

Prof. Rweelos : Red 5-12  
@ 12:20  
mH

B+

RACIAL PROFILING  
AND  
THE FOURTH AMENDMENT

K.J. Miller  
A09082925

## I. INTRODUCTION

Racial profiling is the process of substituting skin color for evidence as grounds for suspicion by law enforcement.<sup>1</sup> A profile can be an expressed or implied department policy or an individual law enforcement officer's practice based on stereotypes and prior experience.<sup>2</sup> Profiling has been used in traffic stops and searches, in targeting certain neighborhoods for increased police action, in commercial establishments attempting to reduce shoplifting and in public airports in an effort to apprehend drug couriers. A public consensus that the police should not stop or question people solely because of their race already exists.<sup>3</sup> The question then is whether police should be able to consider race at all when deciding which citizens to stop and possibly search.

Many people, including the majority of Supreme Court justices, defend officers who "merely" consider race as one of several factors.<sup>4</sup> However, even when race is used only as one factor among others, profiling still uses race as a proxy for criminal intent or culpability because law enforcement officials lack the requisite specific information about specific individuals. As such, all racial profiling constitutes racial discrimination.<sup>5</sup>

The logical site of analysis and relief from racial profiling might appear to be under both the constitutional protection against unreasonable searches and seizures and guarantee of equal protection. However, the Supreme Court decision in *United States v. Whren*<sup>6</sup> would seem to remove the Fourth Amendment from the equation. Yet *Whren* was merely the extension of a myth developed by the Court in *Terry v. Ohio*<sup>7</sup>, whereby racial motivations could be separate from an officer's analysis of probable cause and reasonable suspicion. In reality, racial motivations are inherently involved in such

assessments and impermissible racial motivations should trigger the protections of the Fourth Amendment.

## II. THE DEVELOPMENT OF RACIAL PROFILING

### A. History

Racial profiling is not a new phenomenon. Racial discrimination and policies of abuse against people of color in the United States is a legacy of African-American enslavement, repression and legal inequality.<sup>8</sup> In the early 1900s, racial discrimination was codified in many state laws and the police were expected to enforce what most Americans today would regard as unjust laws. However, over the last four decades there have been systematic efforts to eliminate blatant bigotry in the justice system.

Routine use of racial profiling today has more to do with established techniques of modern policing than with old-fashioned bias.<sup>9</sup> In the 1950s, the police instituted a new model of "professional policing" in an effort to deal with widespread corruption in law enforcement.<sup>10</sup> Policemen were placed in radio-dispatched patrol cars that were controlled and monitored from a centralized location.<sup>11</sup> Officers became responsible for large geographic areas and had limited interaction with members of the public other than criminals and victims.<sup>12</sup> Performance was evaluated by the number of arrests made, the number of requests for service handled and response times.<sup>13</sup> Today, many departments still emphasize reactive tactics. Police officers are required to drive around a loosely defined "beat" area, responding to calls for service or using a set of non-specific criteria to decide which people and which automobiles to detain.<sup>14</sup>

Another main impetus for the use of racial profiling is the so-called "war on drugs" - a fundamentally misguided crusade enthusiastically embraced by lawmakers and

administrations of both parties at every level of government.<sup>15</sup> Drugs and drug use have been seized upon as the new enemy in the post-Cold War era.<sup>16</sup> The naming of the crusade created a fictitious belief in most people that this effort could be "won" and constitutional imperatives became subservient to the cause.

An informal drug courier profile was developed in the mid-1970s by a Drug Enforcement Agency at Metropolitan Airport in Detroit, Michigan.<sup>17</sup> It named a number of "suspicious" characteristics, but race was not among them.<sup>18</sup> The first official racial drug courier policy was developed by the Florida Department of Highway Safety and Motor Vehicles in 1985 following the establishment of President Reagan's Task Force on Crime which intensified air and sea operations against drug smuggling.<sup>19</sup> race became recognized as a valid factor in a reasonable suspicion determination and criminal profile.<sup>20</sup> In 1986, a racially based drug courier profile was introduced to the highway patrol by the Drug Enforcement Agency through a program entitled "Operation Pipeline."<sup>21</sup> To date, this program has trained and encouraged 27,000 police officers in 48 stops to use this profile to effectuate pretextual stops.<sup>22</sup>

The emergence of crack cocaine in 1986, along with the media coverage of inner city crack use created intense public concern about illegal drug use and helped reinforce the perception that drug use was primarily a minority problem. Many cities initiated law enforcement programs to deal with street level drug dealing, primarily in minority neighborhoods.<sup>23</sup> The goal of these programs was to make as many arrests as possible. Minorities were disproportionately represented in the ensuing arrests and skin color alone became a major profile component.

