

ARTICLE

STOPPING THE USUAL SUSPECTS: RACE AND THE FOURTH AMENDMENT

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In this Article, Professor Thompson addresses the constitutional and policy implications of racially motivated searches and seizures. He begins by showing that the Supreme Court's most recent pronouncement on the subject, Whren v. United States, which has been treated by scholars as a new direction in the Court's Fourth Amendment jurisprudence, is actually a natural and inevitable consequence of jurisprudential, rhetorical, and narrative choices the Court made thirty years ago in Terry v. Ohio. Analyzing the language of Terry, Professor Thompson demonstrates the way in which the Court removed race from the case and explains that the Court was forced, as a result, to create an alternative narrative to explain its judgment. He then traces the effects that Terry has had on the Court's treatment of race in subsequent decisions. In Part II of the Article, Professor Thompson challenges the assumptions that underlie the Court's analysis of racially motivated searches and seizures in Terry and subsequent decisions. First, he uses social science data to demonstrate that the Court's conception of "racially neutral" searches and seizures overlooks compelling evidence of the hidden effects of race on individuals' perceptions and judgment. He then draws upon the history of the Fourth Amendment to demonstrate that the Court's treatment of racially motivated searches and seizures runs counter to the intentions of the framers of the Amendment. Professor Thompson argues that the framers of the Fourth Amendment specifically intended to protect disfavored minority segments of the population from selective governmental use of search and seizure powers. Finally, in Part III, Professor Thompson proposes a variety of doctrinal and nonjudicial remedies designed to effectuate the original intent of the Fourth Amendment by deterring racially motivated searches and seizures.

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INTRODUCTION

Recent studies support what advocates and scholars have been saying for years: The police target people of color, particularly African Americans, for stops and frisks.¹ Between January 1995 and Sep-

¹ For books, law review articles, and newspaper articles taking the position that race routinely plays a central role in police officers' decisions to arrest, stop, or frisk, see, e.g., David Cole, *No Equal Justice* 16-62 (1999); Nat'l Criminal Justice Comm'n, *The Real War on Crime* 109-10 (Steven R. Donziger ed., 1996); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Miami L. Rev. 425, 425 (1997) (noting "presumptive social offense . . . described as 'Driving While Black'"); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 677-88 (1994) [hereinafter *Harris, Factors*] (arguing that current criteria for police stops lead to targeting of minority neighborhoods for police stops and searches); David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. Davis L. Rev. 1, 43-45 (1994) [hereinafter *Harris, Frisking*] (citing evidence that police often use race as proxy for criminality when deciding whether to stop person); Erika L. Johnson, "A Menace to Society:" The Use of Criminal Profiles and Its Effects on Black Males, 38 How. L.J. 629 (1995) (analyzing use of drug courier profile and asserting that black men have become main targets of law enforcement agency suspicion under its application); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 Cap. U. L. Rev. 151, 161-213 (1994) (asserting that positive legal image of police renders racial motivation of law enforcement officers in pretextual stops invisible); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 308-23 (criticizing courts for

tember 1996, of the 823 citizens detained for drug searches on one stretch of Interstate 95, over seventy percent were African American.² In New Jersey, a state court judge responded to similar data on racially disproportionate traffic stops on the New Jersey Turnpike by ruling in 1996 that state troopers were using illegal profiling to stop African American motorists.³ In New York City, the police depart-

ignoring evidence that race has qualitative and quantitative effect in traffic stops); Sheri Lynn Johnson, Comment, *Race and the Decision to Detain a Suspect*, 93 *Yale L.J.* 214, 225-38 (1983) (detailing cases in which race or ethnicity was primary motivating factor for stops and searches); Randall S. Susskind, Note, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 *Am. Crim. L. Rev.* 327, 332-48 (1994) (arguing that race is prominent factor for suspicion in variety of law enforcement encounters with civilians); *Developments in the Law—Race and the Criminal Process*, 101 *Harv. L. Rev.* 1472, 1494-1520 (1988) (noting biases of police officers and advocating that courts require arresting officer's justification for search and seizure be convincingly free of racial motivation); Warren Brown, *Seat Belt Push Raises Race Issue: Blacks Weigh Tolls of Safety vs. Bias*, *Wash. Post*, Apr. 3, 1998, at A1 (describing "painful dilemma" faced by black lawmakers over legislation allowing police to stop motorists in order to check seat belt usage); Christopher H. Schmitt, *Ethnic Disparities Start with Arrests: Many More Blacks, Hispanics Taken into Custody Then Freed*, *San Jose Mercury News*, Dec. 9, 1991, at 8A, available in Westlaw, SJMERCURY database (noting that minorities in California experience higher rate of admittedly unfounded arrests than whites); *Traffic Stop Bias Reported*, *Wash. Post*, June 9, 1997, at A4 (reporting that black motorists on Florida Turnpike are six and one-half times more likely to be searched by drug squad than white drivers).

² See Am. Civil Liberties Union, *Driving While Black: Racial Profiling on Our Nation's Highways* (visited Aug. 14, 1999) <<http://www.aclu.org/profiling/report/index.html>> (noting that 72.9% of motorists stopped and searched on Interstate 95 in Maryland north of Baltimore were black, even though only 17.5% of observed traffic violators were black drivers). Following a settlement of a lawsuit brought by an improperly stopped African American motorist (who happened to be a staff attorney of the District of Columbia Public Defender Service returning from a funeral with members of his family), the State of Maryland agreed to monitor car stops on Interstate 95 and gather demographic data on the subjects of such stops. See *ACLU Announces Settlement of Lawsuits over 'Racial Profile' Stops* (visited Aug. 7, 1999) <<http://www.aclu.org/news/n010495.html>>. These data were compiled in connection with contempt proceedings against the Maryland State Police. Plaintiffs contrasted defendants' search data with the benchmark percentages of African American and other motorists of color traveling and violating traffic laws along the relevant segment of Interstate 95. The lawsuit, *Wilkins v. Maryland State Police*, No. MJG-93-468 (D. Md. filed Feb. 1993), was settled with an award of monetary damages and injunctive relief. See Davis, *supra* note 1, at 440. The State's willingness to settle doubtless was influenced by the revelation of a document directing police officers to watch for "dealers and couriers (traffickers) [who] are predominantly black males and black females . . . utilizing interstate 68." David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 *J. Crim. L. & Criminology*, 544, 565 (1997) (quoting Maryland State Police, Criminal Intelligence Report (Apr. 27, 1992)).

³ See Tom Hester, *Trooper Profiling Decision Appealed*, *Newark Star-Ledger*, May 2, 1996, at 34 (reporting that data showed that state troopers practiced "'selective enforcement' by halting motorists based on race" (quoting New Jersey Superior Court Judge Robert E. Francis)). Data showed that "while only 15 percent of all motorists charged with violating traffic laws in New Jersey are black, 46 percent of the motorists stopped on the turnpike during [a] 40-month period were black." *Id.* For a description of the data and methodology by the statistician who conducted the study, see John Lamberth, *Driving*

ment's elite "Street Crimes Unit"⁴ conducted nearly forty thousand stops and frisks in 1997 and 1998 that produced no contraband of any sort;⁵ according to civil rights groups, the vast bulk of those whom the Street Crimes Unit stop and frisk without adequate basis are African Americans and Latinos.⁶

These emerging facts have prompted official investigations. The United States Department of Justice's Civil Rights Division and the New Jersey Attorney General's Office are conducting investigations of race-based traffic stops in New Jersey.⁷ The New York State Attorney General and two United States Attorneys have launched investigations to determine whether New York City police are unjustly stopping and frisking individuals based on their race.⁸ Congressman

While Black: A Statistician Proves that Prejudice Still Rules the Road, Wash. Post, Aug. 16, 1998, at C1. The *Newark Star-Ledger* subsequently obtained data indicating that 75% of the motorists arrested on the Turnpike during the first two months of 1997 were people of color. See Michael Raphael & Kathy Barrett Carter, State Police Reveal 75% of Arrests Along Turnpike Were of Minorities, *Newark Star-Ledger*, Feb. 10, 1999, at 1; see also Editorial, Racial Attitudes in Jersey's State Police, N.Y. Times, Mar. 2, 1999, at A18 (describing racial discrimination in police force and New Jersey Governor's discharge of superintendent of state police because of racial remarks in interview with *Newark Star-Ledger*).

⁴ The Street Crimes Unit is a specially trained unit of the New York City Police Department. One of its primary purposes is to retrieve illegal firearms.

⁵ See David Kocieniewski, Success of Elite Police Unit Exacts a Toll on the Streets, N.Y. Times, Feb. 15, 1999, at A1 (reporting that nearly forty thousand people were stopped and frisked during 1997 and 1998 simply because street crimes officers mistakenly thought they were carrying guns); see also id. (stating that individual officers, interviewed by reporters, admitted that they and others conduct unjustified frisks to try to meet unofficial quota of seizing at least one gun per month). A recently initiated investigation by the New York State Attorney General's Office suggests that the number of unjustified stops and frisks may be vastly higher than these figures suggest because the police routinely fail to record frisks that produced no contraband. See Richard Pérez-Peña, Police May Have Understated Street Searches, Spitzer Says, N.Y. Times, Mar. 23, 1999, at B5 (quoting New York Attorney General Eliot J. Spitzer: "I've spoken to many officers who say they do not fill out the forms . . . for every stop and frisk, and they may fill out, at most, 1 in 5, or 1 in 10.").

⁶ See, e.g., Benjamin Weiser, Frisking Policy of the Police Faces Scrutiny, N.Y. Times, Mar. 19, 1999, at B1 (reporting that Street Crimes Unit "has been roundly criticized by civil rights groups who contend that its members stop and search tens of thousands of people, based on their race"). Complaints about race-based searches and seizures in New York City certainly are not limited to the Street Crimes Unit. See, e.g., Bob Herbert, What's Going On?, N.Y. Times, Feb. 14, 1999, § 4 (Week in Review), at 13 (recounting interviews with African American and Hispanic students who consistently described incidents in which police "treat them as lesser beings, stopping them, demanding identification, and searching their clothing and their bodies at will").

⁷ See Racial Attitudes in Jersey's State Police, *supra* note 3, at A18 (reporting that "the State Attorney General's office and the Federal Department of Justice's civil rights division are investigating race-based traffic stops in New Jersey").

⁸ See Weiser, *supra* note 6, at B1 (reporting investigations by New York Attorney General Eliot L. Spitzer, United States Attorney for the Southern District of New York

John Conyers, Jr. introduced a bill, which passed the House but stalled in the Senate, to study race-based police stops across the country;⁹ he has since introduced an even stricter version of the bill.¹⁰

Assume that the official investigations corroborate the existing empirical and anecdotal data. If so, courts will confront the even more difficult practical issue of appropriate relief. Whether or not the courts find a constitutional violation and order relief, legislators and administrators should have a moral obligation to adopt measures to curtail racially motivated searches and seizures.

On the constitutional plane, the logical site of analysis and relief might appear to be both the federal and state constitutional protections against searches and seizures and the federal and state constitutional guarantees of equal protection. The Supreme Court's 1996 decision in *Whren v. United States*,¹¹ however, would seem to remove the Fourth Amendment from the equation. The issue before the Court in *Whren* was whether a stop of a car, prompted by police observation of a traffic violation that under ordinary circumstances would be sufficient to justify a stop, should be deemed improper because the traffic rationale was a mere "pretext" to conduct an investigatory search.¹² In the course of holding that "the actual motivations of the individual officers" are irrelevant to Fourth Amendment analysis of the validity of a search or seizure, the Court specifically stated that this rule applies even when a search or seizure is prompted by "considerations such as race."¹³ Writing for a unanimous Court, Justice Scalia declared that "the constitutional basis for objecting to [such] intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment" and that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."¹⁴

In the wake of *Whren*, scholars have written off the Fourth Amendment as a basis for challenging racially motivated searches and

Mary Jo White, and United States Attorney for the Eastern District of New York Zachary W. Carter).

⁹ See Joe Donohue, States on I-95 Target Profiling by Their Police, *Newark Star-Ledger*, Feb. 26, 1999, at 21 (reporting that Conyers bill stalled in Senate Judiciary Committee after heavy lobbying by National Association of Police Organizations).

¹⁰ See Traffic Stops Statistics Study Act of 1999, H.R. 1443, 106th Cong. (1999).

¹¹ 517 U.S. 806 (1996).

¹² See *id.* at 808-09 (reviewing facts of case and presenting question for decision). For further discussion of the facts of *Whren* and the issue as framed by the Court, see *infra* Part I.C.

¹³ *Whren*, 517 U.S. at 813.

¹⁴ *Id.*

seizures.¹⁵ Post-*Whren* analyses of the issue have either accepted Justice Scalia's invitation to seek remedies in the Equal Protection Clause or have advocated resort to the legislative or policymaking arenas for relief.¹⁶

This Article will argue that it is too soon to take the Fourth Amendment off the table as a source of relief for racially motivated searches and seizures.¹⁷ The Article will suggest that the Court took a wrong turn in its analysis of the Fourth Amendment and that an appropriate course correction would place that Amendment squarely at the heart of the constitutional analysis of racially motivated searches and seizures.

¹⁵ See, e.g., Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 Loy. U. Chi. L.J. 145, 163-87 (1996) (analyzing Court's opinion in *Whren* and concluding that it allows law enforcement to circumvent traditional Fourth Amendment requirements in traffic stops); Craig M. Glantz, Note, "Could" This Be the End of Fourth Amendment Protections for Motorists?, 87 J. Crim. L. & Criminology 864, 874-86 (1997) (same); Jennifer A. Larrabee, Note, "DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & Pol'y 291, 300-01 (1997) (noting that *Whren* suggests that Fourth Amendment is not appropriate ground on which to challenge use of race in stop after traffic violation).

¹⁶ See, e.g., Davis, *supra* note 1, at 435-42 (describing obstacles to proving denial of equal protection but providing example of successful litigation challenging state police use of race-based profiles as law enforcement tools); Diana Roberto Donahoe, "Could Have," "Would Have:" What the Supreme Court Should Have Decided in *Whren v. United States*, 34 Am. Crim. L. Rev. 1193, 1205-09 (1997) (recommending that state and local executive and legislative bodies act to curb police abuse of discretion); Harris, *supra* note 2, at 576-82 (suggesting that changes in law enforcement regulations coupled with detailed data collection regarding traffic stops and searches may serve to eliminate excessive police discretion); Matthew J. Saly, Comment, *Whren v. United States: Buckle-Up and Hold On Tight Because the Constitution Won't Protect You*, 28 Pac. L.J. 595, 621-26 (1997) (arguing that Equal Protection Clause is unlikely to protect minorities from police harassment and proposing instead legislative action to mandate detailed record of every police stop); Peter Shakow, Comment, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States*, 24 Am. J. Crim. L. 627, 637-43 (1997) (proposing use of test, analogous to one used in employment discrimination cases, to detect most egregious pretextual stops).

¹⁷ It is virtually impossible to prove an Equal Protection Clause violation in these types of cases. Demonstrating that the police stop black motorists in situations where they do not stop white motorists likely would require proof of police conduct over time. In addition, a plaintiff would have to overcome a heavy evidentiary burden in order to surmount discovery limitations. See *United States v. Armstrong*, 517 U.S. 456, 462-63 (1996) (holding that discovery under Fed. R. Crim. P. 16(a)(1)(C) is not available in preparing selective prosecution claims). For excellent descriptions of the substantive and procedural difficulties in prosecuting an equal protection claim based upon a Fourth Amendment violation, see Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 354-62 (1998) (contrasting high evidentiary standard plaintiff must meet for equal protection claim with low evidentiary burden state bears under Fourth Amendment to justify investigative stops); Mark Pazniokas, *Discrimination by Police Often Hard to Prove*, *Hartford Courant*, May 2, 1994, at A1, available in 1994 WL 6632780 (explaining that plaintiffs must prove police acted with specific intent to violate their rights).

Part I will examine the “wrong turn” that the Court took in its Fourth Amendment analysis of race. The discussion will conclude that the error actually did not take place in the Court’s recent decision in *Whren* but rather three decades earlier in the landmark case of *Terry v. Ohio*.¹⁸ *Whren* was merely the culmination of a sequence of doctrinal and conceptual moves that began in *Terry*. Part I will show that *Terry*, *Whren*, and the cases between them contributed to the Court’s conception of a raceless world of Fourth Amendment jurisprudence: a constructed reality in which most police officers do not act on the basis of considerations of race, the facts underlying a search or seizure can be evaluated without examining the influence of race, and the applicable constitutional mandate is wholly unconcerned with race.

Part II will challenge each of the components of the Court’s tapestry of raceless Fourth Amendment jurisprudence. Part II.A will draw upon social science data to argue that race is an ineradicable part of any evaluation of a search or seizure. Part II.B will draw upon history to show that the framers of the Fourth Amendment intended to prevent the police from targeting members of disfavored groups for searches and seizures and that race therefore is quintessentially a relevant consideration when evaluating searches and seizures of members of a “disfavored group” like people of color.

Part III will build upon the foregoing discussions of social science and history to propose solutions to the problem of racially motivated searches and seizures. Part III.A will focus on doctrinal reforms, setting forth various alternatives to the Supreme Court’s treatment of race in Fourth Amendment cases. Part III.B will propose a doctrinal solution and then consider whether the goals of the framers of the Fourth Amendment can best be achieved outside the judicial realm.

