *See supra* text accompanying note 58.

people.<sup>92</sup> At its ratification, Black people were but three-fifths a person as delineated in the Constitution.<sup>93</sup> This historical truth was recognized, challenged, and amended by the passage of the Fourteenth Amendment.<sup>94</sup> Notwithstanding the Radical Republican intention<sup>95</sup> and their Fourteenth Amendment Equal Protection Clause,<sup>96</sup> abolitionist, civil rights advocates, and anti-racists have long challenged and attempted to extend Fourth Amendment protection to Black people with little to no avail.<sup>97</sup> The failure to truly extend in

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<sup>92</sup> See, e.g., Thurgood Marshall, Remarks of Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii (May 6, 1987), <https://www.gilderlehrman.org/collection/glc09640247> [<https://perma.cc/PS54-UDEG>] (“[O]n the issue whether, in the eyes of the Framers, slaves were ‘constituent members of the sovereignty,’ and were to be included among ‘We the People’: ‘We think they are not, and that they are not included, and were not intended to be included . . . [A]ccordingly, a negro of the African race was regarded . . . as an article of property, and held, and bought and sold as such . . . [N]o one seems to have doubted the correctness of the prevailing opinion of the time.’” (second and third alterations in original) (quoting *Scott v. Sandford*, 60 U.S. 393, 404, 408 (1857))).

<sup>93</sup> U.S. CONST. art. I, § 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”). Upon the ratification of the Constitution, James Madison proclaimed, “Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the *slave* as divested of two fifths of the *man*.” THE FEDERALIST NO. 54 (James Madison), reprinted in THE AMERICAN CONSTITUTION 240 (J.R. Pole ed., 1987).

<sup>94</sup> U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

<sup>95</sup> See William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1339 (2007) (“[T]he Amendment’s drafters clearly expressed their intent to ‘remov[e] every vestige of African slavery from the American Republic’ by ‘obliterat[ing] the last lingering vestiges of the slave system; its chattelizing [sic], degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it.’” (alterations in original) (citations omitted)); see also Fareed Nassor Hayat, *Abolish Gang Statutes with the Power of the Thirteenth Amendment: Reparations for the People*, 70 UCLA L. REV. (forthcoming 2023) (“These abolitionists and many who supported their efforts both in Congress, on the battlefield, at the podiums, and on the underground railroad, sought a new America that could truly live up to her promise. They conceived their mission as ‘remedying the permanent disabilities that the institution of slavery inflicted in perpetuity upon an identifiable and stigmatized group, where those injuries were inflicted in furtherance of maintaining slavery and subordination.’ They hoped to ‘eliminate the permanent caste system slavery created and to ensure that such castes would not exist in the future.’” (citations omitted)).

<sup>96</sup> U.S. CONST. amend. XIV, § 1.

<sup>97</sup> See Carbado, *supra* note 50, at 129–30 (“The Supreme Court’s legalization of racial profiling is embedded in the very structure of Fourth Amendment doctrine. . . . This



practice, policy, and spirit the protection of the Fourth Amendment continues to relegate Black people to the conditions of slavery. As the modern equivalent of slaves, the idea that Black people are the manifestation of “laziness, ineptness, intellectual deficiency, non-Christian, not normal, subhuman, hypersexual, shiftless, and dangerous,” is perpetuated.<sup>98</sup>

The recurrence of police interactions where Black men are placed in cuffs, sat on the curb, put in the back of a police cruiser, jailed, and killed confirms racist historical ideology that Black men are lazy, inept, intellectually deficient, shiftless, and dangerous. Accordingly, Black men are perceived as deserving of police abuse and must be doing something wrong to continually end up the target of police contact.<sup>99</sup> This Part rejects that conclusion and asserts that the badge<sup>100</sup> of Black dangerousness and criminality, coupled with a social contract of submission to survive is designed to maintain the social order of slavery and its incidents. Below, I highlight three incidents of slavery in their modern form (police suppression of my Black body), in which I was subjected to the abusive power of police. Each incident demonstrates, like John, my attempt at preserving my dignity is at odds with the social order of this country. In each incident, I attempt to assert my dignity through the Fourth Amendment and each time, I am put back into my place. Though each incident is in violation of the Fourth Amendment of the United States Constitution, the police consistently reminded me that the Fourth Amendment was not intended to protect me. In each incident, I assert my dignity under the Fourth Amendment and police

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legalization of racial profiling has left African Americans less secure in their ‘persons, papers, houses and effects’—and sometimes dead. Put another way, African Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures.” (citation omitted)).

<sup>98</sup> See Hayat, *supra* note 95.

<sup>99</sup> These inaccurate conclusions often arise in various contexts. See, e.g., Monte Williams, *Danny Glover Says Cabbies Discriminated Against Him*, N.Y. TIMES, Nov. 4, 1999, at B8 (reporting that Black actor, Danny Glover, alleged a New York City cab driver refused to allow him to ride in the front passenger seat and that five other cabs refused to stop for him, his daughter, and her roommate). See also generally Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (analyzing the legal implications of racial bias and the rationality of the race-based fears argument).

<sup>100</sup> The term badge of slavery has long been discussed by scholars. See, e.g., Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575–82 (2012) (arguing the original badge of American chattel slavery was blackness, while whiteness functioned as a badge of freedom and masterhood); George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 163, 165 (Alexander Tsesis ed., 2010).

officers respond with a forcible Dignity Taking that could have resulted in my death.<sup>101</sup>

*A. No, I Cannot Come to You*

I was a twenty-five-year-old UCLA graduate, former high school teacher, and a successful real estate investor at the time of the first Dignity Taking described in this Part.<sup>102</sup> I lived in my almost exclusively Black and Brown childhood neighborhood in South Los Angeles.<sup>103</sup> My neighborhood was the

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<sup>101</sup> See Carbado, *supra* note 50, at 128 (“Informing this focus is my view that if the law more tightly restricted police officers’ authority to investigate African Americans, this would both increase the social value of our lives and diminish officers’ opportunities to kill us.”).

<sup>102</sup> Fareed Nassor Hayat was born in South Los Angeles, California. Fareed was placed into the foster care system, where his maternal grandparents (and later, his aunt), through supervision of the courts, raised him. In his youth, Fareed was involved in minor offenses, but, in a testament to how individual community members can make a huge difference in a young person’s life, one by one, mentors helped him stay out of jail, maintain mental stability, and excel in school. See, e.g., Hanna Love, *Want to Reduce Violence? Invest in Place.*, BROOKINGS INST. (Nov. 16, 2021), <https://www.brookings.edu/research/want-to-reduce-violence-invest-in-place/> [https://perma.cc/Q93Q-GEYG]. Fareed went to the University of California at Los Angeles, graduated with a B.A. in History, and became a teacher of history and drama in the Los Angeles Unified School District. Fareed Nassor Hayat, *Curriculum Vitae*, CUNY SCHOOL OF LAW, <https://www.law.cuny.edu/wp-content/uploads/page-assets/faculty/directory/fareed-nassor-hayat/Fareed-Nassor-Hayat-CV.pdf> [https://perma.cc/RQ73-FAMQ]. He began working in nonprofits as a social worker and community organizer, then went to graduate school at the University of Southern California School of Theater to study playwriting. *Id.* While studying theater, Fareed wrote, directed, and professionally produced full-scale plays throughout Los Angeles. As a social worker and life plan developer, he worked with youth placed in the foster care system through the Early Start to Emancipation Preparation program at several community colleges throughout the Los Angeles area. Simultaneously, Fareed received his real estate license, purchased and managed over 100 residential units, built low-income housing, and conducted numerous real estate transactions. Fareed earned his Juris Doctorate from the Howard University School of Law, and then joined the Maryland Office of the Public Defender in Baltimore City’s Neighborhood Defenders Division as an Assistant Public Defender. *Id.* at 1, 3. He litigated thousands of criminal matters, demanded and won over 90% of criminal trials on behalf of his clients, and argued that true criminal justice reform only comes through carceral abolition. Fareed went on to open a private law firm, The People’s Law Firm, where he continued to focus on holistic criminal defense and expanded his practice to include plaintiff-side civil rights cases, including police brutality, correctional medical malpractice, and Eighth Amendment cruel and unusual punishment cases. *Id.* at 2–3. Fareed served as lead defense counsel in the largest Maryland gang prosecution and challenged the legitimacy of gang prosecutions.

<sup>103</sup> Mike Sonksen, *Inglewood Today: The History of South Central Los Angeles and Its Struggle with Gentrification*, USC LUSK CTR. FOR REAL EST. (June 20, 2018), <https://lusk.usc.edu/news/inglewood-today-the-history-south-central-los-angeles-and-its-struggle-gentrification> [https://perma.cc/PC5D-RWAK] (discussing the “Black Los Angeles” and segregationist practices that facilitated the development of Black

epicenter of the 1980s crack cocaine<sup>104</sup> and gang banging<sup>105</sup> epidemics. Freeway Rick<sup>106</sup> frequented the same blocks on which I lived, and the Crips<sup>107</sup> were established at my high school.<sup>108</sup> Because of my educational and economic success,<sup>109</sup> I believed myself to be, like John, a pillar of the community and a catalyst for positive change.<sup>110</sup> I saw myself as an example of the potential of young Black male possibility in inner-city South Los Angeles. As a product and

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neighborhoods in southern Los Angeles and the “Great Migration” in the mid-twentieth century of Latin American immigrants to Southern Los Angeles).

<sup>104</sup> See Mark Osler, *Learning from Crack*, 10 OHIO ST. J. CRIM. L. 671, 671 (2013) (“The origin of the crack cocaine trade in this country was led and designed by the CIA and their paid Nicaraguan agents—who introduced crack cocaine to South-Central Los Angeles.” (citation omitted)). The name “crack” first appeared in the New York Times in 1985. Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 508 (2012).

Crack is sometimes referred to as “cocaine base” and is produced through a relatively simple process of dissolving powder cocaine into a mixture of water and either ammonia or baking soda. This mixture is then boiled until it forms a solid, which is dried and broken into pieces called “rocks.” The drug’s name is derived from the crackling sound it makes when smoked.

*Id.* at 507. Drug charges involving crack historically resulted in substantially worse sentences than charges involving cocaine. *Id.* at 508–11; see Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2545–50 (2010). The Anti-Drug Abuse Act of 1986 “triggered mandatory minimum sentences according to the weight of the drugs involved, using the 100:1 equation. Thus, a conviction or plea involving five grams . . . of crack received the same five-year mandatory imprisonment sentence as a conviction or plea involving five *hundred* grams . . . of powder.” United States v. Watts, 775 F. Supp. 2d 263, 267–68 (D. Mass. 2011). The rationale for this disparity was rooted in the belief that “crack cocaine was an inherently more dangerous drug than powder cocaine. It was certainly less expensive and was thought to be fifty percent more addictive.” *Id.* at 267.

<sup>105</sup> Some of the so-called street gangs that occupied South Los Angeles during this time were the Underground Crips, Hoover Crips, Bounty Hunter Bloods, Grape Street Crips, Hacienda Village Bloods, and the PJ Watts Crips. See Elizabeth Hinton, *Los Angeles Had a Chance to Build a Better City After the Rodney King Violence in 1992. Here’s Why It Failed*, TIME (May 18, 2021), <https://time.com/6049185/los-angeles-rodney-king-misunderstand-what-happened/> [<https://perma.cc/S8XK-L2QB>].

<sup>106</sup> Ricky “Freeway Rick” Ross established a drug empire in Los Angeles in the early to mid-1980s. *Freeway Ricky Ross*, FREEWAY RICKY ROSS, <https://freewayrickyross.com/> [<https://perma.cc/VP6X-JRPT>].

<sup>107</sup> See generally Day to Day, *Tookie Williams and the History of the Crips*, NPR (Dec. 7, 2005), <https://www.npr.org/templates/story/story.php?storyId=5042586> [<https://perma.cc/EEQ4-XEVU>] (discussing the Crips origin story with Raymond Washington and Stanley Tookie Williams).

<sup>108</sup> I attended Washington High School at 10860 South Denker, Los Angeles, CA 90047. Al Valdez, *Tracing the Roots of Black Gang Rivalry*, POLICE MAG. (Aug. 1, 1996), <https://www.policemag.com/338634/tracing-the-roots-of-black-gang-rivalry> [<https://perma.cc/D9QS-X6UN>].

<sup>109</sup> See *supra* note 102.

<sup>110</sup> See *supra* text accompanying notes 3–5.

resident of the neighborhood, I embodied many of the physical cultural expressions by way of dress, hair, and car.<sup>111</sup> I was a hodgepodge of South Los Angeles inner-city culture and a benefactor of affirmative action educational opportunities.<sup>112</sup> I adopted Afrocentric<sup>113</sup> elements in my thinking, personality, and style. Yet, I embodied inner-city South Los Angeles in my car choice, rims, and flashy dress style. I wore locs and an African headwrap while I drove a new Land Rover Range Rover with twenty-inch rims.<sup>114</sup> Although many may have considered me “successful,” this in no way shrouded me from police encounters. To the police, I stuck out, fit the profile of a drug trafficker,<sup>115</sup> and garnered their attention for suppression. According to the inner-city dweller social contract, I was too arrogant, up to no good, and deserving of suspicion.

