RACE AND REASONABLE SUSPICION

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Abstract

The current political moment requires society to rethink the ways that race impacts policing. Many of the solutions will be political in nature, but legal reform is necessary as well. Law enforcement officers have a long history of considering a suspect's race when conducting criminal investigations. The civil rights movement and the progressive criminal justice decisions of the Warren Court mitigated the explicit use of race as a factor, but there is ample evidence that many modern police officers still openly or implicitly use race to guide their investigative decisions.

This Article examines and critiques how courts have historically analyzed the question of race in the context of determining reasonable suspicion or probable cause. There are two constitutional provisions that regulate whether and how the police can use race as a factor to meet the legal standards: the Fourth Amendment and the Equal Protection Clause. Under the Fourth Amendment, police can only use race as a factor if race is relevant to the likelihood that the suspect is engaged in criminal activity. In theory, there could be a relationship between race and criminal activity in a narrow subset of cases. But in reality, police and courts rely on dubious anecdotal data to support this relationship and conduct flawed statistical analysis to calculate the strength of the relationship. Also, much of the data that exists is tainted by decades of biased policing and prosecuting. Because there is a small subset of cases in which a correlation between race and crime may exist, this country needs a legal reform that requires prosecutors to demonstrate the existence and strength of the correlation through empirical data rather than through the subjective experiences of law enforcement.

Under the Equal Protection Clause, police officers may only explicitly use race to support individualized suspicion if the use of race is narrowly tailored to serve a compelling state interest and there is no race-neutral factor that would also satisfy that interest. Although one would expect this standard to severely limit the use of race in criminal investigations, courts have allowed police to use race in a surprising number of cases. In many cases, courts do not even find that the explicit use of race triggers strict scrutiny. In other cases, when so-called race neutral factors trigger disparate impact, the evidentiary burden shifts to criminal defendants to

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prove that the race-neutral factor was applied with discriminatory purpose—a standard which is nearly impossible to establish. Even when strict scrutiny is triggered, courts have often been willing to conclude that crime control is a compelling state interest and that the use of race is narrowly tailored to meet that interest. This Article argues that courts in criminal cases must apply an Equal Protection test identical to the test used in civil cases in order to limit the use of race in criminal investigations, thereby limiting the practice to the rare instances when it is truly necessary.

INTRODUCTION

This country is undergoing a long-overdue examination of race and policing. This examination reaches into every aspect of policing, from how officers use force to where police departments choose to spend their resources. The current movement even questions the continued existence of police forces as in their current form, with many advocates arguing that the systemic racism found throughout the criminal justice system

mandates the creation of new agencies with completely different conceptions of law enforcement and public safety.[1]

Most of these changes will be the result of political action, whether from city councils, state legislatures, or even federal intervention. But in addition to the new legislative rules that will be created to govern police conduct, courts must also challenge some longstanding legal principles regarding race and criminal justice. Specifically, courts need to re-examine whether and under what circumstances police can consider a suspect's race[2] when conducting a criminal investigation.

Conventional wisdom dictates that the Constitution precludes law enforcement from relying on race. However, the question of whether a suspect's race can be a factor in determining probable cause—or its less robust cousin, reasonable suspicion—is more complex than it first appears. Courts are divided as to when it is appropriate for police officers to use race in determining whether to stop or search a suspect, and legal

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1. *See* Rashawn Ray, *What Does 'Defund the Police' Mean and Does It Have Merit?*, BROOKINGS: FIXGOV (June 19, 2020), https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/R8CW-NNCN].

2. Traditionally, the United States has defined race according to the "one-drop rule," wherein a person is considered Black if anyone at all in their ancestry is Black, i.e., even a "drop" of Black blood makes someone Black. *See* Gordon Hodson, *Race as a Social Construction*, PSYCH. TODAY (Dec. 5, 2016), https://www.psychologytoday.com/us/blog/without-prejudice/201612/race-social-construction [https://perma.cc/3PZB-YLGN]. Accordingly, American society has operated as though race is defined by genetic differences. *See* Megan Gannon, *Race Is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/ [https://perma.cc/E9ZL-MZDU]. However, the prevailing view among scientists today is that race is merely a social construct with no biological basis. *Id.* ("What the study of complete genomes from different parts of the world has shown is that even between Africa and Europe, for example, there is not a single absolute genetic difference, meaning no single variant where all Africans have one variant and all Europeans another one, even when recent migration is disregarded . . . ."). Race, in other words, is not inherent; rather, it is a psychological concept based on "rules" that society has agreed on about what it means to be "white" or "black." *See* Hodson, *supra*. That is not to say that race is not "real." *Id.* "On the contrary, it has very real meaning and is of psychological, political, and legal significance," *id.*, as evidenced by the glaring disparities between white and Black Americans in government representation, healthcare, pay, and more, *see* Katherine Tate, *The Political Representation of Blacks in Congress: Does Race Matter?*, 26 LEGIS. STUD. Q. 623, 623 (2001); Angela Hanks et al., *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018, 9:03 AM), https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/ [https://perma.cc/3QDG-4GDP]; Risa Lavizzo-Mourey & David Williams, *Being Black Is Bad for Your Health*, U.S. NEWS & WORLD REP. (Apr. 14, 2016), https://www.usnews.com/opinion/blogs/policy-dose/articles/2016-04-14/theres-a-huge-health-equity-gap-between-whites-and-minorities [https://perma.cc/D7SS-N76Y]. Simply put, race is real in the psychological sense, not the biological sense. Subsequently, when it comes to reasonable suspicion or probable cause based on race, it is not the suspect's "biological" race (as there is no such thing) that will influence the law enforcement officer's decision but rather the race as *perceived* by the law enforcement officer.

standards vary depending on context.[3] In some circumstances, such as conducting *Terry* stops,[4] courts have not only held that race is irrelevant under the Fourth Amendment, but also that using race as a factor in determining individualized suspicion violates the Equal Protection Clause.[5] In other contexts, such as profiling suspected drug couriers or terrorists, courts have reluctantly allowed race to be a legitimate factor in determining reasonable suspicion.[6] And in the immigration context, the U.S. Supreme Court has explicitly allowed the use of race as a factor, holding that it "clearly is relevant" to the criminal investigation.[7]

Police using race to direct criminal investigations is nothing new. Law enforcement agencies have a long history of relying on a suspect's race.[8] While the civil rights movement and the progressive criminal justice decisions of the Warren Court mitigated the explicit use of race as a factor in criminal investigations, there is ample evidence that many law enforcement investigations still openly or implicitly consider the suspect's race.[9]

This Article examines and critiques courts' analysis of race in the context of determining reasonable suspicion or probable cause. There are two constitutional provisions that regulate whether and how the police can use race as a factor to guide their criminal investigations: the Fourth Amendment and the Equal Protection Clause. Under the Fourth Amendment, police can only use race as a factor if race is relevant to the likelihood that the suspect is engaged in criminal activity.[10] Theoretically, race could be a relevant factor to this analysis; in practice, however, courts have an extremely poor track record in appropriately analyzing this factor. Courts have often given too much weight to anecdotal data and

3. *See infra* notes 59–60 and accompanying text. All courts agree that if an eyewitness indicates that the perpetrator was a certain race, police can use race as a factor in determining whether to stop or arrest a suspect—but even that practice can be problematic. *See infra* notes 61–78 and accompanying text.

4. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968). In this context, *Terry* stops include traffic stops.

5. *See infra* notes 50–52, 177 and accompanying text.

6. *See infra* notes 96–106 and accompanying text.

7. United States v. Martinez-Fuerte, 428 U.S. 543, 564 n.17 (1976)*; see also* United States v. Brignoni-Ponce, 422 U.S. 873, 885–86 (holding that Mexican ancestry alone was not enough to justify a stop). For a further discussion of these cases, see *infra* notes 132–36 and accompanying text.

8. *See infra* notes 19–27 and accompanying text.

9. *See infra* notes 28–29 and accompanying text.

10. *See* Whren v. United States 517 U.S. 806, 813–14, 817 (1996) (stating that selective enforcement of the law cannot be based on race); *Brignoni-Ponce*, 422 U.S. at 886–87 (admitting that race could be a factor in enforcing immigration laws because race was relevant to the likelihood that one was here illegally).

have frequently misused statistical data when it is available.[11] Furthermore, much of the statistical data that exists is tainted by biased policing and prosecuting.[12] This Article argues that the state should bear the burden of proving both the existence and the strength of any correlation through actual data rather than relying on arresting officers' subjective experiences. Courts should also adopt a reliable and consistent methodology when applying that data.

Under the Equal Protection Clause, police can only use race as a factor if their use of race is narrowly tailored to serve a compelling state interest and no race-neutral alternative is available.[13] In theory, this constitutional standard should severely limit the use of race. But in the criminal law context, the Equal Protection jurisprudence is inconsistent. Some courts conclude that crime control is a compelling state interest and then apply a lenient standard in their analysis of whether the use of race is narrowly tailored to meet that interest.[14] Other courts require defendants to prove a discriminatory purpose, which can be extremely difficult in the law enforcement context.[15] Still other courts fail to apply the Equal Protection Clause at all, relying only on the Fourth Amendment to determine whether the use of race is appropriate.[16] This Article proposes specific criteria as to how courts should apply the Equal Protection Clause when evaluating the use of race in criminal investigations.