I

THE SUPREME COURT’S CONSTRUCTION OF A RACELESS WORLD OF FOURTH AMENDMENT JURISPRUDENCE

A. *The Racial Dimension of Terry v. Ohio*

The Supreme Court’s decision in *Terry v. Ohio* is well known for the Fourth Amendment rule it announced: The police can conduct limited seizures of the person (now commonly known as “*Terry* stops”) and limited patdowns of a person (“*Terry* frisks”) based on a quantum of suspicion that is less substantial than the “probable cause” standard that the police must satisfy when conducting full-blown ar-

¹⁸ 392 U.S. 1 (1968).

rests and equivalent seizures of the person.¹⁹ In reading the decision, one would see no reason to view the case as relevant to the issue of racially motivated searches and seizures. Yet, closer review of the case—especially when supplemented with an examination of the briefs and the trial court record in the case—reveals an important racial dimension.

In the majority opinion's statement of facts, Chief Justice Warren described Detective Martin McFadden's observations of two men, John Terry and Richard Chilton, standing on a street corner in "downtown Cleveland."²⁰ There is no mention of the race of any of these individuals.²¹ The decision states that McFadden "had never seen the two men before, and he was unable to say precisely what first drew his eye to them."²² McFadden (who was in plain clothes) watched first one individual, then the other, walk back and forth in front of a store window and look in the window as they passed.²³ At one point in this sequence of events, as the two individuals were standing together on the corner, "a third man approached them and engaged them briefly in conversation" then "left the two others and walked west on Euclid Avenue"; after again "pacing, peering, and conferring," Chilton and Terry headed "west on Euclid Avenue, following the path taken earlier by the third man."²⁴ The Court's decision also does not mention the race of "the third man."²⁵

Having concluded that Chilton and Terry were in the process of "casing a job, a stick-up," McFadden followed them down the street.²⁶ He observed them "stop . . . to talk to the same man who had conferred with them earlier on the street corner."²⁷ "Deciding that the situation was ripe for direct action,"²⁸ McFadden approached the group, identified himself as a police officer and asked for their names. The men "'mumbled something' in response to [the officer's] inquir-

¹⁹ That quantum of suspicion has come to be known as "reasonable suspicion." See generally 4 Wayne R. LaFare, *Search and Seizure* § 9.4(a), at 137-43 (3d ed. 1996) (detailing distinctions among various permissible grounds for investigative stops). To conduct a "stop," the police must have "reasonable suspicion" that the individual is engaged in criminal activity. See *id.* To conduct a "frisk," the police must have reasonable suspicion that the individual may be "armed and dangerous." See *id.* § 9.5(a), at 246-70. For discussion of the "probable cause" standard, see generally 2 *id.* §§ 3.1-3.2.

²⁰ See *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

²¹ See *id.*

²² *Id.*

²³ See *id.* at 5-6.

²⁴ *Id.* at 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

ies,” which caused the officer to “grab[] petitioner Terry, sp[i]n him around so they were facing the other two, . . . and pat[] down the outside of his clothing.”²⁹ Finding a gun on Terry, the officer patted down the other two and also found a gun in Chilton’s overcoat.³⁰

The Court presented the foregoing facts, which represent the key portions of the *Terry* opinion’s factual presentation, in entirely race-neutral terms. When treatises recite the facts of *Terry*, they generally follow the Court’s lead.³¹ But an examination of the trial court record reveals that John Terry and Richard Chilton were African American; “the third man,” Katz, was white; Detective McFadden also was white.³²

The Court’s legal analysis was almost entirely devoid of references to race.³³ Invoking an approach to the Fourth Amendment previously used in the context of administrative searches,³⁴ the Court explained that it was diverging from the strict “probable cause” standard and instead adopting a lesser “reasonableness” standard as the measure for brief on-the-street seizures of the person and attendant patdowns of their clothing.³⁵ The Court’s discussion focused almost exclusively on doctrinal aspects of Fourth Amendment law and practical considerations in adapting Fourth Amendment rules to “the need for law enforcement officers to protect themselves and other prospective victims of violence.”³⁶

²⁹ Id. at 7.

³⁰ See id.

³¹ See, e.g., 4 LaFave, *supra* note 19, § 9.2(a), at 18 (omitting any mention of race of police officer or suspects).

³² See *State of Ohio v. Richard D. Chilton* and *State of Ohio v. John W. Terry*: The Suppression Hearing and Trial Transcripts, 72 St. John’s L. Rev. app. at 1408 (1998) (John Q. Barrett ed.) [hereinafter *Trial Transcripts*] (reprinting suppression hearing testimony of Detective McFadden).

³³ For discussion of the limited extent to which the Court *did* address the issue of race, see *infra* notes 37-39 and accompanying text.

³⁴ In the previous term, in *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court declared that housing inspections are subject to a “reasonableness” standard that calls for balancing the interests of the government against the interests of the individual. See id. at 534-35. Under this standard, the government can conduct housing inspections as long as such searches are “reasonable.” See id. at 538; see also Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 Minn. L. Rev. 383, 391-94 (1988) (arguing that *Camara* redefined probable cause as broader concept of reasonableness based on weighing governmental against individual interests).

³⁵ See *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968).

³⁶ Id. at 24. Similarly, the Court stated:

[I]t would be unreasonable to require that police officers take unnecessary risks American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.

Id. at 23.

In one sentence of the opinion and an accompanying footnote, the Court addressed the subject of race. In the textual passage, the Court observed that "minority groups, particularly Negroes, frequently complain" of "wholesale harassment by certain elements of the police community."³⁷ The accompanying footnote acknowledged:

[T]he frequency with which "frisking" forms a part of field interrogation practice . . . cannot help but be a severely exacerbating factor in police-community tensions[,] . . . particularly . . . in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer."³⁸

But the Court dismissed these considerations from its analysis of the Fourth Amendment issues presented by the case, stating summarily that a rule requiring suppression would not prevent improper police activity of this sort.³⁹

The *Terry* opinion's brief discussion of race presumably was a response to an amicus curiae brief filed by the NAACP Legal Defense and Educational Fund.⁴⁰ In that brief, the Legal Defense Fund cited statistics showing that blacks were more prone to being stopped and frisked than whites. Observing that "many thousands of our citizens who have been or may be stopped and interrogated yearly, only to be released when the police find them innocent of any crime,"⁴¹ the Legal Defense Fund warned that the police would exploit a diluted probable cause standard to engage in exploratory searches under the guise of protecting themselves.

Justice Douglas's strongly worded dissent in *Terry* echoed some of the themes sounded by the Legal Defense Fund's brief. He declared that the majority's conferral upon the police of expanded powers of search and seizure represented "a long step down the

³⁷ Id. at 14.

³⁸ Id. at 14 n.11 (quoting Lawrence P. Tiffany et al., *Deterrence of Crime* 47-48 (Frank J. Reimington ed., 1967)).

³⁹ See id. at 14-15; see also id. at 17 n.14 ("[T]he abusive practices which play a major . . . role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations."). The Court did, however, indicate that the "degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." Id.

⁴⁰ See Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae at 4-5, *Sibron v. New York*, 392 U.S. 40 (1967) (No. 63) and *Terry v. Ohio*, 392 U.S. 1 (1967) (No. 67) [hereinafter *Legal Defense Fund Brief*], reprinted in 66 *Landmark Briefs and Arguments of the Supreme Court of the United States* 577, 580-81 (Philip B. Kurland & Gerhard Casper eds., 1975).

⁴¹ Id.

totalitarian path.”⁴² Given what he called the “hydraulic pressures” of society to diminish constitutional guarantees, he predicted that the nation was now entering a “new regime” in which police officers could pick up an individual “whenever they d[id] not like the cut of his jib.”⁴³ Yet, Justice Douglas did not advert to the racial dimension of these concerns as identified in the Legal Defense Fund’s brief or in any other way refer to considerations of race.

When one adds the missing racial element to the Court’s statement of facts, certain otherwise inexplicable events suddenly become much more comprehensible. Detective McFadden’s assertion that “he was unable to say precisely what first drew his eye to [Terry and Chilton],”⁴⁴ an assertion accepted by the trial court and uncritically recited by the Supreme Court, assumes a new meaning when one views *Terry* as a case in which a white detective noticed—and then focused his attention on—two black men who were doing nothing more than standing on a street corner in downtown Cleveland in the middle of the afternoon. The Court quoted Detective McFadden’s statement that “‘they didn’t look right to me at the time,’”⁴⁵ but gave no explanation for what “‘didn’t look right’” meant to McFadden because he himself had offered no such explanation in his testimony.

With the element of race restored to the case, it is more readily apparent why these two men “‘didn’t look right’” to him. This inference becomes even clearer when one considers the officer’s elaboration on this point in his testimony at the trial:

Q. Well, at what point did you consider their actions unusual?

A. Well, to be truthful with you, I didn’t like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and stopped and looked in and come back again.

When he come back, then I observed the other man doing the same thing.

Q. Well, would this be a fair statement then, that it was at this point then that you decided you ought to watch them further?

A. Well, I will be truthful with you, I will stand and watch people or walk and watch people at many intervals of the day. Some people that don’t look right to me, I will watch them. Now, in this case when I looked over they didn’t look right to me at the time.⁴⁶

⁴² *Terry*, 392 U.S. at 38 (Douglas, J., dissenting).

⁴³ *Id.* at 39 (Douglas, J., dissenting).

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ Trial Transcripts, *supra* note 32, at 1456 (cross-examination of Detective McFadden at trial of Richard Chilton).

With the officer's "interest aroused," as the Court put it,⁴⁷ everything the men did became suspicious. Their actions in walking back and forth past a store window and gazing into the store—which the Court itself acknowledged was not inherently suspicious since people routinely "stroll[] up and down the street" and "[s]tore windows . . . are made to be looked in"⁴⁸—became, in the officer's mind, symptomatic of an "elaborately casual and oft-repeated reconnaissance of the store window" for the purpose of "'casing a job, a stick-up.'"⁴⁹ Interestingly, one of the factors that aroused the officer's suspicions was that these two African American men conferred with a white man, who initially left and thereafter rejoined the group. In his suppression hearing testimony, the officer made a point of referring to the race of each of the participants when he described their contact with each other.⁵⁰ The interracial nature of the group apparently also "'didn't look right'" to the detective. Based on these observations, the officer followed the three men, stopped them, demanded identification, and, "[w]hen the men 'mumbled something' in response to his inquiries, . . . grabbed petitioner Terry, spun him around . . . and patted down the outside of his clothing."⁵¹

The Court stripped away the racial dimension of the case by removing all references to the participants' race. Although one cannot, of course, reconstruct the reasons for this rhetorical choice, it seems evident at least that this was a conscious choice. In his suppression hearing testimony, Detective McFadden repeatedly referred to the "third man" (Katz) as a "white man";⁵² the lawyers who questioned McFadden did so as well.⁵³ Yet, the Court's opinion refers to him only

⁴⁷ *Terry*, 392 U.S. at 5.

⁴⁸ *Id.* at 22.

⁴⁹ *Id.* at 6.

⁵⁰ See Trial Transcripts, *supra* note 32, at 1408 (testimony of Detective McFadden):

There was a man, a white man, short white man, came down the north side of Huron Road, and came directly over to where these two men were at, after one of them had come back, and it wasn't half a second, and this white man came over and talked to these two colored men, and he was there for about a minute or so talking to them, and then he left.

⁵¹ *Terry*, 392 U.S. at 7.

⁵² See Trial Transcripts, *supra* note 32, at 1403 ("they met a white man"); *id.* at 1408 ("a white man, short white man"; "this white man"); *id.* at 1419 ("the white man").

⁵³ See *id.* at 1408 (cross-examination of Detective McFadden by County Prosecutor Reuben Payne: "Q. [A]fter the white man left, what then did they do if anything? . . . Q. Approximately how long were they talking to this same white man at this time?"); *id.* at 1419 (redirect examination by defense attorney Louis Stokes: "Q. This would include the white fellow, Officer?").

as "the third man" or by name.⁵⁴

The removal of race from the case presented the Court with a dilemma, however. To determine whether to uphold McFadden's actions under the new "stop and frisk" doctrine, the Court had to ascertain precisely why McFadden stopped and frisked Terry. After all, an essential element of pre-*Terry* "probable cause" doctrine—and one the Court carried forward to the new "stop and frisk" rule—was that a search and seizure had to be supported by specific facts that could be weighed by an objective magistrate.⁵⁵ But, with race eliminated from the case, the most obvious explanation for McFadden's suspicions and his subsequent actions was unavailable. The Court was left with McFadden's testimony that "he was unable to say precisely what first drew his eye to them."⁵⁶ McFadden's explanations for his subsequent actions in stopping and frisking Terry were not much better. He claimed to see criminality in Terry's and Chilton's actions of pacing back and forth in front of the store, gazing into the store window, and conferring with a third man—acts which the Court itself had to acknowledge were innocuous and hardly emblematic of criminal activity.⁵⁷ The frisk, which under the Court's new standard had to be supported by reasonable suspicion that the individual is "armed and dangerous,"⁵⁸ seemed to be based upon utter speculation. Having concluded that the three men must be preparing to commit a daylight robbery, McFadden then deduced that they must be armed because a "daylight robbery . . . would be likely to involve the use of weapons."⁵⁹

What the Court did to "make sense" of McFadden's actions is best understood in the terms of narrative theory. As others have explained, a sound judicial opinion requires coherent factual and legal narratives.⁶⁰ Such narratives permit the judges to clarify the events in

⁵⁴ See *Terry*, 392 U.S. at 6-7 ("a third man"; "[t]his man"; "the third man"; "the same man who had conferred with them earlier on the street corner"; "the third man, Katz"; "Katz"; "Katz' outer garments").

⁵⁵ In the text of the *Terry* opinion, the Court stated this long-established rule in the following way: "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. In an accompanying footnote, the Court explained that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 21 n.18.

⁵⁶ *Id.* at 5.

⁵⁷ See *id.* at 22-23.

⁵⁸ *Id.* at 27.

⁵⁹ *Id.* at 28.

⁶⁰ See, e.g., Anthony G. Amsterdam & Jerome S. Bruner, *Minding the Law* chs. 4-5 (forthcoming 1999) (manuscript on file with the *New York University Law Review*) (describing significance of narrative in legal reasoning and providing examples of use of

their own minds⁶¹ and to present the facts and law in a manner that the legal community will generally accept.⁶² In *Terry*, the narrative upon which the Court settled was one of the "police officer as expert." To explain Detective McFadden's immediate distrust of the two men on the street corner, the Court stated:

He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained . . . that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."⁶³

The Court took McFadden's statement that could easily be construed in racial terms ("they didn't look right to me") and transformed it into a highly skilled officer's instinctive assessment that something in the situation seemed awry and worthy of investigation. And the court accomplished this transformation in a manner quite familiar to those who study narrative: not explicitly (which would have been impossible since McFadden's testimony lacked such a direct link) but by juxtaposing two apparently unconnected subjects.

After acknowledging that each of the acts observed by McFadden was "perhaps innocent in itself" and consistent with the actions of individuals who are not engaged in criminal activity,⁶⁴ the Court invoked the expertise of the detective to declare that "[i]t would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to

narrative in two Supreme Court opinions); Jerome Bruner, *A Psychologist and the Law*, 37 N.Y.L. Sch. L. Rev. 173, 177 (1992) ("Stories are profoundly rhetorical: they provide the medium of making excuses, for justifying our acts, for framing mitigating circumstances. . . . All adjudication is premised upon someone's presumed ability to decide which competing narrative version is truer, righter, or provides a better fit to some point of law."); Peggy Cooper Davis, *The Proverbial Woman*, 48 Rec. Ass'n B. City N.Y. 7, 20 (1993) ("Textual analyses of arguments in litigation have established that themes of advocacy are reflected in metaphors that lawyers unconsciously choose in formulating their arguments. The same process is at work when judges draft their opinions.").

⁶¹ See, e.g., Amsterdam & Bruner, *supra* note 60, ch. 4 (arguing that narrative makes it possible for adjudicator to relate principles of *corpus juris* to particularities of current case); Bruner, *supra* note 60, at 176 ("One of the most basic forms of cognitive activity is figuring out the relation between what you are encountering now and what the world is supposed to be like under present circumstances . . .").

⁶² See Amsterdam & Bruner, *supra* note 60, ch. 5 (comparing uses of narrative techniques in Supreme Court cases).

⁶³ *Terry*, 392 U.S. at 5 (quoting McFadden's testimony).

