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Antiracism in Action

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Antiracism in Action

Daniel Harawa* & Brandon Hasbrouck**

Abstract

Racism pervades the criminal legal system, influencing everything from who police stop and search, to who prosecutors charge, to what punishments courts apply. The Supreme Court's fixation on colorblind application of the Constitution gives judges license to disregard the role race plays in the criminal legal system, and all too often, they do. Yet Chief Judge Roger L. Gregory challenges the facially race-neutral reasoning of criminal justice actors, often applying ostensibly colorblind scrutiny to achieve a color-conscious jurisprudence. Nor is he afraid of engaging directly in a frank discussion of the racial realities of America, rebuking those within the system who would treat Blackness as synonymous with crime. Judge Gregory's jurisprudence can—and frequently does—serve as a model for judges in other circuits who are working to enact the vision of a color-conscious Constitution.

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We dedicate this essay to Providence Napoleon. We will miss your light.

INTRODUCTION

In America, race and criminal punishment go hand-in-glove. From its inception, the American criminal legal system has been a powerful tool in creating and maintaining a racial hierarchy.¹ Today, race plays a critical role at every pressure point in the system—from policing, to indigent defense, to prosecution, to sentencing.²

If courts are to have any role in addressing the entrenched racial disparities in the criminal legal system, then judges must, *at a minimum*, be willing to take into account the role that race plays in the administration of justice. For that reason, we have called for “color-conscious” judges who are willing to “account for the differences in the experience of Black and white Americans with police, prosecutors, and juries.”³ And we have advocated for judges to adopt an antiracist approach to criminal law, which contemplates how the government has “used its power to punish as a means to subordinate Black people.”⁴ If we as a society are

1. See, e.g., Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, in *POLICING THE BLACK MAN* 3, 3–30 (Angela J. Davis ed., 2017) (highlighting that racism in the criminal legal system has been a legacy in the United States ever since the abolition of slavery); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20–23 (2012) (asserting that the criminal legal system has been used to disenfranchise people of color since the abolition of slavery and Jim Crow laws).

2. See Nadia Woods, *The Presence of Racial Disparities at Every Decisional Phase of the Criminal Legal System*, 26 *PUB. INT. L. REP.* 1, 1 (2020) (Racial disparity, in the context of the criminal legal system, refers to the phenomena of a racial or ethnic group's proportion within the control of the system being greater than the proportion of such groups in the general population. These disparities, such as Black people only making up approximately 13% of the U.S. population but comprising nearly half the population of currently incarcerated people, have long infected every step of the criminal justice process).

3. Brandon Hasbrouck, *Pack the Court with Color-Conscious Justices*, *RICHMOND TIMES-DISPATCH* (Oct. 8, 2020), <https://perma.cc/9JML-JLCY>.

4. Daniel S. Harawa, *Black Redemption*, 48 *FORDHAM URB. L.J.* 701, 719 (2021).

truly going to reckon with race,⁵ then the judiciary must be a part of that reckoning.

Although we came to these ideas separately, it's no surprise since we both clerked for a judge who emulates the kind of judge we want to see on the bench. Chief Judge Roger L. Gregory's presence on the United States Court of Appeals for the Fourth Circuit is in and of itself groundbreaking. When President Bill Clinton installed Judge Gregory on the bench as a recess appointment—which President George W. Bush followed up with a lifetime appointment—Judge Gregory desegregated the last all-white federal appellate court in the country.⁶ As President Clinton remarked when appointing Judge Gregory: “It is unconscionable that the Fourth Circuit, with the largest African-American population of any circuit in our Nation, has never had an African-American appellate judge.”⁷ Judge Gregory's presence on the bench remedied that wrong, and in the process, burnished the path for other judges of color to serve on the Fourth Circuit.⁸

The symbolism of Judge Gregory's appointment to the Fourth Circuit is valuable. But Judge Gregory has done so much more than serve as a symbol. In his twenty years on the bench, Judge Gregory has been a shining example of the importance of

5. See, e.g., Ibrahim X. Kendi, *Is This the Beginning of the End of American Racism?*, ATLANTIC (Sept. 2020), <https://perma.cc/EF6L-QXHA> (asserting that Donald Trump “revealed the depths of the country's prejudice— and has inadvertently forced a reckoning”).

6. See Willie J. Epps, Jr., *An Interview with Judge Gregory*, ABA (Nov. 8, 2018), <https://perma.cc/QR86-UKS8> (“I owe so much gratitude to President Clinton for making the recess appointment and President George W. Bush for making the lifetime appointment.”).

7. William J. Clinton, Remarks on the Recess Appointment of Roger L. Gregory to the United States Court of Appeals for the Fourth Circuit and an Exchange with Reporters, 3 PUB. PAPERS 2783, 2783 (Dec. 27, 2000), <https://perma.cc/RBM2-P9NZ>. President Clinton had previously nominated Judge Gregory to the Fourth Circuit, but the Senate did not act on his nomination. See Presidential Nomination 1129, Roger L. Gregory, 106th Congress (1999–2000), <https://perma.cc/RFX6-MRZU>.

8. Since Judge Gregory's appointment, three African-American judges and one Latino judge have served on the Fourth Circuit. See *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS (Feb. 13, 2020), <https://perma.cc/R5TC-GRY7> (stating that as of February of 2020, the court includes two African-American judges and one Hispanic judge).

judicial diversity. He certainly has not taken his historic appointment for granted.

