

Race Consciousness, Colorblindness (Preliminary Draft)

Race Consciousness, Color Blindness and Antidiscrimination Doctrine

By R. Richard Banks *

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Introduction

Consider:

A police officer searching for a criminal assailant in a multi-racial neighborhood stops and questions every young black man, but none of the young white men.

An employer posts an advertisement seeking a “white female” for a particular position.

A government social worker who places children for adoption informs a prospective adoptive family of each of the available white children, but not of any of the available black children.

* * * *

In each of these cases, a decision-maker subject to the non-discrimination mandate of federal constitutional and statutory law treats individual African-Americans less favorably than she would if they were white. The employer would categorically reject a black woman’s application for the advertised position, even as a similarly qualified white women’s application would be considered. The social worker would not attempt to place any black child with the prospective adoptive parents, even as otherwise similar white children would have been individually considered. The police officer would stop and question black men who would not have been investigated had they been white. In sum, the African-American individuals in these scenarios would have been treated better had they been white.

Nonetheless, a racial discrimination claim on behalf of the black children in need of adoption, the black job applicant, and the black men accosted by the police would certainly fail if certain other conditions were met. The police officer’s decision to investigate only black men would be permissible if the officer seeks a specific criminal assailant described as African-American. The racially restrictive advertisement would be permitted if the position to be filled is that of an actor in a movie, play, or visual advertisement, either print or broadcast. The social worker’s exclusion of the black children would be permissible if the prospective adoptive parents have expressed a desire to adopt a white child.¹

¹ My prior work has examined two of these practices. R. Richard Banks, Race-Based Selection and Colorblind Equal Protection Doctrine and Discourse, 48 UCLA L. REV.

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These practices are widespread and commonplace. None of them are explicitly exempted from the non-discrimination mandate. The federal employment discrimination law, for example, does not allow for race to be a bona fide occupational qualification. Similarly, current equal protection clause jurisprudence requires that strict scrutiny apply to all racial classifications,² irrespective of whether they appear to be benign or invidious.³

There are, of course, a variety of considerations that weigh in favor of the permissibility of each of these practices,⁴ reasons that the plaintiffs in each of these cases should lose. Indeed, as a practical matter, it seems clear that the plaintiffs would lose. The most interesting question is not whether we should permit or prohibit these practices, but why. How do and should we understand or justify their permissibility in terms of antidiscrimination doctrine?

Currently, courts not only would permit these practices, they would do so by declaring them non-discriminatory. These practices would be exempted from strict scrutiny rather than subjected to it.⁵

1075 (2001) [hereinafter Colorblind Equal Protection Doctrine] ; R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 *YALE L.J.* 875 (1998) [hereinafter *The Color of Desire*]; R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 *STAN. L. REV.* 571 (2003) [hereinafter *Beyond Profiling*]; R. Richard Banks, *Intimacy and Racial Equality: The Limits of Antidiscrimination*, 38 *HARV. C.R.-C.L. L. REV.* 455 (2003) [hereinafter *The Limits of Antidiscrimination*]; R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 *Cornell L. Rev.* 1201 (2004) [hereinafter *Antiterrorism Efforts*]; R. Richard Banks, *The Benign/invidious Asymmetry in Equal Protection Analysis*, 31 *HAST. CON. L. Q.* 573 (2003).

² *See, e.g., Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (holding that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny”); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

³ I frame the analysis of this Article in terms of the constitutional framework—racial classification and strict scrutiny—fully aware that race based casting does not, as a formal matter, constitute state action, unless undertaken by a governmental entity. I use the constitutional terminology for the sake of simplicity and ease of exposition. The analysis would be substantively the same even if focused on the nondiscrimination mandate of Title VII.

⁴ At times I refer to state practices, and at other times to institutional practices. I use these terms interchangeably to refer collectively to the three practices at issue.

⁵ Equal protection clause jurisprudence requires the application of strict scrutiny to all racial classifications, irrespective of whether they appear to be benign or invidious. *See, e.g., Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (holding that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny”); *Grutter v.*

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What then is one to make of the fact that these race dependent practices are not even subject to strict scrutiny?

In this Article, I show that the non-recognition of these practices as discriminatory is not an inconsequential or easily remedied doctrinal glitch or judicial oversight. Rather, non-recognition is both an effect and mechanism of the ideology of colorblindness. Non-recognition is a means of reconciling the permissibility of these practices with the ideological commitment to colorblindness. The doctrine expresses and facilitates colorblindness not by actually enforcing that principle, as many commentators suppose, but instead by promoting colorblindness as ideology, as symbol, as message.

The doctrinal ideology of colorblindness, in turn, not only mis-describes the actual operation of the doctrine, it misleadingly depicts those race dependent practices that survive strict scrutiny—practices such as affirmative action—as rare exceptions to an otherwise inviolate rule.⁶ Affirmative action only seems a rare exception because so many other race dependent practices are permitted without ever being subjected to strict scrutiny. Contrary to the implication of the colorblindness account of antidiscrimination law, current doctrine does not categorically disfavor all racially discriminatory practices. Nor would we want it to. As a society, we accept many more race dependent social practices than the formal rules of the doctrine would seem to permit.

An obvious alternative to the current doctrine's formal, if not actual, skepticism of all racially discriminatory practices would be to incorporate openly the benign/invidious asymmetry that many proponents of affirmative action have long promoted. Rather than purport to subject all race-based practices to the same stringent level of scrutiny, such a doctrine would accord a lower level of scrutiny to race dependent practices that are benign. This approach, however, would confront difficulty in deciding whether a challenged practice is benign or invidious. Although suspect description reliance, race-based casting and facilitative accommodation are not inherently invidious, neither are they wholly benign. They are not intended, for example, to aid historically disadvantaged racial minority groups. Indeed, they might in practice

Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003). Federal statutory law flatly prohibits racial discrimination by employers. Title VII of the 1964 Civil Rights Act prohibits racial discrimination by employers. *See* 42 U.S.C. 2000.

⁶ Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

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burden racial minorities sufficiently to warrant a designation as invidious.

In sum, then, the permissibility of these practices is neither well explained by the anticlassification approach of current doctrine, nor by the more substantive considerations of the antistatutory approach that is the primary alternative. These practices are neither colorblind, nor efforts to benefit historically disadvantaged racial groups. The quandary of antidiscrimination doctrine inheres in the difficulty of either approach. All race dependent practices are not regarded as invidious, but neither would it be easy for courts to determine which should be regarded as benign.

This doctrinal dilemma becomes less a source of dismay once antidiscrimination doctrine is understood as an expression of our evolving aspirations and intuitions rather than as a transcendent moral mandate. In a society as race conscious as ours, it should not be surprising that we are not ready to eliminate racial discrimination, nor that there would be disagreement about the forms of race dependent decision-making that should be regarded as inconsistent with our racial equality aspirations. Our normative evaluations of race consciousness are evolving.

* * * * *

Part I describes three clusters of race dependent practices--suspect description reliance, facilitative accommodation and race-based casting--that are not legally disfavored, but that according to the formal structure of equal protection doctrine should be treated as racial classifications. Part II discusses a variety of rationales for permitting these practices, none of which, however, warrants the characterization of these practices as non-discriminatory. Part III considers the permissibility of these practices in light of anticlassification and antistatutory theories.

Part I: The Formal Analysis

This Part first describes the cluster of practices associated with suspect description reliance, facilitative accommodation, and race-based casting. It then shows that although these race dependent practices have not been regarded as racially discriminatory, they satisfy the formal

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criteria for being treated as a racial classification in constitutional analysis.

A. The Practices

1. Facilitative Accommodation

A government employed social worker asks prospective adoptive parents which race of child they would prefer to adopt.⁷ The prospective adoptive parents respond that they would like to adopt a white child. The social worker, having racially classified and sorted the children available for adoption, then presents to the prospective adoptive parents only white children. The social worker does not mention to the couple, or present any information about, any of the many black children awaiting adoption. In prior work, I have referred to this practice as facilitative accommodation.⁸ Facilitative accommodation refers to the state's framing of the choice of a child in terms of race in order to facilitate the racial preferences of prospective adoptive parents.⁹

Facilitative accommodation may be responsive rather than proactive. In the scenario described above, it is the social worker who injects race into the process, encouraging, if not requiring, the prospective adoptive parents to state a racial criterion. We could describe this as proactive accommodation, in which the social worker initially frames the choice of child in terms of race even if the prospective adoptive parents do not. The social worker would engage in responsive accommodation if the social worker omits any mention of race and only presents racially categorized lists of children when the prospective adoptive parents state a preference. Finally, the social worker would passively accommodate the parents' racial preference if he declines to sort children by race but stands by while the parents select a child on the basis of race. In passive accommodation, in other words, the state permits but does not actively facilitate the parents' expression of their racial preference.

