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It's Structural, Not Personal: Disrupting the Fallacy That Renders the Court "Unreasonably" Blind to the Meaning of Color in Policing

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ABSTRACT

Unreasonable makes a number of important contributions to discourses on race, crime and justice. First, a central claim of the book is that within policing, race discrimination is not an individual phenomenon or a problem of bad police officers. Rather, bias is seamlessly built in to policing practices, training, accountability policies, and judicial approaches to evaluating police conduct under the Fourth Amendment.

Using narratives and hypotheticals—within the Critical Race Theory tradition—to engage the holdings of foundational Fourth Amendment cases, the text reveals many subtle ways in which race shapes policing. By revealing the structure, we additionally see how the Supreme Court's commitments to colorblindness have prevented a majority of the Justices from acknowledging the work race is doing.

A second contribution of the book is that it provides an opportunity for one to explore a disjuncture in constitutional jurisprudence. The Court that is ostensibly cannot see to the effects of race in the Fourth Amendment context, seems obsessed with limiting the consideration and impact of the social category in the context of its Equal Protection race-conscious benefits programs.

The major intervention within the text is that it challenges the reader to reimagine Fourth Amendment doctrine in a manner that asks whether the cases have ignored how racial considerations permeate policing. It does so by raising critical questions in the hypotheticals and rewriting the majority opinion from Whren v. U.S. The rewritten opinion exposes the misunderstanding of race that allowed the Court to previously conclude the presence of race bias was irrelevant as long as an officer had probable cause to believe the person stopped had committed a low-level civil infraction.

Alongside its critique of bias in policing the text introduces a number empirical studies that demonstrate the disproportionate impact of policing and police violence on Black bodies. By clearly explicating how race bias is operating in stops and the real consequences of racialized policing in people's lives, there is hope for a future where a differently-constituted Court might see and address such issues in its Fourth Amendment jurisprudence and beyond.

In terms of areas where space for further consideration exists, there could have been an additional focus on legislative as well as judicial remedies to bias in policing. Also, while Unreasonable deftly articulates the ways in which race infects policing, it does not fully expound on the trauma racialized policing produces in the lives of those who are subject to it. Ultimately, however, Unreasonable should be praised for advancing an important critique of the limits of the Fourth Amendment through the use of an innovative mix of empirical and critical tools.

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INTRODUCTION: ON SEEING AND NOT SEEING RACE IN LAW

In his new book, *Unreasonable: Black Lives, Police Power, and the Fourth Amendment*,[1] UCLA Law Professor Devon W. Carbado has stories to tell. As a man of West Indian descent who grew up outside of the United States, Professor Carbado's socialization to American race norms, or racial naturalization, took place through social encounters—including police stops designed to convey behavioral expectations for Black men. In *Unreasonable*'s prologue, he offers a story of his own personal experience with policing and how this race naturalization process took place.[2] In his account of this particular police stop, he describes how he quickly discerned that his asking police even reasonable questions upon being stopped could be problematic. In his own words, he was being taught: "*Black + Male + Non-Compliance* = 'Contempt of cop.'"[3] Professor Carbado further opined that this is "a peculiar type of state crime for which police officers serve as judge, jury and—sometimes—executioner."[4]

As someone who has previously written about African American stories and criminal law,[5] I found Professor Carbado's use of personal narrative compelling in at least two ways. First, readers are offered a personal perspective on the rhythms, unspoken rules, and presumptions at the heart of police stops of Black men. As someone who had not grown up in the United States, Professor Carbado nearly missed cues in the officer's directions that reflected police expectations, including those connected to race and gender stereotypes that permeate social life in America. These stereotypes largely

1. DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022).
2. *Id.* at 1–5 (detailing police stopping Professor Carbado and his brother in their car about a year after he moved from London to the United States). Within legal scholarship, the use of storytelling or narrative, including one's own autobiography, has long been accepted as a viable methodology among outsider scholars. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412–14 (1989); Rachel F. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 L. & SOC'Y REV. 515, 546 (2010) (arguing the embrace of narrative methodology was a core innovation of Critical Race Theory); *see generally* Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991).
3. CARBADO, *supra* note 1, at 3 (emphasis in original).
4. *Id.*
5. *See generally* Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941 (2006) [hereinafter *Black Women's Stories*]; Mario L. Barnes, *Racial Paradox in a Law and Society Odyssey*, 44 L. & SOC'Y REV. 469 (2010).

inform officers' beliefs about whom they have stopped, what these drivers or pedestrians are likely doing, and whether they are dangerous. Legal scholar Mark Fajer previously described this phenomenon as involving "pre-understanding" or a belief that we understand someone's circumstances even before we have heard their story.[6] One problem with pre-understanding that is germane to police stops is that "stories that do not conform to our pre-understandings are more difficult for readers/listeners to accept."[7] For Black people born and raised in the United States, police encounters become a place where we cannot tell stories about ourselves that disrupt police beliefs connecting race to criminality. In fact, insisting on doing so—even in a seemingly non-threatening manner—may create a threat to one's very survival.[8]

Second, and consistent with the historical deployment of stories in critical scholarship,[9] Professor Carbado's story is not merely his own. The encounter has an every-Black-man quality to it, as it contains the dynamics and discourses that populate a great many police stops of Black men taking place across the country.

While the *Unreasonable* prologue story provides a salient snapshot of race and policing in the United States, the remainder of the book moves from the personal to the systemic. Much of the rest of *Unreasonable* performs an

6. Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1846–49 (1994) [hereinafter *Authority, Credibility, and Pre-Understanding*]; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIA. L. REV. 511, 524–25 (1992).

7. *Authority, Credibility and Pre-Understanding*, *supra* note 6, at 1846.

8. A recent example of the difficulties arising around not immediately complying with police orders and violence took place in Lancaster, California. *See* Gabriel San Román, '*Disturbing*': *Sheriff's Department Opens Probe After Deputy Throws Woman to the Ground*, LA TIMES (July 4, 2023, 8:22 PM), https://www.latimes.com/california/story/2023-07-04/los-angeles-sheriffs-department-use-of-force-investigation-woman-lancaster [https://perma.cc/U74Q-F292]. A Black woman filming her husband being arrested for suspected shoplifting was grabbed and thrown to the ground, apparently without warning. *Id.* The video revealed that the police were ordering her to the ground, even though she was there already. *Id.* Although she was also pepper-sprayed and threatened with a punch, she was charged with resisting arrest. *Id.*

9. Other autobiographical stories from within the Critical Race Theory (CRT) canon have similarly taken on this emblematic quality. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44–57 (1991) (describing the experience of discrimination associated with then Columbia Law Professor Patricia Williams not being "buzzed" into a New York city store); Paul Butler, *Walking While Black*, NAT'L L.J., Nov. 10, 1997 (describing current Georgetown Law Professor Paul Butler's experience of being stopped and racially profiled on his own block as he walked home from work in Washington, D.C.).

in-depth analysis of policing practices and Fourth Amendment case law. In thought-provoking and easy-to-comprehend prose, *Unreasonable* constructs a searing critique of structural bias's operation in policing and the U.S. Supreme Court's seeming inability to recognize or interdict it. The Court's resulting constitutional jurisprudence, rather than protecting persons who are incredibly vulnerable, most often legitimizes police practices that de facto treat brown skin as synonymous with criminal suspicion.[10]

Unreasonable does not just present Professor Carbado's own story. First, the book presents the stories that inform doctrinally important Fourth Amendment cases, ensuring to articulate the conditions that produce race bias in policing. It does so by providing a comprehensive overview of the elements of police decision-making as well as the Court reasoning that so often finds these decisions unobjectionable. By presenting and performing critical analyses of important Fourth Amendment cases,[11] Professor Carbado points out the numerous miscalculations present in the Court's assessments

10. In earlier work, Professor Carbado has described this link between Blackness and presumed criminality as "the crime of identity." Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 962 (2002).

11. Professor Carbado engages with a subset of some of the most important Fourth Amendment cases, including: Terry v. Ohio, 392 U.S. 1 (1968); Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973) (finding voluntariness of consent to a search shall be judged based on a "totality of all the circumstances"); United States. v. Brignoni-Ponce, 422 U.S. 873 (1975) (holding that border patrol agents need only have reasonable suspicion to stop an auto and question occupants); United States. v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (finding no Fourth Amendment violation at checkpoint stops involving no probable cause or reasonable suspicion and where the drivers "Mexican ancestry" factored into the decision to direct a secondary inspection); United States v. Mendenhall, 446 U.S. 544 (1980) (holding that a seizure occurs when an officer uses physical force or displays authority to detain a person, but race, age, gender, and education of the detainee were dismissed as factors affecting whether seizure had arisen); Immigr. & Naturalization Servs. v. Delgado, 466 U.S. 210 (1984) (holding that the INS's "sweeps" of factories where employees were detained and questioned about their citizenship status did not result in a seizure in violation of the Fourth Amendment); United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (finding no Fourth Amendment violation in detaining a person at the international border for an extended period of time where customs agents reasonably suspect the person is smuggling drugs); Whren v. United States, 517 U.S. 806 (1996) (holding that as long as an officer has reasonable cause to stop a vehicle, they may do so, irrespective of what other personal motivations the officer may have for stopping the vehicle); Illinois v. Wardlow, 528 U.S. 119 (2000) (holding that running from an officer in a high crime area supported reasonable suspicion for a stop); Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (holding that the Fourth Amendment does not limit an officer's ability to conduct an arrest without a warrant for minor criminal offenses, such as failure to wear a seatbelt); *and* United States v. Drayton, 536 U.S. 194 (2002) (holding that a search on a bus was not unreasonable where passengers were free to leave the bus and the individuals who were searched provided voluntary consent).

