# LET'S GET REAL: BEHAVIORAL REALISM, IMPLICIT BIAS, AND THE REASONABLE POLICE OFFICER

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*Constitutional law is not particularly sophisticated about bias, and so it is not very good at protecting people from it. This is nowhere more evident than in the Supreme Court's jurisprudence around racial profiling. The Supreme Court has conceptualized racial profiling as something only bad police officers do; it has equated bad stops with bad cops. But in recent years, social psychologists have amassed significant evidence showing that most people possess implicit biases and that these biases can affect our behavior, particularly when certain conditions are present. This means that many instances of racial profiling are likely to be unintentional.*

*Supreme Court jurisprudence makes the Fourteenth Amendment the constitutional vehicle for remedying racial profiling, but the Court has limited that Amendment's ability to respond to unintentional racial profiling by requiring that plaintiffs show intent to discriminate. I contend that the Fourth Amendment can fill this gap, serving as a powerful tool for addressing contemporary forms of bias. But if the Fourth Amendment is to fill this role, courts must eschew post hoc evaluations of the moral character of the searching and seizing officers in favor of forward-looking, probabilistic assessments of the contexts that are most likely to lead to reasonable outcomes given what we know about human behavior. Rules that constrain officer discretion, encourage restraint rather than action in the face of ambiguity, and hold officers accountable for their choices will lead to more reasonable searches and seizures, because implicit biases will be less likely to be activated with such rules in place.*



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> Rare, indeed, is the Harlem citizen, from the most circumspect church member to the most shiftless adolescent, who does not have a long tale to tell of police incompetence, injustice, or brutality. I myself have witnessed and endured it more than once. . . . It is hard, on the other hand, to blame the policeman . . . . He, too, believes in good intentions and is astounded and offended when they are not taken for the deed. He has never, himself, done anything for which to be hated—which of us has?—and yet he is facing, daily and nightly, people who would gladly see him dead, and he knows it. There is no way for him not to know it: there are few things under heaven more unnerving than the silent, accumulating contempt and hatred of a people.[1]

## INTRODUCTION: MOVING BEYOND GOOD COP/BAD COP

Constitutional law is not particularly sophisticated about bias, and so it is not very good at protecting people from it. The Supreme Court has successfully employed constitutional law, and particularly the Fourteenth Amendment, to address explicit, intentional discrimination, but it has been less adept at reckoning with contemporary,[2] implicit forms of bias.[3] This Article lifts up the

1. James Baldwin, *Fifth Avenue, Uptown*, ESQUIRE, July 1960, at 76.

2. I use the term "contemporary" because, even though implicit biases were no doubt prevalent in earlier times, I think there is something distinct about the way in which bias operates today. While those who hold explicit biases no doubt also hold implicit biases, a novel phenomenon now exists wherein implicit biases are prevalent among the growing number of individuals who sincerely disavow racist beliefs. As I will argue below, this phenomenon of widespread implicit bias among the avowedly non-racist is equally and, in some ways, more troubling than the widespread explicit racism of the recent past.

3. The Equal Protection Clause of the Fourteenth Amendment requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S.

Fourth Amendment as a vehicle for accomplishing what the Court has had difficulty doing with the Fourteenth: protecting individuals from the harms that arise from the types of implicit biases that are pervasive today. In particular, it suggests a mechanism by which the Fourth Amendment can more effectively curtail the harms of racial profiling.[4]

Any account of racial bias in America in 2016 must wrestle with an anomalous historical truth: even as "overt White hostility toward African-Americans has been in decline,"[5] other indicators suggest that equality, in terms of welfare and life opportunities, remains elusive.[6] While the causal explanation for this incongruity is complex, one answer may be found in the

CONST. amend. XIV, § 1. For cases that use this provision to address explicit discrimination, see, for example, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), finding that "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws"; *Loving v. Virginia*, 388 U.S. 1, 12 (1967), finding that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause"; and *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), finding that "the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

4. The Fourth Amendment provides, in part, that the "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, cl. 1.

5. Philip E. Tetlock & Gregory Mitchell, *Implicit Bias and Accountability Systems: What Must Organizations Do to Prevent Discrimination?*, 29 RES. ORG. BEHAV. 3, 9 (2009) ("[F]ive decades of representative-sample surveys document[] greater racial tolerance among Americans. . . . Whereas Americans were once deeply divided over whether Blacks and Whites should be allowed to drink from the same fountains, sleep in the same hotel rooms, attend the same schools, live in the same neighborhoods, or intermarry, there is now near unanimity that all forms of disparate treatment are unacceptable. And whereas either pluralities or majorities of Americans once endorsed sweeping stereotypes of African-Americans as violent or dumb or lazy or hyper-sexual, strong majorities now deem such sentiments unacceptable.").

6. While a full accounting of these indicators is outside of the scope of this article, a few examples will suffice: African Americans experience a higher rate of infant mortality and are less likely to have health insurance than non-Hispanic Whites. *Compare* CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATS., HEALTH OF BLACK OR AFRICAN AMERICAN NON-HISPANIC POPULATION (May 3, 2017), http://www.cdc.gov/nchs/fastats/black-health.htm, *with* CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATS., HEALTH OF WHITE NON-HISPANIC POPULATION (May 3, 2017), http://www.cdc.gov/nchs/fastats/white-health.htm. A significant racial wealth gap remains. *See* Laura Shin, *The Racial Wealth Gap: Why A Typical White Household Has 16 Times The Wealth Of A Black One*, FORBES (Mar. 26, 2015), https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#5cfc621f45e ("The typical black household now has just 6% of the wealth of the typical white household . . . ."). The criminal justice system remains a site of inequity. *See, e.g.*, Cassia Spohn, *Racial Disparities in Prosecution, Sentencing, and Punishment*, *in* OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION 166 (Sandra Bucerius & Michael Tonroy eds., 2014) ("There is convincing empirical evidence that defendant race and ethnicity affect decisions regarding bail, charging, plea bargaining, and sentencing.").

slippery and evolving nature of prejudice. Indeed, over the past two decades, social psychologists have come to understand that not all biases are explicit. As will be described in greater detail below, human brains make implicit associations, which can sometimes lead people to behave in ways that they would not knowingly endorse. Such contemporary, implicit forms of bias may affect individuals' behavior in ways that perpetuate inequalities even though those individuals may be unaware of—and even expressly disavow—such results.[7]

Because constitutional law remains focused on questions of *intent*, however, it can make only limited headway in addressing adverse *outcomes*. This is nowhere more evident than in the Supreme Court's jurisprudence around racial profiling. When it comes to racial profiling, the Supreme Court is stuck in a good cop/bad cop dichotomy that has become outmoded. The Court has conceptualized the problem as one of racist "attitude[s] that reside[] in the mind[s] of bad police officers."[8] But in recent years, social psychologists have come to understand that "[s]tereotypes, like most human mental processes, can and do operate outside of conscious awareness, [such that] they can influence us whether we want them to or not. As a consequence, much of what we call racial profiling is likely spontaneous and *unintended*."[9] The Supreme Court has thus built its jurisprudence on a theory of human behavior that scientific research has revealed to be unsound.

This Article makes a positive case for the Fourth Amendment as a vehicle for addressing contemporary, implicit forms of bias in policing. The Fourth Amendment provides a logical framework for addressing *unintentional* racial profiling both because it is concerned with principles of equal protection and because, as a textual matter, it is focused on outcomes more so than intentions. The Fourth Amendment is concerned with principles of equal protection because we read it in light of the subsequently enacted Fourteenth, which ushered in an entirely new conception of "We the People." Reading the Fourth Amendment in light of the Fourteenth infuses the requirement that searches and seizures be "reasonable" with particular meaning, strongly suggesting that searches and seizures that are instigated *because of* the target's race will not pass muster. But contrary to current understandings of the Fourteenth Amendment, I argue that the Fourth is focused on results rather than intentions. The Fourth Amendment prohibits unreasonable searches and seizures, not

7. *See infra* notes 31-57 and accompanying text.

8. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 968-69, 1034, 1044 (2002) ("[R]ace potentially matters in the Fourth Amendment context only when a case involves a 'racially bad' cop. Police officers who cannot be so described are presumed to be 'racially good,' and their racial interactions with people on the street are presumed to be constitutional. . . . The absence of avowedly racist officers does not mean, however, that a nonwhite person's encounter with police is unaffected by race.").

9. JACK GLASER, SUSPECT RACE: CAUSES AND CONSEQUENCES OF RACIAL PROFILING xii (2014) (emphasis added).

unreasonable police officers. As such, it is focused not on the *intent* of the searching or seizing officer but on the *outcome* of that officer's behavior.

I find in the Fourth Amendment, therefore, a wonderfully suitable home for a constitutional prohibition on racial profiling that is the result of contemporary, implicit forms of bias. But I argue that if the Fourth Amendment is to successfully address cases of *unintentional* profiling, courts will need to adopt a behavioral realist approach to their analysis of reasonableness. Behavioral realism asks courts to "pay close attention to the best available evidence about people's actual behavior" when "formulating and interpreting legal rules."[10]

If we look to the best available evidence about how implicit biases can translate into objectionable behaviors, we see that the question courts often ask to assess Fourth Amendment reasonableness—whether the police officer who effected the search or seizure was reasonable—entirely misses the point. Implicit bias is not the exclusive purview of unreasonable individuals; it is endemic to normal human cognition. Individual police officers may thus be reasonable on the level of conscious thought—they may do their best to act lawfully and fairly—and yet produce constitutionally unreasonable results in the form of stops and searches contaminated by racial bias.

A Court that is *realistic* about human behavior will thus shift its focus away from making post hoc determinations of the reasonableness of individual police officers in their one-off engagements with members of the public. Instead, social psychological findings about implicit biases will permit judges to make probabilistic determinations about situations in which those biases are most likely to be activated in the future, thus leading to unreasonable *results*. Judges may then structure Fourth Amendment rules so that officers find themselves in such situations less often.

What form might such a probabilistic determination take? Social psychologists have demonstrated, for example, that "implicit biases translate most readily into discriminatory behavior . . . when people have wide discretion in making quick decisions with little accountability."[11] This means that, on balance, rules that constrain officer discretion, encourage restraint rather than action in the face of ambiguity, and require officers to articulate justifications for their actions will lead to more reasonable searches and seizures, because implicit biases will be less likely to be activated with such rules in place.

For a court that took a behavioral realist approach to Fourth Amendment adjudication, the fact that a particular rule would likely encourage the activation of implicit biases in future police interactions with the public would not be dispositive of the case. It would simply be another factor for the court to

10. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 972 (2006).

11. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012).

consider in making its reasonableness determination. In cases concerning Fourth Amendment reasonableness, courts currently use a balancing approach, which eschews a "fixed formula" of reasonableness in favor of a careful consideration of the "facts and circumstances of each case."[12] Pursuant to this approach, courts weigh "the need to search (or seize) against the invasion which the search (or seizure) entails."[13] Thus, "serious crimes and serious needs can justify more serious searches and seizures."[14] Were courts to adopt my proposed approach, the likelihood that a particular rule would serve to activate or suppress implicit biases in future police-public interactions would become one factor in the reasonableness equation, and thus one thumb on the scale in a balancing test.

This Article proceeds in four parts. Part One argues that racial profiling is harmful to its victims and offensive to constitutional values of equal citizenship. Part Two details social psychologists' findings that much profiling is likely the product of implicit—as opposed to explicit—biases, and therefore *unintentional*. Part Three notes that while the Fourteenth Amendment is meant to be the constitutional vehicle for remedying the harm of racial profiling, we have limited its ability to respond to contemporary, unintentional forms of bias by imposing a requirement that plaintiffs make a showing of intent to discriminate. This Part argues that the Fourth Amendment can and should serve as a powerful tool for addressing contemporary forms of bias, alleviating the outmoded thinking that hampers the Fourteenth. Part Four notes that if the Fourth Amendment is to fill this role, however, courts must eschew post hoc evaluations of the moral character of the searching and seizing officers in favor of forward-looking, probabilistic assessments of the contexts that are most likely to lead to reasonable outcomes, given what we know about human behavior.

Part Four also addresses potential critiques of the approach proposed in this Article, including the concern—prevalent in recent policing literature—that issues of racial profiling will be most successfully addressed not by courts but

12. United States v. Rabinowitz, 339 U.S. 56, 63 (1950). As the Supreme Court has noted, "there is no ready test for determining reasonableness other than . . . balancing." Terry v. Ohio, 392 U.S. 1, 21 (1968) (quoting Camara v. Mun. Court, 387 U.S. 523, 534-35, 536-37 (1967)). *See also* Whren v. United States, 517 U.S. 806, 817 (1996) ("[I]n principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors.").

13. *Terry*, 392 U.S. at 21 (quoting *Camara*, 387 U.S. at 534-35, 536-37).

14. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 802 (1994). *See also* Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 161 (2015) ("[T]he Fourth Amendment . . . calls for a reasonable balance between liberty and order, seemingly an explicit invitation to consider law enforcement effectiveness."). This is not to say that courts have always embraced a balancing approach in such cases, or even that they should do so. Courts could require that all searches and seizures be supported by a warrant and/or probable cause. My point is a descriptive one about how the Supreme Court tends to view these cases today.

by other institutional actors, such as police departments through their internal rulemaking function. I argue that while other actors will no doubt have important—and perhaps even primary—roles to play, courts are necessary and unavoidable partners in setting the terms for police-public engagements. Judges will continue to be called upon to address the reasonableness of police officers' one-off engagements with the public, typically in individual criminal cases, and they will need some yardstick against which to measure the reasonableness of those interactions. The rules that they promulgate in these individual cases, moreover, will help to set the parameters for further police-public contacts.

## I. THE CHALLENGE OF RACIAL PROFILING

At the outset, it will be helpful to be clear about what I mean when I talk about racial profiling. The term is so familiar that one might easily overlook the fact that it has no one, universally agreed-upon definition. Throughout this Article, I adopt a slightly modified version of the definition proffered by Jack Glaser in his careful study of the topic. Thus, for purposes of the discussion that follows, racial profiling will be defined as "the use of race or ethnicity, or proxies thereof, by law enforcers as the basis of judgments of criminal suspicion," except when there is trustworthy information, relevant to the locality and timeframe, that links a person of a particular race or ethnicity to an identified criminal incident or scheme.[15]

I prefer this definition to others because it frames profiling as a cognitive process rather than a particular law enforcement practice. As Glaser notes, his focus is on "any *judgments* of criminal suspicion, not just actual behaviors (e.g., stops and searches)."[16] When profiling is understood in this way, one sees that it has relevance beyond the prototypical pedestrian or traffic stop that the term may bring to mind. For example, one may think of the decision to shoot an unarmed Black man as an instance of racial profiling if the officer (consciously or unconsciously) considered the man's race as a factor in the

15. GLASER, *supra* note 9, at 16. My addition to Glaser's definition is adopted from the End Racial Profiling Act of 2015, H.R. 1933, 114th Cong. § 2(7) (2015-16) ("The term 'racial profiling' means the practice of a law enforcement agent or agency relying, to any degree, on actual or perceived race, ethnicity, national origin, religion, gender, gender identity, or sexual orientation in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except when there is trustworthy information, relevant to the locality and timeframe, that links a person with a particular characteristic described in this paragraph to an identified criminal incident or scheme."). For other definitions, see, for example, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1077 (2001), defining racial profiling as "the intentional consideration of race in a manner that disparately impacts certain racial minority groups, contributing to the disproportionate investigation, detention, and mistreatment of innocent members of those groups."

