ARTICLES

CAN YOU BE BLACK AND TEACH THAT?
WITH EPILOGUE BY EMMANUEL MAULEÓN

DEVON W. CARBADO*

Notwithstanding the broad literature on race and constitutional criminal procedure, scholars have rarely engaged the epistemological burdens Fourth Amendment law imposes on Black students and faculty. Those burdens derive from a fundamental and insufficiently acknowledged disjuncture: despite the rights-protecting language in the Fourth Amendment (in particular, its prohibition against "unreasonable searches and seizures"), Fourth Amendment law is, for Black people, a domain of existential violence. It is Fourth Amendment law that determines when and how the police may engage us in our homes, in our cars, at school, and on our streets—and it is Fourth Amendment law that produces and governs the anti-Black border between surveillance and death. This fraught and necrological feature of Fourth Amendment law sets the doctrinal terms on which Black students must learn, and Black faculty must teach, the law. In that regard, the violence Black people encounter in the context of engaging with Fourth Amendment jurisprudence is against the very Black body they occupy. This Article describes that normalized epistemological environment. One might think of the account the Article provides as a pedagogy of the Black body, or more precisely, as an articulation of what the Black body can teach us about the racialized "field of pain and death" Fourth Amendment law produces. That field includes a constitutional archive

* Elihu Root Professor of Law, NYU School of Law and Distinguished Research Professor of Law, UCLA School of Law. For comments on or discussions about this Article, I thank Paul Butler, Monica Bell, Bennett Capers, Nyala Carbado, Kim Crenshaw, Adrienne Davis, Anthony Farley, Brittany Farr, Rachel Godsil, Kwame Granderson, Ariela Gross, Cheryl Harris, Alexis Hoag-Fordjour, Yuvraj Joshi, Zina Maka, Angela Onwuachi-Willig, Alice Ristroph, Russell Robinson, Joanna Schwartz, Omavi Shukur, Fred Smith, Colin Starger, Chantal Thomas, Etienne Toussaint, Patricia Williams, and Noah Zatz. I also thank participants at the faculty colloquium at Brooklyn Law School, the CRS workshop at UCLA Law School, the Advanced CRT Workshop at UCLA, the Decarceration Workshop (over Zoom), the CRT in the Humanities Mellon-funded Workshop at Columbia Law School and the African American Policy Forum, the University of Baltimore Law School, and the Law and Capitalism Conference at Duke Law School. I am particularly grateful to David Simson and Emmanuel Mauleón for their deep engagement with the paper and extend an additional gratitude to Emmanuel Mauleón for writing the Epilogue. I also want to thank the *New York University Law Review* editors for their extraordinary patience and their substantive and thoughtful comments throughout every stage of the editorial process. Asha Ramachandran and Shriya Chitale provided excellent research assistance, as did UCLA Law research librarian Brian Raphael. This Article is dedicated to the memory of Jerome McCristal Culp and Derrick Bell, scholars whose work pushed the boundaries of legal analysis through innovative methods and a sustained engagement with race. The Article's title was inspired by Elizabeth Alexander's seminal article, *"Can You Be Black and Look at This?": Reading the Rodney King Video(s)*, 7 PUB. CULTURE 77 (1994).

that requires Black people to learn and teach law through our legally sanctioned disposability. Fourth Amendment law is thus not merely violent in its social effects; it is epistemologically violent—and legal pedagogy is one of the sites where that violence is reproduced.

INTRODUCTION

The text of the Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

The language promises security. For Black people, it organizes vulnerability.[2] It is Fourth Amendment law that determines when and

---

[1] U.S. CONST. amend. IV.

[2] There is a broad literature that stages a racial critique of Fourth Amendment law. *See, e.g.*, Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 VILL. L. REV. 851 (2002); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022) [hereinafter CARBADO, UNREASONABLE]; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425 (1997); Daniel S. Harawa, *Coloring in the*

how the police may engage us in our homes, in our cars, at school, and on our streets—and it is Fourth Amendment law that produces and governs the anti-Black space between surveillance and death.[3] Because that space is an iteration of the colorline,[4] Black people do not experience Fourth Amendment law as a restraint on police power. We experience it, instead, as a racialized source of police empowerment.[5] That empowerment includes not only the authority to surveil, socially control, and discipline Black people in ways that render us disposably alive. It also includes the authority to kill Black people on terms that expose us to "bare death."[6] This fraught and necrological dimension of Fourth Amendment law is a stark reminder both that "legal interpretation takes place in a field of pain and death"[7] and that this doctrinal activity produces the fields in which that pain and death unfold. Because the law school curriculum and legal pedagogy often obscure both the racial dimensions of Fourth Amendment violence and the pedagogical difficulties that violence generates in the classroom,[8] this Article makes those unspoken dynamics its central concern.

Fourth Amendment, 137 Harv. L. Rev. 1533 (2024). Tracey Maclin's work in particular has been foundational. *See, e.g*, Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333 (1998).

[3] A central claim of my work has been that Criminal Procedure is a doctrinal domain in which racial inequality is constitutionalized. *See generally* Carbado, Unreasonable, *supra* note 2 (exploring the racial dimensions of Fourth Amendment law). *See also* Devon W. Carbado & Jonathan Feingold, *Rewriting* Whren v. United States, 68 UCLA L. Rev. 1678, 1699 (2022) (observing that failing to permit a cause of action under the Fourth Amendment in cases like *Whren* effectively constitutionalizes racial profiling).

[4] *See* W.E.B. Du Bois, The Souls of Black Folk 13 (2d ed. 1903) (observing that "[t]he problem of the twentieth century is the problem of the color-line,—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea").

[5] *See* Carbado, Unreasonable, *supra* note 2, at 31; *see also* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 127 (2017) [hereinafter Carbado, *From Stopping Black People to Killing Black People*] (arguing that racial profiling is embedded in the analytical structure of the Fourth Amendment).

[6] *See infra* Part I.

[7] Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986).

[8] Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can Be Intellectually Violent*, ABA J. (Oct. 15, 2020, at 12:23 ET) [hereinafter Ossei-Owusu, *For Minority Law Students*], https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent [https://perma.cc/DWB2-G6R6]; Shaun Ossei-Owusu, *Criminal Legal Education*, 58 Am. Crim. L. Rev. 413, 414 (2021) (articulating some of the ways in which legal education is "intellectually violent") [hereinafter Ossei-Owusu, *Criminal Legal Education*]; Alice Ristroph, *The Curriculum of the Carceral State*, 120 Colum. L. Rev. 1631, 1636 (2020) (discussing how law schools obscure the ways legal education legitimizes and reproduces the carceral state).

One might think of the account this Article provides as a pedagogy of the Black body,[9] or more precisely, as an articulation of what the Black body can teach us about the "field of pain and death" Fourth Amendment law produces but does not register.[10] That field structures routinized violence in society (including by rendering policed Black bodies both normative and natural) and epistemological violence in the classroom (including by forming a constitutional archive that requires Black people to teach and learn law through our legally sanctioned disposability).[11]

To confront and illuminate the scope of that disposability, this Article deploys an *undisciplinary* method.[12] Moving within and across the boundaries of narrative, poetry, and doctrinal exegesis, that method rests on three important epistemological refusals: the refusal to ignore the enduring ways race structures American social life; the refusal to elide the role law plays in producing and sustaining that reality; and the

---

[9] As will become clear, "pedagogy" in this paper is not to "the Black body" what "pedagogy" is to the "oppressed" in Paulo Freire's *Pedagogy of the Oppressed*, though there is some overlap. *See* Paulo Freire, Pedagogy of the Oppressed 47 (Myra Bergman Ramos trans., The Continuum Int'l Publ'g Grp. 30th Anniversary ed. 2000). Nor do I mean to have captured all that the Black body can teach us about policing and the broader racial conditions of social life. The account I provide is decidedly incomplete. I am developing these ideas more fully in a book manuscript that is tentatively titled "Pedagogy of the Black Body." For an excellent account of how to think about pedagogy in relationship to slavery and ontology, see Stephen Nathan Haymes, *Pedagogy and the Philosophical Anthropology of African-American Slave Culture*, *in* Not Only the Master's Tools: African American Studies in Theory and Practice 173 (Lewis R. Gordon & Jane Anna Gordon eds., 2006). The account I provide is narrower than Haymes's theoretically rich formulation of slave pedagogy.

[10] Cover, *supra* note 7.

[11] My approach is a very particularized way of seeing "law through the lens of race." *See generally* Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & Pol. 1, 1 (2005) (articulating several benefits to, and several ways in which one might, study law via an engagement with race). Thinking of the Black body in pedagogical terms is way of taking seriously Jared Sexton's compelling articulation that "Blackness is theory itself." Jared Sexton, *Ante-Anti Blackness: Afterthoughts*, Lateral: J. of Cultural Studs. Ass'n (2012), https://csalateral.org/original/issue1/content/sexton.html [https://perma.cc/N89V-6EQ9] ("Blackness is theory itself, anti-blackness the resistance to theory.").

[12] *See, e.g.*, Christina Sharpe, In the Wake: On Blackness and Being 13 (2016) (discussing the degree to which one must be "undisciplined" to capture various dimensions of the afterlife of slavery). The paper is also undisciplined in another sense. Scholars who may not think of themselves as travelling intellectual partners sometimes occupy the same citational space in parts of the Article. My engagements in that regard are not intended to disappear—or solve—tensions or debates within fields. I am simply trying to make sense of anti-Blackness within a specific juridical domain (Fourth Amendment law) and a specific institutional space (the law school classroom). Sometimes lines of work are helpful. Sometimes a field. Sometimes a single riff. Sometimes a theoretical framework. Sometimes a descriptive account. Sometimes a turn of phrase. And sometimes a normative sensibility. Except for where I expressly say so, the paper is not attempting to make broad claims about how different expressions of Black Studies interact (or should interact) with each other.

refusal to engage the "vexed bond" between race and law solely within the parameters and modalities of conventional legal discourse.[13] Those refusals are consistent with Lewis Gordon and Jane Anna Gordon's call that part of the project of Black Studies should be to build "our own houses of thought."

Organized in four parts, the remainder of the Article proceeds as follows.

Part I presents a poem, *Bare Death.* Although *Bare Death* is the Article's origin, I did not set out to write it. Nor could I have imagined that the thoughts and sensibility that motivated *Bare Death* would culminate in an Article, a point to which I will return later. Like other poems, *Bare Death* invites elaboration, contestation, and rearticulation. Accordingly, I will not offer a definitive interpretation at the outset. What I will say and later develop is that one of the central aims of *Bare Death* is to redescribe Fourth Amendment law as a juridical racial project:[14] a domain that both produces the social meanings of Blackness on which policing relies and adjudicates the permissible scope of state violence through the prism of the Black body.[15]

Parts II and III contextualize the poem. Because *Bare Death* is built from the language, structure, and logics of Fourth Amendment doctrine, Part II describes the poem's formal and thematic operations and connects them to key concepts and frameworks in constitutional criminal procedure—search, seizure, reasonableness, reasonable suspicion, probable cause, justifiable force, plain view, qualified immunity, the exclusionary rule, and related standards. These doctrinal elements supply the poem's grammar. The analysis in Part II demonstrates how the poem's formal pressures—repetition, interruption, breathlessness, and the refusal of closure—mirror the procedural rhythms and justificatory habits of Fourth Amendment law.[16]

---

[13] For an indication of how these refusals map onto the point of departure for Critical Race Theory, see generally *Introduction* to Critical Race Theory: The Key Writings that Formed the Movement (Kimberlé W. Crenshaw et al., eds. 1995). *See generally* Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987) (refusing to confine his engagements with law to conventional legal analysis); Patricia J. Williams, The Alchemy of Race and Rights (1991) (Virago Press Ltd. 1993) (arguing the same).

[14] *See* Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1990s 55–56 (2d ed. 1994) (framing racial projects as "a process of historically situated projects in which human bodies and social structures are represented and organized" in racially hierarchical terms (emphasis omitted)).

[15] As you will see, I will link that formulation to what I call the "Jurisgenerative Black body." *See infra* note 42.

[16] For the most recent articulation of this scholarship, see Devon W. Carbado, *Police Power Abolition*, 72 UCLA L. Rev. Discourse 658 (2025) [hereinafter Carbado, *Police Power Abolition*]. My most comprehensive treatment of race and the Fourth Amendment is my

Part III turns to the pedagogical terrain *Bare Death* occupies. It examines the potential difficulties Black faculty and students confront when teaching and learning Fourth Amendment law. Taking seriously Jerome Culp's call to locate the "me" in scholarly interventions,[17] I describe my experiences teaching Constitutional Criminal Procedure during the COVID-19 pandemic and the nationwide protests against police violence. That moment rendered newly visible the structural conditions under which Black faculty teach and Black students learn the law. Those conditions include navigating a jurisprudence that exposes Black people to "premature death"[18]; witnessing and encountering the racialized enforcement practices through which that death occurs; and occupying an institutional space that disciplines how faculty and students may contest those realities.

The pressures generated by these conditions are not reducible to the racial demographics of the classroom, though demographics certainly matter. They are built into what the classroom is—and is not—designed to be. The pedagogical burdens this Article describes arise from both *who* occupies legal education and from *how* legal education organizes authority, knowledge, and professional formation.[19] To elaborate that point, Part III links the racial burdens it describes to a more general feature of legal education: namely, that Black students must learn to "think like a lawyer,"[20] and Black faculty must

book, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT. CARBADO, UNREASONABLE, *supra* note 2.

17 Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 547–48 (1991) (explaining that the inclusion of personal experiences with race is necessary in legal education).

18 *See* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 247 (2007) (writing that racism is "the state-sanctioned and/or extralegal production and exploitation of group-differentiated vulnerability to premature death.").

19 For a terrific book on the relationship among race, law, and legal pedagogy, see SHAWN OSSEI-OWUSU, LAW ON TRIAL: AN UNLIKELY INSIDER RECKONS WITH OUR LEGAL SYSTEM (2026).

20 A point of departure for much of law school pedagogy is that it is designed to teach students to "think like a lawyer." *See, e.g.*, Susan A. Bandes, *Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law*, 89 FORDHAM L. REV. 2427 (2021); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991); William H. Simon, *"Thinking Like a Lawyer" About Ethical Questions*, 27 HOFSTRA L. REV. 1 (1998). As Etienne Toussaint observes, "law students are inevitably taught that 'thinking like a lawyer' entails analyzing hypothetical facts and abstract legal principles through the eyes of an objective and faceless 'reasonable' person, not through the eyes of a marginalized or oppressed individual." Etienne C. Toussaint, *The Purpose of Legal Education*, 111 CALIF. L. REV. 1, 54 (2023). This is bolstered by "courts [that] have neutralized legal analysis with appeals to 'colorblindness' in judicial opinions, presumably due to a conviction that race and ethnicity should not matter in a neutral and unbiased legal system." *Id.*

teach students how to do so by "teaching like a law professor," under conditions of anti-Blackness.[21]

To substantiate that claim, I show how core doctrinal questions structuring first-year law school courses trade on anti-Blackness—inviting students to debate not only the intellectual capacity, agency, and social responsibility of Black people, but also whether and to what extent we should be permitted to move through social life without private or state violence. Part III puts this normalized pedagogical environment into sharp relief, foregrounds its racially constitutive effects, and connects it to a broader story about how racism operates as an "ordinary" and "ordinarilizing" social force, manifested in forms of violence that "can hardly be discerned."[22]

My critique of the law school environment joins longstanding efforts to expose the racial features of the law school curriculum and legal pedagogy,[23] as well as more recent interventions that locate law schools among the institutional sites that produce and legitimize the very thing our courses claim merely to describe and study—a racialized carceral state.[24] Part III concludes by considering the implications of my critique for the Criminal Procedure classroom and the field of Criminal Procedure more broadly. Here, I suggest that our field more robustly grapple with how ways of knowing produce and legitimize social arrangements—which is another way of saying: how epistemology produces sociology, and not just the other way around.

Part IV returns to the poem, now framed against the doctrinal and pedagogical backdrop that preceded it. The aim is not to fix the poem's meaning, but to invite a contextualized second reading. That second reading will be informed by and attuned to the racial and doctrinal logics on which Fourth Amendment law rests; the phenomenon of "bare

---

[21] For one of the foundational critiques of the treatment of race in legal education, see Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 Calif. L. Rev. 1511 (1991). *See also* Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. Rev. 1215 (2002) (discussing the establishment of the Critical Race Studies Program at UCLA as a way to push back against the way in which race is marginalized in the law school curriculum).

[22] *See* Saidiya V. Hartman, Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America 4 (Oxford Univ. Press 1997) [hereinafter Hartman, Scenes of Subjection].

[23] *See* Ossei-Owusu, *supra* note 19. For two recent brilliant interventions in this vein, see Brittany Farr, *The Race Case in Contracts*, 100 N.Y.U. L. Rev. 1070 (2025) and Toussaint, *supra* note 20.

[24] For one of the most compelling articulations of this point, see Ristroph, *supra* note 8. Scholars outside of law have made a version of this point with respect to academia more generally—namely, that across the disciplines, academic institutions are implicated in the production, expansion, and legitimation of the carceral state. *See* Stefano Harney & Fred Moten, The Undercommons: Fugitive Planning and Black Study (2013).

death" and the death-adjacent conditions of Black life that make bare death possible; the various forms of state power Black bodies juridically produce; and the pervasive ways in which Black people become socially intelligible through the subordinating—and often lethal—ways in which they are constitutionally policed.

The Article then turns to the conclusion. Here I reflect on the intellectual journey that produced the Article—a freewriting that became a poem, and a poem that became legal scholarship. I first consider what that trajectory reveals about the Criminal Procedure archive. I then explore how the field's capacity to understand, confront, and navigate racial violence is constrained by the colorblind grammar of reasonableness that structures Fourth Amendment law.

The Epilogue extends and contextualizes this inquiry. Emmanuel Mauleón, my former student and now a colleague, reads the Article through the analytic, pedagogical, and affective frames it develops. His intervention deepens and unsettles my account by elaborating on the pedagogy of the Black body the Article names, describes, and performs. Together, these reflections press a final, unsettling question: whether one can be Black and teach "that"—or whether the act of teaching "that" both binds one to an archive that speaks through the very Black body it silences and subordinates,[25] and disattends the "double consciousness" that life behind "the veil" demands.[26]

***

The roadmapping I have just provided might lead one to conclude that the arguments the Article advances develop systematically. They do not. The arguments occasionally break form to follow the intellectual and political threads that shaped them. Such is the case here—breaking form to return to a collaboration and a set of concerns I have not been able to leave behind: that the racial logics animating Fourth Amendment law do not stop at the border of "ordinary" criminal procedure. They travel, organizing vulnerability in adjacent domains.

---

[25] *See* Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty (1st ed. 1997) (articulating a compelling account of the law's relationship to the Black body along the lines I am discussing).

[26] Du Bois, *supra* note 4, at 2–3 (introducing the metaphor of "the veil" to describe the racialized structure of misrecognition that both obscures Black humanity from white society and produces a "double consciousness" through which Black subjects come to know themselves and the world).

More than a decade ago, Cheryl Harris and I wrote an article called *Undocumented Criminal Procedure*.[27] Our aim was to show that racialized policing was not only a problem of "ordinary" law enforcement; it was a central feature of immigration enforcement as well.[28]

From the outset, we resisted framing the racial dimensions of immigration enforcement as merely extralegal—as if the abuse began where law ended.[29] Such a framing would have cast law as a boundary the state crossed, rather than as a framework that structured the very practices at issue. Instead, we traced the doctrinal pathways through which Fourth Amendment law authorizes and organizes Latine vulnerability to state violence.[30] We named that problem for what it was: a form of racial inequality the Court has constitutionalized.[31]

We referred to the relevant precedents as the "undocumented cases" because, at the time, they occupied an undocumented status within the criminal procedure archive[32]: Law professors largely did not teach them as part of the Fourth Amendment canon. That curricular and pedagogical silence had epistemological consequences. Students were not exposed to the ways in which "apparent Mexican ancestry"—people who "look" Latine—were subjected to repeated encounters with immigration officials, encounters that exposed them not only to surveillance, detentions, and physical violence, but also to death.[33]

The moment we now inhabit—with Immigration and Customs Enforcement (ICE) openly relying on race in its enforcement practices—did not emerge ex nihilo.[34] It flows from the racial logics embedded in

---

[27] Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543 (2011).

[28] *Id.* at 1575 (explaining that Fourth Amendment jurisprudence explicitly draws on race).

[29] *Id.* at 1573–76 (arguing that law authorizes racialized policing).

[30] *Id.* at 1563–65 (explaining how Fourth Amendment jurisprudence broadens police discretion).

[31] *Id.* at 1565 (concluding that Fourth Amendment jurisprudence enables racial profiling).

[32] *Id.* at 1549 & n.23, 1568, 1581.

[33] To demonstrate that point, we discussed the racial investments of *United States v. Brignoni-Ponce*. *Id.* at 1568–73 (discussing United States v. Brignoni-Ponce, 422 U.S. 873 (1975)). For an excellent critique of *Brignoni-Ponce* that links the case to the Supreme Court's treatment of race in the Fourth Amendment context more broadly, see Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 Geo. L.J. 1005, 1024–25 (2010).

[34] *See Transcript of Are Ice Agents in Minneapolis Breaking the Law?*, N.P.R. Fresh Air (Jan. 21, 2026, at 12:33 ET), https://www.npr.org/2026/01/21/nx-s1-5683915/are-ice-agents-in-minneapolis-breaking-the-law [https://perma.cc/K8MN-3F4W] (explaining that there are many instances in which individuals are stopped by ICE solely due to their apparent race); *see also* Chris Hippensteel, *Minnesota State Senate Fields Testimony on ICE Violence in Twin Cities*, N.Y. Times (Jan. 29, 2026), https://www.nytimes.com/2026/01/29/us/minnesota-senate-ice-hearing.

those undocumented cases. For that reason, as we confront heightened Latine vulnerability to state violence today, the language of lawlessness should not exhaust our terms of engagement.

To be sure, some ICE tactics violate the Fourth Amendment.[35] But that observation should not obscure a more unsettling truth: for people who are Latine, Fourth Amendment law is a site of existential violence.[36] That violence does not arise only when agents act outside the law. It arises as well because they act *through* a legal inheritance capable of rendering "apparent Mexican ancestry" a presumptively illegal identity—detainable, disposable, and removable.[37] As Jennifer Chacón has argued, Fourth Amendment law has long "greenlighted enforcement practices that rely on little more than racial profiling."[38] Rather than allow that "legal relic" to

---

html [https://perma.cc/6NYJ-P9GS] (explaining that testimony before the Minnesota State Senate included reports of ICE agents racially profiling residents).

[35] *See* Melissa Hellmann, *'It's Like They're Hunting': US Citizens and Legal Residents Report Increase in Racial Profiling by ICE*, The Guardian (Jan. 22, 2026, at 11:36 ET), https://www.theguardian.com/us-news/2026/jan/22/us-citizens-racial-profiling-ice [https://perma.cc/BMH4-XK2N] (discussing the degree to which those practices are not based on reasonable suspicion but on race); *see also* Jennifer Medina, *'I'm an American, Bro!: Latinos Report Raids in Which U.S. Citizenship Is Questioned*, N.Y. Times (June 15, 2025), https://www.nytimes.com/2025/06/15/us/hispanic-americans-raids-citizenship.html [https://perma.cc/JXN8-434E] (explaining that ICE agents are racially profiling Hispanic residents in Los Angeles). This is the point that Justice Sotomayor makes in her dissent in *Perdomo*. Noem v. Vasquez Perdomo, 146 S. Ct. 1, 10 (2025) (Sotomayor, J., dissenting) ("The Fourth Amendment thus prohibits exactly what the Government is attempting to do here: seize individuals based solely on a set of facts that 'describe[s] a very large category of presumably innocent' people." (quoting Reid v. Georgia, 448 U.S. 438, 441 (1980))).

[36] Though I am making this point with respect to immigration enforcement, Latine people have been subject to racialized policing outside of that context. *See, e.g.*, Ashley Southall & Michael Gold, *Why 'Stop-and-Frisk' Inflamed Black and Hispanic Neighborhoods*, N.Y. Times (Feb. 19, 2020), https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html [https://perma.cc/6FQL-A7QQ] (arguing that stop-and-frisk gave police officers broad discretion to target mostly Black and Latine men); Maria Cramer, *N.Y.P.D. Searches Target Black and Latino Drivers, Lawsuit Says*, N.Y. Times (Jan. 28, 2026), https://www.nytimes.com/2026/01/28/nyregion/nypd-lawsuit-traffic-stops-black-latino.html [https://perma.cc/ZVB5-SCLY] (reporting a lawsuit alleging intentional discrimination against Black and Latine drivers).

[37] Race is explicitly baked into immigration enforcement. *See Brignoni-Ponce*, 422 U.S. at 885–86 ("In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants."); *see also Noem*, 146 S. Ct. at 5–7 (suggesting that, in addition to relying on ancestry, immigrations officials may also rely on language and accent).

[38] Jennifer M. Chacón, *Whose Common Sense? Some Reflections on* Noem v. Vazquez Perdomo, Border Criminologies (Sep. 24, 2025), https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2025/09/whose-common-sense-some-reflections-noem-v-vazquez [https://perma.cc/GQ57-RSH7].

wither, the Court has, in its more recent engagement of the issue, "just reinvigorated it."[39]

The reach of the Fourth Amendment's racialized constitutional grammar does not end with racialized outsiders. In January 2026, two U.S. citizens—Renée Nicole Good and Alex Jeffrey Pretti, both white—were shot and killed by ICE officials.[40] The government's response was familiar: Their conduct caused their own deaths.[41] They killed themselves.

That rationale did not originate with those killings. It was perfected through—and on—the bodies of Black people.[42] Noting that genealogy matters. Race remains a part of the story when state violence claims white victims.[43] This is so not only because the category "white" is a racialized one and thus what happens or does not happen to white people implicates race, but also because anti-Blackness has long furnished the juridical template through which the state learns how to kill with legal justification.

It is in that sense that Blackness possesses a distinct juridical power: the capacity to generate, refine, and delimit the scope of state authority. Which is another way of saying: the Black body is "jurisgenerative."[44] By jurisgenerative I mean "the productive, not merely the expressive, capacity of the Black body: its power to generate police-empowering law—racially subordinating law—that would not exist, or would exist

---

[39] *Id.* There are carceral dimensions to this racialized enforcement that warrant further scholarly engagement. *See* Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1383–84 (2019) (documenting how the convergence of criminal and immigration enforcement produces a racially stratified carceral apparatus in which "two discrete deference regimes—one from immigration law, the other from prison law—combine to give federal officials broad latitude to determine how and where noncitizens can be punished"); *see also* César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017) (describing the contours of immigration imprisonment and linking it to the history of racialized social control and punishment).

[40] Daniel Arkin, *Hit Record*, NBC NEWS (Jan. 29, 2026, at 4:03 ET), https://www.nbcnews.com/news/us-news/renee-good-alex-pretti-shootings-spark-minneapolis-protesters-video-ic-rcna256350 [https://perma.cc/YWQ5-XN4L].

[41] David Litt, *The Trump Administration Thinks They Had It Coming*, N.Y. TIMES (Feb. 1, 2026), https://www.nytimes.com/2026/02/01/opinion/renee-good-alex-pretti-ice-minneapolis.html [https://perma.cc/LU2E-P5JK] (explaining that the government blamed Renée Nicole Good and Alex Jeffrey Pretti for their deaths).

[42] *See* Devon W. Carbado, *The Jurisgenerative Black Body* (unpublished manuscript) (on file with author) [hereinafter Carbado, *The Jurisgenerative Black Body*] (arguing that the Black body has the constitutive capacity to produce police-empowering law that reaches beyond the Black experience); *see also* Emmanuel Mauleón, *Legal Endearment: An Unmarked Barrier to Transforming Policing, Public Safety, and Security*, 112 CALIF. L. REV. 755, 774 (2024) (exploring how the policing of white people does not exist separate and apart from the policing of Black people).

[43] For an extended treatment of this issue, see Emmanuel Mauleón, White Policing 7 (unpublished manuscript) (on file with author).

[44] *See* Carbado, *The Jurisgenerative Black Body*, *supra* note 42, at 3.

in diminished form, absent the Black body as a juridical force."[45] I develop this argument at length elsewhere.[46] The point I am stressing here is that *some dimensions* of that juridical power reaches beyond, without ever ceasing to target, the Black body. Blackness functions here as a structuralizing force: a site upon which doctrines of state authority, discretion, and immunity are forged, tested, and refined before traveling outward under the cover of neutrality.

The jurisgenerative work Blackness performs in that regard shapes how the state narrates and legally rationalizes violence against *all* bodies caught within its regimes of enforcement and punishment.[47] When the state seeks to legitimize violence, it draws upon the justificatory logics first developed to sanction Black death and disposability.[48] Because those logics were, in some sense, made for (and through the bodies of) Black people, they have less traction—and perform a different kind of racially constitutive work when deployed to justify the killing of white people, the people whose bodies were *not supposed to* experience that violence to begin with.

The point here, then, is not merely that Blackness marks the limits of protection. It is also that Blackness furnishes the legal grammar through which the state learns to make violence lawful in the first place.[49]

---

45 *Id.* at 3.

46 *See id.*

47 *See id.*

48 *See id.*

49 This is the sense in which Jared Sexton is right to worry about what he calls the "people of color blindness," or the degree to which the term "people of color" can elide the anti-Black dimensions of historical and contemporary racial hierarchies. According to Sexton, "people-of-color-blindness" reflects how "the intimate relationship between the censure of black inquiry and the recurrent analogizing to black suffering . . . misunderstand[s] the specificity of antiblackness and presumes or insists upon the monolithic character of victimization under white supremacy—thinking (the afterlife of) slavery as . . . a species of racial oppression among others." Jared Sexton, *People of Color Blindness: Notes on the Afterlife of Slavery*, 28 Soc. Text 31, 47–48 (2010). Sexton is careful to note that "Black existence does not represent the total reality of the racial formation—it is not the beginning and the end of the story—but it does relate to the totality." *Id.* His point is that that existence "indicates the (repressed) truth of the political and economic system." *Id.* That is to say, the whole range of positions within the racial formation is most fully understood from this vantage point, not unlike the way in which the range of gender and sexual variance under patriarchal and heteronormative regimes is most fully understood through lenses that are feminist and queer. *Id.* Emmanuel Mauleón's work is relevant here as well. It demonstrates why it is important to interrogate the policing of white people as a racialized phenomenon that implicates anti-Blackness. *See* Emmanuel Mauleón, *White Policing*, *supra* note 43, at 7; *see also* Carbado, *The Jusrigenerative Black Body*, *supra* note 42 (explaining how the law Black bodies make impacts non-Black people).

I could begin my account of that grammar in conventional doctrinal terms. But doctrine alone cannot illuminate the space where legality, language, and loss collapse into one another.

That, more naturally, is the space of poetry.[50]

I
The Poem (First Read)

Before introducing *Bare Death* and situating that poem within Fourth Amendment doctrine and law school pedagogy, I need to say more about why I turn to poetry at all. Poetry is not a familiar inhabitant of the law review article and rarely functions as a vehicle for legal argument in the way it does here.

I could say that I am turning to poetry because of its liberatory potential. Language always mediates subjectivity, but poetry can loosen the disciplinary demands that prose exerts on the subject who writes.[51] If writing often produces what psychoanalysis would call a "split subject"—a voice separated from the fullness of lived experience—poetry can narrow that divide.[52] With poetry, potentially less of the author's subjectivity is "barred."[53] That partial reclamation of subjectivity helps explain why poetry has long functioned within Black expressive traditions as a mode of resistance: a practice through which Black people see ourselves, name our truths, and contest our marginality.[54] As Audre Lorde observes, "poetry is not a luxury."[55] On

---

50 For a powerful deployment of poetry to give voice to marginalized communities in ways that foreground the failures of the state to address problems of race and poverty, see Monica C. Bell, *Safety, Friendship, and Dreams*, 54 Harv. C.R.-C.L. L. Rev. 703, 706–07 (2019).

51 Bennett Capers makes a similar observation about employing narrative, noting that it "allowed more freedom." Bennett Capers, *The Law School as White Space*, 106 Minn. L. Rev. 7, 12 n.34 (2021) [hereinafter Capers, *Law School*]. None of this to say that writing a poem is utterly free of conventions. For an excellent account of the different ways in which one might approach poetry, particularly as a liberatory project, see June Jordan, June Jordan's Poetry for the People: A Revolutionary Blueprint (Lauren Muller & Poetry for the People Collective eds., 1995).

52 Bruce Fink, The Lacanian Subject: Between Language and Jouissance 45 (1995).

53 *Id.*

54 Matthew Calihman, *African American Political Poetries*, *in* The Cambridge Companion to American Poetry and Politics Since 1900, at 152 (Daniel Morris ed., 2023); Dallas Donnell, *The Political Resonances of Hip Hop and Spoken Word*, *in* The Cambridge Companion to American Poetry and Politics Since 1900, at 211 (Daniel Morris ed., 2023); Gwendolyn Baxley & Yolanda Sealey-Ruiz, *In the Black Radical Tradition: Poetry as a Praxis for Healing and Resistance in Education*, 55 Rsch. Teaching Eng. 311 (2021).

55 Audre Lorde, *Poetry Is Not a Luxury*, *in* Sister Outsider: Essays & Speeches 36, 37 (1984).

this account, turning to poetry is a freer (and quite possibly a necessary though not the only) modality in which to speak truth to power.