As Sherrilyn Ifill once explained, many tout the value of judicial diversity by relying on the fact that judges of color can serve as role models and help increase public confidence in the judiciary.⁹ Judge Gregory checks both boxes. He has been an important role model to those who previously may not have seen themselves reflected in the judiciary—including to us both. And hopefully the public takes solace every time the judiciary comes closer to reflecting the broader population. But Judge Gregory’s value is much deeper than that. Because as then-Professor Ifill went on to explain, we must look beyond the symbolism of diverse judges when calling for judicial diversity and recognize that diversity is valuable to the development of the law.¹⁰ It is here where Judge Gregory shines brightest. His unique perspective has enriched the Fourth Circuit’s decision-making. In every case, he “bring[s] traditionally excluded perspectives” to the fore and centers the experience of the litigants.¹¹

In the criminal context, this means that Judge Gregory has not shied away from the racial realities underlying much of criminal jurisprudence. Quite the opposite. He has written pointedly and poignantly about race and how it effects the administration of justice.¹² Judge Gregory’s criminal jurisprudence is sensitive to the real-world effect that the court’s rulings have on *all* people, particularly those who have historically been excluded from the legal discourse and whose lives are simultaneously disproportionately touched by the criminal legal system. His jurisprudence seeks to fulfill the

9. See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 405 (2000) (explaining that “[t]raditional arguments” for appointing diverse judges emphasize “the ‘role model’ value of black judges and the need for black judges to help promote ‘public confidence’”).

10. *Id.* at 409–12.

11. *Id.* at 417; see Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 49 (2009) (arguing that “diversity on the courts enriches judicial decisionmaking [and] that the interplay of perspectives of judges from diverse backgrounds and experiences makes for *better* judicial decisionmaking, especially on our appellate courts”).

12. See, e.g., *United States v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring) (describing the “long history of black and brown communities feeling unsafe in police presence”).

promise that undergirds the Constitution and is etched into the portico of the Supreme Court: equal justice under law.¹³

While his body of work is far too expansive to capture in one essay, and its importance extends far beyond just criminal law, we will highlight two areas of Judge Gregory's criminal jurisprudence that evince his commitment to equal justice for all people. Part I will explore Judge Gregory's Fourth Amendment jurisprudence. While legal scholars have long criticized the Supreme Court for ignoring race in its Fourth Amendment cases,¹⁴ Judge Gregory has deployed the Supreme Court's precedents in a way that ensures that the Fourth Amendment will protect all citizens, particularly Black and Brown ones. Part II will explore Judge Gregory's jurisprudence surrounding remedies and explain how access to the courts is a racial justice issue. Here, Judge Gregory innovates to guarantee that there is a legal mechanism available to right constitutional wrongs, proving that justice for all is his judicial north star.

Back in 2000, Roger L. Gregory's nomination to the conservative all-white Fourth Circuit promised to be transformative.¹⁵ He did not disappoint.

I. THE BLACK FOURTH AMENDMENT

The Supreme Court's Fourth Amendment jurisprudence is notoriously colorblind. Legal luminaries have explored the

13. See *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (“The Constitution created a government dedicated to equal justice under law.”); *Building Features*, SUP. CT. U.S., <https://perma.cc/2N8X-Y927> (discussing the architecture of the Court).

14. See, e.g., Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 331, 362 (1998) (tracing the Court's failure to recognize race in Fourth Amendment cases); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 246–47 (2010) (describing the Fourth Amendment's “willful blindness to race”); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145 (2012) (discussing how implicit biases affect police decisions to stop and search an individual).

15. See Anne E. Marimow, *There's a Word that No Longer Describes the Federal Appeals Court in Richmond*, WASH. POST (Apr. 13, 2017), <https://perma.cc/MWN5-SWHT> (“A portfolio of Southern cases, genteel courtroom traditions and years of forceful conservative rulings shape the enduring image of the federal appeals court in Richmond.”); Epps, *supra* note 6 (asking Judge Gregory what it was like to be the “first African American to serve on what was then widely viewed as the most conservative of all the Federal Circuit Courts”).

doctrinal harms that flow from the Court's erasure of race in its Fourth Amendment precedents.¹⁶ For instance, Professor Devon Carbado asserted that the Court's "investment in colorblindness" has resulted in a "racial allocation of the burdens and benefits of the Fourth Amendment" whereby "people of color are burdened more by, and benefit less from, the Fourth Amendment than whites."¹⁷ What this means in the real world, scholars elaborated, is that the Court's Fourth Amendment cases, among other ills, "facilitate[] racial profiling"¹⁸ and exacerbate "police attention and harassment of minorities."¹⁹ Some may say that the Supreme Court's Fourth Amendment precedent is a starting point for the racial disparities that run the course of the legal punishment process.

What the scholarship hasn't adequately illuminated is the fact that there are judges like Roger Gregory who are doing the most (in a good way) with the least. While the Supreme Court's jurisprudence is mostly colorblind, Judge Gregory's is not.²⁰ He has successfully deployed the Supreme Court's colorblind cases in a way that recognizes and protects the rights of minorities.²¹

Take, for example, the fortuitously named *United States v. Black*.²² The facts of *Black* are worth recounting in detail.²³ Police were idling at a gas station one night in a "high crime" neighborhood in Charlotte, North Carolina, when they saw a Black man sitting in his car for about three minutes. According to the officers, a person sitting in his car for three minutes

16. See, e.g., Maclin, *supra* note 14, at 375–79 (discussing Fourth Amendment issues stemming from the Court's decision in *Whren v. United States*, 517 U.S. 806 (1996)); Butler, *supra* note 14, at 246–47 (stating that the Court's "willful blindness to race" has expanded "the power of the police against people of color, especially blacks and Latinos"); Richardson, *supra* note 14, 1145 (explaining that the objective "reasonable suspicion" standard has allowed police to stop-and-frisk minorities at higher rates than whites).

17. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 968–69 (2002).

18. Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 117 (2012).

19. Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1592 (2019).

20. See *infra* Part II.

21. See *infra* Part II.

22. 707 F.3d 531 (4th Cir. 2013).

23. All facts are recounted from *id.* at 534–36.

without getting out to pump gas or go in the store was not only “unusual,” but indicative of drug activity. The police ran the plates. Nothing turned up. They followed the man to the parking lot of a nearby apartment complex. There, the driver of the car joined a group of five other Black men, one of whom was Nathaniel Black. The officers also recognized one of the men as having an arrest record. The officers called for backup so they could make “voluntary contact.”

