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The Color of Crime: The Case Against Race-Based Suspect Descriptions

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Law enforcement in the United States relies on racial identifiers as a crucial part of suspect descriptions. Unlike racial profiling, this practice is regarded as both an essential tool for law enforcement and as an unproblematic use of race. However, given the racial history of the United States, such descriptors, particularly “Black,” have developed in such a way to create an extremely large and unreliable category. Due to these factors, the use of race as a physical descriptor in suspect decisions is both discriminatory and inefficient. Employing race as an identifying characteristic allows law enforcement officers broad discretionary powers that can be used in a discriminatory manner, while ultimately proving counterproductive to the aims of effective law enforcement. As an alternative to using racial classifications, this Note proposes the development of a universal complexion chart that will allow officers to continue to collect the information necessary to create accurate suspect descriptions while lessening discriminatory impact.

INTRODUCTION

Race relations in the United States appear to have improved steadily over recent years, yet the divide between the Black community and law enforcement remains deep.1 Survey after survey has shown that, on average, African Americans have much lower opinions of the police than do white Americans and consider the criminal justice system racially discriminatory and the police untrustworthy.2 When viewed in light of the impact this system has had on the Black community, such cynicism is understandable. The statistics are well known, but jarring nonetheless. Approximately one out of every three young Black men is under the con-

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2. See generally Bureau of Justice Statistics, U.S. Dep’t of Justice, Sourcebook of Criminal Justice Statistics (2000) [hereinafter Criminal Justice Sourcebook]. According to surveys compiled by the Department of Justice, 38% of Black respondents and 59% of white respondents rated their confidence in the police as a “great deal/quite a lot.” Id. at 109. Thirty-two percent of Black respondents and 59% of white respondents rated the honesty and ethical standards of police as “high” or “very high” while 27% of Black respondents and 8% of white respondents rated it as “low/very low.” Id. at 116. Similarly, 58% of Black respondents and 20% of white respondents stated that they thought the police do not “treat all races fairly,” but “treat one or more of these groups unfairly.” Id. at 119. Thirty-six percent of Black respondents, as compared with 14.5% of white respondents, answered that they were “sometimes afraid that the police will stop and arrest you when you are completely innocent.” Id.
trol of the criminal justice system. 3 More Black men in the United States are in jail than in college. 4 This state of affairs has become so flagrant that even many white Americans have become suspicious of the way the police treat African Americans. 5

The situation of law enforcement in this country is such that many in the Black community live with the daily fear of being stopped, arrested, or detained by the police. 6 Black parents counsel their children—particularly their sons—on how to behave if confronted by the police. 7 The resulting fear and alienation undermines any relationship Black communities have with the criminal justice system. Law enforcement depends on legitimacy both to compel civilian assistance in police work and as a means of inducing voluntary compliance with legal norms. 8 Police work—especially now, as we move towards community policing—depends on trust. 9 If a particular community feels alienated from the police, the police will be unable to do their job as effectively, given the extent to which “police depend heavily on the voluntary cooperation of


While not meaning to marginalize the impact that racism in the criminal justice system has had on Black women, this Note concentrates on the situation of Black men in light of the disproportionate impact that discrimination in the criminal justice system has had upon them. Nonetheless, the arguments presented here also apply to the situation of Black women. Moreover, in discussing the connections drawn between race and criminality, Black women are “intrinsically linked to and implicated by this stereotype” as well as by the relationship of the Black community with the police. Katheryn K. Russell, The Racial Hoax as Crime: The Law as Affirmation, 71 Ind. L.J. 593, 599 n.40 (1996).


5. David W. Moore & Lydia Saad, No Immediate Signs That Simpson Trial Intensified Racial Animosity, Gallup Poll Monthly, Oct. 1995, at 2 (citing poll showing that 68% of Blacks and 52% of whites believe police racism against Blacks is common); Julia Vitullo-Martin, Fairness, Justice Not Simply Black and White, Chi. Trib., Nov. 13, 1997, at 31 (citing poll showing that over 80% of Blacks and Hispanics, and 56% of whites, think police are “far more likely to harass and discriminate against Blacks than whites”).


7. Id. at 274.


9. Harris, Stories, Statistics, and Law, supra note 3, at 308 (describing new models of policing “often referred to as community policing”). According to Harris, “the community must feel that it can trust the police to treat them as law-abiding citizens if community policing is to succeed.” Id. at 309.
citizens to fight crime."\(^{10}\) Due to the high levels of Black victimization,\(^{11}\) inefficient and ineffective police work can be particularly devastating to minority communities. This cycle will not stop unless discriminatory patterns in law enforcement have been decreased or eliminated.

This Note argues that eliminating the use of race in suspect descriptions provides one way to counter racial discrimination and promote greater legitimacy in law enforcement. The use of racial identity as a fixed and identifiable category has been challenged in many arenas and notions of racial identity have been altered, as reflected notably in the revision of categories for capturing information on race and ethnicity in the 2000 census.\(^{12}\) These trends reflect a new recognition of multiracial identity as well as a social deconstruction of race by critical race theorists.\(^{13}\) Even so, the changing notions of race thus far have had seemingly little effect on the use of racial identifiers in law enforcement for suspect descriptions. Law enforcement officers continue to use qualifiers such as “Black,” “white,” or “Hispanic” as defining characteristics to identify people; frequently however, race becomes not one of many characteristics, but instead the defining characteristic employed.\(^{14}\)

This Note suggests that law enforcement in the United States would benefit from eliminating the use of race in suspect descriptions, given that race has limited use as a physical descriptor, while being so deeply imbedded with social signifiers as to have discriminatory effects. Part I of this Note examines the use of race as a physical descriptor in light of the history of racial classification in the United States. Part II addresses the use of race and the impact of racism within the criminal justice system. Finally, Part III proposes development of a universal complexion chart to guide law enforcement as an alternative to using race.

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10. Fagan & Davies, supra note 8, at 499.

11. Russell, supra note 3, at 606 (“Blacks are disproportionately likely to be crime victims.”).

12. See Nathaniel Persily, Color by Numbers: Race, Redistricting, and the 2000 Census, 85 Minn. L. Rev. 899, 925–27 (2001) (explaining new categories used to collect census data, which allow individuals to choose more than one race).


14. See, e.g., Brown v. City of Oneonta, 235 F.3d 769, 779–80 (2d Cir. 2000) (denying petition for rehearing en banc) (describing how police received description of young Black man with cut hand, then proceeded to interrogate all Black men in the vicinity, as well as at least one woman); Choi v. Gaston, 220 F.3d 1010, 1015 (9th Cir. 2000) (Noonan, J., concurring) (recounting how police were given suspect description of Vietnamese man and arrested Korean man even though “none of the[ ] figures [given] matched Choi’s height, weight or age, nor did Choi’s clothing match” the suspect’s).
I. RACIAL CLASSIFICATION AND ITS SIGNIFICANCE

Racial divisions, particularly the divide between Black and white, have played a strategic and defining role in the United States’ history. Notions of racial superiority and whiteness—as well as the attendant struggle against such notions—have been an integral part of our social and political development. Beginning with the legal framework created in the English colonies, and continuing with the Federal Constitution, the United States’ legal system has created and enforced legal definitions of racial identity. These legal definitions served to define property rights in human persons, to delineate crimes associated with those property rights, and to regulate access to citizenship rights and the legal system more generally.

Racial identity in the United States, in contrast to the rest of the Americas, has been structured around “hypodescent,” more commonly known as the “one-drop rule,” to enforce the distinction between Black and white. The term hypodescent was coined by Marvin Harris, who wrote that the concept “requires Americans to believe that anyone who is known to have had a Negro ancestor is a Negro. . . . ‘Hypo-descent’ means affiliation with the subordinate rather then the superordinate group in order to avoid the ambiguity of intermediate identity.”