⁶⁴ *Id.* at 22-23.

have failed to investigate this behavior further.”⁶⁵ To justify McFadden’s additional intrusion of frisking Terry, the Court stated:

We cannot say his decision . . . to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences *the tempered act of a policeman* who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.⁶⁶

An independent examination of McFadden’s suppression hearing testimony provides cause to be skeptical of the Court’s characterizations of his expertise.⁶⁷ Of course, the Court in the *Terry* opinion does

⁶⁵ Id. at 23. Relying on McFadden’s expertise, the Court stated that the “series of acts,” although “each of them perhaps innocent in itself, . . . taken together warranted further investigation.” Id. at 22. Tracking McFadden’s testimony, the Court recited each of the facts identified by McFadden and strung them together in what appears to be a cogent tale of surreptitious criminality. See id. at 22-23. But what McFadden did in his testimony was a sleight of hand familiar to any police officer who testifies regularly in suppression hearings. Out of the hundreds of movements and small gestures in which Terry and Chilton engaged during the time he watched them, McFadden selected a few and then connected them in a way that would transform each single, innocuous act into a part of a larger story of criminality. The events described by McFadden and reiterated by the Court could just as easily have been woven into a story of wholly innocent conduct. Cf. *United States v. Sokolow*, 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting) (comparing cases chronicling drug courier profile’s “chameleon-like way of adapting to any particular set of observations” (quoting *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987))), in order to capture virtually all conduct of traveler, including, for example: “suspect was first to deplane”; “[was] last to deplane”; “deplaned from middle”; “[had] one-way tickets”; “[had] round-trip tickets”; “[was on] non-stop flight”; “changed planes”; “[carried] no luggage”; “[carried] gym bag”; “[had] new suitcases”; “[was] traveling alone”; “[was] traveling with companion”; “acted nervously”; “[or] acted too calmly” (citations omitted)); Cole, *supra* note 1, at 47-49 (listing traits that “[f]ederal agents have asserted . . . as parts of a drug-courier profile,” which include “arrived late at night”; “arrived late in the morning”; “arrived in afternoon”; “acted too nervous”; “acted too calm”; “made eye contact with officer”; “avoided making eye contact with officer”; and so forth).

⁶⁶ *Terry*, 392 U.S. at 28 (emphasis added).

⁶⁷ At the conclusion of the lawyers’ questioning of McFadden, the trial court asked some questions of its own:

By the Court:

Q. You have mentioned about casing a place. In ordinary language what do you mean by casing?

A. I mean waiting for an opportunity.

Q. Of doing what?

A. Of sticking the place up.

Q. In your thirty-nine years of experience as an officer, and I believe you testified thirty-five years as a detective—is that correct?

A. That’s correct.

Q. Have you ever had any experience in observing the activities of individuals in casing a place?

A. To be truthful with you, no.

Q. You never observed anybody casing a place?

not claim for McFadden any experience in recognizing "casing," for the Court could not have done so. Instead, it implies such expertise by saying that McFadden "testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years."⁶⁸ The ultimate truth of the question of whether McFadden *really* was an expert hardly matters. As cognitive psychologist Jerome Bruner reminds us, "matters of fact, even when filtered through rules of evidence, oaths, and cross-examination, do not, after all, speak for themselves. In many ways, facts are constructed in response to value judgments that exist either in the broader society or in the law itself"⁶⁹ The "police officer as expert" narrative allowed the Court in *Terry* to present a coherent, raceless narrative about why McFadden acted as he did. Moreover, and more important for the broader canvas of Fourth Amendment jurisprudence on which the Court was painting, this device permitted the Court to denounce judicial reliance on police "hunches" in a case in which the Court was doing the very thing it was nominally condemning. In a key passage of the *Terry* opinion, the Court stated, "in determining whether the officer acted reasonably . . . , due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."⁷⁰ The Court treated McFadden's largely unexplained suspicions as "the specific *reasonable* inferences" of a highly "experience[d]" officer rather than a mere "hunch" by transforming McFadden into an expert.

In stripping away race from the case and substituting the officer-as-expert narrative, the Court in *Terry* essentially created a conceptual construct: an officer who was unaffected by considerations of race and who could be trusted even in a race-laden case like *Terry* to be acting on the basis of legitimate indicia of criminal activity. Such an officer could be trusted with the expanded powers conferred by the *Terry* opinion, notwithstanding the dire warnings of the Legal Defense Fund.⁷¹

A. No.

Q. But you have had the experience of a detective in apprehending, and doing your police job as assigned?

A. That's right, and observing.

Trial Transcripts, *supra* note 32, at 1420.

⁶⁸ *Terry*, 392 U.S. at 5.

⁶⁹ Bruner, *supra* note 60, at 178.

⁷⁰ *Terry*, 392 U.S. at 27.

⁷¹ See Legal Defense Fund Brief, *supra* note 40, at 4-5 (warning Court that "many thousands of our citizens" have been or may be stopped and frisked).

Of course, even if the "Detective McFaddens" of the world could be trusted to perform in a race-neutral manner, that still left the other kind of officer described in the Legal Defense Fund brief: the officer who would abuse expanded search and seizure powers unjustly to stop and frisk African Americans and other members of "unpopular racial and religious minorities."⁷² To deal with this concern, the Court once again constructed a narrative. This time, the Court's narrative focused on the Court itself describing the limits of judicial power, and specifically the limitations of lawmakers in construing the Fourth Amendment. The Court stated:

The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.⁷³

Although the Court in this passage appears to accept the validity of the complaints of "wholesale harassment" of "minority groups,"⁷⁴ the Court attributes these abuses to "certain elements of the police community." In essence, the Court divides the world of police officers into "good cops" (the "Detective McFaddens" of the world, who can be trusted) and "rogue cops" (the ones who might be expected to abuse whatever powers have been delegated to them). With respect to the latter group, the Court declares itself powerless—at least in the context of a case implicating the Fourth Amendment and the proper manner of applying the exclusionary rule—to exert control over their abuses. Any such effort, the Court asserts, would be "futile."⁷⁵ Even

⁷² *Id.* at 4 n.5 (quoting President's Comm'n on Civil Rights, Report: To Secure These Rights 25 (1947)).

⁷³ *Terry*, 392 U.S. at 14-15 (footnote omitted).

⁷⁴ As the accompanying footnote reflected, the reasons for crediting these complaints were considerable. A report of a presidential commission, which the Court quoted, attested to the problems which police officers' "field interrogation" practices were causing "between the police and minority groups." *Id.* at 14 n.11 (quoting President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report: The Police 183 (1967)).

⁷⁵ The Court's claim of powerlessness is in sharp contrast with the previous Warren Court decisions championing the rights of the individual in encounters between a civilian and a police officer. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 492 (1966) (holding that statements obtained from defendants who were not informed of their constitutional rights were inadmissible); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (protecting defendant's Sixth Amendment right to counsel); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964) (holding incriminating statements by defendant inadmissible because government agent had obtained statements in absence of defendant's retained counsel and without defendant's knowledge); *Henry v. United States*, 361 U.S. 98, 104 (1959) (holding that arrest is not justified by what subsequent search discloses).

if such a "futile protest" might have symbolic value, the Court concludes that such symbolism must be eschewed because the position advocated by the Legal Defense Fund (adherence to the preexisting probable cause standard) would unacceptably hamper police officers and put them at risk.⁷⁶

The foregoing is of course only a small part of the very large story of *Terry v. Ohio*. Much more can be said (and has been said by others) about, among other things, the facts of the case and the Court's legal analysis,⁷⁷ the place of *Terry* in Fourth Amendment jurisprudence,⁷⁸ and the political context of *Terry* and the extent to which that backdrop affected the Court's ruling and rhetoric.⁷⁹ This take on *Terry*, however, offers some insights into the Court's treatment of racial motivation in Fourth Amendment cases. As the next section will show, the *Terry* opinion established a pattern that would continue in the Court's subsequent Fourth Amendment cases and reach its fruition in *Whren v. United States*⁸⁰ in 1996.

B. *The Court's Post-Terry/Pre-Whren Treatment of Race in Fourth Amendment Analysis*

During the period between *Terry v. Ohio* and *Whren v. United States*, the Court issued other Fourth Amendment decisions in which it stripped race from the case. In *Delaware v. Prouse*,⁸¹ a challenge to the constitutionality of a Delaware "random spot check" procedure under which officers could stop a motorist without probable cause to

⁷⁶ The themes sounded here in support of the "stop and frisk" rule—that such a rule is needed for the sake of effective investigation and to guard police officers from violence—permeate the *Terry* opinion. See *Terry*, 392 U.S. at 22-27.

⁷⁷ See, e.g., John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 St. John's L. Rev. 749 (1998) (detailing background of case and individual justices' roles in decisionmaking process); Wayne R. LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and Beyond, 67 Mich. L. Rev. 39, 47-48 (1968) (giving case facts).

⁷⁸ See, e.g., Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 St. John's L. Rev. 1097 (1998) (noting positive features of *Terry* Court's view of Fourth Amendment while disavowing imprecision in opinion that undercut its logic); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 390-402 (1974) (noting jurisprudential difficulties with Court's approach to Fourth Amendment exemplified by *Terry*); Harris, *Frisking*, supra note 1, at 1, 7-22 (describing application of *Terry* principles in subsequent Court decisions); Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 St. John's L. Rev. 1053 (1998) (praising *Terry*'s conceptual framework for Fourth Amendment).

⁷⁹ See generally Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 St. John's L. Rev. 1271 (1998) (arguing that observers who most vocally support *Terry* tend not to give proper regard to experience of police harassment in marginalized communities of color).

⁸⁰ 517 U.S. 806 (1996).

⁸¹ 440 U.S. 648 (1979).

check the validity of the vehicle's registration or the driver's license,⁸² the brief submitted on behalf of the motorist specifically alerted the Court to the potential impact that broad police discretion can have on motorists of color:

Courts, commentators, and even the State of Delaware, have acknowledged the danger that unguided police authority to stop cars will result in the harassment of disfavored racial or cultural minorities or be used as a pretext for investigation of unrelated criminal activity These assumptions are strongly supported by social science research and literature.⁸³

The brief presented the Court with social science data suggesting that unbridled discretion would lead law enforcement officers to stop individuals on the basis of "salient cues" such as race.⁸⁴ The social science data demonstrated the tendency of officers to use their discretionary power to conduct stops, interrogations, and searches of people who are "different" from the racial majority in this country and, more importantly, different from the police officers themselves. In ruling in the motorist's favor and striking down the Delaware practice, the Court cast its ruling in a narrow fashion, holding merely that random stops confer too much discretion on police officers. The Court did not analyze the implications of race or even refer to the social science data the motorist's brief had presented. Indeed, there is no reference to race at all in the Court's opinion.

An even more dramatic example in which the Court removed the racial dimension of a case took place in *Tennessee v. Garner*.⁸⁵ The issue in *Garner* was whether the Fourth Amendment prohibits the use of deadly force against an apparently unarmed, nondangerous fleeing suspect.⁸⁶ Once again, the Court was presented with statistics showing the overwhelming number of black suspects shot by the Memphis police in property crime cases.⁸⁷ The data suggested that the Memphis

⁸² Employing that practice, a Delaware patrol officer in a police cruiser had stopped an automobile occupied by Mr. Prouse, even though the officer had not observed any illegal behavior prior to stopping the car. See *id.* at 650. After stopping the car for the purpose of checking the driver's license and registration, the officer smelled marijuana smoke and then observed—and seized—marijuana lying in plain view on the car floor. See *id.* at 650-51.

⁸³ Brief for Respondents at 25, *Prouse* (No. 77-1571) (footnotes omitted).

⁸⁴ See *id.* app. A, at 5a-10a.

⁸⁵ 471 U.S. 1 (1985).

⁸⁶ See *id.* at 3.

⁸⁷ See Brief for Appellee-Respondent at 13-14, *Garner* (Nos. 83-1035, 83-1070) (stating that 108 non-violent property crime suspects were shot by Memphis police between January 1969 and October 1974).

police were more likely to use deadly force against African American suspects fleeing the scene of a crime than against white suspects.⁸⁸

In holding that the Fourth Amendment prohibited police use of deadly force in non-threatening situations, the Court was noticeably silent on the issue of race. Although the Court took pains to describe in detail precisely what the officer saw prior to shooting the decedent,⁸⁹ the Court omitted any reference to the decedent's race. Indeed, in reading the opinion, it is impossible to determine the race of the parties.⁹⁰ The Court cited a number of studies that supported an officer's need to use deadly force⁹¹ in its analysis of the reasonableness of the officer's conduct but never identified any that discussed the disproportionate racial impact of the police practice. Given the way the issues had been framed by the parties and the data before the Court, it was apparent that the Court consciously had avoided the issue of race.⁹²

Nevertheless, the Court's Fourth Amendment jurisprudence in the post-*Terry*, pre-*Whren* period did not entirely avoid the subject of

⁸⁸ See James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. Crim. L. & Criminology 707, 718-21 (1982) (describing disproportionate shootings of black, as compared to white, suspects by Memphis police); Brief for Appellee-Respondent at 98-99, *Garner* (Nos. 83-1035, 83-1070) (concluding that "blacks were more than twice as likely to be shot at . . . [than whites]").

⁸⁹ The Court stated:

He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee-respondent's decedent, Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, [Officer] Hyman was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. He thought Garner was 17 or 18 years old and about 5' 5" or 5' 7" tall.

Garner, 471 U.S. at 3-4 (citations omitted).

⁹⁰ Both Garner and the police officer were black. See Brief for Appellee-Respondent at 1, 101 n.52, *Garner* (Nos. 83-1035, 83-1070). However, the officer was one of only a small number of black officers on the Memphis police force at the time. See *id.* at 101 n.52 (noting that racism was "well entrenched" in Memphis police department and quoting police director as admitting that "the black officers tried to out red-neck the white officers").

⁹¹ See *Garner*, 471 U.S. at 18-19.

⁹² See The Supreme Court, 1984 Term—Leading Cases, 99 Harv. L. Rev. 120, 253-54 (1985) (noting that Supreme Court has avoided squarely addressing issue of excessive force used by police against blacks); see also Anthony G. Amsterdam & Nancy Morawetz, *Applying Narrative Theory to Litigation Planning* 30-46 (Apr. 3, 1998) (unpublished manuscript, on file with the *New York University Law Review*) (demonstrating how Garner's attorneys chose to frame issues in case so as to introduce dramatic evidence of racially disparate effect of police use of deadly force without compelling Court to find explicit racial animus needed for Equal Protection Clause violation).

For a similar example of the Court's avoidance of the subject of race in another context, see *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), a case involving the use of the choke hold by Los Angeles Police officers, in which the Court's majority opinion makes no reference to the race of the African American respondent.

race. In two cases involving border stops, race played an important role. In *United States v. Brignoni-Ponce*,⁹³ the Court examined a situation in which Border Patrol agents assigned to a major highway in southern California pursued and stopped those cars in which the occupants appeared to be "of Mexican descent."⁹⁴ The issue before the Court was whether the Border Patrol should be permitted to stop vehicle occupants in areas near the Mexican border without individualized suspicion and based solely on their appearance for the purposes of checking the driver's or occupants' immigration status.⁹⁵ The Court ruled the stops unlawful and made clear that Mexican descent, by itself, would not satisfy the standard necessary for an intrusion.⁹⁶ Although the Court seemed to be staking out a strong position, rejecting the use of race as the sole basis in forming the requisite suspicion to detain,⁹⁷ it stopped short of dismissing race as wholly irrelevant. The Court stated that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."⁹⁸ The question of precisely how race could factor into the quantum of suspicion was left unanswered.⁹⁹

In the very next term, in *United States v. Martinez-Fuerte*,¹⁰⁰ the Court made clear that it was not prohibiting police reliance on race as

⁹³ 422 U.S. 873 (1975).

⁹⁴ *Id.* at 875.

⁹⁵ See *id.* at 874-76 (reciting case background and presenting question for decision).

⁹⁶ See *id.* at 884-85. Although acknowledging the legitimacy of law enforcement officials' goal of apprehending undocumented aliens, the Court observed that large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry. See *id.* at 886. The Court held that "[f]or the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens." *Id.* at 884. In identifying factors that are relevant to determining whether reasonable suspicion exists in a border area, the Court attempted to provide direction to law enforcement officials. The Court set forth a list of factors that includes the characteristics of the area in which the police encounter a vehicle, the car's proximity to the border, the officer's previous experience with "alien" traffic, information about recent illegal crossings, the driving pattern of the vehicle, and the type, load, and appearance of the vehicle. See *id.* at 884-85.

⁹⁷ See *id.* at 886 ("Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country.").

⁹⁸ *Id.* at 886-87.

⁹⁹ See *id.* at 882 (discussing factors leading to reasonable suspicion while failing to describe role of race in calculus).

¹⁰⁰ 428 U.S. 543 (1976).

a factor in the calculus of whether to detain, at least in the border patrol context. *Martinez-Fuerte* presented the question of the constitutionality of a Border Patrol practice of stopping individuals at "fixed checkpoints" on an interstate highway without probable cause or even reasonable suspicion of criminality and then directing some cars to "secondary inspection" areas for further investigation. The government's brief conceded that the decision to refer particular individuals to secondary inspection sites was not made pursuant to articulable suspicion,¹⁰¹ and that "apparent Mexican ancestry" was one of the factors on which Border Patrol agents relied in selecting motorists for further investigation.¹⁰² In a decision which largely ignored the subject of race, the Court upheld the practice on the ground that intrusion was "sufficiently minimal that no particularized reason need exist to justify it."¹⁰³

In one passage of *Martinez-Fuerte*, the Court explicitly addressed the subject of race, saying that, "even if it be assumed that such referrals [to the secondary checkpoint] are made largely on the basis of apparent Mexican ancestry," that fact would not render the practice impermissible.¹⁰⁴ The Court harmonized this conclusion with *Brignoni-Ponce* by describing the earlier decision as one in which "we held that apparent Mexican ancestry by itself could not create the reasonable suspicion required for a roving-patrol stop."¹⁰⁵

In attempting to square the Court's refusal to deal with race in *Terry*, *Prouse*, and *Garner* with the Court's readiness in *Brignoni-Ponce* and *Martinez-Fuerte* to allow race to be a factor in searches and seizures, two hypotheses come to mind. First, the Court may have been drawing a distinction between surreptitious racial motivation and explicit use of race. In a case in which the police ostensibly relied on factors other than race to make out probable cause or reasonable

¹⁰¹ See *id.* at 547.