16. GLASER, *supra* note 9, at 16.

calculation that he posed a threat.

As described above, survey data suggest that explicit racism has been in decline over the past fifty years. But many studies—using what are known as "hit rate analyses" (i.e., analyses of the frequency with which stops and searches produce evidence of a crime)[17]—demonstrate that racial profiling persists.[18] Perhaps unsurprisingly in light of these data, surveys indicate that "people generally feel that profiling occurs."[19]

This pernicious, tenacious racial profiling imposes multiple harms on its victims, and on society more broadly. At the most basic level, all police stops result in a loss of time and some amount of stress and anxiety for those stopped.[20] But more than this, racial profiling "ratchets up racial salience . . . perpetuat[ing] the notion that race matters," and then "stigmatize[s certain] race[s] by ascribing negative meanings to racial difference."[21] Popular discourse suggests that Black Americans, in particular, attend to and understand the meaning that police profiling ascribes to their race. Black parents who feel compelled to give their children "the talk" about how to respond to police officers have internalized, and are transmitting, the idea that a person's skin

17. A hit rate analysis is a type of outcome test. As Ian Ayres explains:

> The basic idea of the outcome test is to analyze whether the outcomes (about which the decisionmaker cares) are systematically different for minorities and nonminorities. . . . [In the policing context, the] ex post probability that a police search will uncover contraband or evidence of illegality is strong evidence of the average level of probable cause that police require before undertaking a search. A finding that minority searches are systematically less productive than white searches is accordingly evidence that police require less probable cause when searching minorities. To be sure, such a finding does not require that we infer that police engaged in disparate treatment—but, at a minimum, it is evidence that whatever criteria the police employed produced an unjustified disparate impact.

Ian Ayres, *Outcome Tests of Racial Disparities in Police Practices*, 4 JUST. RES. & POL'Y 131, 132-33 (2002).

18. *See, e.g.*, IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT i (Oct. 2008) (reviewing pedestrian and motor vehicle stops made by the Los Angeles Police Department between July 2003 and June 2004 and finding "prima facie evidence that African Americans and Hispanics are over-stopped, over-frisked, over-searched, and over-arrested"); CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 52-54 (2014) (reporting from a random sample of drivers in the Kansas City metropolitan area in 2003 and 2004 that 12.2% of white drivers reported being stopped in the past year, compared with 24.5% of African American drivers and demonstrating that car stops of whites and Blacks are substantively different since whites are stopped for violating traffic safety laws and African Americans are subjected to pretextual investigatory stops when they are perceived as suspicious).

19. Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 272 (2004).

20. GLASER, *supra* note 9, at 123.

21. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 22-24 (2011).

color makes him a target of suspicion and possibly violence.[22]

As Ekow Yankah notes, these insults to dignity are particularly powerful because they are made by police officers as opposed to private citizens:

> Any person who unjustifiably attacks another, insults them or treats them with contempt seeks to undermine their dignity. Yet there is something distinct in the use of police authority to treat citizens with contempt. Nor does authority alone explain this wrong. A private boss is certainly wrongful when mistreating his employees but . . . there is a particular injury, the breach of civic trust, which is an important element of . . . stories [of racial profiling]. The role of the police officer as a civic guardian makes the abuse of power and attack on dignity distinct from those of private individuals.[23]

In addition to these violations of individuals' dignity as human beings and as citizens, profiling "undermines trust in public institutions,"[24] and research suggests that the resulting loss of legitimacy for the police—and the criminal justice system more broadly—is likely to have negative ripple effects. Of most immediate concern to law enforcement, people are less likely to obey the law when they perceive actors in the criminal justice system to be illegitimate:

> [N]umerous empirical studies persuasively demonstrate that perceptions of legitimacy have a *greater* impact on people's compliance with the law than their fear of formal sanctions. The bad news is, if people experience an interaction with a police officer that suggests to them the police are untrustworthy, their ties with law and their sense of its legitimacy weaken, which may lead to a lack of cooperation with the police and more law breaking in the future.[25]

Perceptions of police legitimacy have also been linked to feelings of social inclusion,[26] as well as individuals' likelihood of engaging in productive social and economic activity in their communities.[27] Thus, to the extent that racial profiling results in decreased police legitimacy, its costs will be broadly felt.[28]

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22. *See, e.g.*, *"The Talk": How Parents of All Backgrounds Tell Kids About the Police*, NAT'L PUB. RADIO (Sept. 5, 2014), http://www.npr.org/2014/09/05/346137530/the-talk-how-parents-of-all-backlrounds-tell-kids-about-the-police.

23. Ekow Yankah, *Policing Ourselves: A Republican Theory of Citizenship, Dignity and Policing - A Comment on Fagan*, Cardozo Legal Studies Research Paper No. 400, at 13 (2013).

24. Joscha Legewie, *Racial Profiling and Use of Force in Police Stops: How Local Events Trigger Periods of Increased Discrimination*, 122 AM. J. SOCIOLOGY 379, 382 (2016).

25. Megan Quattlebaum, *Procedural Justice: Increasing Trust to Decrease Crime*, OJP DIAGNOSTIC CTR. (May 22, 2015), https://www.ojpdiagnosticcenter.org/blog/procedural-justice-increasing-trust-decrease-crime.

26. Ben Bradford, *Policing and Social Identity: Procedural Justice, Inclusion and Cooperation Between Police and Public*, 24 POLICING & SOC'Y 22, 23 (2014).

27. Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL., PUB. POL'Y & L. 78, 79 (2014).

28. Nor should we feel comforted that racial profiling, though harmful, is effective as a

Bennett Capers argues that when one adds up the many harms it imposes, "[r]acial profiling is . . . citizenship diminishing, suggesting a racial hierarchy inconsistent with our goal of equal[ity]."[29] This diminishment of the equality ideal strikes at the heart of the concerns animating the Fourteenth Amendment's guarantee of equal protection of the laws, suggesting that the harms of racial profiling are constitutionally cognizable. Moreover, as will be described in more detail below, when the Fourth Amendment is read in light of the subsequently enacted Fourteenth, one sees that searches and seizures contaminated by racial bias must also be described as unreasonable.

Before turning to the question of how best to use the relevant constitutional provisions to remedy the problem of profiling, however, it will be useful to detail the social-psychological literature that explains that much profiling is likely unintentional. This lack of invidious intent on the part of many racial profilers makes the question of how to effectively deter such behavior significantly more complex.

## II. IMPLICIT BIAS AND REASONABLE UNREASONABLENESS

Courts often mischaracterize racial profiling as conduct that only "bad" officers purposefully engage in. In *Whren v. United States*, for example, the Supreme Court equated racial profiling exclusively with "intentional[] discriminat[ion]."[30] Since *Whren* was decided, however, more than two decades of social-psychological research have revealed that much profiling is actually *unintentional*.[31] What psychologists have come to understand is that human

crime reduction strategy. Indeed, profiling may perversely lead to "reverse deterrence" when "the dilution of law enforcement for nonprofiled groups causes them to commit *more* crime. . . . [E]ven in the 'best case' (where profiled groups really do offend at relatively high rates) . . . profiling tends to yield very modest efficiency gains that diminish over time . . . ." GLASER, *supra* note 9, at 117, 126.

29. Capers, *supra* note 21, at 19. *See also* EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 18, at 2 ("Police stops convey powerful messages about citizenship and equality. Across millions of stops, these experiences are translated into common stories about who is an equal member of a rule-governed society and who is subjected to arbitrary surveillance and inquiry.").

30. 571 U.S. 806, 813 (1996).

31. When social psychologists speak of *unintentional* racial profiling, they generally mean that the profiling is both *implicit* and *automatic* (that is, it is the product of reflexive, gut reactions). I raise this point to clarify that police officers who unintentionally racially profile are not engaging in a process of deliberation or weighing of their options that is taking place outside of their consciousness. Instead, this deliberative step is actually skipped entirely. *See, e.g.*, John A. Bargh, *Our Unconscious Mind*, SCIENTIFIC AM., Jan. 2014, at 33 (emphasis added) ("When we meet someone new, we form a first impression even before striking up a conversation. We may observe the person's race, sex or age—features that, once perceived, *automatically connec*t to our internalized stereotypes about how members of a particular group are apt to behave. . . . These reflexive reactions often persist, even if they run counter to our conscious beliefs.").

brains make implicit associations, which can sometimes lead us astray.[32]

At the outset, it is important to be clear that the mental process of making implicit associations is not only normal and rational (i.e., reasonable), but also generally beneficial and adaptive. Human brains make shortcuts that, for example, allow us to drive home from work without consciously thinking through every turn on the route.[33] Such shortcuts are necessary if people are to function efficiently and effectively in a complex world. And without them, police officers in particular would have a difficult time doing their jobs, which require an ability to respond to fast-moving developments.[34]

What is worrying is not that our brains make implicit associations per se,

32. One of the most significant of the research efforts in this area is Project Implicit, which was founded in 1998 by three scholars who shared a common interest in the study of "thoughts and feelings outside of conscious awareness and control." PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/aboutus.html (last visited Aug. 22, 2016). Since then, the organization has collected millions of internet volunteers' responses to what is known as the Implicit Association Test (IAT), providing researchers with a rich set of data. Beth Azar, *IAT: Fad or Fabulous?*, 39 MONITOR ON PSYCHOL. 44, 45 (2008). The Project Implicit dataset is the "most prominent" collection of IAT results, but many other social psychologists have also employed similar tests to gather data on reaction-time measures of implicit bias. Kang et al., *supra* note 11, at 1130 n.14.

I highlight Project Implicit specifically and the IAT methodology more generally because they have received significant attention in the popular and legal press. It is true that the predictive capacity of the IAT has been the subject of academic debate. *Compare* Frederick L. Oswald et al., *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Societal Significance*, 108 J. PERSONALITY & SOC. PSYCHOL. 562, 565 (2015), *and* Hart Blanton et al., *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 J. APPLIED PSYCHOL. 567, 567-68 (2009), *with* Anthony G. Greenwald, Mahzarin R. Banaji & Brian A. Nosek, *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553 (2015). But it is worth noting that other methodologies have demonstrated similar effects. *See, e.g.*, Tobias Brosch, Eyal Bar-David & Elizabeth A. Phelps, *Implicit Race Bias Decreases the Similarity of Neural Representations of Black and White Faces*, 24 PSYCHOL. SCI. 160 (2013); B. Keith Payne et al., *An Inkblot for Attitudes: Affect Misattribution as Implicit Measurement*, 89 J. PERSONALITY & SOC. PSYCHOL. 277 (2005). Thus, social psychologists' claims about how implicit bias works are not solely dependent upon Project Implicit or the IAT.

33. This example is drawn from a training program for police officers developed by the Center for Policing Equity. Phillip Atiba Goff et al., CTR. FOR POLICING EQUITY, Tactical Perception: The Science of Justice 9 (unpublished training program and facilitator guide) (on file with author).

34. Arguments that "unconscious bias theory makes racism . . . a medical problem" that might be solved by "counseling or therapy," *see* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1118 (2009), thus fundamentally miss the mark. Implicit bias is not a pathology of the mind; it is an expression of the mind's proper working. The pathology is in our society, where associations between race and negative stereotypes persist. Thus, what is required is not therapy for diseased individuals, but the elimination of these stereotypes from our culture, media, language, etc. But while we work toward that goal, we can also work to disrupt the relationship between implicit biases and their expression in human behavior.

but that these associations can reflect stereotypes about groups that are present in the larger culture, even if we do not consciously endorse them. Moreover, these stereotype-based associations may influence our behavior, in some cases causing us to act in ways that run counter to our own values. As Jack Glaser puts it: "*'normal' is not always 'desirable.'*"[35] A normal, reasonable cognitive process may lead to results that we would consider unreasonable as a matter of constitutional law because they violate equal protection principles.

An example of a normal cognitive process leading to deeply undesirable results is found in the literature on implicit bias, which teaches that even well-intentioned individuals who disavow explicit racism may harbor implicit biases that can—particularly under certain circumstances—affect their conduct.[36] For instance, the Implicit Association Test (IAT) and similar studies have shown that "people are faster to pair positive evaluations (e.g., good) with white faces and negative evaluations (e.g., bad) with black faces," indicating an implicit preference for whites.[37] Indeed, researchers have determined that the power of these stereotypes is so great that they can actually impact visual perception. For example, when subjects were exposed to Black faces, they were more easily able to detect crime-relevant objects.[38]

An implicit bias that is particularly relevant to racial profiling in policing is the connection many people make between Black people and crime.[39] A large body of psychological research demonstrates that people make a strong (i.e., consistent and frequent) association between Blacks and crime, and that these

35. GLASER, *supra* note 9, at 43.

36. It is normal and expected that the human mind catalogs every characteristic to which it has access and then searches for correlations between these characteristics and outcomes in which it is interested. But acting on these associations will be considered "bias" when the characteristic at issue is both one that the person possessing it did not elect (race, for example) and one that we consider immaterial to the decision at hand. I am grateful to Elizabeth Clark-Polner for this clarification.

37. Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 297-98 (2015) (citing Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 52 (2007)).

