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Ordinariness as Equality*

ELISE C. BODDIE†

INTRODUCTION

This Essay argues for an equality norm of racial ordinariness. Ordinariness here refers to the state of being treated as a full, complex person and a rightful recipient of human concern.¹ As a norm, its purpose is to focus constitutional attention on common, everyday interactions as sources of racial indignity.² It also seeks to sensitize courts and other constitutional actors to the infinite varieties and grittier dimensions of discrimination through the “understandings of everyday folk.”³

It may seem odd to think of ordinariness as a matter of racial equality. But consider the following speech by Frederick Douglass in 1865.⁴ Asked “what to do with the negro,” Douglass responded in part as follows:

All I ask is, give him a chance to stand on his own legs! Let him alone!
If you see him on his way to school, let him alone,—don’t disturb him!
If you see him going to the dinner table at a hotel, let him go! If you see
him going to the ballot box, let him alone!—don’t disturb him! If you see
him going into a workshop, just let him alone,—your interference is
doing him positive injury.⁵

Douglass’s plea reveals the vastness of discrimination and how it seeped through the crevices of everyday life.⁶ His request for freedom in the everyday—to be able to go to school, dine, vote, work, *just to be*—spoke to a desire to live as an ordinary person,

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1. This definition is analogous to what Iris Marion Young has described as two general values of the “good life”: “participating in determining one’s action and the conditions of one’s action” and “developing and exercising one’s capacities and expressing one’s experience.” IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 37 (1990). Ordinariness is also similar to what Kenneth Karst has described as a right of belonging and “to be treated by organized society as a respected, responsible, and participating member.” Kenneth Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

2. See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004).

3. Charles Jones, *Why Not Freedom?*, 51 RUTGERS L. REV. 1063, 1068 (1999).

4. See Ronald Turner, *The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative-Action Position: From Bakke to Grutter and Beyond*, 30 HASTINGS CONST. L.Q. 445, 481 (2003).

5. *Id.* at 481 & n.175 (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts* (Jan. 26, 1865), in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blasingame & John R. McKivigan eds., 1991)). Turner writes that “Douglass was criticizing a contract-labor system established and enforced by the general in Louisiana in which freed slaves were forced to work on plantations.” *Id.* at 481 n.175.

6. Cf. Jones, *supra* note 3, at 1069.

unencumbered by racial stigma and by the status of subordination and “otherness” that engulfed black people.

This Essay embraces the same demand for ordinariness that Frederick Douglass expressed over a century and a half ago. Its primary concern is the lived experiences of race for black people and the quiet trauma that comes from being the persistent object of societal fear⁷ and resentment.⁸ To be denied ordinariness is to be shrouded in stereotypes and assumptions in an abstracted identity that is never fully one’s own.⁹ These experiences can take the form of subtler indignities that erode the self. In the extreme, they can be life altering or lead to death.¹⁰

As I have indicated, ordinariness as a measure of equality is not a new concept. This Essay’s goal is to surface some of what has been said about it already in constitutional discourse, but has never been fully heard. For instance, by its terms, *Brown v. Board of Education*¹¹ declared unconstitutional segregation in public education.¹² But it was understood and celebrated by blacks at the time for its promise of ordinariness¹³ and the hope that the decision would bring freedom from the daily encumbrances and stigma of race. In the years after *Brown*, some civil rights litigants took up this claim more directly and framed their demands for equality explicitly through the lens of ordinariness.¹⁴ The idea of ordinariness as a form of equality also surfaced

7. See JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 81–101 (1997); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS 1–13 (1998).

8. See generally Steven A. Tuch & Michael Hughes, *Whites’ Racial Policy Attitudes in the Twenty-First Century: The Continuing Significance of Racial Resentment*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 134 (2011) (discussing the persistence of white racial resentment against African Americans). Kenneth Karst makes a similar point about the complexity of white resentment, suggesting that such resentment is grounded in shame and guilt over blacks’ historical subjugation and mistreatment. Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 268 (1983) (“About twenty years ago, in casual conversation, my friend Vaughn Ball put this idea in words I shall never forget: ‘You can always forgive people for what they do to you, but you can never forgive them for what you do to them.’”).

9. See Lenhardt, *supra* note 2, at 809.

10. See *infra* Part I.

11. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

12. See, e.g., Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1334 (2004) (“*Brown* sought to eliminate segregation in schools and thereby ensure that educational opportunity would not be rationed according to race.”).