## B. Statistical Data Demonstrating the Current Use of Racial Profiling

Pretextual stops are at the heart of the racial profiling debate. A pretextual stop occurs when the police effectuate a stop based on probable cause that a traffic violation has occurred, while in actuality the primary motivation for the detention is to investigate the possibility that a more egregious criminal act is being committed.<sup>24</sup> As a result of several high profile incidents and the ensuing media coverage, racial profiling has now entered the national consciousness, where before it was only discussed among law enforcement officials and minorities. Recent lawsuits have required that statistical data, rather than simply anecdotal evidence, be gathered to support the allegations of racial profiling. This data reveals dramatic and highly statistical disparities between the percentage of African-American motorists detained and searched.

In *Washington v. Vogel*, the Maryland Sheriff's Department put video cameras in police cars on Interstate 95 and documented 100 stops.<sup>25</sup> African-Americans accounted for 70% of the detainees, and 80% of all searches conducted involved minority drivers, yet only 24% of the searches resulted in a seizure or an arrest.<sup>26</sup> It was also determined that the average stop for a minority driver took twelve minutes, compared to the average five minute period that white drivers were detained. In *Wilkins v. Maryland State Police*, the police collected data for almost two years on the Interstate 95 corridor.<sup>27</sup> Many people, including law enforcement agents, argue that it is impossible to determine a driver's race through a car window driving at highway speeds. Yet when the Maryland State Police conducted a forty-two hour rolling survey, it was found that 96.8% of the time it was possible to identify the race of the driver.<sup>28</sup> In that survey, 16.9% of the drivers were African-American and 75.6% were Caucasian.<sup>29</sup> While 93.3% of all drivers

(16.9% African-American and 75.6% Caucasian) violated a traffic law, making them eligible to be stopped by the police, 73% of the drivers stopped were minorities and only 30% of the searches yielded contraband.<sup>30</sup>

More studies also demonstrate the undeniable use of racial profiling by the police in pretextual stops. In *Chavez v. Illinois State Police*, several analyses were compiled by a team of statistical experts who analyzed data bases maintained by the Illinois State Police.<sup>31</sup> The experts concluded that state troopers, especially those assigned to drug interdiction programs, singled out Hispanic motorists for enforcement of the traffic code.<sup>32</sup> While Hispanics comprise less than 8% of the Illinois population, and take fewer than 3% of all personal car trips in Illinois, they account for 30% of motorists stopped for discretionary offenses, such as failure to signal a lane change or driving one to four miles over the posted speed limit.<sup>33</sup>

Racial profiling is based on the premise that most drug offenses are committed by minorities. The premise is factually untrue, but has become a self-fulfilling prophecy. Since law enforcement agents look for drugs primarily amongst minorities, these agents encounter a disproportionate number of minorities with contraband. More minorities are arrested, prosecuted, convicted and incarcerated, reinforcing the prophecy.<sup>34</sup> The perception that whites commit fewer drug offenses is also perpetuated. However, whites are significantly more likely to use illicit drugs than minorities, but are dramatically less likely to be arrested for a drug offense.<sup>35</sup>

Based on the above statistics and data, it appears clear that racial profiling is an ineffective technique to apprehend drug offenders. Yet, it is also apparent that racial profiling techniques continue to be utilized. Some proponents justify the continued use

of such techniques through a result-oriented analysis, pointing to the increased number of drug arrests. However, these proponents ignore both the profound lack of effect these increased arrests have had on illegal drug use and trafficking in the United States, and the equally profound personal and societal costs associated with racial profiling, primarily the persecution of innocent people. Racial profiling also has a corrosive effect on the legitimacy of the entire justice system; it deters minorities from cooperating with the police and causes jurors of all races and ethnic backgrounds to doubt the testimony of police officers.<sup>36</sup>

Some officials deny that racial profiling is utilized by any law enforcement agency.<sup>37</sup> Others continue to argue that the use of racial profiling is an effective way to strategically address specific crime problems.<sup>38</sup> Relying on the flawed premise that minorities are more likely to be involved in crime, these officials ignore the reality that when the police use race-based profile resources, they often devote time and attention to individuals who are not involved in criminal activity. Although arrests are made, the vast majority of drug users and traffickers avoid police involvement and the police are discovering contraband in only a minority of people stopped and searched.

Finally, many blame the use of racial profiling on racially motivated individual officers who engage in discriminatory enforcement of laws.<sup>39</sup> Although there are doubtless some police officers who demonstrate a personal agenda defined by racism, it is more likely that officers possess a subjective discriminatory motive concurrent with an objective legal justification. The vast majority of today's police officers are hardworking, competent individuals struggling to be effective with minimal resources and under difficult conditions. Lacking reliable information, and sometimes lacking

reliable training in how to establish probable cause, officers often rely on hunches or other superficial criteria, such as a minority person traveling in the wrong neighborhood to justify detaining and questioning an individual.<sup>40</sup> However, racial discrimination occurs whenever race is considered, even if only slightly. Used in such a way, “blackness” is erroneously deemed an acceptable risk factor for criminal behavior.<sup>41</sup> Both the police officer that discriminates solely on race and the one who discriminates partly are guilty of discrimination. However, the first is a bigot and it is not clear that bigotry motivates the officer who uses race along with other factors to pigeonhole a person. These officers believe they are making a rational decision based on their previous experiences and crime rates.