Social workers, as a matter of course, strive to fulfill the racial preferences of potential adoptive parents. Even as federal legislation during the 1990s aimed to end racial discrimination in the placement of

⁷ Of course, the social worker could ask the race issue by asking the parents whether there is any race of child that they do not want to adopt.

⁸ Banks, *The Color of Desire*, supra note

⁹ Banks, *The Color of Desire*, supra note

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children for adoption,¹⁰ facilitative accommodation has been permitted to thrive, as a practice deeply embedded in the institutional practices of adoption agencies.¹¹ No court has ever prohibited the practice.¹²

In contrast, other official practices that regulate family formation or intimate relationships on the basis of race have been invalidated as unconstitutional. In its 1964 decision in *McLaughlin v. Florida*,¹³ the Supreme Court invalidated a state statute that authorized more severe penalties for cohabitation and adultery when the parties were of different races. A few years later in *Loving v. Virginia*,¹⁴ the Court invalidated miscegenation statutes that prohibited interracial marriage. Both the rationale and outcome in *Loving* are widely endorsed.¹⁵

¹⁰ The Multiethnic Placement Act, initially passed in 1994 and amended in 1996, generally prohibits the practice of race-matching by adoption agencies that receive federal funding. 42 U.S.C.A. § 1996b (West Supp. 1997). The Act reads:

A person or government that is involved in adoption or foster care placements may not—

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved. 42 U.S.C.A. § 1996b(1) (West Supp. 1997).

¹¹ To promote suitable matches, adoption law is strongly oriented toward fulfilling the preferences of adoptive parents. Adoption agencies attempt to ascertain and fulfill the preferences of adoptive parents as a means of determining and creating an appropriate placement. Prospective adoptive parents are generally allowed to express preferences in a wide variety of areas. Health, age, sex, appearance, and prior experiences are all areas in which parents may say what type of children they want. Race is recognized as one of many preferences parents are likely to hold.

¹² Banks, *The Color of Desire*, *supra* note It should be noted though that federal regulations have recently begun to limit agencies' facilitative accommodation practices. This issue is discussed later in the article.

¹³ 379 U.S. 184 (1964).

¹⁴ 338 U.S. 1 (1967).

¹⁵ RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2002). Commentators quibble only about whether the Court should have acted sooner. See, e.g. Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119 (1998) (examining the legal debates that led the Supreme Court to initially dodge ruling on the constitutionality of miscegenation laws); Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 415 (1994) (pointing to rising tension in race relations as the reason why the Supreme Court avoided deciding miscegenation cases until *Loving*).

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2. Race-based Casting

A business owner who places an advertisement seeking receptionists or attorneys with the stipulation that “No blacks need apply” has clearly violated Title VII of the Civil Rights Act of 1964 and any applicable local antidiscrimination laws.¹⁶ Commentators almost universally support this outcome.¹⁷

An employer posts an advertisement seeking white applicants, only this time the job is a role in a television series, a big screen movie or a print or television advertisement. Let’s call this race-based casting. Race-based casting may be used for a variety of different types of reasons. In some cases, the director may rely on race because the role requires portrayal of an historical figure whose race is widely known, a biography of Winston Churchill or Nelson Mandela, for instance. In other cases, the production may involve a race related theme, an interracial romance, for example, or the indignities of de jure segregation. In still other cases, the director may rely on race for more less concrete reasons, because only an actor of a particular race, for example, would provide the desired texture for the role.

Race-based casting is a staple of Hollywood and other venues where actors are selected for parts in movies, television shows, plays, or advertisements. Advertisements regularly specify the race of an actor sought for a particular part, including roles for which race is not obviously relevant.¹⁸ Even when the advertisements do not specify race, casting directors no doubt regularly take race into account in deciding which actor should play which role.

Although Title VII would seem, as a formal matter, to prohibit race-based casting,¹⁹ as a practical matter, it clearly does not. Similarly, although the constitution would seem to prohibit race-based casting by government entities (for example, a public university staging a dramatic

¹⁶ See *Pittsburgh Press v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973) (finding that a local law regulating such commercial speech was constitutional).

¹⁷ *But see* Richard Epstein, *Forbidden Grounds* (1992).

¹⁸ See Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 94 CALIF. L. REV. (forthcoming 2006)

¹⁹ Title VII provides for the use of sex, but not race, as a Bona Fide Occupational Qualification (BFOQ). 42 U.S.C. 2000. For a broad and insightful discussion of the sex BFOQ, see Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 149 (2004).

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production), it does not. Although a few commentators have critiqued race-based casting,²⁰ no plaintiff has ever prevailed on such a claim.²¹

3. Suspect Description Reliance

Most legal scholars have called for the prohibition of racial profiling by law enforcement officers in ordinary policing. An officer engages in racial profiling if he stops, say, a young black man walking along a street because he thinks that young black men commit a disproportionate amount of street crime.²² During the past decade, racial profiling has been roundly condemned by scholarly commentators as wrongly stereotyping individuals on the basis of the group to which they belong.²³ Law enforcement agencies no longer openly support racial profiling, and an ever-growing number of jurisdictions have formally prohibited the practice.²⁴ In the aftermath of 9/11 there has, of course, been disagreement about the propriety of racial profiling to prevent further acts of terrorism.²⁵ While many commentators have remained opposed to racial profiling, others have argued that racial profiling is inevitable,²⁶ perhaps even desirable.²⁷ But even in the post 9/11 world,

²⁰ See e.g., Leonard M. Baynes, *White out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293 (2003); Bonnie Chen, *Mixing Law and Art: the Role of Anti-discrimination Law and Color-Blind Casting in Broadway Theater*, 16 HOFSTRA LAB. & EMP. L.J. 515 (1999); Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 520-21 (2001) (considering whether Congress should enact a statutory exception for the entertainment and news industries and discounting First Amendment concerns).

²¹ See *Cook v. Babbitt*, 819 F. Supp 1 (D. D.C. 1993).

²² R. Richard Banks, *Colorblind Equal Protection Doctrine*, *supra* note (defining a racial profile as an association of particular racial groups with particular crimes, based on the belief that crime rates differ across groups). See also Samuel R. Gross and Debra Livingston, *Racial Profiling under Attack*, 102 Colum.L.Rev. 1413 (2002)

²³ See David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 292-93 (1999); Kennedy, *RACE, CRIME, AND THE LAW* (1997); David Cole, *No Equal Justice*, 50-51 (1999); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 234-35.

²⁴ More than 20 states have enacted legislation prohibiting racial profiling. See, e.g., CAL. PENAL CODE § 13519.4 (2001); CONN. GEN. STAT. § 54-11 (2001); N.J. STAT. ANN. § 31.1 (West 2003); OKLA. STAT. tit. 22 § 34.3 (2001); R.I. GEN. LAWS § 31-21.1-2 (2001).

²⁵ See, e.g., David A. Harris, *Racial Profiling Revisited: "Just Common Sense" In the Fight Against Terror?*, 17 CRIM. JUST., Summer 2002, at 36, 37.

