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STORIES THAT SWIM UPSTREAM: UNCOVERING THE INFLUENCE OF STEREOTYPES AND STOCK STORIES IN FOURTH AMENDMENT REASONABLE SUSPICION ANALYSIS

SHERRI LEE KEENE*

> *We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. . . . Until their voices matter too, our justice system will continue to be anything but.*[1]

INTRODUCTION

In recent years, there has been much discussion in the media about aggressive policing of African Americans and resulting harms.[2] Increased news reporting about police shootings of unarmed African-American males has sparked broader conversations about targeted policing.[3] Government reports have followed, confirming that African Americans in many communities are disproportionately stopped by police and subject to disparate treatment.[4]

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1. Utah v. Strieff, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting).

2. *See* Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along*, 37 U. HAW. L. REV. 339, 339–40 (2015) (describing extensive news coverage of police officer killings of African-American men and boys).

3. *See, e.g.*, Jonathan Capehart, *From Trayvon Martin to 'Black Lives Matter'*, WASH. POST (Feb. 27, 2015), http://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter/; Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016), http://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html.

4. *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016),

Yet, in the midst of intense public discussion and debate, the Supreme Court recently declined to suppress evidence seized following an unlawful stop, thus further expanding the tools available to law enforcement. In *Utah v. Strieff*,[5] the Court considered whether evidence discovered during a police officer's unlawful stop of a private citizen must be suppressed and excluded from trial when the officer learned during the stop that the citizen was subject to a valid warrant for a traffic violation.[6] In allowing the seized evidence to be used at trial, the Supreme Court seemed to turn a deaf ear to expressed concerns about broad police discretion.[7]

While the majority's decision in *Strieff* was remarkable for its incongruence with conversations outside the courtroom, it was Justice Sotomayor's dissent that attracted attention.[8] Justice Sotomayor challenged many of the assumptions underlying the majority's decision, including the majority's finding that the police officer's conduct in that case was "isolated" and not "part of any systemic or recurrent police misconduct."[9] Justice Sotomayor also spoke bluntly about what the Court's decision meant for private citizens.[10] But what was most notable about Justice Sotomayor's dissent was the part that she wrote "only for [her]self"[11] about the severe consequences of unlawful stops and their disproportionate impact on people of color.[12] Cit-

https://www.justice.gov/opa/file/883366/download; *see also* Wesley Lowery, *Study Finds Police Shoot Unarmed Black Men at Disproportionate Rates*, WASH. POST (Apr. 7, 2016), https://www.washingtonpost.com/amphtml/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3_story.html.

5. 136 S. Ct. 2056, 2064 (2016).

6. *Id.* at 2060.

7. *See id.* at 2064–71 (Sotomayor, J., dissenting).

8. *Id.*; *see* Robert Barnes, *Sotomayor's Fierce Dissent Slams High Court's Ruling on Evidence from Illegal Stops*, WASH. POST (June 20, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-5-3-that-mistakes-by-officer-dont-undermine-conviction/2016/06/20/f1f7d0d2-36f9-11e6-8f7c-d4c723a2becb_story.html; Matt Ford, *Justice Sotomayor's Ringing Dissent*, ATLANTIC (June 20, 2016), http://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/.

9. *Strieff*, 136 S. Ct. at 2068–69 (challenging the majority's conclusion, Justice Sotomayor pointed to studies and statistics about the prevalence with which warrants are issued and how warrants have been used by police across the country to stop private citizens without cause).

10. *Id.* at 2064 ("This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong.").

11. *Id.* at 2069 ("Writing only for myself, and drawing on my professional experiences, I would add that unlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name.").

12. *Id.* at 2070 (stating that "it is no secret that people of color are disproportionate victims of this type of scrutiny").

ing to books by renowned African-American authors, Justice Sotomayor addressed the issue of race in police stops from a space beyond the law—one not carved out by Fourth Amendment legal standards.[13]

In contrast to the majority, Justice Sotomayor's dissent addressed concerns about policing practices that have dominated national news in recent years, but have appeared to have little impact in individual cases and have effected no meaningful changes in the law.[14] Indeed, while protests following police killings of African Americans continue to erupt like wild fire in communities across the country, explicit discussions about the relationship between a citizen's race and the police officer's decision to conduct a stop continue to seem out of place in many criminal courtrooms.[15] In many jurisdictions, the overrepresentation of African Americans as criminal defendants alone seems a good conversation starter. Nevertheless, despite the fact that criminal courtrooms continue to be filled with disproportionately high numbers of black and brown defendants,[16] concerns about the role of race in police stops continue largely to go unspoken and unaddressed.[17]

While many legal outsiders may wonder how increasing public outcries of racial inequality seem to have so little impact in the criminal justice system, those familiar with the law should have a fairly good idea. For many

13. *Id.* (citing W.E.B. DUBOIS, THE SOULS OF BLACK FOLK (1903); JAMES BALDWIN, THE FIRE NEXT TIME (1963); TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015)).

14. *Id.* at 2068–69.

15. *See* Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2265 (2014) (discussing ways for defense counsel to "inject issues concerning race discrimination" into courtroom conversation "which, for too many reasons to recount . . . manages to bypass race bias while being steeped in it").

16. *Trends in U.S. Corrections*, SENTENCING PROJECT 1, 5, http://www.sentencingproject.org/publications/trends-in-u-s-corrections/ (last updated March 2017) (stating that more than 60% of those incarcerated are persons of color); *see also* Jamal Hagler, *8 Facts You Should Know About the Criminal Justice System and People of Color*, CTR. FOR AM. PROGRESS (May 28, 2015, 12:01 AM), https://www.americanprogress.org/issues/criminal-justice/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/ (stating that "40 percent of those who are incarcerated are black" despite "being only 13 percent of the overall U.S. population").