38. Jennifer Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 878 (2004).

39. Of course, African Americans are not the only actual or potential targets of racial profiling and so biases about other groups are also salient. As Devon Carbado has noted, it is important not to lose sight of "race-based policing as a multiracial social phenomenon." Carbado, *supra* note 8, at 967. Moreover, other implicit associations that individuals make about Black people are likely relevant to racial profiling. For example, white Americans have been shown to perceive anger more quickly in Black faces than white faces, and to be more likely to categorize angry than happy faces as Black. Leslie A. Zebrowitz, Masako Kikuchi & Jean-Marc Fellous, *Facial Resemblance to Emotions: Group Differences, Impression Effects, and Race Stereotypes*, 98 J. PERSONALITY & SOC. PSYCHOL. 175, 183 (2010). If a police officer misperceives an individual as angry, she may in turn misperceive that individual as a potential threat.

associations are automatic (i.e., unintentional). The association is also bi-directional—that is, "Black faces and Black bodies can trigger thoughts of crime, [and] thinking of crime can trigger thoughts of Black people."[40] As one group of authors summarized: "Most Americans—and especially white Americans—believe that crime has a black face."[41]

This increasingly vast psychological literature strongly supports a conclusion that a substantial portion of the racial profiling that occurs in modern policing is the product not of explicit racism but of implicit associations that police officers make between racial minorities—Black people in particular—and crime. But before turning to the implications of this insight for constitutional law, it is important to pause here to emphasize that my argument that much racial profiling is likely unintentional should not be taken to minimize the stubborn persistence of racial animus in America. Although our country's history reveals significant progress toward the goal of eliminating racial prejudice, one certainly cannot say that the job is complete, or even that we are marching uniformly in the right direction.[42]

Given that prejudice persists in the public at large, it stands to reason that it also persists among police officers, such that some racial profiling is no doubt the product of "law enforcers acting retributively on their gut-level dislike."[43] Moreover, there may be police departments in which "racism becomes entrenched in institutional culture such that it persists regardless of 'the racial

40. Eberhardt et al., *supra* note 38, at 876.

41. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 18, at 45. We have no reason to believe that police officers are immune from these implicit biases. Due to "the ubiquity of stereotypes, their at least occasional effect on police behavior is virtually inevitable despite the strong social norms against bias operating in contemporary law enforcement." GLASER, *supra* note 9, at 48. Indeed, the visual perception study described above was performed on police officers as well as students, and found similar results. In fact, as will be described below, we have some cause to be concerned that the situations in which officers frequently find themselves—forced to act quickly, under stress, without concrete decision-making criteria, when they are tired or afraid—are particularly likely to cause them to act unintentionally on those biases.

42. *See, e.g.*, Lawrence D. Bobo et al., *The* Real *Record on Racial Attitudes*, *in* SOCIAL TRENDS IN AMERICAN LIFE: FINDINGS FROM THE GENERAL SOCIAL SURVEY SINCE 1972 59 (Peter V. Marsden ed., 2012) (noting "significant progressive changes regarding race, as well as substantial enduring frictions and conflicts"). Explicitly racist views were unfortunately once again on prominent display during the 2016 presidential campaign, with some supporters of then-Republican nominee Donald Trump making headlines for their extreme and hateful speech. *See* Evan Popp, *This White Supremacist Trump Fan Got a Guest Pass to the RNC*, THINK PROGRESS (July 21, 2016), https://thinkprogress.org/this-white-supremacist-trump-fan-got-a-guest-pass-to-the-rnc-9040e80f1e8e/; Sophia Tesfaye, *Trump Delegate Booted from RNC for Racist Online Postings Under "Whitepride" Handle*, SALON (July 21, 2016), https://thinkprogress.org/this-white-supremacist-trump-fan-got-a-guest-pass-to-the-rnc-9040e80f1e8e/.

43. *See* GLASER, *supra* note 9, at 55. *See also* Kang et al., *supra* note 11, at 1139 ("It should go without saying that explicit biases, which often undergird unspoken policies of racial profiling, also play an enormous role in the differential policing of people of color.").

identity and political leaning of any one person at the helm.'"[44] In such cases, police officers may come to view day-to-day practices that perpetuate the racist institutional culture as a "duty that d[oes] not necessarily reflect their actual beliefs."[45] Something like this may be at work, for example, in stories of New York City police officers who testified that in years past they felt pressure to engage in wholesale stops and frisks of primarily young men of color even though they found that practice personally offensive.[46]

Nor do I mean to suggest that contemporary, implicit forms of bias are any less harmful to their victims than explicit racism. As Nicole Gonzalez Van Cleve reminds us in her ethnographic study of a Chicago criminal court, "modern racism, new racism, and colorblind racism" may not, in fact, be so "different from the traditional racism of the past," particularly from the perspectives of those who are subjected to it. "[T]his supposed new brand of racism," she argues, "is just as punitive and abusive as traditional forms associated with the Jim Crow era and the like. Colorblind ideology is not 'racism lite' nor a kinder, gentler form of institutional racism. Imbued with legal authority, power, and institutional legitimacy, the doing of colorblind racism transforms into state-sanctioned racial degradation ceremonies."[47] If Black people are routinely stopped by police officers because of their race, the resulting harms to these individuals and to the racial group as a whole are unlikely to be any less painful because they are unintentionally caused.

Finally, I do not think that the finding that much racial profiling may be the product of implicit bias should be understood as permitting officers "to evade responsibility for their own behavior."[48] To say that someone's misbehavior is not necessarily reflective of flaws in their character does not thereby relieve them of responsibility for correcting that behavior. Hopefully, in fact, it gives them new tools for reflecting on behaviors that might otherwise have escaped their notice and bringing those behaviors in line with constitutional values of equal protection.[49]

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44. L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 871 (2017) (book review) (quoting NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 133 (2016)).

45. Richardson, *supra* note 44, at 871 (citing VAN CLEVE, *supra* note 44, at 135, 137 (internal quotation marks omitted)). While Richardson and Van Cleve were speaking to institutional racism in prosecutors' offices, the critique can be applied to a broader range of organizations, including police departments.

46. *See, e.g.*, Marina Carver, *NYPD Officers Say They Had Stop-and-Frisk Quotas*, CNN (Mar. 26, 2013), http://www.cnn.com/2013/03/22/justice/new-york-stop-and-frisk-trial/.

47. VAN CLEVE, *supra* note 44, at 186.

48. Banks & Ford, *supra* note 34, at 1120.

49. Indeed, implicit bias is so prevalent because negative stereotypes about Black people are still pervasive in our culture. Thus, the implicit bias finding expands responsibility to all of us who have a role in creating culture to ensure that we do not perpetuate those stereotypes further.

Indeed, I think a focus on implicit biases is appropriate precisely because such biases are particularly pernicious and comparatively more common than explicit racism, and because their expression in racial profiling may evade correction through constitutional law as currently configured. Interestingly, there is also some research to suggest that some types of undesirable police behavior (such as so-called "shooter bias," which is the tendency to shoot armed Black men faster than armed white men, and to elect to not shoot unarmed white men faster than unarmed Black men) is *better* predicted by one's awareness of general stereotypes in society than by one's own prejudices.[50] In studies undertaken by Josh Correll and his colleagues, participants played a videogame in which they encountered white and Black people who were holding either guns or other objects. Participants were told to shoot the armed individuals and not shoot the unarmed individuals. Both white and Black participants decided more quickly to shoot an armed target if he was Black, and to not shoot an unarmed target if he was white. [51] Importantly, the magnitude of this bias varied based upon participants' stated perception that there is a cultural stereotype that Black people are aggressive and violent but *not* upon their expressions of explicit prejudice.[52] There is thus reason to think that implicit biases can be just as dangerous as explicit prejudice, and in some cases perhaps even more so.

Implicit biases present a conundrum for courts. How can individuals be deterred from allowing implicit biases to affect their behavior when those individuals may not even be aware that they possess such biases? In cases of explicit discrimination, we expect courts to have the ability to detect misconduct (although the reality that people may hide their biases may make it difficult for them to do so). But due to the unconscious and automatic way in which they operate, it will be nearly impossible for a court to determine if implicit biases have affected the behavior of a police officer in any given individual interaction. This is why studies that analyze whether profiling has occurred generally rely on aggregate data: the evidence of implicit biases is found in disproportionate results across numerous cases that are unexplained by other variables.

Moreover, when the legal system punishes, it typically does so because both an actus reus (bad act) and mens rea (bad intent) have been proved. But when law enforcement officials engage in *unintentional* racial profiling, the mens rea component is absent by definition. It makes little sense to punish police officers for their unperceived and universally human tendencies. Nor is it any more sensible to punish police departments as institutions for hiring

50. GLASER, *supra* note 9, at 55.

51. Josh Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1320 (2002).

52. *Id.* at 1322-23.

officers who exhibit such universal tendencies, since a recruiting requirement that officers must be free from implicit biases would disqualify most human beings from the job. Courts that wish to meaningfully address racial profiling that is motivated by implicit biases must therefore resist the temptation to think in terms of punishment and deterrence—concepts deeply familiar to the law—and instead think in terms of the role legal rules might play in either eliminating implicit biases or structuring the contexts in which officers operate to make it less likely that such biases will be activated. For this reason, my proposed reconceptualization of Fourth Amendment reasonableness is aimed not at deterrence or punishment, but at prevention.[53] Courts, I contend, have a particular role to play in interrupting the connection between problematic associations and problematic behavior by altering the *contexts* in which police officers act.[54]

The idea that the connection between implicit biases and behavior might be interrupted builds on the basic fact that individuals can and do hold implicit biases without acting on them.[55] Moreover, the psychological research has

53. One might reasonably wonder whether courts can hope to exert influence over processes that are so automatic and hardwired. While implicit biases are unlikely to be eliminated, there is reason to think that they can be mitigated. Evidence suggests that just being made aware of one's biases can play a role in constraining them. *See* Devin G. Pope, Joseph Price & Justin Wolfers, *Awareness Reduces Racial Bias*, Economic Studies at Brookings Working Paper Series, 9-10 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/awareness_reduces_racial_bias_wolfers.pdf.

54. Although it may be possible for courts to engage in strategies to actually eradicate police officers' implicit biases, I believe that other actors—in particular, police departments—are likely better suited to that task.

55. That said, evidence suggests that "implicit biases . . . reliably relate to biased treatment of minorities, women, and other stigmatized groups." GLASER, *supra* note 9, at 83. *See also* Jolls & Sunstein, *supra* note 10, at 972 (first citing John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 66 (2002); and then citing Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 439-40 (2001)) ("[T]here is strong evidence that scores on the [Implicit Association Test] and similar tests are correlated with third parties' ratings of the degree of general friendliness individuals show to members of another race."); Calvin K. Lai, Kelly M. Hoffman & Brian A. Nosek, *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCHOL. COMPASS 315, 323 (2013) (first citing Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 17-18, 28 (2009); and then citing John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. IN ORGANIZATIONAL BEHAV. 39 (2009)) ("Substantial correlational evidence demonstrates that implicit prejudice predicts discriminatory behavior . . . ."). Indeed, one researcher who conducted a meta-analysis of IAT studies found that "implicit attitudes . . . predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, *substantially better* than explicit bias measures." Kang et al., *supra* note 11, at 1131 (emphasis added) (citing Greenwald et al., *Understanding and Using the Implicit Association Test*, at 19-20).

shown that whether our implicit biases will affect our behavior is heavily dependent upon the contexts in which we find ourselves. People are more likely to show implicit bias when faced with cognitive or resource constraints; when individuals are tired or stressed, or feel threatened, time-pressured, or distracted, they are "more likely to apply stereotypes."[56] Particularly relevant to a discussion about the role of courts in preventing police officers from acting on their implicit biases, "[w]hen the basis for judgment is somewhat vague . . . [e.g.,] situations that call for discretion . . . biased judgments are more likely. Without more explicit concrete criteria for decision making, individuals tend to disambiguate the situation using whatever information is most easily accessible—including stereotypes."[57]

As I will argue in more detail below, research like this provides judges with the information necessary to make probabilistic judgments about which situations are likely to cause biases to be activated. They may then craft legal rules so as to ensure that police officers find themselves in such situations less often. For example, given what we know about the impact of ambiguity and discretion on the activation of bias, courts that wish to address racial profiling that may occur outside of officers' conscious awareness should craft clear rules and decision-making criteria to guide officers *before* they engage with the public so as to reduce situational ambiguity.[58] In every case in which a court must evaluate the reasonableness of a search or seizure, that court has the opportunity not just to adjudicate the reasonableness of the individual officer in that case, but also to establish ground rules that will help determine the reasonableness of future police-public interactions. Courts that adopt the approach I advocate will thus understand their own decisions to be part of the reasonableness equation.

## III. THE FOURTH AMENDMENT'S PROMISE

The Supreme Court's failure to keep pace with the scientific developments described above has real-world consequences because the existing legal framework ensures that *unintentional* racial profiling will go unseen and uncorrected by courts. Pursuant to current Supreme Court jurisprudence, a claim that a search and seizure was effected as a result of racial profiling is

Moreover, while not all implicit biases will necessarily lead to problematic behavior, the possibility that those biases will translate into action in even a subset of police interactions with members of the public is cause for concern given those officers' position of power and public trust. *See* GLASER *supra* note 9, at 43 ("Stereotype-based judgments, particularly when made by people in positions of power, have discriminatory effects, undermining the process of judging an individual on his or her own merits.").

56. Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 Ct. Rev. 64, 67 (2013).

57. *Id.* at 68.

58. *Id.*

cognizable exclusively under the Fourteenth Amendment. Indeed, in *Whren v. United States*, the Court expressly held that "the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause, not the Fourth Amendment."[59]

Relying on the Fourteenth Amendment to address racial profiling presents two problems. First, the practical difficulties and expense of maintaining a civil case mean that few plaintiffs are likely to have the capacity to do so.[60] Plaintiffs who seek to litigate constitutional torts must pay filing fees,[61] for example, and navigate a complex maze of legal doctrines that determine when their claim will accrue,[62] and whether it may be brought pursuant to 42 U.S.C. § 1983 or on a petition for a writ of habeas corpus.[63] Second, to the extent that profiling is *unintentional*, it will likely not be cognizable under the Fourteenth Amendment, which requires a showing of intent to discriminate.[64] Most

59. 571 U.S. 806, 813 (1996).

60. *See* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 551 (1997) ("On a practical level, equal protection will provide few of those subjected to this treatment with any solace . . . ."); David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction; No*, 73 MISS. L.J. 423, 434-35 (2003) ("Given how difficult it will be for plaintiffs to obtain redress in a civil action, the Court has sent police departments a message: no, it is not legal to use race or ethnic appearance by itself to assess whether or not someone is suspicious, but you can do it if you consider any other factors along with it. And if you do use race or ethnic appearance alone, don't worry too much. There is a risk of a lawsuit, but it is vanishingly small.").

61. *See, e.g.*, U.S. DIST. CT. FOR THE S. DIST. OF N.Y., DISTRICT COURT FEE SCHEDULE AND RELATED INFORMATION, http://www.nysd.uscourts.gov/fees (requiring, as of December 1, 2016, payment of a filing fee of $350.00 and an administrative fee of $50.00 for a new action).

62. *See, e.g.*, MARTIN A. SCHWARTZ, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 163 (2014), https://www.casd.uscourts.gov/Attorneys/CJAAppointments/SiteAssets/docs/FJCSection1983Outline.pdf ("In *Heck v. Humphrey*, [512 U.S. 477 (1994),] the Supreme Court held that a plaintiff who seeks damages on a § 1983 claim that necessarily implicates the constitutionality of the claimant's state conviction or sentence must demonstrate that the conviction or sentence has been overturned, either judicially or by executive order. Strictly speaking, the *Heck* doctrine is not an exhaustion doctrine; in fact, it is more onerous than an exhaustion requirement because, unless and until the conviction is overturned, the § 1983 claim is not cognizable.").