¹⁰² *Id.* at 563 n.16.

¹⁰³ *Id.* at 563. The Court's analysis focused on the extent of the government intrusion and whether there was any appropriate rationale for the stop. The Court proceeded on the premise that checkpoints differ in nature from the roving patrols considered in *Brignoni-Ponce* because signs provided notice to travelers of the checkpoint's existence and the need to stop for U.S. officers. Accordingly, the Court concluded, the potential for intrusion and fright to travelers was markedly lessened. See *id.* at 558-59 (citing *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975)). Furthermore, the Court stressed, the initial stop resulted merely in a referral to an area for "secondary inspection." See *id.* at 560. In light of these factors, the Court upheld the practice, allowing motorists to be stopped and questioned in the absence of individualized suspicion. See *id.* at 562.

¹⁰⁴ *Id.* at 563. Citing statistics on the number of illegal aliens found in the cars referred to the secondary checkpoint, the Court stated: "Thus, to the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint, . . . that reliance clearly is relevant to the law enforcement need to be served." *Id.* at 564 n.17.

¹⁰⁵ *Id.* at 564 n.17.

suspicion, the Court would not consider whether racial motivation played some illicit role. This was the teaching of *Terry*, *Prouse*, and *Garner*. If, on the other hand, the police or prosecution sought to make express use of race as one of the considerations supporting a search or seizure, the Court would directly address the subject of race and, if the Court deemed it appropriate, approve the practice.

An alternative hypothesis is that the Court in *Martinez-Fuerte* and *Brignoni-Ponce* was treating the category of “apparent Mexican ancestry” as something different from race—something more akin to nationality. At a critical point in the *Martinez-Fuerte* decision, as the Court discussed the propriety of relying on “apparent Mexican ancestry” in the calculus of suspicion, the Court stated that this factor “clearly is relevant to the law enforcement need to be served” in catching illegal aliens at the Mexican border but that “[d]ifferent considerations would arise if, for example, reliance were put on apparent Mexican ancestry at a checkpoint operated near the Canadian border.”¹⁰⁶ Of course, viewing “apparent Mexican ancestry” as nothing more than an issue of nationality comparable to “apparent Canadian ancestry” would require that one ignore the complex history and politics of race in the United States. If this view of *Martinez-Fuerte* and *Brignoni-Ponce* is correct, then the decision appears to fit quite neatly into the array of Supreme Court cases denying or minimizing the role of race in police searches and seizures.

C. The Whren Decision

By the time the Court was presented with the issue in *Whren v. United States*,¹⁰⁷ it had a significant body of precedent upon which to base its decision. The issue in *Whren*, as framed by Justice Scalia, writing for a unanimous Court, was

whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment’s prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.¹⁰⁸

As in *Terry*,¹⁰⁹ *Prouse*,¹¹⁰ and *Garner*,¹¹¹ the Court in *Whren* presented the facts of the case without any mention of race. The Court stated that plainclothes vice officers in an unmarked police car

¹⁰⁶ *Id.*

¹⁰⁷ 517 U.S. 806 (1996).

¹⁰⁸ *Id.* at 808.

¹⁰⁹ See *supra* notes 20-45 and accompanying text.

¹¹⁰ See *supra* notes 81-84 and accompanying text.

¹¹¹ See *supra* notes 85-92 and accompanying text.

had been stationed in an area alleged to be a "high drug area."¹¹² The officers observed two young men in a Nissan Pathfinder, sitting at a stop sign. The car remained there for about twenty seconds, which the officers described as an unusually long period of time.¹¹³ Although the officers did not observe any behavior indicating criminal activity, they testified that a variety of factors aroused their suspicion: the occupants were young, the driver appeared to be looking into the lap of the passenger, and the car had temporary license plates.¹¹⁴ According to the officers, the Pathfinder then made a sharp right turn and sped off at a high rate of speed.¹¹⁵ The officers followed the Pathfinder and, at a subsequent red light, approached the car and identified themselves as police officers. As one of the officers approached the driver's window, he observed two large plastic bags of a substance appearing to be crack cocaine in the hands of one of the occupants, Mr. Whren.¹¹⁶ The officers placed both men under arrest.¹¹⁷

In the statement of facts, the only description of the Pathfinder's occupants that the Court offers is that they were "youthful"¹¹⁸ (a fact that figured in the officers' assessment of the need for further investigation). The Court eventually reveals the race of the occupants—that the "[p]etitioners . . . are both black"¹¹⁹—as a prelude to the discussion (and rejection) of petitioners' argument that race should be relevant to Fourth Amendment analysis of the issue before the Court. In a rhetorical move that signals its view of the legal merits of the petitioners' argument, the Court omits the race of the occupants from the statement of facts that the Court deems relevant and treats the missing fact as one whose only relevance is to explain the petitioners' invocation of an argument relating to race.

In the lower courts, the petitioners had asserted that the officers lacked both probable cause and reasonable suspicion to believe that they were engaged in illegal drug activity at the time the officers stopped the car. The petitioners further argued that the traffic rationale for the stop operated as a mere pretext for the officers to conduct an otherwise impermissible evidentiary investigation for drug activity.¹²⁰ The trial court denied the suppression motion and the court of appeals affirmed, holding that the brief detention of the defendants

¹¹² *Whren*, 517 U.S. at 808.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 808-09.

¹¹⁷ See *id.* at 809.

¹¹⁸ *Id.* at 808.

¹¹⁹ *Id.* at 810.

¹²⁰ See *id.* at 809.

did not violate the Fourth Amendment. The appellate court further found that the detention would not have been unconstitutional even if a reasonable officer would not have stopped the motorist without additional law enforcement justifications.¹²¹

In arguing to the Supreme Court that the stop was unlawful, Whren for the first time raised the issue of race and warned of the potential discriminatory use of discretion. He cited anecdotal evidence that police officers across the nation disproportionately target people of color for traffic stops and requests for consent to search. He acknowledged the difficulties of substantiating the claim of racial motivation given that police departments often fail to document their stops, but he pointed to patterns of police conduct in Florida, Pennsylvania, and Colorado that demonstrate the disproportionate frequency with which officers stop motorists of color. Having presented this information, though, he did not explicitly argue that these practices violate the Fourth Amendment.¹²²

The Court began its legal analysis by stressing that the “[p]etitioners accept that [the arresting officer] had probable cause to believe that various provisions of the District of Columbia traffic code had been violated.”¹²³ The Court then explained that the petitioners were seeking a rule that, “‘in the unique context of civil traffic regulations’ . . . [where] a police officer will almost invariably be able to catch any given motorist in a technical violation,” some additional doctrinal safeguard beyond probable cause is needed to assure that the police will not use traffic violations as a pretext for investigatory searches and to guard against selections of particular motorists for stops “based on decidedly impermissible factors, such as the race of the car’s occupants.”¹²⁴

The Court emphatically and unequivocally rejected the position that “ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred.”¹²⁵ With certain narrow exceptions inapplicable to “ordinary, probable-cause Fourth Amendment analysis,” the Court declared, an officer’s “motive [cannot] invalidate[] objectively justifiable behavior under the Fourth Amendment.”¹²⁶ Since, in the Court’s

¹²¹ See *id.* (reciting procedural posture of case and lower courts’ reasoning).

¹²² See Brief for Petitioners at 18-19, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95-5841), available in 1996 WL 75758.

¹²³ *Whren*, 517 U.S. at 810.

¹²⁴ *Id.*

¹²⁵ *Id.* at 811.

¹²⁶ *Id.* at 812-13; see also *id.* at 813 (“[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.”).

view, a traffic violation self-evidently furnished probable cause,¹²⁷ a judicial finding that an officer observed a traffic violation (or, as in *Whren*, the defendant's concession on appeal that there was probable cause) forecloses any need for further inquiry.

Applying these same principles to petitioners' argument about racially motivated traffic stops, the Court stated that even such "actual motivations of the individual officers"¹²⁸ do not furnish a basis for attacking a traffic stop based on probable cause:

We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.¹²⁹

Whren thus made official what the Court had signaled in *Terry*, *Prouse*, and *Garner*: The Court would not consider illicit racial motivation as a factor that can undermine the validity of a search, seizure, stop, or frisk that rests on facts sufficient to satisfy the applicable quantum of suspicion. The reason for this refusal shifted between the time of *Terry* and *Whren*. In *Terry*, the Court claimed to reject consideration of race because the Fourth Amendment could not provide a useful tool for combating racism by police officers. In *Whren*, the Court invoked a doctrinal barrier, declaring illicit racial motivation categorically irrelevant to Fourth Amendment analysis.¹³⁰

This overt removal of race from Fourth Amendment analysis is quite obviously in the foreground of the *Whren* opinion. What is far less visible is the manner in which *Whren* combines with *Terry* to construct a world in which race has no logical place in Fourth Amendment analysis. As explained earlier, the *Terry* opinion can be viewed as having constructed a reality in which some police officers (the "Detective McFaddens" of the world) form suspicions about individuals and situations without consideration of the race of the individual.¹³¹ *Whren* adds to this mythmaking by dealing with the other side of the equation: the officer who is affected by the race of the individual. With respect to such an officer, *Whren* says that the courts should divide the issues into those that implicate the Fourth Amendment and those that implicate the Equal Protection Clause. *Whren* creates a reality in which it is possible to separate a police officer's racial bias

¹²⁷ See *id.* at 817-18.

¹²⁸ *Id.* at 813.

¹²⁹ *Id.*

¹³⁰ See *id.*

¹³¹ See *supra* note 71 and accompanying text.

from his or her observations and account of alleged criminality, thereby making it possible for the reviewing judge at a suppression hearing to uphold the officer's actions as resting upon neutral facts untainted by racial bias.

A central reason why the *Whren* Court could so easily imagine a bifurcated analysis of Fourth Amendment and Equal Protection issues in the same case was because the Court used, as its prototype, a traffic stop based on an indisputable violation of the traffic code. Beginning with the factual situation the *Whren* case presented—conceded violations of the traffic laws regulating speed and requiring signaling before a turn—the Court in *Whren* essentially divided the world into two neat, straightforward categories: those in which there clearly is and those in which there clearly is not “probable cause.” If the world fits into this construct, imagining that an officer's racial bias might play no role in his or her observations or account seems less of a stretch. However, even in the traffic context, there are many situations in which an officer's perceptions and judgment can play a critical role in gauging whether a traffic infraction has taken place.¹³² Outside the traffic context, police officers' perceptions and judgment routinely play a role in the formation of suspicion for a search, seizure, stop, or frisk. As in *Terry* itself, the propriety of the intrusion depends upon

¹³² An examination of vehicle codes across the country reveals that statutes expressly authorize police officers to use their discretion in deciding whether to stop a driver. In California, for example, the Vehicle Code provides that “[n]o person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.” Cal. Veh. Code § 22,350 (West Supp. 1999). Similarly, New York State provides that “[n]o person shall drive a vehicle at speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing.” N.Y. Veh. & Traf. Law § 1180(a) (McKinney 1990). Although many individuals violate the traffic laws, ultimately officers maintain discretion to stop and/or charge them.

Even the vehicle code violation at issue in *Whren* itself furnishes an example of the inherent subjectivity of police judgments in traffic stops. The police claimed that *Whren* violated the District of Columbia's municipal regulations for failing to signal when turning and for traveling at a speed that is “greater than is reasonable and prudent under the conditions.” D.C. Mun. Regs. tit. 18, §§ 2200.3, 2204.3 (1995 & Supp. 1997). Obviously, what constitutes “reasonable or prudent” depends on an officer's subjective interpretation. Even the most ostensibly “objective” vehicle code sections (such as, for example, those that regulate the distance that cars must maintain between one another or the degree to which a car may weave within a lane) unavoidably leave it to an officer to exercise discretion as to whether an individual driver's conduct rises to the level permitting the officer to stop that driver. For further discussion of other vehicle code violations that turn on the discretion of the officer, see Harris, *supra* note 2, at 558-59 (noting myriad potential violations, including: driving too slowly; signaling for under three seconds; slowing “suddenly” without signaling; driving with malfunctioning taillight; and driving with incorrectly displayed inspection sticker).

the accuracy of the officer's assessment of whether particular movements or gestures truly were indicative of criminality.¹³³

The next section will examine the validity of the Court's basic assumptions about race and the Fourth Amendment: that the issue of race can be separated out from the analysis of police officers' assessments of probable cause and reasonable suspicion, leaving a coherent Fourth Amendment ruling, perhaps supplemented by an Equal Protection challenge of selective enforcement; and the more fundamental jurisprudential conclusion that the Fourth Amendment is not concerned with problems of racial motivation. The first of these issues will be addressed in Part II.A; the latter in Part II.B.

II

THE FLAWS IN THE SUPREME COURT'S TREATMENT OF RACE IN FOURTH AMENDMENT DECISIONS

A. *The Inevitable Impact of Race on Police Officers' Assessments of Probable Cause and Reasonable Suspicion*

As the preceding section showed, the Supreme Court's Fourth Amendment decisions treat race as a subject that can be antiseptically removed from a suppression hearing judge's review of whether a police officer had probable cause for an arrest or warrantless search or reasonable suspicion for a stop or frisk. The decisions imagine a world in which some officers are wholly unaffected by racial considerations and in which even biased officers may make objectively valid judgments that courts can sustain despite the underlying racial motivations of the officer. A very different picture emerges, however, when one consults social science research. Thirty years of research suggest that mental states do not break down into such neat categories.

1. *Social Science Research on Categorization, Schemas, and Stereotyping*

Social scientists and cognitive psychologists have studied the manner in which people make sense of themselves and others. In encountering the complexities of our daily lives, we attempt to reduce the social world around us into categories to create a more manageable structure.¹³⁴ This process of categorization enables us to organize and make decisions about information with less time and effort than we would require to confront behavior and events anew.¹³⁵ As the

¹³³ For a discussion of the role of these factors in the *Terry* case, see *supra* notes 55-66 and accompanying text.

¹³⁴ See *infra* notes 136-42 and accompanying text.

¹³⁵ See *infra* notes 139-49 and accompanying text.

human mind seeks to understand conduct, it looks to salient cues, such as race and ethnicity, and then draws on culturally embedded understandings to evaluate behavior.¹³⁶

The process of grouping of information into smaller, more manageable bits of information achieves five essential goals of human organization.¹³⁷ First, categorization reduces the complexity of the environments that we encounter.¹³⁸ People will use concepts that they understand to have certain meanings and then group newly received information according to these organizing properties or categories. Second, categorization enables the individual to identify events or objects by placing them in a familiar class.¹³⁹ In the context of human behavior, it is the inability to put information into a previously defined category that causes anxiety. Third, the establishment of a category based on a set of defining attributes reduces the necessity of constant learning.¹⁴⁰ Fourth, being able to categorize permits the individual to direct her behavior. Understanding, for example, that a substance is poison enables the individual to know in advance how to react.¹⁴¹ Finally, categorization provides the opportunity for ordering and classifying events.¹⁴² Individuals map and give meaning to the world by relating classes of events rather than by relating individual events.¹⁴³

Categories are a set of characteristics that are treated as if they were, for the purposes at hand, similar or capable of being substituted for each other.¹⁴⁴ It is equally important to note that categories reflect cultural norms; thus they are made, not found.¹⁴⁵ Schemas are the preconceptions that define category members.¹⁴⁶ A schema is a piece of knowledge that represents a kind of "averaging" of specific items or events.¹⁴⁷ Cognitive schema theory also provides critical in-

¹³⁶ See *infra* notes 150-55 and accompanying text.

¹³⁷ Jerome S. Bruner, Jacqueline J. Goodnow, and George A. Austin discuss the process by which human beings group the world of particulars into ordered classes and categories. See generally Jerome S. Bruner et al., *A Study of Thinking* (Transaction Publishers 1986) (1956).

¹³⁸ See *id.* at 12.

¹³⁹ See *id.*

¹⁴⁰ See *id.* ("We do not have to be taught *de novo* at each encounter that the object before us is or is not a tree. If it exhibits the appropriate defining properties, it 'is' a tree.").

¹⁴¹ See *id.* at 12-13.

¹⁴² See *id.* at 13.

¹⁴³ See *id.*

¹⁴⁴ See Amsterdam & Bruner, *supra* note 60, ch. 2 (defining categorization and explaining particular functions categories serve).

¹⁴⁵ See *id.*

¹⁴⁶ See John R. Anderson, *Cognitive Psychology and Its Implications* 132-33 (1980).