As they walked up, one man motioned to the officers that he was carrying a gun, which he was legally permitted to carry. For the officers, this triggered “the rule of two,” meaning that “if the police find one firearm, there will most likely be another firearm in the immediate area.” Apparently further piquing the officers’ suspicions, as they approached, Mr. Black voluntarily offered up his ID while the other people in the group were “argumentative”—to the police, Mr. Black’s compliance was “unusual.” Rather than give Mr. Black back his ID, an officer pinned it to his uniform. The officers then started to frisk the men in the group, and at that point, Mr. Black announced he was going home. An officer stopped him, told him that he was not free to leave, and when Mr. Black tried to break free anyways, police tackled him, handcuffed him, and discovered that he had a gun.

In holding that the stop violated Mr. Black’s Fourth Amendment rights, Judge Gregory reprimanded the federal government for its “misuse of innocent facts as indicia of suspicious activity.”²⁴ He then picked apart the government’s arguments one by one, making clear he would take any alleged infringement upon a person’s constitutional rights seriously, and pay close attention to any arguments hinting at the unequal protection of minority citizens.

First, Judge Gregory rejected as “absurd” the government’s argument that it was suspicious for a driver to sit in his car for three minutes at a gas station.²⁵ He then dismantled the idea that someone in a group of people having an arrest record justifies suspicion of the entire group, emphasizing that the Fourth Amendment requires suspicion to be individualized.²⁶

24. *Id.* at 539.

25. *Id.*

26. *Id.* at 540.

The police's "rule of two" was equally problematic, Judge Gregory reasoned, and found it to be an "abdication" of the judicial role to accept this seemingly "arbitrary and boundless rule as a basis for reasonable suspicion of criminal activity."²⁷

Judge Gregory's handling of the government's next set of arguments reflects his careful attunement to issues of race. When the government argued that police had reason to be suspicious based on the fact one of the men was openly carrying a gun, Judge Gregory made clear that once North Carolina decided to allow the open carry of guns, that law applied "uniformly" to everyone, thus police cannot automatically assume a person carrying a gun is committing a crime.²⁸ The government tried to argue that even if that's so, it was unusual for people in this area to legally carry guns (e.g., Black people), but Judge Gregory refused to give his "imprimatur" to that sort of "dichotomy" in Fourth Amendment protections.²⁹

Judge Gregory excoriated the government's reliance on Mr. Black's over compliance with the police as justification for suspicion, explaining that if Mr. Black had not acquiesced, then police would have said *that* was suspicious.³⁰ Judge Gregory homed in on the catch-22 that accepting this argument would put Black people in:

In certain communities that have been subject to overbearing or harassing police conduct, cautious parents may counsel their children to be respectful, compliant, and accommodating to police officers, to do everything officers instruct them to do. If police officers can justify unreasonable seizures on a citizen's acquiescence, individuals would have no Fourth Amendment protections unless they interact with officers with the perfect amount of graceful disdain.³¹

Finally, although police often rely on the fact someone is in a "high crime neighborhood" to justify their suspicion, Judge Gregory was quick to cut the argument down, explaining that "high crime neighborhoods" are often populated by racial

27. *Id.* at 540–41.

28. *Id.* at 540.

29. *Id.* at 541.

30. *Id.*

31. *Id.*

minorities.³² “To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion.”³³

Lest there was any doubt that Judge Gregory was affirmatively wrapping the cloak of the Fourth Amendment’s protections around racial minorities, particularly Black people, who are too often left out in the cold, he closed with this:

The facts of this case give us cause to pause and ponder the slow systematic erosion of Fourth Amendment protections for a certain demographic. In the words of Dr. Martin Luther King, Jr., we are reminded that ‘we are tied together in a single garment of destiny, caught in an inescapable network of mutuality,’ that our individual freedom is inextricably bound to the freedom of others. Thus, we must ensure that the Fourth Amendment rights of all individuals are protected.³⁴

Black is all about Black people having equal Fourth Amendment rights. This should be uncontroversial. Yet because so few decisions explicitly discuss race in the Fourth Amendment context, *Black* has had reverberating effects. Judges across the country have cited it for the proposition that presence in a high crime neighborhood, often synonymous with Black and Brown neighborhoods, is insufficient to give rise to reasonable suspicion.³⁵ They have cited it for the idea that

32. *Id.* at 542.

33. *Id.*

34. *Id.*

35. See *United States v. Gross*, 784 F.3d 784, 789 (D.C. Cir. 2015) (Brown, J., concurring) (citing *Black* to support the assertion that police “playing the odds” by looking for people with guns in high crime neighborhoods is not the same thing as reasonable suspicion); *State v. Gordon*, 846 N.W.2d 483, 489 (Wis. Ct. App. 2014) (quoting *Black* to explain why courts must be particularly careful to ensure a high crime area factor is not used with respect to entire neighborhoods or communities); *Commonwealth v. Crisostomo*, No. 2013-SCC-0008-CRM, 2014 WL 7072149, at *4 (N. Mar. I. Dec. 12, 2014) (“[B]eing out and about late at night is not enough to create reasonable suspicion.”); *Johnson v. State*, No. 2465, 2018 WL 5977917, at *4 (Md. Ct. Spec. App. Nov. 14, 2018) (Arthur, J., concurring) (“Others have pointed out that the term ‘high-crime area’ is not only amorphous and undefined, but that it can be used as a proxy for race and ethnicity.”); *State v. Evans*, No. 2020AP286-CR, 2021 WL 279105, at *8 (Wis. Ct. App. Jan. 28, 2021) (analogizing *Black*’s admonition against reliance on high crime areas to the related context of high crime times of day).

carrying a gun in an open carry state cannot give rise to reasonable suspicion—in essence, Black people are allowed to exercise their Second Amendment rights too.³⁶ And, relying on *Black*, judges have recognized that because of their different experiences Black people are taught to interact differently with law enforcement from a young age.³⁷ By scrutinizing rather than simply accepting police action and government rationales that have a targeted effect on Black and Brown people, and then forcefully rejecting them, Judge Gregory’s decision in *Black* shows what a judge committed to racial justice can do with doctrine that legal scholars have conventionally read as being harmful to minorities.