On the night of my first Dignity Taking,<sup>116</sup> I was approaching the intersection at 107th Street and Denker Avenue, when I saw the patrol car coming from the opposite direction. I came to a complete stop at the intersection, recognizing not doing so would provide a legitimate basis for the police to stop my truck.<sup>117</sup> I dreaded police interaction, and I knew the locs on my head and shining twenty-inch rims on my Range Rover would capture the police officer’s

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<sup>111</sup> See, e.g., Madison Home, *A Visual History of Iconic Black Hairstyles*, HIST., <https://www.history.com/news/black-hairstyles-visual-history-in-photos> [https://perma.cc/28VH-YNSL] (Feb. 1, 2019) (discussing the roots of Black hairstyles and the development of locs as part of a larger movement to reclaim Black history); Khanya Mtshali, *The Radical History of the Headwrap*, TIMELINE (May 10, 2018), <https://timeline.com/headwraps-were-born-out-of-slavery-before-being-reclaimed-207e2c65703b> [https://perma.cc/2CK9-SK3V] (highlighting the history of the African headwrap as a cultural expression and owned what had been a marker of slavery; “it was ultimately the descendants of slaves who determined [the headwrap’s] significance and usage for future generations”).

<sup>112</sup> See, e.g., *What You Need to Know About Affirmative Action at the Supreme Court*, ACLU (Oct. 31, 2022), <https://www.aclu.org/news/racial-justice/what-you-need-to-know-about-affirmative-action-at-the-supreme-court> [https://perma.cc/2VE4-Y58C] (discussing affirmative action and race-conscious policies in higher education).

<sup>113</sup> MOLEFI KETE ASANTE, *AN AFROCENTRIC MANIFESTO* 17 (2007) (“Afrocentricity seeks to examine every aspect of the subject place of Africans in historical, literary, architectural, ethical, philosophical, economic, and political life.”).

<sup>114</sup> See *supra* note 111.

<sup>115</sup> Young Black men are often stereotyped as threatening and as drug dealers. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 107 (rev. ed. 2012) (“[R]acial bias in the drug war was *inevitable*, once a public consensus was constructed by political and media elites that drug crime is black and brown. Once blackness and crime, especially drug crime, became conflated in the public consciousness, the ‘criminalblackman’ . . . would inevitably become the primary target of law enforcement.”). In other words, our society has internalized the criminal stereotype of Black men, and this has led to the disproportionate targeting of Black men as potential suspects, in interrogation, and in wrongful convictions.

<sup>116</sup> The Dignity Taking described herein Part III.A between the Author and the police are his own account of the events.

<sup>117</sup> See *Whren v. United States*, 517 U.S. 806, 810 (1996) (“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”).

imagination.<sup>118</sup> So, I drove with extreme care to avoid interacting with the police. I made eye contact with the officer as we passed each other enroute to our destinations. I could see suspicion in the officer's eyes. My skin, my hair, my car, and my neighborhood, in his eyes, warranted investigation. I could have turned away, but I knew to avoid eye contact would suggest justifiable suspicion.<sup>119</sup> To make eye contact would also provide confrontation.<sup>120</sup> I returned the stare.

I signaled and then turned right on my block. I felt the officer coming. My heart raced. I thought to myself: only one more block until home. I checked my rearview mirror, still clear. The possibility that the officer might make a U-turn still lurked even though I could not see the officer in my rearview mirror, yet. I got halfway down the block and there the officer was, turning right onto my block. The officer moved quickly down the street behind me. He did not activate his lights or sirens. With clarity of the potential consequences of making any mistake, I checked my speed, between twenty and twenty-five miles per hour, perfect. I activated my left signal and turned into my driveway. Gently, but without delay, I put the car in park, turned off the car's ignition, and exited my truck. I placed the keys in my pocket and began walking toward my front door.

The officer pulled up, perpendicular to my driveway. He blocked my parked truck from moving. Now, as a citizen standing in my front yard, I continued walking toward my door. No flashing lights or sirens were activated. No stop. No seizure. Just an accosting occurred.<sup>121</sup> The officer rolled down his window, looking directly at me, and calmly said, "Come here." I paused, looked at the

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<sup>118</sup> See ALEXANDER, *supra* note 116, at 107 ("[A] fairly consistent finding is that punitiveness and hostility almost always increase when people are primed—even subliminally—with images or verbal cues associated with African Americans. In fact, studies indicate that people become increasingly harsh when an alleged criminal is darker and more 'stereotypically black'; they are more lenient when the accused is lighter and appears more stereotypically white.").

<sup>119</sup> See *United States v. George*, 732 F.3d 296, 300–01 (4th Cir. 2013) ("To be sure, while the failure of a suspect to make eye contact, standing alone, is an ambiguous indicator, see *United States v. Massenburg*, 654 F.3d 480, 489 (4th Cir. 2011), the evidence may still contribute to a finding of reasonable suspicion."). In *People v. Flores*, the police were patrolling a "high crime area," and stopped Flores who was crouching behind a car. *People v. Flores*, 275 Cal. Rptr. 3d 233, 235–36 (Cal. Ct. App. 2021). Because the officers believed that Flores looked suspicious and was "attempting to conceal himself from the police," they handcuffed him and searched him. *Id.* at 236. One of the things officers identified as the basis for having reasonable suspicion was that Flores' eyes averted the police. *Id.* at 242.

<sup>120</sup> *United States v. De la Cruz-Tapia*, 162 F.3d 1275, 1278 (10th Cir. 1998) (explaining how a police officer "undermined his grounds for suspicion when he testified that he believed both eye contact and lack of eye contact constituted suspicious behavior").

<sup>121</sup> *People v. Mickelson*, 380 P.2d 658, 660 (Cal. 1963); *In re Tony C.*, 582 P.2d 957, 958 (Cal. 1978), *corrected*, 697 P.2d 311 (Cal. 1985) ("It is settled that circumstances short of probable cause to make an arrest may justify a police officer stopping and briefly detaining a person for questioning or other limited investigation."). Accordingly, police officers can approach, talk to, or ask citizens to search or for submission and are not in violation of the Fourth Amendment.

officer, and took stock of the situation. It was dark. I was the only person outside. I did not want this police interaction to escalate. As Black men, we never do. The officer repeated, “Did you hear me? I said come here.” I paused again. I looked at the officer, feeling confused and belittled by his request. I felt like I was being summoned like a dog. I was no dog. I heard the officer again, this time saying in so many words, “Come here, boy.” I decided that I would not do what I was told and spoke out in response, “I am not walking to your car.” The officer responded, “You walk over here now, or I am going to beat your ass.” I made my decision, prepared for the consequences, and spoke out clearly, “I am not walking to your car.” As promised, the officer alighted from the patrol car and pounced on me. He threw me to the ground. He pulled my arms behind me, his knee in my back, pulled out his pepper spray, and sprayed my eyes. I screamed out, “You can’t do this to me in my own community,” the officer leaned in closely and responded, “I can blow your fucking head off if I want to.” Reality check.

This traumatic incident captures the all-too-common experience of Black men when officers use the Fourth Amendment reasonable articulable suspicion standard to create narratives that permit them to accost citizens and infringe on their freedom of movement and autonomy without any evidence of a crime. From the moment I stared back at the officer, the officer’s narrative for reasonable articulable suspicion was created, drafted, and crafted in his mind. His narrative would control for purposes of a Fourth Amendment analysis. The reality of what actually occurred on that evening would not make it into any charging document or rarely be accepted by the court. What was reasonable would be defined by the officer’s narrative.

As stated previously, reasonable articulable suspicion has its origin in the seminal case *Terry v. Ohio*.<sup>122</sup> In *Terry*, the Supreme Court chipped away at the Fourth Amendment allowing for yet another exception, commonly referred to as “stop and frisk,” finding that it was lawful for officers to seize individuals and frisk them for weapons so long as the officer was “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”<sup>123</sup> Though *Terry* was only seven years removed from *Mapp v. Ohio*, where the Court extended the exclusionary rule to the states to dissuade police officers from violating the law while enforcing it,<sup>124</sup> *Terry* was a significant pivot. It limited Fourth Amendment protections by upholding stop and frisk—forcible detention and search—on less than probable cause.<sup>125</sup>

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<sup>122</sup> *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

<sup>123</sup> *Id.* at 21.

<sup>124</sup> See *Mapp v. Ohio*, 367 U.S. at 643, 657 (1961).

<sup>125</sup> Maclin, Terry, *supra* note 68, at 364; Dylan Matthews, *Here’s What You Need to Know About Stop and Frisk—and Why the Courts Shut It Down*, WASH. POST (Aug. 13, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/08/13/heres-what-you-need-to-know-about-stop-and-frisk-and-why-the-courts-shut-it-down/> [https://perma.cc/J4JK-RWNZ].

In *Terry*, the Supreme Court acknowledged “the rule excluding evidence seized in violation of the Fourth Amendment ha[d] been recognized as a principal mode of discouraging lawless police conduct” but justified the officer’s seizure by citing the “governmental interest in investigating crime” and officer safety citing the “immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”<sup>126</sup> In reviewing the officer’s actions, the Court held that so long as the officer’s actions are “judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?” and are found objectively reasonable then the seizure and pat down are lawful.<sup>127</sup> The Court further found that the officer’s suspicion in *Terry* was reasonable, even stating that it would have been “poor police work” for the officer not to stop and pat down the appellant.<sup>128</sup>

In his article *Terry v. Ohio at Thirty-Five: A Revisionist View*, Lewis R. Katz demonstrates that Chief Justice Warren, writing for the Court, facilitated an evolution of the facts from what occurred on the street, to what the officer’s testimony was at the suppression hearing, to what the Court finally included within their opinion to justify reasonable articulable suspicion.<sup>129</sup> These differences facilitated the development of rules pertaining to stop and frisk that impact Black male Dignity Takings and restoration throughout our nation.

Like in *Terry*, the officer’s narrative in my Dignity Taking incident “point[ed] to specific articulable facts” that I, too, met the requirements of reasonable articulable suspicion and that I, too, was armed and dangerous. To justify his action, the officer made up a story that I had a silver object in my hand and upon being ordered to stop, refused to stop. He claimed that I stood in a combative stance, ready to fight. He claimed that he approached me and upon reaching out to detain me, I spat and swung my fist toward his face. Although based on a completely false story, *Terry*’s justification under the officer safety doctrine would permit the officer to take me to the ground and pepper spray me in my face, as he did. The officer safety doctrine purports that “American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.”<sup>130</sup> To the officer, my Black maleness was criminal enough. The narrative suggests that all suspected criminals are armed with “guns and

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<sup>126</sup> *Terry*, 392 U.S. at 12, 23.

<sup>127</sup> *Id.* at 21–22.

<sup>128</sup> *Id.* at 23.

<sup>129</sup> Katz, *supra* note 69, at 434–35. The differences included: (1) “McFadden ordered the men to keep their hands out of their pockets when he intercepted them,” an act that did not appear in the Supreme Court’s statement of facts; and (2) a discrepancy regarding whether Officer Madison conducted a pat-down frisk prior to reaching into the pockets of the individuals who he believed were carrying weapons. *Id.*

<sup>130</sup> *Terry*, 392 U.S. at 21–23.

knives,”<sup>131</sup> dangerous, and deserving of harsh punitive physical abuse as a justifiable means of control.

Based on the manufactured basis for reasonable articulable suspicion, the officer claims that he took me down to the ground and pepper sprayed me to bring me back under control. His narrative construed me as violent, unhinged, and lawless. Under the officer’s narrative, he had observed enough “specific and articulable facts” to pass constitutional muster under *Terry*. The truth, my safety, my life, and my dignity were inferior to the officer’s made-up narrative.

Much like the police version in the incident report and suppression hearing in *Terry*, what actually occurred on my block would not justify a constitutional stop based on reasonable articulable suspicion. I drove with precision and caution. I had not sped. I parked in my own driveway in front of my home. I had not violated any traffic laws. I simply exercised my right to refuse to comply with the officer’s request. I attempted to be human and maintain dignity when I refused the summons. I did not spit at or attempt to swing at the officer. Nor did I have any weapon, indeed, none was found. I did nothing to warrant suspicion under the law. My actions were not analogous to the recitation of the facts in Justice Warren’s *Terry* opinion. My actions were not a justifiable basis for reasonable articulable suspicion to stop—because no crime—other than Black maleness, was afoot.

Only through a fabricated version of the facts where *Terry* was engaged in “casing” for a robbery and was “pausing to stare in the same store window roughly 24 times,”<sup>132</sup> and feared to be armed, is reasonable articulable suspicion established.<sup>133</sup> On the other hand, refusing to stop where the police intrusion was an accosting, standing in a combative stance upon being questioned, and holding a silver object in one’s hand, although fabricated, was not reasonable articulable suspicion of a crime and not a basis for police intrusion under the Fourth Amendment. My incident differed from *Terry*, where the Court created a factual version to conclude the appellant was engaged in a crime typically associated with weapons.<sup>134</sup> This was an accosting of a Black man, me, for standing in my yard, either combative or not, with something silver or not in my hand. Under the “objective” standard adopted in *Terry*, the facts available to the officer at the moment of my accosting, did not “warrant a man of reasonable caution in the belief” that the action taken was appropriate<sup>135</sup> and that crime was afoot.

The Dignity Taking was unequivocally not supported by the *Terry* standard because no crime or reasonably articulated crime occurred to justify any actions taken by the officer. These facts did not support a *Terry* stop. The genuine facts

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<sup>131</sup> *Id.* at 24.

<sup>132</sup> *Id.* at 6, 23.

<sup>133</sup> See *id.* at 30.

<sup>134</sup> *Id.* at 28 (“[A] daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons . . .”).

<sup>135</sup> *Id.* at 22.



support a Fourth Amendment violation—the very Fourth Amendment violation *Terry* cautioned against: “lawless police conduct” and invasion of “personal security.”<sup>136</sup> But as stated, the Fourth Amendment was not intended for me, or *Terry* for that matter.<sup>137</sup> Rather the police, through the holding in *Terry* and fabricated facts are permitted to intrude on my freedom of movement and set the stage for a Dignity Taking.