13. I heard *Brown* described this way by those who lived through the era of state-enforced segregation at a celebration of the decision’s sixtieth anniversary. *LDF Commemorates 60th Anniversary of Brown v. Board of Education*, NAACP LEGAL DEF. & EDUC. FUND, INC. (May 16, 2014), <http://www.naacpldf.org/press-release/naacp-legal-defense-fund-commemorates-60th-anniversary-brown-v-board-education> [<https://perma.cc/N4ES-Q2DG>]; see also Maksymilian Del Mar, *Exemplarity and Narrativity in the Common Law Tradition*, 25 LAW & LITERATURE 390, 396 (2013) (“[O]rdinariness . . . [is] what a black kid ought to expect on arriving at a school door in Little Rock, Arkansas, after *Brown v. Board of Education* struck down racial segregation.” (quoting JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 5–6 (2002))).

14. See *infra* Part II.

more obliquely in a smattering of constitutional cases from the 1970s and 1980s, principally in dissents by Justice Marshall.¹⁵ From there the trail disappears in race cases, though it has emerged more recently in Justice Kennedy's opinions in *Obergefell v. Hodges*¹⁶ and *Romer v. Evans*,¹⁷ finding for plaintiffs challenging discrimination on the basis of sexual orientation.

Part I explains why ordinariness matters and the importance of everyday interactions to achieving ordinariness. It discusses these points through the lens of a true story about the shooting death of a black man by the police.¹⁸ Part II discusses court opinions that have identified ordinariness, either explicitly or implicitly, as a form of equality. Part III discusses the Fourth Amendment as one example of how constitutional doctrine denies ordinariness. The Essay closes with a brief discussion of the challenges and possibilities of ordinariness as a constitutional norm.

I. WHY ORDINARINESS MATTERS

Consider the following true story:

In July 2016, Philando Castile, a black man, was shot and killed in his car by a Latino police officer in St. Paul, Minnesota, during a traffic stop.¹⁹ The officer stated that Castile looked like someone who was a robbery suspect,²⁰ though he used the pretext of a broken taillight to pull Castile over. Castile, who was a supervisor of a local school cafeteria,²¹ was driving home with his girlfriend and her four-year-old daughter after buying groceries. After Castile volunteered that he had a gun in the car, the officer shot him, reportedly because he feared that Castile was reaching for it and because he smelled marijuana in the car.²² Castile's girlfriend insisted that Castile was reaching for his identification, which the officer had requested moments before he shot him.²³

This is the narrative that surfaces in several online searches about Castile's death. But it misses an important piece of the story. Between July 2002 and July 2016, Castile was stopped by the police at least forty-six times—only six of which were

15. *Id.*

16. 135 S. Ct. 2584, 2607 (2015).

17. 517 U.S. 620, 631 (1996).

18. The idea of ordinariness explored in this Essay originated in an opinion piece that I wrote for the New York Times. See Elise C. Boddie, *Philando Castile and the Terror of an Ordinary Day*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/opinion/philando-castile-and-the-terror-of-an-ordinary-day.html> [<https://perma.cc/7W38-N9YF>].

19. John Bowden, *Police Officer Who Shot Philando Castile Found Not Guilty*, HILL (June 16, 2017, 4:29 PM), <http://thehill.com/business-a-lobbying/338193-police-officer-who-shot-philando-castile-found-not-guilty-report> [<https://perma.cc/UCB3-YVAA>].

20. Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (June 21, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/> [<https://perma.cc/NE9Q-ZV29>].

21. Melissa Chan, *Philando Castile Was a Role Model to Hundreds of Kids, Colleagues Say*, TIME (July 7, 2016), <http://time.com/4397086/minnesota-shooting-philando-castile-role-model-school> [<https://perma.cc/7DXU-K2R3>].

22. Berman, *supra* note 20.

23. *Id.*

for offenses that an officer could have observed prior to the stop.²⁴ As a result, Castile reportedly accumulated \$6000 in fines and tickets, which he struggled to pay.²⁵

Could these repeated interactions with the police have stigmatized Castile? Stigma refers to what R.A. Lenhardt has described as the state of being “a disfavored or dishonored individual in the eyes of society.”²⁶ Stigma imposes a “virtual social identity”²⁷ that shrouds its subjects in racial abstractions and preconceived social judgments. Because stigma prevents persons from participating in society on fully equal terms, it is a significant barrier to ordinariness. When stigma is internalized, it corrupts one’s sense of self.²⁸ W.E.B. Du Bois famously framed this as a struggle that “yields [black persons] no true self-consciousness, but only lets [them see themselves] through the revelation of the other world.”²⁹ As a result of this “twoness,” one is “always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity.”³⁰ Thus, racially stigmatized persons are not only externally diminished by social judgments but also become agents of their own debasement.³¹

To unpack this point let us consider how Castile’s experience of being stopped forty-six times could have burdened his daily experiences of driving to work, driving home, and while running errands, as he was doing the day he was killed. Did the possibility of being pulled over occupy his thoughts as he was driving? Did he plan how he would respond—what he would say and how he would act if the police stopped him again? Did he ever feel demeaned or humiliated by the police in prior stops? And, if so, did the sight of a police car make him anxious or fearful?

