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Constitutionalizing Racism

Jonathan Feingold

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JONATHAN P. FEINGOLD*

INTRODUCTION

Unreasonable is Devon Carbado at his best. Through accessible prose, carefully crafted hypotheticals, effective visualizations, and some cross-examination (for the reader), Carbado reintroduces us to the Fourth Amendment. In arresting detail, *Unreasonable* exposes how the Supreme Court has turned the Fourth Amendment against "the people"—and specifically, against people racialized as Black.[1] Part of the "Bill of Rights,"[2] the Fourth Amendment was adopted to protect "the right of the people" from police overreach.[3] Yet over the

* Associate Professor of Law, Boston University School of Law. J.D., University of California, Los Angeles School of Law; B.A., Vassar College. Many thanks to the Boston University Law Review Online for inviting this response to Devon Carbado's *Unreasonable*.

[1] I employ the phrasing "racialized as" to emphasize the fact that race is a complex social phenomenon—not a biological category. "Race" includes the racial categories individuals identify with and society assigns to them. Common articulations like "Black person" or "white person" are convenient, but risk reifying biological conceptions of race. For this reason, I avoid the phrasing when possible. Though I recognize alternatives—such as "racialized as"—can feel burdensome and distracting. *See generally* #RaceClass Episode 16, How to Talk about Race without Reproducing Racism, https://soundcloud.com/user-808872105/ep-16-how-to-talk-about-race-without-reproducing-racism-a-conversation-with-dr-deadric-williams.

[2] *See* National Archives, The Bill of Rights: What Does it Say?, (last visited Oct. 10, 2023) https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say ("The Bill of Rights is the first 10 Amendments to the Constitution. It spells out Americans' rights in relation to their government. It guarantees civil rights and liberties to the individual—like freedom of speech, press, and religion.").

[3] The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. As one of my students recently remarked, the Bill of Rights might have been adopted to protect "the people," but the Congress that ratified the Fourth Amendment in 1791 did not intend for all people to enjoy its protections. Quite to the contrary. As Carbado notes, the "'the right of the people' was never intended to include 'the right of *Black people.*' . . . the Bill of Rights was part of a Constitution that presupposed, protected, and indeed legitimized chattel slavery." DEVON CARBADO, UNREASONABLE 23 (2022) (This provision did not expressly mention slavery, using the euphemism "person held to Service or Labour." As such, it is an early example of how not explicitly referencing race—or -color-blindness—can be a strategy through which to constitutionalize racial subordination.). Carbado adds that "Congress also anticipated that slave patrols would comprise part of the governing regime of slavery, and passed the Fugitive Slave Act less than a decade after the Fourth

past half-century, the Supreme Court has systematically repositioned the Fourth Amendment as a weapon of police power.[4] Or as Carbado argues: whereas many assume that the Bill of Rights was intended to "protect and empower 'we the people,' [*Unreasonable*] contends that Fourth Amendment law overly protects and empowers 'we the police.'"[5]

Against this backdrop, the remainder of this review explores three ways that *Unreasonable* illuminates key relationships between the law, racism, and anti-Black police violence.

First, Carbado concretizes the easy-to-say but harder-to-explain reality that *racism is structural*.

Second, Carbado troubles the common assumption that the law, in 2023, proscribes racist police conduct.[6] To the contrary, Carbado explains that "the Supreme Court has interpreted the Fourth Amendment to allocate enormous power to the police: to surveil, to racially profile, to stop-and--frisk, and to kill."[7]

Third, Carbado exposes colorblindness as a potent racial ideology that animates Fourth Amendment law and legitimizes racial hierarchy in America.

A. *Racism Is Structural*

The term "racism" is susceptible to a range of competing definitions. For purposes of this review, I offer the following: racism (or more narrowly, "racist policing") encompasses, at the very least, *an individual's exposure to premature death by the police because of their racial identity*.[8] One could break this definition into three discrete elements: (a) exposure to premature death; (b) by the police and (c) because of race. It is important to note that this definition does not, in itself, ensure a structural understand of racism. To get there, one must resist the common impulse to view individual "bad cops" as the source of this racialized vulnerability.

