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PLANTATION LULLABIES: HOW FOURTH AMENDMENT POLICING VIOLATES THE FOURTEENTH AMENDMENT RIGHT OF AFRICAN AMERICANS TO PARENT*

LENESE HERBERT**

"A society that does not protect its adults cannot protect its children."1

* This title is borrowed from the compact disc, ME'SHELL NDEGOCELLO, PLANTATION LULLABIES (Maverick Records 1993).

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1 Maria Grahn-Farley, A Child Perspective on the Juvenile Justice System, 6 J. GENDER RACE & JUST. 297, 299 (2002) (stating that the child is put in a weaker position than the adult through legal and social practices).
INTRODUCTION

Lullabies, dulcet melodies becalm and promise comfort, safety, and security midst their stanzas and refrain. Peaceful, restorative slumber is the goal; relaxation is a prerequisite. The child, recipient of such calming energy, is rendered impervious to her worldly woes, eventually succumbing to the potent emotional elixir of security within a parent’s care. Infants, children, and adolescents rely upon adults to comfort and nurture them. Protection is, of course, paramount.

However, when the lyrics ring false and the singer is exposed as impotent, the child is forever changed, scornful of the parent’s fraud. The child, whose healthy development and growth are often inextricably tied to the understanding of parental omnipotence, is, at best, forever changed and, at worst, destroyed. Parental clay feet, cracked and exposed, reveal adult inability that, in turn, breeds childhood instability. She can no longer trust her parent, nor her fundamental ordering and understanding of The Universe. Herefore omnipotent parents become pretenders to the throne, charlatans utterly incapable of providing protection promised in the well-meaning, yet unforgivable lies. Chaos ensues, raging without and, more tragically, within the disillusioned child. The situation is fraught with risk; deft handling is required. Innocence may be irretrievably lost; parental authority may be stripped of any worthy or admirable meaning.

The Constitution presumes that “fit parents act in the best interests of their children.” This presumption “contemplates that a parent will act for the child in situations in which the child lacks the capacity or judgment that may be required.” Parents, driven to protect their children, are keenly aware that childhood

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“is a time and condition of life when a person may be most susceptible to influence and to psychological damage:”

The right of parents to raise their children as they think best, free of coercive intervention, comports as well with each child’s biological and psychological need for unthreatened and unbroken continuity of care by his parents. No other animal is for so long a time after birth in so helpless a state that its survival depends upon continuous nurture by an adult. Although breaking or weakening the ties to the responsible and responsive adults may have different consequences for children of different ages, there is little doubt that such breaches in the familial bond will be detrimental to a child’s well-being. But so long as a family is intact, the young child feels parental authority is lodged in a unified body which is a safe and reliable guide for later identification.

If parental management of a child’s social identity is subverted or violated, the harm is rarely overstated. Those who have succeeded in deracinating parental authority (necessary for rearing children) and childhood innocence, without parental permission, consultation, or guidance, are guilty of violating a fundamental tenet of American individualism and self-determination and perhaps a basic tenet of human rights.

When that violator is an agent of the government, that agent has not only compromised the integrity and health of a parent’s child, but also the parent’s right to rear his child in the manner he sees fit. This governmentally inflicted injury directly undermines parents’ fundamental right to rear their children in ways that release, rather than staunch, the infinite possibilities of the child’s trajectory for breathtaking goodness and achievement. Such unwelcome and uninvited governmental intervention can only serve to undermine the familial bond which

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6 Duchesne v. Sugarman, 566 F.2d 817, 825 n.19 (2d Cir. 1977) (discussing right of family to remain together without interference by state (quoting Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 YALE L.J. 645, 649–50 (1977) (footnotes omitted))).
is vital to a child's sense of becoming and being an adult in his own right.7

Today, many African Americans still suffer from race-based practices of law enforcement;8 many are still affected by the ultimate reality of abject impotence felt by their enslaved ancestors.9 “Despite birthright and generations’ long residency in the United States, African Americans are still deemed, at best, ‘accidental’ or ‘default’ citizens.”10 This stigma, invariably and inevitably, is imposed upon their children, either directly or indirectly.11

Childhood is certainly too limited. For African American children, it comes with an even briefer shelf life since childhood and adulthood are conflated, often at a time when maturity has not yet manifested, yet punishment and accountability are applied if it has.12 Still, the choice to love, nurture, and protect children has always been a gesture of resistance for African

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7 Id. at 825 n.19 (stating right to preservation of family integrity encompasses rights of parent and child (citing Goldstein, Medical Care for the Child at Risk: On State Supervision of Parental Autonomy, 86 YALE L.J. 645, 649–50 (1977) (footnotes omitted))).
9 Id. at 195 (noting how race-based policing of African Americans “defines who is American and who is not”).
10 Id. at 177.
11 The United States has the second highest incarceration rate in the world, second only to Russia. Although African Americans are approximately twelve percent of the United States population, they comprise nearly fifty percent of those incarcerated. See MARC MAUER, RACE TO INCARCERATE: THE SENTENCING PROJECT 125–26 (The New Press 1999). According to one scholar, an African American male born in 1991 has a twenty-nine percent chance of being incarcerated throughout his lifetime. Id. at 125–26. Moreover, recent statistics compiled by various sources indicate that more Black men are imprisoned than enrolled in universities or colleges. See, e.g., Fox Butterfield, Study Finds Big Increase in Black Men as Inmates Since 1980, N.Y. TIMES, Aug. 28, 2002, at A14. The certainty of this race-based fate, as well as its arbitrariness, has recently been described by those most directly affected by it as “catching a case,” i.e., being arrested for a criminal violation. The phrase used by members of the “hip-hop” community evidences “the same combination of responsibility and happenstance as when one ‘catches’ the common cold”. Paul Butler, Much Respect: Toward a Hip-Hop Theory of Punishment, 56 STAN. L. REV. 983, 998 (2004).
12 African American children are overrepresented in juvenile arrests for both violent crimes and property crimes. In 2002, the population of Caucasian juveniles was 78% and the population of African American juveniles was 16%. However, the juvenile arrest rate for African American youth was 43%. The Violent Crime Index arrest rate for African American juveniles (per 100,000 in that racial group) was more than 3.5 times that of Caucasian and American Indian Juveniles and 7 times that of Asian Juveniles. For property crimes, the arrest rate for African American juveniles was almost double that of Caucasian and American Indian juveniles. Howard Snyder, Juvenile Arrests 2002, JUVENILE JUSTICE BULLETIN (Sept. 2004), at http://www.ojp.usdoj.gov/ojjdp.
Americans.13 Depending on a number of factors within parental control, “a child with a stigma can pass in a special way.” While larger societal racism may overdetermine many aspects of African American adult lives and those of their children, African Americans are still free to be self-determining.14 “Parents, knowing of their child’s stigmatic condition, may encapsulate [her] with domestic acceptance and ignorance of what [she] is going to have to become. When [she] ventures outdoors, [she] does so therefore as an unwitting passer . . .”.15 That is, the child passes as long as she is not aware of her stigma.16 During this stage, her parents freely enjoy the benefit of their child’s unspoiled identity as long as they deem appropriate for the health and integrity of the child, their parental authority, and their family. Social identity management, i.e., exposure to the child of her stigmatized and devalued social status, is left to her parents.17 Consequently, an event predictably traumatizes the child; parents often take much care as to when, where, and how such a revelation occurs, hoping to forestall the life-altering event without compromising the child’s healthy emotional, social, and psychological development.18

Parental control of the introduction to these delicate and challenging aspects of their child’s identity information is paramount.19 Particularly for parents of African American children, “the Psychology of Nigrescence”, the psychology of becoming Black,20 often requires skilled handling. The right to

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13 BELL HOOKS, ROCK MY SOUL: BLACK PEOPLE AND SELF-ESTEEM 19 (Atria Books 2003) (examining various ways African people’s psyches have been assaulted, bruised, brutalized and damaged).


15 GOFFMAN, supra note 14, at 90–91.

16 See id. at 91 (discussing the child’s lack of knowledge about their stigma).

17 Id. at 19 (“It has been suggested that an individual’s social identity divides up the world of people and places for [her], and that [her] personal identity does this too, although differently.”).


19 See GOFFMAN, supra note 14, at 86 (noting that “control of identity information has special bearing on relationships”).

20 “Psychology of Nigrescence” describes the “five stages of racial identity development” in African American children: 1) pre-encounter, where the child absorbs beliefs of the dominant white culture that celebrates and values whiteness over Blackness; 2) encounter, where the child, thanks to a “heightened awareness of the
family privacy and parental autonomy, as well as the reciprocal liberty interest of the parent and child in their familial bond, needs no greater justification than that they comport with each state’s fundamental constitutional commitment to individual freedom and human dignity. Parents typically want to rear their children with minimum governmental interference. Given the “negative hierarchies”\(^1\) associated with African Americans in the United States, African American parents and their families “have been essential to counteract the stress-related effects of structured inequality.”\(^2\)

When African American children are the targets or witnesses of race-based law enforcement, the child as an unspoiled bit of human experience is sullied against the parental will and constitutional rights not only to rear their children, but also to be let alone. African American children so violated suffer lifelong psychological and emotional scarring, as the images and emotions at the time are indelibly imprinted on their psyche.\(^3\) Parents pin their hopes and dreams — fulfilled and yet realized — on the lives and liberty of their young children. Yet, the fundamental right to parent successful Americans and healthy citizens of the world becomes, at best, gravely compromised and, at times, destroyed.

