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RACIAL PROFILING AND THE FOURTH AMENDMENT: APPLYING THE MINORITY VICTIM PERSPECTIVE TO ENSURE EQUAL PROTECTION UNDER THE LAW

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Abstract: Racial profiling was once thought the figment of an overactive minority imagination. Yet, recent media coverage has thrust the reality of racial bias in law enforcement into the national spotlight. Despite its newfound popularity, the real battle for equal protection and justice under the law has been quietly raging across American courtrooms for decades, and it is a battle that people of color continue to lose. This Note examines the judiciary's tendency to excise racial perceptions and bias from its analysis of racial profiling cases under the Fourth and Fourteenth Amendments. Focusing on the recent profiling case of *Brown v. City of Oneonta,* this Note suggests that the imposition of race ignorant standards is itself a subtle but powerful vestige of racial bias in the courtroom. By more broadly considering the subjective perceptions of both police and minority victims of discriminatory police practices, courts will be more responsive to the coercive nature of certain police stops, as well as the discriminatory intent behind abusive police investigations.

"We the People" no longer enslave, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of "liberty," "justice," and "equality," and who strived to better them.

—Thurgood Marshall[1]

Sixty miles west of Albany lies the small town of Oneonta, New York.[2] Of the town's 10,000 full-time residents, fewer than 300 are

* Note Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2000–2001).

[1] Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution,* 101 HARV. L. REV. 1, 5 (1987).

[2] *See* Brown v. Oneonta, 195 F.3d 111, 116–19 (2d Cir. 1999), *amended and vacated by* Brown v. Oneonta, 221 F.3d 329, 334–36 (2d Cir. 2000). The tortured procedural history of *Brown* may itself be indicative of the difficulties and inconsistencies that arise when courts apply race-ignorant analysis to racial profiling claims. *See* 221 F.3d at 329; 195 F.3d at 111. The District Court in *Brown* issued four separate opinions after both sides to the dispute made several motions for reconsideration. *See* 221 F.3d at 335–36 (recounting procedural

black.[3] Nine years ago, near the outskirts of town, the peace of this close community was shattered when someone broke into a house and attacked an elderly woman.[4] The woman could not identify her attacker's face, but she knew that he had a knife and that he had suffered a cut on his hand during the assault.[5] Based on his quick movements and a glimpse of his hand and forearm, the elderly woman was convinced that the culprit was young, black, and male.[6]

The police arriving at the scene began an investigation immediately.[7] A canine unit tracked the suspect's trail to the State University of New York College at Oneonta (SUCO).[8] SUCO has a population of about 7,500 students, roughly 150 of whom are black.[9] Using the woman's description of her attacker, the police obtained a list from college officials of every black male on campus and tried to locate and question them all.[10]

When this strategy proved unsuccessful, the police widened their sweep to encompass the entire town, stopping and questioning over 200 people of color—including, allegedly, some women—whom they could find on public transportation and in the streets.[11] Although the perpetrator was never actually found, many members of the Oneonta black community emerged from the experience feeling hurt, humiliated, and angry.[12] Ricky Brown and several minority plaintiffs subsequently filed a claim that they were discriminatorily searched and seized in violation of the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment.[13] The resulting case was *Brown v. City of Oneonta*.[14]

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history leading to amended opinion). On appeal, a three-judge panel of the Second Circuit dismissed the plaintiffs' § 1983 claims under the Equal Protection Clause and, with regard to several plaintiffs, denied their Fourth Amendment claims. *See* 195 F.3d at 123. The following year, the panel abruptly reversed itself on several Fourth Amendment claims while adhering to its decision that the police sweep did not involve any discriminatory intent. *See* 221 F.3d at 336. This Note considers both the original and amended opinions of *Brown*'s three-judge panel. *See* discussion *infra* Parts II, III.

[3] *See Brown*, 221 F.3d at 334.

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See Brown*, 221 F.3d at 334.

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *See Brown*, 221 F.3d at 334–35.

[14] *See id.* at 329–37.

Although they lost at the District Court level, the plaintiffs in *Brown* went on to appeal.[15] A three-judge panel of the Court of Appeals for the Second Circuit stated that the police did not violate the Equal Protection Clause because they were merely engaged in routine detective work.[16] In the eyes of the court, the decision to use a description based almost solely on race and gender in a criminal investigation was not an impermissible *policy* based on race, but an action that was entirely within the scope of police discretion.[17] Moreover, although several plaintiffs received abusive and threatening treatment from the police, the panel reasoned that they were not unlawfully detained under the Fourth Amendment because they were never held against their will.[18] Months later, the panel would issue an amended opinion that continued to ignore racial bias in the Oneonta police sweep.[19]

The Second Circuit's ruling sparked reactions across the country.[20] One commentator said, "This [goes] far beyond the problem of driving while black. People were being stopped in Oneonta for *breathing* while black."[21] Another writer complained, "It's one thing to be the target of an individual's bigotry. It's quite another to have one arm of government discriminate against an entire race and then have another one give that action legal cover."[22] Even New York State Attorney General Eliot Spitzer, whose office was obliged by law to de-

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[15] *See id.*

[16] *See id.* at 337; *Brown*, 195 F.3d at 119. I had the opportunity to witness the oral argument on June 4, 1999 before (now) Chief Judge John M. Walker, Jr. (who authored both opinions), Judge James L. Oakes, and the Honorable Richard W. Goldberg of the United States Court of International Trade, sitting by designation. *See id.* at 111.

[17] *See Brown*, 221 F.3d at 337; *Brown*, 195 F.3d at 119.

[18] *See Brown*, 221 F.3d at 337; *Brown*, 195 F.3d at 121–22.

[19] *See Brown*, 221 F.3d at 337. The text of the superseding opinion was virtually identical to the original except for several surgically amended sections of its analysis. *See id.* Moreover, while the amended opinion was imbued with some new placatory language, the court stubbornly refused to apply the Equal Protection Clause because it found no discriminatory intent in the police investigation in Oneonta. *See id.* at 336–39.

[20] These reactions came on the heels of the court's original opinion. *Compare Brown*, 221 F.3d at 337, *with Brown*, 195 F.3d at 121–22.

[21] *See* Bob Herbert, *When Race Defines the Suspects*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 5, 1999, at A25. The colloquial phrase "driving while black," or "DWB" describes the phenomenon of discriminatory traffic stops and is discussed in more detail in Part I of this Note. *See* discussion *infra* Part I.

[22] *See* DeWayne Wickham, *Appeals Court Decision Props up Institutional Racism*, GANNETT NEWS SERVICE, Nov. 11, 1999, *available at* 1999 WL 6978113.

fend the police in *Brown* said, "You know what? We won the case, but it makes your skin crawl."[23]

This combined feeling of anger and dread still resonates deep within the heart of the black community. In fact, African Americans have endured an uneasy relationship with American law enforcement for decades. At the turn of the twenty-first century, nearly every major urban area has had its share of infamous profiling headlines: Boston had Charles Stuart's false allegations that a black man killed his pregnant wife (sparking an infamous round of police sweeps of black neighborhoods); New York had the acquitted police slaying of Amadou Diallo (as he reached for his wallet on his doorstep); and New Jersey had to fire Colonel Carl Williams, superintendent of its state troopers, for racist remarks about minorities and drug trafficking.[24] The colloquial phrase "Driving While Black," long a sardonic truism among African Americans, has now entered the modern vernacular as a testament to the reality of racial bias in law enforcement.[25]

These trends have initiated strong discourse on Fourth Amendment prohibitions against illegal search and seizure, as well as, in some instances, on the proper application of the Fourteenth Amendment's Equal Protection Clause.[26] Despite strong criticism, however, courts have tended to approach claims of police abuse with skepticism and occasionally flagrant disregard for the experiences of minority victims.[27] This Note discusses the development of the courts'

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[23] *See* Herbert, *supra* note 21, at A25.

[24] *See* Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593, 597 (1996) (discussing the Charles Stuart hoax in Boston, in which a white man falsely claimed a black man shot him and killed his pregnant wife); Lisa L. Walter, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 260 (2000); Howard Chua-Eoan, *Black and Blue*, TIME, Mar. 6, 2000, at 24 (discussing police brutality and race and the acquitted slaying of Amadou Diallo by four white police in New York). Walter discusses the firing of Colonel Carl Williams, former superintendent of New Jersey's state troopers. *See* Walter, *supra*, at 260. Governor Christine Todd Whitman fired Williams for racist remarks concerning drug crimes and minorities. *Id.* Williams was quoted as saying, "[C]ocaine and marijuana traffickers were most likely to be members of minority groups." *Id.* He denied condoning racial targeting, but said, "[I]t would be naïve to think that race was not an issue in drug trafficking." *Id.*

[25] *See* DAVID HARRIS, AM. CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS 1–8 (1999). This report was prepared by the American Civil Liberties Union, "a nationwide nonpartisan organization of 275,000 members dedicated to preserving and defending the principles set forth in the Bill of Rights." *Id.* at 1. The author of the report, David Harris, is a Professor of Law at the University of Toledo College of Law. *Id.* He has authored numerous scholarly articles on the subjects of racial profiling and search and seizure. *See id.*

[26] *See id.*

[27] *See id.*

treatment of Fourth Amendment and Equal Protection claims in the context of racial profiling cases. In particular, it will focus on the tendency of courts to ignore prevailing racial tensions felt by minority victims of police investigations while imposing race-ignorant assumptions in Fourth and Fourteenth Amendment analysis.[28]

This judicial strategy, described by some as a "race-neutral" approach, ignores existing racial attitudes and potential discriminatory animus in law enforcement.[29] Moreover, it invalidates significant perceptions of fear and mistrust among many black victims.[30] As a result, courts are unresponsive to the sense of fear and powerlessness felt by blacks during police search and seizures, and they do not adequately acknowledge the discriminatory intent behind some profiling techniques. A heightened sensitivity to both factors—how racial perceptions affect minority victims and how racial biases motivate discriminatory policies—could produce more equitable results under the Fourth and Fourteenth Amendments.