Amendment took effect. Predicated on the right of slaveowners to repossess Black people, the Act facilitated rather than regulated slave patrols." Id. ("[T]he Act (and its successor legislation) was part of the broader economy of slavery that, to borrow from Saidiya Hartman, shored up the idea that Black people were 'in need of discipline rather than protection.'").

[4] *See Id.* at 23 ("It's not obvious why the text of the Fourth Amendment—which speaks of 'the right of the people'—would end up creating a body of law that protects 'the right of the police.'").

[5] *Id.* at 14. *See also* ("At least as a formal matter, Black people were part of 'the people' whose privacy and security the Fourth Amendment was supposed to protect" when the Supreme Court held the Bill of Rights applicable to the states and local officials in the 20th century).

[6] For a definition of "racism," *see infra* Part A.

[7] UNREASONABLE, *supra* note 3, at 11.

[8] This definition is arguably under-inclusive, as exposure to premature death is only one—albeit acute—harm that flows from a system defined by racialized hierarchy and subordination. I nonetheless employ it because the deadly intersection of American policing and anti-Blackness comprises a central theme in *Unreasonable*.

This is where *Unreasonable* provides an assist. Building on his past work, Carbado exposes society's very structure as the source of anti-Black police violence.

As *Uncreasonable* reveals, our collective ability to shift the frame from "bad cops" to "bad structure" matters—materially and symbolically.

Materially, the "bad cop" frame assumes that the cure to racist policing is a world without "bad cops." Carbado highlights that this assumption is wrong—in large part because it ignores the structural forces that expose Black people to a heightened risk of police violence. Left unaddressed, these forces will continue to structure precarious police-civilian encounters in a world with only "good cops."

The "bad cop" model of racist policing also has symbolical consequences. Specifically, this individualized conception of racism sanitizes and legitimizes—as lawful and morally acceptable—a world in which people racialized as Black are exposed to premature death by police.

Unreasonable does more than recite the mantra of "structural racism."[9] True to form, Carbado shows us structural racism. As one notable example, *Unreasonable* concretizes and disaggregates the structure of police violence across seven discrete categories: (1) vulnerability; (2) frequency; (3) police culture & training; (4) justification; (5) immunity & indemnification; (6) dissociation; and (7) discretion.[10] This is a list of structural forces, all of which facilitate racist policing—whether or not an individual officer is "good" or "bad."

By concretizing racism's structural side, Carbado performs a separate intervention. When scholars or advocates discuss racist policing, two claims often emerge: (a) that the law fails to proscribe structural sources of racist policing (that is, we have a "regulation" problem) and (b) that racist policing is unlawful but unenforced (that is, we have an "enforcement" problem).

Neither claim is, in itself, inaccurate. But both tend to miss critical dimensions of the relationship between structural racism, the law, and police violence. First, the Fourth Amendment is not just a law that regulates (or fails to regulate) the structural sources of police violence. The Fourth Amendment—and the Supreme Court's Fourth Amendment jurisprudence is part of that structure.[11] To borrow

[9] UNREASONABLE, *supra* note 3, at 15 ("If you bear with me, however, my hope is that you will understand why I propose an understanding of police violence that transcends a focus on individual 'bad cops.'").

[10] *Id*. at 15-21.

[11] *Id.*at 22 ("To repeat: The police power problem I am describing is not principally about lawlessness. Available to 'good' and 'bad'" cops alike, the powers the image depicts are a window on the ways in which Fourth Amendment law effectively decriminalizes coercive and violent forms of police conduct.").

a term from critical race theorists, the law and racist policing are co-constitutive; they both produce and are the product the each other.[12]

Second, when it comes to racist policing, Fourth Amendment law has more than a regulation and enforcement problem. It also has what we might term a "constitutionalization" problem. That is, the Supreme Court's prevailing Fourth Amendment regime formally sanctions racist policing. Or as Carbado details: "[T]he Supreme Court has effectively legalized racially targeted policing by interpreting the Fourth Amendment to protect police officers at the expense of Black Americans."[13] For those prone to quibble, one might question Carbado's inclusion of the word "effectively." As I note below, *Unreasonable* suggests that the Supreme Court has *formally* legalized racially targeted policing—at least under the Fourth Amendment.