Part I briefly examines the various ways in which police have used race in criminal investigations. Part II reviews how courts have applied the Fourth Amendment to race in criminal cases and examines the conditions under which race could potentially be a legitimate factor for police to consider in their investigations. This discussion gives special attention to the immigration context. Immigration cases involve a strong argument for using race as a legitimate factor under the Fourth Amendment, but they also expose the most obvious fallacies in courts' analyses.[17] Part III examines the application of the Equal Protection Clause in the criminal justice context, noting the sparse number of criminal procedure cases that have even applied the Equal Protection Clause, and then discussing the challenge of applying generalized Equal Protection doctrine to the early stages of criminal investigations. Finally, Part IV proposes changes to the way in which courts approach the

11. *See infra* notes 36–39, 52–55 and accompanying text. Much of this data is also tainted because, for a variety of reasons, racial minorities have disproportionate contact with the criminal justice system. *See infra* note 39 and accompanying text.

12. *See infra* notes 39, 123 and accompanying text.

13. *See infra* note 186 and accompanying text.

14. *See infra* notes 255–257, 273 and accompanying text.

15. *See infra* notes 209, 220 and accompanying text.

16. *See infra* note 272 and accompanying text.

17. *See infra* notes 135–172 and accompanying text.

question of using race as an acceptable factor in determining particularized suspicion.

I. A (VERY BRIEF) HISTORY OF RACE-BASED POLICING

For much of this country's history, sections of the substantive criminal law have explicitly discriminated against Black Americans;[18] thus, it was inevitable that law enforcement officers used race as a factor when investigating those crimes. Some scholars have argued that the modern-day police patrols can be traced to slave patrols in the southern colonies during the eighteenth century.[19] These patrols were empowered by all-white legislatures to search the homes of Black slaves and punish free Blacks who could not prove they were free.[20] The victims of these patrols were targeted solely because of their race.[21] Others have argued that modern police forces in the south during Reconstruction were created to control the newly freed Black citizens migrating from plantations into

18. There are several terms used to identify Black Americans, including African American, Black, or person of color. In a 2019 social media survey, most people said that "they would prefer to be recognized as Black before African-American or a Person of Color," stating that "it was more inclusive of the black experience in America, regardless of origin," while others preferred "African-American" to acknowledge both their origins in the African continent and their history on the American continent. Michael Quander & Lauryn Froneberger, *Black vs. African-American: The Complex Conversation Black Americans Are Having About Identity #ForTheCulture*, WUSA9 (May 30, 2019, 5:00 AM), https://www.wusa9.com/article/news/local/dc/black-vs-african-american-the-complex-conversation-black-americans-are-having-about-identity-forthe culture/65-80dde243-23be-4cfb-9b0f-bf5898bcf069 [https://perma.cc/W4M7-NXWB].

In today's world, "Black" seems to be the prevailing preference. *Id.*; *see also* Joshua Adams, *Why We Need to Stop Saying 'People of Color' When We Mean 'Black People*,*'* MEDIUM: LEVEL (Oct. 17, 2018), https://level.medium.com/we-should-stop-saying-people-of-color-when-we-mean-black-people-29c2b18e6267 [https://perma.cc/HA63-7YUJ] ("[The phrase 'people of color'] acknowledges how racism and white supremacy affect people from many groups, not just Black people, and is a platform for their collective shared experiences and concerns. However, it has its limits—and that's why we need to stop saying 'people of color' when we mostly (and sometimes only) mean 'Black people.' . . . Saying 'POC' when we mean 'Black people' concedes that there's a need to describe a marginalized group as 'less' Black for people to have empathy for an issue."). Accordingly, this Article uses the term "Black" throughout; ultimately, however, the appropriate term should be chosen by the individual being referred to.

19. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 336 (1998); Sidney Harring, *The Development of the Police Institution in the United States*, CRIME & SOC. JUST., Spring-Summer 1976, at 54, 57.

20. Mikah K. Thompson, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship Between African-Americans and the Police*, 85 UMKC L. REV. 697, 716 (2017); ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT 94, 109 (2006).

21. *See* Maclin, *supra* note 19, at 335.

cities.[22] According to this narrative, modern-day policing can trace its roots back to practices that were explicitly race-based.

After the civil war, southern states created a new set of laws, known as the "Black Codes," which in part imposed criminal punishment on Black Americans who engaged in specified activities such as "using insulting gestures or language" or preaching without a license.[23] These laws were eventually replaced by Jim Crow laws, which enforced formal segregation.[24] Since Jim Crow laws discriminated based on race, police officers legally targeted Blacks in enforcing them.[25] Although northern states were relatively free of explicitly race-based criminal codes, police in northern towns and cities often failed to enforce criminal laws when whites committed acts of violence against Blacks.[26] All of this contributed to a legacy in which police officers could act as the instruments of white supremacy, leading to a perception that "law enforcement exists to control Blacks rather than protect them."[27]

The civil rights movement and the subsequent repudiation of laws that explicitly discriminated on the basis of race has mitigated the use of race as a factor in law enforcement investigation,[28] but the practice persists. In recent history, the use of race in criminal investigations has been mostly, but not exclusively, implicit rather than explicit. Police officers use race and economic class, which is correlated to race, as a "proxy for criminality" and an "indicator of dangerousness."[29] As Professor Carol Steiker notes:

> [B]lacks found walking in white neighborhoods, traveling on interstate buses, or committing minor traffic offenses are

22. *See* Harring, *supra* note 19, at 56–57; *see also* Thompson, *supra* note 20, at 717 ("[T]he widespread existence of slave patrols in the South must be considered alongside the development of modern policing organizations in the North when describing the evolution of American law enforcement.").

23. Thompson, *supra* note 20, at 718 (quotation marks omitted) (quoting Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 160 (2001)).

24. *Id.* at 719.

25. *See id.*

26. *Id.* at 719–20.

27. *Id.* at 720.

28. The civil rights movement of the 1950s and 60s made it politically unpopular for police to use race as a factor in investigations or enforcement. Even during the protests of the civil rights movement, police could not respond too strongly, or they would encourage further protest. *See id.* at 721. The progressive decisions of the Warren Court also limited the ability of police to take race into account during criminal investigations. *See* Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & C.R.L. REV. 29, 34–35 (2010); Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627, 1632 (2006).

29. Carol S. Steiker, Response, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 840 (1994).

> much more likely to be stopped, searched, and subjected to brutal treatment than similarly situated white people. Moreover, prevalent racial segregation in housing allows for more aggressive and intrusive policing of black and other minority neighborhoods than of white or mixed communities . . . .[30]

Many courts have recognized the persistence of the use of race in criminal investigations.[31] Occasionally, law enforcement officers are transparent about the fact that they considered a suspect's race in their investigation;[32] more often, the reliance on race can be determined through statistical analysis.[33] Throughout the late twentieth century, some

30. *Id.* at 840–41 (footnotes omitted); *see also* Tracey Maclin, "*Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 253 (1991) ("Black men know they are liable to be stopped at any time, and that when they question the authority of the police, the response from the cops is often swift and violent. This applies to black men of all economic strata, regardless of their level of education, and whatever their job status or place in the community." (footnotes omitted)).

31. Holland, *supra* note 28, at 36 & n.35 (citing multiple cases); *see, e.g.*, United States v. Montero-Camargo, 208 F.3d 1122, 1135 n.24 (9th Cir. 2000) (en banc) ("A significant body of research shows that race is routinely and improperly used as a proxy for criminality, and is often the defining factor in police officer's decisions to arrest, stop or frisk potential suspects."); Chavez v. Ill. State Police, 251 F.3d 612, 635 (7th Cir. 2001) (discussing cases that recognize the existence of racial profiling and racial disparities); United States v. Bautista-Silva, 567 F.3d 1266, 1278 (11th Cir. 2009) (Barkett, J., dissenting) (finding that the facts known to the officer in the case "support nothing more than impermissible racial profiling that should never be used under our Constitution"); Martinez v. Village of Mount Prospect, 92 F. Supp. 2d 780, 784 (N.D. Ill. 2000) ("[C]ourts across the country are recognizing claims based on police use of racial profiling."); State v. Soto, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (finding a de facto policy of racially profiling minority motorists).

32. *See, e.g.*, Melendres v. Arpaio, 989 F. Supp. 2d 822, 825 (D. Ariz. 2013) (outlining a sheriff's office's policy of considering race as one factor during "immigration enforcement operations"), *adhered to by* No. CV–07–02513–PHX–GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013), *aff'd in part, vacated in part*, 784 F.3d 1254 (9th Cir. 2015); State v. Dean, 543 P.2d 425, 427 (Ariz. 1975) (discussing how race can be the "basis for an officer's initial suspicion," and outlining an instance in which a man was arrested after an investigation in which his race was considered); Bennett L. Gershman, *Use of Race in "Stop-and-Frisk": Stereotypical Beliefs Linger, But How Far Can the Police Go?*, N.Y. ST. BAR ASS'N J., March/April 2000, at 42, 42–43 (outlining how race has been used by police); German Lopez, *Police Officers Explain How They're Encouraged to Act in Racist Ways*, VOX (July 8, 2016, 12:10 PM), https://www.vox.com/2016/7/8/12128858/police-racism-officers-admit [https://perma.cc/3VVX-9ABH] (discussing an interview in which police admitted to targeting "vulnerable communities," such as people of color).