Part I of this Note describes some of the statistical data supporting claims that racial profiling disproportionately impacts minority groups.[31] It also recounts some of the historical development of the Fourth and Fourteenth Amendments and of the judiciary's race-ignorant approach in resolving racial profiling cases.[32] Part II continues to explore how courts have misconstrued Equal Protection claims by downplaying racially discriminatory animus in police actions.[33] Part III argues that judges must broaden their understanding of the victim's perspective in Fourth Amendment cases, while extending their analysis of discriminatory animus in construing Equal Protection claims.[34] Part IV suggests that by developing a more sophisticated awareness of indicia of racial bias, judges can more equitably consider racial profiling claims. This Note concludes that, in the interest of balancing effective law enforcement and fair treatment for people of

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[28] While my analysis considers the broad experiences and perceptions of people of color in racial profiling cases, it tends to focus on the African-American perspective. There is clear overlap in the histories of all non-white people in America when discussing these perspectives, but an in-depth examination of the entire diaspora of racial and ethnic groups in America is beyond the scope of this Note.

[29] *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1002–05 (1999) (offering an intricate discussion of the race neutral approach by the judiciary in the context of the Fourth Amendment).

[30] *See id.*

[31] *See* discussion *infra* Part I and notes 36–120.

[32] *See* discussion *infra* Part I and notes 36–120.

[33] *See* discussion *infra* Part II and notes 121–146.

[34] *See* discussion *infra* Part III and notes 147–276.

color, a judiciary with a heightened sensitivity to existing racial perceptions among minority detainees would provide a more just remedy to the profiling problem.[35]

I. Racial Profiling in America: Searches, Seizures, and Driving While Black

Although it has received heightened media coverage of late, racial profiling in law enforcement is not a new trend, and can be traced, in part, to street-level law enforcement.[36] "Driving While Black," or "DWB," has become one of the most familiar vestiges of this phenomenon.[37] DWB describes abusive police stops and searches of people of color on America's highways.[38] Some maintain that the trend began in the 1980s with the nation's stepped up war against drugs.[39] As a result of a renewed campaign against drug trafficking, many regions developed strategies designed to attack the street-level use of drugs.[40] Such strategies pushed police to try to record more busts on the nation's roads, and created both spoken and unspoken policies for targeting racial minorities.[41]

For example, the Florida Department of Highway Safety and Motor Vehicles issued guidelines for its policy in 1985 on "The Common Characteristics of Drug Couriers."[42] The guidelines directed state officers to "be suspicious of rental cars," of motorists who show "scrupulous obedience to traffic laws," of drivers wearing "lots of gold," or who do not "fit the vehicle," and ethnic groups "associated with the drug trade."[43] Similarly, many cities began targeting poor, diverse urban areas where, to the public eye, the drug problem (namely the prevalence of the newly developed crack-cocaine) seemed most rampant.[44]

In the case of *Chavez v. Illinois State Police,* the American Civil Liberties Union (ACLU) undertook the representation of a class of black

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[35] *See* discussion *infra* Part IV and notes 277–304.

[36] *See* Harris, *supra* note 25, at 8.

[37] *See id.*

[38] *See id.*; Katheryn K. Russell, *"Driving While Black": Corollary Phenomenon and Collateral Consequences,* 40 B.C. L. Rev. 717, 720 (1999) (noting the disproportionate impact the DWB phenomenon has had on African Americans who traveled extensively in their cars).

[39] *See* Harris, *supra* note 25, at 9.

[40] *See id.*

[41] *See id.* at 8–9.

[42] *See id.* at 8.

[43] *Id.* (emphasis omitted).

[44] *See* Harris, *supra* note 25, at 8.

and Hispanic motorists after receiving hundreds of complaints that the Illinois State Police were singling out people of color for highway drug searches.[45] The ACLU submitted analyses to the court from statistical experts that concluded that state troopers assigned to a drug interdiction program called Operation Valkyrie were targeting motorists of color for enforcement of the traffic code.[46] Analyzing police data, the ACLU reported that, while Hispanics comprise less than eight percent of the Illinois population, and take fewer than three percent of the personal vehicle trips in Illinois, they comprise twenty-three percent of individual searches conducted by Valkyrie police officers.[47] Additionally, the report found that while African Americans comprise less than fifteen percent of the Illinois population and take approximately ten percent of the personal vehicle trips in Illinois, they comprise twenty-three percent of the searches conducted by Valkyrie officers.[48]

These findings support a common belief among people of color: That they disproportionately bear the brunt of crime-prevention efforts by police.[49] The convenient contention that people of color comprise the majority of people living in high crime areas and, thus, disproportionately commit crimes tends to ignore such national trends.[50] For example, despite the fact that blacks actually constitute only about thirteen percent of the country's drug users, they make up thirty-seven percent of people arrested on drug charges, fifty-five percent of those convicted, and seventy-four percent of all drug offenders sent to prison.[51] Moreover, reports indicate that the African-American proportion of drug arrests rose from twenty-five percent in 1980 to thirty-seven percent in 1995.[52]

It is inevitable that these increased profiling efforts, based implicitly or explicitly on racial factors, have caught many innocent people of color in the police dragnet.[53] They also suggest that most of these

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[45] *See* Chavez v. Ill. State Police, 27 F. Supp. 2d 1053 (N.D. Ill. 1998); HARRIS, *supra* note 25, at 27.

[46] *See* HARRIS, *supra* note 25, at 27.

[47] *See id.* at 28.

[48] *See id.* at 28–29. The ACLU analysis is based on state field reports filed in 1987 for motorists stopped on Illinois Highways; the data covers eighteen Districts, which includes the drug interdiction unit. *See id.*

[49] *See id.* at 27–29.

[50] *See id.*

[51] *See* HARRIS, *supra* note 25, at 11.

[52] *See id.*

[53] *See id.*

individuals have not benefited from full protection under our nation's laws.[54] A brief look at the history of the Fourth Amendment, as well as the application of the Fourteenth Amendment, might begin to explain this effect.

A. *Rights Against Unreasonable Searches and Seizures*

The Fourth Amendment guarantees the "right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."[55] During the colonial period, the British subjected the colonists to many unreasonable and sometimes humiliating searches of their homes.[56] Soon after the drafting of the U.S. Constitution, the Framers proposed an amendment to grant protection under English law; according to the amendment, each man's home was to be considered sacred ground where his person and papers could be secure against unreasonable searches and seizures.[57] The Fourth Amendment was thus not explicitly created with an eye towards protecting the liberty of people of color, but was instead rooted in anti-imperialist notions.[58] One scholar nevertheless maintains that the proper purpose of the Fourth Amendment is to protect disfavored minority groups.[59]

The Founding Fathers wrote the first ten amendments with the intent to limit the new federal government that had been created.[60] They were unconcerned with violations of rights that state governments committed locally because they believed such violations were small enough to be limited by citizen pressure.[61] But as early as the

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[54] *See id.*

[55] *See* U.S. CONST. amend. IV.

[56] *See* ANN FAGAN GINGER, THE LAW, THE SUPREME COURT AND THE PEOPLE'S RIGHTS 222–23 (1973). Fagan writes in Chapter ten about the right to security from unreasonable searches as the Framers' reaction to British oppression of colonists. *Id.* Fagan makes a valid point:

> [S]tandards for police in conducting raids and arrests seem to fluctuate with the daily headlines. When police officials . . . make a few mistakes and break into the wrong house for searching suspects, local citizens and judges tend to demand more care in issuing search and arrest warrants. When an individual or group commits acts of violence against people and property and remains at large for a period of time, public clamor for stern enforcement increases.

Id. at 230–31.

[57] *See id.* at 222.

[58] *See id.* at 222–31.

[59] *See* Thompson, *supra* note 29, at 998.

[60] *See* GINGER, *supra* note 56, at 379.

[61] *Id.*

1900s, state violations of the Fourth Amendment had clearly begun.[62] As described by one historian, police sometimes conducted searches without first obtaining search warrants from the courts, and they conducted general searches even when their search warrants were limited as to the area and the persons to be searched.[63] By 1914, in *Weeks v. United States,* the U.S. Supreme Court ruled that, in order to enforce the Fourth Amendment in federal criminal prosecutions, it would exclude all evidence obtained by a federal officer in violation of the Fourth Amendment.[64] In 1920, the Court extended this rule to exclude not only evidence found in the illegal search but also evidence obtained as a result of information or leads gained from the illegal search, known as "fruits of the search."[65] Then, in 1961, the Court held in *Mapp v. Ohio* that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[66] This exclusionary rule, at least on its face, offered some measure of localized constitutional protection to victims of illegal searches and seizures.[67]

Led by Chief Justice Earl Warren, the Supreme Court handed down another landmark decision in *Terry v. Ohio* in 1968.[68] *Terry* definitively established that the Fourth Amendment does not prohibit the police from stopping a person for questioning when they have a reasonable suspicion that the person may be armed and dangerous, even when that suspicion does not amount to the probable cause necessary to make an arrest.[69] *Terry* would become an important source of authority in racial profiling and Fourth Amendment jurisprudence.[70]

In *Terry,* Cleveland Police detective Martin McFadden, patrolling in plain clothes in downtown Cleveland at 2:30 in the afternoon, observed two men, Richard Chilton and John Terry, near a store.[71] At trial, the veteran officer was unable to say precisely what first drew his eye to the men, but he testified that he was familiar with the vicinity, as he had patrolled it for over thirty years, and had a strong hunch

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[62] *See id.* at 223.