63. *See, e.g.*, *id.* ("In *Preiser v. Rodriguez*, [411 U.S. 475 (1973),] the Supreme Court held that a prisoner's constitutional claim challenging the fact or duration of confinement and seeking immediate or speedier release must be brought under federal habeas corpus, following exhaustion of state remedies, even though such a claim may come within the literal terms of § 1983.").

64. *See, e.g.*, Brando Simeo Starkey, *A Failure of the Fourth Amendment and Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131, 136 (2012) ("The Equal Protection Clause of the Fourteenth Amendment . . . has been shredded. With the maintenance of the Intent Doctrine, which requires a claimant to trace a purported equal protection deprivation back to a discriminatory motive, the Supreme Court has nearly nullified a clause that reads as a guarantee of legal equality.").

observers believe that "[t]he Supreme Court has construed the Equal Protection Clause to permit almost any government action that avoids explicit discrimination, unless it can be shown to be based on outright hostility to a racial or ethnic group. As a consequence, the Clause provides no protection against . . . unconscious bias on the part of generally well-intentioned officers."[65]

But litigants should not have to rely exclusively on the Fourteenth Amendment. To date, the Court has "define[d] [Fourth Amendment] 'reasonableness' in a manner that largely excludes considerations of racial equity."[66] But I believe this is a mistake. The Fourth Amendment, too, has an important role to play in remedying racial profiling. This is the case for two reasons.

First, as others have argued, the Fourth Amendment must be interpreted in light of the subsequently enacted Fourteenth, which ushered in an entirely new conception of "We the People." As Bennett Capers put it, the Fourteenth Amendment "grafted a requirement of equal citizenship onto the Constitution as a whole."[67] Reading the Fourth Amendment in light of the Fourteenth infuses the requirement of "reasonableness" with new meaning, strongly suggesting that searches and seizures that are instigated *because of* the target's race will not pass muster.[68] As Akhil Amar has argued, "even if racially

65. David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 307-08 (1997). *But see* State v. Saintcalle, 309 P.3d 326, 338 n.8 (Wash. 2013) (citations omitted) ("It could be argued . . . that 'purposeful discrimination' already encompasses unconscious bias. This argument flows from the idea that the 'purposeful discrimination' requirement was never intended to be a proxy for conscious intent or anything resembling a conscious mens rea, but rather a signpost for distinguishing between discriminatory purpose and disproportionate impact. Before *Batson* was decided, it was well established that disproportionate impact alone does not violate the equal protection clause. It could be argued that *Batson*'s 'purposeful discrimination' requirement therefore meant not that the state's attorney need be found intentionally racist, only that racial bias (conscious *or* unconscious, as the argument would go) be the source of any disparate impact . . . ."), *abrogated on other grounds by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017); Banks & Ford, *supra* note 34, at 1090 ("The Court's use of the term discriminatory purpose was fortuitous and not plausibly intended to apply only to intentional discrimination.").

66. Sklansky, *supra* note 65, at 323.

67. Capers, *supra* note 21, at 37.

68. Reasonableness has been described as the "ultimate touchstone" of the Fourth Amendment. *See* Amar, *supra* note 14, at 760 n.4. But the term is not self-defining. *See* United States v. Rabinowitz, 339 U.S. 56, 63 (1950) ("What is reasonable is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."). Thus, it has been up to the courts to give content to the concept of reasonableness, a task that some argue they have given insufficient attention. *See* Amar, *supra* note 14, at 801 ("Because of the Court's preoccupation with warrants and probable cause . . . the Justices have spent surprisingly little time self-consciously reflecting on what, exactly, makes for a substantively unreasonable search or seizure."). Note, though,

disparate impact alone does not violate the Constitution, surely equal protection principles call for concern when blacks bear the brunt of a government search or seizure policy."[69] For this reason,

> [T]he 'reasonableness' requirement . . . particularly when coupled with the aim of the [Fourth] Amendment's framers to protect against the arbitrary exercise of power by officers in the field, could and should provide a strong alternative basis for addressing a particular form of inequality: discretionary law enforcement practices that 'unreasonably' burden blacks and members of other racial minorities.[70]

When the Fourth Amendment's text is appropriately situated within this larger framework, it is clear that searches and seizures that are contaminated by racial profiling are not constitutionally reasonable.

Second, I contend that a practice of assessing the reasonableness of the *results* of searches and seizures is actually more faithful to the text of the Fourth Amendment than the Court's current approach, which often makes the focal point of the reasonableness test an inquiry into the reasonableness of the searching or seizing officer's thought process. In defining Fourth Amendment reasonableness, courts have in many cases changed the scope of the question—without noting that they are doing so—in a subtle but important way. Rather than interrogate the reasonableness of the search or seizure, courts often frame the question as whether the police officer who effected the invasion was reasonable.[71] Although the logical step is disavowed, courts routinely rule that

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that not all scholars agree that reasonableness should be the key consideration. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) ("The constitutional lodestar for understanding the Fourth Amendment is not an ad hoc reasonableness standard; rather, the central meaning of the Fourth Amendment is distrust of police power and discretion.").

69. Amar, *supra* note 14, at 808. *See also id.* at 805 ("In thinking about the broad command of the Fourth Amendment, we must examine other parts of the Bill of Rights to identify constitutional values that are elements of *constitutional* reasonableness. . . . These other Clauses . . . furnish benchmarks against which to measure reasonableness and components of reasonableness itself. A government policy that comes close to the limit set by one of these independent clauses can, if conjoined with a search or seizure, cross over into constitutional unreasonableness.") (footnote omitted).

70. Sklansky, *supra* note 65, at 326-27.

71. *See* Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 711 (1998) (noting that courts have "equat[ed] reasonableness as a process of logical thought with reasonableness as a standard of constitutionally permissible behavior," and arguing that "the protections of the Fourth Amendment are [thus] reduced to a prohibition against irrational police actions.").

I acknowledge that the Court has described its reasonableness inquiry as an "objective" one that generally does not consider "the subjective intent motivating the relevant officials." *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011). But as David Sklansky has noted, "On the one hand, the Court has long expressed a preference, at least in theory, for tying the legality of law enforcement measures to objective circumstances, rather than to officers' intentions. On the other hand, some doctrines of criminal procedure hinge explicitly on police intent, and even when applying doctrines that do not, the Court often has seemed influenced, sometimes heavily, by suppositions about why the police acted as they did."

when police officers are reasonable, the searches and seizures they conduct are necessarily reasonable, and therefore constitutional.[72]

To see how this "reasonable police officer" standard operates in practice, we may look to recent Supreme Court opinions. In *Heien v. North Carolina*, for example, the Court confronted a case in which a sergeant in the county sheriff's department stopped a vehicle on the interstate because one of its two brake lights was out.[73] The officer believed that this was a violation of traffic laws, but a state court later determined that a single working brake light was all the law required.[74] The Supreme Court held that "[b]ecause the officer's mistake about the brake-light law was reasonable, the stop in this case was lawful under the Fourth Amendment."[75] In *Heien*, the Court seems to equate constitutional reasonableness with a law enforcement officer's best effort. Officers are permitted to make mistakes—of both fact and law—so long as the Court perceives those mistakes to be understandable under the circumstances, i.e., the "mistakes must be those of reasonable men."[76]

This approach has initial intuitive appeal. After all, if the police officer was reasonable, then the thing he did surely must also have been reasonable. But it fails to incorporate the lessons of the literature on implicit bias described in Part Two. Police officers might be reasonable on the level of conscious thought and yet still produce unreasonable results if their judgments about an individual's suspiciousness are influenced by implicit biases. Viewed in this light, the constitutional test, as currently framed, no longer holds together: reasonable police officers do not necessarily conduct reasonable searches and seizures.

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Sklansky, *supra* note 65, at 285.

72. Numerous other scholars have offered critiques of the reasonable person standard as applied to police officer behavior. *See, e.g.*, Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 477 (1991) (quoting U.S. CONST. amend. IV) ("Although the [F]ourth [A]mendment conveys to 'the People [the right] to be secure in their persons, houses, papers, and effects,' the reasonableness approach focuses on the acts of the police instead of the rights of the people. The question, then, becomes whether the police acted reasonably rather than whether a person's rights were violated."); Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 137 (2007) ("[E]ven an abstract 'reasonable person' test is not truly an objective standard. Rather, it relies—perhaps unconsciously—on assumptions, privileging the perspectives, experiences, and values of the dominant group (or perhaps of the decisionmaker) and ignoring the distinct experiences and perspectives of others."); Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's* Miranda *and Fourth Amendment Cases*, 14 LEWIS & CLARK L. REV. 1481, 1483 (2010) ("[A] reasonable officer is allowed to have average perceptions, knowledge, emotions, or behavior, even when these are flawed in some way. The reasonable lay person, however, is not allowed to have such flaws or weaknesses; on the contrary, this person must be a paragon of self-control and rationality, living up to an ideal standard that most people could not meet.").

73. 135 S. Ct. 530, 534 (2014).

74. *Id.* at 535.

75. *Id.* at 534.

76. *Id.* at 536 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

Recentering the text of the Fourth Amendment will be an important first step in addressing these constitutionally unreasonable results. Indeed, it is these results—"unreasonable searches and seizures"—to which the Fourth Amendment is squarely directed. As will be described in greater detail in Part Four, if we focus on the question of how to structure the law so as to generate reasonable searches and seizures, as opposed to reasonable police officers, then our answer will have to take account of all we know about those situations and contexts that are most likely to bring about reasonable, unbiased results. With the benefit of the social psychological literature on implicit bias to guide us, this admittedly difficult task is feasible.

## IV. RECONCEPTUALIZING FOURTH AMENDMENT REASONABLENESS

As described above, the question courts often ask to assess Fourth Amendment reasonableness—whether the police officer who effected the search or seizure was reasonable—will often miss the point. Unconscious bias is not the exclusive purview of unreasonable individuals; it is endemic to normal human cognition. Individual police officers may thus engage in reasonable processes of conscious thought, i.e., they may do their best to act lawfully and fairly, and yet produce constitutionally unreasonable results in the form of stops and searches contaminated by racial bias.[77]

What is required if one hopes to rescue the Fourth Amendment from its *Whren*-imposed exile and reinvigorate it as a vehicle for addressing racial profiling, then, is a reconceptualization of reasonableness that takes into account all that psychologists now know about unconscious mental processes. In the discussion that follows, I will detail my proposal for updating the current Fourth Amendment test.

77. While my proposed use of the Fourth Amendment to address implicit biases that result in racial profiling is unique, I am not the first to make point that much racial profiling is likely the product of implicit bias. *See e.g.*, L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145-46 (2012) (arguing that, in light of research demonstrating that individuals hold implicit biases that may impact their perception of whether someone is suspicious, courts should weigh "an officer's skill at judging the criminality of ambiguous behavior" through means of "'[a]rrest efficiency' or hit-rate data" when determining whether they had reasonable suspicion to stop or frisk in the *Terry* context); Capers, *supra* note 21, at 40 ("[R]acialized policing [is] rarely the product of deliberate discrimination. Rather, it is usually the product of implicit biases about race that we all have."); Carbado, *supra* note 8, at 971 n.118 ("[E]mpirical evidence produced by social cognition theory raises serious questions about how discrimination is framed in law. If discrimination results from cognitive processes as opposed to intentionally biased decisionmaking, racism's remedy cannot derive from a neutrality approach."); Sklansky, *supra* note 65, at 308 (describing "unconscious bias on the part of generally well-intentioned officers" as "probably the most widespread cause today of discriminatory policing.").

A. Behavioral Realism: Toward a New Understanding of Reasonableness

If the Court is to successfully address unintentional profiling, it will need to incorporate the insights of the social psychological literature on implicit bias into its Fourth Amendment jurisprudence. One way to do so would be to adopt a behavioral realist approach to Fourth Amendment reasonableness. Behavioral realism asks courts to "pay close attention to the best available evidence about people's actual behavior" when "formulating and interpreting legal rules."[78] And the best available evidence suggests that not only do most people possess implicit biases, [79] but these biases often affect our behavior and cause us to act contrary to our values when certain circumstances are present—when we have lots of discretion, for example, and when the rules we are enforcing are ambiguous.[80] Courts that adopt a behavioral realist approach will thus recognize that *all* police officers have the potential to engage in racial profiling in certain contexts. And, I argue, they will endeavor to promulgate rules that will minimize the likelihood that police officers will act on their implicit biases in future cases.

This shift of focus away from the individual character of the searching or seizing officer and toward the context in which the police action took place will likely be difficult. As psychologists have described, human beings have a natural tendency to "explain other people's behavior in internal, character-driven terms" and "forsake the power of situations."[81] This is the case because "[p]eople are easy to see. They're tangible. Context is harder: it's an abstract, nebulous concept, a backdrop that can be downright invisible."[82] But although they are sometimes difficult to perceive, situational factors matter tremendously in the search and seizure context, as in many others, because they affect how likely it is that police officers' implicit biases will be activated.

When we adjust the lens to focus on good or bad situations, rather than

78. Jolls & Sunstein, *supra* note 10, at 972.

79. *See* Kang et al., *supra* note 11, at 1126 ("Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects.").

80. *See id.* at 1142.

81. SAM SOMMERS, SITUATIONS MATTER: UNDERSTANDING HOW CONTEXT TRANSFORMS YOUR WORLD 34 (2011). This process is known as the "fundamental attribution error." *See* Lee D. Ross, Teresa M. Amabile & Julia L. Steinmetz, *Social Roles, Social Control, and Biases in Social Perception Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 485, 491-92 (1977) (citations and internal quotations marks omitted) ("This fundamental error is the tendency to underestimate the role of situational determinants and overestimate the degree to which social actions and outcomes reflect the dispositions of relevant actors. That is, man as an intuitive psychologist is too often a nativist, a proponent of stable individual differences, and too seldom a Watsonian behaviorist. He readily infers broad personal dispositions and anticipates more cross-situational consistency in behavior than actually occurs. He jumps to conclusions about others too readily and underestimates the potential impact of relevant environmental forces and constraints.").

82. SOMMERS, *supra* note 81, at 34.

good or bad police officers, we can see that the rules that courts promulgate in Fourth Amendment cases can *themselves* have the effect of either perpetuating and encouraging or mitigating and restraining the activation of implicit biases in future cases. This is because judge-made rules help to create the context in which future police activity will take place. If courts permit officers to stop and question members of the public on less than probable cause, for example, we can expect that increasing numbers of police officers will begin to use this tactic, potentially reshaping police-community relations dramatically. Similarly, if courts give constitutional endorsement to police practices that predictably lead to the activation of implicit biases, then increasing numbers of police officers may engage in those practices, likely to the detriment of both racial minorities and the goal of police legitimacy.