15. This Note focuses primarily on Black-white racial issues. While the experiences of other minority groups are, of course, also significant, they implicate a unique set of issues and are beyond the scope of this Note.


18. Many rights and privileges were once dependent on race. Nonwhites were denied citizenship, the right to vote, and the right to hold property. Sylvia R. Lazos Vargas, Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect, 72 Tul. L. Rev. 1493, 1495–1506 (1998). Among other sanctions, nonwhites were also limited in their ability to testify against whites as well as to be on juries. People v. Hall, 4 Cal. 399, 403–04 (1854) (holding that Chinese and other nonwhites are not allowed to testify against whites); Cole, No Equal Justice, supra note 4, at 105–07 (1999) (recounting jury qualifications based on race). For other examples, see Pace v. Alabama, 106 U.S. 583, 585 (1883) (upholding law making it criminal for Black person to intermarry or fornicate with a white person); Ian F. Haney López, White by Law: The Legal Construction of Race 1 (1996) (describing ways in which whiteness was a prerequisite for obtaining citizenship until 1952); Randall Kennedy, Race, Crime and the Law 76–77 (1997) (recounting criminal statutes that applied only to slaves, including seventy-three capital crimes, as well as the inability to “testify[] against or contradict[] whites in court”).

19. The term hypodescent was coined by Marvin Harris, who wrote that the concept “requires Americans to believe that anyone who is known to have had a Negro ancestor is a Negro. . . . ‘Hypo-descent’ means affiliation with the subordinate rather then the superordinate group in order to avoid the ambiguity of intermediate identity.” Marvin Harris, Patterns of Race in the Americas 56 (1964) [hereinafter Harris, Race in the Americas]. Harris uses subordinate to indicate the racial group with lower status rank, which in this setting is Black, and superordinate for the racial group with higher status rank, or white. Id. at 37.
try . . . to the social status occupied by blacks,” thereby designating all racially mixed progeny into the subordinate group according to genotype regardless of class or racial traits.\textsuperscript{20} This peculiar system of classification has never been employed in any other country or to any other racial group: The one-drop rule has applied exclusively to African Americans.\textsuperscript{21} Early courts devised various means of defining whiteness in order to protect racial privilege, usually by enforcing the property rights of slaveholders and upholding social norms derived from those property rights.\textsuperscript{22} In this setting, application of the one-drop rule entailed the definition of various percentages of “pure” white ancestry as confirmation of whiteness.\textsuperscript{23} The last such “black blood” statute was repealed by the Louisiana legislature in 1983.\textsuperscript{24}

Race is no longer considered a legitimate basis for legal separation or for defining criminal acts.\textsuperscript{25} Moreover, race is now heavily contested

\textsuperscript{20} Davis, Who is Black?, supra note 16, at 82. Genotype refers to genetic background, or racial background, as opposed to phenotype, which refers to physical appearance.

\textsuperscript{21} Id. at 12. Paul Finkelman provides one example of the exceptionality of the one-drop rule as applied to Black heritage: “In 1924 Virginia defined a white person as having ‘no trace whatsoever of any blood other than Caucasian.’ Nevertheless, this statute allowed someone to be ‘white’ if the person had up to one-sixteenth Indian ancestry.” Finkelman, supra note 16, at 2067 (citations omitted). The paradoxical nature of hypodescent becomes all the more apparent when compared with international understandings of race. Hypodescent is unique in its selective application: “Not only does the one-drop rule apply to no other group than American blacks, but . . . the rule is unique in that it is found only in the United States and not in any other nation in the world.” Davis, Who is Black?, supra note 16, at 13. In much of Latin America, for example, racial classifications incorporate a category of mixed individuals as a “middle-minority[ ] buffer status.” Id. at 99–109. Moreover, racial status is highly variable and routinely changes based on “economic and educational achievement.” Harris, Race in the Americas, supra note 19, at 54–59. Even the extremely rigid and racially oppressive apartheid regime in South Africa felt the need to modify hypodescent by constructing the “Coloured” category for all individuals of mixed descent. Davis, Who is Black?, supra note 16, at 92.


\textsuperscript{23} Harris, Race in the Americas, supra note 19, at 19.

\textsuperscript{24} La. Rev. Stat. Ann. § 42:267 (West 1983) was enacted in 1970 to moderate the previous “any traceable amount” law. Gotanda, supra note 1, at 35 n.139. The new statute stated that, “a person having one-thirty-second or less of Negro blood shall not be deemed, described, or designated by any public official in the state of Louisiana as ‘colored,’ a ‘mulatto,’ a ‘black,’ a ‘negro,’ a ‘griaffe,’ a ‘Afro American,’ a ‘quadroon,’ a ‘mestizo,’ a ‘colored person,’ or a ‘person of color.’” Id. Louisiana repealed the 1/32 qualification fixed by section 42:267 in response to the publicity surrounding the court case of Susie Guillory Phipps, a women who sued to have her birth certificate changed from black to white. Davis, Who is Black?, supra note 16, at 9–10. The absence of a “black blood” law left the racial designations on birth certificates to the discretion of the parent. Id.

\textsuperscript{25} See McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring) (“[I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.”).
as a social construction, as shown in part by recent movements to claim a multiracial identity.\textsuperscript{26} By changing practices in recording race for the 2000 census, the federal government admitted the lack of clarity in racial identity and the need to adjust racial definitions to reflect a changing social understanding as well as to respect the right of individuals to self identification.\textsuperscript{27} The potential disjuncture, however, between physical appearance and racial identity has been present as long as racial categories have existed. Throughout the United States’ history, as a result of the one-drop rule, there have been people classified as Black who nevertheless appeared white: Some passed as white, others maintained their Black identity, while some did both.\textsuperscript{28} Scholarly work relating to passing—which addresses the ambiguity of racial identity in the extreme—has highlighted some of the fundamental difficulties in determining race for individuals on the margins,\textsuperscript{29} emphasizing the underlying point that “racial categories that purport to designate any of us are too rigid and oversimplified to fit anyone accurately.”\textsuperscript{30}

Over time, racial categories have risen and fallen in response to different social movements.\textsuperscript{31} Writer Lawrence Wright describes how these “[r]acial categories are . . . often used as ethnic intensifiers, with the aim of justifying the exploitation of one group by another.”\textsuperscript{32} The way in which racial categories change over time demonstrates the uncertainty inherent in race. These categories are not based on biological or physical

\textsuperscript{26} Zack, supra note 13.

\textsuperscript{27} See generally id. For another example, see Wright, supra note 31, at 50 (describing past changes in the census reflecting social changes in societal understanding of race).

\textsuperscript{28} Davis, Who is Black?, supra note 16, at 55–57. For a look at the legal significance of passing, see, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding removal of Plessy, who was seven-eighths white and passed as white, from a whites-only railroad car); Sunseri v. Cassagne, 196 So. 7 (La. 1940) (annulling marriage after white man argued that his wife, who appeared white, was actually Black); Doe v. State Dept’ of Health & Human Res., 479 So. 2d 369 (La. Ct. App. 1985) (upholding designation of plaintiff Susie Guillory Phipps, who was 29/32 white, as Black on her birth certificate).

\textsuperscript{29} Davis, Who is Black?, supra note 16, at 55–57.

\textsuperscript{30} Adrian Piper, Passing for White, Passing for Black, 58 Transition 4, 31 (1992).

\textsuperscript{31} Lawrence Wright, One Drop of Blood, New Yorker, July 24, 1994, at 50–53 (recounting short history of development of racial categories and resulting incongruities). Racial “theorists” in the past have argued for the innate inferiority of Italians, Irish people, and Jewish people with as much enthusiasm as they passed judgment on Africans and other peoples. Karen Brodkin Sacks, How Did Jews Become White Folks?, in Critical White Studies: Looking Behind the Mirror 395, 395–96 (Richard Delgado & Jean Stefancic eds., 1997) (describing racism directed against all racial groups except for the “Nordics of northwestern Europe,” including Russians, Poles, Jewish people, and others from southern and eastern Europe). Wright cites examples of different national groups counted as races, such as Mexicans, Filipinos, and Asian Indians (counted as “Hindu”). Wright, supra, at 50. He also describes the transformation of the “Israelites,” a religious group . . . into a race” by the Nazis. Id.; see also Sacks, supra, at 395–401 (describing the transformation of Jewish into white).