(or lack thereof) of how race should inform determinations regarding the lawfulness of searches and seizures. Second, he renders the legal doctrines he evaluates more accessible to nonlawyers through a series of hypotheticals depicting a Black woman, Tanya, being subjected to scenarios implicating critical police decisions at the heart of several Fourth Amendment cases.[12] A key difference between the hypotheticals and the actual cases is that, in each scenario, Professor Carbado astutely identifies places where race or intersectional forms of bias may arise.

While these cases are already decided, these stories—real and fictional—still matter. As Critical Race Theory (CRT) scholars have long argued, outsider narratives are imperative as they free us to "'re-story' the past and to 're-imagine' the future."[13] Professor Carbado's hypotheticals are reimagined stories fulfilling the function of revealing to readers the errors of previous courts' interpretations and the possibilities of future ones to wrestle more earnestly with how social identity may shape the quality of one's status under law.

Stories, which matter to law and legal scholarship broadly,[14] appear to be especially important within the context of policing. On one level, through his personal reflection and analysis of law enforcement practices, Professor Carbado presents narratives that reflect how race shapes whom police are capable of seeing as presumptively law-abiding and worthy of the full breadth of constitutional protections. On another level, *Unreasonable* analyzes the stories courts tell about criminal justice and how courts understand the importance of race (or not) to police encounters.[15] These stories typically include justifications for the racial naturalization Professor Carbado

12. The story of Tanya begins as a pedestrian check and advances through the various types of surveillance, searches, and seizures that police and agents perform in criminal investigations and border checks. CARBADO, *supra* note 1, at 44–76. The scenarios highlight the many different decision points that can be triggered during a police stop, how one might perceive their Fourth Amendment protections during this stop, and whether racial motivations or understandings may inform police actions.

13. Leslie Espinoza & Angela P. Harris, *Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499, 545 (1998).

14. *See, e.g.*, LAW'S STORIES: NARRATIVE AND RHETORIC IN LAW (Peter Brooks & Paul Gewirtz eds., 1996); Kathryn Abrams, *Hearing the Call to Stories*, 79 CALIF. L. REV. 971, 971–76 (1991).

15. Kim Lane Sheppele, *Forward: Telling Stories*, 87 MICH. L. REV. 2073, 2094–98 (1989) (discussing courts as spaces producing legal narratives that are hostile to outsiders and treated not as subjective, but as discourses resulting from rules and doctrines supported by reasoning committed to an "objectivist theory of truth"); *see also Black Women's Stories*, *supra* note 5, at 951–58 (discussing how biased constructions of identity become embedded in ostensibly neutral doctrinal narratives).

theorizes. They also add to the Court's broader equality jurisprudence, which currently elects to not see any impact of race outside of an extremely limited spectrum.

A significant contribution of *Unreasonable* is its potential for making progress toward justice by bridging a space across competing racial realities. Professor Carbado deftly depicts a world where societal systems and structures create biased policing. This reality collides with a world where courts perceive race discrimination as practiced by misguided, outlier individual perpetrators[16] and treat as real—rather than aspirational—societal commitments to race having no salience.

For those who are willing to unpack the operation of race within the context of policing, Professor Carbado provides a detailed and accessible critique of how race can be absent and yet "all over"[17] at the same time.[18] This is one of the many compelling insights *Unreasonable* offers, and it relates to the topic upon which I intend to primarily concentrate. This Review largely focuses on Professor Carbado's theory of the structural nature of bias in policing and why the Court refuses to revisit police practices that *Unreasonable* clearly identifies as harmful to people of color. In Part I, I discuss Professor Carbado's approach to race discrimination in policing as a structural rather than individual phenomenon. Next, in Part II, I explain how Professor Carbado uses data to highlight the intersection of race and policing. While I have profound respect and admiration for this work, in Part III, I query whether the systemic racism explored at the heart of the text might benefit from an even more intentional engagement with social science studies of law. Finally, I briefly question whether *Unreasonable* is successful in either what it offers as a potential intervention or in fully conveying the trauma that results from race bias in policing. As I believe it is important to state one's scholarly commitments upfront, I will acknowledge that the analysis in this Review draws heavily upon research advancing strategic partnering between

16. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978) (describing the perpetrator perspective as one where "the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.")

17. This is a reference to a classic sociolegal article which details how the poor and disenfranchised often experience law as an overwhelming and disruptive force within their lives. Austin Sarat, *"The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344–45 (1990).

18. *Black Women's Stories*, *supra* note 5, at 973–79 (discussing stereotypes within the criminal justice system having the effect of rendering Black women simultaneously invisible and hyper-visible).

critical theories and social science methods. Work that considers critical theories and social science research may now regarded as belonging to the subfield of empirical methods and critical race theory (eCRT)—a disciplinary approach which encourages critical scholars to increase their engagement with social science studies and sociolegal scholars to borrow from critical theories in determining how to make race a more central concern within their research.[19]

I. THE ISSUE IS STRUCTURAL, NOT PERSONAL

Unreasonable accomplishes quite a bit in terms of defining how policing works and how the inner workings of police practices nearly seamlessly incorporate racial references. In exploring these practices, the book performs a critical demystification by questioning how the U.S. Supreme Court has come to justify as constitutionally sound a number of problematic policing practices. These practices take place within the context of some encounters with which readers are likely to be familiar, such as *Terry* stops[20] and vehicle stops and searches.[21] Professor Carbado also extends his research into important areas where fewer readers are likely to have knowledge of the problematic practices that take place, such as police usages of pedestrian checks and stop-and-strip routines.

Unreasonable is helpful for its articulation of the conditions that produce and permit problematic, racially biased police practices. First, it provides a critical framing of how bias works and how it intersects with wider structures.

19. For germinal arguments on bridging the divide between empirical and critical research, see, *infra* note 102. For an introduction to eCRT, see Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183, 184–85 (2013); Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology*, 2016 WIS. L. REV. 443, 447–48 (2016). Analyzing the book from an eCRT perspective seems appropriate given my own view that, at its core, *Unreasonable* represents a radical and critical deconstruction of policing in a manner that incorporates sociolegal research to support its claims.

20. Terry v. Ohio, 392 U.S. 1, 10–11 (1968) (authorizing police to "stop and frisk" individuals where police have reasonable suspicion rather than probable cause to suspect criminal activity).

21. Vehicle searches include a subset of stops which involve the over-policing of Black drivers that is now so ubiquitous that it is referred to in popular culture as "driving while black." *See generally* David A. Harris, *The Stories, the Statistics and the Law: Why 'Driving While Black' Matters*, 84 MINN. L. REV. 265 (1999). Ironically, certain police have claimed that disproportionately stopping Black drivers is not racist but rather rational due to their beliefs about which groups are more likely to engage in certain types of criminal activity. *Id.* at 268 (citing police departments in Maryland and New Jersey making such claims).

Second, it explains the role of history in modern policing and police bias. Finally, it provides insight into how the U.S. Supreme Court sees, or rather fails to see, race in different jurisprudential contexts.

A. The Role of Bias and Structure

While discussions of the case law and police practices are essential, it is in the initial framing of how bias works that *Unreasonable* provides a critical reimagining. *Unreasonable*'s framing moves the problem of racial bias in policing from the individualized to the systemic. Specifically, Carbado shows how the court's current understanding of racist policing turns on individual beliefs and conduct—that racial bias enters into policing due to the attitudes and behaviors of individual officers. Instead, Carbado frames bias as taking hold within the architecture that encompasses police policies and practices. He asserts that the instances of racial profiling and racialized police violence are typically not the product of bad actors among the police or those who are policed, but rather violence produced through structures.

This is more than a normative claim. He defines policing as a multi-layered enterprise composed of seven levels. Each level of the structure helps to explain why, even though explicit racial animus might be absent, Black people still end up subject to greater police attention, interference, and violence. The levels address, among other things, the vulnerability of Black people, their greater likelihood of having contact with police, and the ways in which police activities are justified and not punished.[22] Of these levels, Professor Carbado states, "[t]he preceding seven levels might be understood as a structure" and one that is unaffected by identifying bad cops.[23] The structure's influence on conduct is overarching and so thorough that police are effectively trained to understand biased policing as good policing.

While theorizing the various echelons of the structure is helpful, understanding the origins of structural bias in policing is only part of what one must understand to interdict the problem. The structure informs policies that govern policing activities, including various types of stops, searches, and

22. Professor Carbado identifies the seven levels of a structure of policing as follows: the vulnerability Black people (I); frequency of the contacts between police and Black people (II); the nature of police culture and training (III); justification for police uses of force (IV); immunity and indemnification from liability for police actions (V); a dissociation that rarely holds police accountable for police misconduct (VI); results of previous levels combined results in a lack of accountability and an ability for police to proscribe what behavior is acceptable (VII). CARBADO, *supra* note 1, at 15–20.