²⁶ See John Derbyshire, *A (Potentially) Useful Tool*, RESPONSIVE COMMUNITY, Winter 2001/2002, at 67, 67-70; Stephen J. Ellmann, *Racial Profiling and Terrorism*, 19 N.Y.L. SCH. J. HUMN. RTS. 305, 314-47 (2003); Michael Kinsley, *Discrimination We're*

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commentators remain opposed to racial profiling in the ordinary policing context that I have described.²⁸

A police officer decides to question and search a young black man wearing blue jeans because a woman accosted and robbed five blocks away fifteen minutes earlier described her assailant as a young black man wearing blue jeans. The officer admits that he would not have bothered to investigate a similarly attired young white man. I have previously described this practice as suspect description reliance.²⁹ Law enforcement officers with a description of an alleged assailant routinely choose to investigate only individuals of the same race as the assailant, even as they may disregard other aspects of the description (clothing, height, and weight, for example).³⁰

As with facilitative accommodation, suspect description reliance may take a responsive or proactive form. Current practices are best characterized as proactive. The policies of most (if not all) law enforcement agencies require officers to obtain a description of criminal assailants that includes race. If the crime witness or victim does not mention the race of the suspect, the police officer, according to department policy, is generally expected to ask. Indeed, officers are typically trained to interview crime witnesses and victims by asking specifically about the race of the assailant. Responsive suspect description practice would only include race in the suspect's description if the witness or victim offers it; the officer would not attempt to elicit any account of the suspect's race.

Suspect description reliance need not always involve a completed crime with a definite, if unapprehended, assailant. The officer may seek a particular individual when the officer is uncertain whether any crime has been committed. For example, someone may phone police headquarters to report a "suspicious" person in the neighborhood and to

Afraid to Be Against, Golden Rule of Racial Profiling, L.A. TIMES, Sept. 22, 2002, at M2.

²⁷ See, e.g., Mathias Risse & Richard J. Zeckhauser, *Racial Profiling* (Kennedy School of Government Working Paper Series No. RWP03-021, Sept. 2003); Peter H. Schuck, *Context is Everything with Racial Profiling*, L.A. TIMES, Jan. 27, 2002, at M6; Jonathan Turley, *Use Profiling Judiciously*, L.A. TIMES, Jan. 4, 2002, at B13.

²⁸ See Samuel R. Gross and Debra Livingston, *Racial Profiling under Attack*, 102 Colum.L.Rev. 1413 (2002)

²⁹ Banks, *Colorblind Equal Protection Doctrine*, supra note ____.

³⁰ See Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 51.

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ask the police to investigate.³¹ Or the police may receive a tip about someone alleged to be planning a crime. Alternatively, the police may know that a crime has been committed but know only that it was committed by a specific gang, comprised entirely of members of a particular race.³² Or the police may simply suspect that a known assailant had co-conspirators or accomplices of the same race as the assailant. In each of these cases, law enforcement officers would rely on race in deciding whom to investigate.

No court has ever invalidated suspect description reliance as racially discriminatory.³³ As the Sixth Circuit has stated, “common sense dictates that, when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the perpetrator known to the officer include race.”³⁴ Other courts have reached similar conclusions,³⁵ sometimes

³¹ See, e.g., Brenda Sapino Jeffreys, *Arrested for his Race? Judge’s Civil Rights Suit Ends in Settlement with City of Houston*, TEX. LAW., Dec. 4, 2000, at 1 (describing an incident in which a black judge was placed under arrest by police officers investigating a report of a suspicious person in a predominantly white neighborhood); see also *People v. Smith*, 566 N.E.2d 939, 942 (Ill. App. Ct. 1991) (describing police questioning of an individual on the basis of a report of a “suspicious” black male); *Authorities to Investigate Stop and Search Incident*, N.Y. TIMES, May 25, 2001, at A21 (describing West Orange New Jersey police officers’ detention of ten unarmed black teenagers preparing to attend their prom after anonymous caller stated that one of them had a gun).

³² Suppose, for example, that an officer stops a young black man wearing a red shirt and baseball hat walking on the street at night because a red shirt and baseball hat are widely known to be markers of a particularly violent African-American street gang, most of whose members have outstanding arrest warrants. The officer admittedly would not have stopped a young white man dressed in precisely the same manner.

³³ Partly this is because until recently, the U.S. Supreme Court segregated its general equal protection jurisprudence from criminal justice issues, developing distinct approaches in the civil and criminal contexts. See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2001-02 (1998). Over the last fifteen years, however, the Court has begun to apply equal protection jurisprudence to criminal contexts. See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996) (noting that the constitutional basis for objecting to racially discriminatory policing is the Equal Protection Clause rather than the Fourth Amendment).

³⁴ *United States v. Waldon*, 206 F.3d 597, 604 (6th Cir. 2000), *reh’g and reh’g en banc denied*, 206 F.3d 597 (6th Cir. 2000), *cert. denied*, 531 U.S. 881 (2000). See also *United States v. Davis*, 200 F.3d 1053 (7th Cir. 2000); *United States v. Lopez-Martinez*, 25 F.3d 1481 (10th Cir. 1994).

³⁵ See, e.g., *Buffkins v. City of Omaha*, 922 F.2d at 468. In *Buffkins*, officers stopped a black woman at an airport in part based on a tip that a black person carrying drugs would arrive at a specified time on a flight from Denver. Although the only physical characteristic relied on by the police was Buffkins’s race, the court dismissed her racial

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simply concluding that race can serve as an “identifying characteristic.”³⁶ Courts reach this conclusion even when the description is used to stop large numbers of people.³⁷ Suspect description reliance is so widely accepted among law enforcement agencies that even the most adamant denunciations of racial profiling yield no criticism of suspect description reliance.³⁸ Scholarly critics of racial profiling have been similarly accepting of suspect description reliance.³⁹

B. The Racial Classification Rule

A policy challenged as racially discriminatory is subjected to the most demanding standard of judicial review—strict scrutiny—if it is a racial classification. The Supreme Court has never precisely defined the term racial classification, but the Court has noted that “whenever the government treats any person unequally because of his or her race, that

discrimination claim in a few sentences, given that her race matched that of the person described in the tip. *Id.*

³⁶ See, e.g., *State v. Ampey*, 609 P.2d 96, 97 (Ariz. App. 1980); see *Cartnail v. State*, 753 A.2d 519, 530 (Md. 2000) (“In looking at the description of the suspects, undoubtedly physical characteristics, such as race, gender, ethnicity, hair color, facial features, age, body build, or apparel of a suspect permits winnowing of innocent travelers.”). Courts that have invalidated police officers’ use of race-based suspect descriptions have done so because they provided too little information, not because they contained impermissible racial information. See e.g., *Davis v. Mississippi*, 394 U.S. 721 (1969). For rare examples of cases in which an equal protection challenge to a suspect description was brought (and promptly dismissed), see *United States v. Cuevas-Ceja*, 58 F. Supp. 2d 1175 (D. Or. 1999); *Valdez v. City of East Hartford*, 26 F. Supp. 2d 376 (D. Conn. 1998).

³⁷ Perhaps the most well known judicial decision concerning suspect description reliance is *Brown v. City of Oneonta*. In that case, the police investigated each of the approximately 300 young black men in an upstate New York town in order to apprehend an alleged assailant of an elderly woman. Although the officers admitted that they relied only on race in deciding whom to stop, the Second Circuit held that the officers’ decision to investigate only African-Americans did not warrant strict scrutiny under the equal protection clause. 221 F.3d 329 (2d Cir. 2000).

³⁸ For example, in a report that condemned racial profiling, the office of the New Jersey Attorney General stated: “No one disputes, of course, that police can take a person’s race into account in deciding whether the person is the individual who is described in a ‘wanted’ bulletin; in this instance, race or ethnicity is used only as an ‘identifier.’” Peter Verniero & Paul H. Zoubek, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 75-80* (1999).

³⁹ See, e.g., Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 9567, 1006-07 (1999).

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person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."⁴⁰

The racial classification inquiry proceeds separately from any inquiry into the justifications for the policy. Under the formal terms of equal protection doctrine, showing that a challenged practice involves a state actor who distinguishes among individuals on the basis of race in the distribution of some benefit or harm should be sufficient to justify characterizing a practice as a racial classification.

The Court has in the past declined to subject to strict scrutiny so-called benign discrimination, preferring instead to evaluate it under a less stringent standard of review.⁴¹ More recently, the Court has rejected the benign/invidious dichotomy when determining the appropriate level of scrutiny and declared that all racially discriminatory laws are subject to strict scrutiny.⁴² The decision whether to apply strict scrutiny no longer depends on any characterization of a challenged policy as benign or invidious.⁴³ The purpose of strict scrutiny, the Court has stated, is to distinguish those laws that are, in fact, benign from those that are

⁴⁰ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-230 (1995).