There's a related reason I could be turning to poetry: Its rhetorical architecture is capacious. That expository flexibility is especially well-suited to intervening into law school pedagogy. Legal education fragments doctrine into discrete units: probable cause here, warrants there, qualified immunity elsewhere. That disaggregation is doctrinally tidy and pedagogically convenient. It is also analytically distorting. Poetry permits these terms to occupy the same discursive space.

Concepts and terms that rarely encounter one another within a single case can coexist within a single stanza. That capacity to stage encounters across doctrinal boundaries make visible what casebooks sometimes obscure: that "probable cause," "warrants," "qualified immunity," "high crime area,"[56] and "pretextual stops" are not isolated legal tools. They are intertextual parts of a single racial script.[57] That script narrativizes Black people as dangerous, violent, and criminal people—and narrativizes police power as a constitutional necessity to manage that threat. Poetry helps to mark those narratives discursively and affectively.

The preceding accounts may or may not justify the presence of poetry in this Article. They did not, however, produce *Bare Death*. As Part II explains, I did not set out to write a poem. I am not at all sure I could have. I arrived in the domain of poetry indirectly: freewriting my way across the difficulties of teaching Criminal Procedure during a *particularly* racially fraught year. In that process, the ideas in this Article, including *Bare Death*, emerged in a form that exceeded the academically conventional modes in which I usually write. *Bare Death* preserves and honors that expressive sensibility.

In doing so, the poem resists what I have elsewhere referred to as "discursive incarceration,"[58] or, if you prefer, "discourse incarceration." The basic idea is the same: "the censorship, criminalization, or delegitimation of ideas in ways that lock them away from public consumption, educational engagement, political mobilization, and social policy promulgations."[59] "[T]he sustained attacks that conservatives

---

[56] *See* Carbado, Unreasonable, *supra* note 2, at 177–93 (discussing the problem of race and the reasonable suspicion).

[57] Of course, conventional legal scholarship can disrupt that disaggregation as well, but not with the same degree of flexibility or economy.

[58] Carbado, *Police Power Abolition*, *supra* note 16, at 703.

[59] *Id.*

have launched against Black intellectual frameworks and political expression"[60] exemplifies the phenomenon.[61]

Discursive incarceration operates within the domain of freedom of expression rather than outside of it. That doctrinal and political space promises formal freedom—the nominal right to speak. But it does not provide substantive freedom, the actual conditions under which one's speech can circulate, be heard, and do work in the world. Discursive incarceration exploits that gap: It prevents particular ideas from existing substantively free while leaving the formal guarantee of freedom of speech—the "robust exchange of ideas"—fully intact. In that regard, discursive incarceration is a reminder that, against the backdrop of what "freedom of expression" has been constitutionalized and politicized to mean, forms of racial dissent, among other oppositional discourses, have always existed in states of unfreedom—as prohibited discourses, as incarcerated discourses in waiting, or as discourses that dare not speak at all.[62]

But discursive incarceration is not only a form of speech suppression. It is a project in "social ordering" that relies on "the mutually constitutive relationship between the disposability of Black bodies and the disposability of ideas designed to foreground and disrupt that subordinating reality."[63] Among its effects, discursive incarceration produces "an 'epistemological break' between what Black people know and feel about their social position in society and what they can say and do about it."[64] The form and substance of *Bare Death* are an effort to refuse that rupture.

***

Chokehold. Handcuffs. Knees.

"Stop—"
Chokehold. Cuffs. Knees.
Not moving.

---

60 *Id.*

61 *Id.*

62 For racial critiques of freedom of expression, see Nina Farnia, *Imperialism and Black Dissent*, 75 STAN. L. REV. 397 (2023) (discussing Black censorship in the context of the American Imperial Project). *See also* Jonathan Feingold & Joshua Weishart, *Discriminatory Censorship Laws*, 99 TUL. L. REV. 585 (2025) (analyzing the impact of recently enacted censorship laws and their disproportionate effects on Black people and other historically subordinated groups (the article itself doesn't analyze the effect on Black people, but rather gestures to the disproportionate effects on subordinated groups generally, though of couse that would include Black people)).

63 Carbado, *Police Power Abolition*, *supra* note 16, at 704.

64 *Id.* (quoting Ngũgĩ wa Thiong'o, DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE 44 (1986)).

Knees.
Not talking.
Knees.
Not breathing.

Walking.
Driving.
Jogging.
Sleeping.
Being
under the totality
of circumstances
Black

Dying
constitutionally
reasonably

In
Stops:
reasonably suspicious
The peculiar sensation
of your body
speaking
against itself

Writs of assistance
resurrected
as
Black bodies
For Black people

Wanted:
Available
for capture
anytime
anywhere
any way

No freedom

to leave

No freedom

to stay

In plain view

Especially
in "high-crime areas":
Disposably
alive

In
Frisks:
reasonably dangerous
The peculiar sensation
of twoness
publicly exposed
but
out of focus
A blurred figure
in Black
spread-eagled
stretched thin
never enough
and surplus

Pain
still here
still there

In
Cars:
reasonably profiled
The peculiar sensation
of being
particularly
unparticularly
Black
Driving
in a state
of necrological
anxiety

Any traffic infraction
anywhere

No traffic infraction
anywhere

Probable cause
everywhere
Producing
pretextual pathways
to
premature
death

In
Homes:
reasonably insecure
The peculiar sensation
of bodies
without borders
Violated
yet inviolable
under siege
under law
Expectations of privacy
society
deems
illegitimate
Experiencing
states of emergency
as
normal
life

In
Policing
writ large:
reasonably
killable
The peculiar sensation
of being triggered
by the trigger
the Black body
triggers
Curtailing critique
controlling contestation
compulsorily
complying
Contemplating

the consequences
of casually
crossing
a permanently
precarious
policed
open
border

the thin blue line
between
agency
and
death

When to resist?
Never.
(Remember
"the talk")
When to move?
Never.
(Remember
"the talk")
Don't make your death
their harmless error
Don't make
their harmless error
your
excited
delirium

Though your life
is never
in your hands
And your submission
can never
be perfect

Prepare
precautions
prophylactically

Perform
palatability
Prophylactically

Discipline
your tongue
De-escalate
your
Blackness
Disarm
the deadly force
of your body

Know
the rightslessness
of your rights

Breathe

(as best
you
can)

Take
your life
off
the line

Come
home

live
to fear
the fears
they rehearse
as scripts
scripts courts
write into law
from the perspective
of a
reasonable officer

live
to feel
your body
keeping
score

live
to mourn
anticipatorily

live
to retrieve
the taking
of your body
even if
it's been
undone
Don't leave
all of it
there

Bring back
what
you can

Let go
of the rest

Alienated flesh
separated
from its body
Watching
more of you
leave
yourself

Finding community
in a ghostly
diaspora
disembodied
disoriented
displaced
Black afterlives

the pieces of us
that die
in police encounters
we survive

live
to bear witness
to the banality
of bare death

dead
Black
bodies

Strange Fruit
of a
poisonous
tree

Watch
them
Watch
us
dying
Souls of Black folks

barely
recognized
Barely recognizable
as
losses
of
life

Look
at the bullets
Look
at what's left
of her body
Look
at the family
she leaves
Look

at the futures
taken

Criminalizing
Black people
Decriminalizing
murder

Everybody
sees it
Law and order
needs it

Black people
know it

Death
as
spectacle
as
ordinary
life

Time
nine minutes
Time
two seconds
Time
five minutes
Time
one second
Time
six minutes
Time
three seconds
Time
eight minutes
and forty-two seconds
Time

to die
too soon
in time

Time
to juridically live

Preserved
by
law

Qualified immunity
Justifiable force
Terms of art
that serve and
protect
them
and authorize
more

Dead Black bodies
dying
with
precedential
life

II
The Doctrine

While I do not presume to know how *Bare Death* landed with you, whether as argument, as polemic, as ambience, or as something closer to recognition, the place where it ends is worth marking: Black bodies are given precedential life only after they have been taken. What follows is a doctrinal contextualization that attempts to make that juridical accomplishment visible.

On some level, that contextualization might bespeak a disciplinary disciplining, the sense on my part that I need to show *the law* of it all. But I am also providing the contextualization because some of the poem's legal vocabulary may have remained opaque in ways that may undermine the affective work the poem hopes to perform. A reader who cannot place the doctrine cannot fully inhabit the feelings the poem generates.

And the ones it forecloses.

The relationship between the affective investments of the poem and legal doctrine is one of the reasons the poem does not recount an incident or incidents. The poem is procedural rather than narrative. It attempts to enact, and not just describe the contours of, a legal system.

The repetition the poem employs is an effort to reproduce the iterative, bureaucratic, and precedent-bound nature of policing.

Line breaks.

Hesitation. Fracture. The impossibility of completing a sentence under pressure. Under vulnerability. Under conditions of life and death.

The impossibility of *really* finishing a thought.

About anti-Blackness.

A sensation that, in some sense, is beyond articulation.

Beyond thinkability.

White spaces.

Constraint. Unfreedom. Pause. More hesitation. Erasure. Disappearance.

Naturalization.

White spaces on pages: the signified and the signifier.

The poem withholds narrative closure because the structure it inhabits withholds resolution. Rather than moving toward catharsis, *Bare Death* marks the circulation of recurrence.

There is no end. Not even in death, where precedential life begins. Law lives with—and becomes law through—Black death and disposability.

The voice of the poem shifts.

At times, *Bare Death* speaks from within Black embodiment, attempting to capture the speech-constraining and speech-restricting forces that shape Black life—the prior restraints through which Black people are forced to speak.

At others the poem employs the voice of the police: their narratives of fear, their grammars of justification, and their syntax of suspicion.

At other times still, the poem ventriloquizes law, enabling it to speak in its own cadence. The poem trusts doctrine to indict itself.

By speaking in these different voices, *Bare Death* marks the multiple ways in which what counts as fact, threat, justification, or error in Fourth Amendment law does not map onto what counts as loss, fear, or injury in Black bodies.

That disjunction between the language of law and the violence it enacts runs through my broader body of work: the difference among what law counts, what law turns a blind eye to, and what law is made not to see.[65] That work is an effort to mark how, consistent with law, Black

[65] *See generally* CARBADO, UNREASONABLE, *supra* note 2. *See also* Carbado, *From Stopping Black People to Killing Black People*, *supra* note 5, at 125–64 (explaining how Fourth Amendment law facilitates and vindicates and at the same time doesn't really see the violence police officers enact on Black bodies).

bodies are seized, sorted, justified, and preserved in various states of unfreedom.

And also killed.

When death occurs, souls—invoking Du Bois's meditation on and recognition of double consciousness—remain barely legible as losses of life.[66]

When life persists, survival is not wholeness, healing, or even redemption. One survives in a subordinated presence that leaves a residue. One survives "still here" with something essential left behind.

The poem proceeds from the premise that law does not merely respond to violence after the fact; it organizes the conditions under which violence becomes thinkable, reasonable, and repeatable in ways that ontologizes that violence as Black living.

Central to the poem is an inversion of the Fourth Amendment's "fruit of the poisonous tree" doctrine.[67] Where law typically asks whether evidence derived from illegality should be excluded,[68] the poem asks what the law continues to produce.

Policed Black bodies are not a "state of exception."[69] They are neither aberrations nor tragic excesses. They are a recurring fruit—dead and alive—of a legal order with poisonous roots: the historical subordination of Black people.

The poem's concern is not whether particular encounters violate doctrine, but how doctrine structures the field of possibility—between freedom and unfreedom and between life and death—within which those encounters occur. *Bare Death* attempts to inhabit that legal environment. To live in it. To live with it. To breathe through the very doctrinal atmosphere that seeks to claim its breath.

Fourth Amendment law promises security against *unreasonable* searches and seizures.[70] However, that promise depends first on a threshold inquiry that the law quietly narrows. If an officer's conduct does not count as a seizure, the Fourth Amendment has nothing to say

---

66 W.E.B. Du Bois, *Strivings of the Negro People*, Atlantic, Aug. 1987, at 194 ("One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.").

67 Nardone v. United States, 308 U.S. 338, 341 (1939) (employing and defining the term "fruit of the poisonous tree").

68 *See id.* at 341 (discussing the process for excluding illegal wiretapping evidence).

69 For the classic articulation of the state of exception, see Giorgio Agamben, State of Exception 3 (Kevin Attell trans., Univ. of Chicago Press 2005) (describing state of exception as "the original structure in which law encompasses living beings by means of its own suspension"; or, in other words, a structure which provides for the legal suspension of the distinction between legality and illegality).

70 U.S. Const., *supra* note 1.

about it. A significant question in Fourth Amendment law thus becomes whether the Amendment is even triggered. If the answer is "no" (what the officer did was neither a search or a seizure), the officer does not need to justify his actions. This is where the quiet narrowing comes in.

Similarly, a search turns on whether courts conclude that a person had a "reasonable expectation of privacy"—a judgment the law defines normatively, often shrinking what counts as private in ways that track policing needs rather than lived vulnerability.[71]

A seizure depends on whether a reasonable person would "feel free to leave."[72] Under that framework, officers may approach, question, follow, request identification, and seek "consent" to search without advising that refusal is permitted. The Supreme Court treats all those encounters as "voluntary."[73] They are, from the Court's perspective, instances in which people are "free to leave."[74] Thus, without any evidence of wrongdoing, officers may engage in the preceding forms of interactions against anyone, anywhere in public, anytime. Because none of those interactions trigger the Fourth Amendment, the government does not have to justify any of them.

To be free *as* unfree—juridically imposed—is neither an event nor a moment. It is a deathly kind of survival through which our bodies are shattered in pieces—the pieces of ourselves we must reassemble in a body we can never make whole; the pieces of ourselves we know are there but from which we feel forever estranged; and the pieces of ourselves */ that die / in police encounters / we survive*.

The unfreedom that the "free to leave" doctrine creates is accomplished through a "totality of the circumstances" framework that purports to consider all the factors that could plausibly structure a person's "freedom to leave." However, that framework does not expressly consider race.[75] Consequently, while the lived terrain of Fourth Amendment law is racially conscious, the language of that law formally is not.[76]

The law's concession that a seizure has occurred is not a moment of accountability. It is the starting point for a doctrinal maneuver

---

71 *See* Bennett Capers, Katz v. United States, *in* Critical Race Judgments: Rewritten U.S. Court Opinions on Race and Law 403 (Capers et al. eds., 2022) (providing a racial critique of the reasonable expectation of privacy test).

72 INS v. Delgado, 466 U.S. 210, 215 (1984).

73 *See* Carbado, Unreasonable, *supra* note 2, at 77–101.

74 *See id.*

75 *See* Carbado, *From Stopping Black People to Killing Black People*, *supra* note 5, at 140 (discussing that the totality of the circumstances inquiry does not consider any subjective characteristics, such as race); *see also* Carbado, Unreasonable, *supra* note 2 at 40–77.

76 Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 968 (2002) [hereinafter Carbado, *(E)racing*] (discussing how colorblindness shapes Fourth Amendment law); *see also* Harawa, *supra* note 2, at 1560–62; Maclin, *supra* note 2, at 370–71.

expressed in the register of "reasonableness." That term of art, which pervades Fourth Amendment law, is textually inscribed in the Fourth Amendment. The Fourth Amendment does not prohibit seizures per se, only unreasonable ones. Thus, the stipulation that a person has been seized does not mean the government has violated the Constitution. If a seizure has occurred, the analysis shifts to reasonableness.

By and large, reasonableness in Fourth Amendment jurisprudence requires very little in the way of justification. For example, reasonable suspicion, the standard effectively born in *Terry v. Ohio*[77] and that now justifies "stops" for those deemed criminally suspicions and frisks for those deemed "armed and dangerous,"[78] is a low evidentiary threshold that readily absorbs vague scripts, such as the person appeared "nervous," engaged in "furtive" behavior, was "evasive," or was present in a "high crime area."[79] These descriptors operate as colorblind conduits for racial meaning, allowing racial suspicion to circulate without explicitly naming race.[80]

Moreover, while a police officer's authority to stop a person does not necessarily carry with it the authority to frisk (police officers are supposed

---

77 392 U.S. 1, 27 (1968).

78 Importantly, *Terry* did not employ the precise language of reasonable suspicion. That would come in later cases. *See, e.g.*, Hiibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177, 184–86 (2004) (employing the term "reasonable suspicion"). Nor did the Court decide whether police officers could stop and question people (as distinct from stopping and frisking them) on less than probable cause. That, too, would be decided post *Terry*. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 878, 880 (1975) (employing the reasonable suspicion in the context of immigration enforcement). *Terry* decided that police officers may stop and frisk people on less than probable cause, a ruling that scholars have roundly contended as weakening Fourth Amendment protections by introducing a low evidentiary bar into the jurisprudence. *See, e.g.*, Jeffrey Fagan, *Terry's Original Sin*, 101 U. Chi. Legal F. 43, 54 (2016) (explaining that the Terry standard, in practice, is very low); Bennett Capers, *Policing, Race, and Place*, 44 Harv. C.R.-C.L. L. Rev. 43, 63 (2009) ("The vast majority of individuals stopped and questioned by the police are not engaged in criminal activity, are not carrying weapons or contraband."); Frank Rudy Cooper, *Cultural Context Matters:* Terry*'s 'Seesaw Effect,'* 56 Okla. L. Rev. 833, 847 (2003) (discussing how the low Terry standard facilitates racial profiling); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. Rev. 1058, 1521 (2017) (noting that Justice Warren undermined Fourth Amendment scrutiny of stops and frisks by "weaken[ing] the form that Fourth Amendment scrutiny would take—police officers need only reasonable suspicion, not probable cause" and "refus[ing] to expressly state that police officers may not stop-and-question a person when they have no evidence that the individual is armed or dangerous").

79 *See* Carbado, Unreasonable, *supra* note 2, at 156–85 (discussing the problem of race and reasonable suspicion).

80 For a discussion of how colorblindness functions as a racial ideology, see Devon W. Carbado & Cheryl Harris, *The New Racial Preferences*, 96 Calif. L. Rev. 1139 (2008). The classic critique of colorblindness is by Neil Gotanda. *See* Neil Gotanda, *A Critique of 'Our Constitution is Color-Blind,'* 44 Stan. L. Rev. 2, 2–68 (1991). For a social psychological critique of colorblindness, see Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Blindness and the Law*, 58 UCLA L. Rev. 465 (2010).

to have a reasonable suspicion that a person is armed and dangerous to justify that intrusion), the social meaning of Black bodies as criminal and dangerous collapses that doctrinal distinction. Police officers have effectively created a *frisk-incidental-to-Black-body* doctrine under which officers automatically frisk Black people incidentally to stopping them.

Probable cause operates similarly in the sense of facilitating contact between Black people and the police. While that standard is more robust than reasonable suspicion, it is not very demanding.[81] The weakness of probable cause is particularly apparent in the traffic stop context. There, minor infractions can supply constitutional cover for investigations grounded in racialized assumptions.[82] The Supreme Court explicitly authorized this cover in a unanimous opinion, *Whren v. United States*.[83] According to *Whren*, so long as police officers have probable cause to stop a person for a traffic infraction, they may use that infraction as a pretext to investigate crimes for which they lack probable cause or reasonable suspicion.[84]

Against the background of the range of infractions that jurisdictions codify, the scope of this pretext problem is massive. Because all of us commit traffic infractions every time we drive, police officers will almost always have probable cause to stop whomever they want, whenever they want.[85]

Race compounds this problem. The *Whren* Court specifically ruled that were a defendant to demonstrate that an officer's decision to stop their car was racially motivated, the officer's conduct would not violate the Fourth Amendment if the officer had probable cause to believe that a traffic infraction had been committed,[86] a requirement that, as we discussed, is no requirement at all. Racially motivated policing of this sort is consistent with the Fourth Amendment's prohibition against "unreasonable searches and seizures."

---

[81] *See* Barry Friedman & Cynthia Benin Stein, *Redefining What's 'Reasonable': The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 341 (2016) (explaining that, in practice, the probable cause standard has often been relaxed to a reasonableness standard); *see also* CARBADO, UNREASONABLE, *supra* note 2, at 77–100.

[82] For a discussion about racialized assumptions animating traffic stop searches, see David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997). *See also* Davis, *Race, Cops, and Traffic Stops*, *supra* note 2, at 427; Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245 (2010); CARBADO, UNREASONABLE, *supra* note 2, at 79–84.

[83] 517 U.S. 806 (1996).

[84] *Id.*

[85] *See* CARBADO, UNREASONABLE, *supra* note 2, at 77–101 (discussing this problem and providing examples of traffic code violations).

[86] *See Whren*, 517 U.S. at 813. In this explicitly race-based scenario, the Court maintains that the litigant should bring an equal protection claim. *See id.* at 813.

The consensus the Court generated around this form of racial profiling renders Fourth Amendment law one of the domains in which "reasonable racism" is juridically instantiated. The *Whren* Court's ruling is a way of saying: PC/Traffic Stop + Racism = a Constitutional Seizure. Even this articulation does not fully capture *Whren*'s holding given what you now know about the ease with which police officers can justify traffic stops. Because probable cause is not really a substantive constraint on an officer's decision to effectuate a traffic stop, the arithmetic that underwrites the *Whren* Court's holding is more accurately expressed via the following formula: Traffic Stop + Racism = a Constitutional Seizure.

The scope of police power in the traffic stop context ends neither with the officer's decision to stop a car nor with the pretextual, race-based reasons the officer may employ to do so. Those powers can cascade into further intrusions with no additional showing of wrongdoing. For example, incidental to conducting a traffic stop, police officers may ask the driver and the passenger to exit the car, seek permission to search the car or the people in it, and employ dogs to perform canine sniffs so long as doing so does not unreasonably prolong the encounter.[87] "*Under siege / under law.*"

None of these additional intrusions require additional justification. Probable cause to conduct the traffic stop effectively authorizes all of them. The power police officers have incidental to conducting traffic stops can create "*pretextual pathways / to / premature / death.*"

Like other dimensions of Fourth Amendment law, those additional pathways trade on colorblindness. This is not to say that the Court expressly draws on colorblindness when justifying expansions of police power. It does not. Unlike with Fourteenth Amendment jurisprudence, where the Court expressly articulates a commitment to colorblindness,[88] Fourth Amendment law does not explicitly invoke that racial ideology.[89] Indeed, there is not a single Fourth Amendment case in which the Supreme Court defends its doctrinal reasoning, or its outcome, with reference to colorblindness. This is one of the ways in which colorblindness works differently in the Fourth Amendment context than it does in the domain of equal protection. Daniel Harawa is thus entirely right to argue that, whatever the merits of colorblindness

---

87 Carbado, Unreasonable, *supra* note 2, at 77–101.

88 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2147 (2023) (stating that "colorblindness" is a "proud pronouncement[] of cases like *Loving* and *Yick Wo*").

89 *See* Gotanda, *supra* note 80, at 5 (demonstrating how colorblindness guided the formation of the equal protection doctrine).

as applied to equal protection doctrine, it is "analytically unfit for Fourth Amendment analysis."[90]

This unfitness is particularly apparent in the Court's use of force jurisprudence. The gravest seizure—deadly force—is governed by the same deferential standard and colorblind sensibility that structure the "free to leave" test.[91] An officer's use of force is judged not by necessity, not by Black people's sense of vulnerability with respect to deadly force, and not by the historical record of racialized police violence. Here, too, the relevant standard is "reasonableness," an inquiry the Court conducts from the perspective of a "reasonable officer" on the scene.[92]

This "reasonable officer" perspective internalizes a racial logic that Judith Butler calls "endangered/endangering." By that she means a process through which the "violent intentionality of police officer actions" are attributed to "the one who is experiencing the blows."[93] This reallocation of violence and culpability makes Black bodies "*reasonably* killable" and produces "[*t*]*he peculiar sensation / of being triggered / by the trigger / the Black body / triggers.*"

Even when courts acknowledge constitutional violations in the sense of ruling that an officer's use of force was excessive, qualified immunity frequently forecloses accountability unless a prior case made the illegality "clearly established" in nearly identical factual circumstances.[94] Constitutional wrongs can thus persist without consequence. Qualified immunity is explicitly built on that doctrinal arrangement. The burden is on Black people to somehow not make our deaths "*their harmless error.*"

Evidentiary remedies narrow the field further. The exclusionary rule promises to suppress the "fruit of the poisonous tree."[95] However, its reach is hemmed in by exceptions like good faith. Here, even if an officer is wrong in believing that a warrant was supported by probable cause, the Court would refuse to suppress the evidence seized pursuant to that warrant if that officer acted in "good faith." This is one of many

---

90 Harawa, *supra* note 2, at 1537.

91 Graham v. Connor, 490 U.S. 386, 394–95 (1989); Tennessee v. Garner, 471 U.S. 1, 2 (1985).

92 *Graham*, 490 U.S. at 396.

93 *See* Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, *in* Reading Rodney King/Reading Urban Uprising 15, 19 (Robert Gooding-Williams ed., 1993).

94 Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1814–18 (2018) (demonstrating that the Court's narrow definition of "clearly established" law, combined with its permission to grant qualified immunity without ruling on the underlying constitutional question, allows constitutional violations to go unremedied and leaves the law underdeveloped).

95 For an early application of this doctrine, see Wong Sun v. United States, 371 U.S. 471, 487 (1963).

doctrinal moments in which the Supreme Court translates constitutional injury into administrable mistake.[96]

The foregoing features of that law reveal an uncomfortable truth that has historical antecedents: Fourth Amendment jurisprudence was not made to protect Black people because Black people and white people were not originally made—socially constructed—to be governed by the same bodies of law.[97] Indeed, what the Fourth Amendment was meant to prevent—generalized insecurity produced by state discretion—returns to Black life in another register. The colonial abuse that animated the Amendment involved writs of assistance.[98] These were effectively (though not technically) general warrants that authorized sweeping searches, including searches of homes, without particularized cause.[99]

The Black body is subject to that same kind of dispersal of power—"Black writs of assistance."[100]

We are not seized.

When we are, we are effectively "in plain view," a term of art that permits police officers to seize objects whose criminality is "immediately apparent"—meaning, objects for which the officer has probable cause to believe are connected to crime.[101]

When probable cause is lacking, the seizure is nevertheless reasonable because the officer has reasonable suspicion.

When the seizure is unreasonable, remedies are unavailable: The officer is not held accountable and/or evidence is not suppressed because of "good faith mistakes" or because the officer benefits from qualified immunity.

Taken together, these doctrines describe protocols of captivity, not limitations on the exercise of state power. They assemble a legal order

---

96 Matthew Tokson & Michael Gentithes, *The Reality of the Good Faith Exception*, 113 Geo. L.J. 551, 553 (2025); *see also* Nadia Banteka, *Police Ignorance and (Un)Reasonable Fourth Amendment Exclusion*, 75 Vand. L. Rev. 365, 367 (2022) (arguing that "[t]he 'good faith exception' to the exclusionary rule is one of the most frequently invoked doctrines in criminal cases").

97 *See* Hartman, Scenes of Subjection, *supra* note 22, at 98 ("The weighing of person and property—the limited recognition of the slave as person . . . endowed the enslaved with limited protections and made them vulnerable to injury, preceisely because the reconition of the person and the calibration of subjectivity were consonant with the imperatives of the institution.").

98 *See* Stanford v. Texas, 379 U.S. 476, 481–82 (1965) (quoting Boyd v. United States, 116 U.S. 616, 625 (1886)) (discussing writs of assistance as a motivation for the Fourth Amendment).

99 *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning, 1602–1791, at 669–772 (2009) (describing the role abusive writs of assistance played in the ratification debate).

100 Carbado, *The Jurisgenerative Black Body*, *supra* note 42, at 10.

101 *See* Horton v. California, 496 U.S. 128, 136 (1990) (describing the plain view doctrine).

that can authorize the encounter, justify the force, excuse the officer, admit the evidence, and finally declare what remains harmless: livable conditions of subordination and killable conditions of bare death.

Always available for capture, this is what it means for Black people to have rights *with* rights;[102] this is what it means for us to experience Black writs of assistance; this is what it means to be "woven [] out of a thousand details, anecdotes, [and] stories";[103] and this is what it means to be disposable and death-eligible under conditions of constitutional "reasonableness."

These multiple senses of "what it means"—each made possible not simply by police power, but by police freedom of power—do not remain outside the classroom. They shape and are shaped by the classroom experience. Classrooms are sites of both doctrinal absorption and doctrinal reproduction. They are spaces where doctrine is internalized, where legal imaginaries are cultivated, and where understanding of the social world, and the role of law in it, are formed.

Those effects of the classroom are not race-neutrally experienced. For Black faculty teaching Criminal Procedure, the racial body at the podium meets itself in the doctrine—in the policed Black bodies, dead and alive, through which Fourth Amendment law is made and expressed.

The challenges this "meeting of bodies" presents, therefore, are not incidental, personal, or idiosyncratic. They are structural and coalesce where doctrinal content, racialized enforcement practices, and institutional norms converge. That convergence suggests not only that Criminal Procedure brings "the street" into "the classroom." It suggests as well that "the street" structures how the classroom is experienced and that the classroom normalizes what happens on "the street" through the very lessons of "reasonableness" Fourth Amendment law teaches.

III
The Classroom

A. Can You Be Black and Teach That?

What happens when the body doing the teaching is one the doctrine already knows how to read? What challenges does that pose for Black faculty? How does that faculty member inhabit the role of "teaching like a law professor"?

---

[102] *Cf.* Hannah Arendt, The Origins of Totalitarianism 298 (1951) (discussing the idea of "the right to have rights").

[103] Frantz Fanon, Black Skin, White Masks 57 (Max Silverman ed., Charles Lam Markman trans., Manchester Univ. Press 2005).

The answer does not lie in temperament or pedagogy alone. It gathers instead in a dense and overlapping web of forces: the substantive content of Fourth Amendment doctrine; the pervasive presence of Blackness within that doctrinal field; the race-silencing habits of law school pedagogy; the racial and gender scripts that baseline professorial legibility; and the background racial forces that help organize those conditions. Taken together, these pressures can make teaching Criminal Procedure a painful endeavor, a reminder that, as Anthony Farley writes, "[t]he colorline does not simply express hatred, it cultivates pain."[104]

What follows stays with that pain, tracking where it settles, how it circulates, and what it asks of those who stand at the front of the room. The movement is necessarily back and forth—between classroom and street, between doctrine and narrative, between poetry and theory, and between past and present. Those expository shifts are necessary because the forces at issue do not respect those boundaries. Teaching, where race is concerned, is not a hermetically sealed activity. It is bound up with, reflective of, and shapes the racial investments of society.

That entanglement can be put in the language of post-colonial theory: "the chalk and the blackboard" of Criminal Procedure does not exist separate and apart from the "the sword and the bullet" of policing.[105] The mutually constitutive relationship between the two links the classroom to the street, the professor to the police, and epistemology to violence. Criminal Procedure thus plays a role in producing the racial state—not despite pedagogy, but through it. In that sense, interrogating the Criminal Procedure classroom is a way of interrogating how epistemology produces (and is not just an effect of) sociology.

1. The Racially Saturated Field

Every year that I teach Constitutional Criminal Procedure,[106] I confront anew the problem of how to describe and engage the racially constitutive effects of Fourth Amendment law. That difficulty is not a

---

104 Anthony Paul Farley, *The Black Body as Fetish Object*, 76 Or. L. Rev. 457, 504 (1997).

105 Ngũgĩ wa Thiong'o, Decolonising the Mind: The Politics of Language in African Literature 9 (1986).

106 The course explores the constitutional constraints placed on police investigatory practices and focuses heavily, though not exclusively, on the Fourth Amendment. *See* Criminal Procedure: Fourth and Fifth Amendments, NYU Sch. of L., https://its.law.nyu.edu/courses/description.cfm?id=38457 [https://perma.cc/6L84-73MS] (last visited Jan. 22, 2026).

function of uncertainty about the doctrine's anti-Blackness.[107] I have written about race and Criminal Procedure for over two decades,[108] and recently published a book on race and the Fourth Amendment.[109] The challenge lies elsewhere: in communicating what racialized policing does—and has done, and will continue to do—to Black people as individuals, families, and communities, and in managing the harm such communication produces in the context of the classroom.

From the very first time I taught Constitutional Criminal Procedure, I was, to borrow from James Baldwin, "bear[ing] witness"[110]—confronting the profound disjuncture between the language of the Fourth Amendment and its life on the ground for Black people. Although the Fourth Amendment is expressed as a guarantor against "unreasonable searches and seizures,"[111] the Supreme Court's interpretation of that text systematically withdraws from Black people what the Fourth Amendment purports to afford: a sense of "secur[ity] in their persons, houses, papers, and effects."[112]

On the best of days, the Criminal Procedure classroom is not a safe space for Black people. It is an institutionally normalized hostile environment. Not only for students, but for professors as well.

Fourth Amendment jurisprudence helps to make it so. That body of law is a particular kind of "Book of Negroes"[113]: a juridical space in which Black people become constitutionally legible through, and are indexed by, our interactions with the police—in our homes,[114] at school,[115]

---

107 Critical Race Theory has long argued that race shapes law and law shapes race. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment*: *Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988); Devon W. Carbado, *Critical What What?*, 43 Conn. L. Rev. 1593, 1608 (2011); Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1713 (1993).

108 The first article I published in this space attempted to foreground how colorblindness was functioning to obscure the racial investments of Fourth Amendment jurisprudence. *See* Carbado, *(E)racing*, *supra* note 76.

109 *See* Carbado, Unreasonable, *supra* note 2.

110 Julius Lester, *James Baldwin – Reflections of a Maverick*, N.Y. Times, May 27, 1984, at 1.

111 U.S. Const. amend. IV.

112 *Id.*

113 *Cf.* Simone Browne, "*Everybody's Got a Little Light Under the Sun": The Making of the* Book of Negroes, *in* Dark Matters: On the Surveillance of Blackness 63 (2015).