Another example of the power of Judge Gregory’s jurisprudence is that he gives voice to perspectives too often excluded from the dialogue. It is not often that judicial opinions talk openly and honestly about the strained relationship Black and Brown people frequently have with policing. This important lived experience has, for the most part, been judicially whitewashed from the Federal Reporter. Judge Gregory’s concurrence in *United States v. Curry*³⁸ breaks this mold.

Curry involved the use of “predictive policing.”³⁹ There, Richmond, Virginia police were patrolling Creighton Court, a

36. See *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132 (6th Cir. 2015) (“Where it is lawful to possess a firearm, unlawful possession ‘is not the default status.’”); *Pulley v. Commonwealth*, 481 S.W.3d 520, 526–27 (Ky. Ct. App. 2016) (“In states in which possession of an unconcealed firearm is legal, the mere observation or report of an unconcealed firearm cannot, without more, generate reasonable suspicion for a *Terry* stop and the temporary seizure of that firearm.”); *Kilburn v. State*, 297 So. 3d 671, 674 n.2 (Fla. Dist. Ct. App. 2020) (collecting cases); *People v. Wilson*, 167 N.E.3d 182, 190–91 (Ill. App. Ct. 2020) (“Suspicion and presumption of illegality are no longer the default for officer observation of gun possession on private property.”).

37. See *United States v. Knights*, 989 F.3d 1281, 1297 n.8 (11th Cir. 2021) (Rosenbaum, J., concurring) (describing “The Talk” Black parents generally have with their children about how to interact with law enforcement so that no officer will have any reason to misperceive them as a threat).

38. 965 F.3d 313 (4th Cir. 2020) (en banc).

39. *Id.* at 347 (Wilkinson, J., dissenting). “Predictive Policing Technology” (“PPT”) is software programming that analyzes large sets of crime data to identify the most likely locations, perpetrators, and victims of future crime.” Margo McGehee, Recent Development, *Predictive Policing Technology: Fourth Amendment and Public Policy Concerns*, U. CINCINNATI L. REV. (Feb. 17, 2021), <https://perma.cc/NVH3-6HJE>.

majority-Black neighborhood, as part of a “focus mission team” in response to recent shootings.⁴⁰ The officers heard gunshots, responded to the area where they believed the shots came from, and saw five to eight people walking away in different directions in a nearby field.⁴¹ The officers approached the people in the field, stopped them, and asked them to show their hands and waistbands.⁴² Billy Curry complied in what police deemed to be a “lackadaisical manner,” so they frisked him and found a gun.⁴³ A majority of the en banc Fourth Circuit held that this stop and frisk violated the Fourth Amendment because the officers lacked reasonable articulable suspicion to believe that Curry was involved in any crime.⁴⁴

It is the separate opinions where things get interesting. While six of the Fourth Circuit judges joined a principal dissent, Judge J. Harvie Wilkinson decided to file his own solo dissent.⁴⁵ In it, Judge Wilkinson opens with a discussion of “two Americas.”⁴⁶ Given the dynamics of the case, one would assume that he would go on to talk about the fact that Black and Brown people often have very different experiences with law enforcement than white people. But no. Instead, in Judge Wilkinson’s view, there is “one America, where citizens possess the means to hire private security or move to safer neighborhoods” in response to “judicial barriers to effective law enforcement,” and the other, where “people have no choice but to endure the unintended consequences of our missteps, as crime moves to fill the vacuum left by the progressive

40. *Curry*, 965 F.3d at 316.

41. *Id.* at 316–17.

42. *Id.* at 317.

43. *Id.* at 317 (alteration in original) (quoting *United States v. Curry*, No. 3:17CR130, 2018 WL 1384298, at *3 (E.D. Va. Mar. 19, 2018)).

44. *See id.* at 331 (affirming the district court’s order). The Fourth Circuit’s holding is particularly noteworthy because it used to be the most conservative court of appeals. *See* Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?*, 45 L. & SOC’Y REV. 171, 171 (2011) (recounting that a 2003 *New York Times* article referred to the Fourth Circuit as “the shrewdest, most aggressively conservative federal appeals court in the nation” (quoting Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAG. (Mar. 9, 2003), <https://perma.cc/WV3W-AUQY>)).

45. *Curry*, 965 F.3d at 315.

46. *Id.* at 346 (Wilkinson, J., dissenting).

disablement of the law's protections."⁴⁷ Judge Wilkinson believed that decisions like *Curry* "risk inducing police officers to simply abandon inner cities as part of their mission," leaving "the least fortunate among us" to "fend increasingly for themselves."⁴⁸ Judge Wilkinson feared that a combination of rising crime and the "lack of respect shown by courts for even good policework" would result in "an America where gated communities will be safe enough and dispossessed communities will be left to fend increasingly for themselves."⁴⁹

Judge Gregory wrote a separate concurrence to respond. He embraced the idea that there are in fact two Americas, but explained, citing Frederick Douglass's *What to the Slave Is the Fourth of July?*, that really, that dividing line is often race.⁵⁰ Judge Gregory educated his colleague on the fact that "[t]here's a long history of black and brown communities feeling unsafe in police presence,"⁵¹ and that increased police presence designed to fight crime often brings increased "peril[]," "what has been described as 'a central paradox of the African American experience: the simultaneous over- and under-policing of crime.'"⁵² Judge Gregory elaborated that Judge Wilkinson's "exegesis" ignores "the concerns of some that any encounter with an officer could turn fatal."⁵³

Judge Gregory paid homage to some of the Black people who had recently been killed by police. He advised that for Black people, who society may deem

dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles, it is still within their own

47. *Id.*

48. *Id.* at 348–49.

49. *Id.* at 349.

50. *Id.* at 332 (Gregory, C.J., concurring).

51. *Id.*

52. *See id.* (quoting JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 35 (2017)).