⁴¹ *See Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 325 (1978) (applying intermediate scrutiny, Justices White, Marshall, Blackmun, and Brennan described the U.C. Davis affirmative action program as "benign," while only Justice Powell applied strict scrutiny and the other four Justices decided the case on statutory grounds); *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

⁴² The standard of review issue was resolved in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989). *See also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("Our decisions have established that all laws that classify citizens on the basis of race ... are constitutionally suspect and must be strictly scrutinized."); *Johnson v. De Grandy*, 512 U.S. 997, 1029-30 (1994) ("[I]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." (quoting *Powers v. Ohio*, 499 U.S. 400 (1991))); *Johnson v. California*, 543 U.S. 499, 505 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). The Court has also appeared to subject sex-based laws to strict scrutiny. *See e.g., United States v. Virginia*, 518 U.S. 515 (1996); *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

⁴³ *See, e.g., United Jewish Orgs. v. Carey*, 430 U.S. 144, 173 (1997) ("Even in the pursuit of remedial objectives, an explicit assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.")

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invidious.⁴⁴ Rejection of the benign/invidious distinction as a means of determining the appropriate level of scrutiny severs the threshold question of whether a challenged policy constitutes a racial classification from any subsequent consideration of the policy's utility or justification.

The formal racial classification inquiry would thus seem to require simply that a state actor has treated individuals differently on account of race.⁴⁵ This assessment has 3 elements: i) the use of race, ii) by a state actor, iii) in a manner that treats individuals differently on account of their race.

Facilitative accommodation, suspect description reliance and race-based casting all distinguish among individuals on the basis of race and all distribute substantial benefits (or harms) on the basis of that racial distinction. In each case, an actor governed by the nondiscrimination mandate subjects individuals to differential on the basis of their race. The young black man, for example, would not have been stopped had he been white. Whether an actor is permitted to audition for a particular role may depend on her race. Whether a child is individually considered for adoption by a particular set of prospective adoptive parents may depend on the child's race.

In each case, the differential treatment is a consequence of the consideration of race by a decision-maker subject to the non-discrimination mandate. The denial of individual consideration made possible by adoption agencies' policies of facilitative accommodation is

⁴⁴ See, e.g., *Bush v. Vera*, 517 U.S. 952, 984 (1996) (plurality opinion) (“[W]e subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign . . . or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification.”); *J.A. Croson*, 488 U.S. at 493 (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”); *Johnson v. California*, 543 U.S. 499, 505 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 279 (2003).

⁴⁵ See e.g., *Adarand Constructors, Inc. v. Peña* 515 U.S. 200, 239 (1995) (Scalia J., concurring in the judgment) (emphasizing “the Constitution’s focus upon the individual”); *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (describing the injury of racial classification as a “denial of equal treatment . . . not the ultimate inability to obtain the benefit”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (describing the evil of the affirmative action plan at issue as denying certain citizens “the opportunity to compete for a fixed percentage of public contracts based solely upon their race”).

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precisely the type of harm that the Supreme Court has previously identified as an evil of racial classification.⁴⁶ Facilitative accommodation and race-based casting both allow race to be the basis for the denial of individualized consideration that is often described as integral to antidiscrimination law.

In sum, each of these practices is racially discriminatory in the formal sense contemplated by equal protection doctrine. According to the formal terms of the doctrine, each should be subject to strict scrutiny.

Part II: The Substantive Analysis

None of these practices are motivated by gross stereotypes or racial animus, and all aim to pursue an unquestionably legitimate non-racial goal. Moreover, the practices seem to operate symmetrically, and do not single out an historically disadvantaged racial group for unfavorable treatment.⁴⁷

Nonetheless, assessing the consequences of these practices is a bit more complicated than it might seem. Evaluation of these practices is more complicated and contestable than one might at first think, both because there are many variants of each practice and because even the same practice might be subject to differing moral assessments by different people. Thus, this Part has both normative and descriptive aims; it evaluates the morality of each practice and also provides an account of intuitions about each practice.

⁴⁶ See e.g., *Adarand Constructors, Inc. v. Peña* 515 U.S. 200, 239 (1995) (Scalia J., concurring in the judgment) (emphasizing “the Constitution’s focus upon the individual”); *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (describing the injury of racial classification as a “denial of equal treatment...not the ultimate inability to obtain the benefit”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (describing the evil of the affirmative action plan at issue as denying certain citizens “the opportunity to compete for a fixed percentage of public contracts based solely upon their race”).

⁴⁷ The police officer would rely on race no matter the race of the assailant. The casting director might well prefer white actors for some roles, and black actors for other roles. The social worker would defer to the racial preferences of prospective adoptive parents irrespective of their race and whatever the nature of their racial preference. So, while all these cases may ostensibly involve differential treatment on the basis of race, that differential treatment would cut against minorities in some cases and in favor of them in others.

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A. Facilitative Accommodation

Facilitative accommodation aims to promote the interests of adoptive parents and children by eliciting and attempting to meet the racial preferences of adoptive parents.

1. Expressive Consequences

Facilitative accommodation implies neither dislike, nor any offensive judgment about, or devaluation of, the character or abilities of members of any particular racial group. To the contrary, the practice seems an instrumentally rational means of achieving the legitimate non-racial goal of the placement of a child with a suitable adoptive family.

The social worker would explain, for example, that he sorts children by race because prospective adoptive parents almost always consider children on the basis of race anyway. If prospective adoptive parents are permitted to choose a child on the basis of race, then why prohibit the social worker from facilitating that preference? Why make it more difficult for potential adoptive parents by requiring that they consider individual children whom they know they will not want to adopt?

Moreover, facilitative accommodation might seem innocuous if one views the private race consciousness that it facilitates as itself unobjectionable.⁴⁸ Put simply, if one views an adoptive parent's desire for a child of a particular race as wholly legitimate, then facilitative accommodation would seem unobjectionable.⁴⁹ The private perception or preference is viewed as legitimate, and it seems a short step to extend that legitimacy to the acceptance of the state/institutional practice as well.⁵⁰ If prospective adoptive parents can choose a child on the basis of race, why make it more difficult for them to do so?

⁴⁸ The perceived legitimacy of the private perception or preference lends legitimacy to the state/institutional practice as well. Our normative evaluation of state practices are shaped by moral intuitions about the private race consciousness that they reflect.

⁴⁹ From this angle, these cases would be consistent with the Court's pronouncement in *Palmore v. Sidoti* that state policy should not give effect to private biases. If these forms of private race consciousness do not constitute bias, then their incorporation into state practice need not be viewed as offensive.

⁵⁰ This explanation of the perceived innocuousness of state practices runs counter to a longstanding conventional presumption or principle of liberalism: that of a sharp divide

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But facilitative accommodation need not necessarily be viewed as non-stigmatizing. In some instances adoptive parents' preference for a child of their same race may reflect a rank dislike of, and general aversion to, a particular group....

There are certainly other reasons that an adoptive parent may express a racial preference. A same race preference might simply signify a desire to mimic the biological family, a means of keeping private a fact that would become public knowledge were the child and parents of different races. Alternatively, a white parent might seek to adopt any non-black child as a means of opting out of an emotionally charged racial politics in which white parents and black children become unwilling combatants. Other forms of transracial adoption tend not to incite the virulent opposition that, in many places, still greets whites who adopt black children. Not only may the parents confront disapproval from whites, they would also need to contend with condemnation by many African-Americans, who may view their adoption of a black child as a form of cultural or racial imperialism.

Although it is impossible to know the precise mix of motives that shape adoptive parents' preferences, it does seem that the desire to conceal the fact of adoption has been declining in importance. Adoption is increasingly socially acceptable. Many parents choose to adopt children of a different race. Transracial adoptions by white parents though are more likely to involve Asian children (or children from some Latin American countries), rather than African-American or African children. The social meaning of these practices, then would reflect both intuitions about the mix of motives that underlie adoptive parents'

separating public and private. The public, comprised of the state and the market, is the domain of regulation, where power must be restrained, where individuals are granted rights against certain forms of adverse treatment. The private, in contrast, refers to the web of social relations where individuals may act free of the norms that guide and limit public action. The private represents the limits of the values that are incorporated into state action or decision-making in the public realm. So, while racial discrimination is prohibited when undertaken by the government, or when undertaken by employers or landlords or service providers, it is not prohibited when undertaken by individuals acting in their private capacity to construct their social world. So, people can choose their friends and associates, and lovers. They can, more or less, incorporate race into their social life however they see fit, without violating the law. So, the law, including antidiscrimination law, stops at the private lives and social relationships that individuals construct.