\textsuperscript{32} Wright, supra note 31, at 50.
facts, but on mere social constructions. The concept of race and its application to individuals have been maintained as byproducts of a history of oppression, when they were used as tools to justify and enforce that oppression. When that history of oppression loses its relevance and its tools are no longer necessary, we may stop seeing them with such force, as has happened with labels such as “Irish” and “Italian.” In the meantime, it has become difficult to use race in any neutral, objective way.

In all probability, these categories will continue to change in the future: In another hundred years, we may be unable to differentiate Black from other racial groups. Such a transformation currently seems unlikely given the significance of maintaining whiteness as a bastion of privilege as well as the resonance Blackness now holds as a source of identity and pride. Nonetheless, in the future, those racial groups that now seem so clearly physically different may be considered as socially and physically nebulous as other groups once considered racially distinct. Even today, it can be extremely difficult to distinguish someone’s racial identity based on appearance alone, particularly as a member of another racial group. To a certain extent, this confusion has been acknowledged with regard to groups such as “Hispanic.” Current events have illustrated how “Arab” or “Middle Eastern” can also be difficult to identify. However, these
moments of racial confusion are only examples of the weaknesses of the racial classification system as a whole.

For the purpose of this Note, it is important to highlight the problems inherent in the white/Black boundary, which appears so certain and paramount in most situations. In the United States, a person learns to see the white/Black division, in the sense that one is trained to differentiate between the two almost automatically. Those who grow up in this country are taught to immediately recognize whiteness and Blackness and instantly determine who “looks Black” or “looks white.” For the process of differentiation occurs as a reflexive line drawing, similar to the instinctive tendency to ascertain a person’s sex immediately upon meeting them so as to avoid any resulting discomfort in interacting with someone whose “classification” is uncertain.

Given our reliance on race as a physical descriptor, it can be hard to contemplate that these categories are mere arbitrarily drawn social distinctions. Nonetheless, the fact that individuals feel confident in distinguishing between Black and white does not indicate that these categories are useful or relevant. As scientist Jonathan Marks illustrates:

When asked to sort blocks of various sizes into large and small, a child can do so easily and replicably, but that is not a testimony to the existence of two kinds of blocks in the universe. It is a testament only to the ease with which distinctions can be imposed on gradients.

Likewise, the ability to differentiate based on race does not provide validation for the categories themselves. The concept of “looking white” or “looking Black,” and its correlate, the use of “white” and “Black” as fundamental categories to establish identity, are fundamentally problematic given the degree to which the white and Black populations vary physically and the fact that identification by race can become a driving fe-

Terrorists Not the Answer, Boston Herald, Nov. 7, 2001, at 25 (“Arabs come in all colors and sizes. Egyptians can be light-skinned and blue-eyed. Indeed, numerous Americans who trace their heritage to Mexico, Spain, Greece, India and Italy share a ‘Middle-Eastern’ look.”); Arab Americans: Dispelling Myths, Seattle Times, Sept. 16, 2001, at A12 (discussing various misconceptions about Arab Americans).

40. Robert Westley, First-Time Encounters: “Passing” Revisited and Demystification as a Critical Practice, 18 Yale L. & Pol’y Rev. 297, 300 (2000) (“Americans are wont to surmise the racial identity of those persons with whom they come into contact. The criteria for making racial judgments are social and automatic.”); see also Gregory Howard Williams, Life on the Color Line: The True Story of a White Boy Who Discovered He Was Black 32–34 (1995) (describing how, at the age of ten when Williams learned he was Black, he already knew how to distinguish clearly African Americans from whites).


43. This variation is due in part to the presence of “miscegenation” between the two populations as well as with other racial groups. See, e.g., Tom Morganthau, What Color is Black?, Newsweek, Feb. 13, 1995, at 64 (“What color is black? It is every conceivable shade and hue from tan to ebony.”).
nature of any subsequent legal process. Even while enforcing racial bound-
aries, contemporary judges have been forced to acknowledge that “[i]ndividual racial designations are . . . social and cultural percep-
tions.”44 These designations may have no connection to biology or physical appearance.45 Given the amount of racial mixture in the United States, thousands of lighter-skinned African Americans are more similar in appearance to Caucasians than to darker-skinned African Americans.46 If appearance, therefore, does not determine race, establishing who “looks Black” or “looks white” becomes all the more complicated.47

Ultimately, the debate over suspect descriptions and racial profiling must address race as a social construct created and sustained through an evolving historical construct.48 This particular history sets an important backdrop for the use of race as an identification technique, by creating a racial classification system in which Black becomes a broad category whose members may have little resemblance to one another. The tradition of hypodescent creates a troubling background to the use of naked racial phenotyping, while emphasizing the subjective nature of white/Black markers. Moreover, the legacy of government classification based on involuntary categories makes phenotype usage particularly problem-
atic; our fixation with Blackness should make us extremely reluctant to employ such overbroad and possibly pejorative classifications.


45. General consensus among theorists on the subject is that about 90% of African Americans have white ancestry, for an average of 25% white descent, while 25–50% of white Americans have Black ancestry, for an average of 5% Black descent. Michael Omi, Racial Identity and the State: The Dilemmas of Classification, 15 Law & Ineq. 7, 18 (1997). The Census Bureau illustrated the current limitations of the newly proposed census categories, pointing out that “75% percent [sic] of those who currently identify themselves as black could identify themselves as multiracial.” Id. at 18. In light of these statistics and the historical realities they represent, the ideal of a multiracial identity seems even more problematic. The difference between multiracial and Black becomes the difference between having recently mixed ancestry and having historically mixed ancestry.

46. Harold L. Hodgkinson, What Should We Call People? Race, Class, and the Census for 2000, 77 Phi Delta Kappan 173, 175 (1995) (“[O]n direct measurement, the darkest quarter of the white population is darker than the lightest quarter of the black population.”).

47. Early nineteenth century courts, in which this issue was frequently litigated, often noted difficulty of determining race by appearance; instead, the courts turned to blood or social indicators to determine race. See, e.g., People v. Dean, 14 Mich. 406, 422 (1866) (noting that “we are compelled to discover some mode of [racial] classification,” while acknowledging that “[t]here are white men as dark as mulattoes, and there are pure blooded albino Africans as white as the whitest Saxons”); Johnson v. Boon, 28 S.C.L. (1 Spears) 268, 269 (Ct. App. 1843) (noting that “[c]olor . . . was sometimes a deceptive test”).

48. See generally Knepper, supra note 34 (discussing the historic discrimination engendered by the use of racial categories).
II. PRACTICAL IMPLICATIONS FOR THE CRIMINAL JUSTICE SYSTEM

A. CURRENT USE OF RACE BY LAW ENFORCEMENT

Police work currently depends on the use of race. The description of a criminal suspect, whether created by the victim, an eyewitness, or the police, always begins with race and gender. Law enforcement officials then use these characteristics to locate the suspect, to create lineups, and frequently to form the legal basis for a Terry stop or an arrest. The police typically use the racial designations white, Black, Hispanic, and Asian. However, the use of hypodescent has created a Black population with such a large amount of variation as to render the use of these racial classifications of limited value in finding a suspect. Allowing an officer to designate one of four or five racial categories serves the same function as providing a box for the officer to check “over or under twenty three” or “over or under 5’6’’.” While making the distinction may be useful in limiting the applicable suspect pool, it relies on an arbitrarily drawn line.