23. *Id.* at 20.

seizures. Within these stops and other activities, police make decisions that are informed by those policies that rely upon stereotypes and other biases to justify them as appropriate to the policing enterprise.[24] This interweaving of bias, policy, and practice seems to suggest that policing is a system captured by bias and where overly focusing on individual officer motivations is not likely to undo this greater problem. Officer decisions must be walked back to policies, which courts and police must be willing to interrogate to locate the influence of stereotypes, implicit bias, and racial animus.

In an effort to refute claims that race bias in policing can be corrected by merely removing racist officers, Professor Carbado identifies that race bias in policing occurs most typically not as a function of singular police motivations and actions, but rather through a confluence of circumstances. Black people (and other groups of color) are vulnerable to police stops because they often live in blighted communities and are stereotypically associated with crime. These preconditions become a source of greater and more disastrous encounters because police are allowed to exercise significant discretion without oversight or consequences. Discretion exercised in these localities among these populations—for whom criminality is presumptive—becomes the confluence of circumstances resulting in disproportionate police violence upon the bodies of persons who are poor and of color.

B. Historical Context

A second element of Professor Carbado's structural critique assesses the history that gave rise to modern policing and racism. Police powers emerged through statutes and early Court opinions tied to enforcing slavery. After the U.S. Congress passed the Fugitive Slave Act of 1850, the *Prigg v. Pennsylvania* case[25] essentially created policing powers for slave owners when it held they could cross state lines and reclaim enslaved people over state protections, such as requiring a warrant before seizing an alleged runaway or imposing criminal penalties on people who illegally removed African Americans from the state.[26]

24. Professor Carbado describes twelve police decisions germane to pedestrian stops and thirteen that can apply to traffic stops. *Id.* at 44–76, 79–100. In many of these decision points, race factors in by either creating vulnerability or opportunity for misperception about the actions of the detained persons.
25. 41 U.S. 539 (1842).
26. CARBADO, *supra* note 1, at 24 (describing how *Prigg* held that states could not limit the activities of slave catchers).

Slave Patrols, as an early form of law enforcement, were arguably a part of the origin story of policing in the U.S. South.[27]

Professor Carbado points out the vulnerability of enslaved people and their descendants was made worse by other regrettable Supreme Court decisions. In *Dred Scott*[28]—where the Court invalidated the Missouri Compromise after determining that freed slaves could not be citizens—the Court not only rejected federal legislation designed to limit slavery but determined that people enslaved within this country were never understood to be part of "the people" the U.S. Constitution protected.[29] The Court stating that enslaved persons within the U.S. and their descendants "had no rights which the white man was bound to respect" rendered escaped and freed slaves more susceptible to state and individualized forms of police power.[30]

Even after the Reconstruction Amendments were ratified, the Court initially held that the Bill of Rights—including the Fourth Amendment—would not be incorporated against the states,[31] and *Plessy v. Ferguson*[32] infamously indicated that the Fourteenth Amendment guaranteed political and not social rights, meaning formerly enslaved people were now entitled to birthright citizenship and protection from certain government intrusions upon fundamentally recognized national liberties, but not to be treated as Whites (alongside Whites) in terms of the receipt of state services or societal social graces.[33] Professor Carbado describes *Plessy* as endorsing the legalized racism that fueled Jim Crow practices of segregation and violence until the Court addressed them many years later in cases such *Brown v. Board of Education*[34] and *Loving v. Virginia.*[35] *Brown* and *Loving,* however, did not eliminate the race-based enforcement of laws that flourished during the post-Reconstruction era. Moreover, policing and resulting confinement—arising

27. See Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of U.S. Policing*, 46 HUM. RTS. 6, 7 (2021); Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police [https://perma.cc/XK8C-TS8P].
28. 60 U.S. (19 How.) 393 (1856) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.
29. CARBADO, *supra* note 1, at 26–27.
30. *Scott*, 60 U.S. at 407. The case was also a key antecedent to the U.S. Civil War. *See* Roberta Alexander, Dred Scott*: The Decision That Sparked a Civil War*, 34 N. KY. L. REV. 643, 660–61 (2007).
31. CARBADO, *supra* note 1, at 25.
32. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
33. *Brown*, 163 U.S. at 543–44.
34. 347 U.S. 483 (1954).
35. 388 U.S. 1 (1967).

out of an exception to the anti-slavery language of the Thirteenth Amendment[36]—arose as additional methods of state social control, which visited violence on Black bodies and routinely transformed them into prison labor.[37] From this history came an evolution of constitutional considerations of policing that gave rise to a Fourth Amendment jurisprudence that Professor Carbado claims, not surprisingly, "decriminalizes coercive and violent forms of police conduct."[38]

While *Unreasonable* traces some easing of the derogatory policing of Black people between *Brown v. Board of Education* and the Second Reconstruction,[39] it is absolutely the case that any gains have evaporated under modern Fourth Amendment jurisprudence. Moreover, there is a significant benefit of Professor Carbado driving a through line between historical forms of state racial violence to a modern structural hierarchy where implicit forms of bias permeate. Seeing this connection deepens our understanding of how law helps to embed bias into structures and assists readers in acknowledging that addressing the problem of racialized policing will require a solution larger than responding to a few bad apples.

C. Racial Visibility Under the Law

Ironically, as this Review of Professor Carbado's timely and important work analyzing race and policing was being written, the Supreme Court issued one of the more anticipated opinions of its 2022–23 term.[40] In *SFFA v.*

36. U.S. CONST. amend. XIII, § 1 (emphasis added) ("Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States . . . ").
37. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 30 (2010) (noting many states adopted vagrancy and other laws that were vigorously and arbitrarily deployed against African Americans, who essentially were made "slaves of the state" due to Thirteenth Amendment language that did not abolish slavery for persons convicted of a crime).
38. CARBADO, *supra* note 1, at 22.
39. Buoyed by *Brown* and a set of 1960s civil rights statutes, the Second Reconstruction was the period between the 1940s and 1980s where political and social rights were seen as improving for Black people in the United States. *See generally* MANNING MARABLE, RACE REFORM AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006 (1984); Richard Thompson Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942 (2014).
40. *See* Students for Fair Admissions v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023) [hereinafter *SFFA v. Harvard*] (eliminating structured considerations of an applicant's race in higher education admissions); Debra Cassons Weiss, *SCOTUS Strikes Down Race-Conscious Admissions Programs at Harvard, University of North Carolina*, ABA J. (June 29, 2023, 9:36 AM), https://www.abajournal.com/web/article/supreme-court-rules-on-affirmative-action [https://perma.cc/SHQ3-JBC6].

Harvard, the Court effectively eliminated structured considerations of an applicant's race in higher education admissions.[41] The Court did so because it determined that the claimed educational benefits of diversity did not meet the burden of strict scrutiny.[42]

When compared to the stories Professor Carbado tells about the unchecked burdens of race in policing, the Supreme Court's finding of race-based affirmative action programs in higher education to be unconstitutional creates a moment of cognitive dissonance.[43] In the context of the Fourth Amendment, short of conduct manifesting explicit racial animus, the Court is unlikely to see stop or search conditions as implicating racial stereotypes or occurring as a result of racial profiling. As such, it never dawns on the justices to consider whether a suspect's resulting decision to flee, to submit to an officer's request, or their feelings regarding whether they may break off contact are tied to their experiences as racial minorities.[44] The Court's failing is rendered more stark when one considers that they rarely if ever consult any of the voluminous social science studies identifying problematic consequences of racial disparities in policing.[45] As problematic, the justices

41. *SFFA v. Harvard*, 600 U.S. at 217–21.
42. *Id.* at 214–15.
43. Originally theorized by Leon Festinger in 1957, cognitive dissonance describes the state of being that results from a person being required to simultaneously hold two contrary beliefs. *See* Joel Cooper & Russell H. Fazio, *A New Look Dissonance Theory*, 17 ADVANCES EXPER. SOC. PSYCH. 229, 230–31 (1984); *see generally* Anthony Greenwald & D.L. Ronis, *Twenty Years of Cognitive Dissonance: A Case Study of the Evolution of a Theory*, 85 PSYCH. REV. 53 (1978).
44. *See infra* discussion accompanying notes 67–73 (discussing how race rather than common understanding may inform how people experience encounters with police).
45. *See, e.g.*, Aline Ara Santos Carvalho, Táhcita Medrado Mizael & Angelo A.S. Sampaio, *Racial Prejudice and Police Stops: A Systematic Review of the Empirical Literature*, 28 BEHAV. ANALYSIS PRAC. 1213 (2022) (reviewing five years of empirical studies looking at policing in five countries and finding that in the U.S. *Terry* stops foster racial selectivity and traffic stops were environments where racial bias thrived); Kimberly Barsamian Khan & Karen D. Martin, *Policing and Race: Disparate Treatment, Perceptions, and Policy Responses*, 10 SOC. ISSUES & POL'Y REV. 82 (2016) (assessing the negative consequences that racial disparities in policing create in the lives of racial minorities); Timothy J. Geier, Sydney C. Timmer-Murillo, Amber M. Brandolino, Isela Piña, Farah Harb & Terri A. deRoon-Cassini, *History of Racial Discrimination by Police Contributes to Worse Physical and Emotional Quality of Life in Black Americans After Traumatic Injury,* 11 J. RACIAL & ETHNIC HEALTH DISPARITIES 1774 (2023)(explicating the relationship between police race discrimination and trauma-specific quality of life outcomes); *and* MAGNUS LOFSTROM, JOSEPH HAYES, BRANDON MARTIN, DEEPAK PREMKUMAR & ALEXANDRIA GUMBS, PUB. POL'Y INST. OF CAL., RACIAL DISPARITIES IN LAW ENFORCEMENT STOPS 3 (2021), https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/ [https://perma.cc/X2XL-EYW8] (finding Black people are twice