17. LYNN LANGTON & MATTHEW DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 1, 9 (2013), http://www.bjs.gov/content/pub/pdf/pbtss11.pdf (citing statistics showing that people of color were nearly three times more likely to be searched during a stop than whites); *see also Racial Disparities in Sentencing: Hearing on Reports of Racism in the Justice System of the United States Before the Inter-Am. Comm'n on H.R.*, 153rd Session, at 8 (Oct. 27, 2014) (written testimony by Am. Civil Liberties Union) (providing that "of the 4.4 million pedestrian stops made by the New York City Police Department from January 2004 through June 2012, 83 percent of the people stopped were African-American or Latino and only 10 percent were white"); Sharad Goel et al., *Precinct or Prejudice? Understanding Racial Disparities in New York City's Stop-and-Frisk Policy*, 10 ANN. APPLIED STAT. 365, 380 (2016) (discussing research showing that while controlling for a number of variables, relative to similarly situated whites, blacks stopped for possible weapon possession are less likely to actually possess a weapon: 2.5% of blacks compared to 3.8% of whites).

years, courts have addressed police stops and searches while ignoring matters of race, often making a seemingly conscious choice not even to mention the defendant's race in their opinions despite police officer testimony that references the defendant's racial identity.[18] Indeed, in 1996, the Supreme Court, in *Whren v. United States*,[19] moved courts beyond what was then merely a practice of discussing police stops in race-neutral terms; there, the Court held that discussions of racial motivation were not relevant to Fourth Amendment analysis.[20] In *Whren*, the Court made clear that the focus of courts' Fourth Amendment analysis is whether a stop can be justified on objective grounds, not a police officer's actual motivations.[21]

In the twenty years since *Whren* was decided, however, it has become increasingly clear that simply ignoring the role of race in police stops does not diminish its impact. Of course, the Court's focus on the validity of individual stops has done little to address the concern that racial minorities as a group are targeted more often for police stops. Indeed, the legal standard asserted in *Whren* allows courts to validate police stops even where the factual basis put forth by a police officer is merely a pretext for racial profiling.[22] But, the Court's decision also fails to account for the hidden effects of racial bias in police officer decisionmaking. In *Whren*, the Court's reasoning rests on a faulty assumption that police officers' perceptions and judgments about a citizen's behavior, are not vulnerable themselves to the influence of race.[23]

18. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962–71 (1999) (discussing the Supreme Court's seemingly "conscious choice" to strip away the racial dimensions of *Terry v. Ohio* by removing all references to the race of the individuals involved).

19. 517 U.S. 806 (1996).

20. *Id.* at 813 (holding that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis" and reasoning that prior cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved").

21. *Id.* ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." (quoting Scott v. United States, 436 U.S. 128, 136, 138 (1978))).

22. *Id.*

23. *See* Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 886 (2015) (first citing Thompson, *supra* note 18, at 987–91; and then citing Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 566–68 (1998)) (describing scholarship criticizing the *Whren* decision on various grounds including that the decision overlooks the problem of police perjury and ignores the psychological realities of police behavior).

Since the time that *Whren* was decided, implicit bias has become the subject of increasing study.[24] A mounting body of research by social scientists now shows that racial bias can be unconscious and impact an individual's thinking at a fundamental level.[25] Negative racial stereotypes associating African-American men with crime have resulted in deeply engrained and widespread bias against members of this group.[26] Even individuals who actively reject negative racial stereotypes can nonetheless be influenced by biases of which they are not even aware.[27] Thus, implicit racial bias can influence decisionmaking, even where decisionmakers think they are being fair and unbiased.[28] Unsurprisingly, police officers are not immune, and perhaps, given the nature of their work, are even more prone to be influenced.[29]

Though implicit bias is now better understood, courts have not yet adapted to address the many concerns that recent studies have raised.[30] Some organizations have made efforts to learn from available research and to strate-

24. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128–32 (2012) (describing the Implicit Association Test (IAT) and social scientists' studies of implicit bias).

25. *See* Kang et al., *supra* note 24, at 1132 (describing implicit biases as "attitudes and stereotypes that are not consciously accessible through introspection."); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 271 (2012) (describing implicit bias as "a psychological process in which a person's non-conscious racial beliefs (stereotypes) and attitudes (prejudices) affect her or his behaviors, perceptions and judgments in ways that she or he are largely unaware of and typically, unable to control"); *see also* CHERYL STAATS ET AL., KIRWAN INST., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW (2016), http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf (annual compilation of research on implicit bias in various subject areas).

26. Richardson, *supra* note 25, at 281 (discussing psychological studies by Jennifer Eberhardt demonstrating that "when thinking about crime, civilians and officers alike non-consciously think about blacks"); *see also* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 883 (2004) ("Not only are Blacks thought of as criminal, but also crime is thought of as Black."); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1072 (2006) (finding that by "conservative estimate," seventy-five percent of whites and fifty percent of blacks show anti-Black bias).

27. Kang et al., *supra* note 24, at 1128–29 ("[A] positive attitude does not foreclose negative stereotypes and vice versa."); Richardson, *supra* note 25, at 271–72 ("[I]mplicit biases can have behavioral effects even when they conflict with an individual's consciously and genuinely held thoughts and feelings.").

28. Kang et al., *supra* note 24, at 1129 (stating that the impact of implicit attitudes and stereotypes on an individual's decisionmaking and behaviors is not dependent on that individual's awareness that he or she possesses such biases).

29. Richardson, *supra* note 25, at 277, 278–79 (discussing how implicit bias can impact the judgments of police officers who engage in "proactive policing").

30. *See* Kang et al., *supra* at note 24 (discussing growing scientific literature on implicit bias and addressing the fundamental question of what should be done about implicit bias in the courtroom).

gize how best to address widespread unconscious racial bias in the courtroom.[31] While there has been significant focus on how courts can reduce bias in areas such as juror decisionmaking, however, less has been said about how courts might address implicit biases that are more firmly rooted in laws and procedures.[32] For example, while much more is known about implicit bias since the Supreme Court made its decision in *Whren*, courts are still bound to follow the legal standard set forth in that case—a legal standard that assumes that police officers' perceptions and judgments about what they observe are not tainted by racial bias.

This Essay challenges courts to acknowledge and address racial bias in the courtroom at a more fundamental level. It discusses the limitations of judicial review, which fails to appreciate the potential impact of implicit racial bias on a police officer's assessment of a citizen's behavior. Specifically, it focuses on the Supreme Court's Fourth Amendment reasonable suspicion analysis and explains how the potential for biased decisionmaking is worsened in a legal system where race is deemed legally irrelevant, and as a result not meaningfully considered. Moreover, this Essay discusses the specific challenge of cognitive shortcuts that can mask implicit racial bias, limiting a court's ability to recognize its potential influence and thus engage in a robust review of police officers' actions.