Social psychologists have demonstrated that "implicit biases translate most readily into discriminatory behavior . . . when people have wide discretion in making quick decisions with little accountability."[83] Judge-made rules thus help to set the stage for the activation or limitation of implicit biases through their role in determining how much discretion police officers have and in encouraging quick thinking versus deliberation.

Therefore, these rules must themselves be factored into the Fourth Amendment reasonableness equation. When judges decide Fourth Amendment cases, they are not just adjudicating the reasonableness of the individual police officers who effected the search or seizure at issue; they are also setting the ground rules for future police engagements with members of the public. And those rules will matter as much as police officers' personal reasonableness in determining whether the *outcome* of these future engagements will be reasonable, because the rules will help to determine how likely it is that the officers' implicit biases will be reflected in their behavior. The pop music version is this: if courts want to make the world a place where less racial profiling takes place, they will have to look to their own rules and make a change.[84]

The question that follows is: how would a behavioral realist approach to Fourth Amendment reasonableness work in practice? Specifically, I suggest that courts should eschew post hoc evaluations of the character of the searching and seizing officers in favor of forward-looking, probabilistic assessments of the contexts that are most likely to lead to reasonable outcomes, given what we know about human behavior. To concretize that suggestion, it will be useful to explore how some search and seizure cases might be decided differently if the reasonableness standard were to take into account how the rules that courts promulgate will themselves affect the likelihood that implicit biases will be activated in future police-public interactions.

83. Kang et al., *supra* note 11, at 1142.

84. *Cf.* MICHAEL JACKSON, *Man in the Mirror*, *on* BAD (Epic Records 1987) (with apologies).

B. Rethinking Pedestrian Stops

Particularly in urban areas where driving is less common, pedestrian stops have become a focal point in conversations about racial profiling. In a high-profile decision, a federal judge found that the New York City Police Department's policy of stopping and frisking individuals on the street as a proactive policing tool violated the Fourth and Fourteenth Amendments because it targeted African Americans and Hispanics.[85] Thus, courts that seek to address racial profiling—and particularly the influence of implicit biases thereon—must consider the body of law that governs street stops.

The key case in this regard is *Terry v. Ohio*, in which the Supreme Court held that investigatory stops require reasonable suspicion that the individual is committing or has committed a crime.[86] The reasonable suspicion standard is described as requiring more than a mere hunch, but as being less stringent than the probable cause standard.[87] But the practical value of this guidance is limited: the caselaw "do[es] not really tell a police officer doing modern police work *how much* suspicion is enough to satisfy constitutional standards, or when the *quantity* of suspicion reaches a threshold of 'reasonableness.'"[88]

As it has evolved in the post-*Terry* caselaw, reasonable suspicion has become a broad and amorphous concept that affords police officers significant latitude to stop and question members of the public as they go about their daily lives. Indeed, suspicion may be "reasonable"—and therefore justify a stop—when it is based on any of a wide variety of factors relating to the suspect, their surroundings, or other information the officer possesses (such as a description of a suspect of a known offense). In some cases, "a suspect's presence in a 'high crime area' multiplies less salient factors into actionable suspicion."[89]

Academics have attempted to categorize the many bases of suspicion that have been sanctioned in the caselaw as "reasonable," grouping and ranking them along various dimensions. Alpert, MacDonald, and Dunham, for example, distinguish between behavioral and non-behavioral criteria of suspicion: "Behavioral criteria include[] specific actions by citizens that [a]re either illegal or interpreted by the officer as suspicious . . . [such as] a traffic offense. . . . Nonbehavioral criteria include[] officer concern about an individual's appearance, the time and place, and descriptive information provided to an officer."[90] Jeffrey Fagan has looked to data on the bases for street stops in New York City—as reported by the police officers who made those stops—and described them as either "probable cause stops" or "non-probable cause

85. Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

86. 392 U.S. 1, 20-22 (1968).

87. *Id.* at 27.

88. Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 44 (2016).

89. *Id.* at 44-45 (quoting Illinois v. Wardlow, 528 U.S. 119, 124 (2000)).

90. Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407, 419 (2005).

stops."[91] He defines probable cause-like criteria for reasonable suspicion as including "observable suspect behaviors that approximate criminal activity: (1) actions indicative of engaging in drug transaction [sic], (2) actions indicative of violent crimes, or (3) 'casing' victim or location."[92] "Each factor," he notes, "is narrow and behaviorally specific, avoiding the vagueness and subjectivity that worried the *Terry* Court."[93] Other criteria relied on by New York City police officers, by contrast, "require subjective judgments and attributions of intent: (1) furtive movements, (2) fits descriptions, (3) carrying objects in plain view, (4) suspicious bulge, (5) evasive actions, or (6) 'other.'"[94]

There are good reasons to think that when it comes to the likelihood that implicit biases will be activated, not all bases of reasonable suspicion are created equal. As Fagan notes, "[i]n contrast to observations of specific criminal activity, [non-probable cause] factors are vulnerable to cognitive bias and error, as well as racialized attributions of suspicion or criminality."[95] Indeed, in an observational study of police decision-making in Savannah, Georgia, Alpert and his colleagues found that officers were four times more likely to form suspicion based on non-behavioral cues for Black suspects versus white suspects.[96] By contrast, officers were more likely to form suspicion for white suspects based on behavioral cues, such as observations of illegal or suspicious conduct.[97]

Non-probable cause indicators of suspicion require less cognitive work on the part of police officers to articulate, and so it should perhaps be unsurprising that officers default to these easier explanations for their stops when they are available. Among the New York City police officers studied by Fagan and co-author Amanda Geller, stops were primarily justified by non-behavioral factors like the location where the stop occurred.[98] Because such stops require little investigatory work to identify suspicious behaviors, officers were able to make judgments about whom to stop very quickly, observing the suspect for less than two minutes before proceeding to an "intrusion" in three out of four street stops.[99]

Courts that are concerned about the potential for the activation of implicit biases in officer decisions about whom to stop thus might limit the permissible bases of reasonable suspicion for pedestrian stops to those behavioral factors

91. Fagan, *supra* note 88, at 46.

92. *Id.* at 68-69 (quoting People v. Richard, 668 N.Y.S.2d 386, 387 (N.Y. App. Div. 1998)).

93. *Id.* at 69.

94. *Id.* at 71 (citing Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 71 (2015)).

95. *Id.* at 71.

96. Alpert et al., *supra* note 90, at 422.

97. *Id.*

98. Fagan & Geller, *supra* note 94, at 71.

99. *Id.* at 63.

that more closely approximate probable cause. *Terry* would remain in place, but subsequent caselaw would be pruned in light of the lessons of the social psychological literature. In this re-envisioning, "probable cause [could] be viewed as a norm for a 'reasonable' search or seizure" such that "departures from probable cause [are] deemed 'reasonable' only as limited exceptions allowed under narrow circumstances."[100] Constraining officers' discretion in this way would make it less likely that their implicit biases will affect their stop decisions because they would be required to articulate the specific behaviors in which the suspect engaged that caused the officer to believe that the individual was committing or was preparing to commit a crime. Such a change in the governing law would no doubt reduce the overall number of investigatory stops, but it should also serve to increase the utility of each individual stop from a crime-fighting perspective and decrease the resentment that is understandably caused by stops that are perceived to be grounded in impermissible considerations like race.

There may be other benefits as well. Limiting *Terry* and its progeny in this way might put pressure on police departments—which have in many cases trained and incentivized their officers to conduct large numbers of street stops as part of a programmatic effort to prevent crime—to change course.[101] As others have noted, police departments have increasingly turned to wholesale programs of pedestrian stops to target crimes like drug and weapon possession. Such programs of widespread stops are not limited to New York City, or even to large urban areas. As Epp, Maynard-Moody, and Haider-Markel argue,

> Although police officers have carried out investigatory stops for decades, police leaders introduced a new twist in the 1980s that considerably heightened the level of racial discrimination in these stops, and then made this reinvented investigatory practice a core tactic in the wars on drugs and crime. This innovation was to encourage the typical street-level officer to engage in proactive stopping of many drivers (and pedestrians) so as to carry out as many intrusive investigations of people as possible. . . . [This] was a deliberate, specific invention that directly contributed to the explosion in arrests

100. Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133, 1135 (1998).

101. Professor Tracey Meares has argued that so-called "stop-and-frisk" is best understood not as a series of one-off officer decisions but as a "program" such that "officers' decisions to stop people do not grow out of investigations in situ, but rather are made exogenously, before police actually get on the ground." Meares, *supra* note 14, at 178. Jeffrey Fagan and Amanda Geller have noted that "[s]top-and-frisk as envisioned by the *Terry* Court was largely a set of distinct 'retail' transactions, characterized by individualization, material or visual indicia, and specificity. But the current 'wholesale' practice is quite different." Fagan & Geller, *supra* note 94, at 61. Indeed, "[i]n New York City, institutional pressures urged officers to increase the number of *Terry* stops as a prophylactic measure against crime. The pressures included threats of sanctions for officers whose 'productivity' was low, based on the evaluations of their supervising sergeants." *Id.* at 54 n.12.

> and imprisonment of racial minorities. . . . [And a]lthough police departments differ in many ways—big cities versus small towns, urban departments versus state highway patrol agencies, traditional versus progressive agencies—the investigatory stop has spread widely among these agencies.[102]

In sum, investigatory stops can be thought of as existing on a continuum. On one end are stops, like the one approved by the *Terry* Court, that are made after an individualized evaluation of facts and behaviors gives an officer reasonable suspicion to believe that an individual has committed or is about to commit a crime. On the other end are stops, like those described by Epp and his co-authors, of large numbers of individuals based upon criteria that are neither individualized nor as closely tied to the observation of specific behaviors. The further toward this latter end of the spectrum a stop or a policy of stops is, the more concern we might have that implicit biases will impact stop decisions. If more probable cause-like criteria must be articulated to support a stop, however, this will push officers and departments back toward the more individualized end of the spectrum, thereby reducing the impact of implicit biases on officers' decisions.

### C. Rethinking Traffic Stops

The United States is, by and large, a nation of drivers: "Outside our most densely populated urban cores, Americans drive to work, to see family and friends, to shop, and to visit places for recreation, worship, and political involvement. . . . [T]he mobility provided by cars has become essential for participation in economic and civic life."[103] Unsurprisingly given the centrality of driving in our daily lives, many Americans' encounters with the police happen while they are in their cars, during traffic stops. According to the Bureau of Justice Statistics, "[t]he most common reason for contact with the police is being a driver in a traffic stop. In 2011, an estimated 42% of face-to-face contacts that U.S. residents had with police occurred for this reason."[104] This frequency of contact has produced its fair share of incidents of racial profiling.[105] One place to begin in order to understand how the standard proposed in this Article would function, then, is to look to the law that governs these interactions.

102. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 18, at 8-10.

103. *Id.* at 17.

104. BUREAU OF JUST. STAT., TRAFFIC STOPS, http://www.bjs.gov/index.cfm?ty=tp&tid=702 (last visited Oct. 8, 2017).

105. *See, e.g.*, State v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) (describing racial profiling by the New Jersey State Police on the New Jersey Turnpike between 1988 and 1991).

1. *Heien v. North Carolina*: Cabining Discretion; Encouraging Restraint

One of the Supreme Court's most recent cases outlining the law of traffic stops is *Heien v. North Carolina*,[106] which I described briefly above. The story of *Heien* begins with Matt Darisse, a sergeant in the Surry County, North Carolina Sheriff's Department, sitting in his patrol car, observing northbound traffic on the interstate. A Ford Escort passes by, the driver of which Sergeant Darisse later stated looked "very stiff and nervous," an impression he said he formed based on the fact that the driver, Maynor Javier Vasquez, was "gripping the steering wheel at a 10 and 2 position, and looking straight ahead."[107] His suspicion aroused, Sergeant Darisse followed the Ford Escort for a few miles; when Vasquez hit the brakes as he approached a slower vehicle, Darisse observed that the car only had one operational brake light.[108] With the justification of what he believed—mistakenly—to be a traffic violation, Sergeant Darisse pulled the car over.[109]

There were two men in the car—Nicholas Brady Heien and Vasquez—and during the course of the stop, Sergeant Darisse viewed the men's behavior as suspicious. In particular, "Vasquez appeared nervous, Heien remained lying down the entire time, and the two gave inconsistent answers about their destination."[110] Darisse requested consent to search the car, which the men granted, and he ultimately found a sandwich bag of cocaine in the side compartment of a duffle bag.[111] The Supreme Court approved the officer's behavior because it found that the police misdeed at issue—stopping someone for something the officer believed to be a traffic violation that turned out not to be—was understandable and reasonable.[112] It thus crafted a rule under which officers' mistakes of law will be forgiven so long as they are the "mistakes . . . of reasonable men."[113]

Had the Court been looking for it, there was much in the *Heien* factual record to raise concerns that Sergeant Darisse's initial suspicions (as contrasted with the suspicions he developed after observing the men's behavior during the stop) might have been activated as a result of bias, implicit or otherwise. Vasquez was driving on Interstate 77, a highway that runs through North Carolina on the North-South line.[114] The speed limit on the highway reaches sixty miles per hour,[115] leading one to wonder how an officer stationed on the

106. 135 S. Ct. 530 (2014).
107. Joint Appendix at 15, *Heien* (No. 13-1604).
108. *Heien*, 135 S. Ct. at 534.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 536 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).
114. *Id.* at 534.
115. N.C. DEP'T OF TRANSP., NORTH CAROLINA SPEED LIMITS MAP, http://ncdot.

side of the road could have observed Vasquez closely enough to determine him to be "stiff and nervous." As the implicit bias literature teaches, it is possible that Vasquez's ethnicity—both he and Heien are Hispanic[116]—could have factored in to that split-second determination of suspiciousness, even if the officer was sincerely unaware of the role ethnicity may have played in this thinking.[117]

Even putting aside the worrying facts of *Heien* itself, however, a court that was focused on the potential for the activation of implicit biases might have been concerned about the effect of its new rule on future police-public interactions. Social science research provides "compelling evidence that *discretionary* police stops are most likely to be influenced by suspect race," a finding "consistent with psychological theory . . . indicating that stereotype-biased judgments are more likely to occur in ambiguous situations."[118] We should thus be "especially wary of searches and seizures that allow too much arbitrariness and ad hocery, unbounded by public, visible rules promulgated in advance."[119] The rule articulated in *Heien*—which permits seizures based on a police officer's stated belief, later contradicted by the text of the law, that the individual was engaged in illegal activity—maximizes officer discretion and encourages action rather than restraint in the face of ambiguous conduct.[120] A court that adopted the approach I advocate would thus be able to make a probabilistic judgment that both of these characteristics are likely to encourage, rather than constrain, the operation of implicit biases in future police-public interactions.