114 *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (involving the search of a Black woman's home); Ken Armstrong, *Dollree Mapp, 1923-2014: "The Rosa Parks of the Fourth Amendment,"* The Marshall Project (Dec. 8, 2014, at 15:55 ET), https://www.themarshallproject.org/2014/12/08/dollree-mapp-1923-2014-the-rosa-parks-of-the-fourth-amendment [https://perma.cc/ZN4P-ZK6Y].

115 *See, e.g.*, Taylor v. City & Cnty. of Honolulu, 666 F. Supp. 3d 1098 (D. Haw. 2023) (involving the arrest of a ten-year-old Black girl at her elementary school).

on the streets,[116] in our cars,[117] at airports,[118] and at the border.[119] All of this unfolds under *constitutional* conditions of marginality.[120]

The demographic makeup of Fourth Amendment cases has a way of saying, "Look a Negro,"[121] a juridical hail that interpellates Black bodies into the very racialized subjects policing presupposes, disciplines, and helps produce.

How, pedagogically speaking, do Black people not "turn"? Is it possible for us to avoid the hail? How do we not hear it? How do we manage it? Can that hail be silenced? By us? By anyone?

Those queries are consistent with Dorothy Roberts's contention that law does not simply withdraw protection from Black people; instead, it actively produces the conditions of Black bodily vulnerability, "killing the black body."[122] Fourth Amendment law is an important part of that story.

The constitutionalized degradation and dehumanization that Fourth Amendment law effects render that jurisprudence "a racially saturated field of visibility,"[123] a field in which we are seen through the racialized prism of our policed Black bodies. Because that mode of seeing prefigures Black people as transgressors of the rights to security we claim,[124] it helps to produce a body of law that simultaneously expands

---

116 *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (involving the stopping and frisking of Black men); Ilan Friedmann-Grunstein, *Curing* Terry*'s Colorblindness*, 76 Okla. L. Rev. 1025, 1031 (2024) (articulating a racial critique of *Terry*).

117 *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (involving a traffic stop of two Black men).

118 *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980) (involving the strip searching of Black women at the airport).

119 *See, e.g.*, United States v. Ezeiruaku, 936 F.2d 136 (3d Cir. 1991) (permitting, under the border exception, an airport luggage search of a Nigerian man conducted without reasonable suspicion); United States v. Leverette, 503 F.2d 269 (9th Cir. 1974) (permitting a strip search of a Black woman at a port of entry).

120 *Cf.* Peter Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. Rev. 977 (1986) (describing the doctrine of unconstitutional conditions).

121 *See* Frantz Fanon, Black Skin, White Masks, *supra* note 103, at 91; *see also* Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, *in* Reading Rodney King/Reading Urban Uprising 15, 15 (Robert Gooding-Williams ed., 1993) (suggesting something like this dynamic with respect to how the defense attorneys in the Rodney King case legitimized the police violence they deployed against King).

122 I am referring here both to the title of Roberts's groundbreaking text and the intellectual sensibility that underwrites it. *See generally* Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty (1st ed. 1997) (describing America's systemic abuse of Black women's bodies).

123 Butler, *supra* note 121, at 15.

124 *See* John Berger, *Chapter 1*, *in* Ways of Seeing (1972) ("The way we see things is affected by what we know or what we believe. . . . [W]hen men believed in the physical existence of Hell . . . fire must have meant something different . . . . Nevertheless, their idea of Hell owed a lot to the sight of fire consuming and the ashes remaining . . . .").

the scope of police power and constricts the reach of constitutional rights. To teach Constitutional Criminal Procedure is thus to confront both police-empowering constitutional doctrines that come into being through the policing of Black people *and* a racially constitutive scene on which the knightstick that renders the body black and blue racially shades the skin it beats Black.[125]

There are intersectional dimensions to this shading of the skin.[126] The racially constitutive effects of Fourth Amendment law implicate the many ways Black people are intraracially differentiated, including along lines of class, gender, gender identity, sexual orientation, disability, and immigration status.[127] Without meaning to be exhaustive, we might add masculinity to this list as well, if only because most of the Black bodies in Fourth Amendment case law are male. That demographic configuration calls to mind Melissa Murray's observation that the Roberts Court appears to be assembling what she terms "a jurisprudence of masculinity,"[128] one that, across doctrinal domains, increasingly prioritizes men's rights both explicitly and implicitly.[129]

Murray's intervention invites a more specific question about Fourth Amendment law: whether it operates as a jurisprudence of masculinity, or more particularly, a jurisprudence of Black "emasculinity"[130]—one

---

125 I am developing these claims more robustly elsewhere via the claim that the Black body is jurisgenerative. *See* Carbado, *The Jurisgenerative Black Body*, *supra* note 42.

126 *See, e.g.*, Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (articulating the theory of intersectionality). Jamelia Morgan's work, for example, has been particularly compelling on the intersection of race and disability in the context of policing. *See* Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 497–98 (2022) (discussing how in the context of policing "disability and race, gender, and class all intersect to form 'multiple axes and forms of oppression'" (quoting Liat Ben-Moshe, *The State of (Intersectional Critique of) State Violence*, 46 WOMEN'S STUD. Q. 306, 306 (2018))).

127 *See* Devon W. Carbado*, Intraracial Diversity*, 60 UCLA L. REV. 1130, 1142–43 (2013) (discussing how intraracial diversity is impliciated in debates over admissions).

128 Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOU. L. REV. 799, 799 (2023).

129 *Id.* at 803.

130 In invoking the idea of "emasculinity," I in no way mean to endorse the view that the problem of racial inequality in the Black community derives from the fact that Black men have been emasculated and have thus been denied their rightful place as patriarchs of Black families. The literature critiquing this position, and the ways it was legitimized by the Moynihan Report, is voluminous. *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 15–19 (1st ed. 1997) (criticizing Moynihan's endowment of poor Black women, the most subordinated members of society, with the power of a matriarch). *See* Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 163 (pointing out the racial critiques of the Report and noting that the Report has been insufficiently interrogated with respect to sexism); ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF

that systematically *de*prioritizes the rights of Black men. I use the term "emasculinity" rather than "masculinity" (though the doctrine implicates both) to foreground what Frank Rudy Cooper theorizes as a racialized masculinity contest, in which officers establish that they are "the man."[131] That demonstration, Rudy Cooper contends, is performed through a "command presence" designed to communicate that police authority is not to be contested.[132]

Social psychological findings bear out a version of Rudy Cooper's theory. L. Song Richardson and Phil Goff have shown that officers who perceive that their masculinity is in jeopardy are more likely to resort to violence than those who do not experience that sense of vulnerability.[133] Their research suggests that an officer's "command presence" is plausibly a response to, and way of managing, masculinity threat. From that vantage point, command presence is not merely a tactical choice. It operates as a form of discipline and social control, extracting racial obedience and embedding hierarchy within the ordinary texture of policing. As Rudy Cooper contends, Fourth Amendment law is implicated in this dynamic.[134]

In *Terry v. Ohio*, Chief Justice Warren observed—remarkably—that officers' deployment of stops and frisks is sometimes "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."[135] The Chief Justice did not endorse such practices as constitutional ideas. But he treated

---

THE WELFARE QUEEN 59–61 (2004) (discussing the enduring dominance of Moynihan's sociological framework in shaping contemporary discourses on Black poverty). I should also add that the discussion of masculinity that follows is gestural and certainly not a complete accounting of how masculinity intersects with the Fourth Amendment.

131 Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009). In advancing this argument, Rudy Cooper productively builds on an earlier intervention by Angela Harris. *See* Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000).

132 Cooper, *supra* note 131, at 674.

133 *See* L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 135–36 (2014) (explaining the relationship between masculinity threat and police violence); *see also* PHILLIP ATIBA GOFF, KARIN DANIELLE MARTIN & MEREDITH GAMSON SMIEDT, PROTECTING EQUITY: THE CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY REPORT ON THE SAN JOSE POLICE DEPARTMENT 1, 11 (2013) (describing how "male gender role stress" is implicated in police violence); Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 2004 (2017) (reviewing JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA) (discussing masculinity threat in relationship to Black policing).

134 Cooper, *supra* note 131, at 702–26 (applying masculinities studies to stop and frisk practices).

135 392 U.S. 1, 15 n.11 (1968) (citing LAWRENCE P. TIFFANY, DONALD M. MCINTYRE & DANIEL L. ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 47–48 (1967)).

humiliation and intimidation as dangers the Court was institutionally limited in its capacity to prevent.

Warren's "judicial I can't,"[136] translates performances of "command" presence into unreviewable police conduct. His abdication left in place a social landscape on which (e)masculation ceremonies—subject-making, hierarchical arrangements in which Black men are rendered "boys" and officers are affirmed as "the man"[137]—are a taken-for-granted entailment of policing. The frequency and normalization of those ceremonies, and the rituals of obedience and subordination they choreograph, explains why it is difficult to *think* of stops and frisks and not *see* Black men enduring what Bennett Capers describes as a kind of "status punishment"[138] and Paul Butler has framed as sexual violence.[139]

That status punishment and sexual violence are not gender exclusive. As the African American Policy Forum's (AAPF) work on policing makes clear, Black women are subject to both. Through its SayHerName Campaign,[140] AAPF produced a short video documenting violent encounters between Black women and girls and law enforcement.[141] The footage is difficult to watch, but analytically instructive. It shows that the masculinity contests at the heart of policing do not recede when Black women enter the scene. Given dominant tropes of Black women as boisterous and emasculating, "sapphires" who need to be subdued,[142] Black women's very being potentially threatens an officer's investment in projecting a commanding presence. Indeed, as Michelle Jacobs observes, drawing on the phenomenon of masculinity threat, "[w]hen police officers see Black women who may not verbally submit

---

136 *See* Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 192 (1975) (analyzing the judicial "cannot" in fugitive slave cases).

137 For an account of how Black men have to navigate the terrain between "buck" and "boy," see Devon W. Carbado, *Colorblind Intersectionality*, 38 Signs 11, 19–20 (2013) [hereinafter Carbado, *Colorblind Intersectionality*]. Rudy Cooper also takes up a version of this dynamic in his own work. *See* Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. Davis L. Rev. 853, 875–89 (2006) (suggesting that Black male performances of identity must contend with hypersexualized stereotypes of Black men, and that one of the ways in which Black men respond to those stereotypes is by exhibiting an identity that aligns with white norms and expectations).

138 Bennett Capers, *Policing, Race, and Place*, 44 Harv. C.R.-C.L.L. Rev. 44, 68–69 (2009).

139 *See* Paul Butler, Chokehold: Policing Black Men (2017).

140 *#SayHerName*, Afr. Am. Pol'y F., https://www.aapf.org/sayhername [https://perma.cc/3DDA-DCG3] (last visited Feb. 6, 2026) (uplifting the stories of Black women killed by police).

141 Janelle Monáe, *Say Her Name (Hell You Talmbout) (feat. Various Artists) [Official Lyric Video]* (YouTube, Sep. 24, 2021), https://www.youtube.com/watch?v=kQbeUN-IfyQ.

142 *See generally* Regina Austin, *Sapphire Bound!*, 1989 Wis. L. Rev. 539 (1989) (describing the applicabiity of the "sapphire" stereotype to Black women and the ways in which it is associated with emasculation).

readily to them, it could present a masculinity threat . . . , thus triggering excessive use of force against the women."[143]

The capacity of Black women's bodies to trigger that threat situates them beyond a system of gender that historically both conferred and withheld, protected and subordinated: the "pedestal as cage."[144] Whatever subordination that system effectuated, and whatever protections it afforded, Black women were not its intended subjects. The "pedestal as cage" was built for white women. The violence the video depicts thus sits outside of it.

Scholars across disciplines have theorized that violence in distinct but related ways, and their insights are indispensable here. They provide the analytic vocabulary for exposing the racial investments of Fourth Amendment doctrine, for naming how those investments implicate gender, and for contesting the pedagogical practices law professors have long taken for granted.

Kimberlé Crenshaw would describe the violence that the video depicts as a form of "intersectional subordination,"[145] examples of intersectional violence that arise from the mutually constitutive forces of race and gender.[146] Crenshaw first exposed those forces through an engagement with anti-discrimination law.[147] Her work demonstrates that whether the context is police violence or employment discrimination, the same architecture of non-recognition, rooted in the history of slavery, exists.

Just as in the context of slavery, law refused to recognize rape against Black women as rape; in the "afterlife" of slavery, law refused to recognize discrimination against Black women as discrimination. One of the cases Crenshaw invokes to illustrate this point is *DeGraffenreid v. General Motors*.[148] There, the court rejected Black women's efforts to bring a lawsuit specifically on behalf of Black women. The court reasoned that:

---

143 Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 Wm. & Mary J. Women & L. 39, 65 (2017).

144 *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (noting that traditionally discrimination against women "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage").

145 *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991) (analyzing the intersection of race and gender to define the structural, political, and representational aspects of violence against women of color).

146 *Id.*

147 *See generally* Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 130 (describing how the single-axis framework in discrimination law, which treats race and gender as "mutually exclusive categories of experience and analysis," perpetuates the marginalization of Black women in antiracist policies).

148 413 F. Supp. 142 (E.D. Mo. 1976).

> Plaintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination. The Court's own research has failed to disclose such a decision. The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new "super-remedy" which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.[149]

DeGraffenreid's analysis reveals how Black women's articulation of themselves as Black women can produce what I call a "double negation"—a falsification of them not only as normatively women, but also as normatively Black.[150] Ironically, *DeGraffenreid* rationalizes this double negation on terms that render Black women precisely what the court claims it seeks to avoid: a "special" category of race and gender, but not a category that law was bound to protect.

Courts have reproduced that unprotected status even in cases where Black women attempt to represent the category "women" writ large. For example, in *Moore v. Hughes Helicopters, Inc.*, another case Crenshaw explicates, the court denied the plaintiff's effort to represent a class of plaintiffs that included white women.[151] According to the court: "Moore [the plaintiff] had never claimed before the EEOC that she was discriminated against as a female, *but only as a Black female* . . . . [T]his raised serious doubts as to Moore's ability to adequately represent white female employees."[152]

The "but only as a Black female" in the court's reasoning is also a falsifying juridical move. And just as in *DeGraffenreid*, this falsification is accomplished by normatively baselining gender as white. The court's insistence that Black women do not experience discrimination "as a female, but only as Black female" elides the whiteness on which that articulation is based. What the court is really saying is that "Moore [the plaintiff] had never claimed before the EEOC that she was discriminated against as a *white* female, but only as a *Black* female." The insertion of "white" before "female" reveals what I have elsewhere

---

149 *DeGraffenreid*, 413 F. Supp at 143. An important part of the court's ruling was also that Black women could not assert a race discrimination claim because the hiring practices at issue did not negatively impact Black men.

150 *Cf.* Marlon Riggs, *Black Macho Revisited: Reflections of a SNAP! Queen*, *in* BROTHER TO BROTHER: NEW WRITINGS BY BLACK GAY MEN 324, 325 (Essex Hemphill ed., 2d prtg. 2007) (referring to Black, gay men as a "triple negation").

151 708 F.2d 475 (9th Cir. 1983).

152 *Moore*, 708 F.2d at 480 (emphasis added).

referred to as "colorblind intersectionality": the ways in which whiteness functions as an intersectionalizing subject position that the law does not treat as such.[153]

Tellingly, even though parts of the *Moore* opinion explicitly evidence a concern for "*white* female employees," noting that Black women, because they are "only . . . Black female[s]," lack the "ability to adequately represent white female employees,"[154] the court does not understand that articulation as a racial preference for white women. Consequently, the court does not frame its opinion as an instance in which the court is constructing gender through the lens of race; does not treat its analytical approach as promulgating a "super remedy" for white women; and does not see "white women" as a *particular* gender category that the court overrepresents as the *general* category, women.[155]

The overrepresentation of white women as women and the juridical unrecognizability of Black women it produces did not originate in antidiscrimination law. Hortense Spillers locates the phenomenon in the grammar of Middle Passage. In Spillers's analysis, Middle Passage and the institution of slavery it inaugurated configured Black women as "ungendered"[156]: people who existed outside of the normative regime of gender, beyond the categories of masculine and feminine.[157] Positioned in that way, Black women could derive none of the protections the "pedestal as cage" provided, including protections that render white women, exceptional, rather than routine, figures of the kinds of state violence the Policy Forum's video records. Those acts of violence are, in Spillers's terms, "materialized scene[s] of unprotected female flesh"[158] that can be traced back to slavery.

Consider how Saidiya Hartman peforms that tracing by foregrounding the legal impunity with which enslaved Black women could be raped. She writes:

> In this instance, tyranny is not a rhetorical inflation but a designation of the absoluteness of power. Gender, if at all appropriate in this scenario, must be understood as indissociable from violence, the

153 *See generally* Carbado, *Colorblind Intersectionality*, *supra* note 137 (exploring concepts of colorblind and gender-blind intersectionality).

154 *Moore*, 708 F.2d at 480.

155 *Cf.* Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, CR: New Centennial Rev., Fall 2003, at 257, 265 (discussing how western epistemology overrepresents the western subject as the human).

156 *See* Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 Diacritics 65, 68 (1987).

157 *Id.* at 72.

158 *Id.* at 68.

> vicious refiguration of rape as mutual and shared desire, the wanton exploitation of the captive body tacitly sanctioned as a legitimate use of property, the disavowal of injury, and the absolute possession of the body and its "issue." In short, black *and* female difference is registered by virtue of the extremity of power operating on captive bodies and licensed within the scope of the humane and the tolerable.[159]

The historical indissociability of gender from violence Hartman describes was a form of gendered race-making, a particular instantiation of Blackness that was accomplished through sexual subjugation. According to Hartman, "the normativity of [that] sexual violence" reveals "an inextricable link between racial formation and sexual subjection."[160] Her point is that, as a historical matter, "sexual violence engendered black femaleness as a condition of unredressed injury."[161] In the context of slavery, that engendering made Black women fungible in multiple ways—fungible enough to be property that could bear property, fungible enough to be property that could have culpability, fungible enough to be property that could be criminalized, and fungible enough to possess a quasi-personhood that was legally predicated on, normalized by, and made socially legible through forced labor, physical violence, and sexual exploitation.[162]

Taken together, Crenshaw, Spillers, and Hartman's theorizing of the relationship among race, gender, and injury point both to, and beyond, differentiation within Blackness. Cumulatively, their work marks a juridical condition that, while shaped by gender, does not displace "the historical ways in which the Black body—in all of its configurations—has been the site on which the United States has worked out its 'law and order' commitments."[163] What began in Middle Passage has had an afterlife in a legal order in which violence against the Black body is not violation at

---

159 HARTMAN, SCENES OF SUBJECTION, *supra* note 22, at 86.

160 *Id.* at 85.

161 *Id.* at 101.

162 Saidiya Hartman references the idea of fungibility throughout her seminal text. SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 7, 21 (1997). In one passage on the point, she writes: "The fungibility of the commodity makes the captive body an abstract and empty vessel . . . and, as property, the dispossessed body of the enslaved is the surrogate for the master's body since it guarantees his disembodied universality and acts as the sign of his power and dominion." *Id.* at 21; *see also* ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 3 (2000) (describing how enslaved people under Southern law had double identity as persons and property). *See generally* Brittany Farr, *Warranting Violence*, 78 STAN. L. REV. 533 (2026) (discussing how warranties in the context of slavery navigated the property/personhood social position which enslaved people occupied).

163 CARBADO, UNREASONABLE, *supra* note 2, at 6.

all, but treated as a tolerable—and sometimes as a necessary—exercise of state power to promote the overall wellbeing of the nation.

The naturalization of Black bodies as the quintessential site on which the state has historically exercised that power helps explain why, with respect to Black people, police violence does not respect the normative boundaries of gender. There is no "pedestal as cage" for Black women—no protection, however constraining, no access even on its terms—to the "patriarchal wealth and fortune" that Spillers names as the exclusive province of those the law recognizes as legitimate gendered subjects.[164] And there is no "castle" for Black men—no zones of privacy or bodily integrity the law presumes to protect, no right to be left alone.[165] "*Violated/yet inviolable*," Black people have existed outside of the normative boundaries of gender.

That outsider status requires that we take seriously Angela Harris's injunction that in "studying racial violence . . . , we should not forget about the codes of gender that make this violence explicable."[166] We might also say: In studying gender violence, we should not forget the codes of race that make that violence explicable. Those "codes" of race and gender are, historically, what made Black women unrecognized and unrecognizable as women—by law—and thus unprotected and unprotectable by that category.

The gendered unrecognition of Black women as normatively women and the subordinated/protective status it withdraws from them becomes even more visible when set against Sylvia Wynter's analysis of the human. While the text I have in mind focuses on Black men, it illuminates the racially gendered grammar of dehumanization that structures Black women's subject position as well, particularly their vulnerability to violence.

In a seminal article on police violence, Wynter interrogates the acronym "N.H.I."—No Humans Involved, a term police officers employed to describe dead Black bodies.[167] In Wynter's account, young Black men, the "Jobless Other," exist outside the "sanctified universe of obligation" and therefore outside the category of the human.[168] Wynter

---

164 Spillers, *supra* note 156, at 65. As I will explain, I am not suggesting that, in some ontological sense, Black women were not therefore women. I am speaking to the baselining of the category of woman with reference to white racial identity.

165 The point is not, of course, that Black women and men should aspire to occupy these subject positions.

166 Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 Stan. L. Rev. 777, 792 (2000).

167 Sylvia Wynter, *No Humans Involved: An Open Letter to My Colleagues*, 1 Forum N.H.I.: Knowledge for the 21st Century 1 (1994).

168 *Id.* at 7.

does not frame her analysis as an examintion of gender per se, but the subject of her analysis is a gendered one: Black men. The ease with which "N.H.I." could attach to Black male bodies is not incidental to that racially gendered position. It derives from what I will provisionally call a "racialized un/gendering" that implicates Black people as sub-human.

I employ the term "racialized un/gendering" to name a co-constitutive double movement: the racial ungendering of Black men from the normative categories of "men" and "Man," and their racial regendering as subhuman,[169] a particular kind of male beast. This double movement, then, does not expel Black men from gender altogether. It removes them from the domain of normative gender and its connection to the human, and repositions them as a degraded and gendered subhuman figure: N.H.I. Constructed as such, Black men have existed outside of the normative category of the human because they have also existed outside of the normative category of gender.

The racialized un/gendering of Black men I am describing is consistent with Spillers's observations about Black bodies in the context of slavery: The captive body was forced into captivity in a moment of both un/gendering and dehumanization. As Spillers notes, the captive body becomes "flesh" prior to the body, prior to the social inscriptions that gender, kinship, and personhood require.[170] This production of flesh—stripped of gender normatively, kinship, and personhood normativity—operates within an episteme in which the white western body "overrepresents itself" not just as "Man" (in the sense of human legibility) but also as "man" and "woman" (in the sense of gender legibility).[171] That overrepresentation renders Black people suspect as women, suspect as men, and suspect as human. Historically, being Black has meant not properly being men, not properly being women, not properly being human. The racial prerequsites of whiteness have also policed the borders of gender and the Human.

---

169 Other disciplines have noted the association between Black people and animals. For a now classic study on this point, see Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. Personality & Soc. Psych. 292 (2008) (demonstrating empirically the ongoing salience of the association between Black people and apes).

170 Spillers, *supra* note 156, at 67.

171 Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, 3 CR: New Centennial Rev. 257–337 (2003) (discussing how "[w]ith this population group's systemic stigmatization, social inferiorization, and dynamically produced material deprivation thereby serv[e] both to 'verify' the overrepresentation of Man as if it were the human, and to legitimate the subordination of the world and well-being of the latter to those of the former").

The historical baselining of "man" and "woman" in the white body is also what Hartman seeks to contest. Hartman pushes back against theories of gender that, a priori, position Black women outside the category of "woman." According to Hartman, "By assuming that woman designates as a known referent, an a priori unity, a precise bundle of easily recognizable characteristics, traits, and dispositions, we fail to attend to the contingent and disjunctive production of the category."[172]

Hartman's intervention is intended not only to disassociate "woman" "from the white middle class female subject who norms the category,"[173] but also to raise a question about the relationship between the category "woman" and the category "gender" and the role race plays mediating that relationship. She asks: "Can we employ the term 'woman' and yet remain vigilant that 'all women do not have the same gender?'"[174] At a minimum, that vigilance is a call for us to understand the gender-constructing work race performs. The gender-constitutive force of race enables race to produce "different" kinds of women with "different" gender identities. Whereas whiteness produces women with gender normativity, Blackness does not.[175]

The nexus I am positing among race, gendering, ungendering, and the human is a core feature of policing today. An afterlife of the slave ship, an echo of its logics, policing effectuates a racially un/gendered dehumanization that captures every Black person. The dispatch code "N.H.I." is a window on that reality. The work race does constructing gender and the human provides at least a partial explanation for why the pained Black body that saturates the field of policing is a Blackness in all of its variations,[176] including along the axis of gender, not exactly an undifferentiated Blackness, but a Blackness as such—"*bodies/without borders*"—presumptively unprotected flesh.

2. The Pained Black Body

Notwithstanding that policing is a site on which Black *bodies/without borders* are produced, the Criminal Procedure curriculum does not thematize Fourth Amendment doctrine along those lines. Nor, by large, do law school casebooks treat Fourth Amendment cases as a

---

172 HARTMAN, SCENES OF SUBJECTION, *supra* note 22, at 99.

173 *Id.* at 99–100.

174 Hartman goes on to query whether we can "'name as "woman" that disenfranchised woman whom we strictly, geopolitically, *cannot imagine* as a literal referent' rather than reproduce the very normativity that has occluded an understanding of the differential production of gender." *Id.* at 99.

175 *Id.*

176 This is not the same thing as saying that Black people across difference are equally vulnerable to policing.

racially saturated, and racially fraught, representational field.[177] They treat it as a normal doctrinal and epistemological archive through which students learn to think like lawyers. On this account, Criminal Procedure appears unremarkable, even antiseptic. As a result, casebooks do not ask whether the Criminal Procedure course should be preceded by "trigger warnings";[178] they do not ask whether its relentless images of Black people being policed are "graphic" in ways that might qualify as violent images[179] within legal education;[180] and they do not ask whether the nature of the Criminal Procedure archive creates an "uneven" pedagogical environment for Black faculty and students.[181]

The case law avoids these forms of racial interrogation. It does so through a distinctive, racially invested colorblind technique: Race is everywhere, operative and rarely acknowledged. The racialized Black bodies through which the Supreme Court makes Fourth Amendment law are hardly ever formally noticed. Instead, Black people figure in the jurisprudence as what Simone Browne calls an "absented presence"[182]: there without juridical announcement. Everybody already knows—at

---

177 For examples of casebooks that do reflect a deep interrogation of race across different bodies of doctrine, see generally BENNETT CAPERS, ROGER A. FAIRFAX, JR. & ERIC J. MILLER, CRIMINAL LAW: A CRITICAL APPROACH (2023); CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS (4th ed. 2019). I am not suggesting these are the only texts that do so.

178 There have long been debates about whether "trigger warnings" are a useful pedagogical device, or whether they instead coddle students in ways that make them less resilient and less open to ideas with which they disagree. *See, e.g.*, Laura J. Bower, *The Woman in Black: A Defense of Trigger Warnings in Creating Inclusive Academic Spaces for Trauma-Affected Students Through a Feminist Disability Studies Pedagogy*, 36 J. CRIM. JUST. EDUC. 1 (2023) (tracing the ableist assumptions and misconstructions in anti-trigger warning arguments and arguing that trigger warnings are accommodations necessary for creating inclusive academic spaces for trauma-affected students and students with disabilities); India Bryce, Nicola Horwood, Kate Cantrell & Jessica Gildersleeve, *Pulling the Trigger: A Systematic Literature Review of Trigger Warnings as a Strategy for Reducing Traumatization in Higher Education*, 24 TRAUMA, VIOLENCE & ABUSE 2882 (2023) (examining "the extent to which trigger warnings constitute a method of best practice for reducing traumatization in higher education"). But a relatively uncontroversial way to think about trigger warnings is simply to conceive of them as a kind of heads-up. Just as we might give our students a "warning" that we are approaching a particularly difficult area of a course, or that a particular reading assignment is longer than usual, we might also instruct them that a particular topic is fraught in one way or another.

179 *But see* Paul Butler, *Stop and Frisk: Sex, Torture, Control*, *in* LAW AS PUNISHMENT/LAW AS REGULATION 155, 164–68 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2011) (describing stops and frisks as a form of sexual violence).

180 *See* Amy F. Kimpel, *Violent Images in Legal Education*, *in* HOW TO ACCOUNT FOR TRAUMA AND EMOTIONS IN LAW TEACHING 43 (Mallika Kaur & Lindsay M. Harris eds., 2024) (exploring the topic of violent images in legal education). One of the areas in Fourth Amendment law where faculty sometimes proceed with caution vis-à-vis teaching the material is excessive force jurisprudence.

181 For a discussion of the how race creates "uneven" learning environments, see Jonathan Feinhold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71 (2013).

182 BROWNE, *supra* note 113, at 13.

least implicitly—that Black people are, and are supposed to be, policing's normal subjects.[183]

The racial power of colorblindness is such that courts can avoid explicitly anti-Blackening Fourth Amendment doctrine and authorize forms of policing that produce that distributional outcome. This is just one example of how race can operate "as an unspoken rationale in legal doctrine in the United States."[184] That colorblinding of law disappears not only race as a named category, but also the racial pain Fourth Amendment doctrine organizes, normalizes, and distributes.

This is not to say that Black pain is fully legible outside of Fourth Amendment law. Indeed, by the time a police encounter reaches constitutional analysis, the experience has already been framed by a perceptual infrastructure that does not readily render Black subjection as injury at all.[185]

The point is that law is not a bystander to the production of the Black body as a site of harmless pain. Law participates in the very ontologizing of injury as non-injury that marks Black life. When the Court declares segregation "equal,"[186] characterizes societal discrimination as "amorphous,"[187] or treats disparate impact as constitutionally insufficient,[188] it is not merely reflecting social understandings of racial harm but specifying the conditions under which harm can exist.

Those determinations do not remain confined to the doctrinal contexts in which they arise; they establish background criteria of injury that organize legal and social perceptions more generally. In that sense, law is already present in the ontological field in which later encounters are interpreted, even when those encounters formally arise outside it. The disappearance of racial pain in Fourth Amendment doctrine, then, is not simply an inherited social blind spot. It is juridically endogenous: The doctrine evaluates police encounters through categories of injury that law has helped to produce.

---

183 This is not the same thing as saying that only Black people are policed, but rather that the policing of Black bodies is normalized and thus normative.

184 Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. Cin. L. Rev. 269, 293 (1994). *See generally* Bennett Capers, *The Law School as White Space*, *supra* note 51, at 7 (discussing the various ways in which law schools function as a "white space").

185 *See* Judith Butler, *supra* note 121, at 19 (Robert Gooding-Williams ed., 1993) (suggesting that "the visual field is not neutral to the question of race; it is itself a racial formation, an episteme, hegemonic and force"); *see also* Russell K. Robinson, *Perceptual Segregation*, 108 Colum. L. Rev. 1093, 1109, 1117 (2008) (discussing how allegations of discrimination may be perceived through fundamentally different psychological frameworks by people of different races).

186 *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

187 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

188 *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

Every time I teach Criminal Procedure, I confront the categories of injury that Fourth Amendment law suppresses and reconstitutes. The point is not that these injuries break through the structures of racial erasure on which the doctrine depends. Rather, reading the cases through a Black embodied position interrupts the doctrinal translation the cases perform. Encounters that the law stabilizes as perception—"free to leave," "reasonable suspicion," "probable cause"—register instead as the infliction of force upon bodies. Through the pedagogy of the Black body, terms of art appear not as evidentiary thresholds separating lawful policing from unlawful policing but as mechanisms by which criminality and dangerousness are given an ontological location in Blackness through the infliction of racial pain.

Fourth Amendment doctrine fails to see and acknowledge that pain and converts the contingent overpolicing of Black bodies that produces it into the appearance of a natural order. In so doing, the jurisprudence helps to make Blackness the inevitable and objective "territory" of dangerousness and criminality, obscuring that those social meanings are, to borrow from Sylvia Wynter, simply the "map" of the doctrine's racial investments.[189] The naturalization of Blackness as criminality and dangerousness sanitizes and disappears the pained Black bodies through which that naturalization is accomplished.[190]

Racial pain in Fourth Amendment law is not only non-justiciable. It is also, in some sense, inarticulable. The difficulty is both expressive and conceptual: The doctrinal vocabulary through which police encounters are analyzed converts bodily intrusion into evaluative judgment, leaving little linguistic space in which pain can appear as injury.

The scholarly literature has not much helped. As Nirej Sekhon observes, "[e]ven progressive discourse around race and criminal justice policy has a way of turning away from the *body in pain*."[191] This is certainly true of the literature on the Fourth Amendment. Part of the reason for this erasure may be that it is "by definition, hard to express pain in words," and so "we tend to avert our scholarly gazes away from it."[192]

---

189 Wynter, *supra* note 155, at 273.

190 *See infra* Part III.

191 Nirej Sekhon, *The Chokehold*, 57 U. Louisville L. Rev. 43, 54 (2019). Perhaps part of the thinking underwriting the (non)engagement with pain is that "the time has come for African Americans to shift the conversation from talking about our *pain* to talking about our *plan*." Jared Sexton, *The Obscurity of Black Suffering*, *in* What Lies Beneath: Katrina, Race, and the State of the Nation 120, 120 (2007). If that is indeed the sentiment, I share Jared Sexton's query: "[W]hy we cannot do both, why, that is, talking about pain must be de-emphasized or muted, put aside or substituted, before talking about plans can commence." *Id.* Part of what motivates Sexton's intervention is his sense that "we who are dark have done precious little talking about our pain in this post-civil rights era . . . ." *Id.* at 121. This is certainly true with respect to interrogating how pain is implicated in law and legal pedagogy.