If racial profiling was a matter of simple bigotry, it would be easy to condemn and ban. However, instead, racial profiling is a practice based on ingrained stereotypes, self-fulfilling prophecies, and misinterpretation of statistics, set against a backdrop of a nation beset with drug-related crime, media hyperbole and understaffed and overworked police departments. Although the logical site of analysis and relief from racial profiling might appear to be both the federal and state constitutional protections against unreasonable searches and seizures, the courts have repeatedly upheld the constitutionality of routinely using race as criteria for selecting targets of law enforcement action.<sup>42</sup> The apparent expansion of police power has essentially eviscerated the protections of the Fourth Amendment in the automobile and traffic stop setting and only the federal and state constitutional guarantees of equal protection remain.

### III. THE FOURTH AMENDMENT

#### A. History

The Fourth Amendment of the United States Constitution states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>43</sup> This Amendment was developed in response to the British use of writs of assistance in colonial America. These writs, granted by the King of England, provided general authority for a search and lasted the length of the King's life. England used this power to search to control commoners, subordinate lower classes and enforce taxes. Political minorities at the time when the Fourth Amendment was drafted were concerned that the state not be allowed to trample the rights of individuals held in disfavor.

The Fourth Amendment is usually interpreted as imposing a presumptive warrant requirement on all searches and seizures predicated upon governmental authority. In order to obtain a warrant, the police must have probable cause. However, because certain circumstances render the obtainment of a warrant impractical or unnecessary, the United States Supreme Court has crafted specifically established and well delineated exceptions to the warrant requirement, including the automobile exception.<sup>44</sup>

#### B. The Automobile Exception

The automobile exception is a pervasive and controversial exception that is central to the use of pretextual stops and searches. It allows the police to search vehicles upon probable cause without obtaining a warrant.<sup>45</sup> The Court primarily relied on two

factors when developing this exception. One, cars are inherently mobile and can be quickly removed from jurisdiction, making the time required to procure a warrant impractical.<sup>46</sup> Two, the Court held that there was a reduced expectation of privacy in an automobile since the occupants and contents of a vehicle are ordinarily in plain view, vehicles are rarely used as a repository for personal effects and vehicles are subject to extensive state regulation.<sup>47</sup>

In following decisions, the Court broadened and defined the scope of the automobile exception. Although a warrant is not required to search an automobile, the police still must have the probable cause required to obtain a warrant. Probable cause for a search or seizure has been defined as a “fair probability that contraband or evidence of a crime will be found in a particular place.”<sup>48</sup> Where the police have probable cause to believe an automobile contains evidence of an illegal activity, they may search objects that could conceal the object of the search.<sup>49</sup> The search may “extend as far as a magistrate could legitimately authorize by warrant.”<sup>50</sup> The police may therefore search anything capable of yielding evidence. This includes both the driver’s belongings and the belongings of any passengers, even if the passengers are not under any suspicion.<sup>51</sup> The Court extended the exception to include passengers based on three rationales: 1) there is no precedential basis for a distinction between a driver and a passenger; 2) passengers, like drivers, have a reduced expectation of privacy and, therefore, the search is minimally intrusive; and 3) governmental interests are substantial – law enforcement efforts would be hampered by a distinction, due to the mobility of the vehicle and the fact that passengers are often engaged in a common criminal enterprise with the driver.<sup>52</sup>

### C. Investigatory Detentions

Recent Supreme Court decisions have imbued the police with even greater authority to act without a warrant during traffic stops, based both on the previously established warrant exception and the need for adequate measures to ensure police safety. In *Terry v. Ohio*, the Supreme Court's decision changed the common law.<sup>53</sup> The holding in *Terry* established that the police may stop, question and perform a limited external search (to determine if the person is armed) on individuals reasonably suspected of engaging in a criminal activity.<sup>54</sup>

The validity of a *Terry* stop and frisk hinges on a reasonableness inquiry, not a probable cause analysis. The Court used a totality of the circumstances test, citing two essential factors.<sup>55</sup> One, the police must have a reasonable, articulable suspicion of criminal activity in order to effectuate a stop. Reasonable and articulable suspicion is defined as an officer's ability "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."<sup>56</sup> Two, the scope of the activity resulting from the stop must be reasonably related to the original circumstances justifying the stop.<sup>57</sup> While even a brief traffic stop constitutes a seizure under Fourth Amendment standards, the Supreme Court ruled that traffic stops are less onerous than custodial detentions.<sup>58</sup> Therefore, traffic stops are classified as *Terry* stops, requiring only that the law enforcement action is based on a reasonable, articulable suspicion of criminal conduct, and be reasonably related in scope to the original stop justification.<sup>59</sup>