33. *See, e.g.*, REPORT OF THE BLUE RIBBON PANEL ON TRANSPARENCY, ACCOUNTABILITY, AND FAIRNESS IN LAW ENFORCEMENT 23–24, 28 (2016) [hereinafter BLUE RIBBON PANEL] (describing how the statistics reveal bias and racial disparities in searches, stops, and arrests). Studies show that law enforcement officers hold many of the same biases as the general public, and in implicit bias tests, patterns are nearly universal. *See* Megan Quattlebaum, *Let's Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer*, 14 STAN. J.C.R. & C.L. 1,

law enforcement officers explicitly used race when compiling profiles of drug couriers.[34] In the early twenty-first century, law enforcement began using race as a factor in terrorism investigations.[35]

Big data policing has ushered in an entirely new phase of the use of race in the criminal justice system. Police, prosecutors, and judges across the country are using predictive algorithms to determine where to allocate law enforcement resources, whether to set bail, and how long to sentence a defendant after conviction.[36] Although these algorithms may increase the efficiency and the accuracy of the system, they have also been

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12, 13 n.41 (2018). Black people (especially Black men) are more often associated with or quickly paired with being threatening, and this tends to hold true regardless of the race or ethnicity of the person taking the test. *See id.* at 12 & n.39. As a result, "Black and Hispanic people are more likely to be searched without consent than any other group, and, of those searched, Black and Hispanic people had the lowest 'hit rates.'" BLUE RIBBON PANEL, *supra*, at 23; *see also* COMM. ON PROACTIVE POLICING: EFFECTS ON CRIME, CMTYS. & C.L. & COMM. ON L. & JUST., NAT'L ACADS. OF SCI., ENG'G & MED., PROACTIVE POLICING 251 (David Weisburd & Malay K. Majmundar eds., 2018) ("The high rates at which non-Whites are stopped, questioned, cited, arrested, or injured by the police present some of the most salient criminal justice policy phenomena in the United States."); C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/R3ZJ-88K6] ("African Americans are more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables such as the reason the vehicle stop was initiated, but are found in possession of contraband 26% less often than white drivers, suggesting officers are impermissibly considering race as a factor when determining whether to search."); ELIZABETH DAVIS ET AL., U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 4 (2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf [https://perma.cc/DET4-2DVH] ("Blacks were more likely to be pulled over in traffic stops than whites and Hispanics."); Clarence Edwards, *Race and the Police*, NAT'L POLICE FOUND., https://www.policefoundation.org/race-and-the-police/ [https://perma.cc/59VL-PEF3] (discussing "the role implicit and overt biases have historically played in creating disparate law enforcement practices and the resulting frictions between African Americans and the police").

A related issue which is beyond the scope of this Article is that police officers are about three and a half times more likely to use lethal force against unarmed Blacks than against unarmed whites. *See* Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011–2014*, PLOS ONE (Nov. 5, 2015), https://journals.plos.org/plosone/article?id=10.1371%2Fjournal.pone.0141854 [https://perma.cc/9UTA-VKZG] ("Racial bias in police shootings in the United States has been widely noted in the sociological literature for many decades. Explanations range from implicit bias in the psychology of individual officers . . . the issue of 'minority threat' . . . [and] racial bias in profiling and encountering suspects . . . ." (footnotes omitted)).

34. *See infra* notes 97–101 and accompanying text.

35. *See infra* notes 102–106 and accompanying text.

36. *See* Shaila Dewan, *Judges Replacing Conjecture with Formula for Bail*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html [https://perma.cc/AJB7-7K66]; Christopher Slobogin, *Risk Assessment*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 196, 202–05 (Joan Petersilia & Kevin R. Reitz eds., 2012); *Algorithms in the Criminal Justice System: Risk Assessment Tools*, ELEC. PRIV. INFO. CTR., https://epic.org/algorithmic-transparency/crim-justice/ [https://perma.cc/7MB7-8CF6].

criticized for exacerbating, or at least reinforcing, the existing racial disparities in the criminal justice system.[37] While none of the predictive algorithms used by police and courts explicitly take race into account, many rely on data such as prior arrests or convictions in predicting future criminal activity.[38] But this underlying data is tainted because racial minorities have disproportionate contact with the criminal justice system and because of established biases in policing and prosecuting.[39] This means, of course, that the current predictive algorithms are merely the newest manifestation of an age-old problem that discriminates against non-white individuals. For decades, law enforcement officers have used race or factors correlated with race in making decisions about where to patrol, whom to investigate, and whom to arrest. Much of the time, police officers and courts have used race as a factor for the simplest and basest of reasons: to reinforce the subjugation of certain ethnic groups. But in at least some contexts, police officers and courts used race as a factor because they believed—rightly or wrongly—that it would help them make more accurate predictions about criminal behavior.

The rise of big data in the criminal justice system also helps to frame the question of race in the criminal justice system in the simplest of terms. Consider a thought experiment—one which could easily become reality sometime in the next decade. Assume that a company has developed an algorithm that can predict with great accuracy whether illegal drugs will be found inside a house. The algorithm requires the user to enter six different inputs, including the address where the house is located, any prior criminal convictions of the house's owner, and specific observations of police officers about activity outside the house. The algorithm also allows a user to input a seventh factor: the race of the house's owner. The algorithm has been tested on over a million cases, and the empirical evidence shows that without using the race factor, the algorithm is correct 40% of the time when it predicts the presence of drugs inside the house. If the algorithm uses race as a factor, its accuracy increases to 60%. The police have purchased this algorithm and they intend to use it during investigations and include its results in their search warrant applications. Should the courts permit the police to use race as a factor when operating the algorithm? If not, why not? If so, under what conditions?

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37. *See, e.g.*, ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING 47 (2017) ("[M]any of the variables [considered by criminal justice algorithms] directly correlate with racially discriminatory law enforcement practices."); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G. REP. 237, 237 (2015) ("[R]isk today has collapsed into prior criminal history, and prior criminal history has become a proxy for race.").

38. *See, e.g.*, Dewan, *supra* note 36.

39. *See* Harcourt, *supra* note 37, at 240. For example, although whites and Blacks use marijuana at the same rates, Blacks are 3.73 times more likely than whites to be arrested for marijuana possession. FERGUSON, *supra* note 37, at 48.

As noted in the introduction, the two constitutional provisions that regulate the use of race in criminal investigations are the Fourth Amendment and the Equal Protection Clause. Parts II and III examine the different ways courts have applied each of these provisions.

II. REGULATING THE USE OF RACE PART I: THE FOURTH AMENDMENT QUESTION

For Fourth Amendment purposes, law enforcement investigations can be divided into two stages. The first is the "pre-contact" stage, in which police officers make decisions about whom they should investigate but do not engage with a suspect in any way that implicates the Fourth Amendment. The second is the "contact" stage, for which the Fourth Amendment regulates the degree to which the officer can interact with the suspect and requires the officer to cite specific factors to justify the length and severity of the interaction.

The pre-contact stage includes deciding where and to what extent to allocate investigative resources and personnel and also when to engage in surveillance in public areas.[40] Contrary to its name, the pre-contact stage also includes some situations in which the police interact with a suspect, as long as the interaction does not implicate the Fourth Amendment.[41] For example, police may approach an individual to engage in a consensual conversation or ask a motorist for consent to search their car after a lawful, non-discriminatory stop. Since none of this behavior is regulated by the Fourth Amendment, the Fourth Amendment does not prohibit using race as a factor, even if it is the only factor, in the pre-contact stage of an investigation.[42]

Using race during the pre-contact stage often leads to discriminatory effects, since pre-contact decisions frequently evolve into contact situations like a *Terry* stop, a traffic stop, or an arrest. Thus, the use of

40. United States v. Travis, 837 F. Supp. 1386, 1391 (E.D. Ky. 1993), *aff'd*, 62 F.3d 170 (6th Cir. 1995).

41. *See* United States v. Avery, 137 F.3d 343, 353 (6th Cir. 1997).

42. *See, e.g.*, United States v. Taylor, 956 F.2d 572, 578 (6th Cir. 1992) (en banc) (finding that, when police approached the defendant outside the airport and asked to interview him and to search his bag, the initial encounter was consensual and thus "it is unnecessary to consider or decide . . . the specific factual question of whether the officers' surveillance of Taylor was motivated to any degree by his race"); United States v. Jennings, 985 F.2d 562, 1993 WL 5927, at *3 (6th Cir. 1993) (unpublished table decision) (describing how the Fourth Amendment is not implicated when a consensual interview takes place); Florida v. Royer, 460 U.S. 491, 497–98 (1983) (stating that a consensual conversation between an officer and a defendant in a public place is not alone sufficient to categorize the transaction as a seizure for Fourth Amendment purposes); United States v. Flowers, 909 F.2d 145, 147 (6th Cir. 1990) (per curiam) (finding a person's voluntary consent to a search of their belongings does not constitute a seizure under the Fourth Amendment); United States v. Collis, 766 F.2d 219, 221 (6th Cir. 1985) (per curiam) (finding that an officer's quest for voluntary information is not a seizure under the Fourth Amendment).

race in the pre-contact stage will often result in a disproportionate number of Blacks or Hispanics being stopped, arrested, and even prosecuted.