¹⁴⁷ See *id.* at 133.

sights into behavior. This theory suggests that people use cognitive schemas in making sense of others' actions.¹⁴⁸ Unique experiences with certain types of individuals form the bases for those schemas. Interactions with those individuals will then activate the schema.¹⁴⁹ Researchers have found that specific schema features would likely be added to this general formulation based on an individual's specific experience with criminals. Given the disproportionate number of experiences that police officers have with men of color, researchers have found that law enforcement officials' schemas also contain race as a descriptive feature.¹⁵⁰

Schemas are formed through the process of categorization. One problematic form of categorization is stereotyping. We cluster information into categories and this leads inevitably to some prejudgment based upon our perceptions of those groupings. Stereotypes have been defined as the "general inclination to place a person in categories according to some easily and quickly identifiable characteristic such as age, sex, ethnic membership, nationality, or occupation, and then to attribute to him qualities believed to be typical of members of that category."¹⁵¹ Of course, stereotypes about groups tend not to be any more accurate than any other type of generalization¹⁵² because they represent oversimplification of complexities.¹⁵³ But we tend to rely on them and, at times, to be prejudiced by them in making complex discretionary decisions.

¹⁴⁸ See Susan T. Fiske & Shelley E. Taylor, *Social Cognition* (2d ed. 1991). Social schemas influence the encoding (taking in and interpreting) of new information, memory of old information, and inferences about missing information.

¹⁴⁹ See *id.* at 119. These schemas are often defined as "role" schemas in that a social role is the set of behaviors expected of an individual in a particular social position. Many of these are socially or culturally promulgated, for example the typical schema for a criminal.

¹⁵⁰ See *id.* at 122. Once cued, schemas affect how quickly we perceive, and what we notice. Cognitive psychologists suggest that we perceive age, race, and gender from the earliest moments of perception. See *id.*

¹⁵¹ Renato Tagiuri, *Person Perception*, in 3 *Handbook of Social Psychology* 395, 422 (Gardner Linzey & Elliot Aronson eds., 2d ed. 1969).

¹⁵² See Shelley E. Taylor, *A Categorization Approach to Stereotyping*, in *Cognitive Processes in Stereotyping and Intergroup Behavior* 83, 84-86 (David L. Hamilton ed., 1981) (noting that research suggests process of developing generalizations about social groups is not fundamentally different from process of generalizing objects).

¹⁵³ See Gordon W. Allport, *The Nature of Prejudice* 192 (1954). Allport suggests that racial and ethnic stereotypes act "both as a justificatory device for categorical acceptance or rejection of a group, and as a screening or selective device to maintain simplicity in perception and in thinking." *Id.* Prejudice (unless deeply rooted) may be reduced by equal contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if the contact is sanctioned by institutional supports such as the law. See *id.* at 281.

Not all categories lead to intractable stereotypes. Some categories are held tentatively and the individual remains open to information that is inconsistent with the stereotypical category. Nonetheless, in most instances, categories stubbornly resist change.¹⁵⁴ Moreover, in the case of racial and ethnic stereotyping, people tend "to hold to prejudgments even in the face of much contradictory evidence."¹⁵⁵

2. *Categorization, Schemas, and Stereotyping in the Context of Police Work*

Categorization intersects with policing goals in fundamental ways. The officer must attempt to synthesize vast amounts of complex information in short periods of time. Because the officer is involved in investigating ongoing criminal activity, she must remain alert to unexpected criminal conduct so that she can detect crime as it is occurring.¹⁵⁶ Given these tasks, anyone would naturally rely on quick evaluations and judgments. Categorization enables the officer to do this. She can quickly determine when something seems out of place or when a person acts suspiciously. Individuals use their learned categories as contexts for making such judgments.

Thus, police officers often proceed on the basis of "traits" that, they assert, correlate with criminal behavior.¹⁵⁷ For example, they will watch for certain mannerisms, language, or modes of dress as clues to unlawful conduct. But when we examine the individuals whom of-

¹⁵⁴ See Amsterdam & Bruner, *supra* note 60, ch. 2; see also Allport, *supra* note 153, at 23, 172 (describing instances in which categories may be rigid or flexible); Fiske & Taylor, *supra* note 148, at 149-52 (describing pressure to maintain stable schemas and persistence of well-developed schemas despite contrary evidence); Henri Tajfel, *Social and Cultural Factors in Perception*, in 3 *Handbook of Social Psychology*, *supra* note 151, at 315, 335-39 (discussing individual's commitment to previous judgments, particularly when influenced by group judgment).

¹⁵⁵ Allport, *supra* note 153, at 23.

¹⁵⁶ See Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* 80 (Macmillan 1994 3d ed.) (1966) (describing police officer as "*always* in 'combat,' out on the streets, doing the job").

¹⁵⁷ See Amsterdam & Bruner, *supra* note 60, ch. 2:

[O]ne's category use[] serve[s] to regulate risk. The most obvious example is in categorizing people as "friend" or "foe." Sentries in combat zones are the exemplary case for playing it safe: Shoot before you get shot; when in doubt, categorize the shadowy figure as "foe." That's why passwords are needed; and even at that, posted sentries are often as dangerous for returning patrols as the enemy troops they were sent out to reconnoitre. It hardly stops there. Racist suspicion often takes a similar form, as when a householder in Louisiana shot to death a young Japanese stranger who approached the house in the mistaken belief that it was the site of a Halloween party to which he had been invited, or when America interned loyal citizens of Japanese extraction during World War II.

(footnote omitted).

officers target as suspicious, these individuals often possess characteristics that differ from those of the officers. Their conduct draws the officers' attention because it stands out in the officers' minds.

Given the nature of law enforcement, stereotyping would appear integral to the police officer's world.¹⁵⁸ Not only are police officers trained to enforce the laws and norms of our society, they are encouraged to investigate behavior that appears to them to be out of the ordinary. Since police officers' duties involve judging and evaluating behavior, it is not uncommon for them to see their jobs in "us vs. them" terms.¹⁵⁹ When one adds to that the public scrutiny and frequent criticism of police behavior, this adversarial relationship is reinforced. The resulting mindset makes it more likely that officers will associate difference with deviance. One of the salient cues for difference often is race.¹⁶⁰

Significantly, schemas may cause biases in the ways in which an officer processes information. An officer may misinterpret ambiguous conduct that could be consistent with innocence to coincide with the prevailing schema.¹⁶¹ Similarly, officers may overlook or reinterpret behavior that does not seem to fit the schema.¹⁶² Thus, exculpatory conduct may be dismissed. More troubling still, an officer's schema can be in use constantly and employed even when situations are not necessarily criminal in nature.

3. *Re-Examining Terry and Whren in Light of the Social Science Research*

Although the Court appeared to assume in *Terry* and *Whren* that police officers can make assessments of criminality independent of whatever attitudes the officers may have about race, the social scientific research shows that the stereotypic judgments and biases that an

¹⁵⁸ See Skolnick, *supra* note 156, at 80 (discussing complex role of stereotyping in police culture).

¹⁵⁹ See Jerome H. Skolnick & David H. Bayley, *The New Blue Line: Police Innovation in Six American Cities* 211 (1986) (noting tightly knit police subculture with "insider/outside vision").

¹⁶⁰ See Jerome H. Skolnick & James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* 99 (1993) (recounting story of black man stopped by police while strolling in white neighborhood because he was "incongruous in [his] surroundings" and thus suspicious).

¹⁶¹ Fiske & Taylor, *supra* note 148, at 123 ("[C]ategorizing someone as an instance of the schema slants encoding of the content of what the person does.").

¹⁶² See *id.* at 122 (arguing that, once cued, schemas affect how quickly we perceive, what we notice, and how we interpret what we notice). People perceive outgroup members as less variable than ingroup members. In addition, they have less complex conceptualizations of them. In police encounters with civilians of color, the result is less capability on the part of the officer to depart from the script of a presumption of criminality.

individual brings to an event fundamentally shape perception.¹⁶³ Research suggests that negative attitudes toward African Americans create a perceptual norm of viewing African Americans as more prone to criminal conduct.¹⁶⁴ As a result of a phenomenon that social scientists call the "principle of least effort,"¹⁶⁵ individuals confuse category members with each other and remember more positive features about members of their own groups than those of other groups because such mental processes involve less mental energy than differentiating among group members.

Moreover, in our effort to predict and understand behavior, we often reduce our perceptions to culturally embedded stories about groups.¹⁶⁶ One such story frequently applied to people of color is that they are more prone to engage in criminal and violent activity than whites.¹⁶⁷ If one believes this as fact, then it is reasonable to assume that conduct engaged in by people of color will more likely be criminal or suspicious than the same actions by whites.¹⁶⁸ The threshold for labeling conduct as "criminal" lowers when viewing conduct by people of color.¹⁶⁹ A practical consequence of this behavioral principle is that when race is "a" factor in the description of individuals suspected of crimes, it may become "the" determining factor in the course of the investigation.¹⁷⁰

¹⁶³ See David L. Hamilton, *Illusory Correlation as a Basis for Stereotyping*, in *Cognitive Processes in Stereotyping and Intergroup Behavior*, *supra* note 152, at 115, 139-42.

¹⁶⁴ See Skolnick, *supra* note 156, at 79 (stating that police judgment is based in part on racial attitudes). Professor Skolnick further points out in his research that the officers themselves often do not perceive themselves as prejudiced. Nevertheless, from the point of view of most police officers, such a term as racial bias does not constitute an accurate description of police attitudes toward African Americans. The officers, although openly admitting that they hate blacks and openly characterizing them in the most pejorative terms, would not admit to being prejudiced. See *id.* (describing police as differentiating between reasoned hatred and bias); see also Independent Comm'n on the Los Angeles Police Dep't, *Policing the Police* 20-22 (Paul Winters ed., 1995) (citing widespread bias on part of Los Angeles Police Department involving both African American and Latino communities). See generally Jeffrey Goldberg, *The Color of Suspicion*, *N.Y. Times*, June 20, 1999, § 6 (Magazine), at 50 (discussing use of race as criterion by police officers when stopping suspected drug couriers).

¹⁶⁵ See Allport, *supra* note 153, at 173-74 (explaining concept).

¹⁶⁶ See Davis, *supra* note 60, at 11 (citing Jerome S. Bruner et al., *A Study of Thinking* 1-24 (Transaction Publishers 1986) (1956)).

¹⁶⁷ See Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 *J. Personality & Soc. Psychol.* 590, 595-97 (1976) (discussing psychological research revealing common stereotype that blacks are prone to violence).

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* at 596.

¹⁷⁰ See Allport, *supra* note 153, at 164.

These distortions do not creep in only at the stage of perception. Cognitive psychologists suggest that the perceiver's biases also may distort the way that she samples, encodes, stores, and retrieves information. The processes of retrieving data and recalling information tend to bolster one's existing beliefs.¹⁷¹

The effects of these phenomena are not limited to police officers whom one can easily characterize as "biased." Of course, some law enforcement officers consciously act on the basis of racial bias in denominating behavior as "suspicious." Such officers embrace stereotypes and allow personal biases to dictate their behavior.¹⁷² But "dominative racists" are not the only class of discriminators.¹⁷³ Especially as it has become less socially acceptable to acknowledge racial prejudices and because people increasingly tend to view themselves as egalitarian, discriminatory treatment is often the product of unconscious racism.¹⁷⁴

The social science data permits a more nuanced reconstruction of the events in *Terry v. Ohio* than the one the Court presented in its opinion. Even giving all benefits of the doubt to Detective McFadden and assuming that he was not acting on the basis of conscious bias, his immediate suspicion of Terry and Chilton can be seen as the product of categorization, schemas, and stereotyping. When McFadden felt at an instinctive level that "'they didn't look right to me at the time,'" ¹⁷⁵ various cognitive processes had been triggered of which he understandably may have been unaware. Thus, it is no surprise that McFadden "was unable to say precisely what first drew his eye to them."¹⁷⁶ Where the Court went wrong in *Terry* was in assuming (and defining) McFadden's visceral reaction as the instinctive judgment of an expert on criminality. All of McFadden's subsequent judgments also appear to be the products of classification, schemas, and stereotyping. Having "decided" at an unconscious level that Terry and

¹⁷¹ See Terrence L. Rose, Cognitive and Dyadic Processes in Intergroup Contact, in Cognitive Processes in Stereotyping and Intergroup Behavior, *supra* note 152, at 259, 295.

¹⁷² See Skolnick & Fyfe, *supra* note 160, at 99. Skolnick and Fyfe detail the "categories" (summarizing work by John Van Maanen) which police use to determine whether to investigate individuals. They cite "suspicious persons" as those incongruous with their surroundings. These suspicious persons and incongruities described above are often proxies for race. See *id.*

¹⁷³ See Sheri Lynn Johnson, Comment, Unconscious Racism and the Criminal Law, 73 Cornell L. Rev. 1016, 1027-28 (1988) (discussing acknowledgment by Freudians, cognitive psychologists, and sociologists of "'aversive' racist, a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly, covertly, and often unconsciously" (footnotes omitted)).

¹⁷⁴ See *infra* Part III.

¹⁷⁵ *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

¹⁷⁶ *Id.*

Chilton were presumably engaged in criminal activity, McFadden, in his mind, could transform even their innocuous movements and gestures into indicia of criminal behavior. And, as a result of memory and reporting biases, his certainty about the correctness of his conclusions grew with time.

The same cognitive phenomena can be seen at work in other high-profile cases in which the police have detained individuals of color. For example, in the case of *Kolender v. Lawson*,¹⁷⁷ which the Supreme Court decided in 1983, the San Diego police repeatedly stopped Edward Lawson, an African American disc jockey and concert promoter who lived in the city and who would periodically take walks in predominately white neighborhoods.¹⁷⁸ Consistent with their training, the San Diego police would stop him and ask him to produce identification. The police arrested Lawson fifteen times between March of 1975 and January of 1977,¹⁷⁹ prompting him to bring suit against the department. The police testified that they stopped him because he was in a neighborhood close to a high-crime area.¹⁸⁰ Other officers explained that his presence in an isolated area aroused suspicion.¹⁸¹ Yet according to the record, Lawson never engaged in any criminal activity.¹⁸² It appears that he simply was attempting to enjoy an evening walk. But because the locale of his strolls was a predominately white neighborhood, his race alone caused police to regard him as "out of place" and therefore inherently suspicious.¹⁸³

In another example of racial schema influencing police officer decisionmaking, in 1995, New York City police officers detained and

¹⁷⁷ 461 U.S. 352 (1983).

¹⁷⁸ See Skolnick & Fyfe, *supra* note 160, at 98-99 (reciting factual background of case).

¹⁷⁹ See *id.* Lawson brought a civil action for declaratory relief seeking a ruling that California Penal Code section 647(e), which required an individual to identify himself to police, was unconstitutionally overbroad. See *Lawson*, 461 U.S. at 354. Justice O'Connor did not indicate anywhere in her opinion that Mr. Lawson was an African American man with dreadlocks. This may be a reflection of her view of the case or of the "story" she wished to tell in the opinion. See Amsterdam & Bruner, *supra* note 60, chs. 4-5; *supra* text accompanying note 60.

¹⁸⁰ See *Lawson*, 461 U.S. at 354 n.2.

¹⁸¹ See *id.*

¹⁸² See *id.* at 354 & n.2; see also Skolnick & Fyfe, *supra* note 160, at 98.

¹⁸³ See Skolnick & Fyfe, *supra* note 160, at 98-99 (noting police reaction to dreadlocked man in "lily white" neighborhood); see also Johnson, *supra* note 173, at 1027; cf. Randall Kennedy, *Race, Crime, and the Law* 141 (1997) (pointing out that most courts have authorized police use of "out of place" doctrine if reasonably related to goal of efficient law enforcement). The underlying assumption of the police in *Kolender v. Lawson*—that an African American man would not be in a predominately white neighborhood to visit friends—can be recognized as a manifestation of the same attitudes that may have caused Detective McFadden in *Terry v. Ohio* to be suspicious of two black men interacting with a white man in an apparently friendly manner. See *supra* note 50 and accompanying text.

searched Earl Graves Jr., a young African American business executive who was a graduate of Yale College and Harvard Business School, just after he exited a commuter train. Officers asserted that they stopped Graves because he matched the description of a suspect, who was said to be African American, 5'5" tall, slim, and had facial hair. Yet Graves was 6'4", 225 pounds, and clean-shaven.¹⁸⁴ In an application of the "principle of least effort,"¹⁸⁵ the single factor of race became the determinative factor in the officers' assessment of whether Graves fit the suspect's description.

Contrary to the Supreme Court's assumptions in *Terry* and its declaration in *Whren*, the subject of race cannot be treated as wholly divisible from the assessment of whether an officer had probable cause for an arrest or warrantless search or reasonable suspicion for a stop or frisk. Many of the perceptions and judgments an officer reports on a witness stand—for example, the commission of a "furtive gesture," an "attempt to flee," "evasive" eye movements, "excessive nervousness"—will not be accurate renditions of the suspect's actual behavior but rather a report that has been filtered through and distorted by the lens of stereotyping. To determine whether the suspect *actually* engaged in behavior justifying a search or seizure, the court must somehow pierce the distortions of perception, memory, and reporting. Whether that task is feasible will be the subject of Part III.A. But before embarking on that discussion, it is necessary first to examine the other fundamental assumptions the Court in *Whren* made about race and the Fourth Amendment: that the Fourth Amendment is unconcerned with the targeting of individuals for searches and seizures, and that such selective enforcement is exclusively the province of the Equal Protection Clause. To examine the validity of that view, one must turn to the history of the Fourth Amendment.