I ask these questions to illustrate that what many take for granted—the casual, mundane experience of driving—for Castile may have been a source of daily trauma that corroded his dignity and freedom. His repeated prior interactions with the police may have led him to internalize the experiences of being a perpetual suspect.³² This

24. Eyder Peralta & Cheryl Corley, *The Driving Life and Death of Philando Castile*, NPR (July 15, 2016, 4:51 AM), <http://www.npr.org/sections/thetwo-way/2016/07/15/485835272/the-driving-life-and-death-of-philando-castile> [<https://perma.cc/V3XL-A566>] (observing that of the forty-six stops, “only six of them were things a police officer would notice from outside a car—things like speeding or having a broken muffler”).

25. *Id.* These facts suggest that Castile was subject to multiple predatory systems—often facilitated by constitutional law—that trap poor people of color. See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017) [hereinafter Carbado, *From Stopping Black People*]; see also Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245 (2010); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) [hereinafter Carbado, *(E)racing*].

26. See Lenhardt, *supra* note 2, at 809.

27. E.g., IRVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2 (1963).

28. See Lenhardt, *supra* note 2, at 841–42 (fully exploring this dynamic).

29. W.E.B. Du Bois, *THE SOULS OF BLACK FOLK* 2 (1994).

30. *Id.*

31. Lenhardt, *supra* note 2, at 818 n.55 (“The idea that one’s racial group ‘is, in fact, less worthwhile, or valuable than other social groups or collective identities’ leads to the inexorable conclusion that one’s personal identity may be similarly flawed.”).

32. See Carbado, *(E)racing*, *supra* note 25, at 966 (describing the burdens associated with

might explain why on that day he volunteered to the officer that he had a gun, leading the officer (who stated that he thought Castile was reaching for it) in turn to shoot him. In listening to his interactions with the officer on the dashcam video,³³ it appears that Castile was trying to avoid surprising the officer and calmly to reassure him that he was not only complying with but submitting to the officer's authority.³⁴ This purposeful demeanor may have reflected lessons that he had learned in his earlier encounters with the police.

These final moments of Castile's life demonstrate the troubling possibilities of stigma. The shadow identity that stigma imposes is costly to dignity, but in the context of interactions with the police it can be the difference between life and death.³⁵ The officer sought to justify the shooting by claiming that Castile was reaching for his gun. Seconds before, however, the officer had asked Castile to produce his license.³⁶ Would the officer have made the decision to fire shots into the car at close range within a matter of seconds had Castile been white?³⁷ Or would he have given a white man the benefit of the doubt that he was reaching for his license, rather than for a weapon? This is the power and tragedy of stigma. It leaves no margin for error in interactions with the police, but it also inevitably shades those very interactions with mutual fear and suspicion. In Castile's case the harms are compounded: the loss of daily freedom he may have experienced in the years before his death and the final injustice of his death itself.

I offer Castile's story as an example of the denial of ordinariness. His story shows how everyday actions, such as driving down a street, can without warning imperil the dignity, or even the lives, of black people. Though they may unfold in an instant

racialized suspicion, including "internalized racial obedience toward, and fear of, the police" and the performance). Carbado writes that

[P]eople of color are socialized into engaging in particular kinds of performances for the police. They work their identities in response to, and in an attempt to preempt, law enforcement discipline. This identity work takes place in a social atmosphere of fear and loathing. It is intended to signal acquiescence and respectability.

Id. (emphasis in original).

33. In the dashcam video of the incident, Castile can be heard to say calmly, "I do have to tell you I do have a firearm on me." Newsy, *Dashcam Video of Castile Released*, YOUTUBE (June 20, 2017), <https://www.youtube.com/watch?v=mLGRv8bWDks> [<https://perma.cc/8BTM-S8M6>].

34. See Carbado, (*E*)*racing*, *supra* note 25, at 946.

35. This problem is so pervasive that New Jersey legislators have proposed legislation to require schools to advise schoolchildren on how to interact with the police. Jacqueline L. Urgo, *Black Lives Balks as NJ Lawmaker Wants To Legislate 'The Talk,'* PHILA. INQUIRER (July 3, 2017, 5:28 AM), http://www.philly.com/philly/news/new_jersey/black-lives-balks-as-n-j-lawmaker-wants-to-legislate-the-talk-20170703.html [<https://perma.cc/Z272-P448>].

36. Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (June 21, 2017, 10:14 AM), <http://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html> [<https://perma.cc/5XDG-CPY4>].