192 Sekhon, *supra* note 191, at 54.

The problem with that aversion is that it forecloses sustained interrogations of how "interpretive commitments are realized . . . in the flesh,"[193] often on the subordinated bodies of Black people. The aversion also obscures precisely what I seek to foreground here: that teaching about the Black body in pain can be a painful experience. Sublimating that pain in the context of the classroom is rarely easy, and sometimes it is not possible at all. That is because to teach Fourth Amendment law is not only to *represent* racial violence; it is also potentially to reenact its affective force, placing the instructor—and not only the students—inside its wake.[194]

As a case in point, I recall playing Billie Holiday's "Strange Fruit" in my Criminal Procedure class to stage a discussion about racial violence, anti-Blackness, and legal doctrine.[195]

Southern trees bear a strange fruit,
Blood on the leaves and blood at the root,
Black body swinging in the southern breeze,
Strange fruit hanging from the poplar trees.[196]

The song struck me as a potentially useful pedagogical vehicle with which to trouble the public/private and legal/extralegal dichotomies that often structure discussion of racial violence to show how such violence circulates across them to become natural parts of society's landscape.

Pastoral scene of the gallant South
The bulging eyes and the twisted mouth,
Scent of magnolia, sweet and fresh,
And the sudden smell of burning flesh.[197]

As I listened to the haunting beauty in Holiday's voice and the violence braided through her words, I felt myself . . . losing myself.

Here is a fruit for the crows to pluck,
For the rain to gather, for the wind to suck,
For the sun to rot, for a tree to drop,
Here is a strange and bitter crop.[198]

---

193 Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1605 (1986).

194 For a powerful meditation on how the wake functions in Black collective consciousness, see SHARPE, *supra* note 12.

195 BILLIE HOLIDAY, STRANGE FRUIT (Vinyl Record, Commodore Recs. Apr. 20, 1939).

196 *Id.*

197 *Id.*

198 *Id.*

Beauty and violence, poetry and death, were no longer contrasts so much as companions, moving together through the song. What had begun as pedagogy—an effort to bring into view the violence legal doctrine habitually pushes to the margins—slipped beyond my control. The role I had prepared to inhabit fell away. I was no longer guiding a discussion. I was being carried and controlled—indeed, taken over—by the very history I had invited into the room.

The more I tried to manage what I was feeling, the less manageable it became. I stood at the front of the classroom in a state of silence that was unmistakable—thick enough for the students to register, heavy enough to be heard.

This was not the kind of silence to which Margaret Montoya refers: a deliberate pedagogical pause, strategically deployed to unsettle the habitual dynamics of speech and authority in the law school classroom.[199] This silence was unplanned and uncontrollable—a silence of unspeakability.

I had been undone.

Dissemblance was not an option. There was no hiding that something was happening—had happened—to me, and there was no easy way out of it. The classroom, usually a site of control and performance, became a space in which my authority was no longer mediated by preparation or doctrine, but by the limits of what I could—not—say.

(Why have I not mentioned that I was crying? Will the fact that I am saying so here survive subsequent edits?)

When Holiday's rendition ended, I did what I could to gather myself, to repossess, as best I could, the pieces of myself the moment had taken away.

I do not recall what I said to move the class forward, only that I did.

The next class came and went. And the class after that and the class after that.

Since then, I have often thought about that painful classroom experience. Each time, I query whether it would have been better for

[199] I am thinking particularly about Margaret Montoya's employment of silence as a pedagogical device. *See* Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847 (2000). According to Montoya: "After I hold silence long enough . . . I ask them to estimate how long we have been quiet. . . . [T]heir estimates are frequently double or triple the time. I take the opportunity to teach about silence and to talk about its cultural and linguistic characteristics." *Id.* at 881.

me to speak;[200] each time, I wonder whether my silence amounted to a pedagogical failure; and each time, I rehearse in my head the things I might have said to get us—to get me—through that moment.

Those questions do not arrive as neutral reflections. They carry judgment, the sense that something was missed, that something should have been done, that something remains due. They arrive, already converted, after the fact as a moral debt, something from which I must still be released.

I call these reflections "racial ruminations." For Black people, they are arguably inevitable and certainly not confined to the classroom.[201] They arise because we can never fully insulate ourselves from the varieties of racism we may encounter.[202]

Nor can we predict when or in what form those encounters will occur. Those uncertainties help generate after-the-fact ontological scenes in which racial ruminations take shape: *Did she really say that? Did he really treat me in that way? Why didn't I do—say—something else?* These ruminations are never fully accomplished. They have afterlives, lingering on hours, days, weeks, and even years after the triggering event has passed.[203]

---

[200] *See* AUDRE LORDE, *A Litany for Survival*, *in* THE COLLECTED POEMS OF AUDRE LORDE 255, 255–56 (W. W. Norton & Company, Inc. 2000) (1977)

("And when the sun rises we are afraid
it might not remain
when the sun sets we are afraid
it might not rise in the morning
when our stomachs are full we are afraid
of indigestion
when our stomachs are empty we are afraid
we may never eat again
when we are loved we are afraid
love will vanish
when we are alone we are afraid
love will never return
and when we speak we are afraid
our words will not be heard
nor welcomed
but when we are silent
we are still afraid.
So it is better to speak
remembering
we were never meant to survive.").

[201] Phillip Brian Harper has written compellingly about a related phenomenon: "speculative rumination[s]," that is, ruminations about whether a particular interaction was racially motivated. *See* Phillip Brian Harper, *The Evidence of Felt Intuition: Minority Experience, Everyday Life, and Critical Speculative Knowledge*, *in* BLACK QUEER STUDIES: A CRITICAL ANTHOLOGY 106, 119–20 (E. Patrick Johnson & Mae G. Henderson eds., 2005).

[202] *See* Deborah Archer, *How Racism Persists in Its Power*, 120 MICH. L. REV. 957, 966 (2022) (arguing that "[r]acism is everywhere and in everything").

[203] Scholars in Black Studies have long employed the idea of an "afterlife" to highlight the survivability of racism. The "afterlife of slavery" is perhaps the most frequent register in which this idea has been rehearsed. *See* Saidiya Hartman, *A Journey Along the Atlantic Slave Route*, NARRATIVE MAGAZINE (2007), https://www.narrativemagazine.com/issues/winter-2007/

But racial ruminations do not only follow painful episodes; they can also excavate earlier ones, pulling forward encounters that have never fully receded, occasioning moments of re-remembrance—engagements with memories that have been processed before, but that ruminations bring back into conscious thought.

And so it has been for me—not only with respect to playing *Strange Fruit* in my class, but also with respect to an incident that occurred long before I ever contemplated a career as a legal academic. This earlier event, too, implicates the classroom. It reflects an assumption about Black people so ordinary as to be unremarkable, so likely pervasive as to shape education pathways,[204] and so normalized as to appear inevitable.

I was at the airport, travelling home from an admitted students' event at Harvard Law School. I was wearing a sweatshirt with the law school's logo visible across the front. As I crossed paths with two white men, one of them said to the other, loud enough for me to hear: "Harvard must be lowering its standards." The remark was not addressed to me, but it was unmistakably about me. I was being hailed.

Even now, many years later, I find myself returning to that moment, rehearsing what I might have said or could have said in response. Even now I feel the afterlife of that racial assault. Although narratives of Black intellectual deficit are as old as anti-Blackness, the comment caught me entirely off guard. There is a disorientation that accompanies these confrontations with racism.

Even when we know that we may encounter racism anywhere and everywhere.

Even when we know it respects no boundaries.

Even when we have lived its patterns before.

Racism breaks through—

as if from nowhere.

(Everywhere/Nowhere)

Anthony Farley is therefore right to conceptualize racism as "a form of ritual abuse."[205] According to Farley, "like other forms of ritual abuse, racism is likely to be repeated."[206] But that repetition does not make

nonfiction/journey-along-atlantic-slave-route-saidiya-hartman [https://perma.cc/CDP2-7E5T]; Saidiya Hartman, Lose Your Mother: A Journey Along the Atlantic Slave Route 6 (Farrar, Straus and Giroux 2007).

204 *See also infra* Section III.B.1.

205 Farley, *supra* note 104, at 483.

206 *Id.*

racism predictable in any meaningful sense. As Farley explains, "[we] cannot [ever] prepare for it."[207] That impossibility of preparation is part of what makes racism racism.[208] Thus we find ourselves endlessly rewinding our lives, returning to the scenes of our encounters after the fact, to racially ruminate about what we might have done differently.[209]

Whatever social utility racial ruminations may have—whatever comfort they offer, whatever sense of "talking back" they provide—they miss something essential about the racial episodes that give rise to them. The pain of those episodes is not just a function of what Patricia Willaims describes as an "ontological imbalance" vis-à-vis one's capacity to return a rhetorical blow.[210] What, for example, is the equivalent of the N-word? What word can Black people deploy against white people that has equivalent historical weight, carries equivalent cultural violence, and has equivalent contemporary power?

The pain of racial ruminations is also the recognition that the incidents of racial injury may, in the moment of their occurrence, foreclose the possibility of speech altogether.[211]

To bring this back to the classroom, my "could have said/should have said" ruminations after playing *Strange Fruit* obscure that I occupied an unspeakable position—a position produced by racial pain.[212] At the time, I did not understand the moment in those terms. But in retrospect, that silence appears less as a failure of pedagogy than as an index of what the moment made unavailable: speakability.

That unspeakability calls to mind Elaine Scarry's observations about the relationship between physical pain and language. For Scarry, a defining feature of physical pain is its resistance to language.[213] This resistance is neither "incidental" nor "accidental."[214] It "is essential to what [physical pain] is."[215] Physical pain, she argues, is "language

---

207 *Id.*

208 *Id.*

209 Of course, everyone, regardless of race, performs these "what I could have said/should have done" reflections. What I am foregrounding here are the racially-specific predicates for those ruminations.

210 Williams, *supra* note 13, at 45.

211 The power dynamics at play may also preclude the possibility of speech. For example, were I to have engaged in an argument with the man who commented that Harvard was lowering its standards, I was far more vulnerable to being arrested than he was—even without escalation into a physical altercation—because I would be vulnerable to being framed as aggressive, notwithstanding he was the discursive aggressor.

212 Of course, and as I discuss further below, not all experiences of racial pain produce that unspeakability, and different people will be rendered unspeakable by different forms and levels of racial pain.

213 Elaine Scarry, The Body in Pain: The Making and Unmaking of the World 5 (1985).

214 *Id.*

215 *Id.*

destroying."[216] To experience that pain, therefore, is to be "bereft of the resources of speech."[217] The unavailability of those resources renders physical pain unshareable. As Scarry argues: "Whatever pain achieves, it achieves through its unshareability . . . ."[218]

3. The Problem of Unspeakability

If racial pain can destroy language in the moment of its infliction, then Fourth Amendment doctrine's silence is not merely descriptive. It is also disciplinary. By refusing to register the body in pain, the law secures a jurisprudence in which reasonableness, force, and suspicion remain intelligible only by excluding what they most reliably produce: a pain that can be language-destroying.

Importantly, my account of pain does not rest on the assumption that racial pain is wholly unshareable. The unspeakability of racial pain and its shareability are not necessarily opposites. With respect to Black life, they often travel together. Black people routinely share stories about the unspeakability of racial pain—about the difficulties of naming it; the inadequacy of language to contain it; the group-based vulnerabilities that register it; the refusals and dismissals that delegitimize it; and the private and state violence that produce it. Language is not an absolute barrier to this form of shareability because racial pain is already collective: Black people share *in* racial pain even when the contours of that pain cannot be fully articulated. The recognition that racial pain exceeds articulation generates other ways of engaging it.

These practices do not necessarily take the narrative form. They sometimes travel as instructions, protocols, and warnings, ways of moving through the world under conditions of threat that are at once familiar, unspeakable, and shareable. Those speaking practices constitute a kind of practical knowledge, an epistemology of survival, a way of speaking, and self-fashioning under conditions of racial governance.

Sometimes that self-fashioning and attendant speech surfaces not in classrooms or any other institutional setting, but in the intimate, unspectacular moments of ordinary life. One such moment arrived for me in a phone call I received from my young-adult, gender nonconforming child, who was concerned that they were being surveilled.[219]

---

216 *Id.* at 19.

217 *Id.* at 6.

218 *Id.* at 4.

219 Black gender-non-conforming people are particularly vulnerable to police violence. For a powerful exploration of this point, see ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 127–43 (2017).

They had arrived early at the house where they were scheduled to tutor a middle-school student and were waiting in their car. After a neighborhood security guard drove by twice, each time slowing to peer through the window of their car, they called to ask what they should do.

I told them to leave their location and drive to a nearby coffee shop until it was time for their tutoring session to begin. Before returning, I instructed them to call their tutee and ask her to meet them outside the front gate. That way, the tutee could escort them inside the house and rebut the presumption that my child was "out of place," racially trespassing in a neighborhood that read their presence as suspect.[220] I also told them to call me once they had parked, to confirm with me that their tutee was waiting outside the gate, and to keep me on the line until they were safely inside.

Some readers may be alarmed that my parental guidance, the version of "the talk" I dispensed that day, operated at the interstices of life and death. What strikes me the most is the ordinariness of that necrological reality.

I am not saying that I was numb to the ways in which my child's predicament was fraught with the possibility of racial violence. Although I do not recall consciously thinking about Trayvon Martin, the unarmed Black seventeen-year-old boy who was killed by a neighborhood watch person only eight years earlier, the circumstances of his death were undoubtedly on my mind.[221] But what feels most salient about the episode as I reflect on it now, is how "normal" and "natural"—how ordinary and pro forma—it felt to advise my child as I did.

That was not the first time I delivered "the talk" to them, and it would not be the last. Like many Black parents, I have dispensed "the talk" over breakfast, folded it into an off-to-work hug, and threaded it through otherwise unremarkable moments of care. The very forms in which the talk is given—its routinization, its informality—can

---

220 For a discussion of how the notion of being "out of place" has played a role in shaping Fourth Amendment law, see Capers, *Policing, Place, and Race*, *supra* note 78, at 66–70. *See also* Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 Iowa L. Rev. 1113 (2016) (comparing the murders of Emmett Till and Trayvon Martin to demonstrate a cultural shift from outward acts of racial violence to still harmful "race neutral" actions).

221 Seventeen-year-old Black teenager Trayvon Martin was followed, shot, and killed by neighborhood watchman George Zimmerman in Sanford, Florida, on the night of February 26, 2012. More than six weeks later, Zimmerman was arrested and, eventually, tried for second-degree murder, but he was ultimately acquitted. *See* Karen Grigsby Bates, *A Look Back at Trayvon Martin's Death, and the Movement It Inspired*, NPR (July 31, 2018, at 7:34 ET), https://www.npr.org/sections/codeswitch/2018/07/31/631897758/a-look-back-at-trayvon-martins-death-and-the-movement-it-inspired [https://perma.cc/L7LU-2V6F] (discussing the political commentary surrounding George Zimmerman's trial and how it led to the Black Lives Matter movement).

partially obscure the vulnerability it is meant to mitigate. Even "the talk," and the various ways in which it is given, can sanitize, or at least fail to capture, the existential violence that necessitates it.[222]

> Giving "the talk" can—
> and probably sometimes must—
> feel like packing your child's lunch
> before sending them off to school.
> It is an "ordinary" thing.
> One simply just does
> to equip a child
> for the day.
> For is it really possible
> to always understand
> that one's child
> can be killed
> by anti-Blackness?
> To always believe
> that the threat
> can be realized
> anywhere?
> To always accept
> that the threat
> cannot be eliminated?
>
> (An Ordinary Talk)

Parenting, here, is lived and managed at the intersection of pragmatics and anticipatory mourning: the ordinary labor of instruction shadowed by the extraordinary fact that it cannot outrun what threatens it.

In that regard, "the talk," the self-fashioning, and the modalities of speech it produces is a window on how Black life is organized and constrained long before any formal encounter with law enforcement. It is a preemptive way of being, a way of being that normalizes anticipatory

222 Commenting on receiving a version of "the talk" as a young child, New York Times Magazine writer Wesley Morris notes that "[a]s a boy, I was told the story [of Emmett Till's murder] the way you warn a child about traffic lights, seatbelts, and talking to strangers." Wesley Morris, *Last Taboo: Why Pop Culture Just Can't Deal with Black Male Sexuality*, N.Y. Times Mag. (Oct. 27, 2016), https://www.nytimes.com/interactive/2016/10/30/magazine/black-male-sexuality-last-taboo.html [https://perma.cc/6JEQ-W4CE] (discussing the treatment of black sexuality in entertainment media). His account is another example of how "the talk" can obscure the very violence it means to prevent. *See id.*

dread, a way of being built upon prophylaxis built upon prophylaxis,[223] a way of being that sees one's children as prefigures of premature death—not as accident, not as anomaly, but as a risk their bodies carry into the world. "[E]ven in the womb, the Black body is already *against the law*."[224]

Even in the womb. To write that and *really* think it are not one and the same thing. As Elizabeth Alexander explains, "[t]he conundrum of being unable to 'bear to think about' something which is 'always present to my mind' is precisely the legacy wrought by state-sanctioned violence against African Americans . . . ."[225]

That conundrum is not contained within the families who deliver "the talk"; it is distributed across Black life as a condition of collective vulnerability. The pain at issue, like racism more generally, is a lived *and* a vicarious experience.[226]

Part of being a Black person includes feeling and sharing in the racial pain of others. Our "linked fate"[227] is such that "*individual* Black bodies" have "*group* representational currency,"[228] rendering Black people "representatively present"[229] in every act of anti-Blackness. That presence is a way of saying not only *there but for the grace of God I go*, but also *there because of the social construction of Blackness I representatively am*.

This logic of representative presence sometimes surfaces in public speech before it ever enters the classroom. I have never explicitly invoked the language of representative presence in my teaching, yet students have likely encountered versions of the idea elsewhere.

---

223 *Cf.* Minnick v. Mississippi, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting) (criticizing what he perceived to be an expansion of *Miranda*'s protections on the view that that expansion "is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement").

224 George Yancy, Black Bodies, White Gazes: The Continuing Significance of Race in America, at xxxv (2nd ed. 2016).

225 Elizabeth Alexander, *"Can You Be Black and Look at This?": Reading the Rodney King Video(s)*, 7 Pub. Culture 77, 85 (1994).

226 For a compelling theory of "vicarious marginalization," see Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2104–14 (2017). Focusing specifically on policing, Bell deploys vicarious marginalization to capture "the idea that *other* people's negative experiences with the police, whether those people are part of one's personal network or not, feed into a more general, cultural sense of alienation from the police." *Id.* at 2105. According to Bell, vicarious marginalization "is ultimately about how people draw upon information other than their own experiences as police targets or suspects to understand their group's common experience with law enforcement." *Id.* at 2107.

227 *See* Michael C. Dawson, Behind the Mule: Race and Class in African-American Politics 77–87 (1995) (using the concept of "linked fate" to explain African American perceptions of racial interests).

228 Devon W. Carbado, *Strict Scrutiny & the Black Body*, 69 UCLA L. Rev. 2, 11 (2022) [hereinafter Carbado, *Strict Scrutiny*].

229 *Id.* (providing an example of representative presence).

Consider then-President Obama's remark that "if I had a son, he'd look like Trayvon [Martin]."[230] Embedded in that statement was a second, unstated claim: "If I had a son, he could die like Trayvon Martin." Within regimes of racial domination, acts of anti-Black violence anywhere implicate and threaten Black people everywhere. In a world structured this way, neither Black faculty nor Black students can easily distance themselves from, or existentially step outside of, the case-after-case narratives through which Criminal Procedure recounts the many ways Black people are racially and constitutionally policed.

Of course, vicarious racial sensation is not the same as direct experience. But it is part of the same racial economy. Particular acts of anti-Black violence are inseparable from the historical and contemporary processes through which Black people, as a group, have been raced and rendered racially legible by the violence we endure. As Patrice Douglass and Frank Wilderson argue, "violence [for Black people is] located at the constitution of being."[231] It "is a structural necessity to the constitution of blacks."[232] Because racial violence is part of a broader "racial naturalization" phenomenon through which people of African descent become and are intelligible as Black Americans,[233] it is also transgenerational.

The historical existence of racial violence creates ties that bind Black people from chattel slavery to the present. As Deborah Archer explains, "[e]very generation has collectively and publicly grieved racialized brutality and the loss of Black lives."[234] As such, racial violence is an intersubjective experience. Consequently, even when specific instances of anti-Black violence are not (in some literal sense) happening to us, we can feel the pain our representative presence produces.

This helps clarify Richard Wright's observation that "[t]he things that influenced my conduct as a Negro did not have to happen to me directly; I needed but to hear of them to feel their full effects in the deepest layers of my consciousness."[235] For Wright, the racial violence he had not personally witnessed exerted a more powerful disciplinary

---

230 Byron Tau, *Obama: 'If I Had a Son, He'd Look Like Trayvon*,' Politico44 Blog (Mar. 23, 2012, at 10:24 ET), https://www.politico.com/blogs/politico44/2012/03/obama-if-i-had-a-son-hed-look-like-trayvon-118439 [https://perma.cc/V3RT-T2VD].

231 Patrice Douglass & Frank Wilderson, *The Violence of Presence: Metaphysics in a Blackened World*, 43 Black Scholar 117, 119 (2013).

232 *Id.* at 117. According to Douglass and Wilderson, "whereas some groups of people might be the recipients of violence, after they have been constituted as people, violence is a structural necessity to the constitution of blacks." *Id.*

233 On the theory of racial naturalization, see generally Devon W. Carbado, *Racial Naturalization*, 57 Am. Q. 633 (2005).

234 Archer, *supra* note 202, at 959.

235 Richard Wright, Black Boy: A Record of Childhood and Youth 150–51 (1945).

force than violence he directly knew.[236] Representative presence thus functions as both epistemology (an experience through which one learns, and not just feels, the boundaries of Blackness) and as governance (a form of racial discipline that reproduces the racial hierarchy without requiring direct encounters).

Representative presence is also, as I suggested earlier, constitutive of racial pain. As Wright himself observed: "I had never in my life been abused by whites, but I had already become as conditioned to their existence as though I had been the victim of a thousand lynchings."[237] Wright is naming a form of racial pain, a pain that does not depend on direct injury, a pain rooted in what we might call "vicarious death."

That death, as David Marriott poignantly notes, is not singular or final. It is a death in which "the Black man can die and die and die again"[238]—a dying that does not culminate in closure, but instead opens onto further injury. One does not survive this dying so much as learn how to live through it: under conditions that presuppose its recurrence. Racial pain is iterative rather than episodic. It accumulates through repetition, anticipation, and the ever-present possibility of loss that never fully recedes.

4. The Ordinary Force of Racism

It is difficult to encounter Marriott's account of repeated dying—Wright's sense of having lived as though the victim of "a thousand lynchings,"[239] Marriott's insistence on death without end—and not reach

---

236 *Id.* at 151 (observing that "the white brutality that I had not seen was a more effective control of my behavior than that which I knew").

237 *Id.* at 84.

238 *See* David Marriott, On Black Men 10 (2000) (discussing photography used during lynchings of black men and how it informed the works of Black writers, including Wright).

239 I recognize that there are critiques, including from a progressive perspective, about the mobilization of the concept of trauma in discourses about inequality. One important concern is that when we employ the language of trauma and "encourage individuals and communities to understand themselves primarily through a lens of . . . trauma," we both invite people to have "wounded attachments" and elide the structural features of injustice. Noa Ben-Asher, *Trauma-Centered Social Justice*, 95 Tul. L. Rev. 95, 139–40 (2020). Noa Ben-Asher rehearses precisely a version of this argument. In a thoughtful discussion, Ben-Asher foregrounds the multiple ways in which trauma is shaping social justice advocacy and worries about the "hidden costs" of that development, *id.* at 99, including creating "wounded attachments." *Id.* at 140. But there is no necessary tension between articulations of trauma and structural accounts of race. Nor do invocations of trauma inevitably lead to wounded attachments. Relevant to both of these points is Angela Harris and Monica Batra Kashyap's contention that a crucial benefit of mobilizing the concept of trauma is that "[t]he language of trauma invites us to ask not 'what's wrong with you?' but 'what happened to you?'" Angela P. Harris & Monika B. Kashyap, *From Trauma to Transformation: Trauma-Informed Pedagogy in Law School*, 27 U. Pa. J.L. & Soc. Change 1, 18 (2023). On this view, the concept of trauma presupposes a structural analysis. None of this means that mobilizations of the language of

for the language of trauma. The idiom seems ready, even compelled. Yet it is here that the limits of particular iterations of trauma discourse (not the limits of trauma discourse per se) begin to surface.

Many accounts of trauma presume a discrete triggering event followed by a symptomatic response—an injury that interrupts an otherwise stable life.[240] Framed this way, trauma risks obscuring what is most salient about racial subordination: that its violence need not arrive as rupture at all. It can be ordinary, ambient, anticipatory, woven into the conditions of living rather than erupting against them.

In the context of racial subordination, those conditions need not be tethered to identifiable moments of shock or conventional symptomology. Such an approach fails to capture the fact that the history of Black people in the United States includes living with racial violence and discrimination as ordinary—and indeed constitutionalized—features of social life.

Racism has always been more than an identifiable event, more than a horrific moment, more than a rupture. Racism has been a structural determinant of Black being.[241] Events-based conceptualizations of racial trauma miss that structural determinacy. Such framings mistake discrete incidents of racism for racism itself and misrepresents the chronic, ambient nature of racism as intermittent harm. The result is an exceptionalist framing of racism that obscures its historical ordinariness and pervasive presence.

To see how racism has operated as an ordinary feature of social life, one need only recall the constitutional and social standing of slavery and Jim Crow in their respective eras. Under both regimes, the legal

---

trauma are per se unproblematic. Further along in this Article, I will explain how trauma discourse can indeed obscure a fundamental feature of racism—its ordinariness.

240 *See, e.g.*, Mohamed Ali Zoromba, Abeer Selim, Ateya Megahed Ibrahim, Mohamed Gamal Elsehrawy, Sameer A. Alkubati, Ali D. Abousoliman & Heba Emad El-Gazar, *Advancing Trauma Studies: A Narrative Literature Review Embracing a Holistic Perspective and Critiquing Traditional Models*, 10 HELIYON 1, 2 (2024), https://doi.org/10.1016/j.heliyon.2024.e36257 [https://perma.cc/P32Z-ZKE9] ("The term [trauma] . . . derive[s] from the Greek word 'trauma,' which means a wound, hurt, or injury. In psychological terms, trauma refers to an experience . . . that overwhelms an individual's ability to cope[,] . . . manifest[ing] [as] . . . intrusive thoughts, nightmares, flashbacks, emotional numbing, hyperarousal, and avoidance of reminders associated with the traumatic event.") (citations omitted); Constance J. Dalenberg, Elizabeth Straus & Eve B. Carlson, *Defining Trauma*, *in* APA HANDBOOK OF TRAUMA PSYCHOLOGY: VOL. 1 FOUNDATIONS IN KNOWLEDGE 21–23 (Steven N. Gold ed., 2017) (suggesting that many clinicians describe trauma in relationship to cognitive and emotional reaction to an event).

241 Inside and outside of law, scholars have conceptualized racism as a structural phenomenon. *See, e.g.*, EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2003) (examining "color-blind racism" as the dominant racial ideology maintaining racial inequality today).

system treated Black people's subordination as legitimate and normal—incidental to what were otherwise understood to be lawful and proper arrangements of society.[242] Racial subordination was not a deviation from the social order; it was part of its design.

These examples illustrate that the ordinariness of racism has a legal history that bears on racism's relationship to trauma. If slavery and Jim Crow are not simply past horrors, if both were routine rather than exceptional experiences for Black people, there is every reason to believe that racial trauma exists beyond moments where horror is recognizable as such. Because racial subordination has been organized as an ordinary, legally structured feature of social life, locating trauma only in discrete moments of shock miss the possibility that structures themselves can be traumatizing.

Consider, in this light, the brutal murder of Emmett Till.[243] The "collective trauma" his murder produced[244] occurred within—and was made possible by—the normalized racial hierarchy of the Jim Crow regime. The "ordinary" dimensions of Jim Crow—the presumption of Black inferiority, the permissibility of white discipline, and the demand that Black people remain in "their place"—made the "extraordinary" violence of Emmett Till's murder thinkable and doable.[245]

---

242 With respect to legal treatment under slavery, see Dred Scott v. Sandford, 60 U.S. 393, 407 (1857) (presupposing the constitutionality of slavery and concluding that Black people were "so far inferior, that they had no rights which the white man was bound to respect; and that [they] might justly and lawfully be reduced to slavery for [their] benefit"). With respect to legal treatment under Jim Crow, see Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (ruling that the concept of "separate but equal" races was constitutional).

243 For a recent engagement of why Emmett Till's murder continues to capture the nation's collective imagination, see generally Elliott J. Gorn, Let the People See: The Story of Emmett Till (Oxford Univ. Press 2018).

244 On the theory of "collective trauma," see Gilad Hirschberger, *Collective Trauma and the Social Construction of Meaning*, 9 Frontiers in Psych. 1 (2018). According to Hirschberger, we should think of "collective trauma" as "the psychological reactions to a traumatic event that affect[s] an entire society; it does not merely reflect an historical fact, the recollection of a terrible event that happened to a group of people." *Id.* at 1. Instead, Hirschberger contends, "[i]t suggests that the tragedy is represented in the collective memory of the group, and like all forms of memory it comprises not only a reproduction of the events, but also an ongoing reconstruction of the trauma in an attempt to make sense of it." *Id.* For framings of Emmett Till's murder as trauma, see Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 Socio. Theory 335, 337 (2016) (arguing that the Black community experienced collective and cultural trauma in response to the not guilty verdict in Till's case).

245 Particularly relevant here is the fact that Jim Crow presupposed (and in some ways was managed by the existence of) private racial violence, including lynchings. For a productive account of lynchings and the way in which the phenomenon implicated law and legal institutions, see Sherrilyn A. Ifill, On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century 74–104 (2007).

Till's murder did not introduce trauma into the Jim Crow experience. Trauma was already there. The absence of constant triggering events or recognizable symptoms in Black life under Jim Crow should not be mistaken for the absence of trauma.

That trauma did not end in 1950s America. It carried forward, embedding itself into the interior spaces of Black life. Reflecting on the ordinary horror of Emmett Till's death as it settled into her grandmother's home, Cheryl Harris recalls: "I can still see Emmett Till's mangled body on the cover of the magazine that lay on my grandmother's living room table—a frozen horror of the chaos of unbridled white supremacy that screamed danger even in the quiet of her orderly house."[246] Harris's grandmother's living room was made to carry—as part of its everyday order—the extraordinary trauma of Emmett Till's murder.

In Harris's grandmother's home, trauma did not arrive as disruption; it became part of the ordinary. Something that settled into the home. Something the home was made to hold. Something as ordinary as furniture.

The relationship between trauma and racism I am describing builds on Angela Onwuachi-Willig's compelling concept of "the trauma of the routine."[247] That concept rests on two central insights. First, trauma need not be confined to individual people; it can operate on a collective or cultural level.[248] Second, trauma does not arise only from shocks to the social order or departures from routine. It can be produced through the routine[249]—"the continuation of what is considered to be a given or expected subordination."[250]

The historical operation of racism in the United States fits squarely within Onwuachi-Willig's framework. Racism has long functioned as a collective and "cultural" phenomenon, rather than merely the product of discrete bad actors.[251] For Black people, it registers less as a disruption than as part of the social atmosphere. Racial trauma, accordingly, does not depend on exceptional moments of violence alone, but on the sustained presence of racial hierarchy as a background condition of living.

---

246 Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings*, 68 CHI.-KENT L. REV. 331, 340 (1992) (recounting her experience as a Black woman law professor).

247 Onwuachi-Willig, *supra* note 244, at 335.

248 *Id.* at 338.

249 *Id.* at 336.

250 *Id.*

251 For the classic critique of that "perpetrator" conception of racism, see Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

None of this is to suggest that the conventional symptoms of trauma were therefore absent from slavery or Jim Crow, or that they are absent from contemporary forms of racial subordination. I am saying: Focusing primarily on those symptoms obscures how racism has operated as an "ordinarilizing" force—rendering its effects, including deeply unequal distributions of life chances and vulnerability, natural and unremarkable features of the social landscape. The point here is not only that every Black person in the United States likely carries a racism-survivor story with which they have ordinarily lived. The point is also that racism is more than something that happens to Black people. It is as a condition of Black existence.

Consider what Black people are expected to confront, every day, as "normal" and "ordinary" features of social life. American society carries on in the face of grossly disproportionate stops, frisks, arrests, beatings, killings, and imprisonment of Black people;[252] in the face of Black marginalization in education, including under-resourced schools, racially segregated classrooms,[253] and curricular regimes that elide, distort, or diminish Black experience, ignore or delegitimize Black knowledge production, and acquiesce in dehumanizing representations of Black people.[254] These conditions do not register as crises. They

---

[252] *See, e.g.*, Sent'g Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system [https://perma.cc/N52P-MEZ9]; *Racial and Ethnic Disparities: Research and Statistics on Racial and Ethnic Disparities in the Criminal Legal System*, Prison Pol'y Initiative, https://www.prisonpolicy.org/research/racial_and_ethnic_disparities [https://perma.cc/G4DF-P4LV] (listing sources showing disproportionalities in justice involvement for people of color, particularly Black people); Emily Widra, *Despite Fewer People Experiencing Police Contact, Racial Disparities in Arrests, Police Misconduct, and Police Use of Force Continue*, Prison Pol'y Initiative (Dec. 19, 2024), https://www.prisonpolicy.org/blog/2024/12/19/policing_survey_2022 [https://perma.cc/77GA-5WVW] (noting that racial disparities in police interactions, misconduct, and use of force remain pervasive).