This article discusses the governmental subversion of the African American’s fundamental right to parent.\(^4\) Specifically,
this article assesses how race-based policing under the guise of Fourth Amendment "reasonableness" obfuscates pernicious disregard of African Americans' right to rear their children free from hostile governmental interference, particularly when such policing occurs in the presence of their children. Race-based policing not only violates the African American parents' Fourth Amendment right to be let alone, but also violates their Fourteenth Amendment right to rear children when such policing takes place in the presence of their children. Furthermore, the imposition of these constitutional violations eviscerates a parent's right to establish a positive foundation for their children's ego knowledge, irrespective of their racial status in society, resulting in a governmental "breeding" of race-based stigma and rendering of impotence of the African American parent.25

I. THE FOURTEENTH AMENDMENT'S FUNDAMENTAL RIGHT TO PARENT

The Fourteenth Amendment of the Constitution provides that no State may "deprive any person of life, liberty, or property, without due process of law."26 Parental liberty interests in family and familial relations have long been recognized as a component of "substantive" due process,27 which includes the rights to "establish a home and bring up children."28

A parent's interest in the care, custody, and control of her child has been acknowledged by the Supreme Court as "perhaps the

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25 The right to parent, considered fundamental and protected by the Fourteenth Amendment, provides parents a liberty interest "in the companionship, care, custody, and management of a parent's child." Stanley v. Illinois, 405 U.S. 645, 651 (1972). In Stanley, the Supreme Court characterized the right to parent one's children as "cognizable and substantial," holding that:

[t]he Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious . . . than property rights.' 'It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'

Id. at 651–52 (citations omitted).

26 U.S. CONST. amend. XIV, § 1.

27 See Troxel v. Granville, 530 U.S. 57, 65 (2000) (asserting right to familial relations is "the oldest of the fundamental liberty interests recognized").

28 See Meyer v. Nebraska, 262 U.S. 390, 399 (1923); see also Stanley, 405 U.S. at 651 (discussing that the family has also found protection in the Ninth Amendment and the Equal Protection Clause of the Fourteenth Amendment).
oldest of the fundamental liberty interests recognized... "29 "The ‘parental rights’ doctrine is grounded on the premise that the autonomy of parents should be protected and can be traced back to the early 1900s."30 The Court has stated that the existence of a "private realm of family life which the state cannot enter,"31 has its source "not in state law, but in intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.”32

The Supreme Court has established that the liberties protected by the Fourteenth Amendment undoubtedly include the right to “bring up children.”33 The right to rear a child as a parent deems appropriate, as provided by the Due Process Clause, is among “the most venerable of the liberty interests embedded in the Constitution.”34 The right is so deeply rooted in American history and tradition, in so far as if that right is sacrificed, “neither liberty nor justice would exist.”35 Unless the government has evidence that challenges a parent’s fitness to rear his child, the Court has held that “no reason [exists] for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the

29 Troxel, 530 U.S. at 65.
30 Pillitire, supra note 3 at 188 (2001) (discussing the legal rights of grandparents to participate in the rearing of grandchildren).
31 See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (explaining the privacy that families have with regards to the state).
33 Pillitire, supra note 3, at 188 (quoting Meyer, 262 U.S. at 399).
34 See Hatch v. Dep’t for Children, 274 F.3d 12, 20 (1st Cir. 2001); see also Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997) (recognizing “constitutionally protected liberty interests that parents have in the custody, care and management of their children”); Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994) (stating that the “state’s removal of a child from his parents indisputably constitutes an interference with a liberty interest of the parents and thus triggers the procedural protections of the Fourteenth Amendment”); Weller v. Dep’t of Soc. Servs., 901 F.2d 387, 391 (4th Cir. 1990) (holding that plaintiff “does have a protectable liberty interest in the care and custody of his children”); Hooks v. Hooks, 771 F.2d 935, 941 (6th Cir. 1985) (explaining “that parents have a liberty interest in the custody of their children”). See generally Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (emphasizing that this liberty is protected by Due Process); Brokaw v. Mercer County, 235 F.3d 1000, 1018–19 (7th Cir. 2000) (stating child’s interest in being in care of parents); Wooley v. City of Baton Rouge, 211 F.3d 913, 923 (5th Cir. 2000) (explaining rights of child to have family integrity); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (noting that child has same family integrity right as parent).
rearing of that parent's children." 36 "Until the state proves parental unfitness, the child and [her] parents share a vital interest in preventing erroneous termination of their natural relationship." 37

"[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." 38 "[This] 'fundamental theory of liberty' . . . relates to the Court's strong reliance on the concept of individual autonomy." 39 Although some courts have characterized this right to control and rear, its contours, and the standard applicable to state law challenges as "not entirely clear," 40 its legitimacy and doctrine are more widely accepted and respected than the related right to familial integrity, which is also rooted in Supreme Court doctrine as well the Fourteenth Amendment. 41 The right to familial integrity has been denigrated and disfavored in the face of the right to control and rear one's child, 42 derided by some federal courts as a "broad" and "abstract" right 43 whose "dimensions . . . have yet to be clearly established." 44 Still, the Supreme Court has acknowledged the right's legitimacy and substantive due process basis in cases


38 See Moore v. City of East Cleveland, 431 U.S. 494, 503 (1978); see also Peggy Cooper Davis, Neglected Stories and the Lawfulness of Roe v. Wade, 28 Harv. C.R.-C.L. L. Rev. 299, 309 (1993) ("Drafters and advocates of the Fourteenth Amendment had vivid impressions of what it meant to be denied rights of family, for the denial of those rights was a hallmark of slavery....") (citation omitted).

39 Pillitire, supra note 3, at 189, n.70.

40 Deana Pollard, Banning Corporal Punishment: A Constitutional Analysis, 52 AM. U. L. REV. 447, 454 (2002). According to Pollard, from its inception, the Court has only provided limited protection for the parental right to rear. Id. Although the Court has characterized the parental right to control children as "fundamental," the Court has never applied strict scrutiny, or even intermediate scrutiny, to challenges of state laws based on a parent's right to rear children. Id. "Thus, despite referring to the parental right to control children's upbringing as 'fundamental,' the Court's historical and contemporary analysis of the right has shown little deference to parental actions that may harm children." Id.


42 See, e.g., Suboh v. Dist. Attorney's Office, 298 F.3d 81, 91 (1st Cir. 2002) (noting that "the interest of parents in the care, custody, and control of their children is among the most venerable of the liberty interests embedded in the Constitution").

43 See, e.g., id. at 91 (characterizing right to familial integrity as "an abstract due process liberty interest" in the context of qualified immunity setting).

44 See, e.g., id. at 93.
spanning the precedents of *Meyer v. Nebraska*\(^{45}\) to *Stanley v. Illinois*,\(^{46}\) and from *Santosky v. Kramer*\(^{47}\) to *Troxel v. Granville*.\(^{48}\) Moreover, both rights are protected by both the substantive and procedural components of the Fourteenth Amendment Due Process Clause, which substantively, limits governmental interference with these (and other) fundamental rights and liberty interests and, procedurally, guarantees a "fair process" regarding any such interference.

However, the Court has also made clear that "[a] parent's rights with respect to her child have thus never been regarded as absolute ... [and] a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*."\(^{49}\) The state's ability to infringe on a parent's right to rear children can be broken down into two categories: (1) cases where the state's interest is based on its police power to protect the public at large from societal ills; and (2) cases where the state's interest is based on its *parens patriae* power to protect children who cannot protect themselves.\(^{50}\) Both interests fall squarely within the state's police power to protect and advance society, even against claims of fundamental rights' violations, provided these interests are served by the state's actions.

For example, in *Meyer v. Nebraska*, the seminal case recognizing a parental right to rear children, the Court essentially applied a rational basis test to the "fundamental" right to control a child's upbringing. The Court stated that a parent's liberty interest in child-rearing could be subverted to a state's proper exercise of its police power via legislation that has a "reasonable relation to some purpose within the competency of

\(^{45}\) 262 U.S. 390 (1923) (constraining state's ability to mandate public education over and contrary to parental wishes).

\(^{46}\) 405 U.S. 645 (1972) (constraining state's ability to remove child from parental custody over and contrary to parental wishes).

\(^{47}\) 455 U.S. 745 (1982) (constraining state's ability to sever parental rights in their child over and contrary to parental wishes).

\(^{48}\) 530 U.S. 57 (2000) (constraining state's ability to mandate grandparent visitation rights over and contrary to parental wishes).

\(^{49}\) See *id.* at 88 (Stevens, J., dissenting) (clarifying that the balancing approach utilized in *Prince* and *Yoder* controlled).

\(^{50}\) See generally Pollard, *supra* note 40, at 454–55 (concluding that the Supreme Court's interpretation of the fundamental right to parent could support a ban on corporal punishment by parents).
the State to effect.”51 In Prince v. Massachusetts, the Court reiterated that the parental right to rear is far from absolute, “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.”52 Similarly, in Wisconsin v. Yoder, the Court stated that a parent’s power may be limited if it appears that parental decisions will have a “potential for significant social burdens.”53 The Yoder Court accepted the state’s arguments that it had an interest in preparing “citizens to participate effectively and intelligently in our open political system . . . [in order] to preserve freedom and independence,”54 as well as in preparing individuals to be “self-reliant and self-sufficient participants in society.”55

More recently, the Court in Troxel v. Granville repeated that the parent’s right to rear is “fundamental,” but did not articulate a standard of review.56 The plurality opinion also failed to answer the requisite state interest necessary to justify state interference with the parent’s discretion to control his children’s upbringing, but did imply that harm or potential harm to a child would be an adequate basis for state intervention. The plurality did employ a “combination of factors” test to determine that a state’s visitation law infringed upon the fundamental right to parent,57 noting constitutionally-derived protections in this area “are best ‘elaborated with care.’”58

Consequently, the standard of judicial scrutiny for cases alleging a violation of the fundamental right to familial relations

51 Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (noting that this police power is not final, it is subject to the courts supervision).
52 Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (noting that child employment could be one of these dangers).
53 Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (explaining that this limiting power is necessary to protect either the health or safety of a child).
54 Id. at 221 (noting that Thomas Jefferson had initially come to this conclusion).
55 Id. (noting that the Court accepted both propositions).
57 See id. at 72–73 (stating that “the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville’s fundamental right to make decisions concerning the care, custody, and control of her two daughters”).
58 Id. at 73 (quoting the dissent of Justice Kennedy and explaining the reasoning behind this).
is unclear. Some heightened level of scrutiny is maintained; however, it also appears that strict judicial scrutiny is not certain nor required, regardless of this right's fundamental nature. Therefore, a heightened scrutiny seems to be the applicable standard, but strict scrutiny does not appear automatic. Nonetheless, the liberty guaranteed by the Fourteenth Amendment still "denotes... the right of the individual to... establish a home and bring up children... [and] enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."  