For example, in *United States v. Williams*,[43] the police used a drug courier profile which focused on travelers who were "(1) young African–American males; (2) arriving into Cleveland from Detroit; (3) using the Greyhound bus system; (4) arriving in the late evening or early morning hours; (5) carrying no luggage; and (6) not met by family members or acquaintances."[44] Given the innocent and relatively common occurrence of factors two through six, the dissent noted that this "profile" essentially meant that the police could follow any young, Black males who got off the bus at the Greyhound station.[45] In the *Williams* case itself, the police followed the two defendants for a period of time, and when the defendants saw the officers, the defendants fled and tried to dispose of a bag, which appeared to contain crack cocaine.[46] The officers then arrested the defendants based on the flight and their attempted disposal of the bag.[47] By the time the police took action, they had race-neutral reasons for making contact: the flight and attempted disposal of the bag. However, had the police not first identified the defendants using race during the pre-contact stage, the defendants would never have been surveilled and followed, and thus never would have been arrested.

Once law enforcement officers make "contact" with a suspect, often through a *Terry* stop, a traffic stop, or by targeting the suspect with a search or arrest warrant, the Fourth Amendment's restrictions come into play. The Fourth Amendment ensures that police conduct is "reasonable"—which usually means that law enforcement officers have demonstrated a sufficient level of individualized suspicion[48] to justify the search or seizure they are engaging in.[49] The Fourth Amendment analysis of whether law enforcement officers can use race as a factor at this stage requires answering an empirical question: Does the suspect's race increase the chance that he is engaging in criminal activity? If so, then the

43. 949 F.2d 220 (6th Cir. 1991).

44. *Id.* at 222 (Jones, J., dissenting). The issue of the Equal Protection Clause was only raised by a dissenting judge after a remand from the U.S. Supreme Court. *See id.* Like many Fourth Amendment cases involving the use of race in criminal investigations, the *Williams* majority did not even discuss the Equal Protection Clause in its Fourth Amendment analysis, although it did discuss the Equal Protection Clause when discussing a sentencing issue. *See* United States v. Williams, 916 F.2d 714, 1990 WL 159153, at *1, *4 (6th Cir. 1990) (per curiam) (unpublished table decision), *vacated*, 500 U.S. 901 (1991).

45. *Williams*, 949 F.2d at 222–23 (Jones, J., dissenting).

46. *Id.* at 221.

47. *Id.* at 222–23 (Jones, J., dissenting).

48. This Article will use the term "individualized suspicion" as a shorthand to refer to either reasonable suspicion (the level of individualized suspicion necessary for a *Terry* stop or a traffic stop) or probable cause (the level of individualized suspicion necessary for a search warrant or an arrest).

49. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

use of race in that context would be an acceptable factor under the Fourth Amendment.[50] Whether the factor in question is related to an immutable characteristic or a suspect class, such as race or religion, is irrelevant. As one court noted: "[T]he Fourth Amendment—unlike the Equal Protection Clause—imposes no a priori restriction on race-based governmental action."[51]

Although the Fourth Amendment does not bar the use of race as a factor for determining individualized suspicion, race is an irrelevant and thus illegitimate factor, unless the law enforcement officer can demonstrate a correlation between the suspect's race and the likelihood that the suspect is engaging in criminal activity. Historically, courts have allowed law enforcement officers to testify that particular factors increase the probability of criminal activity, even when officers base their testimony on subjective opinions supported by personal past experiences and unsupported by quantifiable evidence.[52] Judges then evaluate the

50. *See* Farag v. United States, 587 F. Supp. 2d 436, 462 (E.D.N.Y. 2008).

51. *Id.* at 461; *see also* Whren v. United States, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Some commentators have disagreed, arguing that singling out specific groups should be considered "unreasonable" under the Fourth Amendment. For example, Professor Anthony C. Thompson notes that "one of the primary concerns of the framers was that the state should not exercise its search powers against those who are not members of the established majority," and that the Fourth Amendment was drafted in part to ensure that less-enfranchised individuals, such as Quakers, would not be subject to disparate treatment. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 991, 996 (1999); *see also* Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 932 (2015) (arguing that the values of the Fourteenth Amendment inform what is reasonable under the Fourth Amendment); Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1435–36 (2018) (arguing that individualized suspicion cannot be based on generalized views of a racial group). However, the modern Supreme Court has not interpreted the Fourth Amendment in this way.

52. *See, e.g.*, Seth Stoughton, *Evidentiary Rulings as Police Reform*, 69 U. MIAMI L. REV. 429, 457–59 (2015) (describing how a police officer's use of personal experiences may present problems when relying on their expert testimony). Professor Stoughton notes that courts often allow police officers to use "cop knowledge" of questionable reliability when testifying. *Id.* at 458–59. For example, some officers testify that individuals carrying a weapon "tend to be heavy on one side." *Id.* at 458. One officer relied upon similar cop knowledge when justifying a *Terry* stop when he testified that he could tell the suspect was armed based on the "distinctive way that the defendant stepped up onto a curb." *Id.* When the judge asked the officer whether he had tested this technique, the officer admitted that out of fifty people whom he had stopped based on this "distinctive step," only one was armed. *Id.*; *see also* Ana Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2025–27 (2017) (tracing the history of how courts have relied on police "expertise" when determining whether reasonable suspicion or probable cause exists).

legitimacy and strength of these factors, often incorporating their own subjective beliefs about the strength of the correlation between the factors and criminal activity.[53] For example, officers may testify that a particular encounter occurred in a "high crime area" to help build a case for reasonable suspicion, without providing any data to support the assertion that the neighborhood experiences more crime than other areas.[54] Many scholars criticize such anecdotal evidence as being insufficiently precise and susceptible to abuse.[55] In past decades, the absence of independently verifiable data meant that judicial reliance on the officer's personal opinion could be accepted as a necessary evil.[56] In the absence of empirical data, courts had little on which to rely besides the expertise of the police who patrolled the streets daily and therefore had a "feel" for identifying potential indications of criminal activity.[57] Today, however, law enforcement officers and courts should have access to a wide array of data that can statistically link specific factors to the presence of crime.[58] Thus, in the modern era, courts should be more exacting in reviewing the factors that law enforcement officers cite when trying to

53. *See* Lvovsky, *supra* note 52, at 2025–26, 2029, 2058–59.

54. *See, e.g.*, People v. Bower, 597 P.2d 115, 119–20 (Cal. 1979) (cautioning skepticism when a police officer uses "high crime area" as a factor, since this factor is open to abuse by police officers and the officer's own prior arrests in the area may have been improper or not resulted in a conviction), *superseded in part by constitutional amendment*, Proposition 8 (1982) (codified at CAL. CONST. art. I, § 28(f)(2)).

55. Recent empirical studies of the use of "high crime area" as a factor in investigative stops confirm that this subjective and imprecise standard is useless in actually predicting whether criminal activity is afoot. *See* Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 345–46 (2019) ("[W]e find evidence that officers often assess whether areas are high crime using a very broad geographic lens; that they call almost every block in the city high crime; that their assessments of whether an area is high crime are nearly uncorrelated with actual crime rates; that the suspect's race predicts whether an officer calls an area high crime as well as the actual crime rate; that the racial composition of the area and the identity of the officer are stronger predictors of whether an officer calls an area high crime than the crime rate itself; and that stops are less or as likely to result in the detection of contraband when an officer invokes high-crime area as a basis of a stop."); Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1642 (2008) (recommending that courts demand objective and verifiable empirical evidence proving that an area is a high crime area before considering it a valid part of the reasonable suspicion analysis).

56. *See* Ferguson & Bernache, *supra* note 55, at 1607–09, 1615–16.

57. *See id.* at 1607–08, 1614.

58. *See, e.g.*, Grunwald & Fagan, *supra* note 55, at 353 (noting how devices could inform patrol officers when they are in a high crime area based on crime data and departmental policy).

establish reasonable suspicion or probable cause, setting standards that require actual data rather than anecdotal evidence or subjective beliefs.[59]

Whether judges approve of using race as a factor in criminal investigations depends not only on the type of data that law enforcement present, but also law enforcement's underlying theory as to why race is relevant to criminal activity in any given case. Law enforcement officers usually rely on one of three theories: the suspect's race was part of an eyewitness identification; the suspect's race is an "incongruency" that creates or contributes to reasonable suspicion; or members of a particular race are more likely to commit a particular type of crime, often as part of a criminal profile used by the police.[60] This Article considers each of these theories in turn.

A. *Eyewitness Identification by Race*

Law enforcement officers use race as a factor when searching for a suspect when eyewitnesses include race as part of the description of a perpetrator.[61] This use of race has generally been uncontroversial because it treats race no differently from other identifying characteristics, such as height or hair color.[62] However, because race is such an easily identifiable

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59. Some commentators have argued that implicit bias makes it very difficult for judges to be accurate in using race as a predictor. *See, e.g.*, Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1420, 1434–35 (1979) ("[D]ecisionmakers may be influenced by negative views about minority racial groups to make negative predictions even when the predictive power of race is nonexistent.").

60. This taxonomy is adapted from Professor Sheri Johnson's article. *See* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 225–26, 233 (1983). Professor Johnson creates another category of "illegal aliens," and concludes that the Fourth Amendment allows using race as a factor when law enforcement officers attempt to detect illegal immigration by using race as a factor. *Id.* at 230–33. As noted below, the Author believes Professor Johnson is incorrect in carving out a separate category for the crime of illegal immigration. *See infra* note 91.

Professors Samuel Gross and Debra Livingston include another category: "Underworld Segregation," based on the premise that certain criminal organizations are comprised almost exclusively of a certain ethnicity. Samuel R. Gross & Debra Livingston, Essay, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1433 (2002). This is a relatively rare situation, and when it does occur, the practice fits into the criminal profile category, since it is simply another way of arguing that individuals of a certain ethnicity are more likely to commit a given crime.