[253] Gary Orfield & John T. Yun, Resegregation in American Schools (UCLA: The C.R. Project ed. 1999) (demonstrating that schools in the South are resegregating and Black students in the suburbs experience serious segregation); Gary Orfield, Schools More Separate: Consequences of a Decade of Resegregation (UCLA: The C.R. Project ed. 2001) (noting that segregated schools are highly unequal and racial segregation relates to poverty-driven segregation and educational inequality). Erika Wilson's scholarship has been particularly important in demonstrating the nexus between contemporary school district lines and historical patterns of racial violence. *See* Erika K. Wilson, *White Cities, White Schools*, 123 Colum. L. Rev. 1221 (2023).

[254] There is broad literature on the ways in which the K-12 curriculum has socialized students into adopting problematic understandings of Black people and Black history. *See, e.g.*, Royel M. Johnson, Jessica T. Decuir-Gunby, Alex J. Kenney & Tr'Vel Lyons, *Black Student Belonging in K-12 Schools: Implications for Policy and Practice Amid Attacks on Diversity, Equity, and Inclusion*, 19 Soc. Issues & Pol'y Rev. 1 (2025) (examining factors at the instructional (curriculum, pedagogy, and teacher expectations) level that create feelings of unbelonging among Black students); Joi A. Spencer & Kerri Ullucci, Anti-Blackness at

are absorbed into the background of what counts as ordinary social functioning. Nothing demands emergency. Everything persists. Russell Robinson calls a version of this problem "perceptual segregation": the racially asymmetric frameworks through which the same conditions read as crisis to some and as normalcy to others.

At the same time, Black people's underrepresentation in positions of power—across government, media, and corporate leadership[255]—and our overrepresentation in positions of marginality—among the poor, the homeless, and the disenfranchised[256]—remain largely unremarkable, except insofar as they are routinely justified as the natural expression of inherent inferiority,[257] cultural pathology,[258] or individual choice.[259]

SCHOOL: CREATING AFFIRMING EDUCATIONAL SPACES FOR AFRICAN AMERICAN STUDENTS (2022) (analyzing anti-Blackness in schools through overt hostility, ignoring Black intelligence, omissions and whitewashing in curricula, adultification of Black children, and centering athleticism over intellect).

255 *See, e.g.*, Emily Tomasik & Jeffrey Gottfried, *U.S. Journalists' Beats Vary Widely by Gender and Other Factors*, PEW RSCH. CTR. (Apr. 4, 2023), https://www.pewresearch.org/short-reads/2023/04/04/us-journalists-beats-vary-widely-by-gender-and-other-factors/#journalists-beats-vary-somewhat-by-race-ethnicity [https://perma.cc/A9D9-9DGG] (showing that only six percent of reporting journalists are Black); CTR. FOR AM. WOMEN & POL., BLACK WOMEN IN AMERICAN POLITICS 2025 (2025) (noting that Black women remain underrepresented at every level of government); U.S. BUREAU OF LAB. STATS., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2024), https://www.bls.gov/cps/cpsaat11.htm [https://perma.cc/7NQG-FFL2] (showing that Black people are underrepresented in the management, business, and financial operations occupations).

256 *See, e.g.*, Molly K. Richard, *Homelessness and Race: The Impact of Structural Conditions on Black, White, and Latine Homelessness*, SOC. PROBS. 1 (2025), https://academic.oup.com/socpro/advance-article/doi/10.1093/socpro/spaf044/8257659 [https://perma.cc/4BKR-3XR7] (showing that Black people are at greatest risk of homelessness and that there is a strong positive association between rent and Black unsheltered homelessness, and between income inequality and Black homelessness); FED'N OF PROTESTANT WELFARE AGENCIES, A LOOK AT THE MARCH ON WASHINGTON 60 YEARS LATER: DREAMS AND PROMISES YET TO BE REALIZED (2024) (explaining that Black people experience higher unemployment rates and lower wages, a wealth gap and pay disparities, greater student loan debt, greater childhood poverty, and greater incarceration).

257 The book *The Bell Curve* is one of the most pernicious articulations of this point. RICHARD J. HERRNSTEIN & CHARLES A. MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994).

258 The Moynihan Report remains an important foundational document for legitimizing ideas about Black cultural pathology. For race and gender critiques of this report, see ROBERTS, *supra* note 130, at 16–17 (criticizing Moynihan's endowment of poor Black women, the most subordinated members of society, with the power of a matriarch); Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 163 (pointing to the under-criticized sexism in Moynihan's report).

259 Arguments about Black people's agency and individual responsibility often emerge in discourses about Asian Americans as model minorities. The central claim is that if Black people were more like Asian Americans with respect to the choices they exercise in life, they would not experience the forms of inequality they experience today. For engagement and critiques of this course, see Elaine M. Chiu, *The Model Minority Victim*, 65 SANTA CLARA

Which is to say, Black people live alongside the dense field of "blame the survivor" narratives in which racial inequality is attributed not to racism, but to Black people themselves.[260]

We live alongside persistent negative stereotypes—of criminality, dangerousness, and intellectual deficit[261]—mythologies repeated so often that they assume the status of common sense.

We live alongside laws and policies that hollow out the achievements of the civil rights movement[262] and render efforts to address racial inequality constitutionally suspect.[263]

We live alongside the experience of being simultaneously hyper-visible and hyper-invisible, a "paradoxical seen invisibility," that renders us seen when we do not wish to be seen and unseen when recognition is demanded.[264]

We live alongside accumulated collective memories not exhausted by particular events but anchored in existence.

We live alongside the silencing, disciplining, and—quite literally—policing of Black people who attempt to name and disrupt these "ordinary" features of Black life.[265]

L. Rev. 451 (2025); Lalaine Sevillano & Kirin Macagupay, *Understanding and Dismantling the "Model Minority" Stereotype*, *in* Addressing Anti-Asian Racism with Social Work Advocacy and Action (Meirong Liu & Keith T. Chan eds., 2024); Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. Irvine L. Rev. 947 (2013); Robert S. Chang & Rose Cuison Villazor, *Testing the 'Model Minority Myth': A Case of Weak Empiricism*, 101 Nw. U. L. Rev. 101 (2007).

260 One standard articulation of this point pertains to mass incarceration: If Black people committed fewer crimes, they would not be mass incarcerated. *See, e.g.*, Charles D. Stimson & Zack Smith, *The Myth of Mass Incarceration*, 353 Heritage Found. 10 (2024) (noting that "black individuals comprise a higher percentage of criminal offenders than other racial demographic groups" and that "[p]redominantly black neighborhoods . . . have a higher frequency of crimes and a higher concentrations [sic] of criminals"); Michael Rushford, The Myth of Over-Incarceration 3 (2015) (noting that "more blacks and Latinos are in state and federal prisons because they commit more crimes than other races").

261 *See, e.g.*, Rachel D. Godsil, *Promoting Fairness? Examining the Efficacy of Implicit Bias Training in the Criminal Justice System*, *in* Bias in the Law: A Definitive Look at Racial Prejudice in the U.S. Criminal Justice System 207 (Joseph Avery & Joel Cooper eds., 2020); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1135 (2012).

262 *See, e.g.*, Kimberlé W. Crenshaw, *This Is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. Rev. 1702 (2022) (suggesting that the entire civil rights architecture is under attack).

263 Devon W. Carbado & Russell K. Robinson, *SFFA:* Bakke*'s Chickens Coming Home to Roost*, 113 Calif. L. Rev. 1031 (2025) (discussing how the strict scrutiny of affirmative action jurisprudence has been deployed to render any form of race-conscious racial remediation constitutionally suspect).

264 This problem of hyper visibility and hyper invisibility figures prominently in Black articulations of the self. *See, e.g.*, Patricia J. Williams, Seeing a Color-Blind Future: The Paradox of Race (1997).

265 *See, e.g.*, Chaz Arnett, *Race, Surveillance, Resistance*, 81 Ohio St. L.J. 1103 (2020) (describing the various ways in which technology has been employed to police Black political

None of these dimensions of Black living appear in law, social policy, or public discourses as extraordinary ways of being.[266] They are treated instead as normal life[267]—an existential "what is," if not a "what is supposed to be," for Black people.[268] The ordinariness of these conditions allows them to persist without demanding sustained explanation or repair.

Who among us genuinely believes that Black racial inequality is on the fast track—or any meaningful track—to eradication? Even without embracing Derrick Bell's claim that racism is permanent,[269] it is difficult to sustain the argument that Black inequality will disappear anytime soon. So longstanding and entrenched is that inequality that contemplating a society without it may lie beyond the limits of many people's racial imagination.

Even if such a society were imaginable, the historical record is clear: The United States has, for generations—indeed, since the founding—lived with racial subordination. As a nation, we have had very little difficulty carrying on, conducting our domestic and international affairs, against the backdrop of all the ways in which Black people historically have been the "faces at the bottom of the well."[270] In that sense, the

---

mobilization against police violence) [hereinafter Arnett, *Race*]; Chaz Arnett, *Black Lives Monitored*, 69 UCLA L. Rev. 1384 (2023) (same); *see also* Omavi Shukur, *The Criminalization of Black Resistance to Capture and Policing*, 103 B.U. L. Rev. 1 (2023) (describing the development of antiresisting laws and the anti-Black sentiment under which they were created). For a historical take on the policing of Black dissent, see Nina Farnia, *Imperialism and Black Dissent*, 75 Stan. L. Rev. 397 (2023); Isaiah Strong, Note, *Surveillance of Black Lives as Injury-in-Fact*, 122 Colum. L. Rev. 1019 (2022).

266 I should add here that each of them exists alongside, is facilitated by, and shores up the nation's commitment to colorblindness. One might think that the items on the list would disrupt or undermine the view that we are a colorblind nation. But because colorblindness is tethered to a narrow conception of race and racism (roughly, we are a colorblind nation so long as we prohibit *individuals* from *intentionally discriminating* against other *individuals* on the basis of race), none of what I have listed is a threat to or sits in tension with colorblindness. *See* Gotanda, *supra* note 80 (offering one of the foundational critiques of colorblindness and linking it to different conceptions of race). For an effort to link colorblindness to the intentional model of discrimination, see Carbado & Robinson, *supra* note 263.

267 *Cf.* Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law 11 (2011) (explaining how administrative governance exacerbates the problems faced by marginalized communities rather than being representative of the natural order, using the work of Critical Race Theorists and connecting it to the issues faced by transgender people).

268 In making this point, I am not saying that Black people have not resisted racism. Of course we have resisted, and we continue to do so.

269 Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992).

270 *Id.* I don't mean to be advancing a once-and-for-all hierarchy of oppression argument here. *See* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. Rev. 1283 (2002) (discussing the epistemic difficulties of realizing the antiracist commitment to "look to the bottom"). For a powerful articulation of why it is nevertheless important to adopt a "looking to the

question is not whether we can continue to live with Black racial inequality, but whether we can live without it.

> We the Black people
> of the United States
> are needed.
>
> "If we were not here,
> we would have
> to be invented."[271]
>
> No anti-Blackness,
> no Constitution
> as we have known it.
>
> No anti-Blackness,
> no nation[272]
> as we have known it.
>
> No anti-Blackness,
> no American democracy
> as we have known it.
>
> (Needed)

What happens to Black people in the United States is rarely sufficient to engender a national crisis or to inflict reputational harm to the nation.[273] Far from it, Black people's pursuit of racial equality has always had to contend with what I have elsewhere called a "racial justice counter-majoritarian difficulty."[274] By that I mean, "virtually every

bottom" sensibility in our social change advocacy, see Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

271 *See* Spillers, *supra* note 156, at 65 (suggesting that "[m]y country needs me, and if I were not here, I would have to be invented").

272 FRANK B. WILDERSON III, AFROPESSIMISM 196 (2020).

273 Of course, there have been moments in which particular forms of racial inequality have created difficulties for the United States' geopolitical aspirations. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (suggesting that one of the reasons why *Brown v. Board of Education* repudiated racial segregation was that the State Department was worried about how the violence of Jim Crow was impacting the United States' interest in fighting the Cold War); *see also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

274 Carbado, *Police Power Abolition*, *supra* note 16, at 706.

major racial justice reform in this country was effectuated without (not because of) nationwide buy-in."[275] Because "[t]he nation never seems to be ready for the racial justice transformation it needs,"[276] Black racial inequality has always been a feature of social life, from slavery to the present.

It bears emphasizing that "freedom" and "enslavement" long functioned as uncontradictory commitments in the United States. Concepts and practices that should be mutually exclusive—"liberty" and "mass incarceration," or "equality" and "racial segregation"—have coexisted with remarkable ease. Consequently, the mass incarceration of Black people over decades has not meaningfully unsettled the nation's self-conception as committed to liberty, nor has persistent racial segregation disrupted its professed commitment to equality.

The work Blackness *cannot* perform in these contexts explains why—despite the familiar characterization—the mass incarceration of Black people has never fully established the United States, at home or abroad, as the "mass incarceration capital of the world."[277] Nor has that mass incarceration been widely taken to signal a crisis in American democracy. Because Black bodies lack the representative capacity to anchor a national narrative of democratic failure, their confinement sits comfortably within the bounds of American normalcy, as do contemporary forms of racial segregation.

Unsurprisingly, then, our starting point for engaging race in the United States is not that it *must be* painful or traumatic for Black

---

275 *Id.*

276 *Id.*

277 Raphael G. Warnock, *Let My People Go*, Harv. Divinity Bull. (2020), https://bulletin.hds.harvard.edu/let-my-people-go [https://perma.cc/78SK-RKQ6]; *see, e.g.*, Emily Widra, *States of Incarceration: The Global Context 2024*, Prison Pol'y Initiative (June 2024), https://www.prisonpolicy.org/global/2024.html [https://perma.cc/5HGS-LK8M] ("The U.S. has the highest incarceration rate of any independent democracy on earth . . . ."); Ashley Nellis, *Mass Incarceration Trends*, Sent'g Project 1 (2024), https://www.sentencingproject.org/app/uploads/2024/05/Mass-Incarceration-Trends.pdf [https://perma.cc/9MES-KMJT] ("The United States is unparalleled historically and ranks among the highest worldwide in its dependence on incarceration. . . . [N]early two million people, disproportionately Black, are living in prisons and jails instead of their communities."); Sandro Galea, *Addressing the Horrors of Mass Incarceration*, B.U. Sch. of Pub. Health (Sep. 23, 2022), https://www.bu.edu/sph/news/articles/2022/addressing-the-horrors-of-mass-incarceration [https://perma.cc/W3K6-MVN6] (reporting the disproportionate impact of mass incarceration on Black communities); James Cullen, *The History of Mass Incarceration*, Brennan Ctr. for Just. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration [https://perma.cc/L5UR-V4HD] (describing the policies underlying mass incarceration in the United States); Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, Population Reference Bureau (Aug. 10, 2012), https://www.prb.org/resources/u-s-has-worlds-highest-incarceration-rate [https://perma.cc/7WGN-5UL9] (describing the ways that disproportionate incarceration impacts measurements of progress within Black communities).

people to confront the subordinating dimensions of Black life. On the contrary, Black people are expected to conduct ourselves at work and in life as though those conditions were natural, normal, and legitimate. Embedded in that expectation is a demand for self-governance and self-discipline.

We cannot scream. We cannot shout. We cannot even complain.

We are to live as if the subordinating features of Black life require no explanation, no diagnosis, and no contestation.

We are to adjust our lives to racism rather than confront it.

We are to make "reasonable accommodations" to racism.

We are to permit those "reasonable accommodations" to settle into our terms of existence—structuring where we go, how we move, what we wear, how we speak, when we speak, and what we say.

We are to let that racism live with us undisturbed, troubling it only when it takes the form of explicit and intentional forms of bigotry.

The repertoires of self-fashioning "reasonable accommodations" are neither responses to overt, race-conscious commands nor imposed through explicit instruction.[278] They emerge instead as practical necessities in a world in which racism self-presents as background rather than as event. The ordinariness of racism generates habits, cautions, calculations, prophylactics through which Black people learn how to live with, and within, conditions we are not expected to name.[279]

We are to fully inhabit what Etienne Toussaint calls our "American skin."[280]

With respect to racism, we are to let America be America.

Living in this way does not blunt manifestations of trauma; it deepens the structure of the phenomenon. The historically normalized character of racism in the United States suggests that Black people may experience lives of traumas within traumas: Injuries produced

---

278 *See* Njeri Mathis Rutledge, *Walking the Tightrope: Reflections of a Black Female Law Professor*, 43 Campbell L. Rev. 233, 238 (2021) ("In spite of . . . life experiences, when a fellow law professor asked me if I had ever personally experienced racism, I instinctively and without thinking denied its existence in my life. I realized in that moment that I had normalized and ultimately minimized my experiences as a coping mechanism."); *see also* Njeri Rutledge, *I Thought I Never Personally Experienced Racism. Then I Realized I Just Normalized It.*, USA Today (Sep. 15, 2020, at 08:23 ET), https://www.usatoday.com/story/opinion/voices/2020/09/15/racism-every-day-black-women-column/5793258002 [https://perma.cc/9WK7-V5NN] (discussing the author's realization that she was normalizing the racism-related trauma she regularly experiences).

279 Girardeau Spann makes a related argument when he suggests that "we live in a racially discriminatory culture." Girardeau A. Spann, *Race Ipsa Loquitur*, 2018 Mich. St. L. Rev. 1025, 1091–93 ("The racially disparate impact of the manner in which we have allocated virtually all important societal resources simply speaks for itself. Nevertheless, we remain intent on denying that any significant amount of invidious racial discrimination persists.").

280 *See* Etienne C. Toussaint, *Blackness as Fighting Words*, 106 Va. L. Rev. Online 124, 133–35 (2020) (linking racism to the idea of "living in your American skin").

by moments that register as shocks to the system, nested within the more pervasive trauma generated by the routinized existence of racial hierarchy. Understood in that way, extraordinary acts of racial violence do not stand apart from ordinary racial life; they unfold within it, intensifying conditions that were already there.[281]

To think about what I am saying another way, anti-Blackness is not merely parasitic on Black life; it is ontologically dependent on it.[282] Black marginalization—and Black death—are not accidental byproducts of racial hierarchy, but conditions of its reproduction. On this view, the marginalization and violence that structure Black life do not sit at the edges of the social order. They are a part of its ordinary functioning. Because racism has operated as *the* social order, it does not live only in rupture. It lives in normality.

---

[281] Something like that insight—that Black people live lives of traumas within traumas—is plausibly at play with respect to Patrice Douglass and Frank Wilderson's thesis about "the violence of presence." *See* Douglass & Wilderson, *supra* note 231, at 117. According to Douglass and Wilderson, "the black arrives at the torture chamber as a victim of metaphysical violence, a state too deracinated to be credited even to prior and coherent violent events. Blackness is constituted by violence with no . . . horizons." *Id.* at 122. One way to draw out the connection between Douglass and Wilderson's claim about violence and the argument I am advancing about trauma is to replace "violence" and "violent" in their formulation with "trauma" and "traumatic." Their initial sentence then reads: "the black arrives at the torture chamber as a victim of metaphysical *trauma*, a state too deracinated to be credited even to prior and coherent *traumatic* events." To be clear, I do not mean to suggest that Douglass and Wilderson and I are saying precisely the same thing. Nor do I mean to diminish the critical and particular claim they are advancing about "blackness-qua-violence." *Id.* at 118. What I am saying is that our interventions might be simpatico inasmuch as their account is, in some sense, an account about violence within violence—namely, that the torture chamber, police brutality, etc., are violences that occur on the bodies of people who have already been constituted "by violence with no . . . horizons." *Id.* at 122. A version of that claim is precisely my point about traumas within traumas, or what we might think of as "the trauma of presence."

[282] The notion that racism is always with, and indeed is subject-making with respect to, Black people is, of course, articulable in other theoretical and normative registers. Consider, for example, João Costa Vargas and Joy James's powerful query about the relationship among violence, Black people, and American democracy: "What happens when, instead of becoming enraged and shocked every time a black person is killed in the United States, we recognize black death as a predictable and constitutive aspect of our democracy?" João Costa Vargas & Joy A. James, *Refusing Blackness-as-Victimization: Trayvon Martin and the Black Cyborgs*, *in* Pursuing Trayvon Martin: Historical Contexts and Contemporary Manifestations of Racial Dynamics 193, 193 (George Yancy & Janine Jones eds., 2013). What happens, in other words, when we recognize that such killings are ordinary and ordinalizing aspects of social life? Recall again Patrice Douglass and Frank Wilderson's observations that "violence [for Black people] located at the constitution of being." Douglass & Wilderson, *supra* note 231, at 119. According to Douglass and Wilderson's observations, "whereas some groups of people might be the recipients of violence, after they have been constituted *as people*, violence is a structural necessity to the constitution of blacks." *Id.* at 117. These claims, too, align with the point I am making about the ordinary ways in which racism (including in the form of violence) operates in Black people's lives and the possibility that the ordinariness produces racial trauma. Against the background of the ordinary ways in which Black people are required to live with racism, racial trauma *has to* be there.

Racism stays with us. Changes itself to be with us.[283] Produces a particular kind of intimacy with us.[284] Never—ever—wants to leave us.

I will always be
by your side.
Always.
I will never leave
you
You have always lived
with me.

Ordinarily.
Even when you resist,
I am with you.

There.
Right there.
Making you you.
Ordinarily.
I want this
to work.

Not all of you
will live.

But you can
survive.
You always have.
With me.
Ordinarily.

283 *See generally* Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. Rev. 1235 (2016) (discussing the ways in which racism adapts over time to preserve itself); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (1997) (exploring the how law can transform status hierarchies without abolishing them).

284 Stipulating that there is a relationship between intimacy and power, there are of course other ways to theorize it. Jared Sexton, for example, has argued not only that "power operates intimately (which it does) or that intimacy is inextricable from the question of power (which it is), but [also] that the relation between the two—when . . . it enters language—deranges what we mean, or what we thought we understood, by the former *and* the latter." Jared Sexton, *The Social Life of Social Death: On Afro-Pessimism and Black Optimism*, InTensions, Fall/Winter 2011, at 29.

Sublimate your pain.
Let it become
your life.
Ordinarily.

Otherwise,
I will not live.
I cannot survive
without you.

I need you
to be me.

Till death
do us part.
Ordinarily.
And when you die,
our life together
lives on

in other bodies.

They will know
your death.
They will feel it.
And I will be

with them.
Ordinarily.

(With You)

The poem stages what the preceding analysis describes but cannot fully capture: racism not as external imposition but as intimate relation: something that speaks in the first person; something that claims needs; something that promises permanence.

The "I" attempts to capture a racism that requires Black life, a racism that cannot survive without the very bodies it subordinates. "I need you / to be me" signals both a particular kind of dependency and an association in which domination is reproduced, not through crisis alone, but through the ongoing, ordinary rhythms of a relationship one did not choose and cannot fully leave.

That intimacy, however, is not the whole story. If racial domination often works by settling into the textures of everyday life, it does not do so seamlessly or without remainder. The ordinary cannot fully suppress the violence on which it depends. There are moments when what has been made livable strains against its own containment—when fragments of racial pain break through the discipline of the everyday and force themselves into feeling.[285]

Feel pain feel
Feel
Pain
Feel
(Feel)

5. *Self-Incriminatory Black Body*

One such moment takes us back to the classroom: teaching Criminal Procedure against the backdrop of George Floyd's murder in 2020,[286] and the mass movement that his death, alongside the police killings of other Black people, produced.[287] I knew I was experiencing some form of racial pain. But I also knew that I was feeling something I was not supposed to feel because I—as a Black person—was feeling it.

I did not have the language to name that sensation as racial trauma. Yet the overlapping experience of marginalization, shock, anger, disempowerment, and vulnerability—a peculiar constellation that carried with it its own silencing and refutation—suggests my body was plausibly experiencing racial trauma.[288]

---

285 Those moments may or may not count as acts of "ontological resistance." *See* Frantz Fanon, *The Fact of Blackness*, *in* Black Skin, White Masks 82–83 (Pluto Press 2008) (1952).

286 *See* Dionne Searcey, *At George Floyd Memorial, an Anguished Call for Change*, N.Y. Times (June 9, 2020), https://www.nytimes.com/2020/06/04/us/floyd-memorial-funeral.html [https://perma.cc/L75Y-SVBN].

287 *See* John Eligon, *Black Lives Matter Grows as Movement While Facing New Challenges*, N.Y. Times (Sep. 3, 2020), https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html [https://perma.cc/QG2H-AQRV] (reporting on the growth of the Black Lives Matter movement following George Floyd and Jacob Blake's murders).

288 There is a growing sense among legal academics that trauma can and does show up not only in the context of lawyering (vis-à-vis lawyers and clients), but also in the context of law schools (vis-à-vis faculty and students). For an excellent collection that traverses both of these domains, see How to Account for Trauma and Emotions in Law Teaching, *supra* note 180, at 55–59 (advocating for and providing guidance for implementation of holistic, trauma-centered law teaching). *See also* Sarah Katz, *The Trauma-Informed Law Classroom: Incorporating Principles of Trauma-Informed Practice into the Pandemic Age Law School Classroom*, 25 U.C. Davis. Soc. Just. L. Rev. 17, 18, 25, 33–36 (2020) (considering the impact of trauma and how law professors can address it); Elayne E. Greenberg, *High Anxiety: Racism, the Law, and Legal Education*, 29 Wash. & Lee J. C.R. & Soc. Just. 129, 141 (2023) (analyzing racial stressors in law school and proposing dispute

Speak.
Black body.
Speak.

But not
against yourself.

Peel back
the production
of your production.

Flesh
of your flesh.

Do not let
your body
speak
in their voice.

Black ipsa loquitur[289]
is not
your truth.
(Speak)

How was I, as a Black man, pedagogically speaking? How was I teaching with and through a body in pain? Notwithstanding that the police killings of Black people that sparked the uprisings fell squarely

---

resolution through restorative justice); Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 252 (2003) (highlighting the necessity of trauma-informed education for law students and attorneys to reduce secondary trauma). This is not to say that the "age of trauma" has had a significant impact on lawyering and traditional legal education. *See* Nancy K. Miller & Jason Tougaw, *Introduction: Extremities*, *in* EXTREMITIES: TRAUMA, TESTIMONY, AND COMMUNITY 1, 1–2 (Nancy K. Miller & Jason Tougaw eds., 2002) (describing the modern age as the "age of trauma" given deep effects of historical trauma and memory). I am simply speaking to the notion that the language of trauma now occupies some discursive space in discussions about law and legal education.

289 "The phrase 'res ipsa loquitur' literally means 'the thing speaks for itself.'" Thomas A. Eaton, *Res Ipsa Loquitur and Medical Malpractice in Georgia: A Reassessment*, 17 GA. L. REV. 33, 33 (1982). For articulations of *race* ipsa loquitur, compare Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 782 (1994) (inviting us to think about assumptions about Black people featured in self-defense claims, such as the argument that a "black victim's race is relevant to the reasonableness of [a person's] belief that she was about to be attacked"), with Spann, *supra* note 279 (explaining that the existence of racial disparities is generally one of the ways in which the existence of racism speaks for itself).

within the parameters of Black life, they exacted a toll that was pedagogically unmanageable. It demanded that I translate pain into pedagogy, disposability into doctrine, and precarity into principle.

The routinized representations of dead Black bodies made that demand all the more difficult. The iconographic nature of those images and the frequency and ordinariness with which they are consumed, is one of the ways Black people are made to experience bare death, a particular kind of "deathliness"[290] in which dead Black bodies neither rest in peace nor bear witness to the violence of their death.[291] Instead, they are held in suspension, caught in an afterlife of visibility that refuses both closure and recognition.

Dead Black bodies live on in the representations of their dying. They have an afterlife that is governed by what Fred Smith calls "the constitutional law of the dead."[292] Although Smith's account does not center Fourth Amendment doctrine, I want to suggest that Fourth Amendment law is, in part, a jurisprudence of the dead,[293] a jurisprudence of the *premature* dead. The deferential standard of "reasonableness" that structures Fourth Amendment law analysis,[294] the expansive protections afforded by qualified immunity,[295] and the criminalized and "dangerized" Black body,[296] together render police killings of Black people not merely excusable after the fact, but presumptively reasonable in advance.

That presumption means not only that police killings of Black people are rarely understood as events that disrupt Fourth Amendment reasonableness, but also that those killings are prefigured—anticipated spectacles to test the outer limits of law. From that perspective, we are required to watch police killings of Black people not so much to rebut

---

290 *See* David Marriott, Haunted Life: Visual Culture and Black Modernity 230–31 (2007) (suggesting that "black death is meaningless" in part because it entails a "deathliness that cannot be . . . brought into meaning").

291 *Cf.* Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., Meridian: Crossing Aesthetics 1998) (1995) (defining bare life in relation to sovereign violence).

292 *See* Fred O. Smith, Jr., *The Constitution After Death*, 120 Colum. L. Rev. 1471, 1475 (2020) (providing "for the first time, an account of the constitutional law of the dead and tak[ing] aim at the legal rule that purports to categorically exclude the dead from America's constitutional tradition").

293 *Id.*

294 *See* Terry v. Ohio, 392 U.S. 1, 20–22 (1968) (applying that reasonableness to justify frisks in the absence of probable cause).

295 Ashcroft v. al-Kidd, 563 U.S. 731, 743–44 (2011) (suggesting that the doctrine was intended to protect "all but the plainly incompetent and those who knowingly violate the law" (quoting Malley v. Briggs, 475 U.S. 335, 341)).

296 I employ the term "dangerized" to capture not only the social construction of the Black body as dangerous, but also the fact that this social construction puts Black people in a dangerous position by rendering them vulnerable to state and private violence.

the presumption of reasonableness that anchors those deaths, but rather to test the strength and scope of it.

The question that animates public and legal scrutiny is not whether a Black person was supposed to die, but whether this particular death falls outside the category of deaths that are already anticipated. That inquiry generates the demand for—and the supply of—videos depicting Black people being killed by the police.

We are forced to watch those videos repeatedly—"in doctor's offices, in corner stores, on subway platforms, on Twitter"[297]—even as the dying Black bodies they depict can never fully articulate their truths. Socially constructed as dangerous, Black bodies occupy a permanently compromised position with respect to contesting their premature death. Those deaths must thus be publicly scrutinized, almost as open casket ceremonies, in order for the police violence that underwrites them to possibly (though not inevitably) generate condemnation.[298] Whether any such condemnation emerges often turns on atomized framings of the issue, ones that reduce the question to whether a *particular* officer's killing of a *particular* Black person under a *particular* set of circumstances was justified.

Sometimes that framing produces the conclusion that the officer in question was a "bad cop" who should be punished, as was the case with Derek Chauvin, the officer who murdered George Floyd.[299] I will return to this point below. But often the public debates about policing are rhetorically structured to ask: *If you were that officer under those circumstances, what would you have done? Wouldn't you have feared for your life?*

The "you" in that articulation means to include—indeed, in some ways is especially intended for—Black people. As Patricia Williams notes in recounting an episode in which she was refused entry into a department store:

> I often wonder if the violence, the exclusionary hatred, is equally apparent in the repeated public urgings that blacks understand the buzzer system by putting themselves in the shoes of the white storeowners—that, in effect, blacks look into the mirror of frightened white faces for the reality of their undesirability; and that then blacks would "just as surely conclude that [they] would not let [themselves] in under similar circumstances."[300]

---

297 Christina Sharpe, Ordinary Notes 32 (2023).

298 Much has been written about how Emmett Till's mother's decision to have an open casket burial helped draw attention to the brutality of not only his death, but also of the Jim Crow regime. *See, e.g.*, American Experience: *The Murder of Emmett Till* (PBS television broadcast, aired Apr. 15, 2023), https://www.pbs.org/wgbh/americanexperience/films/till/#film_description [https://perma.cc/4D5Q-89FB].

299 *See* Eligon, *supra* note 287.

300 Williams, *supra* note 13, at 46.

The implications of the demand that Black people see themselves through the white gaze (as if it were possible for us to see *anything* entirely outside of that way of seeing)[301] is that if Black people *truly* looked at themselves and came to terms with what they saw (a condition of seeing that paradoxically disappears Black people as seeing subjects), they would accept that their bodies are not only undesirable, but also justifiably killable.

Whether the public at large, or Black people themselves, ultimately condemn police killings or accept the proffered justifications for those deaths, Black bodies are spectacularized in the video "re-presentations" of their dying. The circulation of those videos constitutes an "undignified disturbance"[302] that undermines the dead person's "right to bodily integrity"[303] and renders their body, in some sense, unburiable. These rarely-articulated social effects of police killings suspend mourning, denying family members closure that burial promises and the healing space to grieve.

The re-presentations of videos depicting police killings of Black people are troubling in another sense: They enable, rather than foreclose, both the violence the video depicts and its representation. The normalized circulation of images showing Black people being killed by the police index and serve as precedent for what the police presumptively can do to Black people. The instantiation of that precedent forces Black people to confront the grim reality that, no matter how many Black people police officers kill, we will never be the beneficiaries of a "Never Again" imperative. Never again never arrives. Everybody knows that it will happen again—and everyone will be invited to watch.