37. See Kelly McEvers, *Video Captures Police Encounter with Murder Suspect*, NPR (Mar. 23, 2017, 4:41 PM), <http://www.npr.org/2017/03/23/521274629/video-captures-police-encounter-with-murder-suspect> [<https://perma.cc/S82U-DAAS>] (describing encounter between a white cop and an aggressive white murder suspect that ends with no shots fired).

these experiences can be deeply debilitating.³⁸ When they go badly, they jeopardize ordinariness by producing and reinforcing stigma. There are broader social harms too, as these experiences are shared with the victim's friends and family, "spreading the psychological costs"³⁹ of the incident and further jeopardizing the possibilities for developing social trust. Lingering fears and anxieties about the risk, consistent with history⁴⁰ and experience, of being racially demeaned, harassed, and even endangered at a moment's notice corrode the sense of self and social bonds across racial groupings. These fears and anxieties help to explain the desire for ordinariness: the experience of belonging; of being treated as a multidimensional person and a rightful subject of human concern; and the presumption of legitimacy and innocence, conferred on whites often as a matter of course, that the status of ordinariness entails.

Recall the hopes for ordinariness expressed by blacks following *Brown*. We can imagine that the harms of school segregation in the *Brown* era lay not simply in the denial of educational opportunity, but also in how it undermined and distorted interactions across race in the ordinary spaces of classrooms, hallways, and playgrounds. The promise of integration was that schools would become places where children would learn to get along (or not) by working through the practicalities of difference. In these spaces children could disagree and reconcile their dissimilarities, develop meaningful or casual friendships, or discover that they really did not like each other at all—not based on race or in spite of race, but in full view of race.⁴¹ The possible benefits of integration lay in allowing students to experience their shared humanity, to see racial differences as part of that humanity and to engage through these differences rather than fearing and resenting them. When students "connect[] through difference and Otherness"⁴² across racial lines, it reduces stigma: "the racial other" passes out of existence and the "two selves" that Du Bois described become one.

I emphasize the significance of embracing racial difference to make clear that the demand for ordinariness is not a call for colorblindness or a claim for sameness,

38. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 45 (1992) (Williams describes her experience of being barred from a store by a white sales clerk: "In the flicker of his judgmental gray eyes, that saleschild had transformed my brightly sentimental, joy-to-the-world, pre-Christmas spree to shambles. He snuffed my sense of humanitarian catholicity, and there was nothing I could do to snuff his, without making a spectacle of myself.").

39. JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 24 (1994).

40. The experiences of everyday discrimination have a long lineage. Isabel Wilkerson, in her moving account of the Great Migration, details the daily injustices heaped on black people as a matter of social custom. See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010).

41. Cf. Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1308 (2009) ("Recognizing how intimate affiliations affect opportunities and status hierarchies, both in the intimate sphere and beyond, points us toward new ways to intervene in the persistent problem of discrimination.").

42. Jacqueline N. Font-Guzmán, *Personal Reflection on 50 Years of Loving: Creating Spaces of Differences by Demanding "The Right to Opacity,"* 50 CREIGHTON L. REV. 637, 638 (2017).

universality, or assimilation. Equality can be confused with these objectives,⁴³ but the logic of ordinariness rejects both. Iris Marion Young observes that seeking sameness and universalism creates social division, because no group of people is ever completely similar or completely different.⁴⁴ Yet the inability to achieve complete sameness incentivizes those in the dominant culture to create “dichotomous hierarchical oppositions” that produce social outsiders by rendering them “good/bad” and “normal/deviant.”⁴⁵ Ordinariness repudiates the goal of transcending difference.⁴⁶ Instead it embraces the “positivity of group differences”⁴⁷ and “equality among socially and culturally differentiated groups who mutually respect one another and affirm one another in their differences.”⁴⁸ Treating difference as the norm, rather than the exception, allows persons of color to be understood as complex, multidimensional human beings.⁴⁹ It allows them, in other words, to be ordinary.

II. CONSTITUTIONAL EXAMPLES OF ORDINARINESS

The previous Part discussed the meaning of ordinariness, why it matters as a measure of racial equality, and how everyday interactions can advance or undermine it. This Part discusses how ordinariness has manifested itself, either implicitly or explicitly, in constitutional opinions. It highlights the multiple pathways that have been taken already by litigants advocating for ordinariness in constitutional law.

*City of Memphis v. Greene*⁵⁰ is a good example. In *Greene*, black residents challenged the City of Memphis’s decision to close a street that connected an all-white neighborhood to a predominantly black one⁵¹ due to “undesirable” traffic from the black neighborhood.⁵² After conducting a traffic study, the City closed the street by erecting a physical barrier at precisely the point where the two neighborhoods came together in addition to deeding a strip of land to residents in the white community.⁵³ The practical effect of the barrier was to block black pedestrian traffic into the white neighborhood.⁵⁴ The black residents claimed that the barrier constituted a “badge and incident of slavery” under the Thirteenth Amendment and

43. Cf. YOUNG, *supra* note 1, at 97 (critiquing ideas of universalism, which obscure the “positivity of group differences”).