II. THE FOURTH AMENDMENT'S RIGHT TO BE LET ALONE

The Fourth Amendment proscribes unreasonable searches and seizures of persons, papers, and effects. It provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, 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.

The basic purpose of the Fourth Amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." At the threshold of a Fourth Amendment inquiry is whether governmental conduct

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59 See, e.g., id. at 78 (Souter, J., concurring) (noting that the Court failed to "set out the exact metes and bounds to the protected interest of a parent in the relationship with his child").

60 See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988) (clarifying that the Supreme Court has held that when governmental infringement upon a fundamental right is challenged, strict scrutiny is the standard against which the infringement is to be measured).

61 See, e.g., Troxel, 530 U.S. 57, at 65 (illustrating that the Court gives heightened protection in these matters).

62 See id. at 65 (detailing that Due Process Clause of Fourteenth Amendment "provides heightened protection against governmental interference with certain fundamental rights and liberty interests").


64 U.S. CONST. amend. IV (providing that "the right of the people to be secure in their persons... against unreasonable searches and seizures shall not be violated").

65 Id.

constitutes a search or seizure within the meaning of the amendment. 67

Prior to seizing and searching an individual, police must be able to justify their action by articulating that they had either probable cause to believe that the individual was involved in criminal activity, 68 which supports full governmental seizures via custodial arrest, or reasonable suspicion 69 that such activity was afoot. 70 Reasonable suspicion allows for "brief" and "less intrusive" seizures and searches that are only "investigatory" in nature and scope. 71 Investigatory seizures and searches are commonly referred to as "Terry stops" and "Terry searches" or "Terry frisks," respectively. During Terry stops and searches or frisks, if an officer can articulate a reasonable suspicion that an individual is armed and dangerous, the officer may seize the individual and search that person's outer clothing. 72 Under the Fourth Amendment, such searches are required to be no more invasive than necessary to attain weaponry that may be used against officers or bystanders. 73

The Fourth Amendment protects against unreasonable governmental intrusions upon reasonable expectations of privacy. 74 Reasonableness has been reported to turn on individualized suspicion of wrongdoing. Under the Fourth

67 See, e.g., Kyllo v. United States, 533 U.S. 27, 31 (2001) (describing the question of whether a Fourth Amendment search has occurred as "antecedent").
69 See United States v. Cortez, 449 U.S. 411, 416–18 (1981) (stating that reasonable suspicion is determined via the totality of the circumstances, relying on "certain commonsense conclusions about human behavior").
70 See Terry v. Ohio, 392 U.S. 1, 30–31 (1968). Prior to the Court's decision in Terry, police were required to have "probable cause" to believe that a suspect had committed or was committing a crime prior to seizing and searching him. See also Brinegar, 338 U.S. at 176; Watson, 423 U.S. at 423–24. With Terry, the Court lowered the level of constitutional suspicion so that officers need only articulate a reasonable suspicion that criminal activity is afoot to support a stop. Additionally, if the officer can articulate a reasonable suspicion that the same individual is armed and dangerous, the officer may also conduct a limited search for the purpose of disarming the seized individual. See Terry, 392 U.S. at 28–30.
71 To the extent that, during an investigatory stop, probable cause develops, the police may affect full, custodial arrest. See Terry, 392 U.S. at 10.
72 See Terry, 392 U.S. at 30 (allowing police officers to conduct limited searches of outer clothing to discover weapons on the basis of reasonable suspicion).
73 See Terry, 392 U.S. at 27 (stating that the search for weapons must be reasonable).
74 See Terry, 392 U.S. at 9 (stating that where an individual "may harbor a reasonable expectation of privacy, he is entitled to be free from unreasonable governmental intrusion").
Amendment (applicable to the states via the Fourteenth Amendment), unreasonable governmental searches and seizures are prohibited and the governmental agent must have probable cause to conduct a search, as evidenced by a search warrant.75

If a person is searched or seized within the meaning of the Fourth Amendment, the presiding judicial authority must evaluate the governmental action "under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."76 Reasonableness, the Court has also said, is context-dependent.77

When an individual has a reasonable expectation of privacy — i.e., when the individual has manifested an actual/subjective expectation that society is prepared to recognize as reasonable78 — warrantless activity by law enforcement will be considered presumptively unreasonable.79 The action will then be considered constitutional only if it falls within one of the "specifically established and well delineated exceptions" to the Fourth Amendment's warrant and probable cause requirements.80 These exceptions are supposed to be parsimoniously gifted because the Fourth Amendment privacy interests must be zealously guarded.

Seminal and inextricably entwined with the right against unreasonable governmental searches and seizures is the right to be let alone.81 Justice Brandeis has characterized the right to be let alone as paramount in a free American society:

75 See, e.g., Horton v. California, 496 U.S. 128, 133 (1990) (quoting the probable cause requirement of the Fourth Amendment).
78 See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (discussing when a person has a constitutionally protected expectation of privacy).
79 Camara v. Mun. Ct. of City of S.F., 387 U.S. 523, 528–29 (1967) (claiming that a search of private property without proper consent is unreasonable).
80 Minnesota v. Dickerson, 508 U.S. 366, 372 (1993) (citations omitted) (stating that unauthorized searches and seizures are subject to few specifically established exceptions).
[O]nly a part of the pain, pleasure and satisfaction of life are to be found in material things. [The drafters] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. [The drafters] conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.82

The right to be let alone could easily be regarded as a natural, coextensive and complementary challenge to governmental activity when children are involved, usually in the context of schools. School-aged children do not give up their reasonable expectation of privacy, nor do they relinquish their constitutional rights at the perimeter of the school.83 Nonetheless, the Supreme Court has not required a search warrant before school officials may search students, and in fact, has lowered the standard of suspicion for school authorities from probable cause that a crime has or is occurring to reasonable suspicion that criminality is afoot.84 This lessening of the governmental burden85 rested upon the Court’s perception that a school’s interests in discipline and order outweigh the students’ privacy interests.86

83 See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (stating the Fourth Amendment provides that the Federal Government shall not violate “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”); see generally Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (establishing that students or teachers do not shed their First Amendment constitutional rights at the schoolhouse gate).
84 See New Jersey v. T.L.O., 469 U.S. 325, 340–41 (1985) (stating that the warrant requirement is unsuited to the school environment).
85 In T.L.O., the test crafted for proper Fourth Amendment searches was whether the school’s authority was justified at its inception and the search was reasonably related in scope to the circumstances that justified interference. See id. at 341. The Court there did not address searches conducted “by school officials in conjunction with or at the behest of law enforcement agencies.” Id.
86 See id. (stating that requiring a teacher to obtain a warrant before searching a child “would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools”); see also Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)) (holding that “where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.’”).
Furthermore, the Supreme Court has rendered that improper officer motives to seize and search are irrelevant. In fact, even though many commentators and lower courts have highlighted that improper officer motivations proliferate when people of color are policed, the Court has maintained that "subjective [officer] intentions play no role in ordinary, probable cause Fourth Amendment analysis." As the Court's Fourth Amendment interpretation now stands, "reasonable suspicion" translates into officer discretion; officer discretion precedes prejudiced policing, as officer perception of race pervades discretion. When subjective and even improper officer motive is disregarded, a confounding dilemma for citizens of color arises.

To the extent that the investigation and thwarting of criminality is the government's interest, understand that the level of "criminality" that is at hand when police stop - but do not arrest adults - is extremely low. Obviously, police are not going to allow those whom they have probable cause to believe have committed a violent or otherwise serious crime to walk away. Nor will police who have witnessed actions of potential criminality, which later ripen into actual law-breaking, turn their heads. No, the police will arrest and prosecute these individuals.

Often, those who are not criminally prosecuted following their arrest are seldom the suspects of a violent felony. Rather, these are typically persons who have violated traffic codes or some sort of vehicular equipment requirement, or who are merely "present" in places where police believe crime is occurring. Given this standard, misdemeanors of all stripes can lead to "lawful"
arrests,\textsuperscript{91} even the most ludicrous and "comparably foolish."\textsuperscript{92} Serious nor dangerous criminals are not being ferreted out when these individuals are stopped, investigated, and arrested. All that is accomplished is the psychological damage of the individual and, if arrested in the presence of one or more children, a violation of the parental right to rear children free from such psychological and emotional damage. American society is implicated, and its tacit complicity and approval – via silence in the face of mounting, recorded, and admitted violations – are evidence to indict.\textsuperscript{93}

This effect is especially apparent when the parent is not threatening the child's health, safety, or well-being.\textsuperscript{94} That the Fourth Amendment does not contemplate individual officer motivation is illogical. By announcing such a standard, the Court condemns African Americans, as well as other minorities, to a permanent status of inferiority, while simultaneously masking the relegation in the lofty language of equality, colorblindness, and objectivity. Within this ironically biased, punitive structure of judicial review, the studied ignorance "insures wrong results by assuming a pseudo-objective posture that does not permit it to hear the complex dialogue concerning

\textsuperscript{91} See Atwater v. Lago Vista, 532 U.S. 318, 332–36, 354 (2001) (stating that the defendant's violation of a transportation code in the presence of a peace officer was grounds for a lawful arrest).