B. The Purposes and Protections of the Fourth Amendment

Judging from the history of the drafting and ratification of the Fourth Amendment, one of the primary concerns of the framers was that the state should not exercise its search powers against those who are not members of the established majority.¹⁸⁶ The language of the amendment appears to have been a direct response to the concerns of political minorities of the time that a federal government would trample the individual rights of those groups or individuals who were held

¹⁸⁴ See Lisa Genasci, Success Is No Shield for Racism, Discrimination, L.A. Times (Orange County Edition), June 14, 1995, at D9, available in Lexis, News Library, LAT file.

¹⁸⁵ See *supra* text accompanying note 165.

¹⁸⁶ See *infra* notes 189-96 and accompanying text.

in disfavor.¹⁸⁷ Thus, the amendment operated as a structural protection against unregulated police power.

During the period immediately preceding the drafting of the United States Constitution, the English Crown used its search and seizure power to maintain control over the "commonality."¹⁸⁸ A series of laws, known loosely as the Vagrancy Acts, effectively subordinated the lower classes in England by permitting wide-ranging searches.¹⁸⁹ The British Crown also conducted targeted searches for political ends. British officers entered and investigated the dwellings and offices of disfavored groups involved in "religious dissent"¹⁹⁰ and, later, of individuals suspected of treason and conspiracy against the Crown.¹⁹¹ Through its search powers, the Crown took aim at any opposition—real or imagined.

The Crown did not confine its searches to England. By using the general search warrant to enforce tax measures, it extended its reach to the American colonies as well.¹⁹² Customs officers enjoyed broad discretion in determining where and by what means they would execute general search warrants.¹⁹³ Using their authority ostensibly to seize untaxed goods, representatives of the Crown stretched their power to identify and search virtually anyone they chose and to seize whatever they wanted.¹⁹⁴ In the end, general warrants in America gave their enforcers almost limitless discretion and engendered great hostility toward the Crown on both sides of the Atlantic.

The colonies soon experienced a new method of abusive search and seizure power, the writs of assistance.¹⁹⁵ These differed from the general warrant prototype in two significant aspects. First, the writs expanded the authority to execute the general warrant to local residents. Indeed, in 1755, the royal governor of Massachusetts issued a

¹⁸⁷ See *infra* notes 196-216 and accompanying text.

¹⁸⁸ See William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791*, at 84, 1267 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with the *New York University Law Review*).

¹⁸⁹ See *id.* at 84-85.

¹⁹⁰ See *id.* at 89 ("Henry VII had issued a proclamation . . . to search all places . . . in which he suspected that counterfeiters might be found. The Tudor monarchs never again issued a proclamation employing that method . . . , although, after 1581, various Crown organs often ordered all suspicious houses to be searched for religious dissenters.") (footnote omitted).

¹⁹¹ See *id.* at 90 (finding such individuals were most frequent targets of these search proclamations).

¹⁹² See Leonard W. Levy, *Original Intent and the Framers' Constitution* 221 (1988).

¹⁹³ See *id.* at 224.

¹⁹⁴ See *id.*

¹⁹⁵ See M.H. Smith, *The Writs of Assistance Case 38-39* (1978). Although not warrants themselves, these writs commanded sheriffs to assist colonial representatives in the implementation of their search authority.

writ calling for the conscription of members of the locale.¹⁹⁶ Second, the writs of assistance greatly extended the length of time during which citizens could enjoy this broad power. Once issued, the writ lasted for the life of the sovereign.

The first broad-based attack on the writs of assistance occurred in 1761 when King George II died.¹⁹⁷ Immediately upon his death, sixty-three merchants in the city of Boston petitioned the high court of Massachusetts for a hearing on the decision to reissue the writs.¹⁹⁸ Representing the merchants, in what later came to be known as *Paxton's Case*, was James Otis, Jr.¹⁹⁹ *Paxton's Case*²⁰⁰ launched a critical attack on the exploratory nature of the searches conducted by Crown officials and simultaneously delivered a revolutionary blow to British rule.

While the colonists were beginning to initiate legal challenges against the broad discretion of the British customs officials, a similar attack began in England against the Crown's use of the general warrant to quell vocal dissent. John Wilkes, a member of Parliament and publisher of the *North Briton*, a political pamphlet, became the focus of a series of lawsuits that would make his name famous both in England and America.²⁰¹ In 1763, Wilkes published the *North Briton No. 45* which included a bitter assault on the King.²⁰² As a result of the criticism of the King, the House of Commons issued a general warrant for "seditious libel."²⁰³ The warrant permitted Crown officials to ap-

¹⁹⁶ See Levy, *supra* note 192, at 226.

¹⁹⁷ See *id.* at 227.

¹⁹⁸ See Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 57 (1970). All outstanding writs of assistance expired six months after the death of the sovereign.

¹⁹⁹ See *id.* at 57-58; Levy, *supra* note 192, at 227 (discussing Otis's role in *Paxton's Case*).

²⁰⁰ *Paxton's Case of the Writ of Assistance* (1761), reprinted in 1 Josiah Quincy Jr., *Reports of Cases Argued in the Supreme Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772*, at 51 (1865).

²⁰¹ See Levy, *supra* note 192, at 229 (recounting "legal donnybrook" that Wilkes started); Lasson, *supra* note 198, at 45-46 (noting that Wilkes's actions brought him "wildest acclaim" in England and also made him famous in America); cf. Akhil Reed Amar, *The Fourth Amendment*, Boston, and the Writs of Assistance, 30 *Suffolk U. L. Rev.* 53, 66 (1996):

Let us also remember the other major figure in these cases, the plaintiff John Wilkes. Americans across the continent adored this champion of liberty, as any map will show: consider Wilkes-Barre, Pennsylvania; Wilkes County, Georgia; and Wilkes County, North Carolina. If an American family had a son in 1800, three of the most popular names around were Jefferson, Franklin, and Wilkes. (Yes, John Wilkes Booth was indeed named after the plaintiff in *Wilkes v. Wood*.)

²⁰² See Levy, *supra* note 192, at 229.

²⁰³ *Id.*

prehend the authors and publishers and to seize their papers.²⁰⁴ Over the course of three days, forty-nine people were arrested, some of whom were forcibly removed from their beds in the middle of the night.²⁰⁵ Wilkes brought suit for trespass and immediately became a popular hero. Indeed, historians note that the cry of "Wilkes and Liberty" became the "byword of the times" in both England and America.²⁰⁶ Wilkes ultimately succeeded in his suit against the Crown.

John Entick, another publisher critical of the government, shortly thereafter brought suit to challenge the Crown's power to search his papers under the general warrant.²⁰⁷ Once Entick prevailed, strong popular and legal opposition to the general warrant and the writs of assistance on both sides of the Atlantic took root. The common theme of this opposition was that the government's search power could not remain unrestricted. These challenges in England and in the American colonies sparked a great debate among scholars as to whether the British search cases or the American writs of assistance cases led directly to the drafting of the Fourth Amendment.²⁰⁸

While British courts were increasingly limiting the Crown's use of searches for political ends, the colonies were taking legislative and political action against the general search. Massachusetts was the first colony to make the specific warrant the standard method of search and seizure.²⁰⁹ Between 1762 and 1775, newspapers throughout America attacked provisions for general searches and seizures.²¹⁰ Almost immediately after the Revolutionary War, the newly independent states began to adopt constitutional restrictions on searches and seizures. Indeed, from 1776 to 1784, eight state constitutions repudiated general search warrants.²¹¹ With the exception of the southern states, where landowners relied on slave patrols to maintain the social

²⁰⁴ See *id.*

²⁰⁵ See Lasson, *supra* note 198, at 43-44.

²⁰⁶ See *id.* at 45-46; Levy, *supra* note 192, at 230.

²⁰⁷ See Lasson, *supra* note 198, at 47. This case was later argued before the Court of Common Pleas. The Court stated that if this point were decided in favor of the government, "secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." *Id.*

²⁰⁸ See Amar, *supra* note 201, at 76-77 (setting out arguments).

²⁰⁹ See William Cuddihy, *From General to Specific Warrants: The Origins of the Fourth Amendment*, in *The Bill of Rights* 85, 92 (Jon Kukla ed., 1987) (discussing adoption of specific warrants in colonies).

²¹⁰ See *id.* at 95 (noting that colonial attacks on general searches and seizures reached national level when in 1774 Continental Congress condemned customs and excise law provisions for allowing warrantless general searches).

²¹¹ William Cuddihy stated:

order, there was an increasing hostility to sweeping general searches.²¹²

However, the battle for a constitutional provision specifying protections against search and seizure abuses was yet to come. The conclusion of the Constitutional Convention witnessed the beginning of a national debate about the absence of a bill of rights in the newly written Constitution.²¹³ Antifederalists objected to the proposed constitution because it left citizens vulnerable to general warrants issued by a potentially tyrannical central government.²¹⁴ The Federalists, in contrast, feared that such an addition would contain various exceptions to powers that were not granted by the Constitution. In addition, the Federalists believed that such a bill would be ineffectual.²¹⁵ As the Antifederalists increasingly attacked the framers' attempts to empower a federal government, James Madison recognized the need to appease them. At the time of the adoption of the Fourth Amendment, the Antifederalists had been outnumbered, outvoted, and politically outmaneuvered in the formation of a federal government. In an attempt to prevent what he perceived to be a weakening of the union, Madison ultimately chose to extend an olive branch in the form of statutory concessions within the new federal constitution. Madison publicly claimed that the Fourth Amendment and its accompanying amendments were enacted to calm the baseless fears of the Antifederalists. Privately, he conceded that the amendments served as a necessary response to growing political pressures of the Antifederalists. In the end, Madison acquiesced in their desire to protect individual rights against the burgeoning power of the national government.

The Antifederalists needed and demanded structural protections to satisfy their concerns over the expansive power of a federal government. Madison responded, in part, with the Fourth Amendment. In drafting the Fourth Amendment, Madison hoped to quiet the increas-

One group of states led by Virginia, the first state to define constitutional restrictions for search and seizure, simply denounced general warrants. Another group, led by Maryland, declared them illegal. The third position, taken by Pennsylvania and Massachusetts, foreshadowed the Fourth Amendment by announcing a general right against unreasonable search and seizure.

Id. at 96.

²¹² For a brief overview of the treatment of southern blacks in relation to searches and seizures, see Maclin, *supra* note 17, at 334-36.

²¹³ See Lasson, *supra* note 198, at 83.

²¹⁴ See Cuddihy, *supra* note 209, at 96.

²¹⁵ See Ralph A. Rossum, *The Federalist's Understanding of the Constitution as a Bill of Rights*, in *Saving the Revolution* 219, 220 (Charles R. Kesler ed., 1987) (explaining Federalist view that bills of rights "had been demonstrated by history to be unable to control the acts of overbearing majorities").

ing criticism of the initial Constitutional Convention.²¹⁶ As further structural protection, Thomas Jefferson suggested that the "declaration of rights" be put into the hands of an independent judiciary. This independent judiciary was a necessary component to appease those who feared the development of an all-powerful central government.

In addition to his political motives in addressing the increasingly critical voice of the Antifederalists, Madison was familiar with the "Quaker incident," labeled one of the grossest violations of the notion of restricted search and seizure.²¹⁷ When government officials intercepted correspondence that implicated the Philadelphia Quaker community as British spies, the framers saw no need to protect the Quakers' rights against the government's search powers.²¹⁸ Six Quaker homes were violently searched and over forty people were deported without any type of hearing.²¹⁹ The Quaker incident was not the only example of indiscriminate searches and seizures; indeed, stories emerged from virtually every newly independent colony.²²⁰ Given the history of targeting disfavored groups, Madison was under pressure from the Antifederalists to create an amendment that would at once protect privacy interests and adhere to the spirit of the Constitution.²²¹ The Fourth Amendment had to impose structural limitations on the power of officials.

To be sure, at the time of the drafting of the Fourth Amendment, the framers did not contemplate racial minorities as encompassed within the communities to be protected by the Bill of Rights. In the wake of the Civil War, Congress not only expanded the concept of citizenship to include racial and ethnic minorities, but it extended to them the full protections of the Bill of Rights.²²² The Reconstruction Congress effectuated this intent in dramatic fashion, attempting to

²¹⁶ See Cuddihy, *supra* note 188, at 1433.

²¹⁷ See Levy, *supra* note 192, at 239 (describing searches of Quaker homes as "cruel[]" and "violent[]").

²¹⁸ See Cuddihy, *supra* note 188, at 1268-75.

²¹⁹ See Levy, *supra* note 192, at 239. There are a multitude of other instances in which search power was used (either in England or the Colonies) as a means of keeping disfavored groups at bay. See Cuddihy, *supra* note 188, at 1273-75, for an analysis of the use of search and seizure to prevent trade with the enemy.

²²⁰ See Cuddihy, *supra* note 188, at 1267. Confronting a rash of robberies, New York's Commissioners for Detecting and Defeating Conspiracies ordered the roundup of all civilian suspects. A month later, twenty-three persons had been detained, several of whose houses had been searched, and the robberies continued. See *id.* In addition, in 1788, Philadelphians formed patrols to apprehend "all suspicious persons" who were "lurking in secret or suspicious places." *Id.* at 1284.

²²¹ See *id.* at 1555-56.

²²² Fairman argues that Congress's intent in passing the Fourteenth Amendment was to equalize the state of the law between blacks and whites. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *Stan. L. Rev.* 5 (1949).

guarantee recently freed slaves the same rights as whites.²²³ Many legal historians and scholars have asserted that prior to the Fourteenth Amendment there was some belief that even free blacks were neither citizens of the state in which they resided nor citizens of the United States.²²⁴ By the end of the Civil War, the prevailing opinion among the Republicans in Congress was that free blacks were citizens.²²⁵

The Fourteenth Amendment itself has been described as a document that espouses a vision of the nation as a single self-governing people with common rights and a common destiny. In addition to the wishes of the framers of the Fourteenth Amendment, social and political enfranchisement of blacks accompanied the Reconstruction Amendments. The interpretive meaning of the Reconstruction Amendments was to apply a culture of human rights and to accord national protections for basic rights to the states.²²⁶

Black political power brought the call for equal rights into focus.²²⁷ Although few would disagree that the fight for equality among all people of color continues today, it is equally well settled that the substance and effect of the Fourteenth Amendment gave all persons the protections intended by the Bill of Rights. Thus, when we examine the Fourth Amendment retrospectively through the lens of the Fourteenth Amendment, the safeguards designed to protect disfavored segments of the society should be read as applying to today's disfavored groups: people of color. This intersection of rights and equality of treatment has been well documented by a number of scholars including John Hart Ely, who writes that "the Fourth Amendment

²²³ See William E. Nelson, *The Roots of American Bureaucracy, 1830-1900*, at 49-53, 74 (1982) (discussing legislation passed by Congress protecting rights of racial minorities).

²²⁴ See Don E. Fehrenbacher, *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective* 34-40 (1981) (discussing antebellum perspectives on free black citizenship); Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* 46-100 (1981) (discussing evolution of northern legal opinion about blacks and slavery in first part of 19th century).

²²⁵ See Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 *Nw. U. L. Rev.* 477, 578-87 (1998) (discussing effect on black citizenship of Reconstruction Amendments in opinion of contemporary lawmakers).

²²⁶ See David A.J. Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* 222-24 (1993) (contending that post-Civil War failure to protect basic rights "betrayed the meaning and promise of the Reconstruction Amendments"). See generally Siegel, *supra* note 225, at 578-87 (discussing Reconstruction Amendments and color conscious laws intended to secure basic rights for freed slaves after Civil War).

²²⁷ See Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 *Cardozo L. Rev.* 2115, 2129-33 (1996) (discussing political shift following enfranchisement of blacks in former Confederate states).

can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities of treatment.”²²⁸

Thus, the history of the Fourth Amendment suggests that the Court erred in *Whren v. United States*²²⁹ by declaring that police officers’ “intentionally discriminatory application” of search and seizure powers “based on considerations such as race” are “not [the concern of] the Fourth Amendment” and are solely the province of the Equal Protection Clause.²³⁰ If police officers target people of color for searches and seizures, this is precisely the kind of abuse of search and seizure powers that the framers of the Fourth Amendment sought to prevent. The next section will explore the practical implications of this conclusion, exploring first the doctrinal remedies that might be adopted to effectuate the framers’ intent and then examining nondoc-trinal, nonjudicial remedies.

III

REMEDYING THE PROBLEM OF RACIALLY MOTIVATED SEARCHES AND SEIZURES

A. *Doctrinal Reforms*

One could imagine a variety of judicial responses to the influence of race in Fourth Amendment encounters. What follows is a necessarily broad sketch of the range of doctrinal choices available to a court.²³¹ This section will first discuss the end of the doctrinal spec-

²²⁸ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 97 (1980); see also William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 3-5 (1988) (suggesting that historians who have searched for intention by Republicans to provide blacks with full protection of their rights have found “[v]oluminous evidence” of that intention, as have historians trying to show that party did not wish to upset existing balance of federalism”).

²²⁹ 517 U.S. 806 (1996).

²³⁰ *Id.* at 813.

²³¹ Because this article has focused on the effects of race on the perspective and conduct of the *officer*, the strategies proposed here are designed to ameliorate the effects of an officer’s conscious or unconscious racial biases. It is important to recognize, however, that racial factors also can affect the *suspect* in an interracial encounter with a police officer. In situations in which the police are relying on an individual’s alleged consent to a warrantless search, the voluntariness of the consent may be affected by the greater feelings of vulnerability that a suspect of color may have when confronted by a white officer. The remedy for this problem could be to restructure Fourth Amendment analysis of voluntariness of consent to inquire whether the individual truly felt that she could refuse to consent to the search. The race of both the suspect and the officer would then be a factor to be raised in a hearing.