44. *Id.* at 99.

45. *Id.*

46. *Id.* at 163.

47. *Id.* at 97.

48. *Id.* at 163.

49. Cf. Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, J. CONST. L. 781, 797 (2015) (explaining that “having greater minority representation enhances the likelihood that individual persons of color will focus on their similarities with individual whites, while low representation leads them to dwell more on racial differences”).

50. 451 U.S. 100 (1981).

51. *Id.* at 102–03.

52. See Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 416 (2010).

53. *Id.*

54. *Id.* at 417.

intentional discrimination in violation of equal protection.⁵⁵ The Court rejected the claims.⁵⁶

In dissent, Justice Marshall focused not only on the practical consequences of the street closing but also on “the racial identifiability and apparent racial meaning of the respective neighborhoods” as factors for assessing the plaintiffs’ claims, particularly the white neighborhood’s “history and reputation” as a racially exclusive community.⁵⁷ His analysis shows empathy for the stigmatic and dignity harms that the closure imposed on the black residents:

The majority treats this case as involving nothing more than a dispute over a city’s race-neutral decision to place a barrier across a road. My own examination of the record suggests, however, that far more is at stake here than a simple street closing. The picture that emerges from a more careful review of the record is one of a white community, disgruntled over sharing its street with Negroes, taking legal measures to keep out “undesirable traffic,” and of a city, heedless of the harm to its Negro citizens, acquiescing in the plan.⁵⁸

Justice Marshall’s language reflects a sensitive understanding of how the street barrier shaped the everyday lives of the City’s black residents and how it demeaned them by physically segregating their neighborhood from that of the neighboring white community. In its attentiveness to history and the racial particularities of social context, Justice Marshall’s dissent illustrates how something so ostensibly ordinary as a street closure could nonetheless deprive blacks of equality. Thus, *Greene* is instructive. It illustrates how incidents that some might perceive as unremarkable deny the benefits of the ordinary and identifies these incidents as a form of racial discrimination.

Two other examples are instructive. In *Dandridge v. Williams*,⁵⁹ Justice Marshall—again in dissent—criticized the Court’s decision to reject an equal protection challenge to a state regulation that capped state allocation of federal public assistance regardless of family size and actual need.⁶⁰ Marshall called for a more practical account of the regulation’s impact on large, poor families⁶¹ that would focus on “the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification.”⁶² His dissent advanced both the letter and spirit of ordinariness by focusing on the concrete effects and daily impact of the state’s regulation for low-income people, reminding the Court that public assistance “provides the stuff that sustains . . . children’s lives: food, clothing, shelter.”⁶³ As in *Greene*, Justice Marshall

55. *Id.*

56. *Id.* at 418.

57. *Id.* at 419.

58. *City of Memphis v. Greene*, 451 U.S. 100, 136 (1981) (Marshall, J., dissenting).

59. 397 U.S. 471 (1970).

60. *Id.* at 508–30 (Marshall, J., dissenting).

61. *Id.* at 520–21.

62. *Id.* at 521.

63. *Id.* at 522. For a thorough discussion of Justice Marshall’s focus on the practical consequences of constitutional decision making, see Gay Gellhorn, *Justice Thurgood Marshall’s*

draws attention to the grittier particularities of inequality and the grinding indignities of everyday discrimination.

*O'Shea v. Littleton*⁶⁴ illustrates another use of ordinariness, this time in framing constitutional claims. There plaintiffs asserted that they were seeking “equality of opportunity and treatment in employment, housing, education, participation in governmental decisionmaking and in ordinary day-to-day relations with white citizens” and government officials.⁶⁵ Although the plaintiffs do not define what they mean by “ordinary day-to-day relations,” the breadth of their claims points to the pervasiveness of discrimination and how it encumbered daily life. Equality here is understood in part as a right to the experience of being unmarked and unstigmatized in common interactions with fellow citizens.

Ordinariness as an expression of equality has surfaced more recently in cases involving discrimination on the basis of sexual orientation. In *Obergefell v. Hodges*,⁶⁶ Justice Kennedy in his majority opinion invoked ordinariness in describing the human costs of denying gay couples state recognition of their marriages:

Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse’s hospitalization while across state lines.⁶⁷

In *Romer v. Evans*⁶⁸ Justice Kennedy framed the constitutional harms of discrimination in ordinariness terms. In *Romer*, plaintiffs successfully challenged a state constitutional amendment that denied any form of protection at the local level against discrimination based on sexual orientation.⁶⁹ Justice Kennedy observes the practical, everyday consequences of the amendment:

These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.⁷⁰

This description shows how pervasive discrimination resulting from the state constitutional amendment denied gays the freedom of ordinariness that most heterosexuals enjoy as a matter of course. By calling attention to the exclusion of gay people from a “limitless number of transactions and endeavors,” Kennedy emphasizes the breadth and nuances of daily marginalization in everyday activities on the basis of sexual orientation.