#### D. Post-Stop Conduct

Once an automobile has been stopped, further intrusive conduct by the police has be sanctioned by the Supreme Court by balancing police safety against the intrusion. The police may order the driver to exit the automobile upon any traffic stop, in order to decrease the risk to the police officer from oncoming traffic.<sup>60</sup> Once the driver has exited the vehicle, the police may conduct a *Terry* frisk if they believe the driver is armed.<sup>61</sup> Since the driver is already detained, the Court found that the ensuing behavior was minimally intrusive and a “mere inconvenience” when balanced against the safety concerns for the officer.<sup>62</sup> The police may also order passengers to exit the car pursuant to a valid traffic stop.<sup>63</sup> Although passengers have a stronger liberty interest than the driver, the risk to the police officer is also increased by the presence of multiple passengers.<sup>64</sup>

The police may conduct a protective search of the interior of a stopped vehicle if they have reasonable suspicion to believe there is a risk that the suspect is dangerous and may gain immediate control of a weapon.<sup>65</sup> This protective search is limited to the area of the vehicle in which weapons may be hidden. Again, the Court cited the concern for police safety, but went on to discuss the lack of Fourth Amendment rights impinged. The Court defined this type of protective search as under the purview of the plain view exception to the Fourth Amendment.<sup>66</sup> By definition, the plain view exception is outside a Fourth Amendment analysis, as a police officer acting pursuant to constitutional authority may seize evidence of criminal activity or contraband which is in plain view. The exception also provides that observation of an object without seizure may contribute to the probable cause or reasonable suspicion necessary to seize the object.<sup>67</sup> Further, this

holding illustrates the Court's preference for objective Fourth Amendment standards and the tendency for the Court to apply pre-existing constitutional standards to new fact patterns.

Following a lawful stop, the police may also conduct warrantless searches with the express or implied consent of the driver, regardless of probable cause or reasonable suspicion.<sup>68</sup> The Supreme Court, using an objective totality of the circumstances test, determined that a police officer does not have a constitutional duty under the Fourth Amendment to inform a lawfully detained driver that he is free to leave prior to requesting permission to search.<sup>69</sup> Nor must the consent be knowing and intelligent consent to conduct a valid warrantless search.<sup>70</sup> The Court later stated that it was impractical to impose the detailed requirements of an effective warning on a normal consent search. Knowledge of the right to refuse a search is simply one factor to be taken into account when evaluating the constitutionality of the government's conduct.<sup>71</sup>

Finally, the police may arrest a driver following a valid traffic stop. The authorities must have probable cause at the moment of arrest; that is, knowledge of facts and circumstances sufficient to warrant a reasonable belief that an unlawful offense has been, or is being, committed.<sup>72</sup> A search incident to arrest is another exception to the Fourth Amendment's warrant requirement.<sup>73</sup> A full custodial arrest must be effected in order for the exception to trigger; a traffic citation does not constitute an arrest. However, once an individual is arrested, the police may conduct a warrantless search of the individual, irrespective of probable cause or reasonable suspicion to indicate the presence of weapons or evidence.<sup>74</sup> The police can also search the area within the immediate control of the individual arrested, including the interior of the car and any

containers within it.<sup>75</sup> This search can take place even after the police have established control over the arrested individual.<sup>76</sup>

The issue of racial profiling takes on a more ominous tone when it is recognized that minorities are not just being subjected to pretextual traffic stops, but, once stopped, may be subjected to further warrantless searches and invasions of privacy.

#### E. Pretextual Stops and the Fourth Amendment

In *United States v. Whren*, the Supreme Court established that the police may stop an automobile upon probable cause of any traffic violation, irrespective of the underlying motivation.<sup>77</sup> The Court found that a pretextual stop is an objectively reasonable and valid exercise of police power, as opposed to the notion that an officer may simply fabricate an underlying reason for a stop.<sup>78</sup> Using an objective test, a decision to stop a vehicle is reasonable when an officer has probable cause to believe a traffic violation has occurred.<sup>79</sup> The Court found that a subjective inquiry into the motivations of individual officers would compromise the invariable nature of established Fourth Amendment protections and necessitate a case-by-case assessment of particular police actions at particular times. According to the Court, this holding was justified because no precedential basis exists for the proposition that ulterior motives may invalidate an objectively justifiable police action.<sup>80</sup> Ulterior motives cannot invalidate police conduct that is justifiable on the basis of probable cause to believe a violation of the law has occurred.<sup>81</sup>

The Court appeared aware that there was a possibility that the police may impermissibly use race as a factor in selecting people to detain. In fact, the police now have virtually unlimited authority to stop and search any car, as every driver probably

violates some provision of the highly technical and detailed vehicle code during even a short drive.<sup>82</sup> However, the Court ruled that these concerns must be dealt with in a Equal Protection, not a Fourth Amendment, context. This is consistent with previous decisions mandating that objectively reasonable enforcement measures should not be prohibited due to the possibility of an unconstitutional application.