treat policing as non-biased even when stops, searches and arrests evince disproportionate racial impacts and ignore racial profiling as long as there is probable cause to believe some minor offense has been committed. Neither police nor courts, then, seem capable of considering costs of racial stereotypes to police stops.[46] Whereas in the context of higher education, Chief Justice Roberts not only discerns race consideration as potentially harmful within a zero-sum admissions process but even articulates how race as a construct is ill-suited for capturing the diversity among Latinx and Asian American sub groups and persons of Middle Eastern descent.[47] In this context, the Court appears fixated on race. The majority states that we should concerns ourselves with the work race is doing, surmises the impact of race on the lives of people not seen as benefiting from the consideration, and even suggests that it understands complications arising from using race to categorize groups..[48] It is difficult to reconcile how the Court can be so obsessed with considerations of race in one context and so completely insensitive to it in another.

There are numerous contours of the Court's opinion in the *Harvard* case, which will be addressed in later scholarship. Here, however, suffice it to say that it is striking to see the majority opinion assert that if we are going to end race discrimination in the United States, we need to "eliminat[e] all of it."[49] Whatever one thinks about the Court's majority opinion and what some would argue is its unfortunate misunderstanding of race and opportunity in

as likely as whites to be stopped in California, even though stops of Black motorists are less likely to yield evidence of a crime or an enforcement action).

46. This failure to account for stereotypes produces what USC Law Professor Jody Armour has described as a "black tax." JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 13–14 (1997) [hereinafter REASONABLE RACISM]; Jody Armour, *'Black Tax'—the Tithe That Binds*, L.A. TIMES (Nov. 20, 2005, 12:00 AM), https://www.latimes.com/archives/la-xpm-2005-nov-20-oe-armour20-story.html [https://perma.cc/U3JL-C32U] ("The black tax is the price blacks (and other minorities) pay in our daily lives because of racial stereotypes.").

47. *SFFA v. Harvard*, 600 U.S. at 216–17.

48. The Court had previously invalidated most race-based affirmative action in employment and government contracting. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (rejecting generalized assertions of previous discrimination as sufficient to justify set-asides in government contracting); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226 (1995) (rejecting the contention that government race-benefits programs involved "benign" uses of race and holding that all forms of discrimination based on race—whether imposed by federal, state, or local authorities—are subject to strict scrutiny review).

49. *SFFA v. Harvard*, 600 U.S. at 184. This exhortation from Chief Justice Roberts was not surprising given his claim in an earlier case assessing race-based school assignment plans that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

America,[50] it contains a certain clarity. It is propelled by an understanding of history that suggests the nation has moved seamlessly from open and complete racial oppression, to what the Court now sees as the near insignificance of race to assessing considerations of opportunity gaps that routinely hamper minority racial groups.[51] In 2023 and beyond, the Court simply cannot countenance explicit government uses of racial classifications. And yet, what Professor Carbado reveals is that race in fact remains implicated in policing, and that the Court has failed to meaningfully confront the many ways—both unconscious and intentional—in which race and policing intersect.

Some scholars have described the Court's approach to claims of race discrimination as a form of denial.[52] Denial in the psychology literature is a defense mechanism that allows one to reject a reality that is too distressing or uncomfortable for one to accept.[53] The Court does not appear to be distressed over race itself, but rather by people who ill-advisedly insist on asserting the continued relevance of race. Given that they have declared we are in an era of waning racial animus, when the Court considers the harms of race, their

50. Justice Ketanji Brown Jackson essentially makes this type of argument in her dissent. *SFFA v. Harvard*, 600 U.S. at 393, 397–98 (Jackson, J., dissenting). *See also* Jamelle Bouie, Opinion, *No One Can Stop Talking About Justice John Marshall Harlan,* N.Y. TIMES (July 7, 2023), https://www.nytimes.com/2023/07/07/opinion/harlan-thomas-roberts-affirmative-action.html [https://perma.cc/8DYV-S3FV]; Henry L. Chambers, Jr., Commentary, *John Roberts Uses Conflicting Views of Race to Resolve America's History of Racial Discrimination*, OHIO CAP. J. (July 27, 2023, 4:30 AM), https://ohiocapitaljournal.com/2023/07/27/john-roberts-uses-conflicting-views-of-race-to-resolve-americas-history-of-racial-discrimination [https://perma.cc/N9QG-4JDG].

51. I use "near" here because Chief Justice Roberts acknowledged in the majority opinion that universities can still consider applicant statements discussing challenges they have experienced related to race. *SFFA v. Harvard*, 600 U.S. at 230–31. On the post-racialism of the Roberts Court, see Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 974, 996 (2010).

52. *See, e.g.*, Kimberlé Crenshaw, *The Court's Denial of Racial Societal Debt*, 40 HUM. RTS. 12, 12–13 (2013); Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1426–27 (1990) (describing the U.S. Supreme Court as having entered the "Era of Denial"). In reflecting on Professor Freeman's earlier work assessing the Court's problematic approach to antidiscrimination law, I previously referred to the Court's current approach to race as moving beyond denial to "incredulity"—meaning the Court finds it shocking that anyone could believe race still matters. Mario L. Barnes, *"The More Things Change . . . ": New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*, 100 MINN. L. REV. 2043 (2016) (reviewing Freeman, *supra* note 16).

53. *See* Phebe Cramer, *Seven Pillars of Defense Mechanism Theory*, 2 SOC. & PERSONALITY PSYCH. COMPASS 1963, 1964 (2008) (denial is achieved through "thought or feelings that would be upsetting, if accurately perceived," being "ignored or misrepresented").

attentions are typically trained upon race-benefits programs.[54] These cases repeatedly demonstrate the Court undervaluing the contemporary consequences of historical and ongoing forms of discrimination against persons of color in favor of protecting innocent others from perceived lost opportunities.[55]

The Court's devotion to this myth of colorblindness results in it largely refusing to address the implications of race for historically subordinated peoples, even where these implications are still present.[56] Perhaps the only time the Court can see race as creating harm for racial minorities is when the behavior looks nearly exactly like the forms of extreme Jim Crow era animus that post-racialism suggest still exists but are now very rare.[57] This deeply problematic orientation toward acknowledging race not only ensures that the Court will not eliminate all discrimination, but that it will not confront most of the commonplace but truly harmful considerations of race taking place within the administration of criminal justice.

This jurisprudential disjuncture largely exists because race-conscious benefits programs consciously seek to acknowledge or see race as having continuing relevance. References to race in policing and most other criminal justice activities are rarely if ever explicit. Rather, policing most typically involves the deployment of racial stereotypes and reliance on implicit biases. A lasting impact of *Unreasonable* is that it demonstrates that in police encounters, race is always engrained within the structure of the enterprise,

54. *See, e.g.*, Shelby County v. Holder, 570 U.S. 529, 546–49 (2013) (indicating one reason the Voting Rights Act pre-clearance procedure is no longer needed is due to the great racial progress that has occurred since the passing of the Voting Rights Act in 1965).

55. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557 (2009) (finding the City of New Haven's decision to invalidate test results for firefighter promotions to prevent a disparate impact claim for Black applicants who performed poorly on the test, resulted in a form of intentional discrimination against the white and one Latinx firefighter who would have been promoted based on the rejected results).

56. The "myth" of colorblindness suggests the perspective is morally required for all "right thinking" people, when it is, in fact, merely a policy choice. Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 162 (1994).

57. Berkeley Law Professor Khiara Bridges has recently made a similar claim regarding the Roberts Court and race:

> When confronted with a claim of racial discrimination, the Roberts Court appears to be simply determining whether the alleged discrimination resembles what the country did in the pre–Civil Rights Era. If the Court sees a resemblance between the present-day harm and the racism of yesteryear, the Court provides relief. If it sees no resemblance, it provides no relief.

Khiara M. Bridges, *The Supreme Court 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 24 (2022).

operating as a background factor, even as police, attorneys, and courts typically treat decisions as non-racial. Rather than questioning how legal standards should be interpreted to disrupt what empirical data detail as inequitable outcomes across race,[58] the Court mostly concerns itself with principles of neutrality and measures of process.[59]

II. THE CIRCUMSTANCES THE COURT CANNOT SEEM TO FATHOM: DATA SHOWING POLICING IS RACED

A major contribution of *Unreasonable* is the way in which it exposes seemingly incongruous gaps between the language of the Fourth Amendment, Supreme Court interpretations of that language, and the resulting racial consequences. The Fourth Amendment text that governs so much police conduct is rudimentary. Professor Carbado and the cases are working from constitutional text that states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause . . ."[60]

This language protecting persons against unreasonable searches and seizures is not the issue. The problem is that the Court often refuses to question how a person's race should inform the application of rules governing what constitutes a search or a seizure.[61] It is for this reason that the main title of the book—*Unreasonable*—perfectly describes the Court's cramped and unrealistic interpretations of police decision-making and conduct.