[63] *Id.*

[64] *See* Weeks v. United States, 232 U.S. 383, 398 (1914); GINGER, *supra* note 56, at 223.

[65] *See* GINGER, *supra* note 56, at 223.

[66] *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961); GINGER, *supra* note 56, at 223.

[67] *See id.*

[68] *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

[69] *See id.*

[70] *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 439 (1991); Brown v. Oneonta, 195 F.3d 111, 121 (2d Cir. 1999).

[71] *See Terry,* 392 U.S. at 4–6.

that the men were planning a crime.[72] After observing them repeatedly wandering about the store window, he decided that they were casing the store for a robbery and feared that they may have a gun.[73] He thus approached the men, who had by then been joined by a third man, identified himself as a police officer, and proceeded to pat them down and question them.[74] He found revolvers on two of the men, Terry and Chilton, and subsequently instructed the proprietor of the store to call a police wagon.[75]

In deciding the case, the Court focused on the safety of the police officer, and did not take the race of the suspects into account.[76] In doing so, it gave a clear articulation of a reasonableness standard that is decidedly race-ignorant:[77]

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, *regardless of whether he has probable cause to arrest the individual for a crime.* The officer need not be absolutely certain that the individual is armed; *the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.*[78]

Terry thus established that the Fourth Amendment permits police to stop a person for questioning when they have a *reasonable suspicion* that the person may be armed and dangerous, even when that suspicion does not amount to the probable cause necessary to make an arrest.[79] This reasonableness test creates problems for minority plaintiffs because it does not take account of racial perceptions in an abusive search.[80]

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[72] *See id.*

[73] *See id.*

[74] *See id.* at 6–7.

[75] *See id.* at 7.

[76] *See Terry*, 392 U.S. at 27.

[77] *See id.*

[78] *Id.* (emphasis added). The issue here is not the Court's focus on police safety, but rather it is the Court's omission of racial dynamics in the police encounter. *See id.*

[79] *See id.*

[80] *See id.*; Thompson, *supra* note 29, at 998–1005.

Although Chief Justice Warren recognized that "minority groups, particularly Negroes, frequently complain of wholesale harassment by certain elements of the police community," he nevertheless displayed only limited sensitivity for prevailing discriminatory attitudes.[81] In particular, the Court stated that "[s]earch" and "seizure" are not talismans. "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'"[82]

The Warren Court's cautious approach may have done more harm than good for future plaintiffs.[83] It has been argued that *Terry* actually set the stage for the narrow reading of the Fourth Amendment that would later emerge in the 1996 decision of *Whren v. United States*.[84] Professor Anthony C. Thompson writes that the Court ignored the perceptions of both police and potential victims and instead constructed a reality in which "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."[85]

B. *Problems that the* Terry *Decision Created for Victims Trying to Prove Violations Under the Fourth Amendment*

As the law has developed since *Terry*, a plaintiff who wants to prevail on a § 1983 claim under the Fourth Amendment must overcome a difficult burden in proving that she was unreasonably seized.[86] A seizure does not occur simply because a police officer approaches an

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[81] *See Terry*, 392 U.S. at 14, 27.

[82] *Id.* at 19.

[83] *See* Thompson, *supra* note 29, at 973.

[84] *See* Whren v. United States, 517 U.S. 806, 813 (1996); Thompson, *supra* note 29, at 973.

[85] Thompson, *supra* note 29, at 962.

[86] *See* Brown v. Oneonta, 221 F.3d 329, 340 (2d Cir. 2000). A § 1983 claim is a civil rights claim brought under federal statutes or under the U.S. Constitution for direct invasions of the person. 42 U.S.C.A. § 1983 (2000); DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 57 (1997). A federal cause of action arises under 42 U.S.C.A. § 1983 when a person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other persons within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the U.S. Constitution and laws. *Id.* Such a person shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C.A. § 1983.

individual and asks a few questions.[87] A seizure occurs when, by means of physical force or a show of authority, a police officer detains a person in a way that would make a reasonable person believe that she was not free to leave.[88] Pertinent factors identifying a police seizure can include the threatening presence of several officers, the display of a weapon, physical touching of the person by the officer, language or tone indicating that compliance with the officer is compulsory, prolonged retention of a person's personal effects, such as airplane tickets or identification, or a request by the officer to accompany him to a police station or a police room.[89]

C. *The Law Today:* Whren v. United States

If *Terry* narrowed remedies under the Fourth Amendment, then *Whren v. United States* took bold steps to obliterate them.[90] *Whren* involved a situation in which plainclothes policemen patrolling a high drug area in an unmarked vehicle observed a Nissan Pathfinder waiting at a stop sign for "an unusually long time."[91] The Pathfinder later turned suddenly and sped off at an "unreasonable" speed.[92] The officers asserted that they stopped the vehicle to warn the driver about traffic violations, and upon approaching the automobile, they observed plastic bags of crack cocaine in Michael Whren's hands.[93] Both Whren and the driver of the truck were arrested.[94] Prior to trial on federal drug charges, both men moved for suppression of the drugs that were seized, arguing that the stop had not been justified by either a reasonable suspicion or probable cause that the men were engaged in illegal drug activity, and that the officers' traffic-violation ground for approaching the truck was a pretext for a drug investigation.[95] However, the motion to suppress was denied, the men were

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[87] *See Brown*, 221 F.3d at 339–40.

[88] *See id.* at 340.

[89] *See id.*

[90] *See* Whren v. United States, 517 U.S. 806, 813 (1996). Led by Justice Scalia, the Supreme Court held that prior jurisprudence foreclosed any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of individual officers. *Id.* at 808, 813.

[91] *Id.* at 808; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 432–33 (1997) (describing the facts of *Whren*).

[92] *See Whren*, 517 U.S. at 808.

[93] *See id.* at 809.

[94] *See id.*

[95] *See id.*

convicted, and the Court of Appeals affirmed.[96] The U.S. Supreme Court granted certiorari.[97]

Writing for a unanimous Court, Justice Scalia embarked on a disconcerting line of Fourth Amendment analysis.[98] He began by stating that, as a general matter, the decision to stop an automobile is reasonable "where the police have probable cause to believe that a traffic violation has occurred."[99] He then pointed out that the petitioners accepted that the officers had probable cause to believe that various provisions of Washington D.C.'s traffic code had been violated.[100] Justice Scalia stated: "Petitioners' difficulty is not simply a lack of affirmative support for their position. Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary."[101]

The Court then listed cases of random searches that were not rendered invalid because of their pretextual nature.[102] It ultimately held that the constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved.[103] Moreover, the Court reasoned, the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is consistent with the Fourth Amendment's prohibition against unreasonable seizures, regardless of whether a "reasonable officer" would have been motivated to stop the vehicle by a desire to enforce the traffic laws.[104] In a final statement, Justice Scalia wrote:

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[96] *See id.*

[97] *See Whren*, 517 U.S. at 809.

[98] *See id.* at 810–11.

[99] *Id.* at 810.

[100] *See id.*

[101] *Id.* at 812.

[102] *See Whren*, 517 U.S. at 812–13. The Court cited prior jurisprudence in which infringing police behavior was not deemed unconstitutional under the Fourth Amendment, discussing United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) (holding an otherwise valid warrantless boarding of a vessel by customs officials not rendered invalid because customs officers were accompanied by a Louisiana state policeman and were following an informant tip), and United States v. Robinson, 414 U.S. 218, 236 (1973) (holding a traffic-violation arrest not rendered invalid by fact that it was pretext for narcotics search). *Id.*

[103] *See id.*

[104] *See id.*

> We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. 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.[105]

By ruling that subjective intentions play no role in "ordinary, probable-cause Fourth Amendment analysis," the *Whren* Court gave police extraordinarily wide latitude to stop motorists based on their own discretion.[106] Even more troubling, the decision expressly closed the door on Fourth Amendment search and seizure claims while imposing the burdens of Equal Protection analysis on victimized minority motorists.[107]

Commentators rightly have decried *Whren*.[108] In its amicus brief to the *Whren* Court, the ACLU argued that pretextual searches violate the core principles of the Fourth Amendment, and warned that to sanction such searches was to invite discriminatory enforcement.[109] Similarly, Professor Angela Davis writes that *Whren* left African Americans and Latinos without an effective remedy for discriminatory pretextual traffic stops by suggesting that the Equal Protection Clause was the more appropriate constitutional basis for a cause of action.[110] To many, *Whren* basically furthers an "ends-means" approach that gives police broad discretion to do whatever is necessary to "get their man."[111]

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[105] *Id.*

[106] *See id.*

[107] *See Whren*, 517 U.S. at 812–13.

[108] *See* HARRIS, *supra* note 25, at 12; Davis, *supra* note 91, at 432–33 (noting that the *Whren* Court dismissed the issue of police using pretextual stops to discriminate "in a single sentence"); Thompson, *supra* note 29, at 998.