61. Johnson, *supra* note 60, at 225–26; *see, e.g.*, Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 2000) (finding that plaintiffs were questioned because a crime victim identified the perpetrators by race, gender, and age); People v. Johnson, 478 N.Y.S.2d 987, 992–93 (App. Div. 1984) ("Where a suspect has been described by his race, it is 'a characteristic which may properly be used as one element of identification.'" (quoting Franklin v. State, 374 So. 2d 1151, 1154 (Fla. Dist. Ct. App. 1979))).

62. *See, e.g.*, United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995) ("[R]ace or ethnic background may become a legitimate consideration when investigators have information on this

characteristic, and because of pre-existing prejudices against particular ethnic groups, the use of race as an identifying factor is subject to abuse even in this seemingly straightforward context. The most infamous modern-day example of this abuse is *Brown v. City of Oneonta*.[63] In *Brown*, police obtained a description from an assault victim that the perpetrator was a young Black man who had a cut on his hand from the attack.[64] After a canine unit tracked the perpetrator's scent in the direction of a nearby college campus, the police obtained a list of every Black male student on campus.[65] They then attempted to question every student on the list.[66] When that tactic failed to find the perpetrator, the police patrolled the town of Oneonta for the next few days, stopping every non-white person they encountered on the street and inspecting their hands for cuts.[67] The individuals on the list of students and many of the individuals who were stopped on the street later brought a § 1983 class action lawsuit, alleging in part that the police violated their rights under the Fourth Amendment and the Equal Protection Clause.[68]

Oneonta is a striking example of how using race as an identifying factor can lead to discriminatory harassment, even when there is an established link between the race of the suspect and the perpetrator of the crime.[69] In addition, *Oneonta*'s unusual fact pattern provides the first useful case study in examining the legal interaction between race and individualized suspicion. Some of the initial police activity did not implicate the Fourth Amendment at all.[70] Obtaining a list of Black

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subject about a particular suspect."); *see also* Gross & Livingston, *supra* note 60, at 1415 ("It is not racial profiling for an officer to question, stop, search, arrest, or otherwise investigate a person because his race or ethnicity matches information about a perpetrator of a specific crime that the officer is investigating. That use of race—which usually occurs when there is a racially specific description of the criminal—does not entail a global judgment about a racial or ethnic group as a whole."). Of course, eyewitnesses' identifications, particularly those involving cross-racial identifications, are often mistaken. *See* United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."). Publicizing the perceived race of a suspect in a serious crime can add to racial tensions and confirm negative racial stereotypes. But these factors are not relevant to the question of whether race can be used as an identifying characteristic when searching for a suspect.

63. 221 F.3d 329 (2d Cir. 2000).

64. *Id.* at 334.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Or perhaps one should say a "claimed link" between the race of the suspect and the perpetrator of the crime, since eyewitnesses can be mistaken. *See supra* note 62.

70. The Fourth Amendment aspect of the *Oneonta* court's decision was focused on whether the various encounters that the police had with the plaintiffs rose to the level of *Terry* stops—the court concluded that some of them did and some of them did not, and then remanded the case to the lower court for further analysis on those that did. *Oneonta*, 221 F.3d at 340–41.

students, for example, is a pre-contact action that falls outside the scope of the Fourth Amendment.[71] Likewise, any consensual encounters that the police had with Black students or residents during the days following the crime are unregulated by the Fourth Amendment.[72] But some of the police officer's later actions were subject to the Fourth Amendment: specifically, the forcible, non-consensual stops of non-white residents to inspect their hands.[73] Given the fact that the victim had identified the perpetrator as Black, it was appropriate to use race as *one of the factors* in determining whom to stop, and the individual's race, perhaps when combined with other factors, would contribute to a legitimate finding of reasonable suspicion. But in conducting their investigation, the police used race as the *only* factor in determining whom to stop. Although the appellate court never reached the question in *Oneonta*, the plaintiffs' race was almost certainly insufficient on its own to rise to the level of reasonable suspicion.[74]

Oneonta also provides a first example of how courts can misconstrue statistical data when determining whether and how race should be used in a Fourth Amendment analysis. The *Oneonta* court stated that the town where the police investigation took place had 10,000 total residents, and that "[f]ewer than three hundred" were Black.[75] Likewise, the court noted that 7,500 students attended the local college, and that "just two percent"

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71. Whether obtaining a list of Black students should trigger the Equal Protection Clause is a question for Part III.

72. *See id.*

73. *See id.*

74. This Article demonstrates that some courts, including the Supreme Court, have held that race on its own can never be sufficient to generate reasonable suspicion. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 885–86 (1975) (concluding that the "apparent Mexican ancestry" of a car's occupants did not "furnish[] reasonable grounds to believe that the . . . occupants were aliens"); United States v. Jones, 149 F.3d 364, 369 (5th Cir. 1998) ("[T]he fact that one is of Mexican national origin does not create reasonable suspicion that one is an illegal alien, since, in border areas, there are far more legal citizens than illegal aliens of Mexican national origin."); United States v. Rodriguez, 976 F.2d 592, 596 (9th Cir. 1992) ("In short, the agents in this case saw a Hispanic man cautiously and attentively driving a 16 year-old Ford with a worn suspension, who glanced in his rear view mirror while being followed by agents in a marked Border Patrol car. This profile could certainly fit hundreds or thousands of law-abiding daily users of the highways of Southern California."), *amended by* 997 F.2d 1306 (9th Cir. 1993). But this is certainly not true in every context. If a victim identified her assailant as white, and the pool of possible suspects has only one white person in it, the police may be able to establish reasonable suspicion for a stop or even probable cause for an arrest based solely on the person's race. Indeed, as the "racial incongruity" argument below shows, law enforcement officers have occasionally testified that individuals of a certain race in a certain neighborhood are nearly certain to be involved in criminal activity. *See, e.g.*, People v. Bower, 597 P.2d 115, 117 (Cal. 1979), *superseded in part by constitutional amendment*, Proposition 8 (1982) (codified at CAL. CONST. art. I, § 28(f)(2)); *infra* notes 79–80 and accompanying text.

75. 221 F.3d at 334.

of them were Black.[76] Focusing on these numbers implies that the important question for Fourth Amendment purposes is the ratio of Black residents to all residents—in other words, that the fact that 3% of the town's residents and 2% of the college students are Black is relevant to the Fourth Amendment analysis. In reality, however, the denominator of that equation—the number of total residents—is completely irrelevant. For Fourth Amendment analysis, all that matters is the number of individuals in the suspect pool who share the characteristic described by the victim—in this case, the number of residents or students who were Black. For example, assume the police knew that the perpetrator was Black and were somehow certain that he was a student at the college. Since there were 150 Black students at the college, the victim's description would mean that for any given Black student at the college, there was a 1 in 150 chance that the suspect was guilty. Although courts have been reluctant to attach any specific percentage to the concept of reasonable suspicion, 1 in 150 is certainly too low.[77] This would be true whether the 150 Black students at the school were 2% of the total student body, or whether they were 98% of the total student body. Conversely, assume that the police were certain that the perpetrator was Black and was a student at the college, and the total student body had only 100 students, only two of whom were Black. In that case, even though Black students made up only 2% of the student body, there was a 1 in 2 chance that either of the Black students was guilty—certainly a great enough chance to create reasonable suspicion. In other words, what is important is not the percentage of the entire suspect pool that matches the racial description, but rather the chance that any one of the individuals who matches the racial description is guilty. As noted below, courts in

76. *Id.*

77. The Supreme Court has been outwardly hostile to any attempts to quantify the level of suspicion that constitutes reasonable suspicion or probable cause. *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 7–8 (1989) (stating that the lower court's attempt "to refine and elaborate the requirements of 'reasonable suspicion' . . . create[d] unnecessary difficulty"); Maryland v. Pringle, 540 U.S. 366, 370–71 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."). However, a 1982 survey of judges revealed that, on average, they equated reasonable suspicion to a 29.59% likelihood that criminal activity was occurring, and they equated probable cause to a 44.52% likelihood that criminal activity was occurring. *See* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1332 tbl.8 (1982). Recently, I conducted my own survey of federal magistrates and calculated similar numbers: On average, magistrates equated reasonable suspicion to a 35.4% chance that criminal activity was occurring, and they equated probable cause to approximately a 52% chance that criminal activity was occurring. *See* RIC SIMMONS, SMART SURVEILLANCE: HOW TO INTERPRET THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 75–77 (2019).

profiling and immigration cases engage in a similar, but more severe, mistake in their probability analysis.[78]

B. *Race as an "Incongruity"*

The second way that law enforcement officers use race as a factor in generating individualized suspicion is when a person's race is incongruous in a certain geographic location, and the incongruity allegedly implies criminal activity.[79] In 1973, an appellate court in Arizona upheld the *Terry* stop of a Latino suspect, solely because the officer testified that "it was very unusual to see a person of either 'white' or Mexican descent in this particular area, and that it had been their experience in the past that the few 'whites' or Mexicans who were in the area were there for the purpose of purchasing narcotics."[80] In *State v. Dean*,[81] the arresting officer never even specified how the defendant's racial incongruity was linked to a specific type of crime but merely stated that the suspect was "a Mexican male in a predominantly white neighborhood of—oh, middle to upper-middle class people."[82] Nevertheless, the Arizona Supreme Court approved the *Terry* stop, holding that "the fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an

78. *See infra* notes 111–151 and accompanying text.