Part I discusses how implicit bias can impact an individual's judgment and subsequent decisionmaking. This Part will focus on implicit racial bias, and address the impact that embedded knowledge structures can have on how individuals process information. Part II discusses Fourth Amendment standards for assessing the lawfulness of police stops and how these standards fail to acknowledge the influence of implicit racial bias. The reasonable suspicion test is meant to balance the need for police intrusion against the constitutional infringement caused by the intrusion on private citizens. This Part will illustrate the role that implicit bias can play when courts engage in judicial review of police officers' decisionmaking in circumstances that can trigger racially biased thinking, but in which the influence of racial bias is ignored. Ignoring the potential influence of race can skew the conversation in the courtroom and lead to an overestimation of the need for police intrusion. Specifically, this Part will discuss, first, how the "objective facts" test articulated in *Terry v Ohio*[33] fails to account for the impact of implicit racial bias on police officers' perceptions of citizens' ambiguous behaviors. Second,

31. *See* STAATS ET AL., *supra* note 25; PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE CTS., HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx.

32. *See* STAATS ET AL., *supra* note 25, at 19–27.

33. 392 U.S. 1 (1968).

this Part will discuss why legal standards encouraging courts' reliance on police officers' experiences relieves courts of the need to demand explanations for police officers' assumptions that may in fact be the result, not of sound reason, but rather of racial bias. Third, this Part discusses how courts' failure to acknowledge the role that race can play in police officers' decisionmaking leads to court findings of reasonable suspicion that appear to be based less on objective facts and more on racial stereotypes.

I. HOW IMPLICIT RACIAL BIAS CAN IMPACT PERCEPTION, JUDGMENT, AND DECISIONMAKING

In 2013, the Supreme Court denied the defendant's petition for writ of certiorari in the case of *Calhoun v. United States*.[34] Defendant Calhoun, an African-American man, had been convicted in Texas federal court for participation in a drug conspiracy.[35] The primary issue at trial was whether Calhoun knew that the friend and associates he had accompanied on a road trip were going to engage in a drug transaction, or whether, as Calhoun argued, he was merely present in the car and did not know of the plan to purchase drugs.[36] Among the evidence put forth to prove Calhoun's knowledge was the testimony of two alleged co-conspirators who pleaded guilty, testimony of law enforcement officers who purported that they had discussed drugs with Calhoun, and Calhoun's possession of a gun.[37] In his defense, Calhoun explained that he always carried a concealed weapon and was licensed to do so.[38] As Justice Sotomayor put it, "[i]t was up to the jurors to decide whom they believed."[39]

Justice Sonia Sotomayor drew notice in that case when she wrote a statement regarding a "racially charged remark" made by the prosecutor during Calhoun's trial.[40] Specifically, her statement addressed the prosecution's suggestion to jurors that they should fill in evidentiary gaps with assumptions based on racial stereotypes.[41] During the prosecutor's cross-examination of Calhoun, Calhoun explained that the night before the arrest, "he had detached himself from the group when his friend arrived at their hotel room with a bag of money."[42] Consistent with his defense, Calhoun testified that he "didn't know" what was happening, and that it "made [him] think . . . [t]hat [he]

34. 133 S. Ct. 1136, 1136 (2013) (mem.).
35. *Id.* (Sotomayor, J., joined by Breyer, J., statement respecting denial for writ of certiorari).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

didn't want to be there."[43] After Calhoun failed to answer the prosecution's questions about why he did not want to be in the hotel room, the prosecutor then asked more pointedly: "You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you—a light bulb doesn't go off in your head and say, This is a drug deal?"[44] Justice Sotomayor described the prosecutor's question as "pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason."[45]

Justice Sotomayor's remarks were noted for her strong rejection of the prosecutor's explicit use of racial bias.[46] Observers would be remiss, however, if they were to conclude that the race of the defendant probably would not have played a role in the jurors' assessment of the case absent the prosecutor's comment. While the prosecutor's explicit remarks are deeply troubling, the deeper concern of racial bias impacting the factfinders' decisionmaking was not prompted only by the prosecutor's statement. Even if the race of the defendant was not explicitly mentioned aloud, it is likely that negative stereotypes of black and Latino men as criminals—here, drug dealers—would have unconsciously influenced the jurors' assessments.

As indicated above, studies by cognitive psychologists show that negative racial stereotypes associating African-American men with crime are deeply rooted in American society.[47] These pervasive stereotypes can lead to unconscious associations between black males and criminality, and can have a significant impact in the courtroom. Indeed, one study has shown that African Americans are not afforded a true presumption of innocence, as factfinders tend to find criminality among African Americans where they would not among others.[48] Studies have suggested that the mere presence of an African-American man can automatically trigger thoughts about stereotypes

43. *Id.* (quoting Trial Transcript at 125–26 (Mar. 8, 2011)).

44. *Id.* (quoting Trial Transcript at 127 (Mar. 8, 2011)).

45. *Id.* at 1137.

46. *See, e.g.*, David G. Savage, *Justice Sonia Sotomayor Slams Texas Prosecutor for Racial Remark*, L.A. TIMES (Feb. 25, 2013), http://articles.latimes.com/2013/feb/25/nation/la-na-court-sotomayor-20130226.

47. *See supra* note 26.

48. Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010) (discussing results showing "implicit associations between Black and Guilty," and that these associations "predicted judgments of the probative value of evidence").

associated with members of his social group, such as criminality.[49] Moreover, not raising the issue of race where bias is triggered can lead to more biased decisionmaking than when race is acknowledged.[50]

To be clear, racial bias can lead an individual to interpret the behavior of an African-American man differently than they would interpret the same behavior of a white man. In fact, one study showed that racial bias can cause individuals to interpret identical behavior differently based solely on the race of the individual being observed.[51] There, research subjects were asked to observe two men engaged in a heated dialogue. During the exchange, one man ultimately shoved the other. While all observers watched two men engage in this interaction, the researchers manipulated the race of the men being shoved and doing the shoving. The results showed that while most observers perceived a shove by an African-American male to be violent or aggressive, the identical behavior by a white male was far more often perceived to be playful.[52]

To understand how race influences an individual's perceptions, judgments, and decisions, it is important to consider how people cognitively process what they hear and observe. To begin, it is important to know that new experiences are understood by being placed into existing cognitive frames derived from earlier experiences.[53] These embedded knowledge structures give meaning to experiences, shaping perceptions and ordering thinking.[54]

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49. Eberhardt et al., *supra* note 26, at 876 (discussing contemporary social psychological research showing that the presence of social groups can activate concepts with which that person's social group has been associated).

50. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1555 (2013).

51. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590 (1976); *see also* Richardson, *supra* note 25, at 276–77 (discussing the Duncan study).