\textsuperscript{92} \textit{Id.} at 353 n.23. Atwater was followed in one case in which a preteen girl was arrested after a transit police officer witnessed her eating – a violation of the public transit's "zero tolerance" regulations – one french fry while standing on a subway train's platform. \textit{See Hedgepeth v. Wash. Metro. Area Transit}, 284 F. Supp. 2d 145, 160 (D.C. Cir. 2003). The district court judge stated that although he was bound by the Atwater decision, he "note[d] with sadness that [the Atwater] dissent's prediction has proved correct. The Court [put] its imprimatur on the 'foolish' warrantless arrest authority of defendants for the serious offense of eating a french fry on a subway platform." \textit{Id.} at 160.

\textsuperscript{93} See generally People v. Sutton, 19 Cal. App. 4th 795, 802 (1993) (discussing the inferring of guilt from a criminal defendant's silence, and whether it is proper).

\textsuperscript{94} Some may argue that African American parents who shield their children from such race-based encounters with law enforcement are, in the United States, damaging their children, who will be more than traumatized upon the first adult encounter with such policing. In fact, these individuals would argue that such parenting would require the state to intervene, given that the parents are setting their child(ren) up for a large and painful fall that, had exposure to such policing early on occurred, would be more of an irritant (versus a major event). I liken this parenting mind set to that exercised against enslaved Africans who were "trained" and treated to get accustomed to what would face them as chattel slaves in the United States. Such "seasoning" is, at best, a cruel "breaking in" an individual violently and for a purpose that serves the oppressor, not the individual. As the right to parent serves the parent and not the police, certainly the notion of seasoning these children is not only unappealing, it is not the real option for healthy parents of these children. Many, especially if they are African American parents, will be quite aware that race-based activities will occur against their children.
the identity question, particularly as it pertains to historically dominated groups."95 Yet, the Court maintains in the face of legitimate, contrary evidence that race does not matter or register in Fourth Amendment policing.96

Therefore, in the context of familial relations and the fundamental right to parent, if the Fourth Amendment fully protects against unlawful arrests, courts should not consider the more broad, amorphous, and general protections established by Fourteenth Amendment due process.97 As the court in Graham v. Connor stated, "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct, that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing the claims."98

However, in the context of African-American parenting in a racially-based policing state, does the Fourth Amendment provide adequate protection? Harassing African American parents in the presence of their children demonstrates a disavowal of the purported American melting pot and equality. Essentially, it is a defrocking and divesting of legitimacy and authority.

Similarly, harassing African American children, without the assent or knowledge of their parents,99 divests those parents of

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95 See Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1707, 1762 (1993) (arguing that the premise that the law is fair as it applies to different racial groups is incorrect).
96 The law holds to the basic premise that definition from above can be fair to those below, that beneficiaries of racially conferred privilege have the right to establish norms for those who have historically been oppressed pursuant to those norms, and that race is not historically contingent. Although the substance of race definitions has changed, what persists is the expectation of white-controlled institutions in the continued right to determine meaning—the reified privilege of power—that reconstitutes the property interest in whiteness in contemporary form. Id. at 1762.
97 See Graham v. Connor, 490 U.S. 386, 395 (1989) (noting that in claims of excessive force by law enforcement, the Fourth Amendment should be used as analysis, not the more generalized due process clause).
98 Id.
99 Here, I speak of programs such as "Scared Straight," which purport to help parents of children deemed out-of-control and criminally inclined or precocious by placing these children in prisons and jails to allow them to get a taste of the reality of incarceration with hardened criminals.

The name comes from a program initiated by the Lifer's Juvenile Detention Program, nicknamed "Scared Straight," where children deemed to be juvenile delinquents were taken to a New Jersey maximum security prison to interact with hardened "lifers," inmates sentenced to one or multiple life terms. These inmates gave the children blunt
their parental and even societal authority in the traumatized child's view. When parents are unable to protect their children from the so-called "bad guys," children learn early on that sometimes, evil not only may triumph, but trump parental omnipotence and authority.

III. "PWB": PARENTING WHILE BONDSMEN

The United States Supreme Court has long determined that a parental right to have and raise one's children as the parent sees fit is fundamental and protected under the Constitution. Traditionally, the Court has determined that a third party or state acting as parens patriae may only interfere with a

accounts of daily prison life; the documentary was met with wide acclaim, garnering one Emmy award.

As a result, the documentary spawned similar techniques or programs of intimidation by various groups to dissuade children from numerous social ills such as smoking, drunk driving, drag racing, and crime. In 2000, the Surgeon General's report on youth violence, described such programs as ineffective:

[S]hock probation or parole program in which brief encounters with inmates describing the brutality of prison life or short-term incarceration in prisons or jails is expected to shock, or deter, youths from committing crimes. Numerous studies of Scared Straight have demonstrated that the program does not deter future criminal activities. In some studies, rearrest rates were similar between controls and youths who participated in Scared Straight. In others, youths exposed to Scared Straight actually had higher rates of rearrest than youths not involved in this intervention.

Studies of other shock probation programs have shown similar effects.


100 See Herbert, supra note 8, at 171-73 (noting that race-based policing can lead to criminalizing a number of lawful activities because of law enforcement's criminalizing the African American, including but not limited to, "IWB, idling while Black, WWB, walking while Black, SWB, shopping or standing while Black, and even BWB, breathing while Black") (internal quotations and citations omitted).

101 See Lassiter v. Dep't of Soc. Servs. of Durham County, 452 U.S. 18, 38 (1981) (Burger, C.J., concurring) (stating that the Court has accorded a high degree of constitutional respect to a natural parent's interest in controlling the details of a child's upbringing).

102 See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that raising children is a fundamental liberty interest); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-36 (1925) (determining a law that requires parents to send their children to public school interferes with the parents' liberty interest); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that "the custody, care and nurture of the child reside first in the parents . . ."); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (reiterating the recognition that "[t]he freedom . . . of family life is a protected fundamental liberty interest"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding a law that denied unwed fathers custody of their children after the mother dies to be unconstitutional); Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972) (holding that the Amish should be exempted from a law requiring children to attend school past the eighth grade).

103 See BLACK'S LAW DICTIONARY 485 (6th ed. 1990) (defining parens patriae as "the state regarded as a sovereign").
family, if there is a showing of harm and that the child's best interests are at stake.

However, for centuries, parents of African American children were legislated congenitally impotent to rear their children in the manner they saw fit. "Under America’s system of slavery, African Americans were defined as chattel or property, with no rights that Whites had to respect."104 The Founding Fathers' characterization of the African and his/her American-born descendants was deliberate,105 leading to the national, state, and local codification of their inferiority, while existing within the borders of the United States.106 Courts followed suit, creating a race-based slave class, a class where members were "legally deemed less than human, for nothing more than the color of their skin . . . and giving white society license to subjugate these others at will."107

"The denial of full citizenship and dignified treatment to [B]lacks was rationalized, explained, and justified under the law, both explicitly and implicitly, by a socially and culturally constructed theory of race . . . [which] posited race as an objective fact, and the white race as inherently and biologically superior to all others."108 The multigenerational violation of the enslaved humans' sense of family "was fundamental to the character of American slavery; it began in the claim of ownership that superseded parental bonds."109 Slavery also required that those enslaved "be bound more surely by ties of ownership than by ties of kinship."110 As such and pursuant to the centuries' long ownership of Africans in America, "[w]hites were cast in the role of custodians for this primitive race . . . to hold them in servitude

105 See, e.g., Andrew E. Taslitz, Hate Crimes, Free Speech, and the Contract of Mutual Indifference, 80 B.U. L. REV. 1283, 1311-13 (2000) ("Some Founders acknowledged that they felt the Union was more important than the end of chattel slavery.").
106 Id. at 1310-11 (noting at least twenty constitutional provisions that preserved and expanded chattel slavery).
107 Norman Redlich, "Out, Damned Spot; Out, I Say:" The Persistence of Race in American Law, 25 VT. L. REV. 475, at 478 (2001) (discussing how prior to America's unique version of slavery, such a status was obtained as a result of a population being "vanquished in a war" or contractually "indebted" for a limited period or amount).
109 See Davis, supra note 38, at 335.
110 See Davis, supra note 38, at 309.
to prevent the type of wanton savagery that would result from their living freely . . .".111 "In the process,112 race-based categories came to be filled with meaning – Blacks were characterized one way, whites another."113 Caucasians – American born or not – were the recipients of constitutional freedoms; Blacks were unfit for civil society114 and its freedoms.115 This was an American tenet; freedom and liberty were rights for Americans, not their property.116

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111 See Redlich, supra note 107 at 479.

112 Even before "the process," the laws – specifically, the Constitution – loaded race-based categories against the enslaved. Five Constitutional provisions clearly sanctioned American chattel slavery. The first, also known as the "three fifths clause," which for the purpose of Southern representation in Congress, counted three-fifths of all slaves (Art. I, § 2. cl. 3); the second prohibited Congress from ending the African slave trade before 1808, but did not require Congress to prohibit slave trading afterwards (Art. I, § 9, cl. 1); the third required calculation of federal taxes pursuant to the "three-fifths clause," (Art I., § 9, cl. 4); the fourth, also known as the "fugitive slave clause," which prohibited states from emancipating runaways and required that they be returned to their owners "on demand" (Art. IV, § 2, cl. 3); and the fifth prohibited pre-1808 amendment of the slave importation or capitation clauses (Art. V).