B. *The Supreme Court Constitutionalizes Racism*

Among other contributions, *Unreasonable* deserves praise for its subtle yet significant myth busting. One of those myths is that American law no longer sanctions racism—racist policing or otherwise. The myth proceeds as follows:

> Sure, we concede that in America's sinister past, all manner of law sanctioned a racial order defined by anti-Blackness and white supremacy.[14] But we are past that past. Racial inequality might persist, regrettably, but the law is not to blame. Brown overturned Plessy and the Civil Rights movement enshrined a new era of federal antidiscrimation protections. The law might be insufficient to counter the vestiges of our racist past, but it does not legalize racism.

Carbado troubles this story. As one example, *Unreasonable* reveals how the Supreme Court has entrenched a Fourth Amendment jurisprudence that sanctions—that *legalizes*—anti-Black racial profiling.

A central piece of this story is *Whren v. United States*,[15] a 1996 Supreme Court case that implicated the following question: If a police officer possesses probable cause to believe that a traffic violation has occurred, is a race-based

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[12] David Simson, Comment, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 527 n.100 (2014) ("A corollary of the idea of law as both a social and a legal construction is that the relationship between law and race is not unidirectional but rather co[-]constitutive."); Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 488 (2010) ("This review identifies an emerging genre of sociolegal scholarship that explores how law and race construct each other in an ongoing, dialectic process that ultimately reproduces and transforms racial inequality."); Ian Haney Lopez, *Introduction* in Race, Law and Society (Ian Haney Lopez, ed.) (2007) ("[L]aw not only constructs race, but race constructs law . . .").

[13] UNREASONABLE, *supra note* 3 at 29.

[14] *Id*. at 23-29 (mapping United States' history of legalized racism).

[15] 517 U.S. 806 (1996)

traffic stop *reasonable* under the Fourth Amendment?[16] In a unanimous decision, joined by liberal champions like Justice Ruth Bader Ginsburg, the Supreme Court said: *Yes*.[17] The Supreme Court held that if an officer sees two cars roll through a stop sign, it would be constitutionally *reasonable* for the officer to stop Car A because that driver appears to be Black (whereas the driver in Car B appears to be white). The Fourth Amendment, in short, condones racial profiling.

Carbado dedicates his final two chapters to *Whren*. Chapter Six contains one page of background text followed by the Supreme Court's opinion. Chapter Seven employs a similar structure. The chapter opens with less than four pages of background followed by a fictional re-written *Whren* opinion.

The juxtaposition of opinions performs its own intervention. By offering the reader two competing legal, factual, and normative texts, Carbado reinforces two insights that weave through *Unreasonable*.

First, he exposes how the Supreme Court fashioned a Fourth Amendment regime that sanctions racially targeted policing. In so doing, Carbado fortifies his counter-story: that the law continues to legalize racism.

Second, Carbado dispels the notion that "the law" is some self-defined or self-executing phenomenon. To the contrary, "the law" is often no more and no less than what the Supreme Court says it is (and how those pronouncements then manifest in the "real world"). *Whren* illustrates this reality. And by pairing *Whren* with his own re-write, Carbado shows that the 9-0 outcome was far from inevitable. Put differently, the Fourth Amendment does not, of itself, legalize racist police. That distinction goes to the Supreme Court.[OK – Mic Drop]