[109] *See* HARRIS, *supra* note 25, at 12.

[110] *See* Davis, *supra* note 91, at 427. There are several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause, and a showing of discriminatory intent/animus is a key component of a successful claim. *See Brown*, 221 F.3d at 337. Professor Davis highlights the difficult burden of proof facing victims of pretextual stops who, under *Whren*, are forced to turn to the Equal Protection Clause rather than the Fourth Amendment for relief. *See* Davis, *supra* note 91, at 427.

[111] *See Davis*, *supra* note 91, at 427.

D. *Race-Ignorant Assumptions Inherent in* Whren

In contrast to these critics, the Court's decision in *Whren* may seem quite reasonable to many. Why should race discrimination play any role in Fourth Amendment analysis? If plaintiffs contend that they have been unreasonably searched or seized, then perhaps race should have no place in the analysis. Maybe, as Justice Scalia asserts, claims of discriminatory enforcement of the law fall more appropriately under the aegis of the Equal Protection Clause of the Fourteenth Amendment.[112]

While this reasoning works well in theory, it fails to properly account for the complex web of racial attitudes, biases and perceptions that form the underpinnings of many interactions in society.[113] It assumes a world in which racism and prejudice have been abolished, in which police, criminals and even people who are victimized are unbiased, rational actors devoid of prejudice or racial stereotypes.[114] This theoretical world is, unfortunately, not the reality of life in modern America.[115] Conceptually speaking, the use of the race-ignorant approach by courts would result in a somewhat effective, if mechanical, disposition of the law—every person would be guaranteed a uniform process at trial.[116] However, as cases like *Brown* show, the race-ignorant approach adopted by many courts often proves to be beneficial to law enforcement and unfairly disadvantageous to people of color.[117] Too often, courts turn a blind eye to the biased motivations of police officers and the mixed feelings of fear, anger and powerlessness that innocent minorities experience when subjected to police searches.[118] Indeed, as Professor Thompson points out, "If police officers target people of color for searches and seizures, this is precisely the kind of

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[112] *See Whren*, 517 U.S. at 813.

[113] *See* Thompson, *supra* note 29, at 991. As Thompson states, 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 and frisk. *Id.* 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. *Id.*

[114] *See id.*

[115] *See id.*

[116] *See id.*

[117] *See* Brown v. Oneonta, 221 F.3d 329, 338–39 (2d Cir. 2000) (holding plaintiffs failed to show discriminatory animus in police investigation); Thompson, *supra* note 29, at 991.

[118] *See Brown*, 221 F.3d at 340 (reversing outcome of several Fourth Amendment claims); Thompson, *supra* note 29, at 991.

abuse of search and seizure powers that the framers of the Fourth Amendment sought to prevent."[119] Thus, the rationale behind *Whren*'s omission of race is at best an incomplete application of the Fourth Amendment.[120]

II. Fourth Amendment and Equal Protection Analysis in the Modern Courtroom: Linking *Terry*, *Whren* and *Brown*

Brown paints a vivid picture of how the race-ignorant approach of *Terry* and *Whren* frustrates and undermines Fourth and Fourteenth Amendment analysis in modern racial profiling cases.[121] Both the original and superseding opinion in *Brown* were produced by a three-judge panel of the Second Circuit and offer special insight into the process of ignoring racial perceptions in the courtroom.[122]

Led by Judge John M. Walker, Jr., the panel began its original opinion by stating that *Brown* "bears on the question of the extent to which law enforcement officials may utilize race in their investigation of a crime."[123] Yet, in considering the plaintiffs' claims that they were unconstitutionally "seized" in violation of the Fourth Amendment, the court initially refused to find that such a seizure had occurred for several victims of the police sweep.[124] The panel also held that the plaintiffs in *Brown* had failed to demonstrate sufficient evidence of discriminatory racial animus to justify a claim under the Equal Protection Clause of the Fourteenth Amendment.[125]

Analyzing the Fourth Amendment component of the case, the panel failed to find any illegal searches in all but two situations.[126] Initially, the judges were not persuaded that Ricky Brown, whose affidavit showed that he was stopped, surrounded and questioned in the street by three police officers, would have reasonably believed that he was unable to leave.[127] Nor did the court initially believe that a police officer who had pointed a spotlight at Jamel Champen and said, "What, are you stupid? Come here. I want to talk to you," had used

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[119] Thompson, *supra* note 29, at 998.

[120] *See id.*

[121] *Compare Brown*, 221 F.3d at 341–42 (vacating original opinion and restating denial of equal protection claim), *with Brown*, 195 F.3d at 121–23 (denying Fourth Amendment and Equal Protection claims to several plaintiffs).

[122] *Compare Brown*, 221 F.3d at 339–42, *with Brown*, 195 F.3d at 121–23.

[123] *Brown*, 195 F.3d at 115.

[124] *See id.* at 123.

[125] *See id.* at 120.

[126] *See id.* at 122.

[127] *See id.* Ricky Brown is a 1999 graduate of Boston College Law School.

language or a tone that indicated that compliance was compulsory.[128] Instead, the court's original opinion brushed these acts aside as merely brief, rude and harmless encounters.[129]

Addressing the Equal Protection component of the complaint, the panel held that when law enforcement officials possess a description of a criminal suspect's race and gender, and when no other evidence of discriminatory racial animus exists, they can act on the basis of that description without violating the Equal Protection Clause.[130] The court promptly affirmed the dismissal of the plaintiffs' § 1983 claims under the Fourteenth Amendment as well as their claims under 42 U.S.C. §§ 1981, 1985(3) and 1986.[131]

In reaching this conclusion in his original opinion, Judge Walker outlined the ways that a plaintiff could plead intentional discrimination in violation of the Equal Protection Clause.[132] He stated that the Equal Protection Clause essentially directs that all persons similarly situated should be treated alike.[133] To show intentional discrimination based on race, a plaintiff can identify a law or policy that expressly classifies persons on the basis of race.[134] She can also identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner.[135] Finally, a plaintiff can allege that a facially neutral scheme or policy has an adverse effect and was motivated by discriminatory animus.[136]

The panel did not believe that most of the *Brown* plaintiffs had been treated in a manner that caught any of these "hooks."[137] It held that this group had not identified any law or policy containing an express racial classification.[138] Judge Walker also employed a deft twist of reasoning: he challenged the plaintiffs' factual premise as being incorrect, maintaining that the police investigation in *Brown* was not a discriminatory policy in itself, but rather a *race-neutral* policy of inves-

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[128] *See Brown*, 195 F.3d at 122.

[129] *See id.*

[130] *See id.* at 115.

[131] *See id.* at 116.

[132] *See id.* at 118–20.

[133] *See Brown*, 195 F.3d at 118 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)).

[134] *See id.* (citing Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999)).

[135] *See id.* at 119 (citing Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886)).

[136] *See id.* (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977)).

[137] *See id.* at 120.

[138] *See Brown*, 195 F.3d at 119.

tigating crimes using whatever descriptors were provided.[139] He wrote, in short, that "the description [was] not a suspect classification, but rather a legitimate classification of suspects."[140]

The judicial reasoning in this early version of the *Brown* opinion demonstrates a powerful but mistaken assumption in Fourth Amendment and Equal Protection analysis: that interactions between police and minority plaintiffs are not influenced heavily by racial dynamics.[141] Judges who approach cases like *Brown* in this race-ignorant manner fail to take into account how racial perceptions between minorities and police might make a person of color feel "seized" under the Fourth Amendment.[142] Such courts also fail to consider how a police investigative policy might be fueled, even in subtle ways, by racial bias.[143] To courts that follow the *Brown* approach, the subjective subtleties of race are subordinated to a pro-law enforcement perspective.[144] Actions by both police officers and minority plaintiffs, even if corrupted by discriminatory animus, are thus treated as entirely devoid of racial influence.[145] The guiding principle of ignoring race, when handed down through cases from *Terry* to *Whren* to the panel's initial opinion in *Brown*, has troubling implications for resolving racially charged conflicts in the future.[146]

III. Fourth Amendment and Equal Protection Claims: Constitutional Construction, Race-Ignorant Standards, and Racial Attitudes Among Minorities and Police

To be sure, Judge Walker's original opinion in *Brown* shows how the race-ignorant approach can fail plaintiffs in both the Fourth Amendment context and in adjudicating claims under the Fourteenth Amendment.[147] The opinion made clear that courts tend to overlook

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[139] *See id.* Judge Walker wrote: "In short, plaintiffs' factual premise is incorrect: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime." *See id.*

[140] *Id.*

[141] *See id.* at 120; Thompson, *supra* note 29, at 998–99 (discussing race-neutrality).

[142] *See id.*

[143] *See Brown*, 195 F.3d at 120; Harris, *supra* note 25, at 8–9; Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 Val. U. L. Rev. 243, 250, 252–61, 265–70 (1991), *reprinted in* Yale Kamisar et al., Basic Criminal Procedure at 117 (9th ed. 1999).

[144] *See* Terry v. Ohio, 392 U.S. 1, 14, 27 (1968) (focusing on police safety, despite recognizing minority complaints of wholesale harassment); *Brown*, 195 F.3d at 120.

[145] *See Brown*, 195 F.3d at 120–22.