So, like in the case of John, the tightrope of dignity maintenance began. Under the law, I was within my right to resist this “unreasonable” intrusion and refuse the officer’s request to submit and “come here.” My desire for autonomy as a human being—my understanding of American chattel slavery, my history degree from UCLA, and my successful real estate portfolio in that very neighborhood—propelled me to reject submission and accept a potential age-old slave whipping.

The officer obliged. The Fourth Amendment to the Constitution guarantees my right against unreasonable seizure, as was occurring here. The officer saw me as an inner-city dweller, undeserving of respect or the protections of the Fourth Amendment. It was when I decided to embrace this right and use this right to assert my dignity that I was subjected to potential death. Like John, due to my education, I chose dignity. I chose dignity because I believed I, too, was American. I chose dignity because I knew I was in my right to resist this “unreasonable” intrusion. In the end, choosing dignity resulted in a knee in my back, my arms pulled back behind my back, getting pepper sprayed, and the threat of death in the driveway of my home.

After being forced back into my prescribed position as a slave, I attempted to hire counsel to sue the officer for unlawful arrest and assault. One attorney told me in recognition of the inner-city social contract, “You should have just walked over to the police officer’s car when he called you.” That attorney’s advice, at least at the time as a twenty-five-year-old, with no legal education, a belief in justice, and a secured feeling of right, seemed like the words of a sellout. They sounded like the words of someone who just didn’t get it. In my view, the attorney was, too, a slave. But now, my forty-five years of experience and a more informed understanding of the social contract of Black submission, the law as written and the law as practiced, and the slave catcher’s history of police, I see his advice differently. I know his sentiment was of survival above sacrifice. I know that he believed and wanted me to recognize the harsh reality of being a Black man in inner-city Los Angeles when interacting with police and that in exercising choice, choose survival.

Much like the attorney that advised me, I regularly counsel clients to consider the consequences of not letting officers search their person, cars, homes, and things before rejecting the request. I suggest to clients that the consequences of asserting Fourth Amendment rights, just might be too much to bear. I tell clients to consider arrest, bail, and trial, or alternatively a search that

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<sup>136</sup> *Terry*, 392 U.S. at 12, 19.

<sup>137</sup> See *supra* note 92–98 and accompanying text.

does not produce illegal contraband and the ability to walk away only suffering a Dignity Taking. I tell clients that the consequences of dignity assertion are not worth the loss of life. I understand that their ability to stay uncaged, at least on a particular occasion, is worth more than abstract concepts of justice. At twenty-five years old, with a degree from UCLA, and a thriving real estate investment portfolio, I could afford a criminal defense lawyer for \$15,000. I could afford the \$5,000 bail and I did not fear losing my job. I had the luxury of asserting dignity. For many Black men, especially those that live in inner-city communities, work as wage laborers, and are presumed guilty in all interactions with police, dignity and its corresponding taking, is not worth the cost. Nonetheless Black men, me, engage in its exercise at times with dire consequences.

### *B. No, You Cannot Search My Car*

My second Dignity Taking occurred as a recent law school graduate. I had become versed in the law, at least enough to complete law school and pass the bar. Through law school, I had gained an understanding of the rights bestowed upon Black people with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>138</sup> In addition, I learned how the Fourth Amendment was supposed to protect me against unreasonable search and seizure. Like John, I had become more educated, angrier, and empowered. I wanted to use my legal education to assert dignity—not only my own dignity, but as a law school graduate and forthcoming member of the Maryland Bar, assert and defend the dignity of other Black men. I wanted to provide legal counsel to Black people when abused by police as I had been abused in my front yard and unable to secure legal counsel. Before I could be sworn into practice law in Maryland, I was faced with an unlawful traffic stop that resulted in a Dignity Taking of myself and passengers.

My brother,<sup>139</sup> my cousin,<sup>140</sup> and I were traveling by car across the country for the Thanksgiving holiday. We intended to stay with family for at least a week. We filled our car with large suitcases and plenty of snacks for the trip. We left the house around 5:00 A.M. that morning in anticipation of the two-day drive. We were headed from Silver Spring, Maryland, where I moved for law school, to Los Angeles, California, where I grew up. We used Mapquest to plan our route. We sought the fastest route, not concerned with sightseeing or desirable rest stops. The suggested route took us on the I-70 to I-40 through

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<sup>138</sup> U.S. CONST. amend. XIII (abolishing slavery); U.S. CONST. amend. XIV (granting citizenship, privileges and immunities, due process, equal protection, and appointment of representation); U.S. CONST. amend. XV (granting universal male suffrage). The incorporation doctrine made portions of the Bill of Rights applicable to the states and thus extended its rights to Black people. Robert Fairchild Cushman, *Incorporation: Due Process and the Bill of Rights*, 51 CORNELL L. Q. 467, 467 (1966).

<sup>139</sup> My brother's full name will be withheld for purposes of this Article.

<sup>140</sup> My cousin's full name will be withheld for purposes of this Article.

Allegany County, Maryland crossing back and forth across Maryland and West Virginia state lines headed west. We feared police harassment while traveling, so I was relieved to learn that the suggested route had us passing through the tip of Texas for the shortest time possible. In my mind, Texas was most notorious for profiling Black motorists. I knew through legal study and personal experience that “traffic stops [were] gateways to more intrusive [and potentially violent] searches and seizures.”<sup>141</sup> I hated uninvited police contact, thus I traveled with my speed set by cruise control. I always believed that I shouldn’t give the police a reason to harass, knowing that they would likely harass anyway. Notwithstanding the fear of police on the road, I decided to take the drive. I needed to get home and I intended to leave the car with my aunt in Los Angeles. I was driving her 2004 FX Infiniti SUV.<sup>142</sup>

While on I-70 approaching Allegany County, I noticed an unmarked police car parked on the shoulder. We passed the unmarked police vehicle.<sup>143</sup> I checked my car’s speedometer and noted that I was not speeding.<sup>144</sup> After I passed his car, the officer, who at the time worked as a police officer in Cumberland, a town in Allegany County, pulled onto the highway and followed us.<sup>145</sup> The officer pulled his car alongside ours and looked into the passenger window. There we were, three Black men, with braids and locs in our hair. I looked directly into his eyes, and he quickly surveyed me and my car’s occupants. I knew trouble was afoot. He then fell back behind us and turned on his sirens and signaled for us to pull over.<sup>146</sup> There was no surprise with the illumination of lights and siren. Although we were not speeding, had not illegally changed lanes, had proper registration, and were following all traffic laws, I knew by looking into his eyes that we were to be seized. I readied myself for what was to surely ensue. I cautioned my brother and cousin to stay calm and let me do the talking. I took a deep breath and believed I could handle it.

I attempted to pull over onto the side of the highway. The officer, using his bullhorn, directed me not to do so, but instead continue driving. He then instructed me to exit the highway and turn right. I didn’t really understand why I just couldn’t pull over. There was enough space on the side of the road, and I had been pulled over at least thirty times in the past and always stopped as soon as I could. Not this time. I felt uneasy and a little afraid. This officer was up to something. Every time I attempted to stop once off the highway, over bullhorn, the officer would instruct me to continue and not to stop the car. Then again,

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<sup>141</sup> See Carbado, *supra* note 50, at 151.

<sup>142</sup> The Infiniti SUV was relatively new and considered high end by the officer. See Complaint at 9, Hayat v. Fairley, No. 108CV03029, (D. Md. Aug. 5, 2009), 2008 WL 7254908. My personal perception of the car was not high-end at all. I leased the car a couple years prior for my aunt to drive. The reality is that the SUV was a common purchase item of the middle class and could as easily be considered a soccer mom’s car.

<sup>143</sup> *Id.* ¶ 21.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ¶¶ 1, 22.

<sup>146</sup> *Id.* ¶ 23.

over bullhorn, the officer called out and instructed me to pull into a parking lot approximately four blocks from the highway.<sup>147</sup>

Once we pulled into the parking lot, the officer approached our car while another officer stood near our vehicle with his hand on his gun holster.<sup>148</sup> The first officer began questioning me about my destination and whether we were carrying drugs.<sup>149</sup> After I answered his questions and assured him that we did not have drugs, he accused me of driving five miles over the speed limit and requested identification from me, my brother, and my cousin.<sup>150</sup> I explained that I was a recent law school graduate—and in fact had just been notified by the Court of Appeals that I had passed the Bar—and that current case law did not require passengers in a car during a traffic stop to produce their identification. The officer laughed, said to me, “You passed the Bar? Yeah, right,” and again demanded our identification. Over my objection, my brother and my cousin produced their identification cards. The officer returned to his vehicle with the requested identification, while the unidentified officer continued to stand near my car with his hand on his gun holster.<sup>151</sup>

Shortly thereafter, a K-9 unit<sup>152</sup> officer, along with another unidentified officer arrived.<sup>153</sup> The K-9 officer approached the car and directed the canine twice around the vehicle. While circling the car, the dog did not bark, growl, scratch, sniff,<sup>154</sup> or make any other indication of alert.<sup>155</sup> I thought to myself, of course it didn’t, we have no drugs. Despite the lack of any alert,<sup>156</sup> the K-9

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<sup>147</sup> *Id.* ¶¶ 25–28.

<sup>148</sup> Complaint, *supra* note 143, ¶ 29.

<sup>149</sup> *Id.* ¶ 30.

<sup>150</sup> *Id.* ¶¶ 30–33.

<sup>151</sup> *Id.* ¶¶ 32–34.

<sup>152</sup> A K-9 unit is a “specialized group of law enforcement officers who use service dogs to perform the responsibilities of a general police officer.” *K-9 Unit*, BLUFFTON POLICE DEP’T, <https://sc-bluffton.civicplus.com/452/K-9-Unit> [<https://perma.cc/3MRP-FED2>].

<sup>153</sup> Complaint, *supra* note 143, ¶ 36.

<sup>154</sup> Although the use of a K-9 unit is permissible, limitations on the extent of use exist. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. at 405, 407–08 (2005) (“A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”); *see also* *Rodriguez v. United States*, 575 U.S. 348, 350–51 (2015) (holding that the Fourth Amendment allows unrelated investigations so long as they do not lengthen the roadside detentions).

<sup>155</sup> Complaint, *supra* note 143, ¶ 37.

<sup>156</sup> Alert is defined as any notice of any unusual and potentially dangerous circumstances. *Alert*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/places/united-states-and-canada/canadian-political-geography/alert> [<https://perma.cc/GG7G-TVQU>] (June 11, 2018).

officer told us that he believed marijuana was in the car, read us our Miranda rights,<sup>157</sup> and ordered each of us out of the vehicle.<sup>158</sup>

Over the next hour, the K-9 officer, the original officer, and the unidentified officers subjected us to numerous unjustified indignities. First, the officers ordered my brother out of the car into the freezing temperatures and snow without allowing him to put on his shoes or coat. After a pat-down of my brother during which no weapons or illegal drugs were found, the officers placed their hands inside his pockets and even inside his socks. At no point during the entire interaction did he give consent to be searched.<sup>159</sup> I wondered if it was my status as a law school graduate that spared me from the most demeaning aspects of the investigation. I wondered if it was my brother's braids, or that fact that he was well over six feet, or the fact that he had several visible tattoos that made him the focus of the inquiry. I knew if the officers truly smelled marijuana in the car as they claimed, they would not have any particularized basis to suspect marijuana on his person as opposed to me or my cousin—other than his appearance.

After frisking and searching us, and finding no weapons or drugs, the officers then turned to searching our luggage that was in the trunk.<sup>160</sup> The officers opened the luggage, went through every pocket, turned out every sock, and threw all the contents onto the ground after searching them.<sup>161</sup> Again, the officers found nothing.<sup>162</sup> Again, we never consented to the search of our belongings.<sup>163</sup>

The officers continued to question us about whether we had any drugs on us or in the car. When I attempted to remind my brother of my earlier warning about not talking to the police, and his right to remain silent under the Fifth Amendment, the officers threatened to charge me with disturbing the peace and arrest me.<sup>164</sup> Despite these warnings, I continued to remind my brother of his right to silence, and in response, the officers locked me in the back of a police vehicle<sup>165</sup> demonstrating an intention to make good on their promise of arrest.

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<sup>157</sup> Miranda rights are constitutional protections requiring police officers to provide certain notices to a person taken into police custody. *Miranda v. Arizona*, 384 U.S. 436, 473 (1966). The warning must advise individuals of their right to silence, ultimately protecting them from self-incrimination. *Id.* at 444. However, to “fully to apprise a person interrogated of the extent of his rights under this system” the individual must be given notice of the right to consult with an attorney and if the individual cannot afford an attorney, the individual will receive representation from an appointed attorney. *Id.* at 473. Without the additional warning of the indigents’ right to appointed counsel, indigents, who are “most often subjected to interrogation,” may not know that they are “truly in a position to exercise [that right].” *Id.*

<sup>158</sup> Complaint, *supra* note 143, ¶ 39.

<sup>159</sup> *Id.* ¶ 50.

<sup>160</sup> *Id.* ¶¶ 47, 48.

<sup>161</sup> *Id.* ¶ 48.

<sup>162</sup> *Id.* ¶¶ 48, 55.

<sup>163</sup> *Id.* ¶ 50.

<sup>164</sup> See Complaint, *supra* note 143, ¶ 51.

<sup>165</sup> *Id.* ¶ 53.