#### IV. THE RACELESS WORLD OF FOURTH AMENDMENT JURISPRUDENCE

Although the Supreme Court decision in *Whren* appeared to remove Fourth Amendment protections from searches and seizures based on racial profiling, *Whren* was merely the culmination of a sequence of doctrinal and conceptual moves that began in *Terry*.<sup>83</sup>

##### A. *Terry*

A review of *Terry* reveals an important racial dimension, despite the fact that the Court presented the facts in entirely race-neutral terms. The Court addressed the subject of race in only one sentence of the opinion and an accompanying footnote. In the textual passage, the Court observed that “minority groups, particularly Negroes, frequently complain” of “wholesale harassment by certain elements of the police community.”<sup>84</sup> The footnote stated: “[T]he frequency with which ‘frisking’ forms a part of a 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.”<sup>85</sup> 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.<sup>86</sup>

In an amicus curiae brief filed by the NAACP Legal Defense and educational Fund, statistics were cited showing that African-Americans were more prone to being stopped and frisked than whites.<sup>87</sup> The Legal Defense warned that the police would exploit a diluted probable cause standard to engage in exploratory searches under the guise of protecting themselves. Justice Douglas' dissent echoes some of the same themes. Yet he did not mention the racial dimension of these concerns. He simply predicted that police officers could now pick up an individual "whenever they do not like the cut of his jib."<sup>88</sup>

The facts in *Terry* recount that a plainclothes detective watched two men walk in front of a store window, looking in as they passed. A third man approached the first two and engaged in a brief conversation. The majority decision states that the detective "had never seen the two men before and he was unable to say exactly what drew his eye to them." Yet, the detective concluded that the two men were in the process of casing a job. He followed them and saw them speak to the third man again. "Deciding the situation was ripe for direct action," the detective approached the group, identified himself, and asked for their names. The men mumbled something in response, causing the detective to grab one suspect, spin him around, and frisk him. Finding a handgun, the detective patted down the other two men and found a second gun.<sup>89</sup>

An examination of the trial court record reveals that the first two men were African-American, the third man was white, and the detective was white.<sup>90</sup> When the missing racial element is added to the facts, the events become much more understandable. In his suppression hearing testimony, the detective made a point of referring to the race of each participant.<sup>91</sup> In his testimony at trial, the detective stated

that he didn't know what first drew his eye to the suspects, but he "didn't like them."<sup>92</sup> Walking past, and looking in, a store window are not inherently suspicious behaviors, but the detective's initial dislike made everything the two men did become suspicious. He also felt the interracial nature of the group was suspicious.<sup>93</sup>

Removing race from the case presented the Supreme Court with a dilemma. A stop and frisk must be supported by a reasonable, articulable suspicion that a suspect is armed and dangerous. The Court had to ascertain why the detective stopped and frisked the suspects in order to decide whether the actions were constitutional.<sup>94</sup> With the race of the participants eliminated, the most obvious explanation for the detective's actions was unavailable. The actions of the suspects, pacing, window shopping and engaging in conversation, were innocent.

The Court therefore relied on the detective's expertise to explain his suspicions. The Court presented the detective as someone who, because of his experience and knowledge, can instinctively assess a seemingly innocent situation and intuit criminal intent.<sup>95</sup> The Court had previously denounced mere "hunches" as constituting reasonable suspicion. But, by presenting the detective as an expert, his hunches were elevated to experienced instincts that could then make his conduct constitutional. The Court developed a myth by treating the issue of race as one that can be separated out from the analysis of a police officer's assessment of reasonable suspicion.<sup>96</sup>

The *Terry* court divided the world of law enforcement into good cops and bad cops. The detective in *Terry* represents a good cop, one who uses his instincts without racial bias when assessing a situation. The Court saw bad cops as a "rogue faction" who will abuse their power, irrespective of the possibility that evidence collected will be

suppressed at trial.<sup>97</sup> Since most officers, according to the Court's constructed reality, do not act on the basis of race, the applicable constitutional mandate is wholly unconnected with race and there was no reason to develop a more subjective rule that would take into account the officer's motivations.

#### B. Subsequent cases

The cases between *Terry* and *Whren* have contributed to the Supreme Court's conception of a raceless world of Fourth Amendment jurisprudence. The Court continued to develop the myth that good cops have no racial bias, or at least do not act on such bias.