See Paul Finkelman, Affirmative Action for the Master Class: The Creation of the Proslavery Constitution, 32 AKRON L. REV. 423, 428-29 (2002). Additionally, Professor Finkelman argues:

Numerous other clauses of the Constitution supplemented the five clauses that directly protected slavery. Some provisions that indirectly guarded slavery, such as the prohibition on taxing exports, were included primarily to protect the interests of slaveholders. Others, such as the guarantee of federal support to 'suppress Insurrections' and the creation of the electoral college, were written with slavery in mind, although delegates also supported them for reasons having nothing to do with slavery.

Id. at 429. Professor Finkleman further implicates a sizeable number of additional provisions that indirectly supported American chattel slavery. Id. at 429–32. Finkleman notes that General Charles Cotesworth Pinckney, a purportedly staunch and able defender of slavery, summed for his constituents how slavery fared at the Constitutional Convention: "considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad." Id. at 433.


114 See Taslitz, supra note 105, at 1313 (describing how early Americans justified chattel slavery of Africans – deemed "incapable of enjoying political liberty . . . unworthy of it," and "unable to profit from even limited individual liberty").

115 See Redlich, supra note 107, at 479 (noting that American colonies deemed blacks as inherently barbaric and therefore unable to enjoy the freedoms of a civilized society).


[S]urely there is in all children, though not alike, a stubbornness, and stoutness of mind arising from natural pride, which must, in the first place, be broken and beaten down; that so the foundation of their education being laid in humility and tractableness, other virtues may, in their time, be built thereon . . .
This system included the right to parent children. Children were an integral part of the plantation system that cradled the United States during centuries of growth and development. Accordingly, separation of families was a routine and inherent practice during American slavery; whole families were rarely sold as intact units, as the most common practice was selling one man, woman, or child at a time. Those enslaved parents who were spared early deprivation of their children knew that their days of parenting and their child’s relative innocence and joy were numbered.

During American slavery, infancy was perhaps the most idyllic time for enslaved parents and their offspring. No wonder: similar to the forced “grace period” planters endured while maintaining crop seedlings and livestock offspring, owners of human property were similarly forced to wait until their new or young enslaved “crops” grew sufficiently sturdy and tall, before hacking them at their root, chopping them down for monetary gain. Inevitably, “there came that blight, which too surely

117 See John Hope Franklin & Loren Schwendinger, Runaway Slaves: Rebels on the Plantation 50-51 (Oxford Univ. Press 1999) (“Sales, trades, transfers, auctions, migration of slave-holders meant that mothers were taken from children, wives from husbands, children from parents, fathers from sons and daughters, and blood kin from one another.”).

118 “The fear of being sold away from family and friends caused constant apprehension and worry. When the fateful moment arrived, as it often did, slaves pleaded with masters not to separate them from loved ones.” See id. at 52. One notable author has also described the separation of slaves from their families as:

Could you have seen that mother clinging to her child, when they fastened the irons upon his wrists; could you have heard her heart-rending groans, and seen her bloodshot eyes wander wildly from face to face, vainly pleading for mercy; could you have witnessed that scene . . . you would exclaim, Slavery is damnable! See also Harriet Ann Jacobs, Incidents in the Life of a Slave Girl, in SLAVE NARRATIVES 769 (William L. Andrews & Henry Louis Gates, Jr. eds., The Library of America 2000).

119 See, e.g., id. at 753 (noting the author’s sudden and rude realization of her slave status at six years old: “[t]hose were happy days – too happy to last”).

120 See, e.g., Jacobs, supra note 118, at 751 (relating the author’s life, being born into slavery, but “never [knowing] it till [sic] six years of happy childhood had passed away,” further stating that “I was so fondly shielded that I never dreamed that I was a piece of merchandise, trusted to [my parents] for safe keeping, and liable to be demanded of them at any moment.”).

121 See, e.g. id. at 753 (noting the sudden and rude realization of her slave status at the age of six years old). See generally Frederick Douglass, Narrative of the Life of Frederick Douglass, in SLAVE NARRATIVES 281 (William L. Andrews & Henry Louis Gates, Jr. eds., The Library of America 2000) (noting that the author was separated from his mother at birth, “a common custom, in the part of Maryland from which I ran away, to part children from their mothers at a very early age”); id. at 282 (“Frequently, before the child has reached its twelfth month, its mother is taken from it, and hired out on some farm a considerable distance off, and the child is placed under the care of an old woman, too old for field labor.”); id. (“For what this separation is done, I do not know, unless it be
waits on every human being born to be a chattel.”122 Children were often taken from their parents and sold away to the highest bidder; children, particularly between the ages of seven and twelve years old, would bring the highest prices.123 Babies, infants, toddlers, and young children were whipped, beaten, tortured, and raped repeatedly, often bearing the offspring of their rapists/owners;124 children were also part of the “eyes wide shut” sexual exploitation of those enslaved.

Commensurate with the destruction of families, African American parents were deprived of authority over their children in the most humbling and humiliating means. Children watched a myriad of “lessons” taught on the backs and greased by the blood of their parents. American slavery and intergenerational trading completely destroyed parent/child bonds or stable families.125

Thus, children of chattel quickly learned that parental obedience and obeisance came second, at best, to obeying their actual, potential, and ostensible owners. Obviously, enslaved parents could not well protect their children.126 Children were
to hinder the development of the child’s affection toward its mother and to blunt and destroy the natural affection of the mother for the child. This is the inevitable result.”). But see, e.g., id. at 759 (relating how a nursing mother was, periodically, “locked up, away from her nursing baby, for a whole day and night”); id. at 753 (noting how the author’s mother “had been weaned at three months old, that the babe of the [white] mistress might obtain sufficient food”).

122 Id. at 753.

123 See FRANKLIN & SCHWENINGER, supra note 117, at 50–51 (asserting that “[t]he trauma of being separated forever from kith and kin can hardly be imagined”).

124 See, e.g., Jacobs, supra note 118, at 771–75 (describing the author’s loss of sexual innocence at fifteen years of age, when her owner pressed upon her his requirement that she be forced into sexual slavery in addition to her overt slave duties).

125 See id. at 74 (explaining that slave owners’ control constantly assaulted family stability).

126 Consider this recollection of a typical New Year’s Day, from the perspective of an enslaved woman:

Hiring-day at the south takes place on the 1st of January. On the 2d, the slaves are expected to go to their new masters... Then comes New Year’s eve; and they gather together their little alls, or more properly speaking, their little nothings, and wait anxiously for the dawning of day. At the appointed hour the grounds are thronged with men, women, and children, waiting, like criminals, to hear their doom pronounced...

[T]o the slave mother New Year’s day comes laden with peculiar sorrows. She sits on her cold cabin floor, watching the children who may all be torn from her the next morning; and often does she wish that she and they might die before the day dawns. She may be an ignorant creature, degraded by the system that has brutalized her from childhood; but she has a mother’s instincts, and is capable of feeling a mother’s agonies.

Jacobs, supra note 118, at 760–61.
routinely sold\textsuperscript{127} away from their mothers, fathers, and siblings. These children could be subjugated by virtually any white person and parents were required to look away. Such a realization, particularly when the birth parents and child(ren) remained on the same property, created a clear divide between parents and their children.\textsuperscript{128}

IV. "PWB": PARENTING WHILE BLACK

As property, enslaved people occupied the same status as other property, separate and apart from the human family.\textsuperscript{129} The latter-day attempts to apply status and privileges to de jure and genetic non-citizens were artificial and forced. The United States had been a nation ruled exclusively by privileged white males.\textsuperscript{130} The omnipotence of Whites and race-based supremacy so completely pervaded American society that attempts to create humans from enslaved Blacks was otherworldly. "[H]ow do you take property and turn it into humans?"\textsuperscript{131}

The Fourteenth Amendment "was America's first attempt to legally challenge White supremacist ideas by creating a truly equal multiracial society . . . legally changing African American men into White men so that they could enjoy all the rights, privileges, and immunities of United States citizenship."\textsuperscript{132} The

\textsuperscript{127} See, e.g., id. at 752 (reciting that the author's grandmother, despite saving to buy her children from those who owned them, was forced to suffer her five children being "divided among her master's children . . . sold, in order that each heir might have an equal portion of dollars and cents").

\textsuperscript{128} See, e.g., id. at 755. The author recalls an incident where her brother had to choose between responding to the beck and call of his father or "his mistress." Id. She stated, "[o]ne day, when his father and his mistress both happened to call him at the same time, [my brother] hesitated between the two; being perplexed to know which had the strongest claim upon his obedience." Id. The author's brother ultimately went to "his mistress" and, after being scolded by his father later for doing so, the father noted, "[y]ou are my child . . . and when I call you, you should come immediately, if you have to pass through fire and water." Id.

\textsuperscript{129} See Bartley, supra note 104, at 482 (announcing that slavery provided African Americans with "no rights that Whites had to respect").


\textsuperscript{131} Id. at 484 (discussing African American status post-Civil War).