53. *Id.* at 331–32.

communities—even those deemed “dispossessed” or “disadvantaged”—that they feel the most secure.⁵⁴

Judge Gregory emphasized that it is arguments like that made by Judge Wilkinson, borne from the idea that they (privileged white people) need to “save minority or disadvantaged communities from themselves,” that create a “Hobson’s choice for these communities: decide between their constitutional rights against unwarranted searches and seizures or forgo governmental protection that is readily afforded to other communities.”⁵⁵ Judge Gregory ended by turning Judge Wilkinson’s words on their head, concluding that the “lifelines a fragile community retains against physical harm and mental despair,’ must be the assurance that there truly is equal protection under law.”⁵⁶

Judge Gregory’s rebuke of Judge Wilkinson’s views and frank discussion of the complicated realities of race and policing drew national attention.⁵⁷ Judge Gregory thereby again exposed the unfortunate fact that honest discussions of race too often do not make it into judicial opinions.⁵⁸ But as Judge Gregory continues to chart this path and have these tough but necessary discussions, hopefully more judges will follow suit. With Judge Gregory on the bench, we’ve come a little closer to the Constitution applying equally to everyone.

54. *Id.* at 332.

55. *Id.* at 332–33.

56. *Id.* at 334 (quoting *id.* at 349 (Wilkinson, J., dissenting)).

57. See, e.g., Mark Joseph Stern, *Black Judge Has to Explain to White Colleague Why Racial Profiling Is Bad*, SLATE (July 16, 2020, 5:46 PM), <https://perma.cc/7FGR-Y26C> (noting that “[t]he task fell on [Judge] Gregory to enlighten his colleague about the realities of racist policing”); Debra Cassens Weiss, *4th Circuit Spars Over Predictive Policing; Dissenter Criticized for Writing ‘With a Smooth Pen and a Tin Ear’*, ABA J. (July 16, 2020, 2:45 PM), <https://perma.cc/9FCY-7XCT> (describing Judge Gregory’s concurrence); Jacqueline Thomsen, *Judges Rebuke Colleague Over Stance on Unfair Policing of Blacks*, NAT’L L.J. (July 15, 2020, 7:26 PM), <https://perma.cc/W9CQ-62C9> (same).

58. See, e.g., Neil S. Siegel, *The Supreme Court Is Avoiding Talking About Race*, ATLANTIC (Aug. 7, 2020), <https://perma.cc/77EV-JM89> (explaining that “[i]t is extraordinarily rare for [Supreme Court] justices—again, except for Sotomayor—to reference race or racism in cases involving police stops”).

II. REMEDIES AND RACIAL JUSTICE

The antiracist nature of Judge Gregory's jurisprudence is especially apparent in his approach to remedies for constitutional violations by police, prosecutors, and judges in criminal proceedings. His jurisprudence emphasizes the need for a strong writ of habeas corpus, cautious application of qualified immunity, and a searching inquiry into the substantive reasonableness of sentences. Even when he does not draw attention to the racial implications of a decision, Judge Gregory's awareness of them consistently shapes his opinions. This is especially important considering the way courts have so often used procedural limitations on remedies to dispose of the claims of Black litigants.⁵⁹

Judge Gregory emphasized the need for a strong writ of habeas corpus in his dissent from the court's opinion in *United States v. Surratt*.⁶⁰ At the outset, he laid out the stakes of the case: "Raymond Surratt will die in prison because of a sentence that the government and the district court agree is undeserved and unjust."⁶¹ While Surratt's sentence—life imprisonment—was within the sentencing guideline range for his offense, the district court in his initial trial erroneously believed that no lesser sentence was available under the statute.⁶² The majority refused to grant habeas relief because the district court did not illegally impose a death sentence, but Judge Gregory called attention to the weakness of this reasoning, as life imprisonment is functionally a death sentence by slower means.⁶³

59. See, e.g., *United States v. Surratt*, 797 F.3d 240, 274 (4th Cir. 2015) (Gregory, J., dissenting) (criticizing the majority's procedural argument that the Black petitioner's claim was barred because he "should have brought a § 2255 motion raising his *Simmons* claim even before *Simmons* existed").

60. 797 F.3d 240 (4th Cir. 2015); see *id.* at 270–71 (Gregory, J., dissenting) (describing the writ of habeas corpus as an "equitable remedy" that is "central to our justice system").

61. *Id.* at 269 (Gregory, J., dissenting).

62. See *id.* ("The district court sentenced Surratt to life in prison only because it thought it was required to do so pursuant to a statutory mandatory minimum. As it turns out, the correct statutory range for Surratt's crime was a minimum of twenty years, and a maximum of life.")

63. See *id.* at 270 ("It leaves him to spend the rest of his life in prison; a death sentence of a different kind.")

Strikingly, the government agreed with Surratt that his sentence was inappropriate in light of the Fourth Circuit's retroactively-applicable decision in *United States v. Simmons*,⁶⁴ where the court decided which state law felonies qualified as predicate felony drug offenses under the Controlled Substances Act.⁶⁵ Other circuits are split on whether the savings clause can apply when subsequent cases clarify that a sentence is above the legal maximum.⁶⁶ Judge Gregory argued for more: even a sentence at the legal maximum could be challenged when the trial court clearly would not have imposed the sentence in the absence of now-overturned precedents.⁶⁷ His reasoning turns on the interaction between the savings clause of 28 U.S.C. § 2255(e) and the Suspension Clause of the United States Constitution.⁶⁸ Section 2255 provides an alternative means for testing the legality of convictions and sentences, having been introduced to relieve the heavy dockets of district courts near federal prisons.⁶⁹ The traditional habeas remedy is meant to remain available through the savings clause when a motion is insufficient to challenge the legality of a conviction or

64. 649 F.3d 237 (4th Cir. 2011) (en banc).

65. 21 U.S.C. §§ 801–14. See *Surratt*, 797 F.3d at 270 (“[W]e corrected our mistaken understanding of just what constitutes a qualifying felony for federal sentencing purposes in *United States v. Simmons*. Both parties agree that under our retroactively-applicable *Simmons* decision, Surratt possesses only one CSA predicate felony.”) (internal citations omitted).

66. See Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause*, 28 U.S.C. § 2255(e), 108 GEO. L.J. 287, 291–92 (2019) (“The Third, Fifth, Tenth, and Eleventh Circuits routinely deny relief to federal prisoners seeking habeas relief in the form of resentencing . . . The Sixth and Seventh Circuits have concluded that some sentencing errors can be addressed under the savings clause.”).

