ADDRESSING OUR UNREASONABLE FOURTH AMENDMENT DOCTRINE

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Devon Carbado's *Unreasonable* begins with a striking account of his personal encounter with police violence. This story illustrates how structural inequality is so embedded into American life that even those who are technically undefinable in typical accounts of American racism (i.e., not African American, not white, but of Black ancestry) are naturalized into American racial inequality.[1] Carbado discusses how despite his English accent and general illegibility as a Black person because he did not display the typical attributes of African American heritage, police eventually, and comfortably, afforded him the same (mis)treatment afforded to Black people native to the United States—a permanent status of suspicion and disrespect.

The book illustrates how this status of disrespect is not only a cultural phenomenon reflected in the everyday experiences of Black people who interact with the police, but a feature incorporated into the legal doctrines that regulate the behavior of police in their interactions with ordinary citizens.

The Fourth Amendment prohibits unreasonable searches and seizures.[2] Supreme Court cases that interpret this right to be free from government intrusion once had the potential to provide guardrails that protect us from invasive governmental intrusions. [3] Carbado convincingly demonstrates how rather than comprehensively protect us from unnecessary government intrusion,

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[1] DEVON CARBADO, UNREASONABLE 4 (2022) ("[T]o the extent that the officers were racially committed to viewing us as criminals, or thugs, or troublemakers, our English accents might have challenged that perception. But not for very long.").

[2] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").

[3] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 660 (1961):

> Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.

Fourth Amendment jurisprudence codifies white supremacist logics that masquerade as colorblindness.[4] He shows readers how Fourth Amendment jurisprudence frequently embraces an "objective" standard that evaluates government and human behaviors against the actions of the "reasonable person."[5] This color-less and gender-less person provides the metrics upon which individual conduct is evaluated. So, when the United States Supreme Court was evaluating the reasonableness of Hodari D.'s choice to spontaneously run away from police when he saw them, the Supreme Court justices summoned this reasonable person as a Fourth Amendment standard-bearer upon which human conduct could be evaluated.[6]

In *California v. Hodari D.*, the Supreme Court decided whether Hodari was seized for Fourth Amendment purposes, when the police engaged in a show of authority, and Hodari failed to yield to them.[7] If he were seized, he should have been afforded Fourth Amendment protection, and the police should have had reasonable suspicion or probable cause to engage in such show of authority. Rather than find a seizure, the Supreme Court found that reasonable people do not spontaneously run away from the police. Reasonable people comply with police orders and view the police as legitimate figures of authority, not figures of terrors. These days, the flaws in such legal analysis are probably obvious—the clearest of which is that not all people experience police figures in the same way, and not all people readily submit when they see the police. Following the George Floyd (and Breonna Taylor) protests, the fact that marginalized communities experience policing as a source of anxiety and terror should be well-known. However, this fact of life appears absent in the current Fourth Amendment doctrine.

In fact, the critiques raised in Carbado's book responds to a Supreme Court jurisprudence which appears to operate in an empirical reality completely unlike the world that the rest of us live in. This is a world where Black people do not have to give their children "the talk"[8] in order to properly protect them for their inevitable encounters with the police. It is a world where there is no racial inequality, in which colorblindness can fairly operate without exacerbating the existing racial inequities in a white supremacist society. It is a world in which

[4] CARBADO, *supra* note 1, at 63 (noting that "not explicitly referencing race—or color-blindness— can be a strategy through which to constitutionalize racial subordination.").

[5] *See* I.N.S. v. Delgado, 466 U.S. 210, 216 (1984) ("Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.").

[6] California v. Hodari D., 499 U.S. 621 (1991).

[7] *Id.* at 626.

[8] JILL MIZELL, THE OPPORTUNITY AGENDA, AN OVERVIEW OF PUBLIC OPINION AND DISCOURSE ON CRIMINAL JUSTICE (2014) ("White Americans are much less likely than African Americans and Latinos to think that the police engage in racial profiling. African Americans see racial bias in policing, sentencing, conditions of confinement, and conditions upon release.").

everyone reasonably trusts the police, instead of reasonably fearing police violence. And stops and frisks are mere nuisances that are required for everyone's protections. *Unreasonable* argues that the Fourth Amendment jurisprudence's failure to acknowledge the differential experience of people of color while providing police with substantial discretion to discriminatorily enforce the law has created a legal environment that permits, and perhaps even facilitates, structural inequality. [9]

When Supreme Court justices embrace a colorblind approach in the manner that they have with Fourth Amendment law, they are not actually blind to color or race. They instead embrace white normativity, that is a white perspective and understanding of the world, to decipher the conduct of everyone, including people who are nonwhite. This approach is especially problematic when the Court draws conclusions about the normalness of behaviors in response to police conduct as there is substantial evidence that indicates that white and Black people have entirely different experiences with the police. This approach is especially problematic when one considers that the bones of Fourth Amendment jurisprudence is built substantially on the backs of Black defendants, as Carbado notes.[10] The book explains why and how there is a problem within the legal doctrine that contributes to systemic racial inequality in the doctrine.

But what should the reader do with this evidence of structural and doctrinal inequality? And, of particular interest to legal educators, what does this view of the doctrine mean for the teaching of Criminal Procedure law? While the past, and perhaps the current, Supreme Court might not be open to an interpretation of the Fourth Amendment that allows for a standard that reflects the pluralistic and diverse experiences in our actual society, a future Court might. I think legal educators would be well-advised to prepare law students for this future reality and maybe even think through strategies for educating lawyers who are prepared to engage in resistance rather than blind compliance with the law. Furthermore, there might be room for advocacy at lower courts, state courts, and in international forums where the systemic violence of the law might be better addressed even if the current conservative United States Supreme Court embraces the rhetoric of colorblindness to entrench white normativity.

[9] CARBADO, *supra* note 1, at 63 (arguing that "the Supreme Court's colorblind interpretation of the Fourth Amendment ends up protecting white Americans more than it does Black Americans.").

[10] *Id.* at 75 (highlighting how many of the defendants in major criminal procedure cases were Black).