The K-9 officer told my brother that other officers had found marijuana shake<sup>166</sup> in the vehicle and that it was okay to admit he sold drugs because the K-9 officer sold drugs, too.<sup>167</sup> After my brother refused to admit to nonexistent drugs, the K-9 officer then lied and told him that other officers found drug paraphernalia in the vehicle.<sup>168</sup> The officers never produced any evidence of marijuana shake, residue, or drug paraphernalia.<sup>169</sup>

As with my brother, when the K-9 officer questioned my cousin, who was only 16 years old at the time, he told him that it was okay to admit to having marijuana in the vehicle because one of his fellow K-9 officers sold crack cocaine.<sup>170</sup> The K-9 officer also falsely told my cousin that the officers had found marijuana in the vehicle.<sup>171</sup> My cousin, however, continued to maintain that there was no marijuana in the car and then exercised his right to remain silent.<sup>172</sup> As a result, the K-9 officer locked my cousin in the back of an unmarked police vehicle.<sup>173</sup>

After the search and seizure continued for almost an hour, the original officer finally issued a warning ticket for driving ten miles, not five, over the speed limit and failing to use a proper turn signal when making a right turn.<sup>174</sup> The fact that I made no lane change in the officer's presence and drove on cruise control within the speed limit was of no consequence.

I later learned that the two officers had conducted numerous traffic stops, primarily pulling over African Americans and other drivers of color, claiming violations of traffic law but eventually searching for drugs.<sup>175</sup> In executing these stops, the original officer would call for outside K-9 assistance, despite the fact that the Cumberland Police Department had its own K-9 unit.<sup>176</sup>

When the officers pulled our vehicle over because they saw three Black men driving in Allegany County and suspected them to be drug traffickers, their narratives became, from its inception, cloaked and protected in the holding of *Whren*, and it did not matter whether they stopped our car due to their racist beliefs of Black male criminality, so long as they were able to formulate a story about a traffic infraction. In *Whren*, the Supreme Court held that "[T]he temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition

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<sup>166</sup> Marijuana shake is "cannabis flower that has naturally broken down through handling." *Shake*, LEAFLY, <https://www.leafly.com/learn/cannabis-glossary/shake> [<https://perma.cc/3HU8-S5G3>].

<sup>167</sup> Complaint, *supra* note 143, ¶ 54.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* ¶ 55.

<sup>170</sup> *Id.* ¶ 57.

<sup>171</sup> *Id.*

<sup>172</sup> *See id.* ¶¶ 57–58.

<sup>173</sup> Complaint, *supra* note 143, ¶ 58.

<sup>174</sup> *Id.* ¶ 59.

<sup>175</sup> *Id.* ¶ 66.

<sup>176</sup> *Id.* ¶¶ 67–68.

against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective.”<sup>177</sup>

In *Whren*, officers saw a vehicle in a high crime area, with temporary tags, and with “youthful” Black males.<sup>178</sup> This alone may have not been enough to stop the car but when the officers headed towards the truck, the truck allegedly made a sudden turn without signaling and sped off at an “unreasonable” speed.<sup>179</sup> The officer pulled the vehicle over and alleged that he saw two bags of crack cocaine in the driver’s hand.<sup>180</sup> Appellants argued that a probable cause standard was too low, reasoning that “compliance with traffic and safety rules is nearly impossible.”<sup>181</sup> The Court squarely addressed race, stating that appellants “who are both [B]lack, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car’s occupants.”<sup>182</sup> The Court, unmoved, stated:

We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.<sup>183</sup>

This pivotal case foreclosed the argument that ulterior motives—even race-based enforcement—can invalidate police conduct justified by probable cause. Indeed, the Court blatantly said that the case “foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”<sup>184</sup>

Under the officer’s narrative, we had gone over the speed limit, and so under *Whren*, that was enough to be considered a legally justifiable basis for the stop.<sup>185</sup> Because *Whren* “foreclose[d]” any challenge to the subjective intent of the officers, their narrative was sufficient, regardless of their pattern of targeting Black drivers.<sup>186</sup> But, the reality of what occurred did not support *Whren*—I had not been speeding. In fact, it wasn’t until after I told the officers that we were not carrying drugs that the attention suddenly turned to an alleged traffic infraction which had never occurred.<sup>187</sup> Nor was this like the situation in *Whren*

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<sup>177</sup> *Whren v. United States*, 517 U.S. 806, 808 (1996).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 808–09.

<sup>181</sup> *Id.* at 810.

<sup>182</sup> *Whren*, 517 U.S. at 810.

<sup>183</sup> *Id.* at 813.

<sup>184</sup> *Id.*

<sup>185</sup> Complaint, *supra* note 143, ¶ 32; *see Whren*, 517 U.S. at 819.

<sup>186</sup> *Whren*, 517 U.S. at 813.

<sup>187</sup> *See* Complaint, *supra* note 143, ¶¶ 30–32.

where after the officer approached the vehicle, drugs or illegal activity were exposed.<sup>188</sup> I had not done anything to justify the stop of my car nor did the officers see any drugs—despite their belief we had drugs—or observe any illegal activity.<sup>189</sup>

Pretextual stops, such as the one that occurred here, are commonplace and are recognized as a basis for unlawful detention. Tracey Maclin in his article *Race and the Fourth Amendment* detailed this all-too-common police practice, highlighting the common nature of such interactions and the racial implication of police officer unlawful detention of African Americans who travel by highway.<sup>190</sup> Similar to my experience, Maclin focuses on the case of “Robert Wilkins, a Washington, D.C., criminal defense lawyer, who with his family, was returning to Washington after attending a funeral in Chicago.”<sup>191</sup>

The facts of *Wilkins v. Maryland State Police* begin with a traffic stop by a state trooper of four Black individuals in Allegany County, Maryland:

The officer requested permission for a consent search, but Wilkins told the trooper that he was an attorney who had a court appearance later in the morning, and that the officer had no right to search the car without arresting the driver. After the request to search was denied, the officer ordered the occupants out of the car and detained them while a drug-sniffing dog was brought to the scene. The canine sniff revealed no narcotics. The officer then permitted Wilkins and his family to leave after more than a half-hour detention.<sup>192</sup>

Wilkins’ case provides an example of how police officers often target Black drivers through pretextual stops. Because of his experience, Wilkins decided to file a class action lawsuit alleging racially motivated illegal traffic stops.<sup>193</sup> During litigation, a Maryland state police intelligence report revealed a warning to troopers to be cognizant of “dealers and couriers (traffickers) [who] are predominately [B]lack males and [B]lack females . . . utilizing Interstate 68.”<sup>194</sup>

Like in Wilkins’ case, the officers stopped me believing that because I was Black, as were the passengers in my car, we were “dealers and couriers” as demonstrated by the continuous questioning regarding drugs. *Whren* makes it easy for officers to justify their race-based stops using traffic infractions because “compliance with all traffic and safety rules is nearly impossible,”<sup>195</sup> and thus, officers could make up a myriad of reasons for stopping me and other similarly situated Black men on the highway.

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<sup>188</sup> See *Whren*, 517 U.S. at 809.

<sup>189</sup> Complaint, *supra* note 143, ¶¶ 19–25.

<sup>190</sup> See Maclin, *Race*, *supra* note 66, at 386–92.

<sup>191</sup> *Id.* at 349.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Whren v. United States*, 517 U.S. 806, 810 (1996).



Externally, these pretextual interactions, as Devin Carbado notes, provide police the opportunity to kill us.<sup>196</sup> In the alternative, if we avoid death and successfully sacrifice dignity, as Paul Butler notes, they kill our spirit.<sup>197</sup> Officers, based on *Whren*, have the pretextual weaponry to stop vehicles solely based on traffic infractions where “compliance with traffic and safety rules is nearly impossible”<sup>198</sup> and then subsequently be shielded because their subjective intent is foreclosed from being considered.<sup>199</sup> According to the *Whren* Court, the Fourth Amendment “provides only procedural protection for the individual.”<sup>200</sup> Thus, if the officer’s version is believed—even when fabricating the facts as in my case and *Wilkins*—“Fourth Amendment protection terminates and the police are free to conduct a seizure at their whim.”<sup>201</sup>

There are Black men, like me, who want to preserve their dignity by asserting their rights even at the cost of losing their physical lives, like John. We don’t want to die, but we also do not want to be reduced to anything less than human. We are conscious of the consequences of escalated police contact and we object, nonetheless. Based on the knowledge gained through legal education, I continued to object to violations of rights and insisted upon informing the passengers in my car of their rights as well. Like John’s riverside conversation with his sister, I told my brother to remain silent and not to consent to search even though I knew it could result in his arrest and the escalation of punishment imposed by the officers.<sup>202</sup> When I did not relent and did not submit, I was threatened with criminal charges. When I continued to resist, I was silenced and thrown in the police car.

Fortunately for us, we were able to walk the tightrope of dignity restoration without the consequences of death. No matter the intensity of the search or the firm belief of officers that we fit the drug trafficker profile, we were not. We simply did not have drugs on our person or in our things. We were just three Black men headed home for Thanksgiving holiday and just so happened to be traveling through the same county in Maryland as *Wilkins* fifteen years prior. Not much had changed, Black men were still being racially profiled for driving while Black<sup>203</sup> on that same highway, searched illegally and without cause, and

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<sup>196</sup> Carbado, *supra* note 50, at 129.

<sup>197</sup> See Butler, *supra* note 60, at 69.

<sup>198</sup> *Whren*, 517 U.S. at 810.

<sup>199</sup> See Maclin, *Race*, *supra* note 66, at 343–44.

<sup>200</sup> *Id.* at 375.

<sup>201</sup> *Id.*

<sup>202</sup> See DU BOIS, *supra* note 1, at 161–62; Complaint, *supra* note 143, ¶ 51.

<sup>203</sup> In 2019, as reported by NBC, the Stanford Open Policing Project found that “police stopped and searched [B]lack and Latino drivers on the basis of less evidence than used in stopping white drivers, who are searched less often but are more likely to be found with illegal items.” Erik Ortiz, *Inside 100 Million Police Traffic Stops: New Evidence of Racial Bias*, NBC (Mar. 13, 2019), <https://www.nbcnews.com/news/us-news/inside-100-million-police-traffic-stops-new-evidence-racial-bias-n980556> [<https://perma.cc/YF4V-YD3C>]. The finding emerged from combing through nearly 100 million traffic stops between 2011 to 2017

forced to stand up for their dignity on the side of the road. Like Wilkins, we survived. Similarly, like Wilkins, we filed a federal civil rights case against the officers<sup>204</sup> and successfully resolved the matter. The labor of filing a lawsuit and the fact that the negative police contact became public knowledge harmed both Wilkins and me. As Black men, we are required to explain our police contact and demonstrate to observers that we are not at fault. Even in fighting back, filing lawsuits and asserting dignity, the narrative of criminality controls and onlookers still suspect us—Black men—of malice and/or criminal activity.

Police officers make up reasonable articulable suspicion and probable cause when conducting stops of cars occupied by Black men.<sup>205</sup> There are limited opportunities for criminal defendants or Black men to prove otherwise and provide alternative narratives. Doing so is a costly proposition. Wilkins and I had the resources, access, and legitimacy to tell an alternative narrative through civil rights lawsuits. This privilege is uncommon in comparison to the number of Black men who are stopped and illegally searched daily.

As a lawyer and now law professor, traffic stops rarely require me to sacrifice dignity in order to survive. In fact, when stopped by police officers, in my upper middle class suburban neighborhood with Howard University School of Law alumni license plates on my car, police are usually justified in their stop. I placed the alumni plates on my car as a protective shield. They appear to be working. With the status of lawyer attached to my car, the police are reasonable in their request, and they leave the scope of the stop to the legitimate basis that they conducted the intrusion in the first place.<sup>206</sup> During police interactions where stops are conducted legitimately, Dignity Takings are limited. I normally have no justifiable anger when stopped by police as a lawyer and law professor because normally, the police limit their interaction to legitimate intrusions. Unreasonable interactions with the police, when officers stop Black men for traffic stops without justification and in violation of the Fourth Amendment, anger ensues, and potential harm emerges. The continuum between asserting dignity and challenging an unlawful interaction leads to potential death.<sup>207</sup>

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recorded by twenty-one state patrol agencies and twenty-nine municipal police departments, including major metropolitan areas such as New Orleans, Philadelphia, San Francisco, and St. Paul. *Id.*

<sup>204</sup> See Complaint, *supra* note 143, ¶ 1; Maclin, *Race*, *supra* note 66, at 349.

<sup>205</sup> See, e.g., Maclin, *Race*, *supra* note 66, at 342 (“The procedural right established under this regime does not stop arbitrary seizures because it fails to consider that police discretion, police perjury, and the mutual distrust between blacks and the police are issues intertwined with the enforcement of traffic stops.”).

<sup>206</sup> Over the last fifteen years, I have been stopped by police upward six times. Each time, I had committed a traffic infraction. When the police approached my car, I knew the reason they had stopped me and remained calm. Because they were justified, I complied with their request. Interestingly enough, each time, I was simply given a warning to refrain from whatever traffic violation I had committed. In each case, I was not asked about drugs or asked if they could search my car.

<sup>207</sup> See *supra* notes 191–92 and accompanying text.

When police act unlawfully in conducting traffic stops, they create a space in which they make Black men engage in this balancing act of asserting known rights at the risk of potential death.

The Fourth Amendment doctrine that permeates our discussion of Black male and police interactions is based on a legal fiction and/or fallacy rooted in pretending that cops tell the truth and things are as they allege. But this pretextual interaction with Black men is the starting point of this tightrope that requires Black men to assert dignity that could lead to a negative interaction, potentially resulting in death. The Court's willingness to allow these interactions, while knowing they are pretextual, facilitates large numbers of Black men great harm. My incidents of Dignity Takings could have ended in great harm, but none of them should have occurred in the first place. For the Black man who refuses to submit, with the Court's approval, death is always upon us.