Ultimately, use of such categorization only results in giving law enforcement officers broad powers to take into custody individuals whose physical characteristics vary widely from those of the alleged perpetrator. In Choi v. Gaston, in the context of Asian as opposed to Black, Judge Noonan noted his concern about the danger of allowing the police such wide-ranging discretion: “To treat persons in this grouping as fungible when one of the group is a crime suspect would be to say that the police could arrest at will. A custom of treating ‘all Asians’ alike would be intolerable.” This Note maintains that considering all African Americans as interchangeable is similarly unacceptable.

Brown v. City of Oneonta, one of the most recent cases on the issue, exemplifies the dangers of using race for suspect description. In Oneonta, the home of an elderly white woman was burglarized. When the police arrived, she told them she could not identify the face of the assailant; the only description she could give was that he was a young Black man with a cut on his hand received in the course of the burglary. Based on this description, the police attempted to locate all of the Black males in the area.

49. For one example of the NYPD’s classification system, see City of N.Y. Police Dep’t, Most Wanted, at http://www.nyc.gov/html/nypd/html/wanted/mwant.html (last visited Jan. 30, 2003) (on file with the Columbia Law Review), and accompanying links. The NYPD also uses “white Hispanic.”

50. See, e.g., Choi v. Gaston, 220 F.3d 1010, 1015 (9th Cir. 2000) (Noonan, J., concurring). While the police were given the suspect description of a Vietnamese man, they arrested a Korean man even though “none of the[ ] figures [given] matched Choi’s height, weight or age, nor did Choi’s clothing match” the suspect’s. Id. Instead of using the information given, the police acted on a “rash generalization” based on seeing another Asian man within the vicinity of the crime site. Id.

51. Id. at 1016.

52. 235 F.3d 769 (2d Cir. 2000) (denying petition for rehearing en banc).

53. Id. at 779 (Calabresi, J., dissenting from denial of rehearing en banc).

54. Id.
town of Oneonta. They obtained a list of all Black male students enrolled at the local state university and attempted to track down each one. The town of 10,000 had fewer than 300 Black residents, in addition to approximately 150 Black students; the police ultimately questioned more than 200 African Americans, but never apprehended a suspect. As Oneonta shows, when race is used to describe criminal suspects, even if employed in conjunction with other descriptors, there is a risk that race will cease to be one characteristic employed among many and will become the sole characteristic upon which law enforcement relies.

While the police were given a description with several qualifiers in Oneonta—(a) young, (b) Black, (c) male, (d) with a cut hand—they approached the investigation by considering only one factor: race. The police disregarded age altogether. Although the police generally limited the search to Black men, they also interrogated at least one woman. While a photograph of all the Oneonta plaintiffs is not available, given the use of hypodescent, one may assume that there was a large disparity in appearance in the questioned suspects: in skin tone, as well as in other characteristics, such as height and weight. However, reliance on the use of Black as the central identifying characteristic enabled the police to take action without obtaining a more accurate description of the suspect. They then used this racial description as probable cause to stop every Black man in town. The police seized Oneonta plaintiffs based on nothing other than race, or, as one columnist described it, for “breathing while black.”

The police sweep at issue in Oneonta, while a recent and rather spectacular event, is not an isolated incident. In numerous circumstances, law enforcement officers have used dragnet-like activities to detain large groups of Black men. Racial hoaxes, such as the Charles Stuart case,
provide further examples of situations in which law enforcement offices, acting on limited evidence, used suspect descriptions as a reason to target entire communities. In 1989, Charles Stuart, a white Bostonian, claimed that a Black man shot him and his pregnant wife. His wife, as well as her premature baby delivered by caesarean section, died shortly thereafter. Three months later, Stuart committed suicide. After Stuart’s death, the public learned that Stuart had committed the murder, shot both himself and his wife, and then blamed the crime on a fictitious Black man in a jogging suit.

In the meantime, the police swept through Boston, “stopping and searching black men more or less at random.” In the days following the shooting, the police undertook over 150 “stop and frisk” searches daily in nearby neighborhoods. Newspaper columnists discussed the atmosphere of “universal suspicion” where “every black man in Boston” became a suspect. Stuart’s hoax, though eventually uncovered when his brother confessed Stuart’s involvement, shows how easily a limited suspect description can work to “trigger[] police invasions of Black communities.” The history of racial hoaxes serves to disprove Judge Walker’s contention that, under circumstances as those in Oneonta, if “the search

acting on suspect description of a “5-foot-10, 185-pound black male” ordered police “to stop every black man near a Northeast Baltimore bus stop”); Parish Police to Stop Blacks Routinely, Wash. Post, Dec. 3, 1986, at A6 (retelling statement by Louisiana sheriff that all “Blacks traveling in white neighborhoods” would be stopped). In Hall v. Pennsylvania State Police, the Pennsylvania State Police issued a directive to local banks that directed bank officials to:

1. Take photos of any black males or females coming into bank who may look suspicious:
   A. Come in to ask directions.
   B. Exchange large bill for small money.
   C. Come in for no apparent reason.

NOTIFY LOCAL OR STATE POLICE.

570 F.2d 86, 88 (3d Cir. 1978).


63. Howe, supra note 62, at 1.

64. Id.

65. Id. Unlike Oneonta, where no Black man was unlucky enough to have cut his hand, one man was so ill-fated as to be found with a jogging suit and almost went to jail because of it. Sean Murphy, Charges Dismissed Against Man Once Thought Tied to Stuart Case, Boston Globe, Nov. 21, 1989, at 23.


68. Raspberry, Righteous Rage, supra note 66, at 50.

69. Howe, supra note 62, at 1.

70. Russell, supra note 3, at 598 n.37.
were for a young white male, the impact would be reversed.”

In the context of criminal hoaxes, the police have proven quick to target the whole of a minority community, but have not acted in that same manner against white communities.

On a less dramatic scale, while not rounding up large portions of a particular community, law enforcement officers have acted on suspect descriptions by stopping or arresting parties who have no resemblance to the description except for race. Some of these matters have been litigated, while others have been recounted in the popular press. In Washington v. Lambert, for example, the Ninth Circuit found civil rights violations when two men were detained based on suspect descriptions of “two African-American males, aged 20–30, one tall (6’ to 6’2”) and 150–170 pounds, and the other short (5’5” to 5’7”) and 170–190 pounds.” Judge Reinhardt noted that,

If the general descriptions relied on here can be stretched to cover [the plaintiffs], then a significant percentage of African-American males walking, eating, going to work or to a movie, ball game or concert, with a friend or relative, might well find themselves subjected to similar treatment, at least if they are in a predominantly white neighborhood.

In other cases, however, the courts have upheld police action based on use of this sort of overgeneralized description.

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72. According to Banks, “[r]esearch has unearthed not one case anywhere in the United States in which law enforcement authorities conducted a search of comparable scope and intensity for a white perpetrator of a crime against a black victim” as was done in Oneonta. Banks, supra note 81, at 1115; see also Andrew Kopkind, The Stuart Case: Race, Class, and Murder in Boston, 250 Nation 149, 149, 153 (1990) (comparing police reactions in Stuart and Tawana Brawley cases); Russell, supra note 3, at 598–99 (discussing how police reactions vary in Black and white communities).

73. See, e.g., Morgan v. Woessner, 997 F.2d 1244, 1254 (9th Cir. 1993) (affirming district court’s grant of judgment notwithstanding the verdict to plaintiff when police seized former professional baseball player based on description, “which essentially made all black men suspect”).


75. 98 F.3d 1181, 1183–84 (9th Cir. 1996).

76. Id. at 1190–91. Judge Reinhardt added that “[n]ot only were the descriptions exceedingly vague and general . . . but [the] plaintiffs did not even match the few physical details that did accompany the general physical descriptions.” Id. at 1190.