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preferences, and the moral valence attributed to particular types of motives.

The social meaning might also depend on the particular type of policy. Asking the prospective adoptive parents about their racial preference even when they have not expressed one, might seem more objectionable than simply responding to a spontaneously expressed preference.

2. Material Consequences

Although facilitative accommodation is formally symmetrical and even handed—black and white parents alike are permitted to express their preference—the practice might impact black and white children differently.⁵¹ Given the demographics of adoption,⁵² facilitative accommodation might both diminish the likelihood of adoption for black children and result in a higher proportion of white children being individually considered by prospective adoptive families. More specifically, most prospective adoptive parents prefer a child of their own race. Because the majority of adoptive parents are white, this same-race preference translates into many more adoptive homes available for white children than for black children. The disparity in the availability of adoptive families is exacerbated by the fact that the children in need of adoption are disproportionately African-American.

However, it is difficult to determine whether African-American children's decreased likelihood of adoption is a consequence of facilitative accommodation rather than simply parental preferences themselves. The policy itself would not disadvantage African-American children if it simply makes it easier for prospective adoptive parents to adopt the sort of child that they would choose to adopt irrespective of the existence of the practice. Indeed, the more attractive the adoption process, the more likely couples would enter into it and consequently the greater the number of children of all races who would be adopted. So,

⁵¹ Even if white children did suffer a magnitude of injury to that of black children, that would not immunize the racial classification from strict scrutiny or otherwise validate it as nondiscriminatory. As the Supreme Court has noted, "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

⁵² Most prospective adoptive parents are white, while children in need of adoption are disproportionately African-American.

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facilitative accommodation might actually benefit African-American children, among others, by making the adoption process more appealing and thereby increasing the number of couples who enter into it.

On the other hand, though, facilitative accommodation might decrease the likelihood of adoption for African-American children in particular if the consideration of individual children even from “nonpreferred” racial groups would cause families to adopt a child from a racial group that they otherwise would not have considered. On this account, facilitative accommodation would rigidify or stabilize racial preferences, whereas not allowing parents to categorically preclude an entire racial group from consideration could, conceivably, facilitate the transformation of prospective adoptive parents’ racial preferences. Some prospective adoptive parents who initially express a preference for a white child might nonetheless agree to adopt a black one if only presented with the opportunity, and encouraged to rethink their desires.

However, if individual consideration would not change preferences, then the ending of facilitative accommodation might fail to increase adoption rates for African-American children, as well as expose them to unnecessary and potentially hurtful rejection. On this view, the maintenance of facilitative accommodation would neither decrease adoption of African-American children, nor reinforce existing race based preferences.

Extending the examination of facilitative accommodation beyond children complicates the analysis further still. Because the pool of prospective adoptive parents includes African-Americans, any burden or inconvenience that the cessation of facilitative accommodation would impose upon prospective adoptive parents would fall upon African-Americans as well. The prospect of ending facilitative accommodation not only has indeterminate consequences for African-American children, it may pit the interests of those children against the interests of prospective adoptive parents who are African-American.

In any event, requiring social workers to ignore parents’ racial preference would be difficult to implement. It may be unwise as well. Even if social workers do not introduce race into the adoption process, prospective adoptive parents probably would. They would indicate clearly their racial preferences, just as they would assert preferences with respect to a variety of other characteristics. Would we expect social workers to ignore what they hear? Would it be wise, or even feasible, for social workers to ignore preferences on the basis of which

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prospective adoptive parents are determined to act? Should social workers expose children to unnecessary rejection by prospective adoptive parents?

Even if social workers told parents that they were no longer permitted to defer to the parents' racial preferences, prospective adoptive parents would not cease to think about race. They might request a "child who looks like them" or a child who could "pass" for their biological child. Social workers in turn would know that, more than any of the many characteristics parent and child may share, race is what determines whether a child looks like a parent.

B. Race-based Casting

Employers are permitted to rely on race in hiring actors as a means of furthering their First Amendment interest in artistic expression.

1. Expressive Consequences

Casting directors reliance on race is taken for granted, by many at least as wholly unobjectionable. If the moviegoer, for example, will attach significance to the race of the actors on the screen, then why should a director, whose job is to create certain meanings, not be able to take into account the influence of an actor's race? The director would consider race for the same reason that the director would consider myriad other factors that might shape viewers' experience of the movie.

As with adoption, the social meaning of racial reliance might vary depending on the particulars. In some dramatic roles, race is unquestionably integral to the part. Consider, for example, a movie concerning an interracial romance. Few people would object to moviegoers attending closely to the race of the actors, or being a bit put off if the actors are of the same race, contrary to the story. It seems reasonable to think that realism should govern, if race is central to the story. Moviegoers might expect that sort of realism, just as they would expect a heterosexual romance to be depicted by a man and a woman.

The seeming ordinariness of racial realism in the case of an interracial romance, however, highlights the cultural power of race even in other contexts. If an actor's race is relevant when the story concerns a

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monoracial romance. Having different race actors in any romantic situation might change the meaning of the scene. To have an interracial romance when both actors are white would, from this angle, be no different than depicting a non-interracial romance with two actors who are of different races. In either case, the audience would have to suppress their reaction to the apparent race of the actors. Similarly, race would matter in an role that is any way “about race”. Imagine a story about slavery, or about life during de jure segregation in the South, for example.⁵³

On the other hand, some responses to race might seem morally troubling. Consider, for example, this reaction to an race submitted to ethics advice columnist: “Last Christmas I took my grandchildren to “The Nutcracker,” a ballet I love. My enjoyment was severely marred by the appearance of a black snowflake and then, worse, a black snow King. The aesthetic incongruity was inconceivable. The entire ballet was spoiled. It is analogous to a one-legged midget playing Tarzan. Does this make me a racist?”

The ethics adviser answered the “this does make you a racist—not in the sense of exercising a virulent antipathy toward African-Americans but of being, like most of us, affected by feelings about race.” The adviser faults the letter writer for, in essence, a failure of imagination, for being able and willing to indulge the fantasy that people were snowflakes, for example, but not to indulge the fantasy that a black person could be a snowflake.

Acknowledgement of the imagination that is always involved in viewing a theatrical production raises the key question: How expansive an imagination do we expect movie viewers to have? Audience members may always notice race—in the sense of being visually aware

⁵³ On this logic, though, race might be relevant to a startling array of roles and themes. It might be hard to imagine a story about American history in which race is truly irrelevant. The American Revolution, industrialization, the expansion of the western frontier, all these stories involve race, in the sense that the race of the characters would be a part of the story, and changing the race of an actor would change the story in some important sense. One might wonder whether there are contemporary stories where race literally does not matter. Stories about work, health, schooling, and suburban living, for example, are all stories about race, in one way or another. Changing the actors’ races would matter even when race is ostensibly unrelated to the story, because race is so socially relevant that most moviegoers would take into account and respond to the range of meanings created by the race of the actors playing the various roles.

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of the physical characteristics that signify race—but they need not always be so overwhelmed or tied to the meanings that are associated with race. What made the letter writer’s response to the Nutcracker objectionable is that viewer associated purity with white people but not black people. The snowflakes signified purity, and a white person in that role seemed fitting, to the viewer, while a black person portraying a snowflake seemed incongruous. I doubt that the viewer would have been any more comfortable resolving the “incongruity” by assembling a cast of all African-American snowflakes. It is that association that seems objectionable, a case of the viewer bringing his own racism to the experience and interpretation of the play.

2. Material Consequences

As with facilitative accommodation, the formal symmetry of race-based casting does not preclude its disadvantaging historically disfavored racial groups. Race-based casting has been criticized as limiting both the amount and type of roles available to racial minority actors. If the overwhelming majority of roles were reserved for white actors (consistent with tradition) African-Americans would suffer two distinct though related harms. First, African-Americans would find it more difficult than equally talented white actors to obtain roles in the movie and television industries. Second, African-Americans as a group would be underrepresented in the images produced by Hollywood.