[146] *See id.*

[147] *See id.* at 118–21.

the subjective perceptions of plaintiffs to impose a one-sided analysis of the facts.[148] More often than not, this analysis has been consonant with the views of law enforcement officials.[149] Although they outlined the factors that contribute to a "seizure" under the Fourth Amendment, the three judges considering the *Brown* appeal did not initially give even brief consideration to the fact that some of the plaintiffs in the case might have felt threatened and detained by the police without consent.[150] Furthermore, the panel dropped its guard in considering the Equal Protection claim because it ignored the possibility of discriminatory racial animus in a policy drawn along racial lines.[151]

A. *Constitutional Tensions and Sociological Influences in* Brown

Taken in one sense, these flagrant omissions reflect flawed constitutional reasoning.[152] Indeed, commentators argue convincingly that the Framers intended the Fourth Amendment to be a check against exactly the kind of police abuses that occur in cases like *Brown*.[153] It has also been advanced that the Founding Fathers did not automatically exclude consideration of race-based factors under the Equal Protection Clause of the Fourteenth Amendment.[154] One scholar, Barbara Flagg, writes that all available evidence suggests that the Framers "did not understand the Fourteenth Amendment to constitutionalize an abstract colorblindness principle."[155]

Taken in another vein, the phenomenon of ignoring subjective racial perceptions under the Fourth and Fourteenth Amendments acquires a more sinister cast.[156] Sociologically speaking, the race-ignorant approach might well be an indication, not only that judges misapply constitutional remedies, but also that their own racial biases pervade and corrupt supposedly neutral standards of reasonable-

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[148] *See id.* at 120–22.

[149] *See id.* at 120.

[150] *See Brown*, 195 F.3d at 120. The court's initial opinion merely stated that it was not blind to the sense of frustration felt by the minority plaintiffs, urging police to be mindful of this phenomenon. *Id.*

[151] *See id.*

[152] *See* Barbara Flagg, *"Was Blind but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, in* POWER, PRIVILEGE AND LAW, A CIVIL RIGHTS READER 196–97 (Leslie Bender & Daan Braveman eds., 1995); Thompson, *supra* note 29, at 998.

[153] *See Brown*, 221 F.3d at 339–42; Thompson, *supra* note 29, at 998.

[154] *See* Washington v. Davis, 426 U.S. 229, 239–41 (1976) (reasoning discriminatory intent needed to show violation of Equal Protection Clause); Flagg, *supra* note 152, at 199.

[155] Flagg, *supra* note 152, at 199.

[156] *See id.* at 197.

ness.[157] Indeed, Professor Sylvia R. Lazos Vargas theorizes that these judicial assumptions of sameness are deeply embedded in the cultural ethos of mainstream society and its laws.[158] Because of these leanings, those who do not fit the prevailing cultural paradigm are at a significant disadvantage in the Fourth Amendment and Equal Protection adjudicatory process.[159]

This disadvantage was readily apparent in *Brown* when Judge Walker created a hypothetical "racial role-reversal."[160] He speculated that the outcome of the case would have been the same if the town of Oneonta were mostly black and the minority plaintiffs were white.[161] The convenient hypothetical that Judge Walker offered is an example of the race-ignorant approach at its worst: it assumes not only that discriminatory attitudes, fear, abuse and mistrust do not exist in encounters between minorities and police, but also that a reversal of racial roles would produce virtually identical outcomes.[162]

Consistent with Vargas' view, this kind of thinking is not only errant, it is "a myth that constructs and reinforces hegemony by constructing those who are the same, from a dominant perspective, as virtuous Americans, and those who fall outside the homogenous core as nonvirtuous outsiders."[163]

The 1991 decision of *Florida v. Bostick* is an extended example of this flawed reasoning.[164] In *Bostick,* two officers boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale.[165] The officers, who were participating in a drug interdiction program, walked up to Terrance Bostick and asked to search his luggage.[166] They found cocaine in Bostick's bags and he was arrested on possession and trafficking charges.[167] Bostick moved to suppress the cocaine

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[157] *See id.*; Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect,* 72 TUL. L. REV. 1493, 1493–1502 (1998). Vargas says that judges continue to assume homogeneity while eschewing the heterogeneity that has become a part of the modern American landscape. *See id.* at 1502.

[158] *See* Vargas, *supra* note 157, at 1501.

[159] *See id.* at 1502.

[160] *See* Brown v. Oneonta, 221 F.3d 329, 338 (2d Cir. 2000).

[161] *See id.*

[162] *See id.*; Vargas, *supra* note 157, at 1525.

[163] Vargas, *supra* note 157, at 1506.

[164] *See* 501 U.S. 429, 436–38 (1991).

[165] *See id.* at 431.

[166] *See id.* at 432 (recalling disputed facts recorded by the Florida Supreme Court).

[167] *See id.*

evidence on the grounds that it had been seized in violation of his Fourth Amendment rights.[168]

The U.S. Supreme Court, with Justice O'Connor writing for the majority, held that an officer conducting a random bus search pursuant to passengers' consent does not *per se* violate the Constitution.[169] The Court reasoned that the state court had erred in focusing on whether Bostick was free to depart rather than focusing on "the principle that those words were intended to capture."[170] Justice O'Connor added that Bostick's feeling of being confined was not the result of coercive police behavior, but was instead the "natural" feeling of confinement shared by all passengers on a bus.[171] She analogized Bostick's situation to the "dispositive" case of *INS v. Delgado.*[172] In *Delgado,* Immigration and Naturalization Service agents conducted random factory visits and positioned themselves near factory exits while questioning workers.[173] The *Delgado* Court concluded that although the factory workers may not have felt free to leave their workstations, their restriction was not the result of police activity.[174] Likewise, Justice O'Connor reasoned that Bostick's freedom of movement was restricted by a factor independent of abusive police conduct—by the mere fact that he was a passenger on a bus.[175]

Although the Court in *Bostick* refrained from deciding whether or not a seizure had taken place, it refused to accord relevance to the subjective racial outlook of the detainee.[176] Rather, Justice O'Connor implied that taking Bostick's perspective into account might have deviated from the presupposition of a reasonable *innocent* person perspective.[177] Anything other than this "innocent person" standard, she hinted, would open the door to countless challenges by criminals.[178]

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[168] *See id.*

[169] *See Bostick,* 501 U.S. at 439.

[170] *Id.* at 435.

[171] *See id.* at 436.

[172] *See id.* (citing INS v. Delgado, 466 U.S. 210, 218 (1984)).

[173] *See Delgado,* 466 U.S. at 212.

[174] *See id.* at 218.

[175] *See Bostick,* 501 U.S. at 436.

[176] *See id.* at 438 (citing Michigan v. Chesternut, 486 U.S. 567, 574 (1988)). Terrance Bostick relied on *Chesternut's* indication that a seizure occurs when a reasonable person would believe that he or she is not "free to leave." *Id.* However, Justice O'Connor raised an interesting tension in the case by noting that *Chesternut* states that the reasonable person standard ensures that the scope of Fourth Amendment protection does not vary with the subjective state of mind of the particular individual being approached. *See id.*

[177] *See id.*

[178] *See id.* Justice O'Connor thus concluded that Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage that

On its face, this logic seems fair enough, given the public policy to assist law-enforcement for the public good.[179] However, upon closer inspection, the "innocent person" reasonableness standard, as wielded by courts, may not be as fixed or fair a test as the O'Connor opinion dictates.[180]

B. *Race-Ignorance and Racial Bias by Courts*

The Supreme Court's decision to ignore racial factors and subjective perceptions in *Bostick* mirrors the myths and problems inherent in Judge Walker's role reversal syllogism.[181] One need only push the syllogism a little further to expose its frailties.[182] Consider, for example, a new hypothetical involving a venerable white male engaged in an evening stroll through a posh suburban neighborhood. The police approach the individual with hostility (i.e., "are you stupid? I said come over here!") and he is surrounded, questioned and frisked by three officers. Would this be deemed a "reasonable" intrusion on his privacy? Would he feel "seized," "detained" or compelled to stay? While many Americans might instinctively assume that some intrusion upon the white pedestrian's privacy occurred, this same sensitivity has historically not been extended to the case of a minority pedestrian who is detained in a similar fashion.[183] It seems fair to say that, for most people, images of race help define, in however subtle ways, the manner in which either situation is perceived.[184] The race-neutral principle that judges advance rests on the stubborn belief that *any* consideration of race is antithetical to the attainment of justice, therefor legitimizing the decision to ignore the racial dynamics of a police encounter.[185]

Unfortunately, instead of being truly neutral, judicial colorblindness often is inherently skewed against people of color in racial

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he or she knows contains drugs "cannot prevail because the 'reasonable person' test presupposes an *innocent* person." *Id.*

[179] *See id.*; Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259–60 (1994).

[180] *See Bostick*, 501 U.S. at 438.

[181] *Compare Bostick*, 501 U.S. at 434 (reinforcing race-neutrality of Terry v. Ohio, 392 U.S. 1, 27 (1968)), *with* Brown v. Oneonta, 221 F.3d 329, 338 (2d Cir. 2000) (discussing role reversal syllogism).

[182] *See Brown*, 221 F.3d at 338.

[183] *See* Flagg, *supra* note 152, at 199 (suggesting so-called colorblindness operates as an unthinking imposition of white norms and expectations).