67. See *Surratt*, 797 F.3d at 270 (“Given this mistake that the parties agree is of constitutional magnitude, the parties further agree that Surratt is entitled to relief from the very sentence that the district court unambiguously stated it would not have imposed absent the erroneous statutory mandatory minimum.”).

68. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

69. See *Surratt*, 797 F.3d at 271 (“The impetus for § 2255 was that federal courts located near prisons had become overwhelmed by petitions from prisoners who, until that point, were required by § 2241 to apply for writs in the district of their confinement.”).

sentence.⁷⁰ This fallback mechanism ensures that § 2255, with all its limitations, does not violate the Suspension Clause.⁷¹

While Congress retains the power to prescribe mandatory sentences with no judicial discretion, it did not do so under the Controlled Substances Act for defendants situated as Surratt was.⁷² Denying Surratt the opportunity to challenge his sentence would compound the initial error that led the district court to believe that no sentence other than life imprisonment was available. This would be a fundamental miscarriage of justice.⁷³ The majority penalized Surratt for not bringing the challenge to the classification of state-law felonies that revealed the flaw in his conviction.⁷⁴ Judge Gregory also took issue with the majority's hand-wringing that allowing challenges under the savings clause might lead to a deluge of such challenges; only a handful of prisoners were similarly situated.⁷⁵ He cuts to the core of the majority's opinion and takes it to task for "picking and choosing whatever rules it wishes to apply to § 2255(e) from other parts of our habeas jurisprudence."⁷⁶

While the dissent is highly technical, Judge Gregory's conclusion is a powerful condemnation of the use of such procedural trickery to buttress the carceral state. In the face of

70. *See id.* at 271 (Gregory, J., dissenting) ("In this way, § 2255 'replaced traditional habeas corpus for federal prisoners . . . with a process that allowed the prisoner to file a motion with the sentencing court.'" (citing *Boumediene v. Bush*, 553 U.S. 723, 774 (2008))).

71. *See id.* ("As the Supreme Court recognizes, the savings clause ensures that subsequently enacted-limitations in § 2255 do not run afoul of the Suspension Clause.")

72. *See id.* at 273 ("For someone like Surratt, with only one qualifying felony drug offense, Congress intended to permit a district court to assign a sentence somewhere in the range of twenty years to life. It did not mandate only a life sentence.")

73. *See id.* ("The majority arrives at this constitutionally-suspect outcome by departing from the traditional savings clause analysis.")

74. *See id.* at 274 ("The majority protests, however, that Surratt should have brought a § 2255 motion raising his *Simmons* claim even before *Simmons* existed.")

75. *See id.* at 275 ("Far from opening the floodgates, as the majority suggests, such an approach may provide relief to those who continue to serve life sentences despite not possessing the requisite number of predicate felony offenses under *Simmons*, which is all of *eight* prisoners in the Western District of North Carolina.")

76. *Id.* at 275–76.

the majority's abdication of its responsibility to the administration of justice, he recognizes that Surratt must rely on the mercy of the executive branch.⁷⁷ He presents the case as a fundamental test of the court's values, and one which it has failed:

To hope for the right outcome in another's hands perhaps is noble. But only when we actually do the right thing can we be just. I lament that today we are not the latter. Neither the plain language of our habeas statutes, our precedent, nor the Constitution demands that Surratt die in prison. I must dissent.⁷⁸

Fortunately, the executive branch did the right thing, commuting Surratt's sentence and mooted his appeal.⁷⁹ Judge Wynn's forceful dissent from the later order dismissing Surratt's appeal as moot hints that he likely would have succeeded in the absence of a commutation under the President's pardon power.⁸⁰ Judge Gregory's reasoning would be explicitly adopted by the Sixth Circuit⁸¹ before ultimately being adopted by the Fourth Circuit in *United States v. Wheeler*.⁸² As a result, erroneously-applied mandatory minimum sentences may be challenged through a writ of habeas corpus, even when the error

77. *See id.* at 276 ("It is within our power to do more than simply leave Surratt to the mercy of the executive branch.").

78. *Id.*

79. *See United States v. Surratt*, 855 F.3d 218, 219 (4th Cir. 2017) (Wilkinson, J., concurring) (en banc)

[Surratt] is also no longer serving a judicially imposed sentence, but a presidentially commuted one. The President's commutation order simply closes the judicial door. Absent some constitutional infirmity in the commutation order, which is not present here, we may not readjust or rescind what the President, in the exercise of his pardon power, has done.

80. *See id.* at 220–22 (Wynn, J., dissenting) (explaining that Surratt would likely have been released because his "time-served exceed[ed] the upper end of his now-applicable Guidelines range").

81. *See Hill v. Masters*, 836 F.3d 591, 599 (6th Cir. 2016) ("We acknowledge the wisdom of Judge Gregory's reasoning. Surveying the authority of our sister circuits, which have split on the issue, we are persuaded by the approach outlined in . . . Judge Gregory's dissent in *Surratt*, now before the Fourth Circuit en banc.").

82. 886 F.3d 415, 433 (4th Cir. 2018). The court was not bound by the prior panel's decision in *Surratt* because of the grant of a rehearing en banc, despite that appeal having been dismissed as moot. *Id.*

is only revealed through later, retroactively-applicable decisions.⁸³

This commitment to the difficult details of the law also shines through in Judge Gregory's qualified immunity cases. Police with itchy trigger fingers have often found that panels including Judge Gregory are inclined to deny them a license to kill.⁸⁴ Among such cases, *Estate of Jones v. City of Martinsburg* is especially noteworthy for its slow procedural crawl through the courts.⁸⁵ These cases require intense scrutiny of the relevant facts and a healthy skepticism for officers' justifications for their actions, which Judge Gregory has demonstrated again and again. But qualified immunity cases do much more than simply restrain violent and reckless police officers—official misbehavior frequently surfaces in the casual racism of everyday investigations.