52. Duncan, *supra* note 51, at 595. The study found that when both men were black, sixty-nine percent thought the shove was violent, compared to thirteen percent when both men were white. *Id.* When a black individual shoved a white man, seventy-five percent thought the shove was violent, compared to seventeen percent when the race of the individuals was reversed. *Id.*

53. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 263 (2009); *see* J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING J. 53, 66 (2008) ("What 'could' happen is determined, not by the decision makers' undertaking an empirical assessment of actual events, but rather by their looking to a store of background knowledge about these kinds of narratives—to a set of stock stories." (citing W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTINGING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 50 (1981)).

54. Berger, *supra* note 53 ("Because of the way the mind works and the culture is constructed, metaphor and narrative are essential, and unavoidable, for persuasion and understanding." (first citing ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 217–45 (2000); and then citing GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT 128 (1999)).

They allow individuals to plug new events "into slots in an existing framework" and to avoid "having to interpret and construct a diagram of inferences and relationships for the first time."[55] As such, these embedded knowledge structures provide both shortcuts and stereotypes, turning "new and unfamiliar situations into the normal and natural course of events."[56]

While embedded knowledge structures play a central role in cognitive processing, their function is not always appreciated by the thinker. People are often unaware of the role that these constructs play in their understanding of the world around them. As Professor Linda Berger has put it, "both information and understanding float beneath the surface, neither consciously acquired nor examined."[57] Thus, our conceptual cognitive processes can operate as a "hidden hand," shaping "how we conceptualize all aspects of our experience."[58]

A number of cognitive frames have been discussed in social psychology literature as embedded knowledge structures including categorizations, schemas, and stock stories.[59] "Categorization" refers to the use of categories to classify elements into groups; this term refers to where individuals place new information.[60] Categorization can lead to classifications of people based on race.[61] And, once a person is categorized into a group, other people then apply "schema," or generalized knowledge about the group to "draw inferences and derive predictions."[62] Thus, racial stereotypes are schema as they organize "people's expectations about other people who fall into certain social categories."[63]

In judging a new event to determine what might have happened, individuals also look unconsciously to deeply embedded plotlines or dominant

55. *Id.* at 265.

56. *Id.*

57. *Id.* at 263 (citing LAKOFF & JOHNSON, *supra* note 54, at 9–15.)

58. *Id.* (quoting LAKOFF & JOHNSON, *supra* note 54, at 128); *see* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 287 (2013) ("Paradigms exercise a 'grip on the human imagination' and therefore guide and influence the reception of evidence as well. They recur so frequently in stories that familiar elements can enact them implicitly." (footnote omitted) (quoting JEROME BRUNER, ACTS OF MEANING 43 (1998)).

59. *See* Ronald Chen & Jon Hansen, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1131–32 (2004) (noting that the dividing line between categories, schemas, and similar concepts is somewhat ambiguous in the social psychology literature); *see also* Berger, *supra* note 53, at 264–69 (discussing the embedded knowledge structures of metaphor and narrative).

60. Chen & Hansen, *supra* note 59, at 1132.

61. *Id.* at 1134 (discussing how schema, including "distinctions commonly made according to race," can impact categorization).

62. *Id.* at 1132 (citing SUSAN T. FISKE & SHELBY E. TAYLOR, SOCIAL COGNITION 105 (1991)).

63. *Id.* at 1137 (describing role schemas that help organize knowledge about "the set of behaviors expected of a person in a particular social position" such as those acquired at birth (quoting FISKE & TAYLOR, *supra* note 62, at 119).

stories, often referred to as stock stories.[64] Without their being aware, these stock stories can lead people to fill in factual gaps with a store of knowledge.[65] A stock story "resolves ambiguity and complements 'given' information with much 'assumed' information."[66] Thus, individuals may be persuaded to believe a narrative about an ambiguous situation, not because it necessarily reflects what happened, but because it corresponds to a familiar stock story.[67] As stock stories can involve characters who are categorized by race and subject to corresponding stereotypes that shape people's expectations, it would appear that certain stock stories are also associated with certain racial groups.[68]

If one considers the *Calhoun* case in this light, it is easy to see how implicit racial bias likely played a role in jurors' assessments of the evidence in that case, regardless of whether the defendant's race was explicitly mentioned. The racial identity of the defendant alone would prompt his categorization and trigger unconscious associations between African-American men and criminality. Beyond this, the story told by the prosecution of an African-American man participating in a drug deal might have rung a familiar bell with jurors who had heard this plotline—and others depicting African Americans as criminals—many times before. Put plainly, as jurors heard the prosecution's story in *Calhoun*, they may have unconsciously referenced a familiar stock story, and the image invoked in their mind might have involved a similar scene with similar characters.

64. *See* Rideout, *supra* note 53, at 66 (discussing how in determining what happened in a new circumstance, individuals can unconsciously make reference to "a store of background knowledge about these kinds of narratives—to a set of stock stories"); Griffin, *supra* note 58, at 286, 297–98 ("'Good lawyers,' one . . . manual states, tie the circumstances of the case to 'plotlines already deeply embedded in listeners' minds, to mythic narratives whose familiar moves reveal how the world is and how people, faced with fateful choices, act for good or for ill.'" (quoting SAM SCHRAGER, THE TRIAL LAWYER'S ART 7 (1999)).

65. Helen A. Anderson, *Police Stories*, 111 NW. U. L. REV. 19, 24 (2016) (citing Berger, *supra* note 53, at 266) ("Storytelling is said to be central to our ability to make sense out of a series of chronological events otherwise lacking in coherence and consistency . . . .").

66. Anderson, *supra* note 65, at 24 (quoting Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 6 (1984)).

67. Rideout, *supra* note 53, at 66 ("The narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it 'really happened.'" (quoting Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analysis of the First Rodney King Assault Trial*, 12 CLIN. L. REV. 1, 2–3 (2005)); *see also* Anderson, *supra* note 65, at 24; Griffin, *supra* note 58, at 297–98.

68. *See* Thompson, *supra* note 18, at 988 (discussing culturally embedded stories about groups and stating that one story frequently applied to people of color is that they are prone to engage in criminal and violent activity than whites); LEE ANNE BELL, STORYTELLING FOR SOCIAL JUSTICE: CONNECTING NARRATIVE AND THE ARTS IN ANTIRACIST TEACHING 29 (2010) (describing stock stories as familiar stories that explain racial dynamics in ways that support the status quo).