It is unclear whether race-based casting disadvantages black actors as a group, much less harms African-Americans more generally. The invalidation of racial restrictions on auditions might have the same sort of salutary effect on outcomes that we contemplated in the adoption context. Talented racial minority actors might land roles for which they otherwise would not have been permitted to audition. Prohibiting the racial restrictions would facilitate the transformation of the preferences of the casting directors, and alter the cultural imagery of American society more generally.

However, while the invalidation of racially restrictive casting might undermine the racial segregation of actors and roles, it might not result in black actors landing more roles in the aggregate. Stated differently, it is not clear that the current system of race-based casting results in black actors receiving fewer roles than they deserve and than racial equity would require. It is difficult, of course, to define racial equity in this context. Perhaps the simplest criterion would be that racial

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equity would require that black actors' share of available roles be comparable to the percentage of African-Americans in the United States population. With this sort of standard as the measure, the best available evidence suggest that black actors as a group are not disadvantaged by the current system of race-based casting. Black actors receive parts that are roughly in line with the percentage of Blacks in the United States population.⁵⁴ Of course, it could well be the case that black actors would receive even more roles were the current racial restrictions eliminated. Just as African-Americans seem to be "overrepresented" in other aspects of the entertainment industry, they may similarly constitute a disproportionate percentage of actors seeking work.

The consequences of attempting to prohibit race based casting would be difficult to forecast. Elimination of formal announcements of racial exclusivity would not eliminate race from the decision-making of casting directors, much less from the thinking of the story and script writers who have created and imaginatively populated the roles in a planned production. Specific roles would continue to be filled on the basis of race, as it would be difficult for writers and directors to imagine characters without giving at least some thought to their race, and maybe having a vision of the race of particular characters. Casting agents might say that they cease to rely on race, but they would no doubt continue to strive for a certain "feel" for a particular role, a calculus in which race would often play a part. Casting agents might describe their preference as the result of intuition, hunch or gut feeling.

C. Suspect Description Reliance

Law enforcement officers' reliance on race-based suspect descriptions may seem to many the most unobjectionable use of race, both in terms of impact and social meaning.

1. Expressive Consequences

On this reasoning, police officers could use race to select suspects if the witness to the crime justifiably used race in describing the assailant. Certainly, if the officer presented the witness a lineup of potential suspects, the witness could use race in identifying the assailant.

⁵⁴ [needs details here, broken down by race and sex and types of roles; e.g. leading actor, supporting, bit part]

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If the police officer could escort the witness through the neighborhood where the crime occurred and have the witness, who would invariably rely upon race, point out the assailant, then why shouldn't the officer be able to take the witness's description and conduct the search on his own? Why not allow the officer, as the agent of the witness, to use race in the same manner as the witness?

Suspect description reliance might seem especially innocuous if one believes that race is treated simply as a marker of appearance.⁵⁵ The police officer might genuinely explain that they are simply seeking someone with a particular appearance. The officer would explain that he relied on race simply as a proxy for, or marker of, appearance, and that such a use of race is especially unobjectionable. The eyewitness who describes the race of an assailant is simply using race as a marker of appearance. In this context, race is a shorthand way of describing someone, a proxy for physical characteristics that it would be much more difficult and time consuming, and less useful, to describe one-by-one. Relying on race as a marker of appearance seems somehow fundamentally different from relying on race as status, both less stigmatic and more reasonable. Indeed, most people would view it as odd to prohibit the use of race in criminal investigations. Witnesses would display looks of incredulity when told that their description of an assailant's race would be ignored or treated as no more important than eye or hair color. What if the victim could remember only the assailant's race? Would we really expect law enforcement officers to ignore a crime victim's description of her assailant as, say, a young black man? Should witnesses be required to use descriptors such as blond hair and blue eyes; narrow eyes and straight black hair; dark brown skin and tightly curled black hair—characteristics that invariably and immediately would be re-encoded by everyone in terms of race.

At the same time, though, reliance on race as a marker of appearance might be viewed as more closely related to the social status of race. Race is defined largely in terms of appearance. A person is socially defined as "black" if she appears to be so. So to say that a decision is made on the basis of race is, tautologically, to say that the decision was made on the basis of appearance. Race is such a fundamental marker of appearance because race is such a fundamental

⁵⁵ Cf. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205-06 (5th Cir. 1977) (analogizing race in the adoption context to hair color, eye color, and other physical attributes.)

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aspect of our social organization,⁵⁶ which, in turn, is a consequence of an historically hierarchical and still racially unequal society.

Perhaps an example would make more clear that the use of race as appearance be regarded as “racial.” A few years ago, my son, then 4 years old, focused on an image in the newspaper that I was reading. It was an advertisement for a woman’s perfume, I think. The ad pictured an attractive woman. My son insisted that this woman was Rose, who is the mother of his best friend. I know that the woman in the picture was not Rose. For one, she is not a model, and therefore would not be appearing in an ad in the New York Times. Moreover, this woman looks NOTHING like Rose. But my son insisted, and so I decided to humor him, to convince him not only that this woman was not Rose, but that she did not even bear any resemblance to Rose. My son studied the picture. A few minutes later, I asked him, “Okay what makes you think this woman looks like Rose?” To my surprise, he had quite a long list of reasons for finding a resemblance. They had the same color hair, they both had straight hair, their complexion was similar, they appeared to be about the same height, and to have the same body type. He went on and on. He had seen similarities in so many features that I had to stop him. In response to his listing of a dozen or more features, I had one, a trump. It was race. “The woman in the photo is not Chinese,” I told him. “Rose is.” To my eye, that one distinction made all the difference. These women could not possibly look alike if one was Chinese and the other as not. My son may have identified more features in common than I did, but as a matter of the social reality that determines what similarities count, I was correct. No matter what they share in common, if two women are not of the same race, they do not look alike.

Judgments of physical appearance, in our society, are invariably bound up with race. One might think of the social construction of race as intertwining the two, but it is probably more to the point to say that vision is itself socially constructed. Perception—the very process of seeing—is mediated by the groupings or categories that are socially

⁵⁶ A parent and child of the same race, for example, appear to look more alike than a parent and child of a different race because our implicit theory of race constrains judgments of similarity, physical and otherwise. People within racial groups are not viewed as similar to one another because they share the same physical characteristics; instead, their physical characteristics are judged to be similar because they share the same race. The categories produce the perceived similarity, not the other way around. See Jennifer Lynn Eberhardt & Jennifer Lynn Randall, *The Essential Notion of Race*, 8 PSYCHOL. SCI. 198, 199 (1997) (book review).

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salient and culturally significant. We see similarity as a matter of race in part because race is such an important social category. In a sense, people become physically visible to us through our attention to the social groups to which they belong.

Race might be especially salient in the context of crime. Race may be memorable in other settings, but absolutely unforgettable when it comes to criminal assailants, as though race acquires some greater relevance when a crime is being committed.

2. Material Consequences

Even if applied irrespective of the race of the assailant, suspect description reliance would very likely lead to greater investigation of innocent African-Americans than innocent whites. Innocent African-Americans would be disproportionately subject to investigation by law enforcement officers, relative to whites, if crime rates are substantially higher among African-Americans. If law enforcement officers have descriptions primarily of African-American assailants, then the innocent people who are subjected to investigation would be disproportionately African-American as well. By extension, innocent African-Americans would also be disproportionately subject to the rare, but inevitable, mishaps associated with police-civilian contacts. Indeed, race-based suspect descriptions have played a prominent (although often overlooked) role in many publicized controversies regarding police selection and treatment of criminal suspects. The encounter that led to the killing of Amadou Diallo, for example, may have begun with suspect description. In the aggregate, suspect description reliance may burden innocent African-Americans as much as the more highly publicized practice of racial profiling.