\textsuperscript{132} Id. at 473. As "the rights and privileges of American citizenship had been reserved exclusively for White men," no provisions for full citizenship were made for any other extant population within the United States. Id. at 479. Moreover, during the drafting of the Constitution, "[t]he fifty-five White men who met in Philadelphia, in May 1787 . . . never considered African American citizenship. The only times African Americans were mentioned were in reference to their propertyed status." Id. at 480.
Fourteenth Amendment changed the de jure law. However, the legal and societal legacy of Black inferiority crippled the amendment's spirit from the outset. Because the United States failed to define objectives for equal opportunity, the creation of laws simply opened access, but did not create means to actualize goals or assess progress. The constitutional addendum could not change White Americans' de facto race-based attitudes; they refused to accept African American equality. Consequently a stigma was borne from a societal belief that blacks were not equal to whites. Thus, one basic flaw in crafting African American citizenship and associated rights may have been faulty reliance upon fictional American foundations of race neutrality, equality, and color-blindness. Such an American society has never existed.

Thus legislation – even of Constitutional magnitude – proved ineffective in abolishing all race-based notions of citizenship.

133 See Wallace, supra note 130, at 697–98 (characterizing the Declaration of Independence and the U.S. Constitution as disingenuous and, perhaps, duplicitous, given the espousing of freedom and equality while ignoring the reality of chattel slavery of Africans).

134 Id. at 695.

135 The Declaration of Independence and the U.S. Constitution are the foundational documents of our democratic form of government. They espouse the values and virtues of equality and freedom for all men. However, the framers did not include Africans in their quest for freedom and independence. In fact, at the time the ideas and ideals were penned in the Declaration of Independence, the Founders argued for their freedom from the tyranny of Great Britain; while at the same time denying the same freedoms, enslaving some Africans, and denying human and civil rights to free Africans in America. Furthermore, in the last paragraph of the Declaration of Independence, the Founders blamed the 'Christian king' for slavery, but gave no ownership for their own duplicity in enslaving Africans in America.

136 Id. at 473 (noting that the reality of changing law did not change race-based attitudes); id. (quoting the 1866 Cincinnati Enquirer's statement that "[s]lavery is dead, . . . the negro [sic] is not, there is the misfortune.").

137 "It was not just enslavement or the notion that slaves were inferior in the minds of whites in the eighteenth century, but rather that all Africans in America were inferior to Whites." See Wallace, supra note 130, at 700. "The African race in the United States even when free, are everywhere a degraded class. . . . They are not looked upon as a citizen by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term citizens." Paul Finkleman, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 56 (Bedford Books 1997) (quoting Chief Justice Roger B. Taney).

138 See Wallace, supra note 130, at 705.

139 Id. at 703 (opining that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them in the same plane").
Law and law enforcement were the keys to control these newly created Americans.140 Determining the meaning of equality quickly uncovered the racism which characterized United States citizenship.141

V. THE DENOUEMENT: STRANGE FRUIT142 OF THE POISONOUS TREE143

"It takes only a handful of minutes . . . to change the course of a lifetime. It takes only an instant to become a cripple."144

When children suffer societal injustice, they are hurt thrice: "indirectly through its direct effects on their caretakers and adult support systems;"145 systemically, when "the structures of discrimination and disadvantage reach beyond adulthood and into childhood in the form of unequal access to the educational system, segregated housing, disproportional arrests and confinements (of children of color), and sexism;"146 and directly, through cruel and unjust treatment, merely because they are children.147

140 See Herbert, supra note 8, at 169 (explaining that African Americans suffered at the hands of mobs which often included law enforcement officers).
141 See Bartley, supra note 104, at 473 (declaring that the Fourteenth Amendment could not eliminate racism among White Americans).
142 This portion of the article's section heading is taken from a song of the same name, written by Allen (Meerpol) and first performed by Billie Holliday. The lyrics are as follows:

Southern trees bear strange fruit, blood on the leaves and blood at the roots, Black bodies swinging in the southern breeze, strange fruit hanging from the poplar trees.
Pastoral scene of the gallant south, the bulging eyes and the twisted mouth, Scent of magnolias, sweet and fresh, Then the sudden smell of burning flesh.
Here is fruit for the crows to pluck, for the rain to gather, for the wind to suck, for the sun to rot, for the trees to drop, here is a strange and bitter crop.

BILLIE HOLLIDAY, Strange Fruit, on THE COMPLETE COMMODORE RECORDINGS (Verve Records 1939).
143 The "fruit of the poisonous tree" doctrine requires courts to reject evidence illegally obtained by the police, i.e., obtained subsequent to a constitutional violation. See Wong Sun v. United States, 371 U.S. 471, 486 (1973). The "poison" of official wrongdoing renders the resultant "fruit" virtually useless, unless intervening events sufficiently break the causal connection. Id. at 487–88. See also Nardone v. United States, 308 U.S. 338, 341 (1939) (coining term for the first time); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (recognizing remedy for criminal defendants).
144 GARBARINO ET AL, NO PLACE TO BE A CHILD: GROWING UP IN A WAR ZONE 6 (Lexington Books 1991).
145 Grahn-Farley, supra note 1, at 298.
146 Id.
147 Id. at 299 (asserting that "social practice of exploiting the weakest in the society affects the child").
According to parents, coping with danger and observing its effects on a child’s behavior is extremely stressful. Moreover, “the prejudices parents have endured during their own childhoods can add to the pain of seeing their own child hurt.” When children are unable to view their parents as powerful, there is a detrimental shift in the parent/child relationship and in the necessary dynamic for that relationship to survive. Given the shift in perception, parents must deal with a child that has borne the scars of a world that devalues and dehumanizes. When the government subverts or ignores the parent’s right to rear children free from race-based interference, it hints that the parent is incapable of protecting its offspring. For the parent and the child, the experience of race-based policing has long and detrimental effects.

A. Impotent Me (Parent)

“For unto us a child is born . . . .”

Chattel slavery haunts the American collective unconscious, particularly given the nation’s limited acknowledgement of its lingering modern effects, aside from the Thirteenth, Fourteenth, and Fifteenth Amendments. Our discussions of it are cloaked in mystery and historical characterizations. In fact, slavery and its lingering effects on the nation require complex, multi-faceted exploration, much the same way any malignancy does.

One major component of slavery’s brutality and its post-Civil War legacy is the terrorism of lynching. “The memory of lynchings was indelibly engraved onto the collective psyche of black communities for generations.” One scholar has described

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148 See GARBARINO ET AL, supra note 144, at 143 (discussing parent’s reaction to children in danger).
149 BRAZELTON & SPARROW, supra note 4, at 348.
150 BRAZELTON & SPARROW, supra note 4, at 349.
151 Cf. Schall v. Martin, 467 U.S. 253, 291 (1984) (Marshall, J., dissenting) (arguing that “juveniles subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably ‘delinquent’”).
152 Isaiah 9:6 (King James).
153 See Ifill, supra note 23, at 287 (discussing the significant lingering effects of lynchings in the African-American community).
the psychological effects of lynching upon the actual and collective unconscious of the African American community:

Black families were profoundly psychologically affected by lynchings. The continuous threat of physical violence undoubtedly affected interactions between community members. Family members were prevented from seeking justice for the lynching of a loved one because of the threat that they too would be lynched. Family members were often too frightened to attend the funeral of their lynched loved one. They were often required to retrieve the mutilated bodies or ashes of their victimized loved ones from the lynching site.

Black residents who observed the mutilated bodies of lynching victims must have been deeply traumatized by the image. Whites deliberately displayed lynching victims, or dragged their bodies through the black community. In many cases, blacks heard the lynchings as they happened. White crowds numbering in the hundreds, often shouted their approval or cheered during the lynching. Shooting hundreds of rounds of bullets at the victim's hanging body was a routine practice. No doubt that in many instances, although shuttered in their homes during a lynching, blacks could hear the horrible cries of lynching victims who were tortured.154

B. Impotent Thee (Child)

"According to physicians specializing in the treatment of children and adolescents, 'children who witness violence early in life, come to see the world as dangerous and unpredictable, and their own place in it as tenuous.'"155 "The problems these children suffer can affect their ability to function normally in their home and at school."156 Sleep disturbances, flashbacks, and emotional detachment problems are all routinely reported symptoms of children who have been exposed to acts of violence.157 "[T]he situation of the child is both unique to being a

154 Id. at 298–301.
155 Id. at 291 (discussing the psychological problems of black children who witness lynchings).
156 Id.
157 Id.
child and, at the same time, inseparable from the situation of the adult."\textsuperscript{158}

Children are spoken of as casualties of all wars and there is clearly an understanding as to why. The malingering "wars" against drugs and crime has taken a public relations backseat to the War On Terror. Being forced off center stage, however, does not mean that those campaigns have slowed or suffered acknowledged defeat. To the contrary, these are ongoing efforts that no longer require justification, statistics, or palpable injury. They have morphed into catch-all efforts, which allow those frustrated leaders to parade the latest prisoners of war, who are often African Americans, in front of the curious and confused public. Each time the government exercises its ability to dominate such prisoners, the government reanimates and resurrects slavery's "visceral destructions.\textsuperscript{159}

Race-based policing is not only "domestic terrorism,"\textsuperscript{160} it effectively may be a precursor to a nation's implosion. What lesson is learned when the "good guys" treat parents as the evil ones, the bad ones, the criminals? In one fell swoop, the parents, the children, and those who are like them in the eyes of society are "un-kinned,"\textsuperscript{161} i.e., disengaged from the American family and the power of the American myth.

This is troubling. Race-based policing – particularly in the presence of African American children – serves the same purpose and creates the same result as the "law enforcement" system of lynching: a damaged, fear-driven lesser vessel of human

\textsuperscript{158} Grahn-Farley, supra note 1, at 299 (noting the particularly vulnerable position of children in society).

\textsuperscript{159} See Michael Eric Dyson, Mercy, Mercy Me: The Art, Loves & Demons of Marvin Gaye 216 (Civitas Books, 2004) (opining that "[i]t is unavoidable that we view corporal punishment's long trajectory in the light of its violent use to control black bodies and to coerce their compliance to white rule.").