Professor Carbado locates numerous ways in which race is implicated by police choices, which a majority of the Court rarely considers. He does so by

58. For prior discussion of studies documenting disparities in policing, see Carvalho et al., *supra* note 45; Khan & Martin, *supra* note 45; Geier et al., *supra* note 45; LOFSTROM ET AL., *supra* note 45.

59. *See generally* CEDRIC MERLIN POWELL, POST-RACIAL CONSTITUTIONALISM AND THE ROBERTS COURT: RHETORICAL NEUTRALITY AND THE PERPETUATION OF INEQUALITY (2023). A case like *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), illustrates this point. A Black motorist sued Los Angeles for injunctive relief after being subjected to a police chokehold during a traffic stop. *Id.* at 98. A 5–4 majority of the Court denied the relief claiming Lyons could not reasonably prove he would be stopped and choked again. *Id.* at 107–08. To dismiss this case on standing—a procedural ground—when it is clear other drivers will be subject to the policy avoids the constitutional and race bias questions that should be answered. *See* ALEXANDER, *supra* note 37, at 128–29.

60. U.S. CONST. amend. IV.

61. In the broader sense, Professor Carbado suggests that in the Court's approach to police practices, it too often finds there is no search or seizure or that there was a search or seizure, but they were reasonable. CARBADO, *supra* note 1, at 31–32.

carefully explicating the contours of several types of police stops—pedestrian checks,[62] *Terry* stops,[63] and auto stops[64]—and how biases embedded in policies and practices map onto these stops. Importantly, within each stop scenario Professor Carbado asks readers whether they would consider some police conduct as triggering a search or seizure governed by the Fourth Amendment. These questions are important because whether conduct is deemed a search or seizure determines whether that behavior triggers constitutional protections, including protections from unreasonable police conduct.

For the Court, the answer to whether a person is searched or seized typically turns on queries such as what actions police must take to locate items that will constitute evidence and whether one would feel free to deny an officer's request or terminate the contact. The Court treats these questions as turning on objective considerations that are common to all. One of the messages embedded in *Unreasonable* is that how one interprets the conduct that takes place within police encounters is likely affected by life experience. Race may therefore inform how a person would respond to police questions or perceive the interactions. Driver and pedestrian responses or perceptions that are inconsistent with how police expect people to respond tend to result in extended police encounters. For drivers and pedestrians of color, racial stereotypes may additionally dictate how police interpret responses and conduct. For example, stereotypes linking minority racial identity to presumptive dangerousness will likely impact whether some movement or comment is perceived as threatening. Courts rarely, however, find police expectations and interpretations of conduct to be unreasonable.

Professor Carbado adroitly points out that people of color often interpret police practices as implicating racial stereotypes or bias in ways the Court simply does not seem to fathom. His analysis highlights how the search and seizure lines the Court draws are both colorblind and decidedly pro-police. To my mind, the resulting Fourth Amendment jurisprudence reflects a Court that is intentionally avoidant. The Court willfully ignores how decisions of ostensibly well-meaning police implicate implicit biases structured into their practice and ignore how race may be impacting police stops. Judges carelessly dismiss the stories as one-offs—like the one Professor Carbado shares in the

62. These stops presumably involve no articulable suspicion and are covered in Chapter One. *Id.* at 43 (referring to such stops as "baseless police interactions").
63. Covered in Chapter Three, these are stops which may be initiated based upon reasonable suspicion and allow for limited searches for police safety. *Id.* at 102–03.
64. Auto or Traffic Stops are covered in Chapter Two and are disproportionately deployed against black motorists. *Id.* at 77–79.

Prologue—but which are ubiquitous in data sets detailing flagrant ways in which policing is experienced as race-centric and oppressive.

A. Stop-and-Frisk Stops

For stop-and-frisk stops,[65] which were approved in the *Terry v. Ohio* case, Professor Carbado claims that the policy is little more than a pretext giving police officers license to stop Black and Brown persons for unfounded reasons. Under *Terry*, police may make stops to investigate possible criminal behavior based on "reasonable suspicion" and during the stop may undertake a search that is limited in scope and designed to protect the officer's safety.[66] Data presented in the text demonstrate how intrusive such stops are in the lives of Black people, and at times, police expand their contacts with the public in manner that avoids the limited rules imposed for stop-and-frisk encounters.

For example, Professor Carbado uses the U.S. Department of Justice Investigation of the Ferguson Police Department[67] to detail problems with community pedestrian checks. As these checks involved officers temporarily stopping people "without any evidence of wrongdoing" they did not implicate the reasonable suspicion rule from *Terry* opinion.[68] These encounters where

65. Professor Carbado describes those terms as follows: "A 'stop' is an investigatory practice where an officer detains and questions a person. A 'frisk' is a precautionary measure wherein an officer stops a person and 'pats down' their outer clothing to determine whether they might be armed or dangerous." CARBADO, *supra* note 1, at 102.

66. The Court first states reasonableness for the stop will exist where, "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968). For the "frisk" or search, the Court further indicated, "when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon . . . .") *Id.* at 24.

67. CARBADO, *supra* note 1, at 41–43, 155, 282–84 (citing C.R. DIV., U.S. DEPT. OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter FERGUSON POLICE INVESTIGATION], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/B5BT-N6Y4]). Most recently, in an investigation following the killing of George Floyd by Minneapolis Police, the U.S. Department of Justice conducted another investigation. *See* C.R. DIV., U.S. DEPT. OF JUST., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT (2023), https://www.justice.gov/opa/press-release/file/1587661/download [https://perma.cc/W5Q8-ET6C]. The report of the investigation found numerous instances of excessive uses of force by police, to include greater uses of force against Black and Native Americans during stops. *Id.* at 38-40.

68. CARBADO, *supra* note 1, at 42.

there was no suspicion of criminal activity, however, became gateways to perform warrant checks.[69] Individuals with outstanding warrants would then be arrested and face other fines and fees—leading to increased revenues for the jurisdiction.[70] In Ferguson, these pedestrian checks constituted a general form of harassment by the state that served the purpose of generating capital for the jurisdiction.[71]

Pedestrian stops, however, are not limited to Ferguson. At least in Ferguson, pedestrian checks included seizures and sometimes searches that implicated the Fourth Amendment.[72] In other jurisdictions, these pedestrian checks are a common form of police contact that may be lawful. Professor Carbado indicates the more dangerous form of pedestrian check is one where police initiate interactions that "are neither searches nor seizures" and "do not implicate the Fourth Amendment *at all*."[73] These stops—referred to in the Ferguson report as "ped-checks"—have become a ubiquitous tool for police to initiate civilian interaction in a manner that subverts the reasonable suspicion or probable cause requirements of Fourth Amendment doctrine.

Even in places where stops are ostensibly premised upon the reasonable suspicion required by *Terry v. Ohio*, race bias may be operative.[74] This is the case, Professor Carbado argues, because the Court has broadly embraced rather innocuous behaviors as triggering police suspicion.[75] The best example of how the stop-and-frisk doctrine effectively generates racialized policing can be seen in the *Floyd. v. City of New York*.[76] In *Floyd,* New York City reported staggering levels of discrimination in terms of the racial composition of New

69. For these stops, there was no reasonable suspicion present. *Id.* at 41–44, 166.
70. CARBADO, *supra* note 1, at 155–56. (using Ferguson as an example to support how police stops result in revenue-generation and including an example of African American woman who had made partial payments totaling $550 for seven years and still owed $543 on what was initially a $151 fine); *see also* Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html [https://perma.cc/A4WY-26LK].
71. CARBADO, *supra* note 1, at 166.
72. *Id.* at 43.
73. *Id.*
74. The *Terry* case involved an officer stopping and frisking three men he believed were in the process of surveilling a potential target of crime ("casing"). Terry v. Ohio, 392 U.S. 1, 6 (1968). Though there was no probable cause for the stop, the U.S. Supreme Court determined the searches and resulting seizure of weapons from the men did not violate the Fourth Amendment, where the officer acted on a "reasonable suspicion" regarding a crime being committed. *Id.* at 21.
75. CARBADO, *supra* note 1, at 118.
76. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

York City police stops.[77] And though the case ultimately invalidated New York's stop-and-frisk policy, the practice in New York is representative of what takes place around the United States, especially in urban centers that are disproportionately populated with poor Black and Brown people.[78] The enormous numbers of stops of Black and Brown men in New York City that failed to yield any evidence of criminal wrongdoing confirm Professor Carbado's observation that for a great many stop-and-frisk encounters, "reasonable suspicion" has been replaced by "racial suspicion."[79]

B. Auto Stops

The data on auto stops and various forms of predatory policing are also so significant that one could imagine a court simply taking judicial notice of race being an improper consideration in these activities. Driving While Black does not just affect young Black men. The data support that Black people are stopped more in cars irrespective of age or gender.[80] In fact, auto stops may be the circumstance where the Court has most ignored the potential for explicit considerations of how race is used in policing. This is also an area where data sets sometimes reveal untold stories.