79. Johnson, *supra* note 60, at 226–30; *see also* Gross & Livingston, *supra* note 60, at 1432–33 (rejecting racial incongruity as a basis for suspicion on policy grounds because it could reinforce racial segregation) ("[A]rresting occasional drug users and retail dealers is not a sufficient benefit to justify stopping and searching people who cross common lines of residential and social segregation, even if the factual premise is correct.").

The theory of racial incongruity has its own dark history, including countless examples of white people calling the police because a Black person seems "suspicious" in a majority-White neighborhood. A recent, tragic example of this phenomenon was the killing of Ahmaud Arbery in Georgia. Although the two white individuals who attacked Arbery claimed that they confronted him because they saw him trespassing on a nearby construction site, it is likely that their suspicions of Arbery were enhanced because they believed that as a Black man he seemed "out of place" in their majority-white neighborhood. *See* Nicquel Terry Ellis, *What We Know About Community Where Ahmaud Arbery Was Shot: 911 Caller Reported 'Black Guy' on Property*, USA TODAY (May 9, 2020, 7:29 AM), https://www.freep.com/story/news/2020/05/08/ahmaud-arbery-shooting-what-we-know-satilla-shores-community/3096389001/ [https://perma.cc/6QYV-YN].

80. State v. Ruiz, 504 P.2d 1307, 1307 (Ariz. Ct. App. 1973). The officer testified that "West Buckeye Road is mainly a Negro district and any Mexicans or white people in the area are suspicious." *Id.* at 1308. The court's *Terry* analysis consists of simply adopting the officer's conclusions: "[T]he evidence reveals that here the police officers observed defendant in an unusual situation which, in light of their experience, gave rise to a reasonable suspicion on their part that criminal activity might be afoot." *Id.* at 1309.

81. 543 P.2d 425 (Ariz. 1975).

82. *Id.* at 427.

officer and the court in determining whether an investigation and detention is reasonable and therefore lawful."[83]

Other courts have been more skeptical of using racial incongruity as a factor in criminal investigations. For example, in *People v. Bower*,[84] the police officer testified that he observed the white defendant in a "'predominantly black' area" at night, and this was a factor in generating reasonable suspicion because, in three and a half years in patrolling the area, he had "never observed a white person in the projects . . . in the hours of darkness . . . for [an] innocent purpose."[85] The officer supported this assertion by testifying that during his career he had encountered twenty-six white individuals in the area at night who were there to purchase narcotics, and that every other white person he encountered there at night was a robbery victim.[86] Assuming the police officer's testimony was credible, this would mean that based on this limited data set, the fact that the person was white was directly correlated with the presence of illegal activity—that is, a white person in that neighborhood had a 100% likelihood of being either a criminal or a crime victim. Thus, under standard Fourth Amendment jurisprudence, the defendant's status as a white man should have been a legitimate factor in determining reasonable suspicion. But the California Supreme Court disagreed:

> [T]he fact that appellant was a white man could raise no reasonable suspicion of crime. A person's racial status is not an "unusual" circumstance and the presence of an individual of one race in an area inhabited primarily by members of another race is not a sufficient basis to suggest that crime is afoot.[87]

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83. *Id.* The court noted that there were other factors that also gave rise to reasonable suspicion, such as the suspect's nervous behavior and "[t]he location of the parked car in front of the apartment complex, [and] its close proximity to three different roads if the driver were required to leave in a hurry." *Id.* at 426. But it explicitly approved of the use of racial incongruity: "That a person is observed in a neighborhood not frequented by persons of his ethnic background is quite often a basis for an officer's initial suspicion. To attempt by judicial fiat to say he may not do this ignores the practical aspects of good law enforcement." *Id.* at 427. In *United States v. Richard*, the court implied that racial incongruity could be a factor establishing probable cause for a warrant but was not sufficient to establish probable cause on its own: "[T]he presence of two black males cruising in a car in a predominately white neighborhood is, *by itself*, insufficient cause for a belief that those persons have participated in a recent crime in the neighborhood." 535 F.2d 246, 248 (3d Cir. 1976) (emphasis added).

84. 597 P.2d 115 (Cal. 1979), *superseded in part by constitutional amendment*, Proposition 8 (1982) (codified at CAL. CONST. art. I, § 28(f)(2)).

85. *Id.* at 117.

86. *Id.*

87. *Id.* at 119.

There is really no way to reconcile *Dean* and *Bower*.[88] In *Dean*, the court approved of using racial incongruity as a factor even though there was no evidence on the record to link racial incongruity to a specific crime. In *Bower*, the officer provided substantial evidence that racial incongruity was strongly correlated with one of two specific crimes, and the court rejected the use of the factor. On one level, this inconsistency reflects the familiarly subjective aspect of determining reasonable suspicion; on another level, it indicates the challenges that courts face when discussing issues of race in the criminal justice system. The *Bower* court was explicit about these challenges, noting that: "Freedom to travel and to associate are fundamental rights in this state, and the suggestion that their exercise can contribute to a lawful seizure of one's person under these circumstances is both illogical and intolerable."[89] It is certainly reasonable to hold that it is *intolerable* for police to target an individual in part because he chooses to associate with a person of a different race—but that is a question for the Equal Protection analysis. Whether using this factor is *illogical* is merely a question of data, and the data the police officer gave to the *Bower* court indicated that it was perfectly logical to use this factor to make an inference of criminal activity.[90]

C. *Race as an Indicator of Criminal Behavior*

The final way in which race could be a relevant factor in determining reasonable suspicion or probable cause is if individuals of a specific racial background tend to commit a specific crime more often than individuals who are not members of that race.[91] There is ample evidence that many

88. At least there is no legally principled way to reconcile the two. It is hard to avoid the observation that in *Dean*, a court approved of using racial incongruity when the police used it as a factor to stop a Hispanic suspect, *see* 543 P.2d at 427, while in *Bower*, a court rejected the use of racial incongruity when the police used it as a factor to stop a white suspect, *see* 597 P.2d at 119.

89. 597 P.2d at 119.

90. Admittedly, the "data" the *Bower* officer provided (one officer's set of observations over a three-and-a-half-year period) might have been exaggerated or suspect. *See id.* at 117. However, it was sworn testimony from a witness at the suppression hearing, and the record shows no sign that the defense presented any countervailing evidence. *See id.* at 117–18, 122. It is certainly more reliable than the oft-used "high crime area" testimony that officers use to enhance their reasonable suspicion.

91. Johnson, *supra* note 60, at 236–37. Johnson has a different category for race as a factor in a profile or race as indicating a higher likelihood of committing a specific crime, but for this Article's purposes these two categories are the same. *See id.* at 233–36; *see also* Gross & Livingston, *supra* note 60, at 1415 ("'[R]acial profiling' occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating.").

police officers, motivated by explicit or implicit bias, *believe* that race can be an indicator of criminality.[92] As a 2018 federal commission on police practices noted:

> Studies show that law enforcement officers hold many of the same biases as the general public, and in implicit bias tests, patterns are nearly universal. Black people (especially black men) are more often associated or quickly paired with being "threatening," and this tends to hold true regardless of the race or ethnicity of the person taking the test.[93]

Former FBI Director James Comey put the issue more bluntly:

> A mental shortcut becomes almost irresistible and maybe even rational by some lights. The two young black men on one side of the street look like so many others the officer has locked up. Two white men on the other side of the same street—even in the same clothes—do not. The officer does not make the same association about the two white guys, whether that officer is white or black. And that drives different behavior.[94]

This explicit or implicit bias explains some, if not most, of the higher rates of stops and arrests against Black and Hispanic individuals.[95]

Many courts and commentators categorize this relationship as claiming that individuals of a certain race have a "propensity" to commit a certain type of crime. *See, e.g.*, Farag v. United States, 587 F. Supp. 2d 436, 467 (E.D.N.Y. 2008). This Article avoids the term "propensity," since it implies a tendency in a person's character or personality to act a certain way. All that is relevant under the Fourth Amendment analysis is whether there is a statistical correlation between a person's race and certain types of criminal activity; the cause of that correlation is immaterial.

92. *See, e.g.*, Robert D. McFadden, *Whitman Dismisses State Police Chief for Race Remarks*, N.Y. TIMES (Mar. 1, 1999), https://www.nytimes.com/1999/03/01/nyregion/whitman-dismisses-state-police-chief-for-race-remarks.html [https://perma.cc/SP8H-JAEW]. McFadden quotes the then-superintendent of the New Jersey State Police:

> Today, with this drug problem, the drug problem is cocaine or marijuana. It is most likely a minority group that's involved with that.
>
> . . . .
>
> . . . If you're looking at the methamphetamine market, that seems to be controlled by the motorcycle gangs, which are basically white . . . . If you are looking at heroin and stuff like that, your involvement there is more or less Jamaican.

Id. (quotation marks omitted). The governor fired the superintendent after he made these comments.

93. U.S. COMM'N ON C.R., POLICE USE OF FORCE 103 (2018), https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf [https://perma.cc/SH4W-7685].

94. *Id.* (quoting James B. Comey, Dir., Fed. Bureau of Investigation, Hard Truths: Law Enforcement and Race, Remarks at Georgetown University (Feb. 12, 2015)).

95. *See supra* note 33.