II. THE POTENTIAL INFLUENCE OF IMPLICIT RACIAL BIAS IN POLICE OFFICER PERCEPTION, JUDGMENT, AND DECISIONMAKING

As discussed above, implicit bias is unconscious and pervasive in our society. As such, it can impact individuals at all levels of the criminal justice system, including police officers.[69] Indeed, the situations that police find themselves in are ripe for implicit bias. For example, where police are actively seeking individuals who are engaged in criminal activity, this can "activate[] negative racial stereotypes that can affect the interpretation of ambiguous behaviors."[70] Moreover, police are often called upon to judge ambiguous situations under stressful conditions, and make quick decisions with limited information.[71] In such circumstances, an individual will often resort to referencing stereotypes, and implicit bias can play a role.[72]

In this Part, the author considers how embedded knowledge structures—categorization, schema, and stock stories—operate in the background as police officers evaluate the suspiciousness of citizens' behavior. Further, it considers how current legal standards not only ignore, but also mask, the potential influence of racial bias, thus diminishing the effectiveness of judicial review. To begin, it is important to set the stage by describing the legal standards that courts apply to police stops.

The Fourth Amendment to the United States Constitution sets forth the right of the people to security "against unreasonable searches and seizures."[73] The Supreme Court has long recognized the importance of this provision to all citizens and the need for restrained law enforcement.[74] Through its decisions, the Supreme Court has given meaning to the Fourth Amendment, setting forth the relevant legal standards that govern police encounters with private citizens.

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69. Kang et al., *supra* note 24, at 1135–52 (discussing some of the crucial points in a criminal case from police encounters to sentencing where implicit bias can influence decisionmaking).

70. Richardson, *supra* note 25, at 281 (citing Eberhardt et al., *supra* note 26, at 876).

71. *Id.* at 282 (citing Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 342 (2004)).

72. *Id.*

73. U.S. CONST. amend. IV. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." *Id.*

74. *See* Terry v. Ohio, 392 U.S. 1, 8–9 (1968). In *Terry*, the Court declared:

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. . . . "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Id. (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

In 1968, in the landmark case *Terry v. Ohio*, the Supreme Court held that police officers could briefly detain private citizens that they deemed to be suspicious on less than probable cause.[75] In reaching this conclusion, the Court confirmed that the Fourth Amendment would still apply in this context and that "the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant."[76] In introducing a new "reasonable suspicion" standard, the Court stated that the relevant test required balancing "the need to search [or seize] against the invasion which the search [or seizure] entails."[77]

In framing the relevant legal standard, the Court decided "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen."[78] To justify a *Terry* police stop, it was determined that a police officer must have "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity."[79] Indeed, police officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[80] The Court has allowed "commonsense judgments and inferences about human behavior."[81] However, a police officer is required to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'"[82]

In *Terry*, the Court also discussed the need for judicial review, emphasizing the importance of judges' "detached, neutral scrutiny" in evaluating the reasonableness of specific circumstances.[83] For judicial review, the Court stated that it was "imperative that the facts be judged against an objective standard."[84] The Court framed the relevant legal question as: "[W]ould the facts available to the officer at the moment of the seizure . . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[85]

Prior to the *Terry* decision, concerns were already being raised about the impact of police stop and frisk practices on minority communities.[86]

75. *Id.* at 24.

76. *Id.* at 20.

77. *Id.* at 21 (quoting Camara v. Municipal Court, 387 U.S. 523, 534–35, 536–37 (1967)).

78. *Id.* at 20–21 (quoting *Camara*, 387 U.S. at 534–35, 536–37).

79. Brown v. Texas, 443 U.S. 47, 51 (1979) (citing Delaware v. Prouse, 440 U.S. 648, 663 (1979); and then citing United States v. Brignoni-Ponce, 422 U.S. 873, 882–83 (1975)).

80. *Terry*, 392 U.S. at 21.

81. Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

82. *Terry*, 392 U.S. at 27.

83. *Id.* at 21.

84. *Id.*

85. *Id.* at 21–22 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

86. Renee Hutchins, *Stop* Terry*: Reasonable Suspicion, Race, and a Proposal to Limit* Terry *Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883, 885 (2013); Thompson, *supra* note 18, at 957; *see*

These concerns were barely addressed by the Supreme Court in *Terry*; there, the Court dismissed the problem as one consisting of a few rogue police officers that the exclusionary rule was impotent to change.[87] While the Court in *Terry* gave little consideration to the racial dynamics of police stops, this concern was later addressed by Justice Thurgood Marshall. In a 1989 decision, *United States v. Sokolow*,[88] Justice Marshall remarked on the function of the reasonable suspicion standard as a way to guard against stops that are prompted on the basis of a defendant's race:

> By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to "overbearing or harassing" police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race.[89]

The Supreme Court's subsequent decision in *Whren* in 1996, however, indicated that Fourth Amendment analysis was to be conducted without considerations of a police officer's "[s]ubjective intentions."[90] While failing to address racial profiling, the Court reiterated in that case that "circumstances, viewed objectively," must justify the police officer's action.[91]

The following discussion considers whether the "objective facts" test set forth in *Terry* adequately protects African-American citizens from police stops based on racial bias. This discussion will consider the role that implicit racial bias can play in a police officer's assessment of a citizen's behavior, and the limitations of judicial review that, following *Whren*, denies that race might even be relevant to such an assessment. This Part will also consider how the relevant legal standards encourage courts to explain evidentiary gaps with a generalized ideal of police expertise, rather than consider the possibility of racial bias. Lastly, it will consider the consequences of the Court's missed opportunities to address the influence of racial bias on police officers' decisionmaking in police stops.

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also Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 363 n.133 (1998) ("[The Commission] not[ed] that police departments, reacting to concerns about crime, have begun aggressive patrol practices, including stop and frisk tactics, 'without weighing their tension-creating effects [for the Negro community] and the resulting relationship to civil disorder.'" (quoting REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 159–60 (1968))).

87. *Terry*, 392 U.S. at 13–14; Thompson, *supra* note 18, at 972.

88. 490 U.S. 1, 11–19 (1989) (Marshall, J., dissenting).

89. *Id.* at 12 (Marshall, J., dissenting) (citing *Terry*, 392 U.S. at 14–15 & n.11).

90. Whren v. United States, 517 U.S. 806, 813 (1996).

91. *Id.* at 813 (quoting Scott v. United States, 436 U.S. 128, 136, 138 (1978)).