77. See, e.g., United States v. Lawes, 292 F.3d 123, 127 (2d Cir. 2002) (upholding finding of reasonable suspicion when police stopped thirty-four year-old Black male, 200
The use of race creates a dual problem of overbreadth and inappropriate narrowness. Overbreadth is created when the law enforcement officers pursue all persons of the same race despite the lack of other similarities. In Oneonta, this meant pursuing all the African Americans in town, despite differences in age, other physical characteristics, and even gender in one case.\textsuperscript{78} The category Black enables, and even encourages, law enforcement agencies to consider all possible Black candidates, even if they look nothing like the suspect and have a completely different skin tone.\textsuperscript{79} Simultaneously, the category remains overly restrictive. Given Black as a characteristic, the police will ignore all individuals in another racial category despite their similarities to the suspect.\textsuperscript{80} Professor Banks articulated this dilemma by imagining a “swarthy white man” who would be ignored by the police pursuing a victim’s Black, but light-skinned, suspect.\textsuperscript{81} Notwithstanding, for purposes of efficient and accurate investigative work, an officer might be well advised to stop the “swarthy white man.”\textsuperscript{82}

Overreliance on race increases the opportunity for a case of mistaken identity. Once a racial distinction is made, the police are unlikely to deviate from that classification, which could cause them to overlook the actual perpetrator.\textsuperscript{83} This distinction will determine whom the police decide to question, what neighborhoods they investigate, which suspect pictures they distribute, and whom they put in the lineup. If, for example, an officer creates a lineup based solely on a Black suspect description, the resulting lineup suspects have a higher likelihood of having a great variation in skin color.\textsuperscript{84} If several eyewitnesses then choose the

79. See id. at 781; see also Choi v. Gaston, 220 F.3d 1010, 1015 (9th Cir. 2000) (Noonan, J., concurring). In Choi, police were given the description of a Vietnamese man, “5’ 10”, Black [hair], Brown [eyes], 18 years old, wearing a white T-shirt and black pants,” Id. at 1013. They stopped and arrested a Korean man, 32 years old, 5’ 7”, 145 pounds, wearing a striped white shirt and blue jeans. Id. at 1014.
80. Interview with Tanya Brinkley, Attorney, in Miami, Fla. (Nov. 23, 2001). Ms. Brinkley, a Miami attorney specializing in criminal defense, described how law enforcement officers in Miami usually do not stop a likely suspect if the individual does not meet the racial profile initially given. Id. She finds this particularly troublesome given the large Black and Latino communities in Miami, and the extent to which the two groups have considerable physical overlap. Id.
82. Id.
83. Id.
only person who looks remotely like the suspect in skin color, they are more likely to all erroneously select the same person.85 Use of Black as a racial descriptor can also pose problems later on for the defense counsel attempting to demonstrate her client’s innocence: If all that the police recorded was Black, it becomes easier to charge another person despite a discrepancy in skin tone, and more difficult at trial for the defense to question the police or victim on whether the skin tone of the person charged differed from that of the identified perpetrator.86

Additionally, the likelihood of a white police officer—and the majority of police officers are still white87—confusing a person of color with another person of color is also greater than the risk of the same officer confusing a white person with another white person, as “[p]eople are better at recognizing faces of their own race than faces of other races.”88 In general, eyewitness identification is subject to a “much greater possibility of error where the races are different than where they are the same.”89 Additionally, in the case of cross-racial identification, the risk of misidentification becomes greater “where the subject belongs to a minority group and the witness to a majority group than . . . in the opposite situation.”90 This difficulty in identification “is strongest and most consistent where

85. See Johnson, Cross-Racial Identification, supra note 84, at 949–50.

86. Interview with Tanya Brinkley, supra note 80. By encouraging more precise descriptions, the use of the universal complexion chart would create a framework that would make it easier for plaintiffs to bring mistaken identity suits against the police.

87. Criminal Justice Sourcebook, supra note 2, at 40 (citing figures that full-time personnel in local police departments are 78.5% white, 11.7% Black, and 7.8% Hispanic; in sheriffs’ departments they are 81.0% white, 11.8% Black, and 5.9% Hispanic); Brian A. Reaves & Timothy C. Hart, Bureau of Just. Stat. Bull., Federal Law Enforcement Officers 1 (2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fleo00.pdf (on file with the Columbia Law Review) (stating that federal officers are 69.5% white and 11.7% Black).


89. Johnson, Cross-Racial Identification, supra note 84, at 937 (quoting Patrick M. Wall, Eyewitness Identification in Criminal Cases 122 (1965)).

90. Id.
white subjects attempt to identify black faces." While some courts have begun to acknowledge this problem, at least one appellate court recently upheld the trial court’s right to deny expert testimony on dangers of cross-racial classification.

C. The Role of Race and Racism in the Criminal Justice System

Leander Shaw, Jr., a Florida Supreme Court Justice, once remarked that:

Racism in the Criminal Justice System is like that crazy aunt in the attic. All the kids know she’s there, but they know that it's taboo to talk about her outside of the family.

The kids all know that Aunt Hester is strange and does queer things, but... we try to justify it as an aberration or simple forgetfulness rather than admitting that Aunt Hester has a serious problem that’s not going to improve until and unless it’s recognized as a problem and given serious attention.

In the same vein, any discussion of race-based suspect descriptions needs to address the figurative aunt in the attic. Arguing that Black/white designates are racially neutral, purely physical descriptions obscures the potential for abuse. In such a vacuum, Oneonta becomes an aberration instead of an example of greater trends. Furthermore, without recognition of the legacy of discrimination in the criminal justice system, the potential for error can be dismissed as another neutral byproduct of police investigative procedures. Only when combined with the aunt in the attic does the importance of ceasing to use race-based suspect descriptions become apparent.

Given this legacy of discrimination, any chance of error becomes particularly pernicious when dealing with minority groups. While, hypothetically, mistakes could end up harming both whites and people of color, due to the structure of the criminal justice system, it is reasonable to expect that the burden resulting from abuse of the system will generally fall on people of color. Given the racism perpetuated through the criminal justice system, a Black man (for example, one who was mistakenly appre-

91. Id. at 949.
94. Leander Shaw, Jr., Bias or Racism in the Criminal Justice System, 2 Fla. Coastal L.J. 213, 213 (2000).
95. See infra text accompanying notes 106–120; see also Russell, supra note 3, at 610 (“[P]rimary targets of the police lawlessness [are] minority communities.”).
hended by the police and tried in court) has a greater chance of being found guilty and of being given a heavier sentence than a similarly situated white male victim of mistaken identity. 96

The use of race as a key indicator of personal identity also serves to further the conception of minorities as disproportionately criminal. The ostensibly innocuous practice of race-based suspect descriptors allows law enforcement officers and witnesses to claim (and usually believe) that they are not acting out of racist motives. 97 As a result, the subsequent targeting of minorities is not considered the result of discriminatory intent on the part of government actors, but instead a response to increased criminal activity by minority groups. 98 If suspect descriptions that focus attention on minorities are not racist, but a neutral byproduct of police investigation, they must originate from disproportionate amounts of criminal activity perpetrated by people of color. 99

These forces recreate the self-fulfilling prophecy already recognized with regard to racial profiling. 100 Professor Harris describes the self-fulfilling prophecy that occurs in relation to drug offenses:

Because police look for drugs primarily among African Americans and Latinos, they find a disproportionate number of them with contraband. Therefore, more minorities are arrested, prosecuted, convicted, and jailed, thus reinforcing the perception that drug trafficking is primarily a minority activity. This perception creates the profile that results in more stops of minority drivers. At the same time, white drivers receive far less police attention, many of the drug dealers and possessors among them