Two examples of such stories are available in impressive data sets detailing auto stops in Missouri and Washington state. Professor Carbado references research led by political scientist Charles Epp, which quotes police resources as encouraging the use of pretextual stops.[81] The associated study looked at over 700 auto stops in the greater Kansas City metropolitan area.[82] The quantitative picture from the study showed that racial profiling was unlikely to occur for stops based on serious violations but much more

77. CARBADO, *supra* note 1 at 103–04 (citing *Floyd* and noting that between 2004 and 2011, the number of stops conducted in New York City went from just over 300,000 to just under 700,000 stops). Between 2004–2012, 4.4 million stops were conducted and less than 10 percent of these stops resulted in arrests or finding weapon (or other contraband). *Id.* at 103–04. At the time, the demographic data for racial composition indicated that New York City was about 52 percent Black and Latinx, and 33 percent White, but Black and Latinx people made up 83 percent of stops. *Id.* at 103.

78. For a discussion of the ubiquitous deployment of stop-and-frisk policing in urban centers, see Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing,* 101 MINN. L. REV. 2397 (2017).

79. CARBADO, *supra* note 1, at 118.

80. *Id.* at 76–77.

81. *Id.* at 83.

82. CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 20 (2014).

prevalent in stops that occurred for no reason or minor infractions.[83] The researchers also included a qualitative survey of over 2300 drivers and of those who were stopped, found that African American drivers were more likely than others to experience police as disrespectful during minor infraction stops.[84]

In a separate multi-year study of thousands of Washington State Patrol stops, the broad data set revealed no ostensible racial profiling in the stop condition.[85] Those data indicated that Black drivers were more often cited in stops, however, and focus group interviews conducted with patrol officers produced statements that included derogatory references toward Asian and Indian drivers.[86] Moreover, the data on searches indicated that Black and Latinx drivers were searched twice as often as white drivers, and Native American drivers were searched at a rate five times that of white drivers. These studies show that quantitative data and associated qualitative commentaries help to provide a fuller picture of race and policing.

Why most the stops studied in these experiments are lawful—even when police consider the race of the drivers—is due to the Court's opinion in *Whren v. United States*.[87] In *Whren,* when the police began observing two Black motorists, there was no probable cause or reasonable suspicion to stop them for the drug offenses with which they were ultimately arrested and charged.[88] The officers subsequently stopped them after the motorists committed a minor traffic infraction. The motorists alleged such stops were a problem because "use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible" and that police might decide which motorists to stop "based on decidedly impermissible factors, such as race of the car's occupants."[89] The Court held that stops are valid as long as evidence exists that a driver violated even just a minor traffic

83. *Id*. at 59–63.
84. *Id*. at 83 (in the traffic safety or pretext stop condition, to a statistically meaningful extent, "African American drivers are more likely than white drivers to describe the officer as acting much more impolitely").
85. Mario L. Barnes & Robert S. Chang, *Analyzing Stops, Citations, and Searches in Washington State and Beyond*, 35 SEATTLE U. L. REV. 673, 675–76 (2012). Between 2003 and 2007, the Washington State Patrol engaged in a study of all their stops and searches during the period, which collected data on variables, such as driver's race, location of stops, citation, and officer discretion. *Id.* at 676–79.
86. *Id.* at 683–84.
87. 517 U.S. 806 (1996).
88. *See id.* at 808.
89. *Id.* at 810.

infraction.[90] It did not matter that the minor infraction was likely a pretext for the stop.[91]

The Court's assessment that the presence of an actual infraction negates impermissible officer motivation conveys a message that racial profiling is constitutionally condoned. As Professor Carbado points out, police leadership understands and embraces the use of pretext in auto stops.[92] This is an example of *Unreasonable*'s analysis bridging disparate worlds,[93] with Professor Carbado highlighting a discrepancy between data revealing racially discriminatory practices operating on the ground and how the Court creates legal doctrines that do not consider them.

C. Predatory Policing

The parts of the book detailing predatory police practices are equally disturbing. As the Ferguson report evinced, policing can be performed in a manner in which a significant goal of police encounters is to generate revenue. This occurs through mass criminalization of inoffensive behaviors,[94] imposition on fines and fees,[95] and civil asset forfeiture rules that make it difficult for persons to prove their property was acquired legally.[96] More problematic than policing as a fleecing enterprise is the far more injurious form of predation that involves police committing sexual violence against vulnerable women.[97] With predatory policing, the structure Professor Carbado sets out initially helps to explain the outsized impact upon Black people. As a group, Black people are vulnerable, overpoliced, and at the mercy of officers whose decisions and conduct are typically condoned. Based on these factors, it is not difficult to see why exploitive elements of predatory policing disproportionately fall upon Black persons.

Evaluated as a group of practices, the elements of various police stops reveal a world where race is not only a consideration, but perhaps the determining factor in shaping how people are policed. Professor Carbado's analysis is coherent, alarming, and consistent with the data and most Black

90. *Id.* at 807.
91. *See id.* at 813–14.
92. CARBADO, *supra* note 1, at 83.
93. *See* discussion in *supra* notes 56–59 and accompanying text.
94. CARBADO, *supra* note 1, at 157.
95. *Id.* at 162–65.
96. *Id.* at 159–61.
97. *Id.* at 142–45; 170–76 (discussing how the vulnerability of Black women becomes operative in "stop-and-strip" scenarios and during predatory police practices that inflict sexual violence).

people's lived experiences.[98] I say more about these experiences later, where I discuss the traumatic impact racialized policing on Black lives that are referenced but not heavily focused upon in *Unreasonable*.[99] Given the large and accessible universe of data detailing the significant impact of race on policing, it seems reasonable to suggest that the Court's refusal to see race as implicated in police practices is more a function of willful avoidance[100] than colorblindness.

III. A REASONABLE CRITIQUE OF *UNREASONABLE*: THEORETICALLY AND METHODOLOGICALLY RICH, BUT OVERLY DOCTRINAL?

Though *Unreasonable* is first and foremost exceptional constitutional legal scholarship, it also seamlessly weaves together an array of theories, methods, and data to structure a comprehensive evaluation of race and policing. In the subsections below, I discuss what I find to be an important strength of the work—its interdisciplinary nature—and I address two areas I believe the book leaves underexplored—the potential for interventions outside the scope of legal doctrine and the role and importance of trauma.

98. At this point, most articles and books considering race in the criminal justice system have identified disproportionate negative effects on Black bodies. Some of those harms are structural, with bias occurring in courts or through legal doctrine. *See, e.g.*, NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016) (describing the informal ways that race is coded and given meaning in criminal cases in Chicago, Illinois); RANDALL KENNEDY, RACE, CRIME AND THE LAW 311–50 (2012) (discussing the impact of being a Black defendant on capital punishment); Devon W. Carbado, *Strict Scrutiny and the Black Body*, 69 UCLA L. REV. 2, 2 (2022) (arguing because Black bodies are threatening, courts essentially require a "compelling justification" for our presence in places we do not presumptively belong). Other harms are achieved through police and ordinary citizens internalizing norms that result in increased violence upon black bodies. *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179, 3193, 3205 (2015) (analyzing data indicating homicides with Black victims are more likely to be justified, especially in jurisdictions with Stand Your Ground Law); *and* REASONABLE RACISM, *supra* note 46 (describing the "reasonable racism" that justifies force being visited upon Black bodies in the self-defense context).

99. *See infra* Part III.B.

100. Within criminal law, willful blindness may be substituted for knowledge where a defendant should have cause to believe that a fact exists, but deliberately avoids learning the truth of that fact. *See* Kenneth W. Simons, *The Willful Blindness Doctrine: Justifiable in Principle, Problematic in Practice*, 53 ARIZ. ST. L.J. 655, 655–56 (2021).

A. Richly Interdisciplinary

In terms of theoretical commitments, *Unreasonable* is an excellent work in the critical tradition.[101] To the extent *Unreasonable* leverages theories and data from other disciplines, it also implicates the subfield of empirical methods and Critical Race Theory (eCRT). The goal of this subfield is to advance knowledge production through scholarship that harvests beneficial elements of critical theory and sociolegal research.[102] Professor Carbado has previously written about the possibility of collaborations between CRT and social science and opined under certain circumstances that the possibility exists for productive "cross-disciplinary exchange."[103] *Unreasonable* certainly more than meets this definition.

Early on, Professor Carbado situates the uneven history of race and policing as evocative of the Critical Race Theory tenet that racial progress is not linear.[104] Another significant claim of CRT is that we must seek to understand race bias as a systemic and structural phenomenon.[105]

101. One of the elements that greatly enriches the discussion in *Unreasonable* is Professor Carbado's astute reliance upon the work of critical scholars such as Patricia Williams (on rights and spirit murder), Kimberlé Crenshaw (on rights, civil rights progress, and intersectionality), Ian Haney-Lopez (on coded racial signaling), Dorothy Roberts (on abolition) and others, to include academics who have researched violence upon the bodies of Black women. CARBADO, *supra* note 1, at 20–21, 35–26, 121, 142–43, 172.

102. On the origin story of eCRT, *see supra* note 19. Though numerous scholars have helped to shape eCRT, its initial formation was precipitated by foundational work by Laura E. Gomez that sought to build stronger bridges between critical theories and social science research. *See* Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat ed., 2004); Laura E. Gómez, *Looking for Race in All the Wrong Places*, 46 L. & SOC'Y REV. 221 (2012).