Obviously, race should not contribute to individualized suspicion if its link to criminal behavior is based solely on a police officer's explicit or implicit bias. However, there are contexts in which the state has argued that race can be a legitimate factor in criminal investigations. In some cases, the suspect's race could be part of a specific profile based on data describing individuals who are likely to commit a certain crime.[96] For example, police routinely use "drug courier" profiles when deciding whom to stop and question in an airport, and those profiles may include the race of the subject.[97] For example, in *United States v. Weaver*,[98] a Drug Enforcement Agent seized the defendant's bags at the airport because the defendant fit a specific profile: he was a "roughly dressed" young Black man; he was walking rapidly; he did not have identification on him; and he appeared unusually nervous when talking to law enforcement.[99] The U.S. Court of Appeals for the Eighth Circuit approved of using the defendant's race as one of the factors, since the

96. *See* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1081 n.17 (2001). In a sense, the "incongruity" reasoning could be considered a subcategory of the "profile" reasoning, with incongruity being one of a number of factors used in a profile. The practice of using race as part of a broader profile for detecting terrorists found strong support in the mainstream media in the weeks following the September 11th attacks. *See* Gross & Livingstone, *supra* note 60, at 1414 n.3 (collecting sources); Stanley Crouch, Editorial, *Drawing the Line on Racial Profiling*, N.Y. DAILY NEWS, Oct. 4, 2001, at 41 (arguing that African American profiling is different from profiling Arab Americans after the September 11th attacks); Michael Kinsley, *When Is Racial Profiling Okay?*, WASH. POST (Sept. 30, 2001), https://www.washingtonpost.com/archive/opinions/2001/09/30/when-is-racial-profiling-okay/4fdb1630-d0b1-4810-aa11-8237c5bbbafc/ [https://perma.cc/Y8LS-D36G] (suggesting that racial profiling at airport checkpoints may be justifiable); Editorial, *Profiling Debate Resumes*, DENVER POST, Oct. 3, 2001, at B6 (suggesting that race should be taken into account in finding law enforcement targets); Dorothy Rabinowitz, *Hijacking History*, WALL ST. J., Dec. 7, 2001, at A18 (arguing that Arab American profiling is different from interning Japanese Americans during World War II); Stephen J. Singer, *Racial Profiling Also Has a Good Side*, NEWSDAY, Sept. 25, 2001, at A38 (arguing that using race, in conjunction with other factors, to identify fruitful targets of investigation is not necessarily racist). There is also ample evidence that law enforcement officers engaged in racial profiling by aggressively targeting individuals of Middle Eastern descent. *See* Amna Akbar, *Policing "Radicalization*," 3 U.C. IRVINE L. REV. 809, 856–68 (2013).

97. As one group of dissenting judges put it, "the DEA has all but reduced to writing a practice of singling out African-Americans for drug courier inquiries." United States v. Taylor, 956 F.2d 572, 581 (6th Cir. 1992) (en banc) (Keith, J., dissenting); *see* Johnson, *supra* note 60, at 234 ("Although the DEA has refused to commit the entire [drug courier] profile to writing, the profile clearly contains a racial component."); Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 844–55 (1985) (discussing the history and use of drug profiles).

98. 966 F.2d 391 (8th Cir. 1992).

99. *Id.* at 392–93; *see also* United States v. Condelee, 915 F.2d 1206, 1210 (8th Cir. 1990) (finding that when law enforcement agents had information that gangs used "sharply dressed black female couriers," the agents could permissibly use the suspect's race as a factor in generating reasonable suspicion).

officer testified that "black street gangs from Los Angeles" were "notorious for transporting cocaine . . . from Los Angeles for sale."[100] The majority cautioned that "large groups of our citizens should not be regarded by law enforcement officers as presumptively criminal based upon their race," but then it held:

> As it is, however, facts are not to be ignored simply because they may be unpleasant—and the unpleasant fact in this case is that Hicks had knowledge, based upon his own experience and upon the intelligence reports he had received from the Los Angeles authorities, that young male members of black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors Hicks relied upon, was a factor in the decision to approach and ultimately detain Weaver. We wish it were otherwise, but we take the facts as they are presented to us, not as we would like them to be.[101]

In the wake of the 2001 terrorist attacks on the United States, law enforcement officers began to cite a suspect's "Middle Eastern descent" as a relevant factor in generating individualized suspicion for terrorism. Courts responded inconsistently to this tactic. In *United States v. Ramos*,[102] a transit authority inspector observed a van in a parking lot next to a subway and bus line terminal.[103] She noted a number of facts that raised her suspicions: the van was parked in the farthest corner of the lot; the driver was sitting in the parked van for over twenty minutes; the van had a paper temporary out-of-state tag over its regular license plate; and the van's occupants appeared to be of "Middle Eastern descent."[104] The U.S. Court of Appeals for the First Circuit approved of the use of Middle Eastern descent as a factor, since a recent terrorist bombing at a Madrid transit station had been carried out by individuals of Middle Eastern descent, and that attack had apparently been coordinated by

100. *Weaver*, 966 F.2d at 392, 394 n.2.

101. *Id.* at 394 n.2. The dissent found this aspect of the case troubling because using race as a factor "reinforces the kind of stereotyping that lies behind drug-courier profiles." *Id.* at 397 (Arnold, C.J., dissenting). But even the dissent agreed that "[i]f, for example, [the court] had evidence that young blacks in Los Angeles were more prone to drug offenses than young whites, the fact that a young person is black might be of some significance, though even then it would be dangerous to give it much weight." *Id.*; *see also* Castaneda v. Commonwealth, 376 S.E.2d 82, 83 (Va. Ct. App. 1989) (en banc) (approving the use of a drug courier profile which included the fact that the drug couriers on this route were "frequently Hispanic or black"). *But see* Whitfield v. Bd. of Cnty. Comm'rs, 837 F. Supp. 338, 340, 343–44 (D. Colo. 1993) (rejecting a drug courier profile that relied in part on race).

102. 629 F.3d 60 (1st Cir. 2010).

103. *Id.* at 62.

104. *Id.* at 62–63. In fact, the driver and all the passengers were Hispanic, but the officers involved all believed they were of Middle Eastern descent. *See id.* at 62 n.2.

Osama bin Laden.[105] The court concluded:

> While in other situations there may be merit to the argument that a description of ethnic appearance is irrelevant and nothing more than impermissible profiling, the argument fails on the facts here. The MBTA attempted to learn from the recent lessons of Madrid and had so trained its employees. Not just the recent history of Middle East-originated terrorism, but also the explicit warnings, issued some eleven weeks before, of future strikes by the same groups in the United States, meant it was material for the officers to consider, among other facts, the risk of terrorist attacks on transit stations in major urban centers and that the persons they were investigating had a Middle Eastern appearance.[106]

Conversely, in *Farag v. United States*,[107] two counterterrorism agents encountered two individuals of Middle Eastern descent while flying on a plane from San Diego to New York.[108] The agents' suspicions were aroused by the ethnic background of the men when combined with a number of other factors, including the fact that they moved seats repeatedly during the flight, they spoke loudly in a mixture of Arabic and English, and one of them checked his watch at various times.[109] The trial judge rejected using race as a factor in the individualized suspicion analysis, holding that even though "the specter of 9/11 looms large over this case," race is an impermissible factor under the Fourth Amendment absent "compelling statistical evidence" linking race to a specific criminal activity.[110]

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105. *Id.* at 66–67.

106. *Id.* at 67–68.

107. 587 F. Supp. 2d 436 (E.D.N.Y. 2008).

108. *Id.* at 442.

109. *Id.* at 449.

110. *Id.* at 467. The court referenced the immigration cases, *see* discussion *infra* Section II.D., as examples of where such "compelling statistical evidence" existed. *Farag*, 587 F. Supp. 2d at 467. Like many other courts which reject the use of race on Fourth Amendment grounds, the *Farag* court also indicated its discomfort with using race as a factor by quoting a passage from the *Korematsu v. United States* dissent that would seem more appropriate under an Equal Protection argument:

> All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Farag, 587 F. Supp. 2d at 468 (quoting Korematsu v. United States, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392 (2018)). A dissenting

The Arizona Supreme Court came to a similar conclusion in *State v. Graciano*.[111] In *Graciano*, a highway patrol officer pulled over a "dark-skinned" young man whom he believed was of "Mexican" descent driving a Ford four-by-four Bronco towards the Mexican border.[112] The officer knew that statistically this type of vehicle was the second-most likely to be stolen in Arizona, and based on meetings he had with county officials, he was "under the impression" that most of these vehicles were being stolen by "young, Mexican males."[113] The court held that the stop was invalid, in part because the defendant's race was an irrelevant factor for the officer to consider: "We know of no statistics which would indicate that dark-skinned Mexican-Americans are more likely to be

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judge from the U.S. Court of Appeals for the Fifth Circuit has strongly criticized the use of race as a factor in immigration enforcement cases, also drawing a parallel with *Korematsu*:

> [H]istory is likely to judge the judiciary's evisceration of the Fourth Amendment in the vicinity of the Mexican border as yet another jurisprudential nadir, joining *Korematsu*, *Dred Scott* [*v. Sandford*, 60 U.S. (19 How.) 393 (1857)], and even *Plessy* [*v. Ferguson*, 163 U.S. 537 (1896)] on the list of our most shameful failures to discharge our duty of defending constitutional civil liberties against the popular hue and cry that would have us abridge them.