96. See infra text accompanying notes 107–119.
97. Belief that their actions are racially neutral could actually lead to increased racial discrimination. Sheri Lynn Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1651 n.192 (1985) [hereinafter Johnson, Black Innocence] (citing study where whites who were told they were not racially prejudiced then treated Black panhandlers worse than whites who were told they were racially prejudiced).
98. This reasoning makes minority groups themselves seem the likely target. From here, one can quickly fall back into the conservative critique best articulated by Randall Kennedy. See generally Kennedy, supra note 18 (expressing idea that disproportionate representation of minorities in criminal justice system is caused primarily by criminal activity by a segment of the Black population, not discriminatory treatment by the police); see also Randall Kennedy, The State, Criminal Law, and Racial Discrimination: A Comment, 107 Harv. L. Rev. 1255, 1259 (1994) (“[T]he most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity.”).
99. Many scholars have written on the issue of disproportionate representation of Black criminal defendants. This disproportionality has been explained alternatively as (a) evidence of Black criminality and justification for perception of Black as criminal, or as (b) proof of racism in the criminal justice system. Compare James Q. Wilson, To Prevent Riots, Reduce Black Crime, Wall St. J., May 6, 1992, at A16 (arguing that white racism is a result of Black crime), with Russell, supra note 3, at 606 (dismissing argument that “criminalblackman [sic] stereotype” results from disproportionate crime rates as “ahistorical and counterintuitive, [as well as] . . . lack[ing] any empirical grounding”).
100. Harris, Driving While Black, supra note 60, at 5.
go unapprehended, and the perception that whites commit fewer drug offenses than minorities is perpetuated. And so the cycle continues.101

Due to police actions, nonwhite skin is seen as an indicator of criminality as well as a justifiable cause for police persecution.102 Perception of criminality in minority populations then alters the general opinion of the public and affecting eyewitness testimony, already notoriously malleable and unreliable.103 The connection between race and criminality can be so overwhelming as to influence an eyewitness’s perception of the suspect’s race, causing the eyewitness to overidentify suspects as Black.104 These perceptions then increase acceptance of the use of race in both suspect descriptions and racial profiling because such use appears entirely rational.105

Eliminating the use of race in suspect descriptions would decrease police discretion and limit the ability of racial stereotypes to impede law enforcement work: Police would still have the ability to utilize suspect descriptions as they saw fit, but would have to construct such descriptions out of a more narrowly construed framework. Professor Peller addresses how “[c]urbing discretion in police and judicial procedures would there-

101. Id.; see also United States v. Harvey, 16 F.3d 109, 115 (6th Cir. 1994) (Keith, J., dissenting) (“African-Americans are more likely to be arrested because drug courier profiles reflect the erroneous assumption that one’s race has a direct correlation to drug activity.”).

102. Harris, Driving While Black, supra note 60, at 4–5. The connection of Blackness to criminality has deep historical roots. See, e.g., Finkelman, supra note 16, passim. As one example, Finkelman describes a 1705 Virginia statute that made it illegal for African Americans, Native Americans, or white criminals to hold elected office: “[B]y classifying blacks as equivalent to convicted criminals, the legislature was fostering the notion that race and crime were synonymous.” Id. at 2088.

103. Banks, supra note 81, at 1103.

104. See Harvey Gee, Eyewitness Testimony and Cross-Racial Identification, 35 New Eng. L. Rev. 835, 843 (2001) (book review) (“[W]hites may observe an interracial scene in which a white person is the actual aggressor, but remember the African American person as the aggressor.”); Johnson, Black Innocence, supra note 97, at 1645 (citing numerous studies where African Americans were overidentified as the criminal perpetrator); Knepper, supra note 34, at 97 (discussing how “victim preconceptions, or prejudices” can affect determination of suspect’s race, and that “victims overidentify black offenders”). Haber and Haber describe a study in which witnesses were shown a picture of two men, one holding a knife, and then were asked to describe the scene. Ralph Norman Haber & Lyn Haber, Experiencing, Remembering and Reporting Events, Psychol. Pub. Pol. & L. 1057, 1063 (2000). When the men “were of the same race, nearly all witnesses correctly described . . . who held the knife” as well as other pertinent details. Id. On the other hand, if one man was Black and one White, most witnesses (Black and White alike) reported that the Black man held the knife even when it was held by the White man. . . . All of the witnesses stated that they believed that crimes were more likely to be committed by Blacks than by Whites. The results suggest that eyewitnesses sometimes encode and remember the event so as to be consistent with their beliefs rather than the way it actually happened.

105. See Knepper, supra note 34, at 96–98.
fore curb racism in relations between people of color and the criminal justice system.” Disproportionate burdens on people of color emerge at each point that discretion is used: whether it be the decision to detain a suspect, to make a traffic stop, to search a driver, to shoot at a civilian, to handcraft a suspect, to make an arrest, to try a minor defendant as an


107. See Angela J. Davis, Benign Neglect of Racism in the Criminal Justice System, 94 Mich. L. Rev. 1660, 1676 (1996) [hereinafter Davis, Benign Neglect of Racism] (“[P]olice officers are generally more suspicious of blacks, and therefore stop and detain them more frequently than whites, [which] is inherently discriminatory.”); New York City Police Department Citywide Stop and Frisk Data: 1998, 1999, and 2000, at 1, available at http://www.nyc.gov/html/nypd/pdf/pap/stopandfrisk_0501.pdf (on file with the Columbia Law Review) (citing NYPD records indicating that approximately one half of all stop and frisk subjects during 1998–2000 period were Black); see also Fagan & Davies, supra note 8, at 490 (considering race-specific arrest rates, “stop rates for blacks and Hispanics were significantly higher than the stop rates for whites . . . [particularly] for stops for weapons and violent crimes”).


109. Bureau of Justice Statistics, U.S. Dep’t of Justice, Contacts Between Police and the Public: Findings from the 1999 National Survey 2 (2001), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp99.pdf (on file with the Columbia Law Review) [hereinafter Contacts between Police and the Public] (“During the traffic stop, police were more likely to carry out some type of search . . . on a black (11.0%) or Hispanic (11.3%) than a white (5.4%).”).

110. Note, Developments in the Law: Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1495 (1988) (“[A] black citizen today is far more likely than is a nonblack citizen to be shot or seriously injured by a police officer.”).

111. Contacts between Police and the Public, supra note 109, at 16 (“Blacks (6.4%) and Hispanics (5.0%) were more likely than whites (2.5%) to be handcuffed.”). Discretion in the arrest process can extend to more horrifying results then the mere use of handcuffs. See City of Los Angeles v. Lyons, 461 U.S. 95, 116 n.3 (1983) (Marshall, J., dissenting) (“[I]n a city where Negro males constitute 75% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds.”).

112. Fagan & Davies, supra note 8, at 491 (“[S]top-to-arrest ratio of blacks (7.3 stops per arrest) is 58.7% higher than the ratio for non-Hispanic whites (4.6).”); Contacts between Police and the Public, supra note 109, at 16 (“Blacks (5.2%) and Hispanics (4.2%) stopped by police were more likely than whites (2.6%) to be arrested.”). For a narrative account of this phenomenon, see Jeffrey Goldberg, The Color of Suspicion, N.Y. Times, June 20, 1999, § 6 (Magazine), at 87 (recounting a police officer’s comments on a drunk-driving checkpoint one night: “I began to notice that when the cops caught a white kid drunk, they would say things like: ’I’m going to call your father. You’re in big trouble.’ With black guys, they’d just arrest them. Well, I mean, black kids got fathers, too.”).

113. Davis, Benign Neglect of Racism, supra note 107, at 1677–81 (discussing racial bias in prosecutorial discretion). For another look at how race can affect the decision to press charges, see Cynthia Kwei Yung Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 Minn. L. Rev. 367, 404–09 (1996) (stating that “Black-as-criminal stereotype may cause people to perceive ambiguously hostile acts . . . as violent when a Black person engages in these acts and non-violent when a non-Black person
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adult, to increase charges, to plea bargain, to convict, to determine sentence length, or ultimately whether to apply the death penalty or not. Each step in the criminal process increases the discriminatory effect, as well as the perceived image of minorities as disproportionately criminal, thereby recreating the self-fulfilling prophecy. Ordinarily, because the white community remains unaffected by this abuse of discretion, they choose to ignore it.