\textsuperscript{160} Id. at 217 (coining the phrase "domestic terrorism" in association with internalized race-based self-hatred's incorporation of chattel slavery's brutal methodologies).

\textsuperscript{161} Id. "Un-kinning" is defined as an act that "violently unmak[es]" and "dismantl[es] a family's] binding relations one beaten body at a time," and as an internal, familial terrorism that constitutes "the most abjectly unfaithful act of all." Id. The act of "un-kinning" in the context of the psychopathology exhibited by some African American families within the United States, involving "a mythologized male authority figure invested with powers to punish" who has been "[o]ften brutalized himself – by older black men and fathers... or by the white society that makes his brutality necessary and convenient, even useful, perhaps;" and adding that such an individual's "domestic terrorism has not made him, amazingly enough, an unloved character within black culture."
possibility, creativity, contribution, and strength. Such a domination of a young person’s world and realm is horribly consequential for African American parents.

This governmental interference with the parent’s right to rear their children cannot have any compelling governmental reason. This is especially true, given the hybrid rights that are being violated when police search and seize on the basis of race: the Fourth Amendment right to be let alone and the Fourteenth Amendment right rear one’s children free from governmental interference.

African American children, particularly those raised in areas considered “high crime,” live lives closer to those children in war-torn societies than “first world citizens,” who possess the luxurious batting of privilege and membership. “Living in a war zone means living with danger, the chronic threat of violent assault that is not a function of who you are as an individual.”162 “You are in jeopardy just because you are who you are when you happen to be the wrong person in the wrong place at the wrong time—all of the time.”163 Such pervasive and unending danger undermines the child’s psychological and emotional well-being.

C. Impotent We

[W]e may perceive [her] defensive response to [her] situation as a direct expression of [her] defect, and then see both defect and response as just retribution for something [her] or [her] parents or [her] tribe did, and hence a justification of the way we treat [her] . . .164

It is a shame that children are forced to witness their parents, humbled and humiliated. Certainly, no healthy parent wants their children to experience such shame and its scarring effects. When these children are confronted with others who look like them, ambivalence and often, abhorrence rushes into the union:

[A] person who wishes to conceal his disability will notice disability-revealing mannerisms in another person.

162 GARBARINO ET AL, supra note 144, at 13 (analyzing the environment of fear and violence resulting from violent conflict, and the effect that such an environment has on children living within it).
163 Id.
164 GOFFMAN, supra note 14, at 6 (explaining the concept of “tribal stigma”).
Moreover, he is likely to resent those mannerisms that advertise the fact of disability, for in wishing to conceal his disability he wishes others to conceal theirs. Thus it is that the person who is hard of hearing and who strives to hide this fact will be annoyed at the old woman who cups her hand behind her ear. Flaunting disability is a threat to him because it stirs up the guilt of having scorned his own group membership as well as the possibility of his own exposure. He may prefer surreptitiously to realize the other person's secret and to maintain a gentlemen's agreement that both should play their 'as if roles to having the other person challenge his pretense by confiding his own.165

What this race-based official dynamic teaches the child is multi-fold: (1) there is something and someone walking the face of this planet greater than my parent, (2) this thing is an official being and my parent cannot challenge it, (3) my parent must be deficient, as s/he cannot deal with the affront by the stranger, and (4) the essence of my being is inferior; might makes right. When the authorities police based on race, they telegraph to their victims, their community, and the world that African Americans are required to behave only in ways authorized by the police and, even then, may be subject to random checks upon their rights of association, ambulation, etc.166 The rise of race-based policing and its increasingly routine rabidity is in response to a resented, yet increased, visibility of African American social and economic mobility, which may indicate the possibility of inclusion, equality, and ultimate superiority.167

As in child-rearing, when slavers physically abused slaves, they often did so due to emotion rather than for pedagogical purpose.168 Such unprovoked, horrific, and humiliating violence was a part of the seasoning of able-bodied adults – and sometimes proud children – into a life of servitude.

165 Goffman, supra note 14, at 86.
166 Ifill, supra note 23, at 280 (noting that “[i]n essence, lynchings were used as a tool to punish any form of black behavior that threatened white supremacy,” and that the lynchings “identified and marked the parameters of black citizenship and freedom”).
167 Id. (noting that “lynching became... an increasingly routine response to black attempts at education, personal and communal government, suffrage, and other indicators of cultural inclusion and equality”).
168 See generally August Meier and Bill Rudwick, From Plantation to Ghetto 59–60 (Hill and Wang 1970) (noting that killing a slave was seldom regarded as murder and that conviction for maltreatment of slaves was extremely rare).
Similarly, race-based policing has a comparable purpose. Like lynchings of African Americans, race-based policing "rights" a disturbed society's racial and social order, via the law enforcement officer. The African American is effectively regulated to the locations and behaviors designated as fitting and proper for their seemingly intractable status as American "Untermenschen."

The awareness of inferiority means that one cannot keep out of consciousness the formulation of some chronic feeling of the worst sort of insecurity, meaning that one suffers anxiety and perhaps even something worse, if jealousy is really worse than anxiety. The fear that others can disrespect a person based on race creates insecurity in her contact with other people; this insecurity arises, not from mysterious and somewhat disguised sources, but from something which she knows she cannot fix. This effect represents an almost fatal deficiency of the self-system. The self is unable to disguise or exclude a definite formulation that reads, "[I] am inferior. Therefore people will dislike me and I cannot be secure with them." Learning repression to survive prepares a child to be dysfunctional:

[the central feature of the stigmatized individual's situation in life can now be stated. It is a question of what is often, if vaguely, called 'acceptance.' Those who have dealings with [her] fail to accord [her] the respect and regard which the uncontaminated aspects of [her] social identity have led them to anticipate extending, and have led [her] to anticipate receiving; [T]he echoes this denial by finding that some of [her] own attributes warrant it."

"In a situation of unequal power, a subordinate group has to focus on survival. It becomes very important for the subordinates to become highly attuned to the dominant as a way of protecting themselves from them." However, excessive focus may be just as costly as too little focus, too much focus leaves

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169 Ifill, supra note 23, at 279-80 (stating that "Lynching was designed to send messages to the black community about how to behave, about whom to associate with, about whether blacks should vote, serve in the armed forces, make a living, be independent, or have dignity.").
170 GOFFMAN, supra note 14, at 13.
171 HOOKS, supra note 13, at 188.
172 GOFFMAN, supra note 14, at 8-9.
173 TATUM, supra note 20, at 25.
nothing for self-care, advancement, and health; moreover, too much focus requires exposure to and adoption of negative stereotypes of the individual’s group.\textsuperscript{174} Too little focus may prove suicidal. Either way, instead of being guided by parental authority, the child pays most attention to those who clearly control the outcomes, irrespective of parents.\textsuperscript{175}

VI. THE HYBRID’S HYBRID: REVIEWING RACE-BASED POLICING’S SUBVERSION OF THE FUNDAMENTAL RIGHT TO PARENT

Race-based policing in the presence of African American children cannot be justified by the state under its competing interests of crime control and law enforcement. Although the government can remove a child from the custody of her parents or sever that parental right when a child’s safety is at risk, under the Fourteenth Amendment’s substantive due process clause, the state must demonstrate that the child’s safety is at risk (via abuse or neglect) by clear and convincing evidence.\textsuperscript{176} In these cases, the parental right is not absolute; the child also has a liberty interest at stake and the government’s\textit{ parens patriae} interest is implicated in such situations.

With the erosion of the traditional American nuclear family and the proliferation of single-parent homes, which may allow children to become more vulnerable to outside authority and influence, the context in which race-based policing occurs is even more pernicious. African American children have been vulnerable due to the 21\textsuperscript{st} century overseer mentality of those officials (government and otherwise) who are often in close contact and quarters with the child. The damage heaped upon them by the police is especially troubling when it appears that the goal might be to “season” with fear and deference rather than prevent crime.\textsuperscript{177}

\textsuperscript{174} See id. at 26 (asserting that “the negative messages of the dominant group about the subordinates may be internalized, leading to self-doubt or, in its extreme form, self-hate”).

\textsuperscript{175} See generally id. at 25–26 (discussing the child’s view towards authority).

\textsuperscript{176} See Santofsky v. Kramer, 455 U.S. 745, 768–71 (1982) (holding that “[a clear and convincing evidence standard] adequately conveys to the fact finder the level of subjective certainty about his factual conclusions necessary to satisfy due process”).

\textsuperscript{177} A recent example of such a tactic occurred in St. Louis, Missouri, when charter school principal Sam Morgan, a former Department of Corrections employee, directed police to handcuff a kindergarten boy, place him in the back of a police cruiser, and drive
Also troubling is the undermining effect that race-based policing has on intact, two-parent families.\(^\text{178}\) A young child needs to believe that his/her parents are omnipotent. This belief is destroyed with what the child is forced to learn at the hands of law enforcement when police are physically and – in the child’s mind – apparently appropriately able to discipline the child's parent(s) in ways humiliating and terrifying. Parents' vulnerability will only exacerbate the child’s and make this police treatment more memorable and believable.\(^\text{179}\)

When African American children are the targets or witnesses of race-based policing, the child as a heretofore unspoiled bit of human experience is sullied against the parental will. Recently, there has been at least one occasion where the notion of “Parenting While Black” has been litigated, both under the Constitution and under 42 U.S.C. § 1983. Specifically, in *Jackson v. Griffin*,\(^\text{180}\) parents of an African American son filed suit, claiming they were denied their fundamental right to parent, which constituted a denial of Equal Protection under the Fourteenth Amendment and 42 U.S.C. § 1983. They argues that they were “made to appear powerless to protect their son . . . from wrongful, discriminatory conduct . . .” inflicted by the police.\(^\text{181}\) In *Jackson*, the police knowingly affected an unlawful arrest of their son. Afterwards they fingerprinted, photographed, violently searched, detained for three days, and placed him in a criminal lineup,\(^\text{182}\) despite their knowledge that others were the actual suspects sought for an armed robbery.\(^\text{183}\) Darryl’s parents twice went to the police station to free their son and regain custody of him “around the block.” According to all accounts, the child's mother never approved of or assented to such a tactic for her child. See Cheryl Wittenauer, *Handcuffed Boy Lands Principal on Leave*, SPRINGFIELD NEWS-LEADER.COM, at http://springfield.newsleader.com/news_archive/1216-Handcuffed-252427.html (last visited on Dec. 23, 2004).