In other contexts, the Court has acknowledged that interposing characteristics such as race or gender onto the reasonable person standard better enables the fact finder to evaluate behavior. For example, in sexual harassment cases, the courts routinely have used a gender-sensitive reasonable person standard in assessing whether workplace conditions represent a hostile or abusive environment. See, e.g., *Harris v. Forklift Sys. Inc.*, 510 U.S.

trum that views race as an unavoidable factor in police officers' analyses in Fourth Amendment situations. This view holds that, because the use of race is inevitable, courts should not scrutinize its use. This section will then consider the option at the other end of the spectrum—barring the use of race as a factor in police officers' suspicion. Finally, this section considers returning to the state of law before *Terry*, so that the stop of a suspect must be predicated on probable cause, not just reasonable suspicion.

The first option would be to concede that police officers' reliance on race in Fourth Amendment encounters is unavoidable and to conclude, on this basis, that the courts should not attempt to scrutinize its use. Dinesh D'Souza, who seems to embrace this view, suggests that a police officer's dependence on race as a proxy for suspicion may be a form of "rational discrimination."²³² In support of his view, he argues that victimization surveys tend to confirm that African American men commit violent crimes at a higher rate than whites.²³³ Given this statistical correlation between race and criminal conduct, D'Souza asserts the logic of some degree of racial discrimination in the criminal justice system. This is not meant to suggest that D'Souza ignores the "moral" implications of a reliance on race.²³⁴ But he does question the reasonableness of constraining law enforcement officials. Until young black men eliminate the "destructive conduct . . . that forms [the] basis for statistically valid group distinction," discrimination against this group of citizens may be valid, he argues.²³⁵ A fair read-

17, 25 (1993) (Ginsburg, J., concurring) (reiterating that "critical issue" in harassment cases is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"). Similarly, here the court would examine the reasonableness of the suspect's reaction in light of his race and the officer's race.

A problem with the concept of a "reasonable person of color" is that it relies on generalizations about the nature of the interactions between police officers and all people of color. Obviously, anecdotal information supports the assertion that some interracial encounters between police and individuals of color are hostile and may result in violence. However this certainly does not occur in every interaction between police officers and people of color, and the frequency of such encounters may be difficult to quantify. More troubling still, the "reasonable person of color" builds into the constitutional analysis a different standard of justice for different people. Finally, and perhaps the most difficult of all the problems, is the fact that judges are not immune from the same psychological influences that police officers experience. Judges, therefore, might find it difficult to divorce themselves from their own biases.

²³² Dinesh D'Souza, *The End of Racism: Principles for a Multiracial Society* 284 (1995).

²³³ See *id.* at 283 (noting that it is unlikely that victims will lie about race of offenders, whom they want found and arrested, and recommending comparisons between victimization surveys maintained annually by Department of Justice and FBI arrest statistics to determine whether any significant discrepancies appear in racial proportion of actual arrests).

²³⁴ See *id.* at 286.

²³⁵ *Id.* at 287.

ing of his argument might lead one to conclude that this discrimination need not be scrutinized or stopped until certain societal changes occur.

But the history of the Fourth Amendment raises questions about such an approach. D'Souza's position would seem to justify police officers' decisions to stop and question men of color given the potential threat that they pose. Yet the framers took steps to erect structural impediments against precisely this type of exercise of governmental power. The framers recognized the impulse to target specific groups often for arguably rational reasons, but chose to limit that power. Thus, rules expressly permitting a reliance on race—without more—would remove any structural checks on the behavior of police officers when deciding to detain persons of color.

Another option might be to bar the use of race as a factor in suspicion. This option finds some support in the scholarship of Professor Randall Kennedy. Like D'Souza, Kennedy states that some degree of racial discrimination by police may be rational.²³⁶ But Kennedy concludes that the danger of permitting any form of discrimination sends the wrong message to law enforcement officials and the general public.²³⁷ Kennedy points to the nation's history of racism and suggests that this history is so egregious that courts should bar the use of race in determining suspicion. In essence, Kennedy embraces a form of race neutrality in police decisionmaking and urges that public officials declare the use of race in those decisions illegal.²³⁸

At first blush, this approach seems appealing. Prohibiting the use of race could send a message that courts would no longer tolerate—or ignore—improper motives on the part of law enforcement officials. But outlawing the use of race would not necessarily change police behavior on the street. It might simply affect the substance of their testimony. The court proceeding would resemble the type of hearing currently held in criminal cases to assess the constitutionality of a law-

²³⁶ See Kennedy, *supra* note 183, at 145:

It does no good to pretend that blacks and whites are similarly situated with respect to either rates of perpetration or rates of victimization. They are not. A dramatic crime gap separates them. In relation to their percentage of the population, blacks on average both commit more crimes and are more often victimized by criminality.

²³⁷ See *id.* at 148 ("Even if race is only one of several factors behind a decision, tolerating it at all means tolerating it as potentially the *decisive* factor.").

²³⁸ Although the Court has avoided condoning the use of race exclusively, it has suggested that there are circumstances such as the border patrol context in which race is probative. See *supra* notes 93-106 and accompanying text. Some courts currently take the view that notwithstanding the officer's reliance on race, if there are other circumstances that would provide objective probable cause, the inquiry ends there. See *supra* notes 98-111 and accompanying text.

yer's use of peremptory challenges for an allegedly improper racial motive. In *Batson v. Kentucky*,²³⁹ the Supreme Court prohibited the use of race as a factor in exercising peremptory challenges. However, it did not provide lower courts with guidelines by which to determine a *prima facie* case of discrimination.²⁴⁰ Because lower courts have been left on their own to structure hearings to uncover these violations, wide disparities in application have occurred.²⁴¹

Even apart from these procedural infirmities, the solution provided by the Court has proven to be, at its core, an insufficient remedy. The requirement that the prosecutor articulate a "race-neutral" reason for the exercise of a peremptory challenge has evolved into an exercise in which *any* race-neutral explanation will suffice.²⁴² Scholarly criticism of these hearings has been considerable.²⁴³ Principally, scholars have questioned the adequacy of this mechanism to expose racism in the jury selection process. In these hearings, the judge must determine whether a litigant has a legitimate basis for the challenge or if the reason proffered serves only as a pretext for an otherwise impermissible strike. Discerning when a litigant is concealing her true motivations in exercising such strikes has proven quite complex. Judges have seemed reluctant to discredit representations by an officer of the court since it impugns her credibility and, in essence, labels that litigant racist. Thus, a judge often opts instead to accept *post hoc* facially neutral rationalizations as a legitimate basis for the strike.²⁴⁴

²³⁹ 476 U.S. 79 (1986).

²⁴⁰ See Charles J. Ogletree, Supreme Court Jury Discrimination Cases and State Court Compliance, Resistance, and Innovation, in *Toward a Usable Past* 339, 349 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

²⁴¹ See, e.g., Jeffery S. Brand, The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters, 1994 Wis. L. Rev. 511, 583-600 (1994) (discussing application of *Batson*); Kenneth J. Melilli, *Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges, 71 Notre Dame L. Rev. 447, 456-84 (1996) (same); Alan Raphael, Discriminatory Jury Selection: Lower Court Implementation of *Batson v. Kentucky*, 25 Willamette L. Rev. 293, 309-38 (1989) (same).

²⁴² See, e.g., *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (refusing to require that *prima facie* race neutrality be "plausible").

²⁴³ See Ogletree, *supra* note 240, at 352 ("State trial courts frequently accept prosecutorial explanations that, although somewhat plausible, have a disparate effect on minorities and therefore may become convenient excuses for rationalizing challenges against minorities."); Brian Wilson, *Batson v. Kentucky*: Can the "New" Preemptory Challenge Survive the Resurrection of *Strauder v. West Virginia*?, 20 Akron L. Rev. 355, 364 (1986) (arguing that hearings force judges to make subjective determinations of prosecutorial discrimination).

²⁴⁴ See Wilson, *supra* note 243, at 364 (declaring that "*Batson* lacks the necessary 'teeth' required to ensure that black jurors are not excluded on the basis of race"); see also Ogletree, *supra* note 240, at 351 (stating that relying on trial court determinations is problematic because decisions are largely unreviewable, due to deference to state court factual findings and because such findings can be reversed only if "clearly erroneous").

Similar concerns would arise in the Fourth Amendment context. Given that officers will not likely admit, or will not be aware, that race prompted their actions, judges would be expected to detect when race is the predominant motivation in officers' behavior. At best, this seems difficult. Judges would face the prospect of labeling a police officer a liar by finding that despite her explanation, improper racial considerations dictated her conduct. Most judges would find such a situation extremely disturbing. Moreover, officers would realize that they only need to provide race-neutral explanations for their conduct to camouflage any cognizant reliance on race. Thus, instead of exposing the influence of race, prohibiting any reliance on race might encourage the officer to conceal the degree to which racial dynamics motivated her conduct.²⁴⁵

Calls for the Court to prohibit the use of race in Fourth Amendment encounters often emerge from scholars who have been critical of the Court's ruling in *Whren*.²⁴⁶ Interestingly, the positions are virtually identical in effect to the Court's. The Court declared in *Whren* that subjective motivations lack Fourth Amendment significance if the officer can and does identify objective bases for her actions. While scholars advancing the view that race should never be permitted would disagree that racial motivations have no importance, their choice to have the Court bar any reliance on race would send the same message as *Whren* to law enforcement officials: Officers must offer race-neutral reasons for their conduct to survive constitutional scrutiny. Of course, barring the use of race could have symbolic value. But it seems unlikely that it would significantly alter police behavior.

An additional problem with the color-blind or race-neutral proposal relates to the history of the Fourth Amendment. The framers had evidence that governmental power likely would be abused when

²⁴⁵ In my own experiences in practice as a deputy public defender in northern California from 1986 to 1995 and then as a private criminal defense lawyer across the state, I observed numerous instances in which police officers tailored their testimony to comport with procedural requirements established in Fourth Amendment jurisprudence. Police officers' personal and professional interests converge in ways that encourage officers to inform the court that they engaged in the precise steps and observed the exact degree of furtive behavior necessary to justify the detention and search. The stakes are all the more significant when the conduct raises the specter of racism.

²⁴⁶ See, e.g., Maclin, *supra* note 17 (arguing that *Whren* Court mistakenly ignored racial impact in justification for pretextual searches and seizures); see also Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 Colum. Hum. Rts. L. Rev. 551 (1997) (arguing that *Whren* Court understated danger that pretextual stops pose to legitimate, nondiscriminatory law enforcement); Pamela S. Karlan, *Race, Rights and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001, 2005-14 (1998) (discussing impact of *Whren* in suppression of evidence resulting from police misconduct).

exercised against politically disfavored groups.²⁴⁷ Thus, in structuring the amendment, the framers were attempting to level the playing field. One could argue that this required a neutral application of the Fourth Amendment's provisions—without regard to political or social status. But a contrary argument exists as well. Particularly in light of the tendency to target politically disfavored groups, the Fourth Amendment was designed to provide those groups with structural protections from governmental intrusion. Applying that reasoning, the Fourth Amendment would seem to mandate scrutiny of police power particularly exercised against disfavored groups. Thus, where evidence of discriminatory implementation of search and seizure practices exists, a race-neutral approach would seem insufficient to provide adequate constitutional protections.

Still another judicial remedy for the racial inequities that have arisen from the *Terry* decision and its progeny has been proposed: returning to the state of the law before *Terry*.²⁴⁸ The courts could require that a stop of a suspect be predicated on probable cause, not just reasonable suspicion. By requiring that police officers conform their conduct to the standard of probable cause rather than the intermediary level of reasonable suspicion, the Court would reduce the discretion that officers could permissibly exercise in street encounters. Officers could only stop individuals when objective reasons existed that gave rise to a belief that a crime had been committed. While the heightened standard would not entirely eliminate the use of race in decisions to initiate encounters with individuals, it could serve to reduce the frequency of such detentions.

Scholars who have proposed this as a remedy to address concerns similar to the ones presented in this article have dismissed this alternative as unrealistic, given the current composition of the Supreme Court.²⁴⁹ That prediction certainly seems borne out by the Court's reactions to the well-documented expansion of police reliance on race in making investigative stops. The current Court consistently has exposed its preference to defer to police officers. For example, the Court has stated:

A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police

²⁴⁷ See, e.g., Cuddihy, *supra* note 188, at 1268-72.

²⁴⁸ See, e.g., Harris, *Factors*, *supra* note 1, at 682 ("Overturning *Terry* represents the cleanest solution to the numerous problems the case has raised from the beginning."). Harris correctly assigns an extremely low probability to the likelihood that the Supreme Court would move in that direction. Indeed, the Court has moved to expand the discretion of police officers in the *Terry* setting by leaps and bounds.

²⁴⁹ See, e.g., Harris, *Factors*, *supra* note 1, at 683.

officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.²⁵⁰

The Court seems to be admonishing trial courts to take care in questioning the observations made by law enforcement officials because trained officers make deductions and inferences that are "invisible" to the untrained eye.²⁵¹ This is, of course, the implicit message in the Court's discussion of Detective McFadden in the *Terry* opinion.²⁵²

Although Supreme Court jurisprudence seems headed in a much different direction than in the pre-*Terry* era, the predictions by the Legal Defense Fund in *Terry* have begun to materialize. *Terry* has led to the likelihood that whenever a law enforcement officer stops a person of color, a search will ensue. Moreover, these searches do not occur only in situations in which a police officer has some suspicion that the individual is armed, but in virtually all encounters.²⁵³ In addition to the types of cases in which officers reasonably suspect that individuals may be armed, some anecdotal and empirical data suggest that in any number of situations, officers routinely search everyone with whom they come into contact in on-the-street encounters.²⁵⁴

Given the limits of these approaches, charting a doctrinal approach is far from easy. Still, some cautious observations may be in

²⁵⁰ *Ornelas v. United States*, 517 U.S. 690, 699 (1996); see also *United States v. Mendenhall*, 446 U.S. 544, 563 (1980) (Powell, J., concurring) (arguing that in reviewing factors that led agents to stop and question respondent, it is important to recall that trained law enforcement agent may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer" (quoting *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979))).

²⁵¹ See *United States v. Cortez*, 449 U.S. 411, 419 (1981) ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions . . . to form a legitimate basis for suspicion . . .").

²⁵² See *supra* notes 60-66 and accompanying text.

²⁵³ See Harris, Frisking, *supra* note 1, at 22-32, for an excellent chronicle of all of the circumstances in which courts now allow "automatic" frisks of certain classes of suspects.

²⁵⁴ See *supra* notes 4-6 and accompanying text (discussing the criticism of NYPD's Street Crimes Unit); see also, e.g., *United States v. Abokhai*, 829 F.2d 666, 670-71 (8th Cir. 1987) (justifying frisk of defendant before placing him in patrol car as "a reasonable precaution taken to protect the officers' safety" because there had been recent armed robbery in area and possible third person was unaccounted for); cf. *Mashburn v. State*, 367 S.E.2d 881, 881 (Ga. Ct. App. 1988) (upholding frisk because defendant became "real scared" when asked to sit in patrol car while officer cited him for violation of local open container ordinance); *People v. Kinsella*, 527 N.Y.S.2d 899, 901 (App. Div. 1988) ("Although a police officer may reasonably pat down a person before he places him in the back of a police vehicle, the legitimacy of that procedure depends on the legitimacy of placing him in the police car in the first place."); *People v. Howington*, 443 N.Y.S.2d 519, 520 (App. Div. 1981) (holding that police department policy requiring "as a safety precaution all suspects about to enter a police vehicle must be subject to a pat-down search . . . may not be employed as justification to search a person impermissibly seized").

order. The Supreme Court has chosen to treat the subjective motivations of police officers as largely irrelevant to Fourth Amendment analysis, but history seems to suggest that intentions matter—at least to the extent to which officers mask their intent to target disfavored groups. Furthermore, these intentions are at the very roots of the problem. Reform at the doctrinal level may not accomplish by itself the changes that need to occur in the relationship between the police and communities of color.

B. Using Race as a Factor

Accepting the historical proposition that intentions matter might require courts to engage in some degree of scrutiny of an officer's motivations and conduct. But simply compelling this examination—without more—does little to advance our ability to confront the question of race squarely. By turning to social science research for guidance, we might conclude that an open discussion of the assumptions underlying discretionary choices may enable both the courts and police to begin to grapple with the complex question of racial dynamics in decisionmaking.

1. A Doctrinal Solution

What form would this doctrinal solution take? One might imagine that a court could accept that race can serve as one factor in the quantum of suspicion. While not a predictor of criminality, the race of the suspect may constitute a rough but workable proxy for suspicion in certain circumstances. Under current Fourth Amendment jurisprudence, this would end the inquiry. The Supreme Court has approved the use of race as a factor in suspicion but has disapproved any examination of how that factor might have influenced an officer's judgment. Why not allow a court to engage in precisely that examination? To do this, a court would begin by providing guidelines regarding the types of situations in which race could be a factor in suspicion. Then, the court would be expected to scrutinize the officer's motivations to determine if the circumstances in a given case warranted this reliance on race.