[184] *See id.*

[185] *See id.*

profiling cases.[186] In this way, race-ignorant standards may be the most invidious form of racial bias from judges.[187] Barbara Flagg's "transparency phenomenon" agrees that judges' assumptions often reflect a distinctively white way of thinking about the world:

> Most whites live and work in settings that are wholly or predominantly white. Thus whites rely on primarily white referents in formulating the norms and expectations that become criteria of decision for white decisionmakers. Given whites' tendency not to be aware of whiteness, it's unlikely that white decisionmakers do not similarly misidentify as race-neutral personal characteristics, traits, and behaviors that are in fact closely associated with whiteness.[188]

The absence of diversity from most judges' lives makes hypothetical racial role-playing a difficult and often unproductive task.[189] Flagg's theory offers a useful framework for understanding how the decision to ignore race might itself reflect inherent racial preferences among judges.[190] Since most judges have no experience of a "genuine cultural pluralism," in which white perspectives are not dominant, they do not have an "experiential basis" for easily creating race-neutral reasonableness standards.[191] Put differently, the easy assumption that race either doesn't or wouldn't matter in deciding a Fourth Amendment case is itself evidence of racial preference—one that allows individuals like Judge Walker to make biased decisions against minority plaintiffs based on flawed reasoning.[192]

C. *The Victim's Perspective: Minority Perceptions of Law Enforcement Officials*

Many people of color would undoubtedly look upon Judge Walker's syllogism with great skepticism.[193] His premise, at least from the perspective of a minority plaintiff in *Brown*, clearly fails to account for the racial attitudes that are embedded in the public conscious-

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[186] *See id.*

[187] *See id.*

[188] Flagg, *supra* note 152, at 197.

[189] *See id.*

[190] *See id.*

[191] *See id.*

[192] *See id.*

[193] *See* Brown v. Oneonta, 221 F.3d 329, 338 (2d Cir. 2000); HARRIS, *supra* note 25, at 36; Flagg, *supra* note 152, at 197.

ness.[194] To a critical eye, Judge Walker's race-ignorant outlook represents a fictionalized view of society in which difficult questions of race are too easily disposed of by glib syllogisms and false claims of even-handedness.[195]

Awareness of this judicial bias intensifies minority attitudes towards law enforcement.[196] Negative attitudes are not just influenced by overt phenomenon like DWB.[197] They are also fueled by a system of justice that appears to operate as if its law enforcement officials and judges are allied and aligned against people of color.[198] This feeling in turn increases the fear, distrust and sometimes contempt that minorities can feel for most police.[199] Such an assertion may appear unreasonably general and therefore naive, but it is arguably even more naïve to underestimate the extent to which the minority image of law enforcement officials is influenced by external experiences.[200] The race-ignorant judicial strategy may therefore exacerbate black perceptions of police.[201]

An example that might better illustrate how race-ignorant legal standards may indirectly intensify minority perceptions of police can be found in the black community's response to racial hoaxes.[202] Professor Katheryn Russell points out that the ease with which the legal system abrogates minority rights when presented with fake evidence of a crime only deepens the racial divide.[203] Studies show, for instance, that many blacks are more likely to believe race-related conspiracy theories than whites.[204] This belief stems from the aggregated effect of police and courts rushing to judgment in criminal cases in which a racial hoax is successfully employed by a white perpetrator.[205] The

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[194] *See Brown*, 221 F.3d at 338–42; HARRIS, *supra* note 25, at 36–37.

[195] *See Brown*, 221 F.3d at 338–42.

[196] *See* Russell, *supra* note 24, at 600.

[197] *Compare* HARRIS, *supra* note 25, at 12, *with* Russell, *supra* note 24, at 600 (describing how hoaxes help create racial division).

[198] *See* Russell, *supra* note 24, at 600; Vargas, *supra* note 157, at 1525–28.

[199] *See* Russell, *supra* note 24, at 600; Vargas, *supra* note 157, at 1525–28.

[200] *See* Russell, *supra* note 24, at 600.

[201] *See id.*

[202] *See id.* at 599–600.

[203] *See id.* at 600. In the comment cited, Professor Russell notes that studies show that blacks are more likely to believe race-related government conspiracy theories, while whites more readily perceive blacks as a criminal menace. *See id.* She discusses the trend in the context of hoaxes and their effect on society and the criminal justice system. *See id.*

[204] *See id.* (citing PATRICIA A. TURNER, I HEARD IT THROUGH THE GRAPEVINE: RUMOR IN AFRICAN AMERICAN CULTURE (1993); Lydia Saad & Leslie McAneny, *Black Americans See Little Justice for Themselves*, Gallup Poll Monthly, Mar. 1995, at 32).

[205] *See* Russell, *supra* note 24, at 594–95.

damage caused by judges and police who mistakenly endorse fraudulent claims against blacks and other minority groups may intensify the perception among minorities that the police are to be feared, not trusted.[206] When a white man, such as Charles Stuart, can fabricate a story that leads to a broad shakedown of an entire community of blacks, or when white New York City police officers can kill an unarmed man with relative impunity, it is not surprising that African Americans will have difficulty seeing officers as protectors of their individual rights.[207] This has the unfortunate cumulative effect of influencing future street encounters with the police.[208]

When asked how much confidence they have in the police, studies have shown that twenty-six percent of blacks and twenty-three percent of racial minorities say "very little" or "none," compared to only nine percent of whites.[209] Thirty-two percent of blacks and thirty percent of all nonwhites rate the honesty and ethical standards of police officers as "low" or "very low," compared to only eleven percent of whites.[210] These statistics underscore the assertion that current perceptions among minorities are significantly different than those among whites, and that these perceptions might be a significant factor enhancing feelings of fear during police stops.[211] These feelings go beyond mere frustration at a traffic stop; they point to a deeper sense of vulnerability and powerlessness that plays a viable role in searches.[212] As Russell suggests, the "collective racial consciousness of each group gains more strength and permanence with each hoax."[213] Since these attitudes play such a palpable part in Fourth Amendment cases, judges' heightened sensitivity to them could help courts better interpret whether a detainee considers herself seized in violation of the Fourth Amendment.[214]

If the Walker court in *Brown,* for instance, was truly sensitive to such perceptions, then it would undoubtedly have quickly understood

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[206] *See id.*

[207] *See id.;* Howard Chua-Eoan, *supra* note 24, at 24 (describing the aftermath of the Diallo trial).

[208] *See* Russell, *supra* note 24, at 594–95.

[209] *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment,* 1997 SUP. CT. REV. 271, 314 n.203 (1997) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS–1995, at 133 (GPO 1996)).

[210] *See id.*

[211] *See id.*

[212] *See id.*

[213] Russell, *supra* note 24, at 600.

[214] *See* Sklansky, *supra* note 209, at 314 n.203, 325–26.

how an African American spoken to in a derisive manner, or surrounded by several officers, might feel that he was not free to leave.[215] This is even more apparent when one considers that the officers' statements were made in the context of a police sweep of a town with a small, outnumbered and therefore vulnerable minority population.[216] Judges must navigate these complex waters in order to more accurately adjudicate seizure claims under the Fourth Amendment.[217] However, because the court in *Brown* was substituting its own race-neutral perspective, it initially failed to consider either of these instances to be violative procedures.[218] Judge Walker's original opinion superficially dismissed the derisive comments as a simple question.[219]

This difference in perception is well-known among members of minority groups.[220] Anecdotal reports of run-ins with police abound among people of color at every level of the socioeconomic scale.[221] In the black community, this has resulted in fear, resentment and altered behavior in dealings with police.[222] Such attitudes alone exacerbate the tensions between police and minorities caught in a police search.[223]

But while perceptions of fear and mistrust for police have burgeoned within the black community based on overt acts of racism, these perceptions are heightened also by the race-ignorant approach of courts.[224] By using a suspect, race-neutral analysis to adjudicate Fourth Amendment and Equal Protection claims, courts have instilled a sense in many members of the minority community that judges and

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[215] *See* Brown v. Oneonta, 195 F.3d 111, 120 (2d Cir. 1999) (failing to discuss racial perceptions and bias in police investigation); Sklansky, *supra* note 209, at 314 n.203, 325–26.

[216] *See Brown*, 195 F.3d at 120; Sklansky, *supra* note 209, at 314 n.203, 325–26.

[217] *See Brown*, 195 F.3d at 120; Russell, *supra* note 24, at 605; Sklansky, *supra* note 209, at 314 n.203. Sklansky writes that, based on hearings held in six cities across the country, a 1995 study by the National Association for the Advancement of Colored People (NAACP) concluded that police officers have increasingly come to rely on race as the primary indicator of suspicious conduct and dangerousness, and that verbal abuse and harassment seem to occur almost every time a minority citizen is stopped by a police officer. *See id.* The NAACP found that law-abiding black parents warn their children about the police, and that the average African-American family does not know whether they should call the police, stop for the police, or help the police—all for fear of becoming a target of police misconduct themselves. *See id.*

[218] *See Brown*, 195 F.3d at 120; Flagg *supra* note 152, at 197.

[219] *See Brown*, 195 F.3d at 120.

[220] *See* HARRIS, *supra* note 25, at 36.

[221] *See id.* at 14–22.