### *C. No, You Cannot Come into My Home*

I was a resident of Montgomery County, Maryland and an adjunct law professor at Howard University School of Law at the time of the third Dignity Taking.<sup>208</sup> I practiced criminal law for eleven years as a Public Defender, Criminal Justice Act Panel attorney, and plaintiff side civil rights attorney.<sup>209</sup> I co-directed the Criminal Justice Clinic at Howard University School of Law and was a member of the appellate panel in the District of Columbia and Maryland.<sup>210</sup> I had litigated thousands of criminal matters and tried and won every one of my first thirty jury trials<sup>211</sup>—ranging from drug possession, drug distribution, attempted murder, assault, rape, robbery, child abuse, handgun violations, fraud, and carjacking on behalf of my clients. I was well-versed in my constitutional rights and able to advocate for myself, my clients, and others. Like John, my legal education and legal practice experience made me unhappy when dealing with police. Every time I interacted with police, I was confronted with their slave history,<sup>212</sup> their discriminatory policing practices, and their

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<sup>208</sup> Amended Complaint at ¶ 4, Hayat v. Diaz, No. 8:20-cv-2994-PWG (D. Md. Feb. 16, 2020); *see supra* note 102.

<sup>209</sup> *See supra* note 102.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 5, 10 (2021) ("Policing is among the vestiges of slavery, colonialism, and genocide tailored in America to suppress slave revolts, catch runaways, and repress labor organizing. . . . The people who chose the police were the same people who drafted the Constitution, who started the wars, who owned slaves, who possessed property, who had the most to lose if oppressed people ever decided to revolt: wealthy white men. And rather than unifying and organizing against the concentrated wealth of this class, the rest of us have been tricked into demanding that the police protect us, too. They cannot."); *see also* NAACP, *The Origins of Modern Day Policing*, <https://naacp.org/find-resources/history-explained/origins->

furtherance of the carceral state.<sup>213</sup> My clients, family, and I, personally, have been abused, lied to and on, and subjected to dehumanizing punishments by police. My only saving grace was my job as a lawyer and the power to advocate on behalf of my clients, cross examine officers under oath, and vindicate dignity on a daily basis.

That dignity was challenged and largely extinguished on October 22, 2017, when officers from the Montgomery County Police Department violated my rights under the Fourth Amendment by approaching my home and accusing me of kidnapping my own children.<sup>214</sup> Specifically, two officers pulled into my driveway that evening and approached my home.<sup>215</sup> It was Howard Homecoming weekend. I had just returned home from a law school classmate's birthday party at the local IHOP. For multiple years, I would join at least ten of my Howard Law School classmates to celebrate this friend's birthday. He was one of our brightest stars and being in his company brought me great joy. On this occasion, ten years out of law school, many of us were accompanied by our young children. My two boys sat in the IHOP with at least ten other Black lawyers and their children engaging in conversation and experiencing the normalcy of being surrounded by lawyers. This year, we were especially excited to celebrate the friend because he was running to become the county executive of Montgomery County, Maryland. I told everyone that the boys and I would have to leave the dinner party early because it was getting dark, and we intended to have a family dinner at our home.

I put the boys in the rear facing seats of my Tesla. I purchased the Tesla at the beginning of the electric car craze, and it gave me great pleasure to be approached in the community to discuss the effectiveness of electric transportation. Every time I talked about the car, undoubtedly amazement ensued about the rear facing seats that allowed the car to seat seven. I placed the boys in, strapped on their seatbelts and closed the hatchback. Before we could leave, the hatch was up. The boys were crying. Apparently one of them had pushed the emergency button and their exposure to the dark of the night scared them. I went to them. First scolding them for opening the hatch, then calming them and ensuring their safety. I got in the car, and we drove the few minutes to our home.

We found their mother, my wife, in the kitchen, as promised, making dinner. She stood at the sink finishing up and looking out of our back door window. Within minutes of our arrival and while sitting at the dinner table, she said,

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modern-day-policing [<https://perma.cc/C5UQ-42HT>] ("The origins of modern-day policing can be traced back to the 'Slave Patrol.' The earliest formal slave patrol was created in the Carolinas in the early 1700s with one mission: to establish a system of terror and squash slave uprisings with the capacity to pursue, apprehend, and return runaway slaves to their owners. Tactics included the use of excessive force to control and produce desired slave behavior.").

<sup>213</sup> See NAACP, *supra* note 214.

<sup>214</sup> Amended Complaint, *supra* note 210, ¶ 20.

<sup>215</sup> *Id.* ¶ 18.

“Fareed, do you see the police coming up the driveway?” I looked up and could see the police officers approaching too. My heart dropped. I did not know what was going on. Why would so many police officers be approaching our home? I didn’t want any problems and I certainly didn’t want a negative police interaction on what had been such a beautiful day. She and I, without an exchange of words, decided to meet the officers at the doorway of our home. Our kids followed behind. We opened the door, walked outside, closed the door behind us and stood on our porch. As confidently as I could, I asked, “Can I help you, officer?” The officers stated that they were investigating a reported kidnapping.<sup>216</sup>

With pride, while under suspicion, I informed the officers of our ownership of our home, our employment status as lawyers and law professors, and the status of our children inside the home.<sup>217</sup> The lead officer asked a series of questions.<sup>218</sup> To the best of our ability, we attempted to answer his questions in hopes of reassuring him that no one was in danger, that no kidnapping had occurred, and that there was no need for the continuation of investigation or an escalation of police contact.<sup>219</sup> After satisfactorily answering all the officer’s questions, and the intensity of the interaction calming down, he asked if he could enter our home and talk to our children.<sup>220</sup> His request was in fact a request and I knew I could legitimately decline. As a college graduate, law school graduate, criminal defense lawyer, civil rights lawyer, and law professor, I knew that this Black man was entitled under the Fourth Amendment of the Constitution and controlling case law to say, “No, you cannot enter my home and talk to my children.” I declined the officers’ request to enter our home.<sup>221</sup> We slowly began to turn to walk into the house, ending our consensual conversation with the police as the law permits.<sup>222</sup> I said to the officer that if he would like to enter our home, a warrant would be required. We slowly walked into our home and attempted to close the door.<sup>223</sup> The officer did not say, “Stop.” The officer did not say, “You are not free to go.” The officer did not articulate any reasonable articulable suspicion that I had committed a crime or was about to commit a crime. So, we walked in the house, and I exercised dignity under the Fourth Amendment to assert, what I believed to be, my constitutional rights.

Upon entering the house, I began to close the door, a Dignity Taking ensued. The officers physically prevented me from closing the door and forced their way in.<sup>224</sup> Multiple additional officers arrived to assist in the forcible entry.<sup>225</sup> The

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<sup>216</sup> *Id.* ¶ 20.

<sup>217</sup> *Id.* ¶ 21.

<sup>218</sup> *See id.* ¶¶ 20–21.

<sup>219</sup> *See id.*

<sup>220</sup> Amended Complaint, *supra* note 210, ¶ 22.

<sup>221</sup> *Id.* ¶ 23.

<sup>222</sup> *Id.* ¶ 24.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* ¶¶ 24–29.

<sup>225</sup> *Id.* ¶ 29.

officers overpowered me and forced their way into my home without consent. The officers tackled and handcuffed me and smashed their knees into my spine; I laid on the floor inside my home.<sup>226</sup> I screamed out to the officers that “I am a lawyer,” “This is my home,” “I am a law professor,” and “You can’t do this to me.” In a screeching voice, my wife pled with the officers to stop.<sup>227</sup> I heard the officers screaming commands, I heard my family screaming for peace, and I recalled telling another officer, nearly twenty years prior, that he too, could not do this to me. I harkened back to his response, “I can blow your fucking brains out.” I went limp.

I thought of my children who witnessed this indignity. Their tears. I watched officers move through my home in awe of its architectural beauty. Never did they question my children or conduct any investigation into their health, safety, and well-being.<sup>228</sup> After a heated exchange on what my constitutional rights were and whether it was permissible to enter my home without a warrant, officers ultimately unhandcuffed me and eventually left my residence.<sup>229</sup> The Howard Law School alumni who I had just celebrated with a short time before were summoned and came to my aid. They transformed into lawyer mode and began preserving evidence for future litigation. They began protecting me, their friend, their colleague, their client, this Black man, and intervened in the officer investigation.

Notwithstanding the calm, sadness filled my home. My sister who had been in the basement cried hysterically. Family and friends gathered around the dining room table traumatized, replaying what had just occurred and trying to figure out how to proceed. Most memorable was that the children sobbed uncontrollably, and I wondered if asserting my constitutional right caused more harm than good. I wondered: what if this particular Dignity Taking had resulted in my death? I walked into the kitchen where I had previously laid flat on my stomach with my face smashed against the floor and feared seeing my dead body riddled with bullet holes. It was not there. I was still alive.

Exigency did not exist at my front door and the officers’ unlawful entry was in violation of my Fourth Amendment rights, but had I sacrificed too much to maintain some sense of dignity? Was dignity maintenance or restoration even possible if as a Black male law professor, I still could not assert the Fourth Amendment without the result of potential death?

My attempt at asserting dignity by denying officers entry into my home was met with predictable force and punishment, but like John, I asserted dignity anyway. Officers did not believe they were required to extend the protection of the Fourth Amendment to me, my family, and my home. Their belief had historical roots and I understood, maybe for the first time, that the harsh truth must be reconciled with how I interact with police.

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<sup>226</sup> Amended Complaint, *supra* note 210, ¶ 31.

<sup>227</sup> *Id.* ¶ 38.

<sup>228</sup> *Id.* ¶ 39.

<sup>229</sup> *Id.* ¶ 42.

As outlined above, the Fourth Amendment protects against unreasonable search and seizure by the government.<sup>230</sup> Personal property is perhaps the most protected aspect of American individualism and is the concept that laid the groundwork for Fourth Amendment protections. Those who drafted the Constitution treated private property as “the cornerstone of a free society.”<sup>231</sup> However, the concept of private property was always intended to be a way for white people to protect their most valuable asset—whiteness—by excluding Black people from owning and defending their own property.<sup>232</sup> The entangled relationship between property and race stems from the legal system’s original design: domination and subordination.<sup>233</sup> Despite its evolution, the systemic structure of white supremacy maintains economic hegemony over Black people.<sup>234</sup>

The deprivation of Black peoples’ property rights and personal security has partly manifested in the way protections against search and seizure have been enforced over history. In the pre-Reconstruction South, states instituted policies subjecting Black people to unwarranted searches and seizures.<sup>235</sup> For example, South Carolina required slave patrols to conduct weekly searches of the homes of the enslaved for concealed weapons.<sup>236</sup> The state later authorized forcible entry in the homes of Black people to search for concealed weapons and to detain any “suspicious” Black person therein.<sup>237</sup> Slave patrols in Virginia also conducted mandatory searches of the homes of all Black people and had the power to arrest any Black person “whose presence excited suspicion.”<sup>238</sup>

Although white colonists also experienced arbitrary intrusions into their homes and businesses, these indignities did not reach the level or extent of invasion that Black people experienced.<sup>239</sup> The privacy and personal security granted to white colonists as a birthright did not extend to Black people.<sup>240</sup> Black people, whether slave or free, were subject to constant search and seizure based only on their race.<sup>241</sup> The history and import of slave patrols is ever present in police practices and policies across this nation.<sup>242</sup> Police target Black people today in much of the same way as their historical predecessor—slave

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<sup>230</sup> See *supra* Part II.

<sup>231</sup> See James W. Ely Jr., *Property Rights in American History*, HILLSDALE FREE MKT. F., <https://www.hillsdale.edu/wp-content/uploads/2016/02/FMF-2008-Property-Rights-in-American-History.pdf> [<https://perma.cc/S69F-CRAW>].

<sup>232</sup> Harris, *supra* note 53, at 1736.

<sup>233</sup> *Id.* at 1714.

<sup>234</sup> *Id.* at 1737–44.

<sup>235</sup> Maclin, *Race*, *supra* note 66, at 334.

<sup>236</sup> *Id.* at 334–35.

<sup>237</sup> *Id.* at 335.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 335–36.

<sup>240</sup> *Id.*

<sup>241</sup> Maclin, *Race*, *supra* note 66, at 336.

<sup>242</sup> *Id.*; see *supra* notes 214–15 and accompanying text.

patrols of colonial America—in excluding Black people from the protections of the Fourth Amendment.<sup>243</sup> This behavior is upheld by the legal mechanisms that are supposed to protect against these kinds of intrusions.

In contrast to the eighteenth-century indignities perpetrated against the enslaved, such intrusions are found to be in violation of the Fourth Amendment when imposed upon white people. I share the story of a former client to illuminate the point. MB, a forty-year-old white male, hired my firm to represent him in a felony drug case for possession with the intent to distribute cocaine. MB was on probation facing nearly seventeen years in prison if found in violation of probation. MB was a casual drug user and dealer who oftentimes used his own supply to get high. On the day of his arrest, he and a lady friend had been consuming his cocaine product for personal use. After several hours, MB told the friend that they would have to save the rest to sell. Upset, she called the police to report that MB was in possession of cocaine. MB immediately put her out of his home. When police arrived at his door, MB met them outside. He told them they could not enter, and that the woman was not a resident. The police pushed their way inside. When they attempted to go into his room to locate the drugs, he objected and told them that it was his room and that they could not enter. They entered the room anyway. Finally, when they went to open his dresser, again he objected and explained that they could not go through his stuff. After a four-hour suppression hearing in which we argued that the entry into MB's home, the entry into his bedroom, the search of his dresser, and the seizure of his drugs were in violation of his Fourth Amendment rights, the Court granted the motion and suppressed all of the drugs. MB's case and probation violation were dismissed. In celebration, I told MB that I was amazed that he understood the Fourth Amendment so well. I was amazed that he knew at each threshold to object to entry and assert his Fourth Amendment rights at exactly the right time. With a confused look on his face, he responded, "I wasn't talking about no Fourth Amendment, they just couldn't go through my shit."