As described above, if the *Heien* Court were to have used the approach I propose, the likelihood that a particular rule would serve to activate or suppress implicit biases in future police-public interactions would not have been dispositive of the case, but rather one factor for the Court to weigh in its Fourth Amendment reasonableness balancing test. It would have been up to the government to articulate a sufficiently compelling interest in the search to

maps.arcgis.com/home/webmap/viewer.html?webmap=978abf2f2fe341c78f6d52636a60ebff (last visited Nov. 7, 2017).

116. Vivan M. Rivera, *When the Police Get the Law Wrong: How* Heien v. North Carolina *Further Erodes the Fourth Amendment*, 49 Loy. L.A. L. Rev. 297, 297 (2016).

117. Vasquez was stopped in Surry County, which has a population of around 70,000, 84.3% of whom are white non-Hispanic or Latino, and 10.3% of whom are Hispanic or Latino. U.S. CENSUS BUREAU, QUICK FACTS: SURRY COUNTY, NORTH CAROLINA, https://www.census.gov/quickfacts/fact/table/surrycountynorthcarolina,US/PST045216 (last visited Nov. 7 2017).

118. GLASER, *supra* note 9, at 33.

119. Amar, *supra* note 14, at 809.

120. By contrast, a rule that requires an officer to have probable cause for a real traffic offense before making a stop is a rule that encourages the officer to slow down and think in the face of ambiguous conduct. She must ask herself: what do I remember from my training? Is it a requirement that the driver have two working taillights? Are there any resources at my disposal that I might check?

overcome this and other factors weighing against reasonableness (the intrusion into Vasquez and Heien's privacy, for example, and the dignitary harm of being pulled over by a police officer in a public place). Whether the government would have been able to do so is unclear. After all, most serious offenses (murder, rape, robbery, battery, and the like) are unambiguously illegal because they cause harm to other people or to property. Officers who stop people based on a *mistaken* belief that they are breaking the law will almost always do so "in the context of low-level, *malum prohibitum* offenses (*e.g.,* motor vehicle regulations) as to which 'the wrongfulness of behavior is not self-evident.'"[121] If the only interest in the stop that the government is able to articulate is in deterring these types of low-level offenses, its interest will be relatively weak. If, however, as seems likely from the *Heien* record, the offense for which the individual was stopped was merely a pretext to allow the officer to investigate some other potential crime, then it would be up to the government to articulate the actual crime of concern and its interest in deterring that activity.

If the officer who stopped Vasquez and Heien was suspicious that they might possess drugs, then the Court would have to weigh the government's interest in catching users and sellers of illegal drugs against the individual privacy interests of Vasquez and Heien. But the Court would *also* have to weigh the government's interest against the concern that a rule that maximizes police discretion and encourages them to act in the face of ambiguous behavior is likely to lead to the activation of implicit biases in future cases and, in turn, the unequal application of the burdens of searches against minorities.

2. Revisiting Pretextual Stops and Consent Searches

Given the Supreme Court's ruling in *Whren v. United States*,[122] one might argue that the decision in *Heien* makes little practical difference in the scope of police officers' discretion. In *Whren*, the Court held that officers may stop a driver whenever they have probable cause to believe that she has committed a traffic offense, even if the true motivation for the stop is the officer's belief that the driver might be committing a separate offense for which the officer lacks probable cause or reasonable suspicion to make a stop.[123] Given its breadth and complexity, some have argued that, "with the traffic code in hand, any officer can stop any driver at any time. The most the officer will have to do is to 'tail [a driver] for a while,' and probable cause will materialize like magic."[124] A

121. Brief for Nat'l Ass'n of Crim. Def. Lawyers, Cato Inst., ACLU, and ACLU of N.C. as Amici Curiae in Support of Petitioner at 16, *Heien*, 135 S. Ct. 530 (No. 13-604) (quoting Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 91 (2011)).

122. 517 U.S. 806 (1996).

123. *Id.*

124. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, *supra* note 60, at 559. *See also* Sklansky, *supra* note 65, at 273 ("Since virtually everyone violates traffic laws at least occasionally, the upshot of

rule that holds the police officer accountable for mistakes of law will have little impact if, as these critics suggest, true traffic violations will nearly always present themselves as justifications for a police stop.

Indeed, even if the Court reverses its decision in *Heien*, officer discretion may still be extremely wide. When combined with the Court's prior ruling in *Schneckloth v. Bustamonte*,[125] *Whren* ushered in a world in which officers may stop motorists whom they deem suspicious—on the pretext of enforcing the traffic code—and then, per *Schneckloth*, request consent to search the stopped car even if they do not have probable cause to believe that evidence of a crime will be found therein. Now, "[p]retextual suspicion can form the basis for the initial stop, while a consent search may follow as a logical result of the officer's initial desire for closer contact with the car and its driver."[126] The stopped individual must voluntarily consent to the car search, but knowledge of the right to refuse is not a prerequisite to a finding that consent was voluntarily given.[127] The result is that officers have significant discretion to stop and search any driver whom they find suspicious, so long as the stop can be connected to a traffic violation. And there is evidence that officers use this power frequently, and that such searches are unequally distributed across the population.[128]

Thus, a Supreme Court that seeks to minimize traffic stops and searches that are unreasonable because race is used as a basis of judgments about suspicion might revisit the significant discretion it has afforded police officers

these decisions is that police officers, if they are patient, can eventually pull over almost anyone they choose . . . .").

125. 412 U.S. 218, 248-49 (1973) ("[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.").

126. Jacinta M. Gau, *Consent Searches as a Threat to Procedural Justice and Police Legitimacy: An Analysis of Consent Requests During Traffic Stops*, 24 CRIM. JUST. POL'Y REV. 759, 763 (2012).

127. In a case decided just a few months after *Whren*, the Supreme Court reinforced this point, holding that an individual does not have to be informed that he or she is "free to go" before her consent to search will be recognized as voluntary. Ohio v. Robinette, 519 U.S. 33, 39-40 (1996).

128. "Approximately 17.7 million people—or 8.4% of all drivers—are stopped by police each year, making this type of involuntary contact the most common reason for face-to-face encounters with officers. . . . Consent searches are the most common type of warrantless search, and often occur in the context of traffic stops." Gau, *supra* note 126, at 764 (citing CHRISTINE EITH & MATTHEW DUROSE, BUREAU OF JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 7 (2011)). Moreover, "[d]rivers who are non-White, who are young, and/or who are male appear to stand the greatest risk of being subjected to consent searches." *Id*. *See also* Sklansky, *supra* note 65, at 313 ("[T]he few available empirical studies confirm what anecdotal evidence has long suggested: minority motorists are pulled over far more frequently than whites.").

through the combined effects of its decisions in *Whren*, *Schneckloth*, and related cases. Fourth Amendment jurisprudence has considered consensual encounters and searches to be voluntary and therefore not subject to the suspicion or warrant requirements of the Fourth Amendment.[129] But the social psychological literature suggests a problem. Officers have significant discretion to stop drivers (anyone who violates a traffic law—indeed, in the wake of *Heien*, anyone they reasonably but incorrectly believe to be violating a traffic law) and limitless discretion to request consent to search stopped drivers' cars. Our knowledge of implicit biases teaches us that they are most likely to be activated in high discretion situations, allowing us to make a probabilistic judgment that minority motorists will bear the disproportionate burden of pretextual stops and consent searches.[130]

Given that the social psychological literature suggests that implicit biases are likely to be activated in the highly discretionary situation of a traffic stop, the Court might decide that it is unreasonable, as a matter of Fourth Amendment law, for an officer to request consent to search a car following a routine traffic stop unless the officer has articulable, reasonable suspicion to believe that she will find therein evidence of a serious crime or of material or circumstances that pose a threat to public safety.[131] Such a rule would better constrain implicit biases than the one currently in place because it would require officers to articulate specific reasons for requesting consent to search the car. This rule would also militate against the practice of stopping drivers for traffic offenses on the basis of mere hunches that evidence of some more serious crime may be found. Officers' articulated reasons for the stop would be subject to post hoc judicial review to ensure that they rise to the level of reasonable suspicion, thus creating stronger accountability for the principled, non-discriminatory use of such searches. Still, officers would be permitted to stop cars when they have probable cause to believe that a traffic violation has occurred, and have the necessary discretion to request consent to search those cars when they are able to articulate a serious need to do so.[132] This arguably strikes a fair balance between liberty and order, while employing a probabilistic

129. *See* Florida v. Bostick, 501 U.S. 429, 434 (1991).

130. Even if drivers may avoid these stops by committing no actual or perceived traffic offenses and avoid the searches by withholding their consent, we may still worry about placing heavier burdens on racial minorities to enforce the boundaries of constitutional reasonableness in this way.

131. *See* Megan Quattlebaum, Tracey Meares & Tom Tyler, *Principles of Procedurally Just Policing: Model Policies for Police Departments* (forthcoming) (on file with author).

132. Police departments that wish to further cabin the likely activation of implicit biases might reconsider the practice of making pretextual stops as a tool of crime prevention and control. Additionally, or alternatively, they might require officers to explain to a stopped motorist that she has the right to refuse to consent to the search. Officers could be required to obtain a written acknowledgement of (1) the person's understanding of their right to refuse to consent and (2) their consent to search.

judgment about the likelihood that implicit biases will be activated to limit the number of police stops and searches that will be constitutionally unreasonable because race was used as a basis for judgments of suspiciousness.

D. Advantages of a Behavioral Realist Approach

Fourth Amendment jurisprudence, as it is currently conceived, aims to ensure that searches and seizures will be reasonable by deterring officers from behaving *unreasonably*, employing the exclusionary rule as a penalty when they do.[133] As the Court put it in *Brown v. Illinois*, the purpose of the exclusionary rule is "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[134]

The challenge where implicit biases are concerned is that such biases are difficult to deter in the traditional sense. Courts are likely to have a hard time determining whether implicit biases affected officer behavior in any individual case, as even those officers who testify truthfully may be sincerely unaware of the impact of implicit biases on their behaviors. But even beyond the practical problems with enforcement of a deterrent regime, the social scientific literature teaches us that it is fundamentally unfair to punish officers for possessing implicit biases. Individual police officers do not willfully elect to hold such biases; they are a normal and expected aspect of human cognition.

An important advantage of a behavioral realist approach, then, is that it allows us to reframe the profiling problem so that we may identify—and gain broader political support for—effective solutions.[135] Behavioral realism will permit us to understand racial profiling as being caused primarily by bad situations, not bad officers. From this starting point, we will be able to advance

133. This is the reason that a central consideration in whether exclusion will be required is how purposeful or flagrant the police misconduct was. *See* Brown v. Illinois, 422 U.S. 590, 603–04 (1975) ("The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant.").

134. *Id.* at 599–600 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

135. As psychologists have noted, how a particular problem or choice is framed significantly influences the way in which people proceed to address it. *See, e.g.*, Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981). Reframing a seemingly intractable problem can thus be a useful starting point for identifying and promoting new, more effective solutions. And although frames can be tenacious, such reframing processes occur all the time: "Despite the powerful influence exerted by existing frames, reframing occurs routinely, contributing to shifting societal understandings. In effect, reframing reorganizes intuitions and understanding, generating different frames, often by introducing alternative ways of speaking about and approaching (and regulating) the dimension of the world in question." Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L. J. 1587, 1645 (2012).

from a regime of detection and punishment to one of effective prevention that interrupts the process whereby implicit biases are translated into behavior. This is the objective of the rules I have suggested in this Article: to better constrain officer discretion at the outset so as to ensure more reasonable results.

The pedestrian and traffic stop cases point to another benefit of courts focusing their attention on the impact of their rules on *future* cases rather than attempting post hoc regulation: doing so will allow them to mitigate the effects of implicit biases in policing beyond the "tiny fraction" of police searches and seizures that are litigated.[136] Because few police stops "result in an arrest, let alone a trial," the possibility that any individual stop was affected by implicit or explicit bias is not only unlikely to be detected, but also unlikely to ever be evaluated by a court after the fact.[137] Moreover, those cases that are litigated will be the ones in which evidence of criminality was found, meaning that courts will only be called upon to evaluate the possibility that implicit or explicit bias affected police officers' judgments almost exclusively in cases where those judgments turned out to be correct. This may result in a sort of "loser's rules"[138] problem for criminal cases, wherein judges only author opinions and create rules and standards in cases where hindsight bias and reluctance to let those who have engaged in criminality go free combine to strongly favor approval of the law enforcement activity. The approach proposed in this Article focuses on prevention rather than punishment and the future rather than the past. Such an approach makes it more likely that courts will craft judgments that will be successful as "everyone's rules," and therefore reflective of the manner in which we all hope and are entitled to be treated by law enforcement.

There is yet another advantage to the approach outlined in this Article. Should it prove workable in the Fourth Amendment context, this effort might also serve as a model for importing social psychological insights into other areas of law. Perhaps the most obvious initial beneficiary of such cross-fertilization might be the Fourteenth Amendment. As others have noted, "[b]ecause the Fourth Amendment is narrowly focused on searches and seizures, it could provide an opportunity to develop specialized doctrines of equality that, if they proved workable and successful, could later be considered

136. Meares, *supra* note 14, at 175 n.81.

137. *Id.*

138. I borrow this term from Judge Nancy Gertner, who uses it to describe "structural forces at work in law-reform litigation that lead to one-sided judicial outcomes." Nancy Gertner, *Losers' Rules*, 122 YALE L.J. FORUM 109, 109 (2012). Using employment discrimination claims as an example, she notes that judicial opinions will likely only be authored at the summary judgment stage when the defendant wins and summary judgment is granted (because this concludes the case). *Id.* at 113. When plaintiffs succeed in avoiding summary judgment, judges simply deny the motion without opinion and the case moves forward. *Id.* This "asymmetry [in] the decisionmaking process distorts the evolution of substantive legal standards. Losers' Rules evolve to justify the judicial analysis." *Id*. at 116 (footnote omitted).

for wider application under the Equal Protection Clause."[139]

E. Addressing Potential Critiques

1. Why Courts?

One conclusion that might be drawn from the social psychological research described above and my description of its mismatch with existing law is that efforts to address racial profiling in policing should focus on reforming systems, such that training and professionalism are improved and implicit biases are institutionally constrained. Such an approach would place far less emphasis on the question of whether an individual officer behaved reasonably (or even achieved reasonable results) in a single interaction. If one agrees that this is the correct approach, it is worth asking whether courts, and particularly the Supreme Court, are the institutions best situated to address problems in policing. In recent years, academics have increasingly argued that they are not.[140]

Those who argue against a central role for courts generally—and constitutional adjudication specifically—in the regulation of policing advance a number of different arguments, three of which merit particular attention.[141] First, some academics worry that courts lack the institutional competence to effectively weigh and resolve the most pressing issues facing modern policing. "Courts," these scholars claim, "often know so little about the institutional structures, occupational norms, market pressures, political influences, and nonconstitutional laws that shape police conduct that they cannot ask the right

139. Sklansky, *supra* note 65, at 327.

140. *See, e.g.*, Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012) ("[T]he problem of regulating the police extends beyond constitutional law to ensuring that the benefits of policing are worth the harms it imposes, including harms not prohibited by the Constitution."); Tracey Meares, 12th Annual Robert H. Jackson Center Lecture on the Supreme Court of the United States (Jul. 11, 2016) (arguing that the changes needed in policing go beyond what the Supreme Court can accomplish in its role in setting constitutional floors). *See also* EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 18, at 7 (noting that "attention should [be] focus[ed] on institutionalized practice" rather than just on individual police stops); Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, *supra* note 60, at 576 ("Given that the door of judicial redress has closed and that the Supreme Court's suggested equal protection remedy seems unlikely to bear any fruit," one should focus on "[p]olice department policy and regulation" to address the problem of pretextual traffic stops and thereby "fill the vacuum created by the Supreme Court's abdication of supervisory responsibility.").