This absence of foreclosure makes police violence against Black people more thinkable, more doable, more circulatable, and more ordinary. It also sustains the after-death public adjudications in which the decedent is discounted, discredited, disfigured, and discarded, extending violence beyond death into a social death in death.[304]

---

301 Du Bois, *supra* note 4, at 3 (describing Black people's "double-consciousness" or the "sense of always looking at one's self through the eyes of others").

302 *See* Smith, Jr., *supra* note 292, at 1498 (discussing the protections against "undignified disturbance[s]" afforded by the law to the dead).

303 *See id.* at 1500 (defining the established "right to bodily integrity" that persists in death).

304 *Cf.* Orlando Patterson, Slavery and Social Death: A Comparative Study 44 (1982) (summarizing that the two modes of slavery as social death are "the intrusive mode," where "the slave was conceived of as someone who did not belong because he was an outsider, while in the extrusive mode the slave became an outsider," and "the extrusive mode," where the slave became an outsider "because he did not (or no longer) belonged. . . . The one fell because he was the enemy, the other became the enemy because he had fallen.").

One might say, borrowing from Saidiya Hartman, that police killings of Black people reflect a "crisis of witnessing."[305] That crisis bespeaks the circumscribed space that Black people have to speak to the endemic nature of police violence and the limitations of the Black body to be a witness to its own brutalization.[306] Because police violence against Black people has functioned as a particular kind of "discredited data,"[307] seeing isn't necessarily believing—indeed, it isn't even necessarily seeing. This is why a visual economy of the most violent acts of police violence becomes a necessary (but often insufficient) predicate for collective public outcry.

Hortense Spillers might describe this problem as deriving from the "hieroglyphics of the flesh," the markings of violence on the flesh that "come to be hidden to the cultural seeing of the skin."[308] What combines these insights is the notion that because police violence against Black people is never fully seeable, obscured if not negated by the very Black body on which the violence occurs, the re-presentation of police killings of Black people becomes a socio-cultural necessity.

To watch these killings that "endlessly repeat"[309] is not only to observe another Black person being killed; it is also to confront Black people's "right to death."[310] As Christina Sharpe contends, the fact and representations of police killings of Black people, force us "always, to face the probability of [our own] death."[311]

Once Black death becomes thinkable as ordinary, the line between violence and governance begins to blur. That blurring widens the field of what violence is and where we locate it. The violence that constitutes Blackness at large ranges from spectacular brutality—whips and lashes on enslaved backs—to more quotidian instantiations of violence, like the public choreography of a police frisk. The former is more readily recognized as racial violence;

305 *See* HARTMAN, SCENES OF SUBJECTION, *supra* note 22, at 29 (defining "crisis of witnessing" as stemming from the inability of Black witnesses to testify against the crimes of slavery, leading to the publicization of cruelty).

306 Another important problem that the concept of the "crisis of witnessing" put into sharp relief is the fact that "the extravagant display of extreme violence" as a mechanism for drawing attention to Black marginality meant that "only the most horrific instance will suffice to convey the brutality of slavery." *Id.* at 30.

307 Ngozi Okidegbe, *Discredited Data*, 107 CORN. L. REV. 2007, 2015 (2022) (discussing the various forms of "discredited data" that cause algorithmic discrimination).

308 Spillers, *supra* note 156, at 67.

309 SHARPE, *supra* note 297.

310 MARRIOTT, *supra* note 290, at 226–27 (describing the notion that Blackness is a "right to death" based on the lack of value and sovereignty afforded to Black deaths).

311 SHARPE, *supra* note 297.

readers may debate whether every police frisk of every Black person warrants that designation.

Yet frisks are not simply a disciplinary law enforcement practice.[312] They are race-making techniques of governance that reinscribe Black bodies as criminal and dangerous, and thus belong to a larger racial economy in which Blackness is continually regenerated through violence. Seen in this way, frisking lies on the same continuum as police killing: The shooting of Black people does not stand apart from the frisking of us. The Blackness that binds "us"—Black people—is constituted in part through our vulnerability to both. Police invoke dangerousness to justify each. Courts give that attribution doctrinal form—reasonable fear for the officer's life in the case of the shooting;[313] reasonable suspicion that the person was armed and dangerous in the case of the frisk.[314] That legal ratification feeds back into and helps reproduce the very construction of Blackness as dangerous on which policing relies.

What I am describing here cautions against treating Fourth Amendment doctrines as analytically discrete categories. The "reasonable suspicion" and "armed and dangerousness" that produce Black suffering in stop-and-frisk[315] and the "probable cause" and "justifiable force" that produce Black death in police shooting[316] are both part of Fourth Amendment law. That relationship reflects not only doctrinal interconnection, but also the jurisgenerative capacity of the Black body.[317] The legal standards that govern both frisks and deadly force come into being through the policed Black body. Marking the doctrinal convergence across frisks and deadly force is thus also a way of marking the capacity of the dangerized Black body to produce racially subordinating law transubstantively.

That jurisgenerative capacity points to a deeper feature of race: its constitutive and distributional power. Scholars have long described race as a social construction to underscore both its contingency and

312 *See generally* Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing 42–59 (2018) (analyzing the rise of misdemeanor policing and convictions in New York City as a strategy to decrease non-misdemeanor crime, the process of which targeted minority spaces in the City).

313 Graham v. Connor, 490 U.S. 386, 388 (1989) (articulating the standard for police use of force as "reasonableness").

314 Terry v. Ohio, 392 U.S. 1, 27 (1968).

315 Remember that to justify a frisk, a police officer must have "reasonable grounds" to believe that a person is "armed and dangerous." *Id.* at 30.

316 *See Graham*, 490 U.S. at 386–87.

317 *See* Emmanuel Mauleón, *infra* p. 230 (observing that, in the Fourth Amendment context, "the doctrinal vocabulary for Black suffering is limited to 'objective reasonableness,' 'consent,' and 'justifiable force' . . . .").

its materiality.[318] Yet that insight often fails to inform how criminal procedure is taught, and even how scholars write about the field. Consequently, students do not always grasp the relevance of the social construction of race in debates about race and policing. There are at least two ways to make that connection visible.

First, the fact that Black life is so often linked to death is a function of both the social meanings of race and its material and distributional power. The policing of Black bodies trades on and produces social meanings of race.[319] Second, the indexation of Black life to death is inseparable from the dehumanization of Black people and the attribution of criminality and dangerousness to Black bodies. As I suggested earlier, drawing on the work of Sylvia Wynter, one way to mark this problem is to say that Black people—as "the map"—are mistaken for the domain of criminality—"the territory."[320]

But a related way to make the point would be to say that it, through Blackness, criminality becomes not just a terrain of law-breaking, but a category of being. Blackness stabilizes the categories of dangerousness and criminality in the form of racial embodiment. As George Yancy contends, "[f]rom the perspective of whiteness, the Black body *is* criminality itself."[321]

The construction of Blackness as criminal and dangerous explains why criminality and dangerousness do not require specific behavioral predicates to attach to Black people; why a Black person and white person standing on a street corner are not *doing* the same thing; and why the Black body is a condition of possibility for its own death.

---

318 For a classic articulation, see Omi & Winant, *supra* note 14. *See also* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1 (1994); Devon W. Carbado, *Critical What What?*, 43 Conn. L. Rev. 1593, 1618–19 (2011) (describing other scholars' articulations of race as a social construction in the context of Critical Race Theory); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005) (relating cognitive data about implicit racial biases to the social construction of race vs. race's materiality and "biological inevitab[ility]").

319 Emmanuel Mauleón makes a version of this point when he argues that "White people benefit from racially disparate policing practices through both the quality of their individual policing experiences and the symbolic messages that such experiences communicate about the group." Mauleón, *supra* note 42, at 771. Mauleón is speaking here to the social meaning and distributional outcomes that structure the white side of the colorline of policing. *See id.*

320 *See* Wynter, *supra* note 155 (discussing the distinction between the "map" and the "territory" with respect to who counts as human).

321 Yancy, *supra* note 224, at xxx.

Criminality.

Dangerousness.

Two reconcilable strivings.

Two complementary ideals.

Both
socially constructed

in
one
dark
body.

(Double Consciousness)

When Derek Chauvin casually kneeled on George Floyd's neck for almost nine minutes, he was trading on that "one dark body." He was relying on its inculpatory power with respect to Black people, and its exculpatory power vis-à-vis the police.

Culpability is Black.

For being Black
you must feel

Violence.

Seen and negated.
Seen and negated.
Seen only through negation.

Juridically foreclosed.

(Negation)

Chauvin also had to contend with the power of the "bad cop" frame.[322] That power lies largely in the work the figure of the "bad cop" performs

[322] Nicole Brown Chau, *Police Brutality Goes "Beyond Individual Bad Apples," Professor Says*, CBS News (June 11, 2020, at 04:07 ET), https://www.cbsnews.com/news/police-brutality-qualified-immunity-osagie-obasogie [https://perma.cc/4RC2-4PWC].

in displacing structural accounts of policing. The frame's dominant message is that racialized policing is not an endemic social problem, but an individual "bad apple" problem. This "dangerous few"[323] conception of policing casts "bad cops" as exceptions to an otherwise well-functioning institution, making them exceedingly difficult to find. Under this logic, "bad cops" function largely as rhetorical figures rather than as embodied social actors. While public discourses often treat Black bodies as *ordinarily* criminal and dangerous, police officers are treated as only *extraordinarily* bad.

I am not suggesting that most or even many police officers are in fact "bad apples." Nor am I arguing that anti-racist interventions should be directed at finding and punishing the ones who might be. Much of my work presses the opposite point[324]: the "bad cop" frame obscures the legal authority police officers already possess to engage in racially subordinating policing. The central question, then, is not whether there are too many "bad cops," but whether police officers have too much legal power.[325]

That "bad cops" circulate more readily as discursive figures than as actual people does not mean the frame is empty. For the frame to have currency, a few officers must exist to whom the label plausibly applies. Yet what makes the label stick is not violence alone, but the racial distribution of condemnation. Because white witnessing and Black witnessing do not carry equal social weight, white critiques of policing often function as the condition under which Black critiques gain traction. Borrowing from Toni Morrison, we might say that here, too, "the power of looking is white."[326] Thus, the power to render a police officer "bad" turns, in part, on a particular kind of white gaze.

---

323 The idea of a "dangerous few" figures in discourses about prison abolition wherein abolitionists are asked to answer the question of how their abolitionist thinking would address the fact that there will always be a "dangerous few" who should not be part of society. For a recent engagement of this issue, see Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022). What I am suggesting here is that discourses about policing trade on the idea of a "dangerous few" police officers to leave undisturbed the overarching apparatus of policing.

324 *See generally* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (offering a structural framework for thinking about race and policing).

325 *See id.* at 1505.

326 TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 73 (1992). Toni Morrison responded to the critiques that her work didn't center white people this way: "As though [Black people's] lives have no meaning and no depth without the white gaze . . . I have spent my entire writing life trying to make sure that the white gaze was not the dominant one in any of my books." AMERICAN MASTERS, *Toni Morrison On Writing Without the "White Gaze,"* at 01:50 (PBS, June 1, 2020), https://www.pbs.org/wnet/americanmasters/toni-morrison-on-writing-without-the-white-gaze/14874 [https://perma.cc/Q5J4-UELN]. Morrison spoke of the power of the "white gaze" vis-à-vis Black bodies. But white people

Chauvin undoubtedly understood all of this. There is little reason to think he believed that he was a "bad cop" or that he believed he was at risk for being seen as one. The confidence and ordinariness with which Chauvin took George Floyd's life on a commercial street, in bright daylight, before an intervening public[327]—while his murder was being recorded[328]—speak to the power Chauvin believed (knew?) he had, the disposability of Black life, and the relationship between the two. Watching the video depicting George Floyd's death is to see many things. But it is also, potentially, not to see an important part of what the video reveals: a man just doing his job. Chauvin doesn't appear to be thinking: *I'm doing something wrong*, *I'm transgressing social norms, I'm exceeding my authority*. His entire demeanor seems to be saying: *I'm doing what I'm supposed to be doing*, *I'm protecting and serving, I'm doing my job*.

One can certainly frame Chauvin's commitment to *that* job as a moment in which Chauvin could never *really* see that George Floyd was dying, and could not *really* hear the last words with which Floyd cried for help, "I can't breathe."[329] But it might also be true that Chauvin understood that police killings of Black people have long been a site and sight of law and order in a racially structured tautological sense: the very fact of police brutality against Black people is a sign of its justification. Thus, disappointment and anger may not have been the only emotions Chauvin experienced after a jury convicted him of murder.[330] He may also have felt abandoned and betrayed by a carceral system—and a carceral state—that was supposed to be on his side.

---

carry the power of seeing in another sense: what white people see as racism is largely what counts as racism.

327 Associated Press, *Witnesses: Onlooker Anger Increased as Floyd Stopped Moving*, Politico (Mar. 30, 2021, at 22:01 ET), https://www.politico.com/news/2021/03/30/george-floyd-chauvin-trial-witnesses-478538 [https://perma.cc/BLC7-DG9N] ("Onlookers grew increasingly angry as they begged Minneapolis Officer Derek Chauvin to take his knee off George Floyd's neck . . . .").

328 Douglas Perry, *Why Police Officer Charged with George Floyd's Murder Wasn't Concerned About Being Filmed: MIT Technology Review*, Oregon Live (June 10, 2020, at 06:19 ET), https://www.oregonlive.com/nation/2020/06/why-police-officer-charged-with-george-floyds-murder-wasnt-concerned-about-being-filmed-mit-technology-review.html [https://perma.cc/C8PF-28EH].

329 For a powerful articulation of this point, see Yancy, *supra* note 224, at 4 (querying whether Eric Garner, killed by police in 2014, was "really" "hearable or seeable") (emphasis omitted).

330 Chauvin was ultimately sentenced to more than twenty years in prison for violating George Floyd's federal civil rights and to twenty-two-and-a-half years in prison for second- and third-degree murder and second-degree manslaughter under state law. Daniella Silva, *Derek Chauvin Sentenced to Just Over 20 Years for Violating George Floyd's Federal Civil Rights*, NBC News (July 7, 2022, at 16:02 ET), https://www.nbcnews.com/news/us-news/

I have served and protected,
served and protected,
served and protected.

In your name.
For your benefit.

Advancing your truths.

I have unnecessarily killed
in your name.

Constitutionally.

Surely you know
it is always a question
of their life or mine—
whether or not
my life is on the line.

When did that change?
Why?

How could I have known?
When did his life
matter more than mine?

Why have you forsaken me?
For them?

For him?
(Betrayal)

Betrayal stages Chauvin's interiority not to invite sympathy but to illuminate the system that produced it. A man who believed he was doing his job, who had internalized the racial logics of policing so thoroughly that conviction registered not as justice but as betrayal, is himself a product of the doctrinal architecture Part II described.

The betrayal Chauvin likely felt was real in the sense that, as a historical matter, the system has protected and served officers who have

derek-chauvin-sentenced-just-20-years-violating-george-floyds-federal-rcna36958 [https://perma.cc/M6RA-FRRS].

protected and served racial domination. That history likely suggested to Chauvin that he had something close to a right, existentially, ideologically, legally, culturally, socially—and racially—to expect immunity. That expectation, so consistently honored, and Chauvin's certainty that it would be honored once more, is what the movement that rose from Floyd's killing attempted to name and shatter.

6. The Structure of Bare Death

The 2020 uprisings were remarkable in their breadth: multiracial,[331] multigenerational,[332] multiregional,[333] and multinational.[334] As Vincent Southerland observes, with respect to white people in particular, "[t]he level of . . . support . . . was unprecedented."[335]

The interventions the uprisings staged quickly expanded beyond police violence. Movement organizers pressed the nation (and the world) to confront racial injustice writ large. That "call" for broad social transformations was met with a "response." Across institutions and communities, people signaled a collective willingness to reckon with entrenched manifestations of anti-Blackness and to imagine a role for everyone, including the state, in dismantling them.[336] As Sunita Patel

---

331 Douglas McAdam, *We've Never Seen Protests Like These Before*, Jacobin (June 20, 2020), https://jacobin.com/2020/06/george-floyd-protests-black-lives-matter-riots-demonstrations [https://perma.cc/VV7S-NYVC] (reporting that sixty-one percent of protesters at early demonstrations were white, nine percent were Hispanic, twelve percent were Black, and twelve percent were Asian).

332 Habiba Ahmed, Henry Newton, Christian Stirling Haig & Samuel Brannen, *The George Floyd Protests: A Global Rallying Cry for Democracy*, Ctr. for Strategic and Int'l Stud. (June 11, 2020), https://www.csis.org/analysis/george-floyd-protests-global-rallying-cry-democracy [https://perma.cc/JG65-637X] ("[T]he George Floyd protests have already demonstrated the possibilities for change when a broad, multigenerational, multiethnic coalition of citizens vigorously organize across the whole nation and demand reform.").

333 Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/D3FW-W5N2] (mapping the protests).

334 Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS News (June 4, 2021, at 19:39 ET), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact [https://perma.cc/62SK-LRW3] (reporting on protests in the United Kingdom, New Zealand, Colombia, France, and Washington D.C.).

335 Vincent M. Southerland, *Toward a Just Future: Anticipating and Overcoming a Sustained Resistance to Reparations*, 45 N.Y.U. Rev. L. & Soc. Change 427, 435 (2021).

336 *See* Sunita Patel, Three Potential Institutional Barriers for Abolition Praxis 7 (Apr. 2, 2026) (unpublished manuscript) (on file with the New York University Law Review). According to Patel, almost overnight "the global uprisings following George Floyd's murder brought about the convergence of a public realization of anti-Black police violence on one hand and structural racism with the government's care responsibilities that shifted due to COVID-19 on the other. It was a moment of great promise towards an abolitionist vision . . . ." *Id.*

puts it, there was a real sense "that *what is today, need not be what is tomorrow*."[337]

That sense of possibility (of change approaching, even already underway) registered at the interpersonal level as well. I felt white and other non-Black people attempting to see us outside of the racializing gazes through which Black people have long been constituted.[338] Their "inner eyes" seemed engaged in a form of race-conscious remediation, peeling away the accumulated social meanings that have overdetermined Black bodies.[339] Our figurative capacity—across multiple lines of intra-racial difference—to "be" fear[340] (and not just be feared) gave way to smiles, eye contact, hellos, how-are-yous, and emails checking in. The uprisings produced a moment in which Black people were interpellated in ways that made the sensation of being seen feel less perceptually subordinating.[341]

When they see us
they don't
see us
outside
their gaze.
Where am I?
This feels
wrong.
Like I've been
put
out of my place.
Where am I?
Who am I?
(Their Gaze)

---

337 *Id.* at 2.

338 Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOU. L. REV. 817, 823 (2021) ("Polling data suggests that many . . . Whites experienced an awakening to the realities of racism after the sickening killing of George Floyd.").

339 *See* RALPH ELLISON, INVISIBLE MAN 3 (Vintage Books, 1972) (1952) (describing the inner eyes as "those eyes with which they look through their physical eyes upon reality").

340 Patrice D. Douglass, *On (Being) Fear:* Utah v. Strieff *and the Ontology of Affect*, 17 J. VISUAL CULTURE 332, 340 (2018) ("Blackness is the ontological antagonism between the performance of feeling-threat and the threat of the feeling of (non)being.").

341 My thinking about perceptual subordination is very much informed by Russell Robinson's articulation of perceptual segregation. *See* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1117 (2008) ("The theory of perceptual segregation predicts that blacks and whites, on average, will interpret allegations of racial discrimination through substantially different perceptual frameworks and often will reach different conclusions about whether discrimination has occurred. . . . [A]nd these differences create significant obstacles to cross-racial understanding.").

My surmise is that other Black people felt less perceptually subordinated as well. Whether any of them became somewhat inscrutable to themselves in the sense of looking into a figurative mirror to discern what about them had changed, I do not presume to know.

Meanwhile, institutions across the United States, including universities and corporations of every kind, were engaged in their own self-interrogation. Many issued statements condemning George Floyd's murder, and other police killings, while professing a broader commitment to racial justice.[342] Media outlets did the same, insisting that American society confront not only race and police violence, but also racial inequality more broadly.[343] The salience of race as a national concern created the impression that the nation was prepared, at last, to stage what now seems politically unthinkable: a racial reckoning.[344]

The ease with which the "right now" of that racial reckoning has receded into a "back then" warrants reflection. It exposes both the narrow currency and ready forgettability of Black civil rights concerns.

---

342 *See, e.g.*, Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America's $50 Billion Vow*, Wash. Post (Aug. 24, 2021, at 19:03 ET), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice [https://perma.cc/447D-EG2M]; Tiffany Hsu, *Corporate Voices Get Behind 'Black Lives Matter' Cause*, N.Y. Times (June 10, 2020), https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html [https://perma.cc/444Z-WLJQ]; Tom Bartlett, *The Antiracist College*, Chron. Higher Educ. (Feb. 15, 2021), https://www.chronicle.com/article/the-antiracist-college [https://perma.cc/56KR-J5PP]; Sarah Wood & Walter Hudson, *A Year Later, Institutions Reflect on Systemic Changes Following the Murder of George Floyd*, EDULedger (May 24, 2021), https://www.diverseeducation.com/home/article/15109296/a-year-later-institutions-reflect-on-systemic-changes-following-the-murder-of-george-floyd [https://perma.cc/2AUC-5X5M].

343 *See, e.g.*, Editorial, *Target Aid to Black Americans*, Wash. Post, June 15, 2020, 2020 WLNR 16642036 (stating that African Americans deserve "a tangible, secure stake in this country's prosperity"); Editorial, *George Floyd and the Story of the Two Americas*, Fin. Times (June 2, 2020), https://www.ft.com/content/12ff370a-a40d-11ea-81ac-4854aed294e5 [https://perma.cc/PL9N-4T44]; Editorial (New York Daily News), *Biden's Plan to Attack Racial Wealth Gap Is Focused, Overdue*, Sun-Sentinel, June 3, 2021, 2021 WLNR 17894492; William J. Barber II & Mary Bassett, Editorial, *Systemic Racism Is Social Dynamite*, The Nation (June 19, 2020), https://www.thenation.com/article/activism/systemic-racism-june2020 [https://perma.cc/6VVN-JLCD]; *see also* Southerland, *supra* note 335, at 435–37 (discussing the degree to which all sectors of society bought into the idea that racial justice interventions were warranted against the backdrop of George Floyd's murder).

344 *See* Rachael Bade, Karoun Demirjian & Paul Kane, *Amid Racial Reckoning, Black Caucus Aims High*, Wash. Post, June 29, 2020 ("The Congressional Black Caucus is seizing the national moment of reckoning over systemic inequality and racial injustice to wield its greatest level of influence inside the Capitol and in national politics.").

"Racial time"[345] is always at work, pressing civil rights outside the present tense so that they become not simply history, but Black history—a past that arrives too soon, that circulates on the margins of historical memory, and that is constructed to bear no meaningful relationship to the present.

In anticipation of the racial reckoning that never materialized, I was scheduled to give a DEI (Diversity, Equity, and Inclusion) presentation to law school admissions officials. The entire edifice of DEI is now under attack,[346] but only four years ago, DEI was a decidedly palatable register for talking about race.[347] Universities and corporations organized their racial equity initiative under that rubric,[348] and I was expected to speak in that register as well.

I could not. About fifteen minutes before the session, I decided to draw from an early version of *Bare Death*, the poem with which this Article began. I read what I had written up to that point. My sense, as I spoke, was that at least some participants experienced my presentation as a bait-and-switch.

---

345 *See* Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625, 1635 (2023) (drawing on various literatures in Black studies to articulate the ways in which time functions as a disciplinary device vis-à-vis the pursuit of racial justice).

346 For critiques of these recent attacks on DEI, see, for example, Nicholas Confessore, *'America Is Under Attack': Inside the Anti-D.E.I. Crusade*, N.Y. TIMES (Jan. 20, 2024), https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html [https://perma.cc/AGY4-SG3B] (recounting the anti-DEI push and describing the movement's shortcomings); Stacey Abrams & Margaret Huang, *How Anti-DEI Push Threatens American Dream*, USA TODAY, Aug. 1, 2024, 2024 WLNR 12643495 ("We have seen this throughout our nation's history: moments of incredible progress being met with vigorous resistance from reactionary groups that wish to take our country backward because they fear change and competition."); *see also* Tanya Katerí Hernández, *Can CRT Save DEI?: Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action*, 71 UCLA L. REV. DISCOURSE 282, 284 (2024) (discussing and critiquing the attacks and "explor[ing] a counterintuitive path forward: a wholesale shift to CRT-framed training[]").

347 In fact, some progressives criticized DEI interventions precisely because they perceived them to be insufficiently radical. *See, e.g.*, J.C. Pan, *Workplace "Anti-Racism Trainings" Aren't Helping*, JACOBIN (Sep. 9, 2020), https://jacobin.com/2020/09/workplace-anti-racism-trainings-trump-corporate-america [https://perma.cc/CDZ4-E5S6]; Bhaskar Sunkara, *Stop Trying to Fight Racism with Corporate Diversity Consultants*, GUARDIAN (July 8, 2020, at 17:30 ET), https://www.theguardian.com/commentisfree/2020/jul/08/diversity-consultants-racism-seminars-corporate-america [https://perma.cc/KS4V-TGLY] (noting that union membership may be a more useful tool for decreasing racial bias than anti-bias trainings).

348 *See, e.g.*, Sandra Portocarrero & James T. Carter, *Diversity Initiatives in the US Workplace: A Brief History, Their Intended and Unintended Consequences*, 16 SOCIO. COMPASS 1, 4 (2022) (noting that a popular approach to DEI has been "to train away bias (for example, diversity training)"); Katerina Bezrukova, Karen A. Jehn & Chester S. Spell, *Reviewing Diversity Training: Where We Have Been and Where We Should Go*, 11 ACAD. MGMT. LEARNING & EDUC. 207 (2012) (examining research on DEI initiatives).

The poem was raw, as was I—raw in ways I rarely allow. There was no reference to equity, diversity, and inclusion; no appeal to implicit bias[349] or cultural competency[350]; only an unmediated engagement with presumptive Black culpability and the structural conditions that enable and sustain it.[351]

Because the session took place over Zoom, there was no easy way to step out of the encounter. I cannot say whether anyone tried. By then, my attention had turned inward. I was focused on getting through the poem. Accordingly, I was not in a position to notice whether eyes were skittering across screens, furiously searching for an exit from a confrontation with race they had not logged on to receive.

The process of writing the poem was hard. What I shared with the participants was the culmination of several days of freewriting, a practice in which I typically do not engage. For better or worse, I am what you might call a controlled writer. Not only do I monitor and moderate the registers in which my ideas come to me—being Black is always already a prior restraint on speech—I often write over and against those ideas before giving them a meaningful opportunity to live.[352]

How many of my thoughts have died that way?

Suppose I had permitted them to live?

I sometimes wonder about the cumulative effect of that prior restraint on thought. What would it mean for Black people to open the "word vaults"[353] into which unknown quantities of Black forbidden speech have been put—some, but not all, of our freedom words? What unspeakable knowledge would we find waiting there? What stolen "treasures of rhetorical wealth" would we recover?[354]

---

349 Implicit bias is a standard dimension of DEI trainings. *See, e.g.*, Jerry Kang, Implicit Bias: A Primer for Courts, Nat'l Ctr. for St. Cts. 2 (Aug. 2009), https://www.sog.unc.edu/sites/default/files/reports/kangIBprimer.pdf [https://perma.cc/XQT8-ABQL] (explaining the importance of recognizing implicit biases); Anthony G. Greenwald, Nilanjana Dasgupta, John F. Dovidio, Jerry Kang, Corinne A. Moss-Racusin & Bethany A. Teachman, *Implicit-Bias Remedies: Treating Discriminatory Bias as a Public-Health Problem*, 23 Psych. Sci. Pub. Int. 7, 32–33 (2022) (providing recommendations for reducing implicit bias).

350 On the importance of lawyers being culturally competent, see, for example, Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 Clinical L. Rev. 373 (2002); Susan Bryant, *The Five Habits: Building Cross-Culture Competence in Lawyers*, 8 Clinical L. Rev. 33 (2001).

351 For a recent account of structural racism as an infrastructural phenomenon, see Deborah Archer, Dividing Lines: How Transportation Infrastructure Reinforces Racial Inequality (2025).

352 *Cf.* Morrison, *supra* note 326, at 4 (observing that "[m]y work requires me to think about how free I can be as an African-American woman writer in my genderized, sexualized, wholly racialized world").

353 Williams, The Alchemy of Race and Rights, *supra* note 13, at 226.

354 *See* Spillers, *Mama's Baby*, *supra* note 156, at 65, 80 (advocating that to deconstruct the names which degrade, one must wade through their historical roots and meanings).

During the uprisings and the COVID-19 pandemic, I was not asking those questions in quite those terms.[355] Nevertheless, I knew that I needed to give my voice some space to speak. And as best I could, I did. I released my voice from the constraints of my body, allowed it to take shape on the page, and resisted disciplining and policing it out of existence.[356] What the admissions officials heard was an early version of that effort.

Months later, my students would hear another version. By then, I had begun to think more deliberately about my racial relationship to teaching Criminal Procedure. In that context, the question was not so much about pedagogical style. It was also about how I was teaching the course at all—in the sense of simply being there. On Zoom. Day in, day out. What did it mean to teach a course whose juridical archive mirrored the disciplined, disfigured, degraded, defiled, and sometimes dead Black bodies everyone was seeing—but not all of us were witnessing—in real time?

Can you be Black and teach that?[357]

I knew that reading the poem would be hard, harder than reading it to the admissions officials. When I read the poem to the latter, I was angry. For reasons that are not entirely clear to me now, I wanted the admissions administrators to know it. Although the audience was predominantly non-Black, I made no effort to "work my identit[y]" to make the poem racially palatable.[358]

I occupied a different position in the classroom. I knew my students and, as best I could tell, we had built a genuine sense of community. I worked to address the reality that teaching amid COVID-19 and the uprisings were intensifying how students were experiencing what was happening beyond the classroom, even as those events were pressing inward, compounding the strain inside. I tried to signal that I cared, that I would be present, and that we were moving through a difficult moment together.

I should have done more.

---

355 The pandemic itself was generating discussions about race, particularly with respect to whether race was mediating people's exposure to the virus and the likelihood that they would die from it. *See* Leonard E. Egede & Rebekah J. Walker, *Structural Racism, Social Risk Factors, and Covid-19—A Dangerous Convergence for Black Americans*, 383 NEJM 77, 78 (2020).

356 As you might have surmised, the version of the poem you are reading in this Article has been subject to quite a bit of rewriting. But the first few days were written with a greater sense of expressive freedom. The poem retains the normative thrust of that initial writing.

357 *See* Alexander, *supra* note 225, at 79–81 (exploring the ways in which Black group formation is forged at least in part through our collective experiences with and exposure to violence).

358 *See generally* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 Corn. L. Rev. 1259, 1261 (2000) (explaining the various ways in which people with non-normative identities "work their identities" to both avoid discrimination and fit in within majoritarian institutions).

By the time I considered sharing the poem with my students, the weight of Black disposability felt especially heavy. Black people were naming it, writing into it, asking what it demanded of us. Those engagements, and the forms they took, reflected a collective effort "to find a language to talk about"—and to—"my people."[359] A striking example of that effort appears in the painting below, featured on the cover of the June 15, 2020, issue of Time Magazine.

FIGURE 1: *ANALOGOUS COLORS*[360]

The painting is by Titus Kaphar, who wrote the following poem to accompany it.

I
can not
sell
you
this
painting.

[359] Alexander, *supra* note 225, at 77. Alexander begins her brilliant essay on the Rodney King beatings this way: "At the heart of this essay is a desire to find a language to talk about 'my people.'" *Id.* She goes on to interrogate the notion of "my people" and to explain how racial violence helps to construct that sensibility among Black people. *Id.*

[360] Titus Kaphar, *Analogous Colors* (painting 2020), *reprinted by* TIME (2020).

In her expression, I see the Black mothers who are unseen, and rendered helpless in this fury against their babies.

As I listlessly wade through another cycle of violence against Black people,

I paint a Black mother…
eyes closed,
furrowed brow,
holding the contour of her loss.

Is this what it means for us?
Are black and loss
analogous colors in America?
If Malcolm could not fix it,
if Martin could not fix it,
if Michael,
Sandra,
Trayvon,
Tamir,
Breonna and
Now George Floyd…
can be murdered
and nothing changes…
wouldn't it be foolish to remain hopeful?
Must I accept that this is what it means to be Black
in America?

Do
not
ask
me
to be
hopeful.

I have given up trying to describe the feeling of knowing that I can not be safe in the country of my birth…

How do I explain to my children that the very system set up to protect others could be a threat to our existence?

How do I shield them from the psychological impact of knowing that for the rest of our lives we will likely be seen as a threat,

and for that
We may die?
A MacArthur won't protect you .
A Yale degree won't protect you .

Your well-spoken plea will not change hundreds of years of institutionalized hate.
You will never be as eloquent as Baldwin,
you will never be as kind as King…
So,
isn't it only reasonable to believe that there will be no
change
soon?

And so those without hope…
Burn.
This Black mother understands the fire.
Black mothers
understand despair.
I can change NOTHING in this world,
but in paint,
I can realize her….
This brings me solace…
not hope,
but solace.
She walks me through the flames of rage.
My Black mother rescues me yet again.
I want to be sure that she is seen.
I want to be certain that her story is told.
And so,
this time
America must hear her voice.
This time
America must believe her.

One
Black
mother's
loss
WILL
be
memorialized.
This time
I will not let her go.