In *Delaware v. Prouse*, the constitutionality of a random spot check procedure was challenged.<sup>98</sup> Officers were stopping drivers, without probable cause, to check licenses and registrations. Social science data was presented to the Court that such unbridled discretion was allowing the police to stop drivers based on "salient cues" such as race. The Court ignored the data and did not refer to race in its decision.<sup>99</sup>

In *Tennessee v. Garner*, the Court evaluated the constitutionality under the Fourth Amendment of the use of deadly force against an apparently unarmed, fleeing suspect.<sup>100</sup> The Court was presented with statistics that suggested it was more likely that the police would use deadly force against African-American suspects.<sup>101</sup> The data showed the overwhelming number of African-American suspects shot by the Memphis police in property crime cases. The Court omitted any reference to the decedent's race in the decision. Although the Court held that the Fourth Amendment prevented the use of deadly force in non-threatening situations, no mention of race appeared in the rationale.<sup>102</sup>

The Court did discuss race in two border patrol cases. In *United States v. Brignoni-Ponce*, the Court evaluated the constitutionality of border patrol officers stopping vehicles driven by Mexicans.<sup>103</sup> The officers had no individualized suspicion, but simply stopped the cars based on the driver's appearance. The Court held that such stops were unlawful, as Mexican appearance alone does not satisfy the standard necessary for intrusion on a privacy interest. However, the Court stated that race is a relevant factor in "the quantum of suspicion."<sup>104</sup> In *United States v. Martinez-Fuerte*, the Court upheld the constitutionality of the police relying on race as a factor in deciding who to detain at fixed checkpoints.<sup>105</sup> The Court stated that the intrusion was sufficiently minimal that no particularized reason was required to justify it. The possibility that the choice to detain was made on the basis of race did not make the practice impermissible.<sup>106</sup>

There are two possible theories for the differences in these cases from those that omit racial references. One, apparent Mexican ancestry may be more of an issue of nationality than race. The Court may be distinguishing surreptitious racial motivations from the explicit use of race.<sup>107</sup> The Court appears willing to address situations where the police make express use of race. However, if the police rely on factors other than race to develop probable cause or reasonable suspicion, the Court will not consider whether racial motivation played an illicit role.<sup>109</sup>

### *C. 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 the police.<sup>110</sup> In *Whren*, the Court invoked a doctrinal barrier, declaring illicit racial motivation

categorically irrelevant to a Fourth Amendment analysis.<sup>111</sup> The facts in *Whren* do not mention race. The Court reveals the suspects were African-American only to discuss and reject the argument that race is relevant to a Fourth Amendment analysis.<sup>112</sup>

In *Whren*, two white plainclothes vice officers saw a vehicle with temporary plates driven by two young African-American males. The car was stopped at a stop sign for an extended period, and the driver was looking in the passenger's lap. The vehicle then made a sudden right turn without indicating. The officers stopped the car and discovered two large bags of crack cocaine. A search revealed more illegal drugs.<sup>113</sup> The Court established that the police may stop a vehicle upon probable cause of any traffic violation, irrespective of the officer's underlying motivation.<sup>114</sup> The Court stated that there was no precedential basis for the proposition that ulterior motives may invalidate objectively justifiable law enforcement action.<sup>115</sup>

By omitting race from the facts, the Court treated race as irrelevant. *Whren* adds to the myth developed in *Terry*. The Court continues to construct a reality where it is possible to separate a police officer's racial bias from his observations and his account of reasonable, articulable suspicion or probable cause. This then makes it possible at a suppression hearing for a judge to uphold the officer's actions as resting upon neutral facts untainted by racial bias.

#### D. The reality of the impact of race

Social science data demonstrates that we reduce the world around us into categories or salient cues. This process allows us to organize and make decisions with less time and less effort. We use salient cues like race and draw on culturally embedded understanding to evaluate the actions and behaviors around us. Once developed, we tend

to hold to these categories and prejudgments even in the face of much contradictory evidence.

The categories we use reflect stereotypes, which oversimplify complexities. Although law enforcement agents must use race as a descriptive feature, it also can become a determining factor in all assessments of possible criminal behavior. Police officers have to synthesize vast amounts of complex information quickly. They often proceed on the basis of traits they associate with criminal behavior. Therefore, stereotyping is integral to the world of law enforcement. Given the disproportionate number of experiences law enforcement agents have with people of color, race becomes one of these integral stereotypes. Police tend to see the world in "us vs. them" terms, reinforced by public scrutiny and criticism. The majority of police officers are white and even minority officers see themselves as different from the suspects they apprehend. The data reveals that the police are more likely to stop people who are unlike the majority and/or unlike the officers themselves. This leads not only to conscious, but also unconscious, racism. If the police believe minorities are more likely to be criminals, race can become the determining factor in any assessment of behavior.