A. Stories Are Treated as Objective Fact

As Part I suggests, meaning is contextual. As such, one troubling aspect of the Court's Fourth Amendment analysis is that it starts by considering the "facts available to the officer at the moment of the seizure."[92] Indeed, the Court's confidence in police officers' statements as a reliable starting point for judicial review of police conduct rests on the faulty premise that bias does not alter appreciably a police officer's perception of what he is observing and deems to be fact. To the contrary, "much of our knowledge is tacit and much of our thinking is unconscious."[93] Embedded knowledge structures determine our "experience and expression"; they work without our awareness shaping perceptions and reasoning processes.[94] Put simply, one must consider whether a citizen's observed behaviors make a police officer suspicious, or whether suspicion colors the meaning that the police officer assigns to what he observes.[95]

An illustration for this point—that some purported "facts" are subjective—can be found in *Terry* itself. In *Terry*, the police officer testified that he believed that Terry and his companion, both African-American males, who he had seen standing and moving about on the street, were "casing a job, a stick-up."[96] There, the police officer based his suspicion that the men intended to rob a store on a combination of seemingly innocent behaviors. As the Court observed: "There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in."[97]

In finding that the police officer was able "to point to specific and articulable facts" sufficient to justify the police stop, however, the Court did not merely rely on a bland recitation of clearly observable facts drawn from the police officer's testimony.[98] Rather, the Court repackaged these facts and

92. *Terry*, 392 U.S. at 21–22.

93. Berger, *supra* note 53, at 263; *see also* Griffin, *supra* note 58, at 287 (describing narrative as "preconceptual," with the power to "influence not just how facts are perceived but what facts *are*").

94. Berger, *supra* note 53, at 262–63.

95. United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (noting that "[r]eflexive reliance" on a drug courier profile "runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention"). In *Sokolow*, Justice Marshall stated that such a risk was enhanced by the profile's "chameleon-like way of adapting to any particular set of observations." *Id.* (quoting United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987)); Kang et al., *supra* note 24, at 1137 (discussing studies by social scientists finding that police officers may "have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention").

96. *Terry*, 392 U.S. at 6.

97. *Id.* at 22–23.

98. *Id.* at 21–23.

organized them into a narrative. Utilizing this framework, the Court presented the police officer's testimony in a manner that supported the police officer's assertion that the behavior of Terry and his companion, though they were engaged in no activities that alone appeared to be unlawful, were nonetheless suspicious:

> [T]he story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternatively along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away.[99]

Indeed, it is easy to see how a story makes a more compelling case for reasonable suspicion than bare facts alone. However, the Court's narrative also reveals the malleable nature of the police officer's statements, not to mention the persuasive quality of the Court's story. Indeed, one might question how imperfect facts couched in story, can ever be labeled as "objective facts."[100] Stories are certainly told from a perspective, and the author controls the meaning.[101] In *Terry*, the Court fashioned the police officer's testimony into a familiar narrative with a clear theme.

Moreover, the police officer's statements took on new significance in the story as the Court selected words to describe the men's behavior that carried subtly different meanings and some negative connotations. In the Court's retelling of the police officer's story, the men who it first described as being engaged in the act of "standing together" were later described as "hover[ing]," not to mention that their "strolling" became "pac[ing]," and their "look[ing]" became "star[ing]."[102] Indeed, in the *Terry* opinion, while the Court articulated the need for judicial review based on "objective facts,"

99. *Id.* at 23.

100. *See* Anderson, *supra* note 65, at 31–39 (comparing stories in judicial opinions that focus on police officers' perspectives with those that humanize the private citizen and tell the story from the private citizens' point of view; and noting the different choices made as to "language, point of view, detail, and context").

101. Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 772 (2006) ("Each character has needs and goals. The author controls how much the audience knows about those needs and goals.").

102. *Terry*, 392 U.S. at 6, 22–23.

the Justices did not distinguish the clearly observable facts from the meaning that the police officer—and later the Court itself—attached to them.[103]

B. Police Officers' Logical Leaps Are Not Meaningfully Challenged

While it is troubling that courts may treat stories as "objective facts," it is equally concerning when courts fail to critically consider why police officers judge defendants' seemingly innocent conduct to be indicative of criminal activity. The opinion in *Terry*, for example, provides no evidence that the Court ever received a satisfactory answer as to what it was about the particular men's actions that led the police officer to judge their behavior as suspicious. Clearly, the police officer's assessment was based on his brief, visual observation of the men. While the opinion provides that the police officer did not know the men he observed, however, the police officer was "unable to say precisely what first drew his eye to them."[104] The officer also claimed that when he looked over to them, the two men "didn't look right" to him.[105] Nonetheless, the Court considered the police officer's assessments of suspicion to be sufficient given his police experience.[106]

In contrast to the Court in *Terry*, and many cases that have followed, in his dissenting opinion in the relatively recent case, *United States v. Mason*,[107] Judge Roger Gregory of the Fourth Circuit raised concerns about a police officer's inability to explain why he thought a defendant's seemingly innocent actions were suspicious.[108] In *Mason*, the court considered whether a police officer was reasonable in his suspicion that the defendant, an African-American man, was engaged in drug activity, justifying an extension of a traffic stop.[109] In that case, the majority acknowledged that "several of the facts, when taken alone, were . . . consistent with innocent travel."[110] But, similar to *Terry*, the court found that the facts, when taken as a whole, supported a finding of suspicion.[111]

In his dissent, Judge Gregory questioned both what the majority deemed to be the "objective facts" in the case and the story put forth by the majority.[112] To start, the dissent and the majority described the police officer's statements as to why Mason was suspicious in very different ways. Mason

103. *See id.* at 21–22.
104. *Id.* at 5.
105. *Id.*; Thompson, *supra* note 18, at 966.
106. *Terry*, 392 U.S. at 23.
107. 628 F.3d 123 (4th Cir. 2010).
108. *Id.* at 136 (Gregory, J., dissenting).
109. *Id.* at 128 (majority opinion).
110. *Id.*
111. *Id.* at 128–29.
112. *Id.* at 137 (Gregory, J., dissenting).

and his companion, both African-American men, were stopped on the interstate in Georgia, not too far from Atlanta, in a vehicle that had tinted windows.[113] The dissent boiled down the relevant "objective facts" as follows:

> (1) Mason's one-to-two second delay in pulling over; (2) Mason's looking in the direction of his passenger; (3) the fact that there was a strong smell of air freshener in the car; (4) the fact that Mason was driving away from Atlanta; (5) the fact that there was only one key in the ignition; and (6) the fact that there was no visible luggage in the backseat.[114]

While the dissent focused on observable facts, by contrast, the majority's asserted facts were lengthy and offered in the form of a narrative.[115] In finding that the police officer had articulated facts supporting reasonable suspicion, the majority noted that context matters.[116] But, there, the context appears to have been supplied mostly by the police officer.[117] For example, with respect to the single key on Mason's key ring, relying on the police officer's testimony, the court presented the following narrative:

> [The officer] observed that there was only a single key on Mason's key ring. He concluded that this fact, combined with the fact that the two men were coming from the direction of Atlanta, a city that, according to [the officer], was ranked third in the nation in terms of drug distribution, on a known drug route, could indicate that the men might have been on a "turnaround" trip as drug couriers.[118]

A wide logical gap exists between the fact that Mason had a single key in the ignition and the above narrative of drug activity. However, the majority did not question why the police officer concluded that the single key on

113. *Id.* at 126 (majority opinion).