\(^{179}\) See generally BRAZELTON & SPARROW, supra note 4, at 349 (discussing a parent's job of raising children free of racism).


\(^{181}\) Id. at *4.

\(^{182}\) Id. at *2–5 (discussing the process of the arrest).

\(^{183}\) Id. at *2–3 (noting the absence of a good faith mistake).
him from the police.\textsuperscript{184} They were unsuccessful; the police continued to hold him unlawfully.\textsuperscript{185}

Among other causes of actions, the parents' lawsuit against the state alleged that their son's arrest violated the Fourth and Fourteenth Amendments as well as 42 U.S.C. § 1983.\textsuperscript{186} Specifically, the lawsuit alleges that:

conduct of the police officers was designed to and did intentionally inflict mental and emotional anguish on [the parents] because of their race and color . . . [and they] were made to appear powerless to protect their son . . . from wrongful, discriminatory conduct visited on him by the police officers because of [the son's] race and color . . . that the conduct of the police officers was intended to and did deprive [the parents] of equal protection of the laws; and . . . that as a result of the conduct of the police officers, [the parents] . . . were deprived of the society and comfort of their son\textsuperscript{187} [because of their race and color].\textsuperscript{188}

According to the parents, the Chicago police treated them differently than they would have towards white parents whose minor child was arrested.\textsuperscript{189} These causes of actions were joined, given that Section 1983 does not create substantive rights, but does provide remedies for deprivations of rights established elsewhere.\textsuperscript{190}

Strikingly, even after the City of Chicago's motion to dismiss was denied, the appellate court seemed to require parents to be

\textsuperscript{184} Id. at *2–4 (discussing the parents' attempts to regain custody of their son).

\textsuperscript{185} Id. at *3–4 (noting the unlawfulness of the custody).

\textsuperscript{186} See id. at *4 (discussing the claims brought against the police). See generally 42 U.S.C. § 1983 providing that:

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .
\end{quote}


\textsuperscript{188} See id. at *6 (explaining that the parents felt they suffered a constitutional deprivation because the police deprived them of the society and comfort of their son based on their color and race).

\textsuperscript{189} Id. (noting that an action concerns "how parents are treated when they attempt to help their child," as their parental rights were frustrated by this race-based policing).

\textsuperscript{190} See id. n.6 (clarifying that the racially motivated conduct of the police was not in violation of § 1983 because § 1983 does not create substantive rights).
"active participants in the action surrounding"\textsuperscript{191} race-based treatment of their children, implying that the parents must actively assert and attempt to protect their fundamental right to parent, rather than presuming it applies when the prerequisite of children triggers the right.\textsuperscript{192}

Parallels can be drawn between the current governmental disrespect of the rights for parents of African American children and the system and results that occurred during American slavery.\textsuperscript{193} African American parents do not bargain for such governmental violations of their right to rear their children in the manner in which the parents choose. Parents typically want to rear their children (and the Constitution is read to affirm their desire) with as little governmental interference as possible. African American parents did not bargain for this minimal slice of citizenry; yet, their fundamental ability to parent successful Americans and healthy citizens of the world becomes, at best, compromised if not destroyed.

Moreover, when law enforcement police African American children based on their perception that they are "solving the problem" at the root by instilling fear and deference, the need to "kill the problem" demands more annihilatory measures given the desire never to come this way again. There is no understanding that such children will ever grow into Americans who are, by definition, wonderfully worthy by birthright; rather, the understanding is that African American children are a regrettable pox on society that disrupts healthy American life while also exploding the criminal pandemic. There is no motive to moderate, no perception of possibility in the entity other than rampant, pernicious, unrepentant criminality.

\textsuperscript{191} \textit{Id.} at *19 (specifying that the Jackson holding does not permit all parents whose minor children are wrongfully arrested to bring § 1983 claims and emphasizing that the Jackson case involves parents who were actively involved in their son's arrest).

\textsuperscript{192} \textit{See id.} at *19-20 (holding that "when the parents are targets of intentional and racially-motivated discrimination which deprives them of federally protected fundamental rights, and when the actions are taken under color of state law, then the allegation will be sufficient to withstand a motion to dismiss"); \textit{id.} (highlighting facts, such as the Jacksons' active participation in the actions surrounding their son's arrest, the racially-motivated conduct of the police officers which "thwarted" the Jacksons' attempts to free their son, and the Jacksons' deprivation of the care, custody, management, and control of their son, that led the court to deny the defendants' motion).

\textsuperscript{193} \textit{See id.} at *18 ("The Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." (quoting Moore v. City of East Cleveland, 431 U.S. 494 (1978))).
When police infringe upon an individual's right to be let alone, his right against unreasonable searches and seizure, and his right to parent his child free from governmental interference, such governmental action implicates at least two and, arguably all three types of constitutional protection. Consequently, such governmental action—especially if predicated and initiated on the insidious use of race—merits increased constitutional protection and—this article argues—heightened scrutiny and judicial review.

The Supreme Court has recognized the "hybrid right," which requires increased constitutional protection for conduct that implicates more than one constitutional right.194 Given the history of policing and law enforcement toward African Americans, it is befitting the status of African American demicitizens to benefit from such a right as well as the heightened level of judicial review require. To the extent that race-based policing occurs in the presence of or on African American children, the Court should apply the heightened scrutiny applicable when two constitutional rights are implicated.

CONCLUSION

Police do have an enormous impact on our society, particularly young children and teens. Police visit schools and indoctrinate children with the character of "Officer Friendly," the official representative of law enforcement who purports to be your friend and societal savior. Police also take advantage of their societal status and gain prominent entry into various locations where children are present. In those locations, police often are on their best and most politically correct behavior.

Parents must constantly deal with the world showing their children that life is not fair, kind, or merciful. What makes the crucial difference here is that such a message comes at the hands

194 See Isaacs v. Bd. of Educ., 40 F. Supp. 2d 335, 338 (D. Md. 1999) (citing Wisconsin v. Yoder, 406 U.S. 205, 234 (1972)). In Yoder, the Supreme Court overturned a lower court's convictions of Amish parents who removed their children from public school, despite a state law requiring compulsory attendance until the age of sixteen. Yoder, 406 U.S. at 232. As the parents' rights involved both their Fourteenth Amendment liberty interest in parenting, as well as their First Amendment right to free exercise of their chosen religion, the Court deemed the right "fundamental" and reviewed the state's action under a strict scrutiny standard, creating a "hybrid" constitutional protection for the conduct at issue. Id. at 232.
of the government and is based on an immutable trait of those subjected to the hostility. Imagine what goes through the child's mind when, in a later context and location, that same Officer Friendly or one or more of his associates treat that child's parents and loved ones as presumed criminals, dangerous on the face of their melanin? The child becomes scarred, both with regard to his self image, that of his adult caretakers, and of those who look like him.

"[W]hat war is really about is destroying people."195 This is most true of our modern brand of wars than what has come to be regarded as conventional wars. "The situation sounds melodramatic to be sure. But war zones convert the stuff of melodrama into reality."196 What seems to matter is that the learned knowledge on the part of the child who has witnessed or been a victim of race-based policing is that it or worse could happen not merely as a remote possibility as being struck by lightning or hit by a meteor; rather, as a frequently recurring event that is sure to occur again and against which there is no protection. In essence, for the child so exposed, race-based policing becomes not a matter of if, but when, each time it is actually or nearly experienced.197

Perhaps the old adage that African Americans have proffered to their progeny over the ages still rings true. Despite the acknowledged gains that had resulted from a more socially sensitized judiciary toward the enforced vagaries of African American life at the hands of race-based institutions, it seems still apt to warn this group of Americans - and all those who live, love, travel, and associate with them - that they must continue to exert twice as much effort to get half as far. Perhaps asserting the denial and infringement of two to three constitutional rights when police actions under the Fourth Amendment are race-based and occurs on or in the presence of African American children may finally serve to raise one or more judicial eyebrows and allow Blacks to wrest an important, additional sliver of the

195 GARBARINO ET AL, supra note 144, at 7.
196 Id. at 6.
197 Id. at 7 ("What good are the days and maybe even weeks when there are no real bullets in the air but bullets continue to exist in the imagination fed by memory?").
birthright of their citizenship that White Americans enjoy without ever facing such a challenge.\textsuperscript{198}

\textsuperscript{198} But see Atwater v. Lago Vista, 532 U.S. 318, 354–55 (2001). The court upheld pretextual seizure and arrest where probable cause existed for seatbelt violations. In Atwater, the defendant had her children in the car with her when she was seized for a traffic violation and arrested. See id. Although the defendant argued the unreasonableness of the officer's conduct, particularly in the presence of her children, she did not argue the Fourteenth Amendment right to parent was violated by the alleged trauma inflicted upon her children by this governmental agent. Id. at 370 (O'Connor J., dissenting).