Evaluating the burdens created by possible discriminatory effects of a race-based physical descriptor requires acknowledgement and understanding of racial discrimination in other parts of the criminal justice system. If racism had been purged from the rest of the criminal justice system, the dangers involved in the use of race as a suspect descriptor—the increased risk of a Black man being mistakenly seized or arrested—would be less significant. However, given the impact discretion has on African Americans once they enter the criminal justice system, any initial risk of error is magnified. Additionally, the existence of a predominantly white

114. Shaw, supra note 94, at 217 (citing Los Angeles study showing that “minority youth are more than twice as likely as their White counterparts to be transferred out of California’s Juvenile Justice System and tried as adults”).

115. Cole, No Equal Justice, supra note 4, at 143, 149–50 (citing examples of racial disparities in charges); Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 Fordham L. Rev. 13, 31–37 (1998) (asserting that prosecutorial discretion can lead to racial disparities in how defendants are charged) [hereinafter Davis, Prosecution and Race].

116. Marc Mauer, Race to Incarcerate 125 (1999) (“[S]tatistical analysis by the United States Sentencing Commission concluded that, for comparable behavior, whites were being offered plea bargains leading to outcomes falling below the level requiring a mandatory minimum sentence more often than blacks or Hispanics.”); Davis, Prosecution and Race, supra note 115, at 31–37 (1998) (citing various “race-neutral factors [that] may be permeated with unconscious racism” and create racial basis in plea bargaining).


118. Cole, No Equal Justice, supra note 4, at 143, 149–50 (citing several examples of racial disparities in sentencing); Laura Frank, Equal Crime, but Not Equal Time, Tennessean, Sept. 24, 1995, at A1 (stating that Black defendants receive sentences ten percent longer than similarly situated white defendants).


120. Cole, No Equal Justice, supra note 4, at 5 (“Because they do not bear the costs of law enforcement, white people have less reason to be concerned about discretionary law enforcement.”); see also Coramae Richey Mann, Unequal Justice: A Question of Color 133–34 (1993) (“Tragically, many white social scientists . . . not only appear blind to the pervasive problem of white police maltreatment of peoples of color, but also disregard documentation proffered by the abused as ‘anecdotal’ and belittle the opinions of experts in the field, particularly racial minorities with experience and expertise.”).
police force also introduces cross-racial identification problems into preliminary police procedures such as photo arrays and suspect lineups.\(^{121}\)

One would hope that a white defendant would receive full and fair access to all of the checks and balances of the United States' judicial system, would be treated justly in accordance with the crime committed, and presumably would be found innocent if warranted by the situation.\(^{122}\) For a Black defendant, on the other hand, once the wheels of justice begin moving, they have a tendency to grind against him. Under these circumstances, it becomes even more important that the initial steps of the investigatory process are weighted in order to identify suspects most accurately. Once declared a suspect, a Black defendant will find it more difficult to prove innocence than a white defendant will.\(^ {123}\)

### III. Looking For Alternatives Beyond Race

Despite the potential harms of using race as a physical descriptor, the search for an alternative can seem an insurmountable task. Any critique of racial categorization must acknowledge Judge Walker's assertion that "it is a fact of life in our diverse culture that race is used on a daily basis as a shorthand for physical appearance."\(^ {124}\) Disregarding individuals on the margin, where the average observer might confuse racial status, Black can still be an immensely useful categorization in limiting an applicable pool of suspects.\(^ {125}\) Nonetheless, it is possible to move away from

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121. Gee, supra note 104, at 841–42 (discussing how own race bias creates discrimination against Black suspect in photo arrays and suspect lineups by creating lineups and photo arrays where "members differ more from each other than is the case of same-race" scenarios).

122. Even with a white suspect, however, whether or not a suspect receives the full benefit of judicial fairness may ultimately depend on the class status of the defendant. See, e.g., Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1841–42 (1994) (asserting that death penalty verdicts depend on quality of counsel which is determined by ability to pay); Joseph F. Sheley, Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination, 67 Tul. L. Rev. 2273, 2277 (1993) (citing study that found higher risk of police assaults for lower-class citizens).

123. See, e.g., William Raspberry, Breathing While Black, Wash. Post, Dec. 6, 1999, at A27 [hereinafter Raspberry, Breathing While Black]. Raspberry discusses the dangers of defining a suspect by race and asks that the reader take the Oneonta scenario and imagine a black student unlucky enough to have cut or scratched himself—slicing tomatoes, hanging Venetian blinds or working on his 10-speed—within a day or two of the assault. Who can doubt that he wouldn't have been jailed? And who can imagine how he would have cleared himself? . . . [I]t wouldn't have surprised me greatly if a local jury had convicted him.


125. This Note does not argue that we should give up the use of racial categories in general. As social constructs, racial classifications are important in describing and analyzing race relations in the United States. For example, the collection of demographic
race as a descriptor, and to attempt instead to impose skin tone as a means of identifying suspects. Looking at international contexts can also provide insight into different ways of examining race. 126 In one study in Brazil, Brazilians in Bahia came up with forty different racial terms to describe a collection of portraits. 127 Other countries utilize a number of common terms to distinguish gradations of color. 128 These sources should be further explored as part of an attempt to replace the use of racial designations in the United States.

As an alternative to racial descriptors, this Note proposes development of a Universal Color Complexion Chart. Such a chart would consist of ten to twenty skin tones covering the spectrum of human coloring, with a swatch for each color, in a manner similar to a paint chart. The skin tones could also be keyed to number designates (i.e., one to twenty) so as to be useful when presented solely orally. As part of their preliminary training, law enforcement officers would be instructed in use of the chart and familiarized with the skin tones presented. The officer would then carry the color chart around with her as another piece of standard equipment. 129 When the situation called for a physical description, the officer could quickly consult the chart and pick the most accurate designation. If gathering information from bystanders, the officer would allow the eyewitness to pick from the color chart. As all law enforcement members would have access to the chart, officers could call in a physical description accompanied by the appropriate number designate. Unlike racial descriptors, the number designate would not depend on an individual’s personal belief of race, could be easily conveyed to countless others without any decrease in accuracy, and would create greater conformity in suspect descriptions as a whole. The officer who received a suspect description over the radio could quickly consult his personal color chart and instantly know what he was looking for, instead of having to worry that his conception of Black or Latino might be different from that of the previous officer.

No matter how well a universal color complexion chart is constructed, the number of boxes available is finite and individuals will always end up falling among or between shades. Additionally, given the statistics on race in the census, which was dropped by the Canadians in 1951 as a symbol of racism, serves an important basis of allocating resources, monitoring voter registration, and enabling affirmative action. Wright, supra note 31, at 50. Racial categories can also be important as a source of pride, identity, and community.

126. See, e.g., Davis, Who is Black?, supra note 16, at 81–119 (analyzing international system of racial classification as a way to highlight development of hypodescent in United States).

127. Id. at 101.

128. See id. at 103–04 (describing different terms for skin color used in Puerto Rico).

129. One could imagine a wallet-sized laminated card that would be convenient and easily accessible.
unreliability of eyewitness testimony, a suspect who, if examined closely might most accurately be a six, could be recorded as a five. Alternatively, if the sighting had been brief or in difficult lighting, a witness might not be able to pick one number designate, but could only narrow down the description to, for example, a four to ten spread. Use of the chart would incorporate an understanding that a suspect might be a five/six instead of simply a five, or that if the record said four, the police would look for persons designated three to five, or possibly for all twos to sevens. The chart would provide flexibility for the police to note as much as they or eyewitnesses know; this would allow them to be as accurate as possible, but also to collect information that is more general when nothing else is available.