141. Notably, other critics simply suggest that, because courts have proved unwilling to address racial profiling in the past, it is unwise to expect that they will do so in the future. I mention this argument separately because it takes the form of a prediction about what courts will do rather than an argument about what they are suited to do. *See, e.g.*, GLASER, *supra* note 9, at 177 ("Because courts have tolerated profiling given the slightest pretext, and legislatures have generally failed to act comprehensively, agency-level policies may be the most promising avenue for mitigating racial profiling.").

questions in making judgments about the police."[142] Second, some worry that whatever the merits of Fourth Amendment litigation, these cases will never address the more fundamental question of whether policing agencies are democratically accountable. On this view, "[r]ather than attempting to regulate policing primarily post hoc through episodic exclusion motions or the occasional action for money damages, policing policies and practices should be governed through transparent democratic processes such as legislative authorization and public rulemaking."[143] Third, some scholars have noted that, "because rights are held and enforced by individuals, usually with respect to specific actions, they do a poor job of measuring aggregate costs and benefits of law enforcement activity or its effects on the quality of life in society."[144] Many such scholars have identified alternative institutions, including police departments themselves,[145] state, local, and federal governments,[146] and even private insurance companies,[147] that they believe should be called upon to do much of the heavy lifting of regulating police practice.

These have been critical interventions in a law review literature that has arguably been overly focused on courts and constitutional litigation. Prospective policing reformers would no doubt be wise to pay heed to the myriad goals a reform project might pursue and the many institutions and individuals that might be partners in it. My argument is not that the courts (or the Supreme Court) are the only or even the best-situated institutions to address the problem of racial profiling or other challenges that face American policing today. Rather, I believe that they are necessary and unavoidable partners in setting the terms for police-public engagements.[148] Judges will continue to be

142. Harmon, *supra* note 140, at 774. Academics have also questioned whether courts are truly effective at altering police behavior in practice, *see, e.g.*, Neal A. Milner, *Supreme Court Effectiveness and the Police Organization*, 36 L. & Contemp. Probs. 467, 467 (1971), but it is telling that law enforcement officials themselves seem to believe that Supreme Court rulings are impactful. Particularly during the Warren Court era, Supreme Court decisions have inspired substantial resentment and resistance from law enforcement. *See id.* at 468-69. Some policing leaders now acknowledge that the Court has "contributed to the progress of police professionalism" by specifying standards for various police activities. *See* LEE P. BROWN, POLICING IN THE 21ST CENTURY 83 (2012).

143. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832 (2015).

144. Harmon, *supra* note 140, at 777.

145. *See* Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, *supra* note 60, at 576.

146. *See* Friedman & Ponomarenko, *supra* note 143, at 1832; Harmon, *supra* note 140, at 812-816.

147. *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1544 (2017).

148. Courts, moreover, are the institutions responsible for enforcing constitutional norms, so to the extent that law enforcement is frequently failing to treat people of different races equally or is engaging in unreasonable searches and seizures, this is appropriately thought of as a problem for the courts, even if they are unlikely to be able to resolve the issue on their own.

called upon to address the reasonableness of police officers' one-off engagements with the public, typically in individual appeals of criminal convictions, and they will need some yardstick against which to measure the reasonableness of those interactions.[149] The rules that they promulgate in these individual cases, moreover, will help to set the parameters for further police-public contacts.

The cases that brought us the reasonable police officer standard will not disappear simply because we do not judge them to be the best vehicles for reform.[150] We should thus seek to ensure that courts' reasonableness inquiries are themselves reasonable (i.e., reflective of the ways in which police officers actually behave). The thoughts offered in this Article are meant as a step in that direction, but serious and sustained thought is also required about how other actors (police departments, legislatures, civilian oversight boards, etc.) might contribute with their own behavioral realist approaches to addressing racial profiling.[151] Indeed, there is no reason why police departments, for example,

149. Class-action cases that permit courts to address systemic issues do sometimes arise. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (holding New York City liable for violating plaintiffs' Fourth and Fourteenth Amendment rights as a result of "disproportionate and discriminatory stopping of blacks and Hispanics" and finding that some of the stops at issue in the case lacked reasonable suspicion); State v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) (holding "that unrebutted statistical evidence of disproportionate traffic stops against African-American motorists established de facto policy of targeting blacks for investigation and arrest and thus established selective enforcement violating the equal protection and due process clauses"). But these are likely to be rare.

150. Nor should we neglect the advantages that criminal defendants bring to the table as regulators of police activity. As Joanna Schwartz argues, "police reformers need three qualities to have any hope of influencing police behavior: sufficient *leverage* such that law enforcement will respond to their pressures, recommendations, or demands; sufficient *motivation* to engage in their reform efforts; and sufficient *resources* to do their work." Joanna C. Shwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 439 (2016). Criminal defendants' leverage is limited, but they are "highly motivated to suppress evidence when they can," and, at least in one view, they are relatively well-resourced. *Id.* at 454. "At a micro level, criminal defendants and their attorneys are notoriously resource constrained . . . [but n]o other police reformer—with the exception of criminal prosecutors—are as plentiful. And with counsel, even overburdened counsel, comes some success: [b]est estimates are that 300,000 criminal cases are dismissed each year as a result of Fourth Amendment violations." *Id.* at 454-55.

151. Some law enforcement agencies explicitly direct their officers not to profile. *See, e.g.*, U.S. DEP'T OF JUST., GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY 1 (2014) ("In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal [sic] law enforcement officers may not use race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity to any degree, except that officers may rely on the listed characteristics in a specific suspect description. This prohibition applies even where the use of a listed characteristic might otherwise be lawful."). The New York City Police Department has proposed a new training program that would tell officers not to employ racial profiling. Laura Ly, *Proposed NYPD Materials: Don't 'Engage in Racial Profiling'*, CNN (Apr. 21, 2015),

might not themselves make the same probabilistic assessments I have advocated that courts make. They could decide that, as a matter of policy, they will not allow their officers to engage in practices that seem likely to lead to the activation of implicit biases. Numerous examples exist of departments cabining their officers' discretion in these ways.[152] Departments will also have a unique vantage point from which to assess and address the extent to which racial profiling may be operating on an organizational level, through decisions about where to deploy officers, for example.[153] Moreover, while courts have a large role to play in diminishing the likelihood that police officers' implicit biases will affect their behavior, their part in eradicating the underlying biases may be smaller.[154] Police departments will likely have to play a much greater part in putting into place direct debiasing strategies, such as exposing their officers to counter-typical associations and educating them about the role implicit bias may play in their decision-making.[155]

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http://www.cnn. com/2015/04/21/us/nypd-training-racial-profiling/. But behavioral realism suggests that more may be required if departments are to influence the likelihood that their officers' decision-making will be colored by implicit bias—i.e., the likelihood that they will engage in racial profiling without consciously intending to do so. Some departments are taking steps in this direction. *See, e.g.*, Tina Rosenberg, *A Strategy to Build Police-Citizen Trust*, N.Y. TIMES (July 26, 2016), http://www.nytimes.com/2016/07/26/opinion/a-strategy-to-build-police-citizen-trust.html?_r=1; Rocco Parascandola, *Exclusive: NYPD to Develop 'Implicit Bias' Training Curriculum*, N.Y. DAILY NEWS (July 15, 2016), http://www.nydailynews.com/new-york/exclusive-nypd-develop-implicit-bias-training-curriculum-article-1.2713332?cid=bitly.

152. *See, e.g.*, Erin McCormick & Jim Herron Zamora, *Racial Bias in CHP Searches: Latinos, Blacks More Likely to Have Vehicles Examined After Being Pulled Over*, S.F. CHRONICLE (July 15, 2001) (noting that the California Highway Patrol enacted a six-month moratorium on the practice of permitting officers to request consent to search a car following a stop, in absence of probable cause to believe a crime had occurred, as a result of data demonstrating racial disproportion in the use of this tactic).

153. Alpert et al., *supra* note 90, at 410.

154. This is the case due to the limits of courts' power over officers, at least in the context of Fourth Amendment adjudication. Courts may provide rules to guide and constrain police officer discretion, but they will have no direct, day-to-day role in recruiting, training, and managing those officers. *See* Lai, Hoffman & Nosek, *supra* note 55, at 318 ("Situational goals, motives, or behavioral strategies may not affect the existence of implicit prejudice, but instead alter its expression."). A possible exception is that courts—and particularly the Supreme Court—may be able to influence the broader culture out of which these stereotypes arise. There is public awareness of at least the more culturally and politically contested Supreme Court opinions, so these opinions may have some role in educating the public about how the world does or should work (i.e., in creating culture).

155. For these and other debiasing strategies, see Kang et al., *supra* note 11, at 1169-86. For example, it has been demonstrated that officers who work in areas with high concentrations of minority residents and high violent crime rates demonstrate greater shooter bias. *Id.* at 1170. Police departments that are aware of this effect might consider rotating their officers in and out of such areas on a routine basis, though other considerations—such as the community's ability to grow comfortable with particular officers and to gain trust in them—would also have to be weighed. To be clear, I also believe that police departments, like courts, have an important role to play in preventing implicit biases from affecting police behavior by creating clear rules that constrain discretion and hold officers accountable.

2. Science, the Courts, and Administrability

The Supreme Court has demonstrated a capacity in prior cases to marshal scientific evidence in a similar manner to that which I suggest here. For example, in the trio of opinions in which it invalidated the death penalty for individuals who are under eighteen years old,[156] prohibited life without parole sentences for juveniles who commit non-homicide crimes,[157] and directed that a life without parole sentence cannot ever be made mandatory for a juvenile offender,[158] the Court consulted not only "common sense"—"what 'any parent knows'"—but also "science and social science" to identify key differences between juveniles and adults that it found made severe sanctions for juveniles less appropriate than they might be for adults who commit similar crimes.[159] As the *Miller* Court summarized:

> In *Roper*, we cited studies showing that "[o]nly a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior." And in *Graham*, we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "deficiencies will be reformed."[160]

In its opinions in *Roper*, *Graham*, and *Miller*, the Court incorporated insights from the developmentally-based neuroscience research on juveniles and juvenile offenders to guide the articulation of a punishment scheme whose overall structure it judged to be less likely than previous schemes to subject juveniles to punishments disproportionate to their culpability. In essence, the Court made probabilistic judgments, based upon the scientific literature, about which punishments were likely to be excessive for juveniles based upon the general characteristics of this age group. In a similar manner, I contend, courts might consider the findings of the social psychological literature on implicit bias to make probabilistic judgments about what search and seizure rules are most likely to lead to reasonable outcomes.

Of course, the Court's deployment of scientific evidence in the juvenile punishment cases had its detractors. Some of their objections went to the ability of the neuroscientific evidence provided to support the specific conclusions the Court reached,[161] but others addressed more fundamental questions of whether

156. Roper v. Simmons, 543 U.S. 551 (2005).
157. Graham v. Florida, 560 U.S. 48 (2010).
158. Miller v. Alabama, 132 S. Ct. 2455 (2012).
159. *Id.* at 2464 (citing *Roper*, 543 U.S. at 569).
160. *Id.* at 2464-65 (internal citations and quotation marks omitted).
161. *See, e.g.*, *Roper*, 543 U.S. at 588 (O'Connor, J., dissenting) ("Adolescents *as a*

and under what conditions courts should consider scientific evidence at all. As Justice Scalia argued, for example,

> To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.[162]

Justice Scalia's argument boils down to one about judicial competence. "Given the nuances of scientific methodology and conflicting views," he concludes,

> courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures "are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."[163]

Justice Scalia's argument is ultimately unpersuasive. Scientific findings are one type of evidence that, in some cases, may help us to define constitutional terms that do not have one obvious meaning. If science helps us to understand that some types of defendants are, as a group, less blameworthy and more vulnerable than others, this adds content to the concept of cruelty of punishments that is found in the Eighth Amendment. Similarly, if science helps us to understand that some types of rules lead more readily to the disproportionate targeting of minorities for searches and seizures, this adds content to the concept of Fourth Amendment reasonableness. Such evidence will, of course, have greater persuasive value to the extent that it is methodologically sound and broadly accepted in the scientific community. But to say that judges should simply ignore scientific evidence because they risk making imperfect decisions about its quality and persuasiveness is to prefer an answer to the question of what is reasonable that we *know* to be wrong (because it is incomplete) to one that *may* be wrong (to the extent that judges have misapprehended the import of the scientific literature). Better answers to these difficult questions of constitutional meaning will come only from bringing out all of the available evidence on point and debating it fully—testing the scientific findings, as Justice Scalia argues, over and over again in adversarial proceedings.

Indeed, a key advantage of the behavioral realist approach I propose is that it is reasonably straightforward to administer. Courts are well-suited to adapt

*class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17–year–old murderers are sufficiently mature to deserve the death penalty in an appropriate case.").

162. *Id.* at 616-17 (Scalia, J., dissenting).

163. *Id.* at 618 (quoting McCleskey v. Kemp, 481 U.S. 279, 319 (1987)).

their Fourth Amendment deliberations to the psychological findings about implicit biases. They need only add an additional consideration to the reasonableness equation: they must consider how the rule that they promulgate in the case before them is likely to shape the reasonableness of future police-citizen encounters by making it more or less likely that implicit biases will be activated. No statistical analysis will have to be conducted about the rates at which officers in a particular department discover evidence of criminality during searches and seizures, nor do courts need to wait for a class-action lawsuit to bring out evidence of patterns of racial profiling across many law enforcement engagements. Courts, and the litigants who come before them, need only to consult the scientific literature for clues about what types of rules are likely to activate implicit biases. The burden of becoming educated about how implicit bias works, moreover, will diminish as the case law incorporating the research evolves.