In that moment, MB's plain words stopped me in my tracks and revealed to me something I had always known but did not want to accept. MB would always be protected. MB was born an American, as a white male, with the protection of the Fourth Amendment. Whiteness, as Professor Cheryl Harris articulated in *Whiteness as Property*, was:

[I]nitially constructed as a form of racial identity, evolved into a form of property, historically and presently acknowledged and protected in American law. . . . Following the period of slavery and conquest, whiteness became the basis of racialized privilege—a type of status in which white racial identity provided the basis for allocating societal benefits both private and public in

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<sup>243</sup> Maclin, *Race*, *supra* note 66, at 336.



character. These arrangements were ratified and legitimated in law as a type of status property.<sup>244</sup>

The idea, value, and property of whiteness continued even after the abolition of legal segregation.<sup>245</sup> Thus, the law has established that whiteness is both protected property and a protected right in which there's a vested interest in upholding.<sup>246</sup> Black people have never and will never possess whiteness as property, for:

[T]he "presumption of freedom [arose] from color [white]" and the "black color of the race [raised] the presumption of slavery," whiteness became a shield from slavery, a highly volatile and unstable form of property. . . . [S]lavery made human beings market-alienable and in so doing, subjected human life and personhood—that which is most valuable—to the ultimate devaluation.<sup>247</sup>

In other words, I will never be *white* because I am Black. MB understood that he was entitled to the protection of his "shit." He did not need to know the actual words of the Fourth Amendment, study the law, have a law degree, practice law, or be a law professor to know that his whiteness gave him the exact rights that the Fourth Amendment promised. His dignity was bestowed upon him at birth and his dignity would be protected by the law of the land. The Fourth Amendment for MB is alive and well. Only through a warrant—issued by a neutral magistrate—would MB's Fourth Amendment rights be compromised.

As a standard, "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment."<sup>248</sup> In the 1960s and 1970s, the Supreme Court provided limited exceptions to the warrant requirement for exigency.<sup>249</sup> These circumstances include: (1) hot pursuit; (2) imminent destruction of evidence; (3) need to prevent escape; and (4) risk of danger.<sup>250</sup> The four circumstances that create exigency—and the exception therefrom—were not present at MB's or my front door.

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<sup>244</sup> Harris, *supra* note 53, at 1709.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1724–25.

<sup>247</sup> *Id.* at 1720 (alteration in original) (quoting 1 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES §§ 68–69, at 66–67 (1858)).

<sup>248</sup> Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (quoting Mincey v. Arizona, 437 U.S. 385, 393–94 (1978)).

<sup>249</sup> Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984).

<sup>250</sup> *Id.* at 750, 759.

In *Payton v. New York*, the Court held that the police may enter a home without a warrant when there are “exigent circumstances.”<sup>251</sup> Absent exigent circumstances, “a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.”<sup>252</sup> In *Welsh v. Wisconsin*, the Court held that “[b]efore agents of the government may invade . . . [a] home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.”<sup>253</sup> But a relatively minor offense proves difficult to overcome the presumption of unreasonableness.<sup>254</sup>

The exigent circumstance rule allows police officers to violate the Fourth Amendment when the threat of imminent danger, destruction of evidence, or the escape of a suspect arises.<sup>255</sup> The rule does not apply though if the police themselves create the exigent conduct.<sup>256</sup> Thus, under the “police-created exigency” doctrine, exigent circumstance do not justify a warrantless search when the exigency was “created” or “manufactured” by the conduct of police,<sup>257</sup> as was at MB’s and my front door. A warrantless entry based on exigent circumstances is therefore only reasonable when the police did not create the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment.<sup>258</sup>

In *Brigham City, Utah v. Stuart*, the Supreme Court squarely addressed the exigency exception to the warrant requirement.<sup>259</sup> In *Brigham*, officers responded to a call about a loud party.<sup>260</sup> Once the officers arrived, they alleged they witnessed, through a window, adults and juveniles in a physical altercation.<sup>261</sup> During part of the altercation, officers observed the juvenile punch one of the adults, causing the adult to spit blood.<sup>262</sup> The officers entered the home without a warrant citing exigency because of the observed physical altercation.<sup>263</sup> The Supreme Court, as in *Whren*, again addressed the issue of whether the officer’s subjective motivation mattered when entering the home and once again unequivocally stated that the officer’s subjective beliefs—even if pretextual—did not matter.<sup>264</sup> The Court stated: “Our cases have repeatedly

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<sup>251</sup> *Payton v. New York*, 445 U.S. 573, 590 (1980).

<sup>252</sup> *Id.* at 587–88.

<sup>253</sup> *Welsh*, 466 U.S. at 750.

<sup>254</sup> *Id.*

<sup>255</sup> *Kentucky v. King*, 563 U.S. 452, 460 (2011).

<sup>256</sup> *Id.* at 461.

<sup>257</sup> *Id.* (citing *United States v. Chambers*, 395 F.3d 563, 566 (6th Cir. 2005)).

<sup>258</sup> *See id.* at 460–61.

<sup>259</sup> *Brigham City v. Stuart*, 547 U.S. 398, 402 (2006).

<sup>260</sup> *Id.* at 400–01.

<sup>261</sup> *Id.* at 401.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 401–02.

<sup>264</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996); *Brigham City*, 547 U.S. at 404.

*rejected* this approach. An action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed *objectively*, justify [the] action.’”<sup>265</sup> The Court determined that police officers were justified in entering a home without a warrant under the exigent circumstances exception to the warrant requirement, as long as they had an “objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.”<sup>266</sup>

Attempting to use the holding in *Brigham* and the prevailing case law, officers justified their misapplication of exigency in forcibly entering my home and subsequently forcing me to the ground in front of my distressed children and wife. The officers’ narrative may have been cloaked in exigency, but the reality was completely void of exigent circumstances. The 911 call itself did not describe anything illegal—children crying and being placed in rear-facing seats is not a crime. Unlike *Brigham* where an assault, causing an individual to spit blood, took place before the officers’ view, there was no observed kidnapping or illegal actions.

Upon seeing the officers in my driveway, I knew a Dignity Taking was upon me. I began processing several potential scenarios simultaneously: I could stay in the house and ignore their presence, I could submit to their request to talk to my children, or I could assert my dignity like MB. Unlike MB, I had to balance this decision with the many intersections of my being: Black, male, cisgender, lawyer, law professor, father, and husband. I knew the perils that could unfold to not just me but my family. So like MB, I engaged in asserting my dignity in a measured way—I said, “No, you cannot come into my home.” I acted with precision, calculated in hopes of not dying in front of my children. I knew every step towards asserting dignity could lead to death but in that instance, I thought to live without dignity was to die a thousand deaths.

I thought of the Black men that had been killed by police and the trauma they, their families, and their community endured.<sup>267</sup> I thought about MB. I thought about the holdings in *Payton*, *Brigham*, and the repertoire of Fourth Amendment cases that I spent hours reading, teaching, and studying.<sup>268</sup> I thought about the trauma and death that occurs between Black children and police who kill them. I, like John, thought about my duty to protect my family. So, when the officers asked to speak with my children, I knew I had to protect my boys like John protected his sister and MB protected his “shit.” I told the officers, “No.” No, they could not speak with my children. No, they could not enter my home. No, they could not continue to ask me questions.

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<sup>265</sup> *Brigham City*, 547 U.S. at 404 (first and second emphasis added) (alteration in original) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

<sup>266</sup> *Id.* at 400.

<sup>267</sup> See *infra* Part IV.

<sup>268</sup> See cases cited *supra* notes 251–66 and accompanying text.

I knew the Fourth Amendment allowed me to resist any further attempt to investigate me, my family, and/or my home.<sup>269</sup> I was not a fleeing felon, no one was in danger in my home, no evidence was going to be destroyed, and officers had no basis to believe these things existed.<sup>270</sup> They were in violation of the law. Like John did for his sister, I knowingly risked my life at that moment for autonomy and dignity maintenance by asserting the Fourth Amendment protected my home from unreasonable searches and seizures. I was met, like John, with the force and threat of death. The officers' response was a quintessential Dignity Taking. Unlike John, I had not accepted death as my act of dignity restoration. I, like MB, believed I had the right to live.

#### IV. WELL-KNOWN DIGNITY TAKINGS AND ONE'S ATTEMPT AT RESTORING DIGNITY

This Part highlights three nationally significant examples of submission, resistance, and repatriation as attempts to avoid Dignity Takings. The killing of Philando Castile illuminates an unsuccessful attempt by a Black man at submission in order to maintain dignity that ended in death. The killing of Eric Garner illuminates an unsuccessful attempt at resistance as dignity maintenance that ended in death. Finally, I conclude by suggesting that the greatest and most radical act of dignity restoration is to leave America, as Du Bois, the author "Of the Coming of John," did instead of dying a dignified death as his character John.

##### *A. Philando Castile and Submission as Dignity Restoration*

On the evening of July 6, 2016, Philando Dival Castile, a thirty-two-year-old Black male, drove down Larpentuer Avenue in Lauderdale, Minnesota (near Minneapolis/St. Paul) with his girlfriend, Diamond Reynolds, and her four-year-old daughter.<sup>271</sup> Officer Jeronimo Yanez, on patrol that evening, noticed Castile driving, and radioed in "that he had reason to pull the vehicle over and that the occupants 'just look like the people that were involved in a robbery.'"<sup>272</sup> Yanez believed that Castile looked similar to one of the robbery suspects "because of [his] wide set nose."<sup>273</sup> After running Castile's license plate, Yanez found that

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<sup>269</sup> *See id.*

<sup>270</sup> *See supra* note 252 and accompanying text. The Court held that law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Kentucky v. King*, 563 U.S. 452, 460, 470 (2011) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

<sup>271</sup> Felony Criminal Complaint at 3, *State v. Yanez*, No. 62-CR-16-8110 (Minn. Dist. Ct. Nov. 15, 2016), 2016 WL 6800872.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

the vehicle was registered to Castile and that he had no arrest warrants.<sup>274</sup> Even still, Yanez chose to pull over Castile, claiming the vehicle's broken brake light as his justification.<sup>275</sup> When Yanez alerted Castile to pull his car over, Castile immediately complied.<sup>276</sup>

As Yanez approached the vehicle, he kept his hand close to his gun.<sup>277</sup> While Castile remained seated with his seatbelt secured, Yanez asked him for his license and proof of insurance.<sup>278</sup> Then, the following occurred:

Castile calmly informed Yanez: "Sir, I have to tell you that I do have a firearm on me." Before Castile completed the sentence, Yanez interrupted and calmly replied "Okay" and placed his right hand on the holster of his own holstered gun.

... Yanez said "Okay, don't reach for it, then." Castile responded: "I'm ... I'm ... [inaudible] reaching ...," before being again interrupted by Yanez, who said "Don't pull it out." Castile responded "I'm not pulling it out", and Reynolds also said "He's not pulling it out." Yanez screamed "Don't pull it out" and quickly pulled his own gun with his right hand while he reached inside the driver's side window with his left hand. Yanez removed his left arm from the car, then fired seven shots in the direction of Castile in rapid succession. ...

... Reynolds yelled "You just killed my boyfriend!"

... Castile moaned and said, "I wasn't reaching for it."

... Reynolds loudly said, "He wasn't reaching for it." Before she completed her sentence, Yanez again screamed "Don't pull it out!" Reynolds responded, "He wasn't." Yanez yelled "Don't move! Fuck!"<sup>279</sup>

The immediate exchange after the shooting was livestreamed on Facebook by Reynolds.<sup>280</sup> Audio recordings reveal the following exchange between Yanez and Reynolds:

Yanez: "I told him not to reach for it, I told him to get his hand off of it."

... Reynolds: "He had, you told him to get his ID sir and his driver's license. Oh my God please don't tell me he's dead."<sup>281</sup>

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Felony Criminal Complaint, *supra* note 274, at 3.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 3–4.

<sup>280</sup> *Id.* at 4.

<sup>281</sup> *Id.*

As clearly illuminated in the recitation of the documented facts in the killing of Philando Castile, Mr. Castile was pulled over, then killed for “driving while Black.”<sup>282</sup> Yanez pulled over Mr. Castile because he saw a Black man driving that “look[ed] like” a suspect who allegedly committed robbery.<sup>283</sup> Instead of asking more questions or getting a more accurate set of descriptions, Yanez’s narrative became cloaked and protected in the holding of *Whren*.<sup>284</sup> It did not matter whether he stopped the car due to his subjective, racist beliefs of Black male criminality so long as he was able to have probable cause for any stop.<sup>285</sup> In this case, a non-working brake light sufficiently justified a traffic stop under the law.<sup>286</sup> The holding of *Whren* did exactly what it was intended to do. It provided legal justification to do what officers have done since the time of slave patrols: target, capture, and punish Black bodies.<sup>287</sup> The criminal legal system patently supports and furthers racist police mentalities and consequently, kills Black men.<sup>288</sup> It is this fertile ground, largely driven by racial disparities and the cultural regime of dehumanization, that *Whren* took advantage of and made into law. Mr. Castile became the 123rd Black person to be killed by U.S. law enforcement that year even though he wholeheartedly attempted to comply with all of the officers’ requests.<sup>289</sup> Notwithstanding his effort to submit, his actions resulted in death.<sup>290</sup> Although all police killings are fundamentally egregious notwithstanding racial motivation or bad faith, when Black men are killed by police in less egregious examples, the question is asked or the statement is made: if only he had complied. Philando Castile complied and died anyway.<sup>291</sup>

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<sup>282</sup> See generally Kathryn K. Russell, “Driving While Black”: Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999) (describing “Driving While Black” as “a wide range of race-based suspicion of Black and Brown motorists”).