[222] *See id.*

[223] *See id.*

[224] *See* Russell, *supra* note 24, at 600.

police work in alliance against minorities, exacerbating the perceived threat posed by street officers.[225]

Several months after issuing its shocking initial opinion, the Walker panel issued a sparsely amended opinion that sharply reversed the initial denial of several plaintiffs' Fourth Amendment claims.[226] The new opinion added placatory language that empathized with "innocent plaintiffs" that might have been humiliated in the Oneonta criminal investigation.[227] Conduct once described as merely "rude" and "brief" by the court was now characterized in the new opinion as unconstitutionally "compulsory."[228]

But despite its grudging willingness to consider the subjective perspective of the innocent victims of the police sweep, the *Brown* court still refused to acknowledge the overarching racial perceptions and discriminatory bias in the case.[229] At no point, for instance, did the opinion explicitly address the issue of race or racial perceptions in the police stop.[230] Nor did the amended opinion recognize any discriminatory motive in conducting the police sweep.[231] The new opinion simply reiterated Judge Walker's reasoning that "defendants' policy was race-neutral on its face" and lacked "evidence of discriminatory animus."[232]

This amended outcome in *Brown* offers scant hope for future plaintiffs—as evinced by circuit judge Chester J. Straub's dissent in a subsequent denial of rehearing en banc by the Second Circuit.[233]

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[225] *See* Flagg, *supra* note 152, at 197; Russell, *supra* note 24, at 600.

[226] *See* Brown v. Oneonta, 221 F.3d 329, 341 (2d Cir. 2000).

[227] *See id.* at 339.

[228] *Compare Brown*, 221 F.3d at 340–42, *with* Brown v. Oneonta, 195 F.3d 111, 121–23 (2d Cir. 1999). A comparison of the amended and original opinions in *Brown* reveals a dramatic reversal in the three judge panel's analysis of the plaintiffs' Fourth Amendment claims. *Compare Brown*, 221 F.3d at 340–41, *with Brown*, 195 F.3d at 122. For Ricky Brown's claim, Judge Walker's original opinion stated, "While it is a closer case than some, we agree with the district court that no seizure occurred . . . ." *Brown*, 195 F.3d at 122. In contrast, Judge Walker's amended opinion concluded that "a reasonable person in Brown's position—directed to return by one of the police officers who, just moments before, had encircled him—*would not have felt free to leave. Brown*, 221 F.3d at 341 (emphasis added). Although Chief Judge Walker authored both opinions, he offered scant reasoning to support the court's dramatic reversals on the Fourth Amendment claims. *See id.* While it is possible that the amended opinion implicitly incorporated the racial dynamics of the police encounter, the court made no mention of such perceptions. *See id.*

[229] *See Brown*, 221 F.3d at 336–39 (upholding denial of Equal Protection claim).

[230] *See id.* at 336–42 (omitting discussion of racial perceptions or bias).

[231] *See id.* at 342.

[232] *Id.* at 338–39.

[233] *See* Brown v. Oneonta, 235 F.3d 769, 789 (2d Cir. 2000) (dissenting against denial of rehearing en banc).

Judge Straub worried that although the Walker court had managed to reverse some of its earlier inequitable decisions, the new opinion nevertheless arrived at a "grave conclusion" by failing to recognize discriminatory animus in an investigation "based on a witness's predominantly racial description."[234] Urging his colleagues to reconsider the decision, the judge went on to say that "[t]he judges of this Court obviously disagree sharply over the serious and difficult constitutional questions presented in this case, which appear to be of first impression in this Circuit and every other. For that reason alone, if not for any other, this case would seem to demand *in banc* reconsideration."[235] The reconstituted *Brown* decision, therefore, is far from a panacea for aggrieved minority plaintiffs in the racial profiling context.[236]

However, the United States Supreme Court has shown some willingness of late to slow down its expansion of police discretion under the Fourth Amendment.[237] In *Florida v. J.L.*, the Court issued a unanimous ruling that an officer may not stop and frisk a pedestrian based only on an anonymous caller's tip.[238] In *J.L.*, an anonymous caller reported that a black male wearing a plaid shirt near a pawn shop had a concealed gun.[239] A short while later, police officers spotted a male who fit the caller's description and ordered him to put his hands on a bus shelter.[240] An officer then noticed a gun protruding from the suspect's left pocket, and arrested the boy, referred to only as J.L. in the court record.[241]

At trial, the boy (who, at the time of the arrest, was ten days shy of his sixteenth birthday) was charged under state law with carrying a concealed firearm without a license, and with possessing a firearm while under the age of eighteen.[242] His counsel subsequently moved to suppress the gun as the fruit of an unlawful search, and both the trial court and Florida Supreme Court upheld the motion under the Fourth Amendment.[243]

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[234] *Id.* at 789.

[235] *Id.* at 791.

[236] *See id.*; Brown v. Oneonta, 221 F.3d 329, 339–42 (2d Cir. 2000).

[237] *See* Florida v. J.L., No. 98–1993, 2000 WL 309131, at *4–5 (2000); David G. Savage, *Supreme Court Curbs Police Power to Stop, Search Based on Tips,* BOSTON GLOBE, Mar. 29, 2000, at A3.

[238] *See J.L.*, 2000 W.L. 309131, at *5.

[239] *See id.* at *2.

[240] *See id.*

[241] *See id.*

[242] *See id.*

[243] *See J.L.*, 2000 WL 309131, at *2.

At the U.S. Supreme Court, Justice Ginsburg's majority opinion stated that the tip "lacked the moderate indicia of reliability" needed to admit the gun as evidence.[244] She reasoned that an accurate description of a subject's readily observable location and appearance was reliable to the extent that it helped police to correctly identify the person who the tipster meant to accuse.[245] Referring to *Terry*, she stated that the reasonable suspicion at issue in *J.L.* required that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.[246] In this instance, said Ginsburg, "[T]he single phone message 'left the police without a clue concerning the caller's knowledge or credibility. The Fourth Amendment is not so easily satisfied.'"[247] Moreover, she warned, a lenient rule for anonymous tips could allow innocent people to be targeted for embarrassing searches.[248]

In a rare but guarded rebuff to the police, the Court concluded that an anonymous tip, without a standard indicia of reliability, does not justify a stop and frisk under the Fourth Amendment.[249] The Court carefully limited its ruling to the facts of the case, refusing to speculate about circumstances under which the danger alleged in an anonymous tip might be so great (i.e., a call identifying someone carrying a bomb) as to justify a search even without a showing of reliability.[250] The Court also implied that the case might have been decided differently if the youth had been seen in an airport or on school grounds, where public safety concerns are greater and individuals cannot expect to have the same standard of privacy.[251]

The ruling in *J.L.* reminds us that there are indeed upper limits to police discretion under the Constitution.[252] However, it is important to remember that the Court's ruling in *J.L.* was narrow and hedged.[253] Had the anonymous caller given a name and reported other details that could have been checked, the search would probably have been upheld.[254] While *J.L.* may take a small step toward pro-

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[244] *Id.* at *3.
[245] *See id.* at *3–4.
[246] *See id.* at *4; Terry v. Ohio, 392 U.S. 1, 30 (1968).
[247] Savage, *supra* note 237, at A3 (quoting Justice Ginsburg).
[248] *See J.L.*, 2000 WL 309131, at *4.
[249] *See id.* at *5.
[250] *See id.*
[251] *See id.*
[252] *See id.*
[253] *See J.L.*, 2000 WL 309131, at *3–5.
[254] *See id.*

tecting the rights of minorities under the Fourth Amendment, it does not overrule over a decade of decisions giving officers great leeway to conduct abusive searches.[255]

D. *Protecting Police Discretion: The Importance of Law Enforcement*

In the effort to protect minorities from the dangers of race-ignorant Fourth Amendment decisions, judges must also stay attuned to the attitudes and objectives of police officers.[256] From a law enforcement standpoint, the Court's ruling in *J.L.* may well be horrifying to many.[257] One national police leader found the ruling "baffling," and said that it would leave officers and the public more vulnerable to gun-toting thugs.[258]

These concerns are no less relevant to proper Fourth Amendment analysis than the feelings of anger, mistrust and vulnerability experienced by people of color when subjected to unreasonable searches.[259] Although the Court's unwillingness to broaden police discretion in *J.L.* is encouraging, one cannot overlook the alarming realities that led up to the event: an adolescent boy was walking the streets of Miami carrying a gun in his pocket.[260] Thus, while courts must strive to develop a more sophisticated method of analyzing these Fourth Amendment and Equal Protection profiling claims, they must also avoid overly constraining police in the execution of their duties.[261]

A proposal for a more equitable interpretation of the Fourth and Fourteenth Amendments would not, however, discredit the essential tools of good policing: street-savvy, intuition and experience.[262] These factors help save many thousands of lives each year, including, as Justice Warren correctly noted in *Terry*, those of the police officers themselves.[263]

Furthermore, some commentators note that members of poor black communities are often the ones most frequently in need of ef-

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[255] *See id.* (citing cases from Terry v. Ohio, 392 U.S. 1 (1968) to Alabama v. White, 496 U.S. 325, 332 (1990)).

[256] *See* Savage, *supra* note 237, at A3.

[257] *See id.*

[258] *See id.*

[259] *See Terry*, 392 U.S. at 23–24 n.21 (noting that it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties).

[260] *See J.L.*, 2000 WL 309131, at *2–6; Savage, *supra* note 237, at A3.

[261] *See J.L.*, 2000 WL 309131, at *2–6; Savage, *supra* note 237, at A3.

[262] *See J.L.*, 2000 W.L. 309131, at *4 (recognizing danger of firearms).