103. The authors made clear that the possibility for this exchange was contingent upon "proceed[ing] from the view that disciplines are not static modes of knowledge production governed by rigid and fixed rules. Rather, they are contingent intellectual arrangements whose boundaries shift in response to what scholars do to and within them." Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 150–51 (2014).

104. CARBADO, *supra* note 1, at 27–28 n.45 (citing to work of Kimberlé Crenshaw as a classic articulation).

105. KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 11 (2018) (noting "CRT places emphasis on the systems that subordinate people of color" and that CRT scholars are not interested in exploring racial inequality as a function of individual "bad actors"). Mari Matsuda, a scholar who has produced canonical CRT work, has recently made this claim in words that support Professor Carbado's approach: "The problem is not bad people . . . . The problem is a system that reproduces bad outcomes." Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html [https://perma.cc/29FA-DSF4] (internal quotation omitted).

Reimagining racialized policing as a structural problem, rather than an individual problem, is a key contribution of *Unreasonable*. With the use of his own story, the Tanya hypotheticals, and the rewritten *Whren v. United States* opinion,[106] Professor Carbado leans heavily on CRT's commitments to narrative forms of expression.

Unreasonable's analysis, however, suggests the limits of law alone for disrupting race bias in policing. The race biases structured into policing, after all, replicate biases which appear within the larger society. Dealing with the knottiness of the United States' race problem is also a prominent theme within germinal CRT pieces. For example, luminary critical race theorist Derrick A. Bell, Jr. averred that people of color in general, and African Americans in particular, inhabit a world where the impact of race is broad and unrelenting. This vulnerability of Black people to nearly ubiquitous and embedded forms of bias is a central framing device of *Unreasonable*, and is at the heart of Bell's first book, *And We Are Not Saved*.[107] *Unreasonable*, unfortunately, also appears to implicate the less hopeful theme Bell later explores in *Faces at the Bottom of the Well*—the contention that our proposed solutions to racial discrimination should accept the premise that racism is likely permanent.[108] A core insight of *Unreasonable*—that courts unreasonably avoid seeing the relevance of race in policing—is not merely an unfortunate and temporary condition. Rather, given the Supreme Court's conservative super majority and society's embrace of post-racialism, it is arguable that the race bias present (but unseen) in policing will remain inescapable and unyielding for the foreseeable future.

As much as *Unreasonable* skillfully incorporates critical perspectives and theories, it also significantly leverages sociolegal methods. As noted through the studies discussed previously,[109] policing is an area where both raw data and particular research projects have greatly detailed the impact of race. At

106. Chapter Seven of the book, titled *Reasonable*, includes a rewritten version of the majority opinion from *Whren v. United States.* CARBADO, *supra* note 1, at 193. The rewritten opinion first appeared in CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 582 (Bennett Capers et al. eds., 2022). The significant correction made in the rewritten opinion is the determination that an auto stop must be assessed for reasonableness even if probable cause exists to believe a traffic offense has been committed. Where an officer has considered race as part of the motivation to make the stop, it will be deemed per se unreasonable under the Fourth Amendment. CARBADO, *supra* note 1, at 203–12.

107. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

108. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 10-12 (1992)

109. *See* the text accompanying *supra* notes 767–91.

points, Professor Carbado effectively uses this data and research to point out the very different experiences Black people have with policing.[110] He also relies on studies from social psychology exploring the dynamics involved in how bias affects our perceptions and choices.[111] To be clear, there are certainly other empirical studies that could have been used to bolster *Unreasonable's* claims regarding racialized policing.[112] Moreover, Professor Carbado himself does not state his goal in including the empirical work he references. As work that blends theoretical claims from CRT with social science data, however, *Unreasonable* makes a significant contribution to the burgeoning eCRT subfield.

Unreasonable is one of the most in-depth critiques of how Fourth Amendment jurisprudence misunderstands race. The analysis of constitutional doctrine is terrific, but it does raise questions that I now pose to Professor Carbado. My first query concerns the choice to explicate race bias in policing through a constitutional analysis that is deft but mostly relies on pointing out shortcomings in the Supreme Court's interpretation of the Fourth Amendment. As numerous cases confirm, the Court simply does not search for racial meaning or implications in their assessments. In what I see as the main intervention in the book,[113] one way to address the problems

110. *See* CARBADO, *supra* note 1, at 41–43, 155, 282–84 (citing FERGUSON POLICE INVESTIGATION, *supra* note 67) (citing the U.S. Department of Justice investigation of the Ferguson Police); *Id.* at 101–04 (citing the David Floyd litigation against the New York Police Department); *Id.* at 19, 83 (citing sociolegal research studies by Charles Epp, Osagie Obasogie, and Zachary Newman).

111. Professor Carbado uses social science research to establish perceived links between race and crime. CARBADO, *supra* note 1, at 118–19 (discussing Stanford Psychology Professor and MacArthur genius grant winner Jennifer Eberhardt). Professor Carbado also discusses how cognitive impairments, such as implicit bias and stereotype threat inform police practice. *Id.* at 15 n.6 (citing to work of Attiba Goff, L. Song Richardson, Jerry Kang, and Cynthia Lee).

112. Two of Osagie Obasogie's articles are representative: see Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1287–88 (2019) (claiming that in police use of force cases, Fourth Amendment doctrine is being shaped by police inputs on "reasonableness" being adopted by the Court, rather than the Court defining an "exogenous" standard and applying it downward); *see also* Osagie K. Obasogie, *More Than Bias: How Law Produces Police Violence*, 100 B.U. L REV. 771, 771 (2020) (explicating how personal and organizational biases alone do not explain the systemic tolerance for outsized uses of police force). The same is true of a recent study assessing racial profiling in auto stops. *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637 (2021).

113. While he does not explicate them at length, Professor Carbado does suggest other ways to limit race bias in policing through changes to Fourth Amendment doctrine. CARBADO, *supra* note 1, at 195 (suggesting we could abolish pedestrian checks, require probable

Professor Carbado identifies would be for the Court to become more attentive to race in its Fourth Amendment decisions. The last two chapters—which present the original and rewritten versions of the *Whren* decision—provide an excellent example of how this might be achieved.

But given existing case law and the Court's current composition, it is worth considering whether *Unreasonable* is too focused on the failings of Fourth Amendment jurisprudence. This focus clearly makes sense in light of the Court's meaningful influence on policing and refusal to apply Fourteenth Amendment equal protection doctrine to anything other than explicit discriminatory intent. Also, in their re-writing of *Whren*,[114] Professor Carbado and Professor Feingold offer a cogent analysis of how a Supreme Court concerned with the impact of race bias might better reinterpret the Constitution. But the Court may never be willing to acknowledge the kind of structural racism Professor Carbado so wonderfully explicates as something it can address through Fourth Amendment doctrines.

Given the unlikeliness that the current Court would analyze the Fourth Amendment with such attention to race, I wish *Unreasonable* had considered the efficacy of non-doctrinal (court-centered) interventions. For example, there is a question as to whether state or federal legislative interventions hold promise for dislodging race bias from the structure of policing. Within states, cities and counties could employ behavioral interventions within their police forces that have a capacity to disrupt racialized policing.[115] There are also efforts underway at state-level legislatures that may serve to limit biased policing. For example, California recently passed a racial justice act.[116] One

cause for *Terry* stops, and require police to show cause greater than that for a simple traffic infraction to justify asking drivers to exit cars).

114. *Id.* at 214–19 (rejecting colorblindness and articulating a standard that finds it unreasonable under the Fourth Amendment for an officer to make a stop "because of race").

115. *Unreasonable*, for example, cites Professor L. Song Richardson's work on "hit rates"—the rates at which police stops yield evidence of criminal activity. CARBADO, *supra* note 1, at 228 n.73 (citing L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012)). That research suggests the rates can be used to train police as to when they are overly relying on race rather than evidence to justify stops. *See id.*

116. California Racial Justice Act of 2020, A.B. 2542, 2019–2020 Reg. Sess. (Cal. 2020) (prohibits "the state from seeking a criminal conviction or sentence on the basis of race, ethnicity, or national origin"). But see North Carolina Racial Justice Act of 2009, S.B. 461, 2009 Reg. Sess. (N.C. 2009) (prohibiting "seeking or imposing the death penalty on the basis of race"), which the state legislature attempted to repeal. *See* Press Release, ACLU, North Carolina Supreme Court Finds the Repeal of Racial Justice Act Unconstitutional (June 5, 2020, 12:30 PM), https://www.aclu.org/press-releases/north-carolina-supreme-court-finds-repeal-racial-justice-act-unconstitutional [https://perma.cc/ZQ7B-H2DW].

goal of this legislation is to combat racial penalties within the criminal justice system. Much like the standard Professor Carbado proposed in the rewritten *Whren* opinion, the Act provides that evidence of impact is sufficient to prove the existence of bias. California is still figuring out how to implement the Act, but it is now considering a broader law that would require state criminal courts to consider the disparate impact on historically disenfranchised and system-impacted populations when issuing a sentence.[117]

With regard to the federal government, Professor Carbado leans heavily on the data included in the U.S. Justice Department's investigation of policing in Ferguson, Missouri.[118] He does not, however, discuss the potential viability of federal legislation addressing issues of race in policing. For over thirty years, Congress has considered but struggled to enact racial justice bills focused on crime policy reform.[119] Most recently, in 2022, Congress proposed but failed to pass the George Floyd Justice in Policing Act.[120] The bill sought, in part, to address issues related to qualified immunity and police accountability for violence. If it were enacted, the legislation would have addressed at least two levels within the structure of policing Professor Carbado identifies—immunity and greater accountability for excessive uses of force. It would have been helpful to hear whether Professor Carbado believes state and federal legislatures might provide relief from bias in policing should the federal courts stay devoted to colorblind and post-racial approaches to Fourth Amendment cases.