114. *Id.* at 137 (Gregory, J., dissenting).

115. *Id.* at 128–29 (majority opinion); *see* Anderson, *supra* note 65, at 36–38 (providing an example of a story told in a judicial opinion from the private citizen's perspective without explanations for the police officer's actions).

116. *Mason*, 628 F.3d at 129–30 ("[C]ontext matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." (quoting United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008))).

117. Anderson, *supra* note 65, at 38 (discussing context supplied by police officers that is included in judicial opinions, and rarely questioned, including that the area where an incident occurred is a "high crime area" or "other general facts about suspected criminals that officers have learned through 'training and experience'").

118. *Mason*, 628 F.3d at 129. The dissent included additional details of the police officer's assumptions based on Mason's possession of a single key:

> [The police officer] stated that [the single key in the ignition] suggested to him that the car was borrowed. Because it was borrowed, he stated, there was no house key. "And the reason there's no house keys," he stated, "is because there's criminal activity being pursued and no one wants to be linked to the car or criminal activity."

Id. at 137 (Gregory, J., dissenting) (footnote omitted).

the key ring suggested that its particular possessor was a drug courier, or whether something about the two men led the officer to attach such a meaning to the key. Instead, the majority readily adopted the police officer's narrative of the meaning of the single key and other "facts," while noting that several of the "facts" presented by the police officer [alone] "could hardly have distinguished suspicious activity from innocent travel."[119] In finding reasonable suspicion, the majority, without much further discussion, concluded that the facts taken together would have given an "experienced officer a reasonable suspicion that criminal activity was afoot."[120]

Judge Gregory, however, questioned the police officer's significant leaps in logic, stating that the police officer failed to articulate why any of the observable facts "would be associated with criminal activity."[121] According to Judge Gregory, "[the police officer] provided 'articulable' facts, yet provided no basis for why these factors were 'suspicious' individually or in the aggregate."[122] Judge Gregory also noted that reasonable suspicion analysis should not change with the gender, race, or ethnicity of the motorists.[123] To further his point, Judge Gregory provided an alternative narrative that incorporated what he had identified as the relevant "objective facts." In that narrative, the two African-American male motorists were replaced with a mother and child:

> While running errands with her child, a mother is pulled over on I-20, just north of the Savannah River. It takes her one second to pull over to the right-side emergency lane and while doing so, she looks to the right, which also happens to be where her child is sitting. She has cherry-flavored air freshener hanging from her rear-view mirror. She has one key in the ignition because her key, like many keys on modern vehicles that also electronically lock and unlock car doors, is too big to fit on standard-issue key chains. And she has no luggage in the backseat because, like most people travelling to the grocery store, she does not plan to spend the night.[124]

Judge Gregory noted that a police officer's decision to then detain the woman and child, in the example, and to investigate them for drug trafficking "would be patently unreasonable."[125] The dissent's hypothetical story suggests what courts often seem to ignore, that so-called "objective facts" are not always what leads the police officer to be suspicious, so much as the

119. *Id.* at 129 (majority opinion).
120. *Id.*
121. *Id.* at 137 (Gregory, J., dissenting).
122. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).
123. *Id.* at 138 n.7.
124. *Id.*
125. *Id.*

meaning given to the facts derived not just from the circumstances, but also from assumptions made about the character of the defendant.[126]

In relying on the general, undefined concept of police officers' "experience" to explain the logical leaps from making an observation to labeling it suspicious, the court misses the opportunity to do what it aims to do: discern whether the police officer had reasonable grounds for determining that a defendant's behavior is suspicious. Indeed, the fact that a police officer may have experience does not mean that the police officer is not relying on short cuts, such as racial stereotypes or stock stories, to fill in the gaps.

C. Implicit Racial Bias Can Fill In the Gaps

While courts give deference to police officers' experience to explain logical gaps in their analysis, police are not immune from the influence of racial bias. As discussed in the beginning of this Part, the nature of a police officer's job may even make them more vulnerable to reliance on stereotypes and other cognitive shortcuts.[127] Current laws and procedures, however, can hinder the courts' ability to identify implicit bias in police officers' decisionmaking. Many legal standards allow little room for defendants to challenge police officers' subjective perceptions and judgments which are labeled as objective facts and treated as invulnerable to racial bias. This is the case even where there are factual clues suggesting that racial bias may have impacted a police officer's judgment. Indeed, in its opinion in *Mason*, the majority omitted facts suggesting that the police officer took notice of the defendant and his companion's race as African American and associated the men's race with criminality.[128] Notably, these facts were included in the dissent.[129]

For example, the police officer's testimony in *Mason* suggests that Mason's race may have drawn the police officer's attention to him and shaped the police officer's perception of events.[130] On cross-examination, the officer

126. *See* Anderson, *supra* note 65, at 25 n.30 ("Indeed, it is our lightning-quick tendency to fill in the facts with a stock story that is responsible for much of the problems caused by implicit bias—we fill in a (biased) story to fit a character we have learned is African-American or Hispanic."); López, *supra* note 66, at 15 (discussing police officers' reliance on "the most easily generated information"); Richardson, *supra* note 25, at 272 ("Implicit bias can cause individuals to interpret identical behaviors differently dependent solely upon the race of the individual observed.").

127. *See supra* note 24–25 and accompanying text.

128. *See generally Mason*, 628 F.3d at 123–34 (majority opinion).

129. *See generally id.* at 134–40 (Gregory, J., dissenting).