Judge Gregory tackled the unreasonableness of racist investigatory practices in *Smith v. Munday*.⁸⁶ April Yvette Smith was arrested without probable cause and held for eight days on charges of possessing and selling crack cocaine.⁸⁷

83. See *Allen v. Ives*, 976 F.3d 863, 868 (9th Cir. 2020) (Fletcher, J., concurring) (denying a petition for a rehearing en banc of a decision allowing a habeas challenge to a mandatory minimum sentence erroneously imposed under since-retroactively-overturned precedent and noting that this is also the law in the Fourth, Sixth, and Seventh Circuits).

84. See, e.g., *Henry v. Purnell*, 652 F.3d 524, 527 (4th Cir. 2011) (denying qualified immunity to an officer who shot an unarmed man while intending to use on a taser on him); *Ray v. Roane*, 948 F.3d 222, 227 (4th Cir. 2020) (denying qualified immunity to an officer who shot and killed a tethered dog while serving a warrant); *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 663–64 (4th Cir. 2020) (denying qualified immunity to officers who fatally shot a Black man experiencing homelessness while he lay on the ground between the officers and a stone wall).

85. See generally *Estate of Jones*, 961 F.3d 661; *Estate of Jones v. City of Martinsburg*, 726 F. App'x 173 (4th Cir. 2018); *Estate of Jones v. Martinsburg*, 655 F. App'x 948 (4th Cir. 2016). Before ultimately settling, the case appeared before the Fourth Circuit to settle the issue of qualified immunity after twice coming before the panel on evidentiary issues. *Estate of Jones*, 961 F.3d; *Estate of Jones*, 726 F. App'x 173.; *Estate of Jones*, 655 F. App'x 948. These opinions also demonstrate Judge Gregory's acute understanding on how civil procedure can be weaponized in cases involving police use of deadly force. *Estate of Jones*, 961 F.3d 661; *Estate of Jones*, 726 F. App'x 173; *Estate of Jones*, 655 F. App'x 948.

86. 848 F.3d 248 (4th Cir. 2017).

87. *Id.* at 251.

Officers sent a confidential informant—wired with malfunctioning audio and video recorders—to purchase crack cocaine.⁸⁸ The informant reported that he purchased crack from a Black woman in her forties named “April Smith.”⁸⁹ Sometime later, Officer Munday searched police databases for Black women in Lincoln County named April Smith with criminal records and discovered that April Yvette Smith had three prior convictions for selling crack cocaine.⁹⁰ Even though he had no indication that the woman who sold crack to the confidential informant had a criminal record, he considered Ms. Smith’s age, race, gender, and prior record as proof enough of her guilt and applied for an arrest warrant.⁹¹ He conducted no further investigation, and did not attempt to resolve the conflict between his confidential informant’s report that the woman who sold him crack was “skinny” and the fact that Ms. Smith weighed 160 pounds.⁹²

Contrary to the district court’s conclusions, Judge Gregory wrote that “a criminal history, common race, common gender, and unfortunately common name is not enough to establish probable cause.”⁹³ Not only did Munday lack any reason to believe that the woman who sold his confidential informant crack lived in Lincoln County or had prior convictions, but even his database search based on these faulty assumptions returned multiple Black women named April Smith.⁹⁴ Such thin evidence cannot support a finding of probable cause, and if it did, “officers

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.* at 251–52. While the use of first and last names alone to search databases for a suspect might not have obvious racial implications on its face, the relatively low number of surnames among non-white communities make this practice especially pernicious when identifying Black people. *See* Naila S. Awan, *When Names Disappear: State Roll-Maintenance Practices*, 49 U. MEM. L. REV. 1107, 1122–23 (2019) (exploring the ways that the Crosscheck program over-selected Black, Hispanic, and Asian voters in its purges through its reliance on first and last name matches).

92. *See Smith*, 848 F.3d at 251–52. Ms. Smith alleged that she was even heavier at the time the confidential informant purchased the drugs. *Id.* at 252.

93. *Id.* at 252.

94. *See id.* at 253 (“[W]hen [Munday] found multiple individuals, at least two of whom were black women named April Smith . . . he chose one for no immediately apparent reason.”).

would have probable cause to obtain arrest warrants for any local residents who fit the generic description of the day—be it ‘black woman,’ ‘black man,’ or otherwise—so long as they had a criminal history and an unfortunately common name.”⁹⁵ In the absence of any evidence tying Ms. Smith in particular to the scene of the crime, Munday’s application for an arrest warrant lacked probable cause, and thus violated her Fourth Amendment rights.⁹⁶ Filling in the gaps with racist assumptions could not magically render such a warrant application reasonable, and therefore, Munday was not entitled to qualified immunity.⁹⁷ It might be easy for a court to condone such logical shortcuts from law enforcement officers, but Judge Gregory insists that they at least clear the low bar of reasonableness to invoke the defense of qualified immunity.

Judge Gregory applies similar scrutiny to reviews of the substantive reasonableness of sentencing decisions. In *United States v. Blue*,⁹⁸ he emphasized that, “[t]here is no mechanical approach to our sentencing review.”⁹⁹ Benjamin Blue “pled guilty to armed bank robbery and brandishing a firearm during a crime of violence.”¹⁰⁰ He raised numerous arguments in favor of a downward departure from the sentencing guidelines, but the district court imposed a sentence at the low end of the guidelines’ range without addressing Blue’s arguments.¹⁰¹ While a judge has discretion to reject such arguments, that rejection requires an explanation when the arguments are nonfrivolous.¹⁰²

Blue raised six arguments in favor of a downward departure from the sentencing guidelines:

- 1) the career offender Guideline range was overly harsh and failed to deter offenders;
- 2) a within-Guidelines

95. *Id.* at 254.

96. *See id.* at 255.

97. *See id.* at 255–56 (“Qualified immunity does not apply ‘where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.’” (quoting *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986))).

98. 877 F.3d 513 (4th Cir. 2017).

99. *Id.* at 518.

100. *Id.* at 516.

101. *See id.* at 516–17.