Jurisprudence of Equal Protection of the Laws and the Poor, 26 ARIZ. ST. L.J. 429 (1994).

64. 414 U.S. 488 (1974).

65. *Id.* at 490–93.

66. 135 S. Ct. 2584 (2015).

67. *Id.* at 2607.

68. 517 U.S. 620 (1996).

69. *Id.* at 631.

70. *Id.*

Each of these examples illustrates the possibilities that ordinariness could more meaningfully play in constitutional law. They elevate the practical consequences of daily discrimination in common social interactions through empathetic reasoning and a sensitive appreciation of social context. *Obergefell* and *Romer* in particular show that the demand for ordinariness occupies constitutional terrain outside of racial discrimination.

As this Part has suggested, there are multiple potential constitutional pathways to ordinariness. Equal protection is an obvious source, as are other constitutional provisions. Part III focuses on the Fourth Amendment as a specific barrier to ordinariness.⁷¹ However, the goals of ordinariness are not just limited to doctrine or courts. Rather, we can deploy all sorts of constitutional actors—by which I mean people who are simply invested in making meaning of the Constitution⁷²—in advancing ordinariness for socially marginalized groups. Part III briefly discusses one such possibility.

III. THE FOURTH AMENDMENT AS A CONSTITUTIONAL BARRIER TO ORDINARINESS

One of the most consequential barriers to ordinariness lies in the Court's interpretation of the Fourth Amendment. As Devon Carbado observes, the Fourth Amendment plays a prominent role in racial subordination through a litany of cases that enable police to stop, frisk, question, search, chase, and arrest black people.⁷³ The entire infrastructure of Fourth Amendment doctrine “facilitates the space between stopping black people and killing black people”⁷⁴ in ways that affect all manner of ordinary activities. The killing of Philando Castile, discussed earlier in this Essay,⁷⁵ makes this painfully clear.

The Supreme Court's decision in *Whren v. United States*⁷⁶ is a key part of this constitutional infrastructure. In *Whren*, the Court concluded that police officers did not violate the Fourth Amendment when they used a pretextual traffic stop to search for drugs without probable cause or reasonable suspicion that drugs were in the car.⁷⁷ A full description of the events that preceded the stop and the stop itself help to illustrate how *Whren* denies ordinariness:

On the evening of June 10, 1993, plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department were patrolling a “high drug area” of the city in an unmarked car. Their suspicions were

71. See Carbado, *From Stopping Black People*, *supra* note 25, at 129.

72. *Id.*; see also R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527 (2011); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CAL. L. REV. 1323, 1325 (2006) (describing a form of “constitutional culture [that] shapes both popular and professional claims about the Constitution and enables the forms of communication and deliberative engagement among citizens and officials that dynamically sustain the Constitution's democratic authority in history”).

73. See Carbado, *From Stopping Black People*, *supra* note 25, at 129; Butler, *supra* note 25, at 245; Carbado, *(E)racing*, *supra* note 25, at 966.

74. Carbado, *From Stopping Black People*, *supra* note 25, at 125.

75. See *infra* Part I.

76. 517 U.S. 806 (1996).

77. *Id.* at 819.

aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to his right, without signaling, and sped off at an “unreasonable” speed. The policemen followed, and in a short while overtook the Pathfinder when it stopped behind other traffic at a red light. They pulled up alongside, and [one of the officers] stepped out and approached the driver’s door, identifying himself as a police officer and directing the driver . . . to put the vehicle in park. When [the officer] drew up to the driver’s window, he immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren’s hands. Petitioners were arrested, and quantities of several types of illegal drugs were retrieved from the vehicle.⁷⁸

Petitioners moved to suppress the evidence on grounds that the stop that led to the seizure of the drugs was unconstitutional.⁷⁹ They argued that the officers lacked a “constitutionally adequate” basis to stop the car and search for drugs and that the officer’s asserted basis for approaching the car—to warn them about the traffic violation—was pretextual.⁸⁰

Before *Whren*, the courts of appeals split on the standard for evaluating the use of pretextual traffic stops where officers otherwise lacked probable cause. The standard adopted by two other circuits called for courts to evaluate whether “a reasonable police officer ‘would have’ conducted the search under similar circumstances.”⁸¹ On the particular facts of *Whren*, this standard would have required the court to determine whether a reasonable officer would have bothered to stop a car solely for turning without signaling and speeding off. The answer to that question likely would have been no. Most police officers probably have better things to do.