However, these burdens may be offset by certain benefits. While suspect description reliance, for example, disadvantages those innocent African-Americans who are unlucky enough to be investigated, or even mistreated, by law enforcement officers, it presumably benefits the black community as a whole, if it leads to the apprehension of more wrongdoers who might otherwise victimize members of that community. The failure to provide the benefit of protection against crime could itself be described as racially subordinating. Racially equitable provision of the benefit of crime protection could require either that African-American wrongdoers be apprehended at the same rate as white wrongdoers or, a more stringent standard, that disadvantaged African-

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American communities be no more subject to criminal victimization than more affluent white communities. Either norm of racial equity could conceivably require that many more, rather than fewer, African-Americans be investigated, which, in turn, would mean that many more innocent African-Americans would be investigated as well.

Suspect description reliance thus embodies a tradeoff between different types of racially disadvantaging practices. Less suspect description reliance would benefit those innocent blacks who would have been stopped. More suspect description reliance would benefit the African-American community, including the innocents whose investigation is a necessary consequence of stepped up efforts to apprehend wrongdoers.

Finally, the benefits and burdens of law enforcement officer' reliance on race per se necessarily depends on some comparison to how the suspect selection process might operate if race based suspect descriptions were prohibited. The racial burden of race-based suspect selection might be defined, more precisely, as the additional group burden attributable to race, compared to a suspect selection process that does not rely on race. It is difficult to envision that alternative process. Would it require that officers rely on appearance, including, for example, complexion? If so, that process would certainly disproportionately impact innocent African-Americans, relative to innocent whites, as long as crime rates are higher among African-Americans. In this sort of non-race-based process, innocent African-Americans would be more subject to investigation than innocent whites because innocent African-Americans would be more likely than innocent whites to look like an at-large assailant, even disregarding race per se.

Part III: The Doctrinal Quandary

A. Non-Recognition

As the preceding discussion suggests, there are a number of reasons why these practices should be permissible. However persuasive these considerations in terms of permissibility, they do not bear on the threshold question of classification, of whether these practices treat individuals differently on account of race. The formal evenhandedness of the practices, for example, provides little reason for characterizing them as nondiscriminatory. An admittedly race-based practice does not become nondiscriminatory simply because it applies to all groups. The

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only Supreme Court decisions to support what one might describe as a symmetry exemption from strict scrutiny are *Plessy v. Ferguson*⁵⁷ and *Pace v. Alabama*,⁵⁸ cases whose reasoning and results have long been discredited. More recent decisions have explicitly rejected the symmetry argument.⁵⁹ As the Court observed in *Shelley v. Kraemer* in considering a symmetry argument in favor of racially restrictive covenants, the equal protection clause does not countenance the “indiscriminate imposition of inequalities” on the basis of race.⁶⁰

Similarly, the purported rationality of each practices does not undermine the fact that it entails treating individuals differently on account of race.⁶¹

Even if one grants that the more formal types of these practices should be viewed as a racial classification, one might distinguish such policies from more informal and less affirmative considerations of race. In each case, though, a decision-maker to whom the non-discrimination mandate would apply would have treated individuals differently on the basis of race. The police officer would have decided which individuals to investigate on the basis of the race-based suspect description provided by the crime witness. The social worker would have decided not to present black children to a prospective adoptive parent who communicates a desire not to adopt a black child. Casting agents or directors would continue to associate particular roles with actors from specific racial groups, and to make decisions based on those associations. The racial classification rule would apply even to much less formalized uses of race.

⁵⁷ 163 U.S. 537 (1896).

⁵⁸ 106 U.S. 583 (1883).

⁵⁹ See, e.g., *Johnson v. DeGrandy*, 512 U.S. 997, 1029-1030 (1994) (Describing as “axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.”) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

⁶⁰ *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); see also *McLaughlin v. Florida*, 379 U.S. 184 (1964).

⁶¹ Evidence of animus or, conversely, rational might bear on the characterization of a formally race neutral practice. If a decision-maker denies having acted on the basis of race, for example, the rationality of the practice might help a fact-finder to decide whether the challenged decision stemmed from consideration of race or from some other, more legitimate, factor. But one need not consider the issue of rationality, when, as with our cases, the practice is overtly race dependent.

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B. Colorblindness

Non-recognition does not determine the permissibility of particular practices but it does create an ideological effect. Non-recognition produces, at the level of doctrine, the ideology of colorblindness. The ideology of colorblindness could only coexist with the permissibility of these practices if the practices are characterized as nondiscriminatory. The ideology of colorblindness, in turn, shapes the perception of race dependent practices, both those that are recognized as discriminatory as well as those that are not.

To understand how non-recognition produces the ideology of colorblindness, imagine that such practices were permitted by satisfying strict scrutiny rather than being exempted from it. For a challenged practice to withstand the rigors of strict scrutiny it must further a compelling governmental interest. Because the list of compelling interests is short,⁶² most practices that are accorded strict scrutiny are struck down.⁶³ The upholding of facilitative accommodation, race-based casting, and suspect description reliance would represent a profound shift in antidiscrimination law.

The upholding of these practices would necessarily represent a relaxation of the strict scrutiny test. For these practices to be upheld the need to apprehend criminal assailants, the choice of actors of for specific roles, and the best interests of children in need of adoption would all need to be deemed compelling. Upholding these practices would require finding compelling interests where there had been none previously, expanding the category of interests deemed compelling. The Supreme Court has on at least one occasion declined to declare compelling the state interest in the apprehension of criminal wrongdoers.⁶⁴ Similarly, the Court has never found the best interests of children sufficiently compelling to warrant racial discrimination. A holding that these practices satisfy strict scrutiny would thus necessarily entail a lengthening of the list of compelling interests.

⁶² The Court has accepted as compelling state interests the remedying of past discrimination and the pursuit of student body diversity by an institution of higher education. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁶³ Even if the asserted interest is accepted as compelling, a specific use of race must still be found to be narrowly tailored.

⁶⁴ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 (1976) (noting the “substantiality” of the public interest served by controlling the flow of undocumented immigrants).

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If the compelling interest test is met in these circumstances, then so too would it be met in many other cases that, under current law, would not seem to present compelling interests. However compelling the interest that would need to be asserted to survive strict scrutiny, “compelling” could no longer be equated with extraordinarily rare or unusual. As the number of compelling interests multiply,⁶⁵ the less stringent the strict scrutiny test would become, and the weaker its presumption against the permissibility of discriminatory practices. Such a doctrinal transformation would bring into existence a new category of governmental practices: those that are recognized as racially discriminatory, yet permitted nonetheless.

So too would the recognition of race based casting as permissible even though discriminatory undermine the presumption against race based employment practices. The federal employment discrimination law does not currently permit race to be used as a bona fide occupational qualification. To treat race based casting as permissible discrimination, rather than as non-discriminatory, would entail the creation of a BFOQ defense for race based discrimination in employment. However, broad the BFOQ, its existence would undermine any notion that federal employment discrimination law flatly prohibits racial discrimination in employment.

In creating a category of discriminatory, yet permissible, practices, these developments would decouple the normative and descriptive components of the concept of racial discrimination. The term racial discrimination describes; it refers, paradigmatically, to the practice of distinguishing among individuals on the basis of their race and then using race as a basis for treating them differently. The term racial discrimination though also entails a normative judgment; it connotes moral condemnation. One has not only treated people differently, one has done a bad thing. To characterize a practice as racially discriminatory, then, is simultaneously to describe and to condemn it. The intertwining of characterization and condemnation is integral to the

⁶⁵ The more state interests that are characterized as compelling, the easier it would become to find additional compelling interests. Conversely, the more numerous the interests already designated compelling, the more difficult it would be for a judge not to declare an interest compelling when doing so would permit a seemingly sensible use of race. The compelling interest requirement thus would become a more readily surmounted hurdle.

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doctrine, and to popular discourse as well. That coupling would be undone by the acknowledgement of practices that are discriminatory in the descriptive sense but that do not warrant condemnation and prohibition.

The decoupling of descriptive and evaluative judgments would reshape the prevailing understanding of racial discrimination and of antidiscrimination law. The facile assumption that antidiscrimination law implements a near inviolate prohibition of discriminatory practices would be exposed as incorrect. Moreover, it would become increasingly difficult to proclaim that practices that treat individuals differently by race are, for that reason alone, inherently repugnant and worthy of near categorical prohibition.