The Supreme Court's view of a race-neutral assessment is improbable, if not impossible. Stereotypes and biases fundamentally shape perception. Law enforcement agents cannot make assessments of criminality independent of their attitudes about race. Race is used as a proxy for criminal intent or culpability, because the police lack specific information about individual suspects. Therefore, even the Court's "good cop" is unable to be completely unaffected by racial considerations and biased officer's are incapable of making objectively valid judgments. The Court is ignoring the reality of the situation

when it sustains an officer's judgment of probable cause and reasonable suspicion without evaluating the officer's underlying racial motivations.

## V. CONCLUSION

One of the core principles of the Fourth Amendment is that, in order to stop and detain an individual, the police must have either probable cause or reasonable suspicion to believe that individual is involved in criminal activity. The history of the Fourth Amendment demonstrates that racial targeting is the type of harm the amendment was intended to avert. Recent decisions have expanded the scope of law enforcement power, abrogating the protections of the Fourth Amendment, especially in the vehicular context. The Supreme Court has ignored the effects of racial motivation and held that such considerations are irrelevant to a Fourth Amendment analysis. Yet, as social science data reflect, the Court has underestimated the extent to which racial factors affect an individual officer's perceptions and assessments.

Racial profiling is inconsistent with the basic rights and freedoms afforded in our democracy. It destroys the presumption of innocence and any gains realized from its use are overwhelmed by its costs. Whether or not the courts find a constitutional violation and order relief, legislators and administrators have a moral obligation to adopt measures to curtail racially motivated searches and seizures.

---

<sup>1</sup> See generally, David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways* (May 1999) (unpublished report by the American Civil Liberties Union, on file with the author and at <<http://www.aclu.org>>). Mr. Harris is the author of many academic articles on racial profiling and search and seizure. See also, *Is Jim Crow Justice Alive and Well in America Today?* (unpublished report by the American Civil Liberties Union at <<http://www.aclu.org>>).

<sup>2</sup> Kathryn K. Russell, *Driving While Black*, 40 B.C.L. REV. 717 (May 1999).

---

<sup>3</sup> Randall Kennedy, *Profiling the Racial Profiler*, (December, 1998) (<<http://www.intellectualcapital.com/issues/issue167/item1930.asp>>).

<sup>4</sup> See *United States v. Whren*, 517 U.S. 806 (1996), *cert. denied*, 522 U.S. 1119 (1998).

<sup>5</sup> Kennedy, *supra*.

<sup>6</sup> *United States v. Whren*, 517 U.S. 806 (1996).

<sup>7</sup> *Terry v. Ohio*, 392 U.S. 1 (1968)

<sup>8</sup> Harris, *supra*.

<sup>9</sup> John D. Cohen, Janet Lennon, and Robert Wasserman, *Eliminating Racial Profiling: A Third Way Approach* (February 2000) (unpublished report by the American Civil Liberties Union, on file with the authors and at <<http://www.aclu.org>>).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Harris, *supra*.

<sup>16</sup> Dan Baum, *Smoke and Mirrors: The War on Drugs and the Politics of Failure*, at xi (1996).

<sup>17</sup> See *United States v. Sokolow*, 490 U.S. 1 (1989)

<sup>18</sup> *Id.*

<sup>19</sup> Harris, *supra*.

<sup>20</sup> See *United States v. Weaver*, 966 F.2d 391 (8<sup>th</sup> Cir. 1992) (held that a stop based solely on the nature of race would be invalid, but that race could be considered in light of other factors).

<sup>21</sup> Harris, *supra*.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

---

<sup>24</sup> Thus, under this definition, a pretextual stop is an objectively reasonable and valid exercise of police power, as opposed to the notion that an officer may simply fabricate an underlying justification for a stop. See *United States v. Harvey*, 16 F.3d 109 (6<sup>th</sup> Cir. 1994); *United States v. Whren*, 517 U.S. 806, 812 (1996).

<sup>25</sup> *Washington v. Vogel*, 880 F.Supp. 1545 (M.D. Fla. 1995).

<sup>26</sup> *Id.*

<sup>27</sup> *Maryland v. Wilson*, 519 U.S. 408 (1997).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Harris, supra.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Kennedy, supra.*

<sup>35</sup> According to the government's own report, 80% of the country's cocaine users are white. *Harris, supra.*

<sup>36</sup> *Harris, supra.*

<sup>37</sup> *Kennedy, supra.*

<sup>38</sup> When police use race-based profile resources, they often devote time and attention to individuals who are *not* involved in criminal activity. *Kennedy, supra.*

<sup>39</sup> *Kennedy, supra.*

<sup>40</sup> Officers often rely on hunches or other superficial criteria - such as a minority person traveling in "the wrong neighborhood" - to justify detaining and questioning an individual. *Kennedy, supra.*

<sup>41</sup> A recent report released by the National Institute of Justice found that it is the social and economic status of a neighborhood, not the racial or ethnic makeup, that is the key contributor to a community's subculture of crime and violence.