<sup>283</sup> See *supra* note 274–75 and accompanying text.

<sup>284</sup> See *supra* text accompanying notes 179–86.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> See PURNELL, *supra* note 214, at 56–59 (arguing that the creation of police began during the transatlantic slave trade and that the first police were for the purpose of targeting, capturing, and punishing Black bodies). The word “cop” derives from the word “capture.” *Id.* at 57 (“[T]he etymology of ‘cop’ likely comes from Middle French *capere*, meaning to capture, or Latin, *capere*, ‘to seize, to grasp.’”).

<sup>288</sup> See Ralph Ellis & Bill Kirkos, *Officer Who Shot Philando Castile Found Not Guilty on All Counts*, CNN, <https://www.cnn.com/2017/06/16/us/philando-castile-trial-verdict> [<https://perma.cc/D4KT-P9SC>] (June 16, 2017). Jeronimo Yanez was tried in a jury trial, facing multiple counts including manslaughter, and was found not guilty of all counts. *Id.*

<sup>289</sup> Ryan Grenoble, Kim Bellware & Matt Ferner, *Outrage Sweeps Nation Day After Philando Castile Killed by Police ‘For No Reason,’* HUFFPOST (July 7, 2016), [https://www.huffpost.com/entry/philando-castile-shooting\\_n\\_577e6d3ee4b0344d514e1d3c](https://www.huffpost.com/entry/philando-castile-shooting_n_577e6d3ee4b0344d514e1d3c) [<https://perma.cc/Q3RH-C2PB>].

<sup>290</sup> Felony Criminal Complaint, *supra* note 273, at 3–4, 6.

<sup>291</sup> *Id.*

*B. Eric Garner and Resistance as Dignity Restoration*

On July 17, 2014, Officers Pantaleo and D’Amico suspected Eric Garner, who stood in front of a beauty supply store talking with a man, of conducting an illegal transaction.<sup>292</sup> After accusing Mr. Garner of selling untaxed cigarettes, Officer D’Amico threatened to place him under arrest.<sup>293</sup> Denying this allegation, Mr. Garner explained to Officer D’Amico that he had just broken up a fight.<sup>294</sup> Witnesses corroborated his statement—that indeed, all Mr. Garner was doing was breaking up a fight.<sup>295</sup> Nonetheless, Officer D’Amico insisted that Mr. Garner submit to arrest. Mr. Garner refused to comply, believing that these officers, who had arrested him before, were harassing him.<sup>296</sup> In response to Mr. Garner’s refusal to comply, Officers D’Amico and Pantaleo wrestled him to the ground while Officer Pantaleo placed him into a chokehold.<sup>297</sup> Mr. Garner began wheezing and repeatedly stated “I can’t breathe.”<sup>298</sup>

Mr. Garner’s speech became more and more labored until he eventually fell silent.<sup>299</sup> Officers believed Mr. Garner was “playing possum”—avoiding arrest by pretending to be unconscious.<sup>300</sup>

As Mr. Garner continued to lay unresponsive on the ground, officers declined to administer any medical care despite observing his shallow breathing.<sup>301</sup> Approximately five minutes after Mr. Garner was brought to the ground, Emergency Medical Technicians arrived on the scene.<sup>302</sup> Once Mr. Garner was transported to the Richmond University Medical Center, doctors attempted to save him through intubation and cardiopulmonary resuscitation (CPR) but to no avail.<sup>303</sup> Mr. Garner was pronounced dead.<sup>304</sup>

After leaving the hospital to return to the precinct, officers informed their commanding officer that “it doesn’t look good,”<sup>305</sup> which led to the following:

The commanding officer instructed [Sergeant] Saminath to notify the IAB, which he did. He also texted [Lieutenant] Bannon to inform him that Mr. Garner had ‘resisted’ and ‘might be DOA.’ Lieutenant Bannon responded, ‘For the smokes?’ Sergeant Saminath confirmed, ‘Yea’ and explained that

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<sup>292</sup> *Matter of Carr v. de Blasio*, 152 N.Y.S.3d 1, 1–2 (N.Y. App. Div. 2021).

<sup>293</sup> *Id.* at 2.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Carr*, 152 N.Y.S.3d at 2.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Carr*, 152 N.Y.S.3d at 2–3.

<sup>305</sup> *Carr v. de Blasio*, 133 N.Y.S.3d 737, 745 (N.Y. Sup. Ct. 2020), *aff’d*, 152 N.Y.S.3d 1 (N.Y. App. Div. 2021).

Respondent ‘grabbed him [and] they both fell down.’ Lieutenant Bannon answered, ‘Ok, keep me posted, I’m still here . . . Not a big deal, we were effecting a lawful arrest.’<sup>306</sup>

Eric Garner refused to submit to this “lawful arrest” because, put simply, he did nothing wrong. He died resisting and attempting to maintain some sense of dignity. In Mr. Garner’s death, we see the consequences of the Court’s choice in *Terry* which diverged from the strict probable cause standard and instead adopted a lesser reasonableness standard as the measure for stop and frisks.<sup>307</sup> For the officers, it was enough that Mr. Garner had been arrested in the past and that he was near the beauty supply shop where they assumed he was selling “untaxed cigarettes.”<sup>308</sup> The moment they laid eyes on Mr. Garner, he was transformed into the racist trope of a disruptive, uncivilized, noncooperative, superhuman, Black criminal who disobeyed police orders and deserved punishment.<sup>309</sup> Officers D’Amico and Pantaleo obliged in this instance by placing Mr. Garner in a chokehold, causing his death. Like Mr. Castile, the Fourth Amendment did not and was never going to protect him.<sup>310</sup> It was his word as a Black man against the words of the officers who “tend to be given the benefit of the doubt,” often deemed the experts, only ever acting on the basis of illegitimate indicia of criminal activity.<sup>311</sup> And it’s sad to say that even if Mr.

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<sup>306</sup> *Id.* (third alteration in original) (citation omitted). “IAB” refers to the Internal Affairs Bureau of the Police Department. *Id.* at 754. DOA stands for “dead on arrival.” DOA, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/DOA> [<https://perma.cc/S6UM-GE2R>].

<sup>307</sup> See *supra* notes 122–25 and accompanying text.

<sup>308</sup> *Carr*, 133 N.Y.S.3d at 743.

<sup>309</sup> Similarly, during grand jury testimony regarding the murder of Michael Brown in Ferguson, Missouri, Officer Darren Wilson testified that, “[W]hen I grabbed him, the only way I can describe it is I felt like a 5-year-old holding onto Hulk Hogan.” Jessie Singal, *Why Did Darren Wilson Think Michael Brown Had Superpowers?*, CUT (Nov. 25, 2014), <https://www.thecut.com/2014/11/why-did-wilson-call-michael-brown-a-demon.html> [<https://perma.cc/ZYF9-V6LE>]. Arguably, Garner’s killers similarly believed Garner to have superhuman strength. See Adam Waytz, Kelly Marie Hoffman & Sophie Trawalter, *A Superhumanization Bias in Whites’ Perception of Blacks*, 6 J. SOC. PSYCH. & PERSONALITY SCI. 352, 358 (2015) (“Superhumanization of Blacks might . . . explain why people consider Black juveniles to be more ‘adult’ than White juveniles when judging culpability; perhaps people attribute enhanced agency to Blacks thereby judging them more culpable than Whites for their actions. Relatedly, superhumanization of Blacks may contribute to Whites’ tolerance for police brutality against Blacks; perhaps people assume that Blacks possess extra (i.e., superhuman) strength enabl[ing] them to endure violence more easily than other humans. For now, the present research provides evidence of a superhumanization bias that, despite its ostensible distinction from other forms of prejudice, may be just as dehumanizing and consequential.” (citations omitted)).

<sup>310</sup> See *supra* text accompanying note 92 and Part IV.A.

<sup>311</sup> Kimberly Kindy, *Ferguson Decision Reflects Juries’ Tendency to Give Police Benefit of Doubt, Experts Say*, WASH. POST (Nov. 24, 2014), <https://www.washingtonpost.com/politics/>



Garner had submitted, like Castile, he could have just as easily died at the hands of the police.<sup>312</sup> His resistance was principled and courageous, but like John and Castile, he lost his life.

*C. W.E.B. Du Bois: The Most Radical Act of Dignity Restoration—Repatriation*

W.E.B. Du Bois recognized that dying in an effort to maintain dignity was not the Black man's pathway forward.<sup>313</sup> Du Bois, who had been vocal about issues Black Americans faced, received criticism and faced consequences for his work.<sup>314</sup> Efforts were made to silence him including revoking his passport after being accused of being a Communist.<sup>315</sup> After a life of civil rights advocacy, labor organizing, and scholarly exploits on behalf of Black people, in 1961, Du Bois decided to move to Ghana and become a citizen.<sup>316</sup> He moved to Ghana largely because there was not much left for him in the United States.<sup>317</sup> Du Bois leaving the United States suggests the realization that self-sacrifice for the advancement of Black people might not be the only way to provide the Black man salvation.<sup>318</sup> He left, like that of Josephine Baker, James Baldwin, Richard

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ferguson-decision-reflects-juries-tendency-to-give-police-benefit-of-doubt-experts-say/2014/11/24/268c7b62-7311-11e4-a589-1b102c2f81d0\_story.html [https://perma.cc/F9ZD-7P4V].

<sup>312</sup> See, e.g., Mike Males, *Opinion: Police Shooting Statistics of Unarmed Suspects Show the Young More Likely to Be Killed*, JUV. JUST. INFO. EXCH. (Feb. 11, 2021), <https://jjie.org/2021/02/11/police-shooting-statistics-of-unarmed-suspects-show-the-young-more-likely-to-be-killed/> [https://perma.cc/SZE6-UQVQ]; Nicholas Quah & Laura E. Davis, *Here's a Timeline of Unarmed Black People Killed by Police Over Past Year*, BUZZFEED NEWS (May 1, 2015), <https://www.buzzfeednews.com/article/nicholasquah/heres-a-timeline-of-unarmed-black-men-killed-by-police-over> [https://perma.cc/5WFY-JQQV].

<sup>313</sup> See Theodore M. Shaw, *The Race Convention and Civil Rights in the United States*, 3 N.Y. CITY L. REV. 19, 23–24 (1998) (“The great W.B. Dubois’ [sic] ideological sojourn took him from integrationist to socialist to pan-Africanist to expatriate.”).

<sup>314</sup> See e.g., Joyce A. Hughes, *Muhammad Ali: The Passport Issue*, 42 N.C. CENT. L. REV. 167, 183–84 (2020).

<sup>315</sup> *Id.* In 1961, the Department of State returned his passport. *Id.* at 184.

<sup>316</sup> *Id.*; see also DU BOIS, *supra* note 1, at xxxvi; W.E.B. Du Bois—*The Father of Modern Pan-Africanism?*, NEW AFRICAN (Mar. 12, 2013), <https://newafricanmagazine.com/4091/#> [https://perma.cc/3MZA-BZMP].

<sup>317</sup> Hughes, *supra* note 316, at 181–85.

<sup>318</sup> See Stanley Brodwin, *The Veil Transcended: Form and Meaning in W. E. B. DuBois’ “The Souls of Black Folk,”* 2 J. BLACK STUD. 303, 303 (1972) (“Black intellectuals had to accept the sacrifice of personal ambition, recognizing that there were issues and causes that transcended individual goals.”). However, in time, Du Bois’ “sight took flight” and he “lifted up [th]ine eyes to Ghana.” See W.E.B. Du Bois, *Ghana Calls*, 2 FREEDOMWAYS 71 (1962), *reprinted in* CREATIVE WRITINGS BY W.E.B. DU BOIS: A PAGEANT, POEMS, SHORT STORIES AND PLAYLETS 53 (Kraus-Thomson Organization Ltd. 1985). Ultimately, Du Bois accepted an invitation from President Kwame Nkrumah to come to Ghana to work on the Encyclopedia Africana project and was offered substantial government resources for his work. *Ghana’s Role in Honouring US Civil Rights Hero WEB Du Bois*, BBC (Oct. 13, 2021),

Wright, Maya Angelou, and Nina Simone, to “feel mentally and spiritually free from White America’s psychic violence.”<sup>319</sup> America could not be fixed, and Black men would always be subjected to harm when exercising dignity under the Fourth Amendment or otherwise.

In Du Bois’ poem “Ghana Calls,” which is dedicated to Kwame Nkrumah, Ghana’s first president, Du Bois wrote:

I went to Moscow: Ignorance grown wise taught me Wisdom;  
I went to Peking: Poverty grown rich  
Showed me the wealth of Work  
I came to Accra.