130. *Id.* at 135. Notably, similar clues that race may have played a role can be found in *Terry*. Thompson, *supra* note 18, at 968 ("But, with race eliminated from the case, the most obvious explanation for McFadden's suspicions and his subsequent actions was unavailable. The Court was left with McFadden's testimony that 'he was unable to say precisely what first drew his eye to them.'" (quoting Terry v. Ohio, 392 U.S. 1, 5 (1968))).

testified that based on his "experience" he was suspicious of criminal activity "as soon as he pulled over Mason's car," and agreed that his suspicion was based on a "sort of gut instinct."[131] The officer's testimony also demonstrates that the officer noted the race of Mason and his companion—describing them as "older black males, that [were] not in good shape"—in providing an explanation for why he needed a K-9 unit on the scene.[132] The officer stated that he did not feel that the men would challenge him physically, but he "felt like if they had a gun, we were probably fixing to shoot it out."[133]

At another point during the stop, the police officer indicated that Mason failed to make eye contact with him and that he thought this was a sign of criminality:

> Mason was [n]ot making eye contact, shifting his weight. It's hard to explain in the sense that if you've ever looked into the eyes of a person that's looking at the rest of their life in prison they have a certain look about them. And fear is hard to explain in that sense. But when you are looking at a person that is fearful it's just a different look that every officer that I know understands.[134]

It is worth noting that the evidence in that case, however, suggested that the police officer was not accurate in his reporting of even Mason's observable behavior. According to the dissent, a video recording of the stop showed just the opposite of what the police officer indicated—Mason tried to make eye contact while the officer looked away.[135] Nonetheless, the police officer shared both his inaccurate observation and the above narrative to describe why Mason appeared to him to be suspicious, and this did not deter the majority from finding legal justification for the police stop.[136]

To address implicit bias, courts must be willing to take a more critical look at whether race, rather than experience, may be the reason that a police officer has made the leap from an observation of a defendant's engagement in an innocent activity, to a narrative of suspicion. Courts have too often allowed testimony of a few innocent behaviors and lots of stories, to justify reasonable suspicion.[137]

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131. *Mason*, 628 F.3d at 134–35 (Gregory, J., dissenting).

132. *Id.* at 135.

133. *Id.* at 134–35 ("Regrettably, I must begin by supplementing and clarifying some key facts about Trooper Swicord's detention of Mason that are omitted by the majority.").

134. *Id.* at 135.

135. *Id.*

136. Similarly, the suppression hearing transcript in *Terry* provides clues of a racial dynamic in that case that the Supreme Court's opinion did not. Thompson, *supra* note 18, at 964.

137. David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 669 (1994) (concluding that the evidence required for reasonable suspicion "has shifted, slowly but inexorably, to the point that a few innocent activities grouped together, *or even no suspicious activities at all*, can be enough"). While beyond the scope of this

III. CONCLUSION

To justify a police stop, police officers must be able to point to "specific and articulable facts . . . taken together with rational inferences," to justify reasonable suspicion.[138] Police officers are not to rely on a mere "hunch."[139] Implicit bias, however, can impact a police officer's judgment as to what is suspicious behavior. Racial stereotypes can work unconsciously in the background, shaping the officer's perception. Stock stories can play a role, providing a familiar narrative structure, and filling evidentiary gaps with assumed knowledge.

To effectively review police conduct, courts need to be able to critically assess police officers' factual assertions, seek explanations for police officers' logical leaps, and consider the relevance of race. But, to do so, courts need to be aware of the embedded knowledge structures that are working behind the scenes, and to be able to "unpack" them.[140] For example, concerning the police officer's testimony in *Mason*, it would be important for a court to consider the pull of the stock story of black men as criminals that may have been at work in the police officer's subconscious. Indeed, a court should consider critically the strength of the evidence as it hears a police officer testify that a defendant seemed to be acting in a nervous manner, or even that a single key on a key ring could reasonably signal drug activity. However, in addition to considering the strength of the evidence, courts might try to find ways to separate the observable facts from the meaning that readily attaches to them. Judges might consider alternative narratives that match the police officer's stated facts, or consider whether the police officer's story makes sense if you change the race of the defendant.

While they represent alternative narratives, stories of African-American males' police encounters told outside the courtroom have seemed to gain little traction inside the courtroom. Perhaps the tides are turning. In a recent case, *Commonwealth v. Warren*,[141] the Massachusetts Supreme Judicial Court considered reported findings of racial profiling in Boston in its reasonable suspicion analysis of a case involving a black male defendant.[142] In *Warren*, the court concluded that "the finding that black males in Boston are

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Essay, it is worth noting that in many reasonable suspicion cases the location in which the defendant is stopped—often categorized as a "high crime area"—is not based on any specific behavior of the defendant other than his being present, but is often weighed in reasonable suspicion analysis. *Id.* at 685–86. The loaded term "high crime area," combined with a defendant's racial status, would seem to only invite bias into a court's analysis.

138. Terry v. Ohio, 392 U.S. 1, 21 (1968).

139. *Id.* at 27.

140. Lee Anne Bell, *The Story of the Storytelling Project: An Arts-Based Race and Social Justice Curriculum*, 5 STORYTELLING, SELF, SOCIETY 107, 112 (2009).

141. 58 N.E.3d 333 (Mass. 2016).

142. *Id.* at 342.

disproportionately and repeatedly targeted for [police] encounters suggests a reason for flight totally unrelated to consciousness of guilt."[143] The court further instructed that "[g]iven this reality for black males in the city . . . , a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus."[144] In challenging long held factual assumptions based on new information, the Massachusetts high court's decision drew notice for its deviation from the status quo.[145]

As the Massachusetts decision demonstrates, stories told outside the courtroom can play an important role in uncovering implicit bias. Stock stories work to maintain the status quo, presenting a dominant narrative that often goes unchallenged. But, counter-stories can help judges to develop a more critical ear: "Underneath the stock stories are numerous, teeming stories that talk back to the stock stories, that challenge them, that speak otherwise."[146] Indeed, "[g]iven their special vantage point, concealed stories can teach us much about stock stories."[147] Juxtaposed to stock stories, counter-stories can work to dismantle stock stories as truth and instead make them "just another story among many."[148]

To address implicit bias at a more fundamental level, it is important that courts move beyond the mislabeling of ambiguous evidence as "objective facts," and the myth of police officers as infallible experts who are not vulnerable to the influence of racial bias. Most importantly, courts must recognize the legal relevance of conversations about race in Fourth Amendment analysis, and its necessity for meaningful judicial review.

143. *Id.*

144. *Id.*

145. John R. Ellement & Jan Ransom, *Black Men Have a Reason to Flee Police, Mass. High Court Rules*, BOSTON GLOBE (Sept. 20, 2016), https://www.bostonglobe.com/metro/2016/09/20/sjc-judges-must-consider-high-rate-fios-between-boston-police-and-men-color/0baqga4wecvXxsWZwSnNlI/story.html.

146. Bell, *supra* note 140, at 112.

147. *Id.* (Counter-stories are those of individuals who are on the "periphery and looking at the center, of recognizing the things that can be seen from the margins that cannot be seen from the center.").

148. *Id.*