102. *See id.* at 518–19.

sentence was too severe in light of his co-defendant's 63-month sentence; 3) he had a positive employment record; 4) his family relationships had developed since his prior robbery convictions; 5) he had accepted responsibility; and 6) he had attempted (albeit unsuccessfully) to assist in the prosecution of others.¹⁰³

The district court's failure to grapple with these arguments rendered Blue's sentence procedurally unreasonable.¹⁰⁴ Nevertheless, the Government argued that the sentence should stand because a within-guidelines sentence is entitled to a presumption of reasonableness, Blue was given the opportunity to argue for a downward variance from the guidelines, and the court's cursory statement that it considered arguments on Blue's behalf was sufficient.¹⁰⁵ Judge Gregory rejected each of these arguments in turn.

Judge Gregory rejected the first argument because the presumption of reasonableness only applies to the substantive prong of the analysis, while Blue challenged the procedural reasonableness of his sentence.¹⁰⁶ On the second argument, Judge Gregory rejected the notion that the opportunity to make arguments alone was sufficient to satisfy procedural reasonableness.¹⁰⁷ The court was required to "address[] and explain[] the defendant's nonfrivolous arguments prior to sentencing."¹⁰⁸ As to the third, Judge Gregory rejected the notion that merely acknowledging the defendant's arguments satisfied the district court's duty to consider them.¹⁰⁹ Without direct discussion of the district court's reasoning or sufficient contextual evidence to infer it, an appellate court lacks the necessary information to conduct a meaningful appellate review

103. *Id.* at 519.

104. *Id.*

105. *Id.* at 519–20.

106. *See id.*

107. *See id.* at 520.

108. *Id.*

109. *See id.* at 521 (explaining that the district court failed to explain how the § 3553(a) factors shaped the decision, that the record fails to show that "Blue was immune to other means of deterrence," and that the district court failed to "engage counsel in a discussion about the merits of Blue's arguments").

of that decision.¹¹⁰ Judge Gregory declined to engage in speculation, instead remanding Blue’s case for a full exploration of the relevant facts and arguments.¹¹¹

Habeas corpus review, civil rights suits, and direct appeals of procedurally unreasonable sentences are markedly different remedies in both form and substance. Yet all are critical for holding criminal justice actors accountable. Judge Gregory consistently approaches all three with a common plan: scrutinize the facts, thoroughly assess the controlling law, and rigorously apply that law without undue deference to police, prosecutors, or trial judges.

CONCLUSION

*A democracy cannot thrive where power remains unchecked
and justice is reserved for a select few.*

John Lewis¹¹²

Too often, courts allow the institutional racism of the criminal legal system—and with it, much of the power of police—to go unchecked.¹¹³ Race (and its close companion, wealth) can be outcome-determinative in the criminal justice context from the very fact of whether an encounter with police occurs in the first place through the ultimate verdict and sentence.¹¹⁴ The Supreme Court’s insistence on a colorblind

110. *Id.*

111. *See id.* (deciding that, since Blue’s sentence was procedurally unreasonable, the Court was unable to review the sentence for substantive reasonableness).

112. Ahmed Young, *John Lewis’s Legacy Shows Path Forward*, IND. LAW. (Aug. 19, 2020), perma.cc/7AC5-SUC2 (quoting John Lewis, Remarks in support of the George Floyd Justice in Policing Act (June 25, 2020)).

113. *See* Hasbrouck, *supra* note 3 (“[O]ur courts complicitly adopt deferential rules for reviewing the misdeeds of police, prosecutors and judges.”).

114. *See* Maclin, *supra* note 14, 333 (“In America, police targeting of black people for excessive and disproportionate search and seizure is a practice older than the Republic itself.”); THE SENT’G PROJ., REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 3 (2018), <https://perma.cc/U4N5-DCUD> (PDF) (finding that Black persons are arrested and convicted more often than whites, and then they are sentenced more harshly than whites); Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD.

constitution conveniently excuses judges who would prefer to ignore the role of race in policing, prosecution, and punishment.¹¹⁵ While much of Judge Gregory's jurisprudence is facially colorblind, his rigorous application of precedent to scrutinize government action is substantively—and powerfully—antiracist.

Overpolicing of Black and Brown communities often eludes serious review through its reliance on lax application of ostensibly colorblind precedent.¹¹⁶ The standard of reasonableness will be credulously applied to police behavior and decision-making, rendering challenges dead on arrival.¹¹⁷ The government's invocation of procedural bars to relief will be credited without serious inquiry.¹¹⁸ The facts of a case will be carefully distinguished from precedent to avoid fitting police behavior within the realm of firmly established law.¹¹⁹ When judges resort to these dismissive techniques, Black and Brown litigants quickly find themselves on the losing side of a case. By refusing to abdicate the power and duty of judicial review in

OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 28, 2020), <https://perma.cc/967E-T84G> (“New data from the 2019 Survey of Consumer Finances (SCF) show that long-standing and substantial wealth disparities between families in different racial and ethnic groups were little changed since the last survey in 2016 . . .”).

115. See Carbado, *supra* note 17, at 1044 (“[The Supreme Court] carefully enlists the ideology of colorblindness to elide the complexities of race. As a result of this racial elision, people of color continue to experience the Fourth Amendment more as a technology of surveillance than as a constitutional provision . . .”).

116. See Butler, *supra* note 16, at 247 (“The Fourth Amendment accomplishes its racial project in three parts. First, the jurisprudence rarely mentions race. Next, it grants extraordinary discretion to police and prosecutors. Finally, it constructs the criminal as colored, and the white as innocent.”).

117. See Yankah, *supra* note 19, at 1581 (“[T]he subjective motivation of a police officer [is] irrelevant in determining the reasonableness of a Fourth Amendment seizure.”).

118. See, e.g., *United States v. Surratt*, 797 F.3d 240, 256 (4th Cir. 2015) (reasoning that habeas relief could not be granted since the lower court did not give an illegal sentence).

119. See, e.g., Michael P. O'Connor & Celia Rumman, *Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 *FORDHAM INT'L L.J.* 1234, 1259–62 (2002) (relaying how a Foreign Intelligence Surveillance Court of Review ignored Fourth Circuit precedent, instead distinguishing on the dates of the underlying facts).

criminal justice, Judge Gregory has shifted its application in the Fourth Circuit in a markedly antiracist direction.