I
can not
sell
you
this
painting.[361]

There is much one might say about this poem and its relationship to the painting, including the haunting way in which it captures how Black motherhood is implicated in the death and disposability of Black people: "This Black mother understands the fire."[362] The lines that open and close Kaphar's poem—"I / can not / sell / you / this / painting"[363]—are not simply a refusal of a market exchange. Kaphar is grappling with the nexus between detachment, release, and separation, on the one hand, and memory and memorialization, on the other: "One / Black / mother's / loss / WILL / be / memorialized. / This time / I will not let her go."[364]

The commitment to see, name, and memorialize Black loss and disposability was not his alone. It reflected a broader commitment among Black people to register the moment in which we found ourselves. That commitment motivated me to both write the poem and later to read it to my students.

My voice cracked at several points during the reading. Like an inflated balloon trying to hold its air once its neck has been compromised, I felt my body working to keep itself intact. I was determined to carry on.

And I did. One discursive moment at a time.

I arrived at the last stanza.

Delivered the last few lines.

The last line. . .

The last word.

And . . . it was over.

---

361 Titus Kaphar, *'I Cannot Sell You This Painting.' Artist Titus Kaphar on his George Floyd TIME Cover*, TIME (June 4, 2020, at 06:19 ET), https://time.com/5847487/george-floyd-time-cover-titus-kaphar [https://perma.cc/25A8-6E5G].

362 *Id.*

363 *Id.*

364 *Id.*

Almost seventy years after

An unarmed Black man was dead. . .

At the hands of a police officer. . .
Who thought he would kill that man.

One second at a time.
In plain view.

In the middle of the day.

And get away

with murder.[365]

(The Lesson)

Brown v. Board of Education[366]

Today, education is perhaps the most important function of state and local governments.[367]

Today, it is a principal instrument in awakening the child to cultural values. . .[368]

in preparing him for later professional training. . .[369]
in helping him to adjust normally

to his environment.[370]

When I ended the poem, I thanked the students for listening.

I did not discuss the poem, its relationship to the course, or its relevance to the moment.

I did not explore what the poem suggested about the very publicness of George Floyd's murder. "The public airing of his last breaths," in Chaz Arnett's phrasing.[371]

I did not frame Floyd's death as evidence that Black people are presumptively dangerous even when we submit to the police, even when we are subdued by them (three of them), and even when they are subjugating us. Killing us.

---

365 To be sure, Chauvin was convicted. *See* Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges fo*r Killing George Floyd, CNN (Apr. 21, 2021, at 12:31 ET), https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations [https://perma.cc/QK26-BAWB]. The point is that he seemingly could not imagine that he would be.

366 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

367 *Id.* at 493.

368 *Id.*

369 *Id.*

370 *Id.*

371 Arnett, *Race*, *supra* note 265, at 1119.

I did not assign the vicarious lessons Floyd's death produced. Analogous to Wright's sensation of feeling like "the victim of a thousand lynchings,"[372] Floyd's death "blurred the lines between 'look what they did to him' / 'this could happen to me' / 'this is happening to us' / 'this is happening to me.'"[373]

I did not guide them to consider Floyd's death in relationship to Black bodily autonomy—how policing takes from us, territorializes us, and renders our bodies "open fields," a pastoral domain of police power.[374]

I did not make clear this loss of bodily autonomy is not only the degradation, humiliation, and vulnerability that police encounters can engender; not only the peculiar pain of feeling publicly exposed yet perceptually out of focus; and not only the realization (in the moment, immediately after, and in many moments that follow) that the "scenes of subjection"[375] policing generates are quotidian precisely because they are presumptively constitutional.[376]

The racial sensation of losing bodily integrity and autonomy also entails feeling simultaneously made and unmade, established and disestablished, through the insidious ways policing saturates Black bodies with social meaning. It inscribes us with the very legibility of vagrancy, disorderliness, dangerousness, and criminality on which policing relies, while stripping away the visibility, individuality, and benign humanity that might disrupt those imposed meanings.

I did not explain how policing both inflicts physical violence and reinscribes metaphysical violence, continually producing the very Blackness on which it depends.[377]

---

372 WRIGHT, *supra* note 235, at 65.

373 Carbado, *Strict Scrutiny*, *supra* note 228, at 11.

374 In Fourth Amendment law, "open fields" receive no Fourth Amendment protection. Police officers can intrude upon them and search those spaces with any justification at all. *See* Oliver v. United States, 466 U.S. 170, 177 (1984) (reaffirming the open fields doctrine).

375 HARTMAN, SCENES OF SUBJECTION, *supra* note 22, at 3–4.

376 This presumption need not be inevitable. *See* Carbado & Feingold, *supra* note 3, at 1678 (offering an alternative writing of *Whren v. United States*, the case that effectively constitutionalized race-based profiling).

377 The claim that Black people's bodies are not our own during police encounters is not to suggest that Black people simply give themselves up in those contexts and never engage in acts of resistance. Resistance might not be a particularly useful concept here because, among other reasons, Black people's interactions with the police occur against a backdrop in which Black bodies are justifiably killable. Because, for Black people, policing is a space of "necropolitics," a domain in which life is subjugated "to the power of death," resistance or not, Black bodies are always on the line. Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 39–40 (Libby Meintjes trans., 2003).

I did not invite discussion of what it means to teach this course with—and in and through—a racial body that is presumptively both policeable and constitutionally killable.[378]

I did not ask, whether, when we defend Supreme Court cases that facilitate or legitimize anti-Black policing, we ratify the idea that the overpolicing of and police violence against Black people are how the Court's "interpretive commitments" should be "realized in the flesh."[379]

Whether I should have pursued any of those lines of inquiry at the end of the poem, I made an affirmative choice not to do so. Not because I occupied the same unspeakable position to which *Strange Fruit* had transported me, but because I did not want to risk being taken back there.

I remained at the helm of the classroom, not unable but unwilling to extend the lesson, the pedagogy of the Black body.

We
can not
always
teach
the things
we might need
to teach
in the bodies we have.
Sometimes
the racial contours of a pedagogical scene
means
you cannot be Black
and teach that.

(Teaching That)

***

B. Can You Be Black and Learn That?

1. The Law School and the First-Year Curriculum

Every time I teach Criminal Procedure, I confront the fact that Black students face the racialized features of the Criminal Procedure

---

[378] Race is not simply an identity we have; it is a position we occupy.

[379] Cover, *supra* note 7, at 1605.

classroom in multiple marginalizing and disempowering ways.[380] Students do not control either the content of the course or its framing; much of the law school curriculum, especially the first-year course of study, is standardized[381]; and students may encounter either silence about the salience of Blackness in the course or "colorblind" framings that treat race as a non-issue.[382]

Another difficulty for students derives from representational dissonance. Black people are *under*represented as students in law schools and *over*represented as presumptive criminals in Fourth Amendment cases.[383] That demographic configuration renders Black people spectacles along two subordinating axes: as the natural subjects of policing, and as the unnatural occupants of legal education.[384]

---

[380] *See* Samuel Vincent Jones, *Law Schools, Cultural Competency, and Anti-Black Racism: The Liberty of Discrimination*, 21 BERKELEY J. AFR.-AM. L. & POL'Y 84, 87–89 (2021) (describing the anti-Black experiences law students encounter in law schools); Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71, 75–101 (2013) (discussing various forms of "racial unevenness" in the law school environment).

[381] *See* Kathleen Elliott Vinson, *What's on Your Playlist? The Power of Podcasts as a Pedagogical Tool*, 2009 U. ILL. J.L. TECH. & POL'Y 405, 406 (footnote omitted) ("[T]he basic curriculum of the first-year of law school that developed more than 100 years ago has remained mostly the same over the last century."). To be sure, there have been changes, and some quite substantial, most of which have taken place in the past forty years. The rise of courses devoted to legal ethics following Watergate, clinical programs, greater attention to skills training following the MacCrate Report, and improved classroom technology are just four examples. But in terms of the fundamental method in which aspiring lawyers are trained, there have been relatively few changes. *See* Christophe G. Courchesne, *"A Suggestion of a Fundamental Nature": Imagining a Legal Education of Solely Electives Taught as Discussions*, 29 RUTGERS L. REC. 21, 25 (2005) ("At Harvard Law School, as at the many law schools that consider Harvard the standard-bearer of legal education, professors teach the major courses at the heart of the curriculum in much the same format that professors have taught those same courses for more than one hundred years.").

[382] Needless to say, other students lack control of the content of the course as well. I am focusing on the relationship between the lack of that control and the difficulty Black students may have, because they are Black, contesting the anti-Black dimensions of Criminal Procedure.

[383] *See, e.g.*, Kevin D. Brown & Kenneth G. Dau-Schmidt, *Racial and Ethnic Ancestry of the Nation's Black Law Students: An Analysis of Data from the LSSSE Survey*, 22 BERKELEY J. AFR.-AM. L. & POL'Y 1, 3, 5 (2022) (examining the relative representation among law students of "Ascendant" or American Black, Black multiracial, Black Hispanic, and Black immigrant groups); Kevin Woodson, *Entrenched Racial Hierarchy: Educational Inequality from the Cradle to the LSAT*, 105 MINN. L. REV. HEADNOTES 481, 485–504 (2021) (analyzing Black underrepresentation in law schools in the context of systemic racial hierarchy, including racial socioeconomic disparities, racial stigma leading to anti-Black prejudices and stereotypes, and racial segregation).

[384] Which is to say, that demographic configuration furthers the message, at least implicitly, that the reason Black people (and particularly Black men) are not robustly "in here" (in the Criminal Procedure classroom) as students is because of the choices they make to be "out there" (on the streets) as criminals.

Compounding that representational dissonance has been the dominant perception of affirmative action as a system of racial preferences.[385] Historically, that perception legitimized the presumption that Black students do not possess the same intellectual standing as other students, a presumption hardened by the current anti-DEI climate.[386] That hardening has intensified even against the backdrop of the recent Supreme Court opinion in *SFFA* rendering Harvard-style affirmative action programs unconstitutional.[387] The assumption is that we are not supposed to be here, there, or anywhere for which the barriers to entry are high. Thus, even post *SFFA*, Black presence in universities and professional workplaces often provokes questions about whether standards have been lowered. Our absence provokes none, because Black exclusion is still read as sign of meritocracy. These social meanings of race are such that, even when Black students resist "impostor syndrome,"[388] they may still feel pressure to "work [their] identity"[389] out of the trope of intellectual deficit that has historically attached to Black people.

("Harvard must be lowering its standards.")

The problem does not end there. When Black students attempt to initiate serious discussions about race, the response is often condescension or discipline. From peers, this can take the form of gazes suggesting that Black students are engaged in a kind of educational theft, stealing the opportunities of other students to learn the (colorblind) law.[390] From faculty, it approximates a time, place, and manner restriction in the following rhetorical form: "Those concerns

---

385 On the framing of affirmative action as racial preferences, see Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of Preferential Treatment*, 16 Nat'l Black L.J. 127, 132–37 (1998). *See also* Devon W. Carbado, Kate M. Turetsky & Valerie Purdie-Vaughns, *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. Rev. Discourse 174, 225 (2016) (contesting the racial preference framing of affirmative action).

386 The Trump Administration has made dismantling DEI a core part of its governance priorities. *See, e.g.*, Exec. Order No. 14173, 90 Fed. Reg. 8633, 8633 (Jan. 31, 2025) ("Ending Illegal Discrimination and Restoring Merit-Based Opportunity").

387 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

388 *See generally* David A. Grenardo, *The Phantom Menace to Professional Identity Formation and Law Success: Imposter Syndrome*, 47 U. Dayton L. Rev. 369, 373–76 (2022) (explaining the experience of imposter syndrome vis-à-vis law school specifically).

389 *See* Carbado & Gulati, *supra* note 358, at 1262 (suggesting that part of the reason people "work [their] identity" is to counteract negative racial stereotypes); *see also* Devon W. Carbado & Mitu Gulati, Acting White?: Rethinking Race in "Post-Racial" America 1–3, 23–25 (2013) (same).

390 For a discussion of the concept of educational theft vis-à-vis race and the policing of school district boundaries, see generally LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. Rev. 566 (2021).

are important, but irrelevant to the doctrinal issues at hand . . . ."[391] As Kimberlé Crenshaw notes, when students "step outside the doctrinal constraints" of a case, they are marked not only as failing to "think like a lawyer," "but as revealing an improper emotional investment in racial identity."[392] Chantal Thomas makes a related point, describing how a question about poverty's social context in a criminal law class was "dismissed as irrelevant," producing a chilling fear "of embarrassment in the gladiatorial sport of Socratic dialogue."[393]

Because Black students who press racial analysis are often denied meaningful opportunities to do so, many may submit to the domination the epistemological whip of colorblindness produces in their classrooms.[394] The resulting "no-race-talk" pedagogical scene appears nonracial, non-discriminatory, non-disciplinary, and nonpolitical.[395]

Like other colorblind racial projects, faculty racial preferences for avoiding race, disciplining racial inquiry, or treating race as irrelevant are regarded as race-neutral pedagogical choices that require no—and certainly not a compelling—justification.[396] The racial privilege with which colorblindness travels as a race-neutral project—even as it produces and obscures racial inequality—is one of the reasons one might say that colorblindness is the theory and racial subordination is the practice. To borrow from an observation George Yancy has made about whiteness, colorblindness "is a master of concealment."[397]

---

391 For examples of law students' concerns about raising racial issues outside of particular constrained contexts, see Taifha N. Baker, Note, *How Top Law Schools Can Resuscitate an Inclusive Climate for Minority and Low-Income Law Students*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 123, 137–41 (2017).

392 Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 5 (1988).

393 Chantal Thomas, *Reloading the Canon: Thoughts on Critical Legal Pedagogy*, 92 U. COLO. L. REV. 955, 965 (2021). One might refer to these dynamics as one of the "law[s] of white spaces." *See* Peter Goodrich & Linda G. Mills, *The Law of White Spaces: Race, Culture, and Legal Education*, 51 J. LEGAL. EDUC. 15, 36 (2001) ("To raise the question of race and legal knowledge was variously to be ignorant, foolish, or offensive, and expressed with either delusion, or charlatanry, stupidity or fraud.").

394 Angela Harris might frame some of this as bespeaking the challenges of performing education work. *See* Angela P. Harris, *On Doing the Right Thing: Education Work in the Academy*, 15 VT. L. REV. 125 (1990). Harris reasons that: "In practice, education work is *work* as well as *education*. . . . [I]n order to be taken seriously by the 'target' community, you must first become a part of it. For a 'diverse' member of a collegial body, the calculations involved . . . are many and subtle." *Id.* at 132.

395 *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 125 (3d ed. 2015) (articulating the theory of racial projects).

396 To the extent that, broadly speaking, there are two approaches one might take with respect to race—that it matters or that it doesn't—choosing the latter is not racially neutral.

397 YANCY, *supra* note 224, at 229.

The relationship between colorblindness as a theory and racial subordination as a practice helps explain why accusations of "playing the race card" have social, intellectual, and political traction, while the idea of "playing the colorblind card" scarcely exists.[398] That discursive asymmetry licenses colorblindness as a neutral baseline while marking racial analysis as deviation, increasing the likelihood that race—and more specifically, anti-Blackness—is both unspoken and unspeakable as a pedagogical practice.

Some of the dynamics I am describing affect non-Black students as well, especially the silencing that can follow from attempts to center race. I focus on Black students, however, because Criminal Procedure sits within a broader curricular universe in which law students learn to "think like a lawyer" under conditions of anti-Blackness.[399] By anti-Blackness here, I mean something more expansive than the circulation of negative stereotypes or the jurisprudential gaslighting through which courts deny the historical subordination of Black people, though both are implicated.[400]

Anti-Blackness here names a structural condition—one in which Blackness functions not merely as a social identity subject to discrimination, but as a constitutive position against which the law's categories of personhood, citizenship, and rights-bearing subjectivity have historically been defined. On this account, anti-Blackness is not reducible to intentional racial animus or discrete acts of prejudice. It is embedded in the background rules, default assumptions, and organizing logics of legal doctrine—the conditions under which Black people have been rendered available for violence, fungible as legal subjects, and disposable as rights-bearers. Seen at this scale, the Criminal Procedure classroom is not an exception to the curriculum's racial logics but an expression of them. While I do not want to overstate the

---

398 A Westlaw search of "playing the race card" yields 414 results. "Playing the colorblind card" produces zero. On Google, the former turns up about 343,000 search results, and the latter just 314.

399 Another reason I am centering Black students relates to a point I made earlier: Stereotypes of Black people as both intellectually inferior and criminally suspect potentially make intellectual environments in which the subject at hand focuses on criminality particularly fraught for those students. To borrow from social psychology, such environments create a "threat in the air" that anything Black students say will confirm preexisting racial stereotypes of Black intellectual deficit and thus further undermine Black students' sense of belonging. For the classic articulation of the phenomenon of "stereotype threat," see generally Claude M. Steele, Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us (2010).

400 *Cf.* Angelique M. Davis & Rose Ernst, *Racial Gaslighting*, 7 Pol., Grps, and Identities 761, 761 (2017) (defining racial gaslighting as "the political, social, economic and cultural process that perpetuates and normalizes a white supremacist reality through pathologizing those who resist").

degree to which anti-Blackness figures in legal education, its presence is undeniable.

Consider Constitutional Law. To begin, one can take this course and learn nothing about slavery and the Constitution. Were one to examine the "learning objectives" on the syllabi of professors who teach Constitutional Law, very few of them would include something like: "To understand the ways in which the Constitution presupposed and constitutionalized slavery." Nor would those learning objectives betray an investment in teaching students how current Supreme Court doctrine legitimizes racial inequality and delegitimizes racial remediation.

Constitutional Law traffics in anti-Blackness in more doctrinally specific ways. Take affirmative action, a recurring topic in the course. The specter of Black intellectual deficit hovers over those discussions. Students are invited to think about whether Black students are as qualified as other students,[401] whether they were admitted because of the color of their skin,[402] whether they displace more deserving applicants, and whether they will struggle academically as a result.[403] These are not merely questions about policy. They are occasions where the curriculum reproduces anti-Blackness as a background condition of legal reasoning.

Moreover, the Supreme Court's treatment of affirmative action as presumptively unconstitutional, and its decision to subject the policy to the most searching standard of judicial review—"strict scrutiny"—paved the way for the Court to delegitimize racial remediation efforts

401 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277 (1978) (observing that "[i]n both years, applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's"); s*ee also id.* at 289 ("To the extent that there existed . . . at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. . . . [This is] a line drawn on the basis of race . . .").

402 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2154 (2023). Chief Justice Roberts's majority opinion observes that "[g]aining admission to Harvard is . . . no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. It can also depend on your race." *Id.* (citation omitted). For a critique of how Roberts's opinion "gerrymanders" the way in which it defines what race "is" (including, but not limited to, skin color) at different points in the opinion, in apparent pursuit of a goal of delegitimizing affirmative action, see David Simson, *Conceptual Gerrymandering in* SFFA *and Some Thoughts On How It Enables the Case's Weaponization*, 73 Buff. L. Rev. 1377, 1412–35 (2025).

403 *See, e.g.*, *Students for Fair Admissions*, 143 S. Ct. at 2197–98, 2198 n.8 (Thomas, J., concurring) (repeatedly referring to "mismatch theory," which suggests that, because of affirmative action, Black students are academically mismatched to institutions and thus have difficulty competing in them).

more generally.[404] Central to that delegitimation is the idea that race-conscious efforts to remedy inequality are themselves suspect,[405] and perhaps unnecessary, because Black marginalization is presumed to be self-inflicted or otherwise a natural state of affairs.

More broadly, the perception of undeservingness and capacity deficits on which the "racial preference" and "reverse discrimination" conceptions of affirmative action are based evoke a logic of criminality from which the Black body is never free: theft. In the context of slavery, Black freedom itself was regarded as theft:[406] the taking of someone else's property; the stealing of oneself from him—the master; the taking of an opportunity that did not belong to enslaved people: freedom. Through that historical prism, Black people's post-emancipation selves—our status outside of formal bondage—have already stolen something. Affirmative action law and discourses render that "something" quite concrete: educational opportunities.[407]

Needless to say, when the Supreme Court applies strict scrutiny to affirmative action, its reasoning does not sound explicitly in the register of educational theft. The Court presents strict scrutiny as an antidiscrimination safeguard that seeks to prevent the state from allocating benefits or burdens on the basis of race, absent a "compelling justification" that is "narrowly tailored" to achieve that "compelling" goal.

Yet early applications of strict scrutiny revealed that, far from being an antidiscriminaton regime, the framework would pose a significant barrier to racial justice interventions.[408] For one thing, strict scrutiny treats "benign" and "invidious" uses of race as constitutionally

404 *See* Carbado & Robinson, *supra* note 263, at 1040 (arguing the racial logics the Court employs in the affirmative action context have been imported into other domains of equal protection law).

405 *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226–27 (1995) (holding that both benign and invidious uses of race trigger strict scrutiny); *SFFA*, 143 S. Ct. at 2193 (affirming *Adarand* and subjecting affirmative action programs to strict scrutiny).

406 *See* Hartman, Scenes of Subjection, *supra* note 22, at 65–66.

407 LaToya Baldwin Clark's work on race and education theft is relevant here as well. *See* LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. Rev. 566 (2021). It is worth noting here as well that the tropes of Black people as criminal and intellectually deficient are mutually constitutive: The presumption of the latter helps make the former epistemically stick, and vice versa. That is why the disposability of Black bodies (through various dimensions of carcerality, including policing) exists alongside the disposability of Black minds (through various mechanisms of exclusion and stratification, including the abolition of affirmative action).

408 *See* Carbado, *Strict Scrutiny*, *supra* note 228, at 35–36 (focusing on Justice Powell's opinion as early articulation of the strict regime and indicating the ways in which it compounds racial inequality); *see also* Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 Fordham L. Rev. 1753 (2001) (discussing the racially subordinating logics on which equal protection doctrine rests); Carbado & Robinson, *supra* note 263, at 1047 (arguing that strict scrutiny "erects barriers to racial remediation" and facilitates challenges to race conscious interventions).

indistinguishable with respect to whether they trigger strict scrutiny. Strict scrutiny applies to both affirmative action and to Jim Crow-style decisionmaking.[409] For another, central to strict scrutiny are the ideas that remedying systemic underrepresentation is not, as a constitutional matter, "compelling," and that "societal discrimination" is too "amorphous" a concept to warrant judicial remediation.[410] These are just some of the ways in which strict scrutiny leaves racial inequality constitutionally intact.

These juridical problems are exacerbated by the fact that the legal structures of strict scrutiny operate within a social regime of the phenomenon that trades on some of the same racial logics I have described. Under the legal regime of strict scrutiny, racial remedies are presumptively suspect.[411] Courts thus strictly scrutinize them to "'smoke out' illegitimate" racial motivation—"invidious" uses of race.[412] The presumption is that there is no "compelling" reason for courts to act and that, even when such reasons exist, efforts taken to advance them must be "narrowly tailored" in ways that limit their remedial possibility.

In the social regime of strict scrutiny, Black bodies are presumptively suspect.[413] That presumption authorizes surveillance, regulation, and force—mechanisms designed to "smoke out," discipline, or manage a particular kind of Black "invidiousness"[414]—criminality and dangerousness. To survive the social regime of strict scrutiny, we need to have a "compelling justification" for our presence, wherever we are, and we must "narrowly tailor" ourselves—strip away layers of social meaning that attach to our bodies,[415] "come clean," to borrow from Hortense Spillers[416]—a demand that refuses the possibility of what it asks.

The interaction between the legal regime of strict scrutiny and the social regime produces an anti-Black racial double bind that makes the Black body a social resource for its own marginalization and a juridical resource from which law draws to deny, ignore, or rationalize that marginalization. Articulated with respect to policing, racialized

409 Carbado, *Strict Scrutiny*, *supra* note 228, at 27.

410 *Adarand*, 515 U.S. at 226 (1995) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986)).

411 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023) (employing the strict scrutiny analytical structure to declare Harvard-style affirmative action programs unconstitutional).

412 *Adarand*, 515 U.S. at 226 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

413 *See* Carbado, *Strict Scrutiny*, *supra* note 228, at 2.

414 *See Adarand*, 515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)) (suggesting that the purpose of the equal protection doctrine is to "'smoke out' illegitimate uses of race").

415 Carbado, *Strict Scrutiny*, *supra* note 228, at 20–21.

416 Spillers, *Mama's Baby*, *supra* note 156, at 65.

suspicion in the social world expands police power under the Fourth Amendment while constraining racial remedies under the Equal Protection Clause. Black bodies thus help generate doctrines that both reinscribe them as criminal, dangerous, and intellectually deficient and disable efforts to address the consequences of those social meanings. Within this double bind, Black people may not survive the strict scrutiny they experience in life, and interventions aimed at mitigating that precarity may not survive the strict scrutiny they encounter in law. Foregrounding this double bind reveals how Black people are at once over-policed and under-protected beyond the typical way in which that argument is rehearsed.[417]

This understanding of strict scrutiny—as a doctrine that operates within, and is reinforced by, a social regime of strict scrutiny—does not figure in how Constitutional Law is typically taught. More generally, the course is not structured to foreground the dominant way strict scrutiny puts equal protection law to work: to delegitimize racial remediation and leave in place the range of racial disparities that characterize American social life. Textbooks are not organized to tell that story or to otherwise center anti-Blackness as a feature of Constitutional Law.

Property Law reflects a similar set of problems. Here, too, anti-Blackness is a foundational feature of the course. As with Constitutional Law, Property courses are often silent about the relationship between property and slavery—a relationship that cries out to be named yet is muted in the Property Law curriculum.[418] The course *sometimes* contains the traces of enslaved people, but their voices rarely register in how that course is generally taught. At best, they appear as units of value, objects of conveyance, or entries in probate disputes, not as subjects struggling to speak into the legal record.

Beyond this foundational silence, more discrete doctrinal inquiries also structuralize anti-Blackness: Is it reasonable for the government to protect single-family homes from apartment houses, which "very often [are] a mere parasite" and "depriv[e] children of the privilege of quiet and open spaces for play?"[419] May the government condemn an

---

417 The standard way to think overpolicing and underprotection is that policing both overpolices Black people (subjecting them to disproportionate stops and frisks, for example) and underprotects them (failing to mitigate Black people's exposure to various forms of interpersonal harms). For an articulation of this problem and its intersection with gender, see Kimberlé W. Crenshaw, Priscilla Ocen & Jyoti Nanda, Black Girls Matter: Pushed Out, Overpoliced and Underprotected (2015).

418 K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 Yale L.J. 1062 (2022) (exploring how slavery has been erased from the property law canon and the consequences of that erasure).

419 *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

entire Black community that it views as a "slum" or "blighted?"[420] May a person who is trying to sell a single home choose not to sell to a Black person?[421] Should the Civil Rights Act of 1964 exempt "private clubs" that expressly exclude Black members?[422] May a white homeowner prevent a Black family from purchasing a home in the neighborhood?[423] These questions do not merely implicate race. They invite students to work through the legal parameters of Black people's precarity as rights-bearers: their disposability as property owners, their "fitness" as neighbors, and their standing as community members.

Examples from other courses abound. In Criminal Law, tropes of Black criminality and dangerousness have long shaped the development and application of self-defense law, inviting students to deliberate about the reasonableness of fear in the presence of Black bodies.[424] In Contracts Law, race has played a significant role developing various dimensions of the doctrine, inside and outside the context of slavery,[425] and yet is elided in law school offerings of the course.

---

420 *See* Berman v. Parker, 348 U.S. 26, 34–35 (1954).

421 *See* Fair Housing Act, 42 U.S.C. § 3603(b)(1) (answering that question in the affirmative so long as the person doesn't use a realtor or advertise their racist intentions).

422 *See* 42 U.S.C. § 2000a(e) (exempting private clubs or establishments "not in fact open to the public" from Title II's public accommodation non-discrimination requirements).

423 *See* Shelley v. Kraemer, 334 U.S. 1, 9–13 (1948) (explaining that racially restrictive covenants are private agreements and therefore do not violate the Fourteenth Amendment absent state enforcement).

424 *See* People v. Goetz, 497 N.E.2d 41 (N.Y. 1986). Bernhard Goetz, a white man, was initially indicted for criminal possession of a gun after shooting four black youths on a New York subway. *Id.* at 43–45. Goetz was approached in the subway car by two of the youths, one of whom told Goetz to give him five dollars. *Id.* at 43. Goetz raised a defense of justification (self-defense), though none of the youths were displaying weapons. *Id.* at 43–44. *See also* Joyce Purnick, *Ward Declares Goetz Didn't Shoot in Self-Defense*, N.Y. Times (Feb. 22, 1985), https://www.nytimes.com/1985/02/22/nyregion/ward-declares-goetz-didn-t-shoot-in-self-defense.html [https://perma.cc/4MDK-Y42X] (noting the race of the defendant and shooting victims in this case). *See generally* Addie C. Rolnick, *Defending White Space*, 40 Cardozo L. Rev. 1639 (2019) (arguing that modern self-defense law, though facially race-neutral, works alongside residential segregation and racially contingent perceptions of fear to legitimize private violence that reinforces racial hierarchy). For a casebook that centers race in its engagement with Criminal Law, see Bennett Capers, Roger A. Fairfax, Jr. & Eric J. Miller, Criminal Law: A Critical Approach (2023). *See also* Cynthia Lee & L. Song Richardson, Criminal Procedure: Cases and Materials (3d ed., West Acad. Publ'g 2023); Cynthia Lee & Angela Harris, Criminal Law: Cases and Materials (4th ed., West Acad. Publ'g, 2019).

425 For scholarship on how antebellum contract doctrine both accommodated and was constituted by the practice of slavery, see generally Gross, *supra* note 162 (examining how local trial courts in civil disputes over the sale and hire of enslaved people accommodated the slave regime), and Farr, *supra* note 162 (analyzing how contract warranty doctrine was constituted by the violence of slavery). For a broader historical account of race's role in shaping contract doctrine, see generally Dylan C. Penningroth, *Race in Contract Law*, 170 U. Pa. L. Rev. 1199 (2022) and Emily Houh, *Race and Contracts*, *in* The Oxford Handbook of Race and Law in the United States (Devon Carbado et al. eds.) (forthcoming 2026).

Moreover, as Brittany Farr has noted, when race is engaged in Contracts casebooks, it is often through a single case, framed as the "race case" in the literature,[426] that traffics in "cultural scripts" of Black women as "welfare queens," a script that casebook authors themselves sometimes reproduce in their commentaries about the case.[427]

These examples are not offered as a call for doctrinal erasure, but as context for understanding the pedagogical terrain Black students inhabit. Black students do not encounter the demands of Criminal Procedure in a vacuum. By the time they enroll in that course, many have moved through pedagogical scenes structured, in part, by anti-Blackness.

2. The Law School and Legal Pedagogy

By and large, Criminal Procedure scholars have not engaged the challenges Black students plausibly face in the Criminal Procedure classroom. Indeed, those challenges have not even been "issue-spotted."

This is not to say that the field, as currently constituted, ignores race. When I began writing in the Criminal Procedure space a little over two decades ago, the challenge was to persuade Criminal Procedure professors to take a "race turn" in both teaching and scholarship. The field is still a work-in-progress, but meaningful advances have been made.

Still, we can—and should—do more, especially in engaging the intersection of race, Criminal Procedure, and legal pedagogy. My call aligns with recent efforts by Bennett Capers,[428] Alice Ristroph,[429]

---

426 Farr, *supra* note 23. The case is *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). One of the appellants in this case, a mother of seven children who received government assistance, purchased a number of household items from the appellee furniture company between 1957 and 1962. The printed form installment contracts containing the terms of these purchases specified that if the appellant defaulted on any of her payments, the appellee could repossess any of the purchased items. The appellant defaulted on her payments for the last purchased item, and the appellee repossessed all of the items she purchased since 1957. The appellant contended that some of the contracts she entered into with the appellee were unconscionable. *Id.* at 447. While the court opinion does not mention the race of the appellant, a number of scholars who have researched and written about this case have noted that she was Black. *See, e.g.*, Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 New Eng. L. Rev. 889, 893 (1997).

427 The problem of anti-Blackness in the law school curriculum extends well beyond these examples. I am a coeditor on a volume that examines this issue, and racial inequality more generally, across the law school curriculum. *See* The Oxford Handbook of Race and the Law (Khiara M. Bridges, Devon W. Carbado & Emily Hough eds.) (forthcoming 2026). David Sklansky has written an excellent account of how anti-Blackness is implicated in evidence law. *See* David A. Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering* Queen v. Hepburn, 2022 Sup. Ct. Rev. 413, 442 (2022).

428 Capers, *Law School*, *supra* note 51, at 33–34.

429 Ristroph, *supra* note 8, at 1631.

Cynthia Lee,[430] Shaun Ossei-Owusu,[431] and Daniel Harawa[432] to interrogate the racial and carceral dimensions of lawyering and the law school curriculum. It is a call that invites law professors to take seriously that when students enter our Criminal Procedure classrooms, they are entering *racialized* "field[s] of pain and death."[433] That reality imposes on law faculty the pedagogical responsibility to confront difficult questions:

How do we create safe learning environments for our students when, as I mentioned earlier, Criminal Procedure requires some students to learn the law and legal analysis through their constitutionalized subalternity? How do we address the ways Fourth Amendment doctrine produces the very forms of racialized policing it refuses to see?[434]

How might our teaching resist the unarticulated ways in which Criminal Procedure functions as a mass-incarcerating juridical field? What would follow if we described Fourth Amendment law as "the Fourth-Amendment-to-prison pipeline," or the course more broadly as "the-Criminal-Procedure-to-Prison Pipeline?"[435] How would such framings reshape our teaching, scholarship, and institutions?