[263] *See* 392 U.S. at 22–23.

fective policing.[264] Professor Randall Kennedy addresses this trend by stating that "[t]he most lethal danger facing African Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity."[265] Although Kennedy perhaps overstates the black cry for police protection (indeed many blacks in our nation's most beleaguered inner-cities may have abandoned hope of police protection) he accurately highlights the importance of effective policing in the minority community.[266]

But, as unwise as it would be to adopt an extreme position that runs counter to the goals of public safety, good police work and effective law enforcement, courts must still do more to recognize the negative stereotypes and attitudes that drive some police behavior.[267] Moreover, judges have to be cognizant of how public opinion in the profiling context creates a cloud of bias that affects encounters between police and minorities on our nation's streets.[268] Katheryn Russell notes that this public bias encourages an "us-versus-them" sentiment among police officers and the public, which challenges the credibility of black claims of harassment, while making blacks increasingly suspicious of police motives.[269] Characterizations that demonize rogue officers while romanticizing dangerous criminal offenders will only arouse more anger, fear, and distrust, instead of inspiring more sophisticated decision-making by police and courts.[270]

Critics who support expanding police discretion would argue that the interests of effective crime fighting require us to use the best means available to fight crime.[271] The argument supposes that since half of those imprisoned in this country for drug offenses are African American, stopping a disproportionate number of African-American motorists is not racist, but is rather good police work.[272] Author Lisa Walter notes that this argument "not only admits the use of race as a proxy for criminality, but also argues that it is natural or proper to do so."[273]

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[264] *See* Kennedy, *supra* note 179, at 1259.

[265] *Id.*

[266] *See id.*; Sklansky, *supra* note 209, at 314 n.203.

[267] *See* HARRIS, *supra* note 25, at 1–8.

[268] *See* Russell, *supra* note 24, at 600.

[269] *See id.*

[270] *See id.*

[271] *See* Walter, *supra* note 24, at 265–66.

[272] *See id.*

[273] *Id.* at 266.

Courts must guard against such use of racial proxies as they consider the scope of police discretion.[274] A more careful and sophisticated approach to Fourth Amendment and Equal Protection analysis will enable courts to do this while better assessing when police officers have committed constitutional violations.[275]

Rather than adopting a "distinctive stance characterized by hostility toward the agencies of crime control, sympathetic identification with defendants and convicts, and a commitment to policies aimed at narrowly constraining the powers of law enforcement authorities," an approach that looks closely at racial attitudes involved in Fourth Amendment and Equal Protection cases can still secure the public good of effective law enforcement.[276]

IV. Recalibrating the Reasonableness Standard of the Courts

A heightened awareness of inherent bias among judges, perceptions of fear and distrust of police among minorities, and the attitudes and objectives of law enforcement officials would enable courts to make more equitable decisions in the search and seizure context.[277] As Barbara Flagg recommends, judges need to adopt a more skeptical outlook on race neutrality in order to accomplish this.[278] Courts must thus recalibrate standards of reasonableness used to adjudicate profiling cases in two ways.[279] First, judges must evaluate cases with an awareness that it is both harmful and unfair to presume that true race-neutrality exists in the courtroom and on the streets.[280] Second, judges must adjudicate such cases with an understanding of how racial attitudes held by police and by people of color contribute to violations of the Fourth and Fourteenth Amendments.[281]

Another way to conceptualize this shift in thinking might be for courts to recognize that the notion of police infringement on rights is not easily quantifiable or disposed of by race-ignorant decision-making.[282] Encounters between white police and black detainees, for instance, can frequently be dynamic situations influenced by a broad

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[274] *See id.*
[275] *See id.* at 265–66.
[276] Kennedy, *supra* note 179, at 1258.
[277] *See* discussion *supra* Parts II, III.
[278] *See* Flagg, *supra* note 152, at 203.
[279] *See id.*
[280] *See id.*
[281] *See id.*
[282] *See id.*

variety of overt and subtle racial factors.[283] Rarely should such intrusions invite as cold and unflinching a response as that offered by courts that would impose race-ignorant standards.[284] Instead, judges should develop a broader reasonableness standard through a more searching assessment of how feelings of fear, danger, vulnerability and even prejudice might make a detainee feel powerless in a search and seizure situation.[285] Likewise, if it were easier to understand role reversals in cases like *Brown*, judges might more readily consider how they would respond to similar police actions in their own neighborhoods.[286] Unfortunately, because many judges do not recalibrate their perceptions to understand how minority plaintiffs might see police actions, they often overlook constitutional harms suffered by those plaintiffs.[287]

The fear and detention factors used in Fourth Amendment seizure cases should not be considered solely from a judge's race-neutral standpoint.[288] Fair decision-making requires something more.[289] Judges must do more to place themselves in the shoes of minority plaintiffs, utilizing a heightened standard for legal and factual review.[290] More importantly, judges must be aware that their race-neutral standards might not be as free of racial bias as the adjudicatory process necessitates.[291] Under a more careful, race-sensitive inquiry, a judge such as *Brown's* Judge Walker might more easily see how an innocent person of color could consider herself seized or discriminated against when aggressively approached by police in her home, in a car, on the bus, or in the street.[292]

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[283] *See* Flagg, *supra* note 152, at 203; Kennedy, *supra* note 179, at 1258; Russell, *supra* note 24, at 600.

[284] *See* Whren v. United States, 517 U.S. 806, 813 (1996); Terry v. Ohio, 392 U.S. 1, 24–27 (1968); Brown v. Oneonta, 195 F.3d 111, 119 (2d Cir. 1999), *amended and vacated by* Brown v. Oneonta, 221 F.3d 329, 338 (2d Cir. 2000).

[285] *See* Flagg, *supra* note 152, at 203; Kennedy, *supra* note 179, at 1258; Russell, *supra* note 24, at 600.

[286] *See Whren*, 517 U.S. at 813; *Terry*, 392 U.S. at 24–27; *Brown*, 195 F.3d at 119.

[287] *See Whren*, 517 U.S. at 813; *Terry*, 392 U.S. at 24–27; *Brown*, 221 F.3d at 341–43.

[288] *See* Flagg, *supra* note 152, at 197–99; Kennedy, *supra* note 179, at 1258–59; Russell, *supra* note 24, at 600; Thompson, *supra* note 29, at 956–99.

[289] *See* Flagg, *supra* note 152, at 197–99; Kennedy, *supra* note 179, at 1258–59; Russell, *supra* note 24, at 600; Thompson, *supra* note 29, at 956–99.

[290] *See* Flagg, *supra* note 152, at 197–99; Kennedy, *supra* note 179, at 1258–59; Russell, *supra* note 24, at 600; Thompson, *supra* note 29, at 956–99.

[291] *See* Flagg, *supra* note 152, at 197–99; Kennedy, *supra* note 179, at 1258–59; Russell, *supra* note 24, at 600; Thompson, *supra* note 29, at 956–99.

[292] *See Brown*, 221 F.3d at 341–42.

Conclusion

As a general trend, the legacy of racial profiling cases describes an history of judicial deference to police discretion.[293] In situations involving members of the minority community and the police, many of these outcomes have been skewed by the imposition of race-ignorant judicial standards in Fourth and Fourteenth Amendment analysis.[294] These standards of reasonableness routinely ignore racial dynamics and assume that judicial impartiality is not vulnerable to its own racial biases.[295]

In order to achieve more equitable results under the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment, judges need to move away from ideological assumptions of sameness.[296] In turn, they must utilize a reasonableness standard that permits a more sophisticated understanding of racial perceptions.[297] By gaining an understanding of what Professor Sylvia Vargas calls "the full complexity of difference," judges can better resolve conflicts between the races.[298]

But exactly how should such a process be implemented? What would be the best mechanism for enhanced judicial scrutiny of search and seizure cases? One challenge facing judges seeking change is how to factor difficult racial attitudes and perceptions into legal analyses. Most judges simply lack familiarity with diverse cultures.[299] An erroneous assessment of an individual's racial perceptions might induce a court to hold that a reasonable search was unreasonable, or vice-versa. Even worse, an over-emphasis on racial perceptions might itself give rise to a host of new biases.[300] In light of this difficulty, it is challenging, if not impossible to design a bright-line standard for factoring subjective racial perceptions into a Fourth Amendment and indeed, an Equal Protection analysis.[301]

A sensible starting point for judges might be to simply challenge their own notions of race-neutral objectivity in Fourth Amendment

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[293] *See* Whren v. United States, 517 U.S. 806, 813 (1996); Terry v. Ohio, 392 U.S. 1, 27 (1968); *Brown*, 221 F.3d at 341–42; Flagg, *supra* note 152, at 199–203.

[294] *See* Flagg, *supra* note 152, at 199–203.

[295] *See id.*

[296] *See* Vargas, *supra* note 157, at 1495.

[297] *See* Flagg, *supra* note 152, at 203; Vargas, *supra* note 157, at 1495.

[298] Vargas, *supra* note 157, at 1505.

[299] *See* Flagg, *supra* note 152, at 197.

[300] *See id.* at 201. Flagg's sophisticated inquiry could be vulnerable to overzealous application. *See id.*

[301] *See id.*

and Equal Protection cases.[302] To begin to question how overriding beliefs and life experiences create views that infiltrate the courtroom. Judges can and should take proactive steps, through workshops and sensitivity training, to learn more about the diverse individuals who appear before them. By taking a critical look at the assumptions that infiltrate ostensibly objective standards, judges might begin to develop a better understanding of racial dynamics.[303] This sophisticated method of review would allow judges to see behind abusive police stops and help balance the scales of equity for all Americans.[304]

[302] *See id.*

[303] *See id.* at 203.

[304] *See* Flagg, *supra* note 152, at 203.