B. Too Reliant on Doctrine: What About Trauma?

A second concern I have with the text relates to whether the significant focus on policing practice and court opinions obscures the trauma that is part of the story of the harm inflicted through police stops. A lesson that is easily gleaned from Professor Carbado's insights is that racialized policing results in

117. *See* Stacy M. Brown, *California Legislature Pushes Bill Mandating Judges Consider Race in Sentencing*, SAN DIEGO VOICE & VIEWPOINT (July 11, 2023), https://sdvoice.info/california-legislature-pushes-bill-mandating-that-judges-consider-race-in-sentencing/ [https://perma.cc/R6S2-8H7C].

118. *See* CARBADO, *supra* note 1, at 41–43, 155–56 (analyzing the U.S. Department of Justice's FERGUSON POLICE INVESTIGATION, *supra* note 67).

119. *See, e.g.*, Racial Justice Act of 1988, H.R.4442, 100th Cong. (1987–1988) (prohibiting "the imposition or the carrying out of the death penalty in a racially disproportionate pattern"); Racial Justice Act of 1994, H.R. 4017, 103d Cong. (1994) (prohibiting putting a person "to death under color of State or Federal law in the execution of a sentence that was imposed based on race.")

120. George Floyd Justice in Policing Act of 2021, H.R. 1250, 117th Cong. (2021).

certain persons of color, especially African Americans, experiencing a diminished quality of citizenship. The text is heavy on depicting how this disrespect plays out in police encounters.[121] The work raises but does not fully address the additional emotional harms that result from this type of racialized policy.[122]

From a theoretical perspective, discriminatory policing produces the "trauma of the routine" that Angela Onwuachi-Willig proposes.[123] Yes, there are singularly jarring events, such as the murder of George Floyd, that produce sizeable trauma. But that trauma is propagated through more routine inflictions of harm, and according to Onwuachi-Willig, "the longstanding history of a routine harm against a subordinated group creates a constant simmering of individual and collective distress, tension, and psychological trauma underneath the surface for the subordinated group's members and leads them to expect not much more than a continuation of past harms."[124]

Alongside the trauma there is also a resulting loss of faith in policing based on discrimination that is underexplored in the text. This concept is captured in the theory of legal estrangement proposed in the excellent work of Monica Bell. Based on the way they are policed, Black people experience alienation from law enforcement, whom we may perceive as "too corrupt, unpredictable, or biased to deem them trustworthy."[125] These experiences of trauma and estrangement are real and exist across age and socioeconomic class boundaries. I will illustrate this point by finally adding my own story.

I am a Black man in my fifties who is well-educated, financially secure, a retired military officer, and who has never been arrested or convicted of any

121. Professor Carbado has previously described the feelings that arise from stops involving racial profiling: "Our privacy had been invaded, we experienced a loss of dignity, and our blackness had been established—once more—as a crime of identity." Carbado, *supra* note 10, at 962.

122. I do not mean to suggest that Professor Carbado is insensitive to the trauma produced through biased policing. In his discussion of stop-and-strip policies, he is especially critical of the humiliation these practices produce. CARBADO, *supra* note 1, at 140–43. I only mean to suggest that the humiliation has produced a trauma that is now triggered in even less intrusive police practices.

123. Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma From the Emmett Till Verdict*, 34 SOCIO. THEORY 335 (2016). It is worth noting that Professor Carbado has cited to the relevance of this work and that of Derrick Bell in later scholarship on Black bodies. *See* Carbado, *supra* note 98, at 11 (discussing the work of Dean Onwuachi-Willig and Professor Bell).

124. Onwuachi-Willig, *supra* note 123, at 341.

125. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2087 (2017).

crime. And yet, any time I see police lights in my rear-view mirror, I am overcome with anxiety. I have been stopped numerous times for minor traffic offenses, and it is clear to me that I have likely been racially profiled. These experiences with auto stops create frustration because I am cognizant of how my race may be contributing to the decision to stop me. Each stop also produces fear over whether this will be *the time*—that for reasons outside of my control—the story will become one where I was perceived as a threat or otherwise subjected to police force. Part of the anxiety further stems from knowing that none of the characteristics of my life that reflect privilege and social worth would offer protection from a potentially violent outcome.[126]

My anxiety is facilitated by my awareness of the extremely traumatic policing events that took the lives of George Floyd, Michael Brown, Eric Garner, Tamir Rice, Scott Walker, and far too many other Black men and boys to name. It is also triggered by my exposure to nearly daily reminders that police policies construct Black men as suspicious and dangerous. This construction means that for officers, I am not *like* these men, I *am* these men. A stop for even the most harmless of reasons, then, could result in a situation where my very survival is at stake.

The mental and emotional toll of this realization is exhausting, and for those of us who were born and raised in America, we have managed this stress since childhood. Biased police stops become part of the fabric of state actions detracting from the emotional, mental, and physical well-being of vulnerable populations. Deaths resulting from these encounters resonate as a form of "modern-day lynching"[127] Giving greater attention to this facet of what it means to be severely overpoliced would have communicated the full extent of the harms attached to structural bias in policing. It would have also made clear there are at least two types of stories of stops for Black people. For people like Professor Carbado who migrate from other places, these are tales of racial naturalization. For those of us born and raised in the United States, these stories remind of us of a type of natural racialization—the depressing and

126. The only times I ever felt somewhat at ease during a traffic stop were the occasions where I was wearing my military uniform when stopped. My period of active and reserve naval service was from 1990–2013. Each time I was stopped in uniform, I was treated more politely and even kindly. Moreover, I rarely received a citation, and the stop would often end with the officer thanking me for my service. It was as if my uniform restored presumptions of belonging and civility that other motorists routinely enjoyed. These were presumptions, it seemed, that my race obscured when my uniform was absent.

127. *See* MARY-FRANCES WINTERS, BLACK FATIGUE: HOW RACISM ERODES THE MIND, BODY AND SPIRIT ix (2020). This claim again implicates the work of Dean Onwuachi-Willig as the stops reflect the cultural trauma arising of the interplay of outsized and routinized episodes. *See* Onwuachi-Willig, *supra* note 123.

omnipresent ways we have accepted or naturalized how our race may be used to police us under the color of law.

CONCLUSION

This Review began by remarking on the distress created for many people by the Supreme Court's cramped understanding of how race shapes social life in the United States.[128] Professor Carbado's book is replete with real and hypothetical stories that reflect a Supreme Court incapable of fathoming how race shapes policing. Yet in the context of race-conscious benefits programs, the Court sees race and finds it harmful. The harm is not tied to our nation's legacy of race discrimination that continues to impact people of color, but rather the perceived danger of keeping racial consideration alive in a world where race, supposedly, no longer matters.

For students applying to college, applicants of every race basically stand in equipoise and any life challenges experienced due to racial discrimination may not be systematically accounted for as a structured portion of a university's admissions process. On this issue of treating unalike things the same, *Unreasonable* makes a not dissimilar point within the context of Fourth Amendment jurisprudence. Per the Court's most important Fourth Amendment cases, it believes people irrespective of race are policed in a substantially similar fashion. *Unreasonable* takes the Court to task for ignoring how race actually informs police policy and practice. For policing, the question becomes how we bridge the gap between people of color's lived experiences with discrimination and what the police and courts believe to be lawful, colorblind (or at least rationally racist) practices.[129]

A key benefit of Professor Carbado's work is that it both confirms for those who are subject to biased policing the built-in unfairness of their encounters and pushes back against the Court's decisions which treat race as if it is of no import to police. Importantly, the text makes clear that the Court's desire to upend what they believe to be the last remnants of societal bias will never be achieved by searching out the handful of racist police who might still exist. Whatever one takes from the myriad stories that populate *Unreasonable*, they together overwhelmingly demonstrate the discrimination that operates within policing is structural, not personal. To his great credit,

128. *See* text accomanying *supra* notes 40–42.
129. *See* Harris, *supra* note 21, at 268 (citing officers discussing why they are justified in stopping Blacks in greater numbers).

Professor Carbado joins a list of impressive scholars throughout the years whose goal has been to help a colorblind Court see this (and us).

Returning to the work's connection to Derrick Bell, *Unreasonable* clearly reflects that after decades of deploying law and policy to combat racialized policing we still are not saved. Moreover, the ways that racist norms are hardwired into policing practices are most likely permanent. Professor Carbado's refusal to accept this status quo as a reason to give up is laudable and evokes Professor Bell's own response to the permanence of racism—that acknowledging racism as permanent does not alleviate us of the duty to continue to fight it.[130]

130. BELL, *supra* note 108, at 199 ("Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor.").