How do we engage race and carcerality in minority-Black institutions where Black professors, and not just Black students, are non-normative, presumptively improperly professorial? When we say we want more Black students in Criminal Procedure courses, what do we mean? Do we overlook that teaching the course *with* Black students is also racially fraught?

What labor do we expect Black students to perform (with their "diverse" bodies)—and for whose benefit?[436] How do we avoid the racial double bind faced by Black students, a structural position in which they are instructed—explicitly or implicitly—to leave race

---

430 Cynthia Lee, *Race and the Criminal Law Curriculum*, *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado et al. eds.) (2022).

431 Ossei-Owusu, *Criminal Legal Education*, *supra* note 8, at 414.

432 Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 937 (2023).

433 *See* Cover, *supra* note 7, at 1601 ("Legal interpretation takes place in a field of pain and death." (footnote omitted)).

434 *Cf.* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1779 (2012) (arguing, in the equal protection context, that constitutional doctrine has evolved into a form of "intentional blindness" that obscures ongoing racial subordination under the guise of colorblindness).

435 *See* Ristroph, *supra* note 8, at 1685–92 (querying whether we might think of a "law school to prison pipeline").

436 Prior to the 2023 *SFFA* case, diversity was the substantive justification for affirmative action. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (holding that diversity is a compelling justification for affirmative action). Some scholars critiqued this justification in part because it seemed to protect affirmative action largely for the benefit of white people. *See, e.g.*, Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155–56 (2013).

at the classroom door yet find their racial identities conscripted for instructional performance?[437]

What would it mean for us to take seriously that Fourth Amendment law has long operated as an engine of police power expansion, not constraint, and that race has long operated as central, not incidental, to its doctrinal architecture?[438] Despite policing's historical role as an instrument of Black racial subordination and violence,[439] the Supreme Court has not, for decades, seriously engaged with that reality in developing or applying doctrinal rules. Instead, the Court ignores race altogether, declares the Amendment ill-suited to address racialized policing,[440] or directs such claims to other constitutional domains.[441] Suppose we took that doctrinal reality as a point of departure to discuss and explore the possibilities of police abolition. Would that render the idea more legible?

I do not deny that police abolition raises hard normative and pragmatic questions. I address some of them elsewhere in developing a "police power abolition" framework.[442] But against the normalization and frequency of policing Black bodies, to dimiss abolitionist projects outright, to say that abolitionism is unthinkable, is also potentially to say—knowingly or not—that a society in which Black people are not policed is unimaginable.

Part of our work as Criminal Procedure scholars must be to challenge that unthinkability—to name what doctrine obscures: that contemporary policing depends on Black people in ways structurally continuous with earlier regimes of racial domination. In different ways, policing today *requires* Black people every bit as much as Jim Crow did. Fourth Amendment law has helped produce and legitimize that dependency, a dependency that bodies register, theory sometimes abstracts, and poetry has the potential to lay bare.

---

437 Crenshaw, *supra* note 392, at 6. Crenshaw describes this as a form of "subjectification." *Id.*

438 Davis & Ernst, *supra* note 400 (describing racial gaslighting).

439 *See* Daanika Gordon, Policing the Racial Divide: Urban Growth Politics and the Remaking of Segregation 15–17 (2022) (ebook); Race, Crime, and Punishment: Breaking the Connection in America, chs. 1–3 (Keith O. Lawrence ed., 2011).

440 *See* Terry v. Ohio, 392 U.S. 1, 14–15 (1968) (suggesting that because Fourth Amendment cases are litigated against the backdrop of the exclusionary rule, there is nothing the Fourth Amendment can do to prevent the "wholesale harassment" of Black people by the police).

441 *See* Whren v. United States, 517 U.S. 806, 813 (1996).

442 Carbado, *Police Power Abolition*, *supra* note 16, at 703–24.

IV
The Poem (Second Read)

Chokehold. Handcuffs. Knees.

"Stop—"
Chokehold. Cuffs. Knees.
Not moving.
Knees.
Not talking.
Knees.
Not breathing.

Walking.
Driving.
Jogging.
Sleeping.
Being
under the totality
of circumstances
Black

Dying
constitutionally
reasonably

In
Stops:
reasonably suspicious
The peculiar sensation
of your body
speaking
against itself

Writs of assistance
resurrected
as
Black bodies
For Black people

Wanted:
Available
for capture

anytime
anywhere
any way

No freedom

to leave

No freedom

to stay

In plain view

Especially
in “high-crime areas”:
Disposably
alive

In
Frisks:
reasonably dangerous
The peculiar sensation
of twoness
publicly exposed
but
out of focus
A blurred figure
in Black
spread-eagled
stretched thin
never enough
and surplus

Pain
still here
still there

In
Cars:
reasonably profiled
The peculiar sensation

of being
particularly
unparticularly
Black
Driving
in a state
of necrological
anxiety

Any traffic infraction
anywhere
No traffic infraction
anywhere

Probable cause
everywhere
Producing
pretextual pathways
to
premature
death

In
Homes:
reasonably insecure
The peculiar sensation
of bodies
without borders
Violated
yet inviolable
under siege
under law
Expectations of privacy
society
deems
illegitimate
Experiencing
states of emergency
as
normal
life

In
Policing
writ large:
reasonably
killable
The peculiar sensation
of being triggered
by the trigger
the Black body
triggers
Curtailing critique
controlling contestation
compulsorily
complying
Contemplating
the consequences
of casually
crossing
a permanently
precarious
policed
open
border

the thin blue line
between
agency
and
death

When to resist?
Never.
(Remember
"the talk")
When to move?
Never.
(Remember
"the talk")
Don't make your death
their harmless error
Don't make
their harmless error
your

excited
delirium

Though your life
is never
in your hands
And your submission
can never
be perfect

Prepare
precautions
prophylatically

Perform
palatability
Prophylatically

Discipline
your tongue
De-escalate
your
Blackness
Disarm
the deadly force
of your body

Know
the rightslessness
of your rights

Breathe

(as best
you
can)

Take
your life
off
the line

Come
home

live
to fear
the fears
they rehearse
as scripts
scripts courts
write into law
from the perspective
of a
reasonable officer

live
to feel
your body
keeping
score

live
to mourn
anticipatorily

live
to retrieve
the taking
of your body
even if
it's been
undone
Don't leave
all of it
there

Bring back
what
you can

Let go
of the rest

Alienated flesh
separated
from its body
Watching
more of you
leave
yourself

Finding community
in a ghostly
diaspora
disembodied
disoriented
displaced
Black afterlives
the pieces of us
that die
in police encounters
we survive

live
to bear witness
to the banality
of bare death

dead
Black
bodies

Strange Fruit
of a
poisonous
tree

Watch
them
Watch
us
dying
Souls of Black folks

barely
recognized

Barely recognizable
as
losses
of
life

Look
at the bullets
Look
at what's left
of her body
Look
at the family
she leaves
Look
at the futures
taken

Criminalizing
Black people
Decriminalizing
murder

Everybody
sees it
Law and order
needs it

Black people
know it

Death
as
spectacle
as
ordinary
life

Time
nine minutes
Time
two seconds
Time

five minutes
Time
one second
Time
six minutes
Time
three seconds
Time
eight minutes
and forty-two seconds
Time

to die
too soon
in time

Time
to juridically live

Preserved
by
law

Qualified immunity
Justifiable force
Terms of art
that serve and
protect
them
and authorize
more

Dead Black bodies
dying
with
precedential
life

***

That I invited this second reading does not mean that I have resolved what the first reading opened. Resolution was not the aim. The impulse to invite a second reading was about contextualization.

What the poem could only gesture toward before the doctrinal and pedagogical analysis may now register with greater granularity and affect: the accumulated racial weight of policed Black bodies, including dead Black bodies, given precedential life.

The second reading sharpens not only how we see that precedential life, but also what it means to embody that insight—to feel it, to carry it, to pedagogically manage it in the classroom.

Black death as legal afterlife. Black death: doctrinally sedimented. Black death: an event already calendared.

Put it in your book.
The date that I must keep with death.
Would you like to come and look?
You will see a Black boy die.
Would you like to come and cry?
Maybe tears politely shed
Help the dead.
Or better still, they may help you—

Langston Hughes, from *August 19*[443]

Black death as legal afterlife. Black death: doctrinally sedimented. Black death: an event already calendared.

In some ways, Fourth Amendment law is about carceral events already calendared, about the dates Black people are forced to keep with the police, including those that culminate in death. The life of Fourth Amendment law ensures that the life of Black people is going to be policed. The life of Fourth Amendment law ensures that some of us are going to die.

August 19 may not be our date, but we have one.

Dates with death permeate the jurisprudence. Not in the sense that every Fourth Amendment case involves the use of deadly force. In fact, most do not. The point is that the cases comprising the Criminal Procedure canon exist against the background of a necropolitical shadow, one that invites us to think about the boundaries of Black survivability: the conditions under which we live when we are not dying.

443 Langston Hughes, *August 19 . . . A Poem for Clarence Norris*, *in* The Collected Poems of Langston Hughes 204 (Arnold Rampersad & David Roessel, eds.) (1995).

Doctrine enters the classroom already saturated with that death-adjacent positionality. Doctrine enters the classroom with the Black body in peril.

Conceptualizing the Fourth Amendment as a body of law that keeps time means that the central cases in the field are not simply asking whether an officer's conduct was reasonable.[444] They are structuralizing proximity to death. *Terry v. Ohio*, *Whren v. United States*, *Illinois v. Wardlow*, *Tennessee v. Garner*—key cases in the Fourth Amendment archive—are not only holdings about stops and frisks, pretextual stops, flight from the police, or use of force, respectively. They are also calendaring devices. They specify when police contact may begin, how it may escalate, and under what circumstances it may end in a body on the ground.

In time.

The salience of time as an architecture of Fourth Amendment law marks the jurisprudence as one of the regimes through which a temporality of captivity is instantiated—the Terry stop, the traffic stop, frisks, excessive force—moments in which time simultaneously stands still and continues, moments that have been already calendared, moments that presuppose their recurrence, moments that Jared Sexton might call "colored time"—"an experience for which 'there is no intermission.'"[445]

At the outset of writing what has culminated in *Bare Death*, these dimensions of racial temporality, or versions of them, were squarely on my mind. That is why *Bare Death* is not only about death as finality.

It is also about bare death: the conditions under which Black people are made to die and the life of the Black body after death.

It is also about Black living: the conditions under which Black people are made to live in proximity to their own death.[446]

It is about Black dread: the conditions under which Black people come to learn that police encounters can stage their crossing.

And it is about self-mourning: the conditions under which we grieve the self whose death has been calendared—and rehearse an obituary without knowing . . .

---

444 In some ways, my intervention here builds on a broader literature on "racial time." For a synthesis of that literature and its relationship to civil rights, see generally Yuvraj Joshi, *Racial Time*, 90 U. Chi. L. Rev. 1625 (2023).

445 Sexton, *The Social Life of Social Death*, *supra* note 284, at 4–5.

446 I see these claims as simpatico with arguments Jared Sexton and Huey Copeland have advanced about social life and social death. *See generally id*. (describing the tension between afro-pessimism and Black-optimism in regards to the social death of slavery).

Conclusion

I wish I could say that, as I end this intellectual journey—from a freewriting that became a poem, from a poem that became an Article—I know how to pedagogically manage the various dimensions of anti-Blackness I have described. I wish I could say that I know what to do, pedagogically speaking, when the Black bodies in the classroom meet the Black bodies in the archive.

But I do not. And so, as a prelude to beginning my Criminal Procedure class, I will continue to tell my students that I will pedagogically fail them.[447] For to encounter Criminal Procedure as a Black person is potentially not merely to feel one's flesh—a sensation the language of "triggering" does not begin to capture—but to risk collapsing into it.

This is not to throw my hands in the air in the face of the *being-black-and-teaching-that* dynamics I have discussed. Nor is it to retreat from teaching the Criminal Procedure course. What I am saying is more difficult and more exacting: I do not know how to create a "safe" learning environment in a course whose archive helps produce and normalize the criminalization of Black people and the disposability of our lives.

Bare Death is, in part, a call for us to "bear death"—to bear witness to Black death and disposability; to bear witness to the anti-Blackness that is often not merely a motivation for doctrine, but the doctrine itself; and to bear witness to the role professors play in teaching students how to mobilize that doctrine.

That doctrinal literacy does not remain in the classroom. It travels outwards—into courtrooms, police departments, and everyday encounters—carrying anti-Blackness forward as legal craft.

This returns us to the question that has haunted this project from the outset: Can you be Black and teach that? Perhaps the more unsettling question is whether you should.

Whatever one's answer, there is pain in that endeavor. The pain of engaging a body of law that positions Black people as the problem; the pain of witnessing the constitutionalized disposability of Black life;[448] the pain of reliving racial scripts without a language, or even a

---

[447] My move in this regard aligns with Shaun Ossei-Owusu's comments about feeling "compelled" to apologize to his students. He writes: "I feel compelled to apologize, not because of some personal responsibility, but because . . . learning [] law—particularly for racial minorities—can be intellectually violent. It pales in comparison to the structural and physical violence that people experience outside the ivory tower, but it is also unforgiving, . . . and often goes unnamed." Ossei-Owusu, *For Minority Law Students*, *supra* note 8.

[448] For a useful account of how we might conceptualize trauma and its manifestation in the classroom, see generally Sarah Katz, *The Trauma-Informed Law Classroom*, *supra* note 288 (arguing that law professors can support student well-being by acknowledging trauma's impact on learning and modeling empathetic, trauma-informed responses in the classroom).

register, in which to manage them; the pain of inhabiting a body socially constructed to be self-incriminating, a body rendered available *for pain*, a body that was "asking for it," to borrow the grotesque logics of sexual violence.

The pain of knowing what the Black body knows about the physical pain of physical force; the pain of being told that there is no pain or that you should get over it; the pain of teaching in a state of anticipatory mourning; and the pain of confronting, again and again, the knowing unknowingness of that pain, a fabricated racial illiteracy that places the racial pain beyond the juridical consciousness of Fourth Amendment law, beyond the pedagogical consciousness of the legal academy, and beyond the ethical consciousness of the legal profession.

Beyond articulation.

But the pain of being Black and teaching that is not only a response to effects of anti-Blackness saturating the doctrine. It is also the pain of pedagogical complicity—of sensing that one is directing, and participating in, what Paul Butler might describe as a "minstrel show": instructing students to sing along to the sheet music of minstrel performance called Fourth Amendment law.[449]

The pain includes the recognition that one is helping to stage the very logics that degrade, criminalize, and endanger Black life.

These are not incidental harms. They are constitutive features of what it means to teach *this* law in *this* body. Their cumulative force support Shaun Ossei-Owusu's observation that, for Black people, engagement with legal doctrine can be "intellectually violent."[450]

The standard terms of doctrinal engagement demand a kind of epistemological self-betrayal from Black faculty and students alike: to argue against, minimize, or remain silent about what their own body already knows and teaches.

How, then, does one avoid becoming a central figure in a pedagogical scene in which anti-Blackness is organically bound up with what it means to "think like a lawyer"? How does one "teach like a law professor" in the Criminal Procedure context without teaching the very rules that make Black bodies the source of their own degradation—the rules that criminalize us, endanger us, kill us, and effectuate one's own undoing?

How does one teach excessive force jurisprudence and not feel that death is not the worst of it, because one has already died before?[451]

---

449 In a brilliant rewriting of *Terry v. Ohio*, Paul Butler presents the case as a minstrel show. See Paul Butler, *Terry v. Ohio*, *in* Critical Race Judgments (Bennett Capers et al., eds. 2022).

450 *See* Ossei-Owusu, *For Minority Law Students*, *supra* note 8.

451 *See* Craig A. Reynolds, *The Worst of It*, *in* Brother to Brother: New Writings By Black Gay Men 142 (1991) (describing the sense of knowing death—"[d]eath is not the

How does one enter the Criminal Procedure classroom—and leave it—without knowing, always knowing, and feeling, that one is Black and teaching *that*?

These are not rhetorical questions. They are the conditions under which teaching in Black bodies takes place.

What remains is not resolution but reckoning. I do not have an answer that redeems the enterprise. What I have is *Bare Death.* That poem insists on bearing witness to what the law renders livable; refuses the comfort of ordinariness; names the violence that doctrine produces and settles into; and acknowledges that some forms of knowledge cannot be taught without cost.

If this Article does anything, let it mark that cost—and make clear that when Black life is organized around death and disposability, teaching the law that authorizes both is never neutral, never safe, and never just teaching.

***

Although I end here, the Article does not. Emmanuel Mauleón, my former student and now a colleague, takes up what remains, reading this Article from the inside of a pedagogical relationship that the Article attempts to name.

Epilogue

Emmanuel Mauleón[452]

Over nearly five years, I have borne witness to the development of Devon Carbado's *Bare Death*—first shared tentatively as an unlikely fragment, a poem he believed would never surface in a law review. We exchanged poetry and debates about the purpose of engaging Fourth Amendment doctrine, police power, and abolition in a moment of rupture and uprising. And during that period, he articulated—at times more forcefully than others—the desire to opt out altogether: an

worst of it / for I have died before"—against the backdrop of the ways in which it is bound up with homophobic violence against Black gay men).

452 Associate Professor of Law, University of Minnesota School of Law. I write from a position that is not Black. Though my connection to Carbado's work on Criminal Procedure and policing is borne, in many ways, from similarly disembodying experiences of police violence, it is not an equivalent racialized experience. My own encounters with policing have been shaped by an anti-Black system that swells its banks to flood the adjoining terrain. As a Latine man, I bear witness to the *Bare Death* Carbado recalls, differently than those who live its prefiguration in their skin. And yet, in a nation that requires anti-Blackness as a structuring logic, none of us remain untouched by white supremacist hierarchies of disposability. What follows is written from this dual distance/proximity to the conditions his work theorizes.

insistence that policing had already extracted too much from his mind and body outside the classroom, such that returning to that terrain within the classroom felt increasingly untenable.

And yet, during that same period, he completed *Unreasonable*, which forcefully mapped the Fourth Amendment as a doctrinal engine of Black death.[453] He extended that project by interrogating the doctrinal and practical "strict scrutiny" to which the Black body is subjected.[454] He engaged debates on abolition directly and articulated a "police power abolition" framework.[455] And he did not turn away from the poem for long, converting the experience of hitting a wall into the blueprint for a window—inviting others to see what the doctrine tries to occlude.

Those of us shaped by his teaching recognize his insistence that we attend to antiracism in multiple registers: discursive, doctrinal, historical, and phenomenological. More than most, he is unconcerned with speaking to acolytes—my sense is that he prefers the harder work of conversion. Yet that very commitment to persuasion has often kept him from occupying the register of pure testimony. *Bare Death* marks a consequential shift: a movement from critique to testimony, from legal analysis toward what Saidiya Hartman has described as *critical fabulation*—writing that refuses to reproduce the silences the law demands while refusing, too, to speak only in the register the discipline authorizes.[456]

This shift is not simply a matter of form (though poetry embedded in and throughout a law review article is no small departure). It is a refusal to let doctrine metabolize Black death into precedent without mourning. To ask, "can you be Black and *teach* that" and "can you be Black and *learn* that" is to ask—from the perspective of the pulpit and pew—"how do you do this mourning?" It is a refusal to allow anti-Blackness to remain submerged as the infrastructure of Fourth Amendment pedagogy, humming the quiet melody of a minstrel tune whose origins were long suppressed.[457]

---

453 Carbado, Unreasonable, *supra* note 2.

454 *See* Carbado, *Strict Scrutiny*, *supra* note 228.

455 *See* Carbado, *Police Power Abolition*, *supra* note 16, at 693 (defining "police power abolition" as "the elimination of various police powers, including those that Fourth Amendment law effectively allocates to police officers").

456 Saidiya Hartman, *Venus in Two Acts*, *in* 12 Small Axe 2, 11–12 (2008).

457 Carbado raises reference to Paul Butler's reimagining of *Terry v. Ohio* as a minstrel act. *See* Butler, *supra* note 449. What I'd like to suggest is that his invocation is all the more apt, given how many minstrel tunes remain part of the popular landscape today, their racism (like that at the core of the Fourth Amendment) sanitized and normalized as shared cultural touchstone. *See, e.g.*, April C. Armstrong, *The Minstrel Tradition at Princeton University*, Princeton & Slavery, https://slavery.princeton.edu/stories/the-minstrel-tradition-at-princeton-university [https://perma.cc/U55X-Y9MA] (last visited Nov. 24, 2025) (tracing the origins of "I've Been Working on the Railroad" to a Princeton Minstrel composition, "The Levee Song"); Kyna Hamill, *"The Story I Must Tell": "Jingle Bells" in the Minstrel Repertoire*,

When the doctrinal vocabulary for Black suffering is limited to "objective reasonableness," "consent," and "justifiable force," the professor who teaches in that register alone risks becoming a custodian of the doctrine's carceral impulses. If the only language we offer our students is the language that authorizes anti-Black policing, we tacitly reproduce what Joy James names as the "[s]tate['s] indifference toward, or complicity in, antiblack political violence"; indifference and complicity that renders Black suffering "first frighteningly significant, then hazily familiar, and finally depoliticized memory."[458] And so, Carbado deploys poetry to do what doctrine refuses: name the pain, name the body, name the death. Here, as in much of his recent work, Carbado demonstrates that the Black body provides both the subject of and a condition of possibility under Fourth Amendment law: a "jurisgenerative" resource through which police power expands and constitutional protection contracts.[459]

More specifically, *Bare Death* extends that account by continuing Carbado's project of reading Fourth Amendment doctrine against Black studies, where the question is not simply whether violence is justified, but how racialized violence comes to appear as ordinary governance at all. In that cross-reading, Blackness is not merely the object of police power, but one site through which law works out the terms of flesh, gender, and the human.[460] What doctrine describes as a particularized encounter between a Black person and a police officer,[461] Carbado reopens as a scene of collective racialized un/gendering and un/humanity—where the violated body appears at once hypermarked and

58 Theatre Survey 375, 375–76 (2017) (tracing the connection between minstrelsy and the dissemination of the idealized "sleigh music" genre, including "Jingle Bells"); Paul Resnikoff, *The Original Lyrics to 'Oh Susanna' Are Brutally Racist*, Digital Music News (Oct. 13, 2017), https://www.digitalmusicnews.com/2017/10/13/oh-susanna-original-lyrics [https://perma.cc/DNC3-HZVQ] (reproducing the original, deeply racist lyrics to "Oh Susanna"); Theodore R. Johnson, III, *Recall That Ice Cream Truck Song? We Have Unpleasant News for You*, NPR News: Codeswitch (May 11, 2014, at 13:48 ET), https://www.npr.org/sections/codeswitch/2014/05/11/310708342/recall-that-ice-cream-truck-song-we-have-unpleasant-news-for-you [https://perma.cc/9HFF-VT4Q] (tracing the origins of the popular ice cream truck theme to a minstrel song titled "Zip Coon").

458 Joy James, *Black Suffering in Search of the "Beloved Community": Political Imprisonment and Self-Defense*, 1 Trans-Scripts 212, 215 (2011).

459 Although Carbado is developing this jurisgenerative conception of Blackness in another paper, *see* Carbado, *The Jurisgenerative Black Body*, *supra* note 42, at 4, the idea both figures in his prior works, *see* Carbado, *From Stopping Black People to Killing Black People*, *supra* note 5, and appears in this Article. *See supra* text accompanying notes 14–15 ("[The] Fourth Amendment law as a juridical 'racial project' . . . both produces the social meanings of Blackness on which policing relies and adjudicates the permissible scope of state violence through the prism of the Black body.").

460 *See supra* Section III.A.1.

461 *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 27 (1968).

bare, differentiated and flattened, and across those variations rendered available to force. The scene is never merely individual. It is categorical. That is what Criminal Procedure's official vocabulary cannot quite say.

That insight alone could be sufficient testimony. But he makes a further, more destabilizing claim: the classroom does not merely interpret anti-Black violence; it reproduces it. He demonstrates that teaching Criminal Procedure is not simply about conveying knowledge, but also about constructing a legal affect.[462] The typical Criminal Procedure classroom asks that we circumnavigate grief, trauma, and unspeakable racial pain for which the law school offers no sanctioned vocabulary. To read about racial violence and then confine the debate to "reasonableness" is to stage the inquiry as if the answer were still open. Yet even when we lend the inquiry a critical valence, asking ultimately whether this violence is constitutional obscures the prior questions of what constitutes this violence in the first place. We can train students to approach these endlessly renewed last encounters through law's own narrowing vocabulary, as though doctrine provides the last word on the political and ontological meanings of what it authorizes. They are trained, too, to meet anti-Black state violence through distance, abstraction, and disciplined fidelity to the test—even as we invite critique—because in the end it is still the instrument they must master to clear the bar and enter the profession.

This, then, is the pedagogy of the Black body: a curriculum in which "thinking like a lawyer" can require Black students to think against their own survival.[463] A curriculum that renders, in the language of Hortense Spillers, every Black body it encounters into doctrinally captive flesh,[464]

---

462 *See* Mauleón, *supra* note 42, at 795–803 (describing the mechanisms of racial socialization vis-à-vis the police that contribute to legal endearment with the institution of policing, including in educational settings).

463 Critics of legal pedagogy have long argued that "thinking like a lawyer" trains students to privilege process over justice, suppress explicit discussion of values, emotion, race, and politics, and substitute a professionalized idiom of neutrality and legalistic analysis for normative judgment and historical understanding. *See generally* Kimberlé Williams Crenshaw, *supra* note 392. (critiquing legal pedagogy for universalizing ostensibly neutral methods of analysis while marginalizing race-conscious critique and subordinating the experiences and perspectives of students of color); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Educ. 591 (1982) (contending that legal education's claim to neutrality masks its role in reproducing hierarchy through discipline, deference, and professional socialization); Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. Legal Educ. 247 (1978) (arguing that law school pedagogy inculcates a professional style of analysis marked by skepticism, instrumentalism, and the displacement of moral and political judgment). *But see* Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning 1–12 (2009) (treating lawyerly reasoning as a distinctive professional craft and defending its core methods as the central object of legal training).

464 *See* Spillers, *supra* note 156, at 67.

in the forever suspended state between "free to leave" and "reasonably suspicious."[465] *Bare Death* makes plain that where students are taught to see Black people only through the fact patterns of Fourth Amendment "reasonableness," "reasonableness" becomes a curricular technology for producing Black disposability.

Carbado knows this. *Bare Death* names it, refusing the doctrine's portrayal of Blackness as ordinary. But refusal has a cost. He has described the pain—indeed, the impossibility—of being Black and teaching "that": teaching the very rules that degrade and endanger you, the cases that mark the Black body as always already culpable; doctrine that makes your death a matter of procedure rather than of loss. Though the pain is structural, its burden is individualized, borne on the shoulders of the Black professor whose own body is simultaneously the object and vehicle for instruction.[466]

Critical legal scholars have long noted that writing against the law within the discipline can be akin to being forced to inhabit a non-native tongue, effectively silencing those for whom the grammar is not intuitive.[467] *Bare Death* suggests teaching against law is no less fraught. We are forced to teach Criminal Procedure through doctrinal moves that tie our hands behind our backs: by professional expectations, by the perceived fragility of white students, by the institutional appetite for diversity without disruption. Asking, "can you be Black and teach that?" presses this point further: what if, while teaching, those handcuffs extend beyond metaphor into memory?

Bare Death refuses this bind—the discipline's discipline. Carbado's shift is not merely in register and in form; it is in target. Previous work has dismantled the doctrinal forms through which anti-Black policing and carceral logics proliferate. Here, the addressee is the field itself: the casebooks, the conferences, the scholarly conventions, the pedagogical norms that constitutionalize Black people's bare deaths.[468] In that sense,

---

[465] United States v. Mendenhall, 446 U.S. 544, 554–56 (1980) (announcing the "free to leave" test for Fourth Amendment seizures).

[466] *See* Culp, *supra* note 17, at 543–44 ("Almost all black law professors are forced to write, teach, or speak their concerns about race. Neither our colleagues, nor our own interest in racial justice, will permit us to forget that we are black professors of law."); M.K.B. Darmer, *Teaching* Whren *to White Kids: Using Cognitive Dissonance to Teach the Fourth Amendment*, 15 Mich. J. Race & L. 109, 123–25 (2009) (reflecting on the difficulty of teaching racialized policing doctrine to predominantly white law students).

[467] *See, e.g.*, Williams, The Alchemy of Race and Rights, *supra* note 13, at 6–8 (describing the need to move beyond traditional forms of legal writing); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. Legal Educ. 47, 54 (1988) (explaining how "trying to fit women's experiences into categories forged with men in mind reinstates gender differences").

[468] *Cf.* Crenshaw, *supra* note 463, at 2–4, 7–9 (1989); Darmer, *supra* note 465, at 128–32; Alice Ristroph, *The Curriculum of the Carceral State*, 120 Colum. L. Rev. 1631, 1635–36 (2020);

this Article is not only a reflection, but an indictment. It asks whether we, as Criminal Procedure professors, are training the next wave of lawyers to perfect the mechanics of anti-Black policing. It asks whether pedagogy can be antiracist if it never unsettles police power's presumed legitimacy. This question does not permit easy answers. And importantly, he does not pretend otherwise.

Here is where I must speak not only as a scholar but as a student formed in his classrooms. In the Article, Carbado apologizes for failing to name anti-Blackness in the classroom. Yet he grounded my own legal education in the premise that such naming is the precondition to, not consequence of, understanding the Fourth Amendment.[469] If the doctrine was, as he demonstrates, braided so thoroughly with Black suffering, then to teach the doctrine without the suffering would have been dishonest. Because he made space for that honesty—even if imperfectly—a generation of scholars now reads Fourth Amendment cases as racial scripts rather than exercises in objective reasonableness. That is also the pedagogy of the Black body.[470]

There is another sense, finally, in which "body" matters here. The pedagogy of the Black body refers not only to what law does to Black bodies, but what a Black body of work can do in response.[471] He insists that Constitutional Criminal Procedure cannot be understood apart from the racial violence it authorizes. He insists that *Bare Death* is the natural extension of a doctrinal landscape that refuses to invest in Black life. What he has taught, and what this Article performs, is that such investment begins in the classroom. It begins in the refusal to let bare death masquerade as doctrinal neutrality. It begins in the confrontation with pain as pedagogy.

As Du Bois wrote of the gift and burden of double consciousness,[472] one learns to see the law as both one's inheritance and one's undoing.

Shaun Ossei-Owusu, *Criminal Legal Education*, *supra* note 8, 414–15, 419–20 (2021). Those works each expose, in different ways, the racialized and carceral assumptions embedded in legal pedagogy. Carbado's intervention layers on how, even when approached from a critical standpoint, the doctrine itself makes it nearly impossible to avoid inculcating these assumptions into our students.

469 *See* Carbado, *(E)racing*, *supra* note 76, at 964–67 (describing three prongs of "racing" work needed in Fourth Amendment scholarship).

470 *See* Monica C. Bell, *The Obligation Thesis: Understanding the Persistent "Black Voice" in Modern Legal Scholarship*, 68 U. Pitt. L. Rev. 643, 680 (2007) (describing Carbado as "one of the few young legal scholars at elite schools keeping critical race theory alive for students and the legal community").

471 *See* Christina Sharpe, In the Wake: On Blackness and Being 10 (2016) ("What does it mean to defend the dead? To tend to the Black dead and dying . . . . It means work. It is work: hard emotional, physical, and intellectual work that demands vigilant attendance to the needs of the dying, to ease their way, and also [] the needs of the living.").

472 *See* Du Bois, *supra* note 4, at 3–4.

We can honor Carbado's dual insight here not by elevating him beyond critique (he would reject that absolutely), but by doing what he has always demanded of others: Pushing further.[473] Thinking harder.[474] Refusing comfort.[475] Critiquing even the critique.[476] The truest testament to his work is that it does not culminate with him; it extends, proliferates, and unsettles. It forces those of us who write within and against the legal academy to ask: What would a pedagogy of the Black body look like that does not reproduce the racial state?

Langston Hughes asked us to mark the date—the appointment Black people must keep with death.[477] *Bare Death* insists that legal education should not get to mark that date merely with a case citation. If we are to continue teaching this body of law, we must also teach the dates it inscribes into Black life. The question that remains is not whether the date will come, but whether the law school classroom will continue to prepare its students to defend the inevitability of its arrival—or whether we will teach them to refuse it.

Bare Death is not an elegy, but a demand that we reckon with the field's foundational violence. That we recognize the cost borne by those who teach and learn it. And that we refuse to treat Black death as a passing topic rather than a crisis. It is a demand to bear witness to the pedagogy of the Black body.

---

473 *See, e.g.*, Carbado, *Colorblind Intersectionality*, *supra* note 137, at 812–17 (pressing intersectionality beyond its conventional deployment by insisting that whiteness, patriarchy, and heteronormativity also operate as intersectional formations rather than invisible baselines).

474 *See, e.g.*, Carbado, *Strict Scrutiny*, *supra* note 228, at 19–23 (reworking the legal concept of strict scrutiny into an account of the social and juridical surveillance to which Black people are subjected, thereby forcing a deeper inquiry into how doctrine and lived racial regulation converge).

475 *See, e.g.*, Carbado, *From Stopping Black People to Killing Black People*, *supra* note 5, 105 Calif. L. Rev. 125 (2017) (refusing the comfort of treating ordinary police stops as distinct from lethal state violence by showing how Fourth Amendment doctrine helps structure the continuum between them).

476 *See, e.g.*, Carbado, *Race to the Bottom*, *supra* note 207 (interrogating a familiar critical assumption that the "bottom" necessarily supplies the clearest epistemic or political standpoint and thus turning critique back onto critique itself).

477 *See* Hughes, *supra* note 443.