---

<sup>42</sup> Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U.L. REV. 956, 960 (October 1999).

<sup>43</sup> UNITED STATES CONSTITUTION, AMENDMENT IV.

<sup>44</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967). For a thorough review of warrant and probable cause exceptions, see *Twenty-Eighth Annual Review of Criminal Procedure: Warrantless Searches and Seizures*, 87 GEO. L.J. 1124 (1999).

<sup>45</sup> *Carroll v. United States*, 267 U.S. 132, 153 (1925).

<sup>46</sup> *Id.* at 149. See also, *Chambers v. Maroney*, 399 U.S. 42 (1970) (warrantless search deemed constitutional where probable cause existed to believe vehicle contained evidence of recently committed robbery).

<sup>47</sup> *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977). Similarly, the Court has pointed to public operation and servicing as factors which further diminish the expectation of privacy in an automobile. See *California v. Carney*, 471 U.S. 386, 392 (1985).

<sup>48</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>49</sup> *United States v. Ross*, 456 U.S. 798, 825 (1982).

<sup>50</sup> *Id.*

<sup>51</sup> *Wyoming v. Houghton*, 119 S.Ct. 1297 (1999).

<sup>52</sup> *Id.* at 1300-1303.

<sup>53</sup> *Terry v. Ohio*, 392 U.S. 1, 22-24 (1968).

<sup>54</sup> *Id.* at 20.

<sup>55</sup> *Id.* at 21.

<sup>56</sup> *Id.* at 21. Accordingly, inarticulable hunches or generalized suspicions cannot serve as the basis for an investigative detention. *Id.* at 22.

<sup>57</sup> *Id.* at 22.

<sup>58</sup> *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

<sup>59</sup> See *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

<sup>60</sup> *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

---

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 111.

<sup>63</sup> *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

<sup>64</sup> *Id.* at 413.

<sup>65</sup> *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983).

<sup>66</sup> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

<sup>67</sup> *Long*, *supra*, at 1050.

<sup>68</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

<sup>69</sup> *Ohio v. Robinette*, 519 U.S. 33, 33-34 (1996).

<sup>70</sup> *Schneekloth*, *supra*, at 227.

<sup>71</sup> *Id.*

<sup>72</sup> *See Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

<sup>73</sup> *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973).

<sup>74</sup> *Belton*, *supra*.

<sup>75</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969).

<sup>76</sup> *Belton*, *supra*.

<sup>77</sup> *United States v. Whren*, 517 U.S. 806, 812 (1996).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 810.

<sup>80</sup> *Id.* at 811.

<sup>81</sup> *Id.* at 812. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 584, n.3 (1983); *United States v. Robinson*, *supra*; *Scott v. United States*, 436 U.S. 128, 138 (1978).

---

<sup>82</sup> See Chris K. Visser, *Without a Warrant, Probable Cause or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?*, 35 Hous. L.Rev. 1683, 1708-09 (1999).

<sup>83</sup> *Whren, supra; Terry, supra.*

<sup>84</sup> See *Terry v. Ohio*, 392 U.S. 1, 14 (1968).

<sup>85</sup> *Id.* at 14 n.11 (quoting Lawrence P. Tiffany, et al., *Deterrence of Crime* 47-48 (Frank J. Remington ed., 1967)).

<sup>86</sup> *Id.* at 14-15; see also *id.* at 17, n.14.

<sup>87</sup> See Brief for the NAACP Legal Defense and educational Fund, Inc. as Amicus Curiae at 4-5, 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).

<sup>88</sup> *Terry*, 392 U.S. at 38-9 (Douglas, J., dissenting).

<sup>89</sup> *Id.* at 5-7.

<sup>90</sup> 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.) (reprinting suppression hearing testimony of Detective McFadden).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 *N.Y.U.L. REV.* 956, 968 (October 1999).

<sup>95</sup> *Id.* at 969; *Terry, supra* at 5.

<sup>96</sup> *Id.* at 970.

<sup>97</sup> *Id.* at 972.

<sup>98</sup> *Delaware v. Prouse*, 440 U.S. 648 (1979).

<sup>99</sup> *Id.* at 650.

<sup>100</sup> *Tennessee v. Garner*, 471 U.S. 1 (1985).

---

<sup>101</sup> 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).

<sup>102</sup> *Garner*, 471 U.S. at 3-4.

<sup>103</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

<sup>104</sup> *Id.* at 882.

<sup>105</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

<sup>106</sup> *Id.* at 563.

<sup>107</sup> *Thompson*, *supra* at 979.

<sup>109</sup> *Id.* at 977-78.

<sup>110</sup> *Terry*, *supra*.

<sup>111</sup> *Whren*, *supra*.

<sup>112</sup> *Id.* at 808.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 810.

<sup>115</sup> *Id.*