Here at last, I looked back on my Dream;  
I heard the Voice that loosed  
The Long-looked dungeons of my soul  
I sensed that Africa had come  
Not up from Hell, but from the sum of Heaven’s glory.<sup>320</sup>

Du Bois, like so many Black men, spent most of his life living what he described as double consciousness:

[T]wo souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

The history of the American Negro is the history of this strife,—this longing to attain self-conscious manhood, to merge his double self into a better and truer self. . . . He simply wishes to make it possible for a man to be both a Negro and an American, without being cursed and spit upon by his fellows, without having the door of Opportunity closed roughly in his face.<sup>321</sup>

That idea that there could be a merger of the double self, of both Negro and American, he realized would not be found in America for the Black man<sup>322</sup>—for America does not want him—America has made him no promise. And just like John, in the end, Du Bois chose what for him was a dignified death; he chose to not lay his Black body in these American soils. He chose repatriation.

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<https://www.bbc.com/news/world-africa-58884584> [<https://perma.cc/S7GA-MLFE>]; Keisha N. Blain, “*I Lifted Up Mine Eyes to Ghana*,” JACOBIN (Aug. 27, 2018), <https://jacobin.com/2018/08/w-e-b-du-bois-colonialism-pan-african-congress> [<https://perma.cc/BMN4-NWL3>].

<sup>319</sup> Karen Attiah, Opinion, *For African Americans Tired of U.S. Hostility, Ghana Is Still Calling*, WASH. POST (May 18, 2022), <http://www.washingtonpost.com/opinions/2022/05/19/black-americans-emigrate-tops-shooting-ghana> [<https://perma.cc/U2RQ-TJX5>].

<sup>320</sup> Du Bois, *supra* note 320, at 52–53.

<sup>321</sup> DU BOIS, *supra* note 1, at 8–9.

<sup>322</sup> *See id.* at 8–14.

Repatriation has its roots in fifteenth century America with the beginnings of the American slave trade.<sup>323</sup> It serves as one of the oldest manifestations of Black American nationalist sentiments.<sup>324</sup> Most Africans who were forcibly removed from their homeland longed to return to “their cultural and spiritual way of life.”<sup>325</sup> This burning desire to reconnect with Africa has only grown over the past four centuries.<sup>326</sup>

Unsurprisingly, it’s also been an effort supported by white supremacists<sup>327</sup> and racists alike who dream of a white-only America.<sup>328</sup> In fact, Abraham Lincoln was a proponent of this effort:

On Aug. 14, 1862, a mere five years after the nation’s highest courts declared that no [B]lack person could be an American citizen, President Abraham Lincoln called a group of five esteemed free [B]lack men to the White House for a meeting. It was one of the few times that [B]lack people had ever been invited to the White House as guests. The Civil War had been raging for more than a year, . . . [and it] was not going well for Lincoln. Britain was contemplating whether to intervene on the Confederacy’s behalf, and Lincoln, unable to draw enough new white volunteers for the war, was forced to reconsider his opposition to allowing [B]lack Americans to fight for their own liberation. The president was weighing a proclamation that threatened to emancipate all enslaved people in the states that had seceded from the Union if the states did not end the rebellion. The proclamation would also allow the formerly enslaved to join the Union army and fight against their former “masters.” . . .

. . . .

. . . “Although many men engaged on either side do not care for you one way or the other . . . without the institution of slavery and the colored race as a

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<sup>323</sup> Robert Johnson, Jr., *Repatriation as Reparations for Slavery and Jim-Crowism*, in *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 427, 427 (Roy L. Brooks ed., 1999).

<sup>324</sup> *Id.* at 427.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> See Sarah L. Trembanis, *Strange Bedfellows: Eugenicists, White Supremacists, and Marcus Garvey in Virginia, 1922–1927* (Aug. 2001), <https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=3835&context=etd> [<https://perma.cc/76NS-DXSU>] (M.A. thesis, College of William and Mary) (“Three men led the charge for racial purity in Virginia . . . [Major Earnest] Cox founded the White America Society and published various books and pamphlets on the importance of the purity of the white race. . . . Cox held the most extremist ideas, fervently insisting that repatriation of blacks back to Africa was the only solution to what he saw as a precarious situation for the white race in the United States.”).

<sup>328</sup> Kwame Anthony Appiah, *What Was Africa to Them?*, N.Y. REV. (Sept. 27, 2007), <https://www.nybooks.com/articles/2007/09/27/what-was-africa-to-them/> [<https://perma.cc/QLY9-E74E>].

basis, the war could not have an existence,” the president told them. “It is better for us both, therefore, to be separated.”<sup>329</sup>

As history tells us, many Black men had not taken Lincoln’s proposition to abandon these lands, for they fervently believed, “This is our home, and this our country. Beneath its sod lie the bones of our fathers. . . . Here we were born, and here we will die.”<sup>330</sup> They believed in this nation’s founding ideals of freedom and of equality.<sup>331</sup> But if they had been given a crystal ball and were able to look at the state of our nation now, what would they have thought? Would they have said yes? I wonder.

During Reconstruction, the Thirteenth, Fourteenth, and Fifteenth Amendments were passed.<sup>332</sup> At the time, Congress seemed open to the idea of a multiracial democracy that Black people had fought for.<sup>333</sup> However, due to the anti-Black racism running through “the very DNA of this country,” progress from Reconstruction faced heavy white resistance.<sup>334</sup>

The unthinkable violence against the descendants of those formerly enslaved has not ended.<sup>335</sup> In fact, the systemic white suppression of Black life has continued to become more entrenched as any legal protections, hard won, have become more and more watered down.<sup>336</sup> This is why a growing number of Black activists, scholars, and thinkers have called for repatriation, for Black Americans will never be seen and treated as equals in America, whose lands are gripped firmly in the hands of the white man.<sup>337</sup> Going back to Africa may provide the only viable option for Black male dignity.

The “Back to Africa” Movement has a rich history, but the most significant contributions come from the creation of Garveyism and Pan Africanism.<sup>338</sup> Henry Sylvester Williams, commonly viewed as the father of Pan

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<sup>329</sup> Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [https://perma.cc/3DSV-VZBE].

<sup>330</sup> *Id.*

<sup>331</sup> *See id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *See generally Racial Discrimination in the United States*, HUMAN RTS. WATCH (Aug. 8, 2022), <https://www.hrw.org/report/2022/08/08/racial-discrimination-united-states/human-rights-watch/aclu-joint-submission> [https://perma.cc/E659-KM72].

<sup>336</sup> *See supra* text accompanying notes 77–82.

<sup>337</sup> *See, e.g.,* Johnson, *supra* note 325, at 427–33; *see also* Favour Nunoo, *The African American Who Moved to Ghana ‘to Escape US Racism,’* BBC NEWS (Aug. 24, 2019), <https://www.bbc.com/news/world-africa-49394354> [https://perma.cc/YQU8-6PWX]; *cf.* ROBIN D.G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* 126 (2002).

<sup>338</sup> *See generally* Ben F. Rogers, *William E. B. DuBois, Marcus Garvey, and Pan-Africa*, 40 J. NEGRO HIST. 154 (1955) (discussing the efforts made by Du Bois and Garvey to advance Black people in the United States).

Africanism.<sup>339</sup> Williams organized the Pan-African Conference in the 1900 at the Westminster Town Hall in London.<sup>340</sup> Marcus Garvey believed that the race will not “be given the fullest opportunity to develop itself. . . in countries where we form but a minority in a majority government of other races.”<sup>341</sup> Marcus Garvey, born in Jamaica on August 17, 1887,<sup>342</sup> “found that Black people were ‘kicked about’ in all the communities where he found them around the world, always situated at the bottom of the social hierarchy.”<sup>343</sup> He eventually moved to the United States and started the Universal Negro Improvement Association (“UNIA”).<sup>344</sup> He fervently believed that the future of the Black race rested in a land where they were the majority.<sup>345</sup>

Since Garvey, several countries like Ghana have opened their doors for Black Americans who want to get away from the United States.<sup>346</sup> In 2020, the government brokered a deal with local leaders to protect 500 acres of land, enough for 1,500 families, near Ghana’s center for newcomers.<sup>347</sup> In part, the motivation for such an initiative was the public campaign, “Year of Return,” attracting a record number of tourists to Ghana in 2019.<sup>348</sup> The campaign aims to transform the tourist experience so that a temporary visitor will become a resident, by creating special land deals, expatriate guides, and more accessible paths to citizenship.<sup>349</sup> Chief executive of the Ghana Tourism Authority Akwasi

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<sup>339</sup> See John Henrik Clarke, *Pan-Africanism: A Brief History of an Idea in the African World*, 145 PRÉSENCE AFRICAINE 26, 30 (1988), [https://www.jstor.org/stable/pdf/24351577.pdf?refreqid=excelsior%3Ab708b0b3fc7ecb14a4e46465d69d29fc&ab\\_segment=s=&origin=&acceptTC=1](https://www.jstor.org/stable/pdf/24351577.pdf?refreqid=excelsior%3Ab708b0b3fc7ecb14a4e46465d69d29fc&ab_segment=s=&origin=&acceptTC=1) [<https://perma.cc/4SDA-BEAY>].

<sup>340</sup> See COLIN LEGUM, PAN-AFRICANISM: A SHORT POLITICAL GUIDE (1962; rev. ed. 1965).

<sup>341</sup> Marcus Garvey, *Letter to Guy M. Walker*, in MARCUS GARVEY AND THE VISION OF AFRICA 152, 152 (John Henrik Clarke & Amy Jaques Garvey eds., 1974) [hereinafter *Letter to Guy M. Walker*]; Marcus Garvey, NAT’L ARCHIVES, <https://www.archives.gov/research/african-americans/individuals/marcus-garvey> [<https://perma.cc/BED3-CTJM>] (Sept. 15, 2020).

<sup>342</sup> Marcus Garvey, HIST., <https://www.history.com/topics/black-history/marcus-garvey> [<https://perma.cc/64JT-4CWX>] (Nov. 2, 2022).

<sup>343</sup> Justin Hansford, *Jailing a Rainbow: The Marcus Garvey Case*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 325, 327 (2009).

<sup>344</sup> Marcus Garvey, *supra* note 342.

<sup>345</sup> See *Letter to Guy M. Walker*, *supra* note 341, at 152–53.

<sup>346</sup> See Benjamin Tetteh, *Beyond the Year of Return: Africa and the Diaspora Must Forge Closer Ties*, AFR. RENEWAL (Sept. 20, 2020), <https://www.un.org/africarenewal/magazine/september-2020/beyond-year-return-africa-and-diaspora-must-forge-closer-ties> [<https://perma.cc/JKC5-YU4J>].

<sup>347</sup> Danielle Paquette, *Ghana to Black Americans: Come Home. We’ll Help You Build a Life Here*, WASH. POST (July 4, 2020), [https://www.washingtonpost.com/world/africa/ghana-to-black-americans-come-home-well-help-you-build-a-life-here/2020/07/03/1b11a914-b4e3-11ea-9a1d-d3db1cbe07ce\\_story.html](https://www.washingtonpost.com/world/africa/ghana-to-black-americans-come-home-well-help-you-build-a-life-here/2020/07/03/1b11a914-b4e3-11ea-9a1d-d3db1cbe07ce_story.html) [<https://perma.cc/5D34-EMM8>].

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

Agyeman stated, “We want to remind our kin over there that there is a place you can escape to. That is Africa.”<sup>350</sup>

## V. CONCLUSION

Can the elusive concept of dignity be restored, maintained, and enjoyed for Black men in the homeland or some other majority Black country? Honestly, I don’t know. I do know that the Fourth Amendment offers little solace. I’ve argued that Black men in the United States are faced with potential Dignity Takings every time police intrusion occurs in violation of the Fourth Amendment. I’ve argued that Black men in the United States are forced to walk a dignity tightrope every time they assert their rights under the Fourth Amendment. I’ve argued that Black men must choose to either submit to a spiritual death or to resist and risk physical death when interacting with police in this country. Both choices are untenable, and Black men cannot depend upon the Fourth Amendment to bestow humanity or freedom upon their person. Dignity will not be realized through the Fourth Amendment because “[t]he systems responsible for our oppression cannot be the same systems responsible for our liberation.”<sup>351</sup>

As long as the police, in violation of this country’s founding documents, specifically the Fourth Amendment, continue to target, capture, punish, and kill Black people or alternatively reduce them back to the condition of slave, abandoning this country must remain a potential option. Neither submission nor resistance can truly prevent the Dignity Takings imposed by the police that are fundamental to the preservation of this country.<sup>352</sup> Dignity requires freedom, and all we may truly have is the freedom to leave—and abandon this failed experiment. It has been said that “[s]ometimes, leaving is the most powerful form of resistance.”<sup>353</sup>

The Fourth Amendment’s promise to protect, through the Fourteenth Amendment’s Due Process Clause, Black people—the descendants of the formerly enslaved—their person, places, or things, will unfortunately continue to go unfulfilled. Small procedural victories or individual vindication is not enough. Supreme Court jurisprudence, *Terry*, *Whren*, *Brigham*, and their progenies, furthers white supremacy and constitutionalizes Black oppression—the oppression of me and my Black body. Leaving these United States of America can restore my sense of dignity, moral agency, and autonomy. If I leave the United States, I can avoid the double-edged sword of death. I don’t have to die, like John, in order to have dignity. The narrative of the Fourth Amendment as a constitutional right that provides security in person, places, or things, reduced to reasonable articulable suspicion, probable cause, and exigency when

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<sup>350</sup> *Id.*

<sup>351</sup> See PURNELL, *supra* note 214, at 36.

<sup>352</sup> See *supra* Parts IV.A, IV.B.

<sup>353</sup> Attiah, *supra* note 321.

applied to Black people, does not provide salvation. No longer will this Black man, me, be willing to walk the tightrope of death by engaging in potential Dignity Takings in the attempt to maintain some semblance of a right that was never mine or intended for me. What I do know, if and when necessary, I will leave.