Petitioners pressed the Court to adopt the “reasonable officer” standard on grounds that it was more protective of civilians.⁸² They observed that “total compliance with traffic and safety rules [was] nearly impossible” because “the use of automobiles is so heavily and minutely regulated.”⁸³ Consider some examples of traffic safety violations: “driving too slowly,” driving too closely, using a “loud or unnecessary horn,” and driving at a speed that is greater than what is “reasonable and

78. *Id.* at 808–09.

79. *See id.* at 809.

80. Brief for American Civil Liberties Union as Amicus Curiae Supporting Petitioners, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75760, at *2 (“In denying defendants’ motion to suppress, both the district court and the court of appeals acknowledged that the police lacked any constitutionally adequate suspicion to stop the car and search for drugs. And neither court quarreled with defendants’ assertion that the alleged traffic violations were only a pretext to conduct a drug search for which there was no other colorable constitutional basis.”).

81. *Id.*

82. *Whren*, 517 U.S. at 810.

83. *Id.*

prudent.”⁸⁴ As the American Civil Liberties Union (ACLU) observed in its amicus brief in support of the petitioners, “[w]hether intentionally or not, virtually everyone violates the traffic laws at one point or another.”⁸⁵ Thus, a standard that allowed officers to make pretextual traffic stops would eviscerate the protections of the Fourth Amendment, because an officer could “invariably . . . catch any motorist in a technical violation.”⁸⁶

There was another obvious problem. A decision that validated the pretextual use of traffic stops, petitioners warned, would exacerbate the problem⁸⁷ of racial profiling.⁸⁸ Although *Whren* would apply to any motorist, the brunt of an adverse ruling would be borne by blacks and other racially marginalized groups.⁸⁹

This prediction proved to be accurate. In the years since *Whren*, racial profiling has continued to be a persistent problem, but with very little constitutional recourse. A New York Times analysis of “tens of thousands of traffic stops and years of arrest data” in Greensboro, North Carolina, for example, “uncovered wide racial differences in measure after measure of police conduct.”⁹⁰ Blacks were pulled over for traffic violations “at a rate far out of proportion with their share of the local driving population.”⁹¹ The analysis also revealed that officers “used their discretion to search black drivers or their cars more than twice as often as white motorists—even though they found drugs and weapons significantly more often when the driver was white.”⁹² The same pattern occurred across the rest of the state and in other jurisdictions across the country.⁹³ The human consequences of these stops are significant. For example, blacks have been killed by police after being “pulled over for minor traffic infractions: a broken brake light, a missing front license plate, and failure to signal a lane change.”⁹⁴

Return to the facts of *Whren*. Just what was it about the “youthful occupants” driving a car with temporary plates who had stopped at an intersection for “more than 20 seconds,” with the driver looking down at the lap of the passenger that “aroused

84. See Carbado, *From Stopping Black People*, *supra* note 25, at 154; see also Butler, *supra* note 25, at 245; Carbado, *(E)racing*, *supra* note 25, at 946.

85. Brief for American Civil Liberties Union as Amicus Curiae Supporting Petitioners, *supra* note 80, at *3.

86. *Whren*, 517 U.S. at 810.

87. See David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 375 (2001) (noting petitioners’ argument that such a standard “would give police almost unlimited discretionary power to stop any driver at any time, and that police would almost certainly use this power to stop minorities, especially African-Americans, in numbers well out of proportion to their presence on the road” and “even cited recent statistics from studies in Maryland and New Jersey that substantiated this very fact”).

88. *Whren*, 517 U.S. at 810.

89. *Id.*

90. See Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/A7TR-K4X7>].

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

suspicion”?⁹⁵ There are a number of possible innocent explanations. Maybe the car was new (hence the temporary plates). Maybe they stopped longer than necessary at the stop sign because they were lost. Maybe the driver was looking at the passenger’s lap because the passenger had a map. Maybe they stopped because they thought they forgot something.

Or maybe the car’s occupants just “looked suspicious” to the officers because they were black.⁹⁶ (Would they have stopped the car if the youth were white and driving through a white neighborhood?)

The problem with *Whren* is that it constitutionalizes racialized suspicion of ordinary behavior. It gives police officers license to use minor infractions to justify pretextual stops in ways that target blacks. Under the auspices of supposedly race neutral police practices, *Whren* facilitates presumptions of black criminality for otherwise common conduct. It is an example of the kind of constitutional decision that frustrates the ability of blacks to engage in the kinds of everyday activities and behaviors that whites typically can do as a matter of course.