The characterization of permissible race dependent practices as nondiscriminatory is a means of maintaining the ideological primacy of colorblindness. In permitting race-dependent practices without recognizing them as an exception to the nondiscrimination mandate, non-recognition helps to maintain the fiction that nearly all race-dependent practices are objectionable, and therefore summarily prohibited. A common intuition is that anti-discrimination law is a response to the evil of discrimination, but this analysis suggests that the perceived evil of racial discrimination may also be a consequence of antidiscrimination law. Antidiscrimination doctrine produces, rather than merely responds to, the moral condemnation associated with race-dependent decision-making.

While perhaps not unique to the United States, it is worth noting that the ideology of colorblindness is not shared by many other countries, including those with tortured racial histories. The Constitution of South Africa, for example, does not purport to prohibit racial discrimination. Rather, it insulates the characterization of a practice from the question of permissibility. A practice might draw a racial distinction without being discriminatory, and a practice may be discriminatory without being prohibited. The South African Constitution thus relies on a continuum of race based practices, rather than attempting to force practices into the binary categories that United States equal protection doctrine contemplates.

Thinking through these issues sheds light not only on the operation of antidiscrimination doctrine but, more generally, on popular

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thinking about racial discrimination. At the level of doctrine, it is true that all racial classifications are subject to strict scrutiny and are almost always invalidated. But this claim is only true in a tautological sense. The meaning of racial classification is circumscribed so as to only include those race dependent practices that are likely candidates for invalidation. Race dependent practices that are certain to be upheld are simply not subjected to strict scrutiny, no matter how plain their differential and unfavorable treatment of individuals on account of race. More generally, whether a race dependent practice counts as racial discrimination is often based on whether the practice is viewed as undesirable. An objectionable race dependent practice would be placed within the bounds of discrimination, while a seemingly unobjectionable practice would more likely be placed beyond the bounds of the concept of discrimination.

C. The Antisubordination Alternative

One plausible implication of non-recognition is that it signifies a problem with current doctrine. Current antidiscrimination law, according to this reasoning, wrongly supposes that all discrimination is presumptively immoral, and therefore should be categorically disfavored. In fact, as the example of these practices suggests, not all discriminations are the same. Some are more objectionable (or desirable) than others. The difficulty arises from the fact that the doctrine stubbornly insists on assuming a moral equivalence of discriminations, an equivalence which we know to be fallacious.

However, a more substantively oriented doctrine—something akin to an anti-subordination approach--would not necessarily solve the problem. As the foregoing substantive analysis suggests, these practices are not necessarily invidious. But neither are they necessarily benign. They impose real burdens, even as they offer unquestioned benefits. The indeterminacy of the impact analysis partly reflects empirical uncertainty. It is difficult to know how these uses of race might and do play out in practice. But the difficulty also reflects heterogeneity in values. Even if we could know for certain how particular uses of race might play out, there could be disagreement about whether the uses are benign or invidious because analysts might have different ideas of what it means for a practice to be benign or invidious. They might have different visions of racial equality, different accounts of the sort of society toward which we should be striving. [more to come]

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D. Ideological Effects [very, very incomplete]

Non-recognition produces an ideological effect, which shapes understanding of these practices. Non-recognition makes these practices seem wholly unobjectionable. Their acceptance under a relaxed form of scrutiny such as rationality review suggests that such practices do not even implicate the racial equality concerns that animate antidiscrimination law. Consequently, these practices, as a result of non-recognition, need not be justified. Rather, once they are characterized as non-discriminatory, the inquiry comes to an end. Thus, they receive less scrutiny, both in a doctrinal sense and also in an analytical sense, than if they were acknowledged as formally discriminatory.

Just as non-recognition renders some race dependent practices so innocuous as to seem invisible, so too does it shape perception of those race dependent practices that are acknowledged as discriminatory. Affirmative action admissions policies in higher education, for example, seem so extraordinary partly because they are depicted as unusual. The heavy burden of justification that confronts such programs, in the legal and political, arises in part from the assumption that such programs would stand practically alone as permissible race dependent practices. Consider how background assumptions about the prevalence of race dependent policies influence debate about affirmative action. Currently, a university that implements an affirmative action admissions policy must overcome a strong presumption against such a practice. The presumption gains force from the belief that the law rarely permits such practices, that affirmative action stands as a near lone such practice in a society that has disavowed race dependent practices as woeful reminders of Jim Crow if not current instances of racial injustice. Alternatively, if affirmative action were understood as one of many permissible race dependent practices—in other words if the law were understood to permit many such practices—then the burden that affirmative action proponents would need to overcome would be less daunting. Affirmative action would no longer be viewed as some rare exception to a categorical prohibition of race dependent practices, but instead as one of many race dependent practices that courts, for a variety of reasons, permit.

Indeed, the same sort of dynamic can be seen in existing doctrine, in which affirmative action is most permissible (or only permissible)

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when situated under the umbrella of diversity. As an element of diversity, race becomes one of many types of diversity that an institution seeks. Thus, the university's consideration of race may be seen as of one piece with the university's consideration of a variety of other characteristics, not as some dangerous exception to an otherwise generally applicable principle.

While the shortcomings of the formal racial classification/strict scrutiny framework of existing doctrine are undeniable, explicit reliance on the benign/invidious asymmetry in determining the standard of review would confront similar problems. Although suspect description reliance, race based casting and facilitative accommodation might be viewed as racially innocuous and unquestionably useful, these practices also impose concrete race specific harms. Evaluating whether the race specific impacts of these policies warrant the designation benign or invidious is complicated, as it is difficult both to assess the magnitude of particular burdens and the extent to which they are offset by corresponding race specific benefits.

The characterization of these practices as non-discriminatory seems to obscure their race related burdens. Not viewing a practice as discriminatory renders its harms less salient, if apparent at all. Non-recognition creates a frame, so to speak, for viewing a practice that inclines one not to look for any race specific harms, and not to think of the practice in racial terms at all. The assumption that race based suspect selection, for example, is not racially discriminatory makes the racial burdens of suspect description reliance disappear. The racial burden seems non-existent even though dramatically different rates of violent crime across groups render innocent African-Americans much more likely than innocent whites to be stopped, searched, or even physically abused because they are thought to resemble a suspect. One might view the disproportionate burdening of innocent African-Americans as at least partly a consequence of law. Yet, in fact, the disproportionate investigation of innocent African-Americans is virtually never linked to suspect description reliance. To the contrary, such outcomes may be associated with racial profiling even if, as in the Diallo case, a suspect

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description played a prominent role in the police-citizen encounter.⁶⁶ Because suspect description reliance is not thought to be racially discriminatory, its racial burdens recede from view.

Similarly, because the decision to cast a white actor in a role—even where race is not obviously relevant to the character—is not seen as an instance of racial discrimination, the fact that such decisions could dramatically limit the job opportunities of black actors becomes less salient, if noticed at all. And, even as analysts of the adoption process have examined the problem of unadopted black children, there has been little attention to the role of facilitative accommodation in exacerbating that problem.

If the analysis thus far is correct—that is, if neither of the two obvious doctrinal possibilities would solve the problem—then perhaps antidiscrimination doctrine should be understood differently. Rather than conceptualizing the doctrine as an expression of some transcendent commitment, either to anticlassification or to antisubordination, we should instead develop a deeper appreciation of the extent to which the doctrine represents a working out of our antidiscrimination intuitions and commitments as they evolve along with our society. Our antidiscrimination commitment is neither complete, nor static. Just as many practices that were accepted in the past might seem permissible now, so too may practices that now seem unobjectionable come to be regarded as invidious in the future.⁶⁷

⁶⁶ See Francie Latour, *Protests Rise Over Diallo Verdict*, Boston Globe,

Feb. 27, 2000, at A6.

⁶⁷ My own sense is that our society would be well served if it were to evolve toward the aspiration of colorblindness. I do not mean colorblindness in the sense that people, literally, would not see the physical indicators of race, but instead colorblindness in the sense that those physical features would lose the special salience with which the concept of race endows them. One could even imagine race, as a social category, fading away, in the same way that people no longer think of Germans or the Irish as a grouping with no on-going significance, a symbolic identity with no material consequences. The law should facilitate the evolution of prevailing norms toward a society where race would have lost so much salience as to cease to be a meaningful social category.

Conclusion

[to come]