While these designations may insert a certain degree of uncertainty into the process of physical description—a witness may be less comfortable saying five than simply saying Black—such ambiguity highlights the fact that race can be uncertain, and that police officers need to be aware that racial designations are not always correct. The system also emphasizes the connection of persons with similar skin tones despite their differing racial designates: Using the color chart, it is no longer an impossibility that “[i]n pursuing a light skinned black assailant [an] officer [would] be more likely to stop a swarthy white man than a brown skinned black man.”

Use of the color chart as opposed to conventional racial classifications could also create confusion by broadening the class of applicable suspects. For example, in the case of a dark-skinned Latino man, use of number designates would create a suspect description that would cover both Black and Latino populations. Instead of limiting police discretion to indiscriminately stop African Americans, this would now allow the police to stop a Black man based on the suspect description, when under the current regime only Latino men would have been covered. In these circumstances, however, not all Black men would be covered by the suspect descriptions, but only those whose number designate is similar enough to the original description given. In cases where a suspect could be of more than one race, the law enforcement officers should be looking for a person that falls under both groups, not unfairly focusing on one segment of the population. As some recent incidents have shown, even the police have started to recognize that suspect descriptions can

130. Banks, supra note 81, at 1103 & n.110 (citing empirical studies of error in eyewitness identification).
131. Id. at 1111.
133. This is particularly important given that the police would be more likely to focus on African Americans considering the tendency to overidentify criminal actors as Black. See Knepper, supra note 34, at 98 (suggesting that “Black category amounts to a catch-all
not be clearly one race, and have released suspect drawings picturing the same suspect as two different ethnicities. Moreover, the use of number designates in place of conventional racial designations highlights the uncertainty in racial identification. Eyewitness testimony is notoriously unreliable and this unreliability extends to an eyewitness’s ability to racially categorize. Use of the universal complexion chart would not lock the police into a potentially erroneous racial categorization.

Such a system would likely be awkward at first, as any new system always is. However, once law enforcement becomes familiarized with use of the color complexion chart, the chart would make their work more accurate and efficient. The chart would allow greater precision in creating suspect descriptions. A more precise suspect description would enable greater precision in investigative work and in the creation of photo arrays and lineups. In turn, enhanced accuracy would increase the legitimacy of law enforcement work, which would improve interactions with the community and ultimately result in more efficient policing.

In addition to increased accuracy, an appearance of less discriminatory behavior would also encourage development of a better relationship between the police and minority communities. Currently, there is a feeling among Black communities that Black men can be stopped indiscriminately because victims cannot distinguish between Americans of African descent and other visible minorities); supra note 104.


135. See Haber & Haber, supra note 104, at 1090–91.

136. Banks, supra note 81, at 1103–04; supra note 37. For a case example, see State v. Macklin, No. 42653-24, 1999 WL 390962, at *1–*2 (Wash. Ct. App. June 14, 1999) (describing how Black man was originally described as “Arabian” by victim eyewitness). The court noted that “[t]he victim’s description of the burglar as ‘Arabian’ did not eliminate Macklin, who is black, as a possible suspect.” Id. at *8; see also Lisa Richardson, An Enigma Wrapped in a Mysterious Racial Identity, L.A. Times, Mar. 13, 2001, at D1 (recounting how single bank robber was described by eyewitnesses as white, African American, Puerto Rican, Brazilian, and Middle Eastern).

137. The color chart also addresses another element of white privilege: its transparency. Whiteness usually goes unmentioned among whites, creating a presumption of whiteness when describing someone simply as a “man” or “woman.” In contrast, Blackness is always mentioned as part of the physical description. As Sheri Lynn Johnson writes:

Often the description will not appear to include race, but it may do so implicitly, as when a white person testifies about the appearance of another white person; because being white is seen as “normal,” it need not be reported, just as the presence of two legs and two arms need not be reported.

Sheri Lynn Johnson, Racial Imagery in Criminal Cases, 67 Tul. L. Rev. 1739, 1746 n.20 (1993). With the color chart, both whiteness and Blackness will be equally noted.

138. Fagan & Davies, supra note 8, at 499.
nately by the police. This belief engenders great hostility towards the police, making their job more difficult, and even more dangerous. As the Second Circuit has noted, “[t]he effectiveness of a city’s police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias.” As more districts incorporate community policing techniques, this phenomenon becomes even more important. Greater faith in the criminal justice system could also lead to diminished crime, which would benefit both police and civilians. Belief that the criminal justice system functions in a discriminatory manner serves to undermine the system’s legitimacy, which in turn undercuts the coercive power of its laws. Given that African Americans are disproportionately victims of crime, both the police and African American communities have an even greater incentive to encourage trust and cooperation.

However, institutionalizing finer skin tone distinctions may have its own price, if such a system imposes a special stigma on darker-skinned African Americans, a group traditionally subject to the heaviest impact of racism. In the same way that racial discrimination has resulted in neg-
ative stereotypes being associated with African Americans, “lighter-skinned individuals [are] ascribed more ‘positive qualities and attributes’ than their darker counterparts.”147 As Professor Baynes has noted, even if race becomes immaterial, “color will still be a problem because darkness casts a longer discriminatory shadow than lightness.”148 The negative connotations associated with darkness may result in an eyewitness bias towards choosing a darker box on the color chart.149

Unless executed carefully, the color chart proposal could potentially shift discrimination onto this subgroup of the Black population, ultimately reducing the amount of injustice falling on African Americans as a whole by instead concentrating greater injustice in less politically powerful groups, i.e., darker-skinned groups. These possible repercussions would need to be explored further before any potential implementation.

CONCLUSION

The certitude with which rigid concepts of race continue to be used in law enforcement—particularly in the context of a physical identifier used for suspect descriptions and racial profiling—seems untenable in the face of changes in other areas. The use of race in law enforcement is allowed because of its practical value for identifying a suspect, but given the inherent ambiguities of racial classification, that value is limited. Nonetheless, challenges to such racial practices have not incorporated critiques of the concept of race as a useful indicator of appearance.150 The emergence of multiracial identity, which suggests that race is not as clear as previously accepted,151 provides one point of departure for this critique. While the United States’ populations have always been racially mixed, the 2000 census was a crucial moment of state recognition that race is potentially indeterminate.152 While antidiscrimination law and


147. Baynes, supra note 146, at 134.
148. Id. at 185.
149. Baynes found that whites seem to shift their perception of color based on their opinion of an individual. Id. at 170. In contrast, his “Color Survey seem[ed] to suggest that Blacks draw a hard line for who they consider as dark or medium and seem to be uniformly consistent about it.” Id. at 170–71.
150. For an example, see generally, Banks, supra note 81 (criticizing police use of suspect descriptions and racial profiling but not suggesting a move away from Black/white designates).
151. See generally Zack, supra note 13.
152. Id. at 35–57.
other fields have recognized some of the difficulties inherent in determining race, the criminal legal system has not questioned its substantive use of race in the same way.

In the aftermath of Oneonta, one editorialist argued, “I wouldn’t have expected the police in Oneonta to ignore the sliver of a description they had. But it was amateurish to go from that sliver to turning the town’s black male population into a company of humiliated (and I dare say frightened) suspects.” Similarly, this Note does not call upon the police to disregard valuable evidence, but rather to attempt to gather and use such information in a way that will lessen any possible discriminatory impact. The proposed color complexion chart would allow the police to continue to collect the necessary information to create suspect descriptions.

More precise suspect descriptions with less discriminatory impact would ultimately benefit everyone by decreasing the detention of innocent people and increasing conviction of culpable parties. Everyone affected by the criminal justice system, including the general public, would profit from increased accuracy in our law enforcement apparatus. Moreover, without interfering with law enforcement, this system bolsters the legitimacy of the police and fosters improved relationships between minority communities and the police. Furthermore, even if this policy would limit the police’s ability to pursue investigations in a way that reduces police efficiency, such actions would be justified as a means of encouraging antidiscriminatory policies. Ultimately, if we are to hope for a just judicial system, we must work to promote just police work wherever and whenever possible.

153. Raspberry, Breathing While Black, supra note 123, at A27.