In formulating the guidelines under which race could be used as a factor, a court might look for those occasions on which race would constitute an essential element in determining whether criminal activity was occurring. For example, a court might accept that membership in certain gangs has specific ethnic limitations. Thus, in investigating criminal conduct by members of these gangs, an officer could consider race as one factor contributing to her suspicion of gang activity.

An example of this type of criminal investigation can be seen in the investigation of gang activity in the Chinese communities of this nation's urban centers.²⁵⁵ The gangs in urban Asian communities are composed almost exclusively of individuals (usually young men) of Asian descent.²⁵⁶ In the early 1980s, United States law enforcement officials became concerned with outbreaks of violence that plagued urban Asian communities.²⁵⁷ As a result of a series of murders, including the rape and murder of a Caucasian female tourist in New York City's Chinatown, law enforcement officials decided to investigate and infiltrate these Asian gangs.²⁵⁸ Law enforcement officials relied on a number of factors—obviously including race—to identify, follow, and infiltrate groups of individuals engaged in street-level criminal conduct such as the heroin trade.²⁵⁹ A court could look at the initiation of this type of investigation and acknowledge that in these particular situations, Asian ethnicity is a prerequisite to membership in the criminal enterprise. Similarly, investigations of criminal activity involving exclusively African American gangs—or any race/ethnic specific gang—would permit an officer to consider an individual's race in exercising investigative discretion. Race or ethnic characteristics become a factor to *exclude* a large portion of the population from investigation. In the same way that a description for a "tall man" presumably eliminates "short women" from the universe of suspects, inclusion in the "target subgroup" does not automatically equal a higher degree of suspicion (i.e., every tall person would not immediately become a target for a discretionary stop). But race could serve here as a factor in a detention decision.

A court might also refer to the border patrol cases, *United States v. Brignoni-Ponce*²⁶⁰ and *United States v. Martinez-Fuerte*,²⁶¹ in which the Supreme Court explained that race or ethnicity might be relevant in identifying individuals who have entered the country illegally.²⁶² In such situations, race certainly would not be presumptive proof of illegality, nor could it serve as the sole factor in creating suspicion. But to suggest that an officer should overlook appearance at the border would seem counterproductive for at least two reasons. First, there *is*

²⁵⁵ See, e.g., Ko-lin Chin, *Chinatown Gangs: Extortion, Enterprise, and Ethnicity* (1996).

²⁵⁶ See *id.* at 102-04.

²⁵⁷ See *id.* at 10.

²⁵⁸ See *id.*

²⁵⁹ See *id.* at 10-11 (explaining how law enforcement officials received help from Immigration and Naturalization Service in targeting drug traffickers).

²⁶⁰ 422 U.S. 873 (1975).

²⁶¹ 428 U.S. 543 (1976).

²⁶² See *supra* notes 93-105 and accompanying text.

a correlation between apparent Mexican ancestry and the law enforcement objective of preventing Mexicans from entering the country without documentation. Second, outlawing the use of race as a variable will not prevent officers from actually using it as a factor in their suspicion. Thus, acknowledging its use and limited relevance may encourage an officer to acknowledge her reliance on racial factors.

Permitting some reliance on race should not be read as accepting the officer's judgment without inquiry. Police officers could not rely on stereotypic caricatures about people of color that amount to little more than the view that "all young black men are criminals" or that every young man of color must be part of a gang. Rather, a pointed inquiry into the assumptions that an officer made would be warranted if she indicated that the race of the suspect contributed to her suspicion. Currently, officers testifying in suppression hearings consider any mention of race taboo. By allowing the police officer to testify that race factored into her determination to detain, the subject would be seen as one of many appropriate for cross-examination. The defense counsel in this hearing would be allowed to inquire whether other factors came to bear on the officer's decision. Thus, a hearing would involve an examination of the criteria that added to the officer's suspicion. One would expect an inquiry into whether the race of the suspect influenced the officer's judgment about the suspicious nature of the suspect's conduct. The court would then evaluate the evidence presented, the inferences argued from that evidence, and the information (if presented) on the social science impact, and determine whether sufficient constitutional criteria existed to justify the intrusion. With the subjective motivations of the officer now relevant, social science information could be included in the judicial examination and analysis of the factors relating to suspicion.

Obviously, this alternative is an imperfect choice among imperfect choices. It relies on judges to scrutinize and evaluate the propriety of the motivations of police officers in these encounters. Since many judges share the same cognitive and cultural limitations as the police officers testifying before them,²⁶³ they may be unable or unwilling to recognize that race inappropriately influenced and motivated

²⁶³ For an unusually candid admission of this limitation by a former trial judge who is now an appellate judge, see Donald C. Nugent, *Judicial Bias*, 42 Clev. St. L. Rev. 1, 48 (1994) (stating that statistical evidence on gender and racial bias should alert judges to "the absolute necessity . . . to recognize the possibility that gender, race, or ethnicity may influence their judicial decision-making"); see also Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev. 95, 101-03 (1997) (discussing displays of racial bias by state court judges and findings of state commissions regarding racial bias in court system).

the officer's conduct. Similarly, this alternative still expects judges to make determinations, where appropriate, that a police officer engaged in racist behavior. Judges have been reluctant to make such findings. But through the use of social science data, a court might be able to identify more palatable—and less politically and emotionally charged—explanations for an officer's improper reliance on race in a given case.

This option has the significant advantage of bringing the discussion of race to the forefront. The current status of ignoring race—or “declaring” race irrelevant—both drives the discussion underground and encourages courts to assume nonracial motives in instances where the facts suggest otherwise. Further, it “demonizes” the use of race and predisposes courts against labeling a law enforcement officer a “racist.” Under a system that acknowledges that race does play a role in the exercise of discretion, there is a beginning to the long and difficult process of dealing with and working through this issue.

But doctrinal approaches have obvious limits. Rules can help to amend conduct when an individual is both aware of her actions and perceives them to be rule bound. The social science data suggest, however, that doctrinal reforms may be an insufficient means to control the conduct of law enforcement personnel. Particularly in examining ways to curb police conduct, it may be necessary to consider strategies that can be implemented directly within police departments and that might begin to change the culture in which police officers operate.

2. *Reforming Police Culture in Communities of Color*

The reform of police culture in communities of color plays a necessary and complementary role in Fourth Amendment doctrinal reform.²⁶⁴ However, changing police culture presents two principal problems. First, polarization between police officers and communities is deeply ingrained.²⁶⁵ The traditional, reactive form of professional policing, which relies on the squad car to police urban centers, contributes to the perception that police departments constitute an occupying force within communities of color. Adding to this sense of

²⁶⁴ A detailed analysis of the reform of police culture toward people of color is beyond the scope of this article. Accordingly, what follows serves as a survey of ideas to be explored in subsequent scholarship.

²⁶⁵ See Pete Yost, *Local Police Ratings Vary by Race*, Associated Press, June 3, 1999, available in 1999 WL 17810248 (citing Bureau of Justice Statistics study showing 24% of blacks were dissatisfied with police, compared to 10% of whites).

separation from communities is the high degree of solidarity²⁶⁶ that police officers experience as members of a police force.²⁶⁷ Such strong professional identification can have positive qualities; it may, for example, encourage a sense of professionalism and pride. But solidarity may also have negative consequences, particularly when solidarity leads officers to remain silent about misconduct of fellow officers.²⁶⁸

Second, this traditional form of police interaction within communities of color fuels adversarial relations with residents of these communities. Consequently, the history of antagonistic relations between the police and individuals of color has fostered general uneasiness among people of color about contact with police officers.²⁶⁹ Implementing a new race-conscious vision of policing will be far from easy.

A first step might be to familiarize officers with the cultures and histories of the communities in which they would be working. Building on this concept, police departments would need to reimagine the ways in which they communicate attitudes and inculcate behavior. Departments would need to implement rules regarding the use of race, initiate training programs that would increase officers' sensitivity to racial dynamics, and recruit and promote officers willing to work in partnership with communities of color.

A race-conscious Community Policing Model might incorporate a number of features to counteract negative expectations that police officers tend to hold about people of color and simultaneously to expose

²⁶⁶ See Skolnick & Bayley, *supra* note 159, at 211 (1986) (discussing "we/they" or "insider/outsider" mentality of traditional police culture).

²⁶⁷ See Skolnick, *supra* note 156, at 50-54 (discussing how occupational social activities, perceived lack of public cooperation with and understanding of police work, and effect of danger on job contribute to higher-than-normal level of occupational solidarity).

²⁶⁸ Some scholars and reporters have suggested that a blue wall of silence exists in many police departments throughout the country. See generally Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233 (1998) (discussing problem of police perjury); Henry Goldman, *Serpico's Testimony Renews Focus on Police 'Blue Wall of Silence'*, *Houston Chron.*, Sept. 24, 1997, at 14A (discussing calls for independent monitoring board to investigate police claims of wrongdoing within New York police department); Lawrence Goodman, *Alleged Cop Torture Victim Suing PBA*, *N.Y. Daily News*, Aug. 6, 1998, at 12 (discussing police torture victim Abner Louima's plan to sue police union for promoting blue wall of silence); Tom Hays, *Serpico Testifies NYC Police Still Brutal, Corrupt*, *Portland Oregonian*, Sept. 24, 1997, at A27, available in 1997 WL 13122730 (discussing blue wall of silence in context of Abner Louima case); *Torture Case: The Blue Wall of Silence Helps No One*, *Dallas Morning News*, Aug. 19, 1997, at 10A (same).

²⁶⁹ See, e.g., Bob Herbert, *A Brewing Storm*, *N.Y. Times*, Feb. 11, 1999, at A33 ("There is a widespread feeling among black New Yorkers that they are living in a police state, and that many of the cops are a threat to the very lives of their children.").

officers to more positive experiences. Community policing²⁷⁰ is a philosophy of policing that involves neighborhoods and communities in the law enforcement enterprise.²⁷¹ The critical task in a *race-conscious* community policing model is to develop a "cultural norm" that takes into account the complexities of relationships between law enforcement officers, communities in general, and communities of color in particular.²⁷² Scholars who have studied the police caution that community policing could degenerate into aggressive strategies and result in the "Balkanization" of communities.²⁷³ If, however, as social science data suggest, police behavior may result from various types of "cues" and negative perceptions that such cues trigger, then the best place to begin changing police officers' behavior is by changing their experience with communities and individuals of color.²⁷⁴ Exposing officers to these communities in less confrontational ways may begin to broaden officers' perception of individuals within these neighborhoods.²⁷⁵

Statistical tracking of race in searches and seizures is another important tool in implementing a race-conscious police culture. As the studies of race-based traffic stops on I-95 in Maryland²⁷⁶ and the New Jersey Turnpike²⁷⁷ have demonstrated, acquiring data on the race of individuals stopped by the police provides a useful foundation for

²⁷⁰ See George L. Kelling & James Q. Wilson, *Broken Windows*, *Atlantic Monthly*, Mar. 1982, at 29, 29-33 (suggesting link between community policing and "quality of life" in public places and neighborhoods).

²⁷¹ See *id.* at 29 (describing community policing as "a new professionalism" and "a new vision of the role of police in a democratic setting"); see also Mark Harrison Moore, *Problem-solving and Community Policing*, in *Modern Policing* 99, 103-07 (Michael Tonry & Norval Morris eds., 1992) (describing community policing as "organizational strategies" redefining mission, methods, and arrangements of police departments).

²⁷² Virtually all commentators agree that police culture cannot be changed by forcing street-level officers to act in a certain way. See Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in *Police Violence* 129, 142 (William A. Geller & Hans Toch eds., 1996) (arguing that officers' attitudes are affected more significantly by internal police influences than by externally enforced rules).

²⁷³ See Paul Chevigny, *Edge of the Knife* 86-87 (1995) (discussing danger that police are so estranged from communities that they are bound to make violent mistakes); *id.* at 115-16 (arguing that police will not cede power to communities).

²⁷⁴ See generally Amsterdam, *supra* note 78, at 415, 424 (recommending implementation of rules to guide police searches that both promote police receptiveness and accessibility to community input and increase police awareness of implications of their actions).

²⁷⁵ This greater range of exposure may ultimately influence the ways in which officers view individuals of color and perceive their conduct in encounters on the street. This could produce the requisite change in the culture of policing. See Malcolm Sparrow et al., *Beyond 911: A New Era for Policing* 172-74 (1990). In addition, some police programs choose to focus less on response time and arrest rates and more on working to prevent crime. See Kelling & Wilson, *supra* note 270, at 33.

²⁷⁶ See *supra* note 2.

²⁷⁷ See *supra* note 3.

making changes. The data make it possible to assess the scope of the problem and also to identify patterns that may point the way to reforms.²⁷⁸

Training and recruitment are also critical in changing the conduct of all officers. Cognitive psychologists have suggested that training programs focused on the extent to which officers resort to their own biases might be a necessary prerequisite to changing their behavior.²⁷⁹ In addition, increasing the "cost" of being wrong increases a police officer's level of accuracy. Moreover, police departments should hire officers from diverse ethnic, racial, and economic backgrounds, and individuals of color should be actively recruited from their communities and neighborhoods. However, without proper training, this measure alone may backfire. Officers of color, in order to gain acceptance with their majority counterparts, often display acute disdain for people of color in the communities they patrol.²⁸⁰

Any comprehensive training program would need to focus on specific problems that a given department has encountered. Some requirements, however, seem universally applicable. For example, training should include exercises that encourage officers to confront their own biases and to examine the risk of resorting to stereotypic judgments in cross-racial encounters. This training would draw on social science data to explore both the legitimate and illegitimate use of classifications in investigations. Officers might begin to differentiate between unsubstantiated stereotypes and those "defensible generalizations" that aid in the efficient detection of crime.²⁸¹

²⁷⁸ In addition to providing data for developing reforms, the process of keeping statistics could itself serve as a vehicle for reform. Officers quickly would realize that race-driven practices would put them at risk. Cf. Pérez-Peña, *supra* note 5, at B5 (reporting New York State Attorney General's statement that police officers had told him that they often mask unjustified searches by failing to "file the paperwork, a form called a UF250, that is required by department policy" whenever frisk is performed).

²⁷⁹ See Fiske & Taylor, *supra* note 148, at 159-60 (describing importance in debiasing process of providing individuals with exact knowledge of how to avoid false schemes). Increasing personal accountability motivates officers to examine the harmony between the data given and their expectations (or stereotypes). Keeping accurate statistical information about which individuals are detained or stopped and why (in a traffic context) would thus seem a good first step in providing officers with a profile of their "usual suspect."

²⁸⁰ See *Black Police Officers: An Interview with Alfred W. Dean, Director of Public Safety, City of Harrisburg, Pennsylvania* (Dec. 7, 1983), in *The Criminal Justice System and Blacks* 161, 161-65 (Daniel Georges-Abeyie ed., 1984) (discussing disproportionate police-community problems associated with black police officers in Harrisburg); see also Locke, *supra* note 272, at 138 (discussing resentment in communities of color often directed at nonwhite police officers).

²⁸¹ Simulations could prove an effective teaching tool. A fact pattern could present a scenario in which a suspect's race has raised an officer's suspicion. The training exercise would then involve officers in identifying any other indicia of criminality that might justify detaining the individual for further investigation. To trigger more in-depth examinations

An officer should also be immersed in the community as part of training before beginning to patrol. Immersion might take several forms. Community-based social service representatives could offer insights into their activities within the community. Gang intervention specialists, church representatives, and community mental health workers might provide a complement of individuals within the community whose expertise could prove instructive to new officers. Departments might also assign officers to work with neighborhood watch programs or with local community groups to devise plans to ensure the safety of their neighborhoods. While such interactions alone may not change perceptions, they may introduce officers and community members to a more collaborative and less antagonistic relationship.

CONCLUSION

This article suggests that the Supreme Court has distorted Fourth Amendment jurisprudence by initially ignoring the effects of racial motivation and then, in *Whren v. United States*,²⁸² declaring that the subject of racial motivation is irrelevant to Fourth Amendment analysis. As social science data reflect, the Court has underestimated the extent to which racial factors affect an individual officer's perceptions, memory, and reporting, transforming what may be innocent behavior into indicia of criminality and the basis for a search or seizure. The Fourth Amendment's history reveals that the Court also has seriously underestimated the propriety of treating racial targeting as a type of harm the amendment was intended to avert.

This article suggests certain doctrinal reforms that could be adopted to better effectuate the intent of the Fourth Amendment's framers. The key to such reforms is to focus explicitly on race. Such a focus would improve the ability of the judicial process to screen out the distorting effects that race can have on perception, memory, and reporting.

As this discussion has acknowledged, however, stereotypes appear to be so deeply ingrained in our culture that doctrinal reforms cannot suffice. This article has proposed a variety of nondoctrinal, nonjudicial reforms that could directly affect the thinking of police officers by focusing squarely on race. As in so many contexts, we cannot overcome the effects of racial bias until we "critically examine our

of the influence of race, officers might engage in a process of "race-switching." Officers would be asked to imagine that the suspect was not a person of color and then to examine any shifts in their own perceptions that this change in race caused.

²⁸² 517 U.S. 806 (1996).

individual collective pasts, honestly confront our difficult present, and imaginatively project an all-embracing moral vision for the future."²⁸³

²⁸³ Michael Lerner & Cornel West, *Jews & Blacks* 5 (1995).