C. *Colorblindness Is Not Neutral*

Consistent with Carbado's expansive body of work, *Unreasonable* disrupts the proposition that colorblindness offers a neutral approach to race and racism. Carbado's doctrinal analysis and vivid hypotheticals expose colorblindness for how the framework most-often operates: as a racial ideology that denies the

[16] *See id.*

[17] *Id*. The Supreme Court noted that racial profiling could create constitutional concerns under the Equal Protection Clause. *See id*. at 813 ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable—cause Fourth Amendment analysis."). Even were the Fourteenth Amendment a viable vehicle for relief from racial profiling, that does not diminish the reality that *Whren* legalized racial profiling under the Fourth Amendment. *See* Devon W. Carbado & Jonathan Feingold, *Rewriting Whren v. United States*, 68 UCLA L. REV. 1678, 1690 (2022) ("Petitioners need not cede their Fourth Amendment protections simply because they may find recourse under the Fourteenth Amendment. Indeed, we find it hard to understand how police conduct that would violate the Fourteenth Amendment would be considered reasonable under the Fourth. If anything, the fact that racially discriminatory policing raises a cognizable Fourteenth Amendment claim suggests the opposite.").

perspective and experience of groups who face, and have faced, the threat of racialized police violence.

Consider how Carbado interrogates the Supreme Court's "free to leave" test. To concretize this doctrinal rule and its real-life consequences, Carbado draws on Tanya Mohammad, a fictional character who "is, or is perceived to be, a [Black] Muslim."[18] Carbado imagines a scenario in which two law enforcement officers approach Tanya and ask to search her bag. This encounter triggers the Fourth Amendment if the interaction constitutes a "seizure." And this is where the "free to leave" test comes in. Under prevailing precedent, a person is not "seized" for Fourth Amendment purposes if a "reasonable person" under similar circumstances would have felt "free to leave."[19]

Against this backdrop, Carbado notes that this test could be "formulated in two ways."[20] A "colorblind" formulation might ask "Whether a reasonable person would feel free to leave?" A "color-conscious"[21] formulation, in contrast, might ask the more specific question: "Whether a reasonable Black Muslim person would feel free to leave?"[22] These competing formulations reveal how colorblind regimes that choose not to "see race" internalize a racial preference for those with racial privilege.

Consider the following. Colorblindness generally, and the colorblind "reasonableness" formulation specifically, presumes a universal experience with law enforcement. Were this accurate, the two formulations should produce the same answer. But as Carbado distills, Muslims broadly (and Black Muslims more narrowly) have a racially-particularized relationship with law enforcement. The colorblind formulation erases (if not denies) that reality.

In so doing, the colorblind "free to leave" test misrepresents actual life in the United States. But it also privileges a particular racial perspective. That specific perspective belonging individuals and groups who lack a history of racialized police violence, surveillance, and harassment. Put differently, colorblind is itself a racial preference—but one we rarely recognize as such.[23] Thanks to *Unreasonable*, we can see things a bit more clearly.

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[18] UNREASONABLE, *supra* note 3 at 58.

[19] United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

[20] UNREASONABLE, *supra* note 3 at 58.

[21] For a general overview of competing racial ideologies, see Jonathan P. Feingold, *Color-blind Capture*, 102 B.U. L. REV. 1949, 1958 (2022) (distinguishing "colorblind" and "color-conscious" conceptions of race and racism).

[22] UNREASONABLE, *supra* note 3 at 58..

[23] Carbado rightly notes that the Supreme Court's "free to leave" test also embodies a set of "normative and policy judgements[] about the kinds of burdens people should put up with." Unreasonable at 59. This inquiry—which asks who must bear which burdens—is itself a racialized analysis. *Id*. ("Applying the preceding insights to our voluntary interview hypothetical, the legal conclusion that a reasonable person is not seized in the context of a voluntary

interview is a normative position that a reasonable person should not feel seized. Put more provocatively, a reasonable Muslim should not feel seized under the facts I described. Only unreasonable Muslims would not put up with "voluntary interviews" in the sense of experiencing them as seizures that the government must justify.").