The kinds of stops that *Whren* allows can have lasting effects on one’s self-esteem, sense of safety, and other markers of physical and emotional well-being. Consider what happened in 2013 to Rufus Scales, a black man, who was pulled over in Greensboro for minor traffic violations that included expired plates.⁹⁷ Because Scales was uncertain whether to get out of the car, he reached over to prevent his younger brother from opening the passenger door.⁹⁸ The officer tasered Scales and dragged him, paralyzed, from the car, giving him a split lip and a chipped tooth.⁹⁹ Years later his brother would not leave the house without a “hand-held video camera and a business card with a toll-free number for legal help.”¹⁰⁰ If the police approach, Rufus Scales “instinctively turns away.”¹⁰¹ This encounter may be more severe than is typical. But the pervasiveness and frequency of police stops, coupled with awareness of their potential deadly consequences, instills a particularly intense fear of the police among black people.¹⁰² That fear conditions a set of responses—running away, for example—that we should not reflexively presume to be suspicious, evasive behavior.

What can be done to advance ordinariness outside the doctrinal confines of the Fourth Amendment? We can start with police regulations. The District of Columbia police officers who instigated the stop in *Whren* were subject to a departmental regulation prohibiting plainclothes officers or officers in unmarked cars from making traffic stops unless the traffic violation was “so grave as to pose an immediate threat to the safety of others.”¹⁰³ Similar kinds of regulations could limit the kind of citizen-

95. *Whren v. United States*, 517 U.S. 806, 810 (1996).

96. The description of their race surfaced only in connection with their constitutional argument that a lower Fourth Amendment standard would increase the risk that police officers would make stops based on race. *Whren*, 517 U.S. at 810.

97. See LaFraniere & Lehen, *supra* note 90.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. See Carbado, *From Stopping Black People*, *supra* note 25.

103. Brief for American Civil Liberties Union as Amicus Curiae Supporting Petitioners,

police encounters that endanger black lives. We should also limit policies and practices that criminalize black and Latino communities, such as aggressive stop and frisk policies¹⁰⁴ and “broken windows” policing that targets minor street infractions for enforcement.¹⁰⁵

CONCLUSION: PUTTING ORDINARINESS TO WORK THROUGH THE CONSTITUTION

The goal of ordinariness is for people of color to be able to take their place in the world of the mundane, to be able to do the kinds of things in the course of the everyday that many whites take for granted. Although this Essay has focused on the experiences of black people, it has demonstrated that this project could apply to other socially marginalized groups.¹⁰⁶

Some may resist the framework of ordinariness because it is too focused on everyday social interactions. They might argue that we should concentrate instead on rights that are more tangible, more textually supported and more immediately consequential.¹⁰⁷ To the extent that the project engages courts, there are also questions about how to construct appropriate decisional rules that would advance ordinariness in constitutional decisions, a subject that I have not explored here.¹⁰⁸

The doctrinal limitations are also substantial. A good part of constitutional law more or less is constitutive of the racial caste system. Equal protection, for example, has legitimized a superstructure of inequality, limiting the possibilities for ordinary racial interactions.¹⁰⁹ I have already discussed the problems with the Fourth Amendment, which sustains and reinforces blacks’ perpetual state of otherness. Thus, there are significant doctrinal headwinds.

Still, these barriers need not deny ordinariness all normative possibilities. As Lawrence Sager has argued, just because a norm is underenforced does not mean that it is, or should be regarded as, conceptually invalid.¹¹⁰ Norms can still bind other

supra note 80, at *1–2.

104. *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (enjoining stop and frisk policies and practices).

105. See Jonathan Oberman & Kendea Johnson, *Broken Windows: Restoring Social Order or Damaging and Depleting New York’s Poor Communities of Color?*, 37 *CARDOZO L. REV.* 931 (2016).

106. See *infra* Part II.

107. As Lawrence Sager has observed, “there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues.” Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212, 1213 (1978).

108. See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 *VA. L. REV.* 1649, 1658–67 (2005) (describing the factors that “lead the Court to adopt a decision rule that varies significantly from the constitutional operative provision”).

109. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (striking down voluntary, race-specific policies that sought to limit the impact of residential segregation by promoting integration in public schools).

110. Lawrence Sager argued as such:

[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits . . . By “legally

governmental actors, such as administrative agencies, legislators, and private citizens.¹¹¹ Indeed, the benefit of calling for a norm is that it can influence an array of public and private decisions without having to sort out all the doctrinal particulars.

Thus, the problems are difficult and longstanding. None of these challenges, however, diminish the significance of the demand for ordinariness and the desire just to be. The hope for ordinariness is integral to the future of the Constitution. Only by attending to the experiences of the everyday can we make its equality guarantees meaningful.

valid,” I mean that the unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution, save only that the federal judiciary will not enforce these margins.

Thus, the legal powers or legal obligations of government officials which are subtended in the unenforced margins of underenforced constitutional norms are to be understood to remain in full force.

Sager, *supra* note 107, at 1221; *see also* Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801, 811 (2012) (“But even when underenforced by courts, constitutional norms are binding to their conceptual limit on other actors and retain their full trumping status in and out of court.”).

111. *See* Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (2012).