3. Potential Risks: Overcorrection and Underenforcement

Another concern that might be raised about a behavioral realist approach to Fourth Amendment adjudication is that we might overcorrect for implicit associations such that courts begin to impede effective enforcement of the law. If, as I have described, implicit associations are the results of mental processes that are generally beneficial and adaptive, then it cannot be our goal to rid police officers of *all* implicit associations. Rather, our sole aim should be to eradicate (or deactivate) only those implicit *biases* that cause police officers to act in ways that are contrary to the constitutional value of equal application of the law. It is theoretically possible that courts could cabin officer discretion so severely that they deactivate the operation of useful associations as well as pernicious ones.[164]

A first answer to this concern is that the potential for the activation of implicit biases will be just one factor for courts to consider in a Fourth Amendment balancing test. That is, law enforcement needs and objectives will be explicitly considered and weighed in a determination of whether officer behavior was reasonable. The test is thus designed from the outset to account for the fact that not all law enforcement tasks are equal, and that more serious crimes and more urgent danger may justify more rapid and fluid police responses. Courts that adopt a behavioral realist approach to Fourth Amendment reasonableness may consider both the fact that increased discretion is likely to lead to greater activation of implicit biases *and* the possibility that constraining officer discretion too much may limit their ability

164. Indeed, the Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), could be seen as a court-orchestrated increase in police discretion in reaction to the dramatic increase in homicide rates and other public safety concerns that arose in the seven years after the Court held in *Mapp v. Ohio*, 367 U.S. 643 (1961), that the exclusionary rule would apply to all searches and searches conducted without probable cause. *See* Fagan, *supra* note 88, at 43-44.

to operate effectively.

A second answer is that the empirical information now available to us suggests that police officers make better stops, from a crime control perspective, when they make stops that are based on "probable cause indicators of criminal behaviors," rather than more subjective, inchoate suspicions.[165] A team of researchers who evaluated police stops in so-called "impact zones" in New York City from 2004 to 2012 found that "increases in probable cause stops, after the formation of impact zones, [were] associated with reductions across several types of crime. . . . [But] the increase in stops based on general suspicion ha[d] no consistent association with reductions in crimes."[166] This suggests that at least some types of police activity will be both less reflective of implicit biases and more effective at controlling crime if the officers who engage in those actions have less rather than more discretion.

Those responses notwithstanding, it is fair to say that because courts have not yet attempted to mitigate constitutionally suspect implicit biases, they have little experience to guide the proper calibration of judge-made rules to this end. But the game is worth the candle. Racial profiling is unconstitutional because it conflicts with the values expressed in the Equal Protection Clause and because searches and seizures that are effected because a suspect's race has been made a proxy for her suspiciousness are not reasonable. The practice has been condemned by American presidents of both parties[167] and subjected to multiple efforts at reform, but it persists in part because it is driven by implicit biases that are hard to recognize and challenging to address. Courts that fail to attempt

165. *See* John MacDonald, Jeffrey Fagan & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, PLOS ONE, June 2016, at 1.

166. *Id.* at 9.

167. *See* Paige Lavender, *Obama Talks About His Own Experience with Racial Profiling*, HUFFINGTON POST (Dec. 17, 2014), https://www.huffingtonpost.com/2014/12/17/obama-people-interview_n_6339972.html ("'It's incumbent on all of us as Americans . . . that we recognize that this is an American problem and not just a black problem,' Obama said after a grand jury announced it would not indict the . . . officer who killed [Eric] Garner. 'It is an American problem when anybody in this country is not being treated equally under the law.'"); Eric Lichtblau, *Bush Issues Federal Ban on Racial Profiling*, N.Y. TIMES (June 17, 2003), http://www.nytimes.com/2003/06/17/politics/bush-issues-federal-ban-on-racial-profiling.html ("President Bush issued guidelines today barring federal agents from using race or ethnicity in their routine investigations, but the policy carves out clear exemptions for investigations involving terrorism and national security matters. . . . [The policy] grows out of a commitment Mr. Bush made on the campaign trail in 2000 and again in February 2001, in a State of the Union-style address, when he said of racial profiling: 'It's wrong, and we will end it in America.'"); Steven A. Holmes, *Clinton Orders Investigation on Possible Racial Profiling*, N.Y. TIMES (June 10, 1999), http://www.nytimes.com/1999/06/10/us/clinton-orders-investigation-on-possible-racial-profiling.html ("Declaring racial profiling 'morally indefensible,' President Clinton today ordered Federal [sic] law-enforcement agencies to compile data on the race and ethnicity of people they question, search or arrest to determine whether suspects are stopped because of the color of their skin. 'Racial profiling is in fact the opposite of good police work where actions are based on hard facts, not stereotypes,' the President said. 'It is wrong, it is destructive and it must stop.'").

a solution risk being part of the problem, insomuch as they may promulgate rules that increase the likelihood that implicit biases will be activated.

## CONCLUSION: LET'S GET REAL

In the United States in 2018, there is a prominent and painful national conversation occurring regarding what many see as deep divisions between police and the communities they are meant to serve.[168] In large part, this has been due to increased public attention to the problem of police killings of members of the public, and particularly of African American men—attention that was demanded by activists who became part of what is known as the Black Lives Matter movement. As Franklin Zimring notes, "[t]he fifteenth year of the twenty-first century was an important time of transition for public awareness of killings by police as an American phenomenon."[169] Crowdsourced estimates generated by news outlets suggest that 1,134 individuals were killed by police in 2015.[170] Of those who died, 95% were male and 26% were African American.[171] While 55.7% of those killed possessed a gun, 11.3% were unarmed and 3.7% had something in their possession that police mistook for a gun.[172] Although it can get lost in the dry statistics, the upshot is that in 2015

168. We have been here before. Moments when such debates have engaged large portions of the public might even be traced through the history of various presidential commissions that have been established to address them. These commissions include the National Commission on Law Observance and Enforcement established by President Hoover in 1929 to review problems with law enforcement, particularly as related to Prohibition, *see* THE WICKERSHAM COMM'N, RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT: PART ONE: RECORDS OF THE COMMITTEE ON OFFICIAL LAWLESSNESS (Kermit Hall & Samuel Walker, eds. 1997); the Commission on Law Enforcement and the Administration of Justice established by President Johnson in 1965, *see* THE PRESIDENT'S COMM'N ON LAW ENF'T AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 99 (1967) (noting that "[i]n city slums and ghettos, the very neighborhoods that need and want effective policing the most . . . [t]here is much distrust of the police, especially among boys and young men"); and the National Commission on Civil Disorders, also established by President Johnson in June 1967, *see* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL COMMISSION ON CIVIL DISORDERS 157-58 (1968) ("cit[ing] deep hostility between police and ghetto communities as a primary cause of the disorders surveyed" and noting that many complaints about the police arose out of "routine police actions such as stopping a motorist"). Most recently, in December 2014, President Obama established the President's Task Force on 21st Century Policing, "[i]n light of . . . events that have exposed rifts in the relationships between local police and the communities they protect and serve." PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (May 2015).

169. FRANKLIN E. ZIMRING, WHEN POLICE KILL 3 (2017).

170. *Id.* at 35.

171. *Id.* at 45.

172. *Id.* at 57. Moreover, in 4.2% of cases, the weapon indicated was an automobile, and in 2.9% of cases, the presence of a weapon was unknown or disputed. *Id.*

and 2016, news reports of incidents of police use of force against African Americans became almost daily fare, and disputes over the meaning of those deaths for criminal justice policy were a heated topic of debate during the presidential election. But reading the Supreme Court's recent Fourth Amendment decisions, one has little sense that the opinions are being authored against this fraught backdrop.[173]

This disengagement is nowhere more evident than in the Court's continued inability to right the constitutional wrong of racial profiling, one of the main drivers of current public discontent. By incorrectly theorizing racial profiling as something only "bad cops" do, the Supreme Court has taken both the Fourth and Fourteenth Amendments off the table as potential remedies to the problem, leaving the targets of racial profiling with little recourse. In doing so, the Court has not only misinterpreted the Fourth Amendment's requirement that searches and seizures be "reasonable," it has also allowed the alienation of Americans from their law enforcement officials to deepen. As one federal district court recently noted, such "alienation cannot be good for the police, the community, or its leaders."[174] Nor is it likely to be good for the general public's belief in the utility of the United States Constitution for addressing critical modern day concerns.[175]

But it was not always this way. In an earlier era of policing reform, the Supreme Court was often (though not always) at the forefront of public conversations about race and policing, even if the driving force behind those cases was not always made explicit. As many have noted,

> The need that gave birth to the existing criminal procedure regime was institutionalized racism. Law enforcement was a key instrument of

173. The opinion in *Heien*, for example, came down three weeks after the announcement that there would be no indictment filed against the police officer who fatally shot Michael Brown in Ferguson, Missouri. *Compare* Heien v. North Carolina, 135 S. Ct. 530 (2014), *with* Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014). But the possibility that the decision might have an impact on police-community relations seemed to evade the Court's notice. There have been notable exceptions in the dissents of Justice Sotomayor—most prominent among these, her highly publicized opinion in *Utah v. Strieff*. *See* Utah v. Strieff, 136 S. Ct. 2056, 2069, 2071 (2016) (Sotomayor, J., dissenting) (arguing that the rule created by the majority "risk[ed] treating members of our communities as second class citizens" and noting that "[w]e must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but."); *see also Heien*, 135 S. Ct. at 544 (2014) (Sotomayor, J., dissenting) (noting the "human consequences" of the majority's decision, "including those for communities and for their relationships with the police") (citation omitted).

174. Floyd v. City of New York, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

175. *See also* Amar, *supra* note 14, at 800 ("Judges who value long-run stability and sustainability should prefer institutions that connect the People to Our Constitution, rather than ones that alienate Us from it.").

> racial repression, in both the North and South, before the 1960's civil rights revolution. Modern criminal procedure reflects the Supreme Court's admirable contribution to eradicating this incidence of American apartheid. Supplanting the deferential standards of review that had until then characterized its criminal procedure jurisprudence, the Court, beginning in the 1960's and continuing well into the 1970's, erected a dense network of rules to delimit the permissible bounds of discretionary law-enforcement authority.[176]

Indeed, Bennett Capers argues that the Fourth Amendment cases of this era reflect a concern "about the Fourteenth Amendment's promise of equal citizenship."[177]

Today, America faces an evolving set of challenges. As described above, a significant percentage of racial profiling may be the responsibility of well-meaning officers, who desire no connection with the kinds of policing of African American communities that characterized the Jim Crow South. The Supreme Court must address the fears and concerns of these officers as well. If left to fester, the anxieties and resentments of law enforcement officers—many, but by no means all of whom seem to feel that they have been unfairly blamed and targeted by public ire in the wake of too many news stories of police killings of African American men—will continue to exert a divisive influence on political dialogue and priorities surrounding criminal justice.[178] The Court can take a lead role in reframing the conversation from one of individual guilt for bad acts to one of collective responsibility for mitigating the harms of the implicit biases that most human beings possess.

If, by contrast, the Justices routinely fail to acknowledge the concerns animating litigants—not to mention the public and police more generally—they risk diminishing their popular legitimacy. Such a loss would have real consequences. Research suggests that individuals who evaluate the Court as being procedurally just (i.e. who feel that the Justices respect citizens and their rights, consider their views, and care about their concerns) are more likely to accept its decisions and feel obligated to defer to them, even when they personally disagree with the result.[179] At a time when negative views of the

176. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 27 ANN. REV. CRIM. PROC. 1153, 1153 (1998). *See also* Capers, *supra* note 21, at 3 ("[T]he criminal procedure revolution that took place between the 1920s and 1960s" was in part motivated by a desire to "ensure the rights of minority law breakers *and* the rights of minority law abiders at a time when minority law abiders faced harassment and victimization by the police, risked arrest without probable cause, and were subject to physical brutality under the guise of interrogation.").

177. Capers, *supra* note 21, at 3.

178. *See, e.g.*, Nathalie Baptiste, *Here's What the Biggest Police Union Wants from Trump*, MOTHER JONES (Dec. 13, 2016), http://www.motherjones.com/politics/2016/12/heres-what-biggest-police-union-wants-trump-his-first-100-days.

179. *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

Court are at a historic high and when people perceive that the Justices are motivated by their own political views,[180] this is not a consequence that can easily be ignored.

Acknowledging litigant concerns does not require the Court to rule in favor of those who express them. *Terry v. Ohio*[181] might serve as an example here. The Court ultimately ruled in favor of the right of the police to conduct a stop-and-frisk when they have reasonable suspicion (short of probable cause) that crime may be afoot and that the suspect may be armed.[182] But the Court also acknowledged some of the worries of those who may have suspected that Terry and his co-defendants initially attracted police attention because two of the three men arrested were Black,[183] noting that "minority groups, particularly Negroes, frequently complain[ed]" about "wholesale harassment by certain elements of the police community."[184] The Court also cited the President's Commission on Law Enforcement and Administration of Justice for the proposition that "[i]n many communities, field interrogations are a major source of friction between the police and minority groups."[185] While Terry and his sympathizers could reasonably disagree with the outcome,

> [A]t least the decision expressly recognized the problem of police harassment, took note that the problem appeared particularly acute from the vantage point of black Americans, acknowledged the role that investigatory stops can play in patterns of police abuse—and kept these "difficult and troublesome" realities in mind when interpreting and applying the Fourth Amendment.[186]

Giving such concerns genuine and thoughtful consideration in arriving at case outcomes is not just a polite gesture. It is the very heart of procedurally just lawmaking.

To address litigant concerns and ensure its own status as a legitimate lawmaker, the Court should, at minimum, "get real" about the implicit biases that likely drive a significant portion of today's racial profiling. The aim of this Article is to point a way forward for the Court to meaningfully address such

180. *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RES. CTR. (July 29, 2015), http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/.

181. 392 U.S. 1 (1968).

182. *Id.*

183. *See* Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 730 (1998) (noting that when asked what attracted him to the defendants, the arresting officer testified, "'Well, to tell the truth, I just didn't like 'em.'"); Alex French, *He Would Have Stopped the Frisks*, N.Y. MAG. (June 17, 2012), http://nymag.com/news/intelligencer/nypd-stop-and-frisk-2012-6/.

184. *Terry*, 392 U.S. at 14.

185. *Id.* at n.11 (quoting THE PRESIDENT'S COMM'N ON LAW ENF'T AND ADMIN. OF JUSTICE, U.S. DEPT. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967).

186. Sklansky, *supra* note 65, at 315–16 (quoting *Terry*, 392 U.S. at 9).

unintentional profiling in its Fourth Amendment jurisprudence. But the exhortation to "get real" is also meant to encourage the Court to attend to the high stakes involved in the current debate. Public and police distrust and anger are boiling over, and the current Court cannot simply disclaim responsibility for helping to turn down the heat. If we are to move forward to a place of healing and reconciliation, the institution of federal government with chief responsibility for enforcing constitutional norms will have a critical role to play.