United States v. Zapata-Ibarra, 223 F.3d 281, 282 (5th Cir. 2000) (Wiener, J., dissenting) (footnotes omitted). Many other courts have also rejected race as a legitimate factor under the Fourth Amendment. *See* United States v. Slocum, 464 F.2d 1180, 1184 (3d Cir. 1972) (recognizing in the Fourth Amendment context that police profiles used to screen potential plane hijackers may not "discriminate against any group on the basis of religion, origin, political views, or race"); Whitfield v. Bd. of Cnty. Comm'rs, 837 F. Supp. 338, 344 (D. Colo. 1993) ("While race is an appropriate characteristic for identifying a particular suspect, it is wholly inappropriate to define a class of suspects."); People v. Bower, 597 P.2d 115, 119 (Cal. 1979) (stating "[a] person's racial status is not an 'unusual' circumstance" contributing to reasonable suspicion), *superseded in part by constitutional amendment*, Proposition 8 (1982) (codified at CAL. CONST. art. I, § 28(f)(2)); State v. Kuhn, 517 A.2d 162, 165 (N.J. Super. Ct. App. Div. 1986) ("No rational inference may be drawn from the race of one to be detained that he may be engaged in criminal activities."); People v. Johnson, 478 N.Y.S.2d 987, 993 (App. Div. 1984) (noting race is relevant in the context of physical description but "[a] person's racial status is neither an unusual circumstance nor probative of propensity to commit crime").

111. 653 P.2d 683 (Ariz. 1982) (en banc).

112. *Id.* at 685–86. When pressed on this question, the officer admitted that he did not know at the time he made the decision to pull the car over "whether the driver was Mexican 'rather than Armenian or Syrian'"—all he really knew was that the driver had "dark skin." *Id.* at 686. This is a recurring issue in cases where law enforcement officers use race as a factor to generate reasonable suspicion or probable cause: the officer is in fact not really sure of the ethnicity of the suspect, only that he is not white. Often, as in *United States v. Ramos*, 629 F.3d 60, 62–64 (1st Cir. 2010), or in *United States v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975), the officer's guess is incorrect. *See* Kevin R. Johnson, Essay, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1022 (2010) (noting that the officer in *Brignoni-Ponce* believed the occupants of the car were all of Mexican descent, when in fact only one was of Mexican descent, while the others were Puerto Rican and Guatemalan).

113. *Graciano*, 653 P.2d at 685.

automobile thieves than light-skinned ones, nor that Mexican-Americans are more likely to be automobile thieves than Irish-Americans, Polish-Americans, or any other subdivision of Americans."[114]

The different results in *Weaver* and *Ramos* on the one hand, and *Farag* and *Graciano* on the other, are the direct result of the different kinds of evidence the respective courts were willing to accept to meet the defendant's Fourth Amendment challenge. In the former two cases, the courts accepted as evidence (in *Weaver*'s case) the testimony of the police officer linking the defendant's race to a specific type of crime, or (in *Ramos*' case) the "recent history" of Middle Easterners being involved in terrorist attacks.[115] In the latter two cases, the courts set a standard that required empirical evidence linking the defendant's race to the specific criminal activity that was suspected. As noted above, relying on an officer's individual experiences or a judge's subjective beliefs based on current events was probably a necessary evil in the past—not just for race, but for the correlation of any observed factor with criminal activity.[116] As law enforcement becomes more data-driven, however, courts should follow the *Farag* and *Graciano* courts' example and require the prosecutor to present empirically based evidence linking specific characteristics or observed behavior to criminal activity.

The most widespread—and yet the least explicit—use of race as a factor is when police conduct *Terry* stops and traffic stops.[117] Whether because of implicit bias, explicit racial prejudice, or a belief that certain races are more likely than others to engage in certain kinds of criminal activity, there is a vast amount of empirical evidence that police pull over

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114. *Id.* at 686 (footnote omitted).

115. In fact, the "recent history" relied upon by the *Ramos* court consisted of only two incidents in four years: the bombing of a train station in Madrid in 2004 and the September 11th attacks in the United States in 2001. 629 F.3d at 66, 68.

116. *See supra* notes 55–59 and accompanying text.

117. *See, e.g.*, United States v. Weaver, 966 F.2d 391, 394 & n.2 (8th Cir. 1992). The dissent found this aspect of the case troubling because using race as a factor "reinforces the kind of stereotyping that lies behind drug-courier profiles." *Id.* at 397 (Arnold, C.J., dissenting). But even the dissent agreed that "[i]f, for example, [the court] had evidence that young blacks in Los Angeles were more prone to drug offenses than young whites, the fact that a young person is black might be of some significance, though even then it would be dangerous to give it much weight." *Id.*; *see also* United States v. Laymon, 730 F. Supp. 332, 337 (D. Colo. 1990) ("[Officer] Perry, Officer Roybal and Sheriff A.J. Johnson all testified that being Black or Hispanic was and is a factor in their drug courier profile on which they decide who to stop and search."). The judge in *Laymon* held the traffic stop of the Black defendants was unconstitutional because, although the arresting officer testified that the car was weaving before the stop, the judge found that testimony not credible. 730 F. Supp. at 338. The court further held that even if the car had been weaving, the weaving was a pretext and the officer's true motivations for pulling the car over was the race of the car's occupants. *Id.* at 339. This second part of the holding was probably overruled in *Whren v. United States*, 517 U.S. 806, 813, 819 (1996). *See generally* Johnson, *supra* note 112 (arguing that *Brignoni-Ponce* and *Whren* working together have legitimized racial profiling).

and stop Black and Hispanic individuals far more often than white individuals.[118] But although the aggregate data demonstrates that the police use race as one of the factors in deciding whom to stop, in none of these cases does the prosecutor argue that the race of the suspect was a legitimate factor. Instead, the prosecutor points to race-neutral factors that justify the stop, arguing that race was irrelevant to the police officer's decision—or, if it did influence the officer's decision, there were sufficient race-neutral factors to justify the stop without taking into account the suspect's race.[119] As long as each individual stop is supported by objective reasonable suspicion as established by race-neutral factors, the Fourth Amendment is indifferent as to whether racial bias was a factor or even the primary motivator behind the officer's actions. In *Whren v. United States*,[120] the Court held that the police acted permissibly when they pulled a car over "based on decidedly impermissible factors, such as the race of the car's occupants" because the stop was supported by probable cause.[121] When courts do step into stop such practices, they do so under the Equal Protection Clause.[122]

From a purely Fourth Amendment perspective, it is conceivable that race could be a legitimate factor in certain contexts, since there is some data to support that certain ethnic groups commit certain crimes at a greater rate.[123] Sociologists and other experts have been debating the

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118. *See supra* note 33; *see also* Gross & Livingstone, *supra* note 60, at 1420 (describing racial profiling by the Maryland and New Jersey state police on I-95). Of course, a *Terry* stop often leads to a frisk, while a traffic stop often leads to a request for a consent search or a canine sniff of the car, either of which could lead to a full-blown search of the car.

119. *See, e.g.*, *Whren*, 517 U.S. at 809 (describing the trial court's acceptance of the argument that traffic violations independently created probable cause for the stop).

120. 517 U.S. 806 (1996).

121. *Id.* at 810, 813 ("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. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

122. *See infra* note 177 and accompanying text.

123. National numbers tend to show that Black Americans are arrested at a higher rate than other races for violent crime, white Americans are arrested at a higher rate for drunk driving, and Asian Americans at a higher rate for illegal gambling. *See* Janet L. Lauritsen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, *in* THE HANDBOOK OF CRIME & PUNISHMENT 58, 62 (Michael Tonry ed., 1998); *see also* Gary LaFree, *Race and Crime Trends in the United States, 1946-1990*, *in* ETHNICITY, RACE, AND CRIME 169, 170, 177 (Darnell F. Hawkins ed., 1995) (finding that, in 1989, Blacks represented 12% of the population of the country but accounted for 64% of the robbery arrests and 55% of the homicide arrests, leading to the conclusion that "the hypothesis of no difference by race seems unlikely"); BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN UNITED STATES, 1999 STATISTICAL TABLES tbl.40, tbl.46 (2001),

reasons for this disparity for years,[124] but the underlying cause is immaterial for Fourth Amendment purposes: if there is an empirically

https://www.bjs.gov/content/pub/pdf/cvus0102.pdf [https://perma.cc/5YKA-LEWG] (reporting that, in 1999, 46% of single-offender robberies were committed by Black individuals, and 38.2% of multiple-offender robberies were committed by Black individuals); Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 TEX. TECH L. REV. 299, 304 (2010) (noting that homicide rates are seven or eight times greater for Blacks than for whites); NAZGOL GHANDNOOSH, THE SENT'G PROJECT, RACE AND PUNISHMENT 20 (2014) (reporting that, in 2012, Blacks represented 13% of the U.S. population but accounted for 39% of arrests for violent crimes and 29% of arrests for property crimes); Crim. Just. Info. Servs. Div., *Table 43A: Arrests by Race, 2012*, FED. BUREAU INVESTIGATION (2012), https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/43tabledatadecoverviewpdf [https://perma.cc/ZH83-LKAN] (reporting that, in 2012, Black individuals were 49.4% of the arrestees for murder and nonnegligent manslaughter and 54.9% of the arrestees for robbery); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 46 (2012) ("While rates of drug offenses are roughly the same throughout the population, blacks are overrepresented among the population for violent offenses. For example, the African American arrest rate for murder is seven to eight times higher than the white arrest rate; the black arrest rate for robbery is ten times higher than the white arrest rate.").

The data based on arrests alone are suspect, since they are almost certainly skewed by bias in the policing and prosecution of crime. However, this bias becomes less pronounced for the most serious crimes, particularly murder. *See* LaFree, *supra*, at 175, 177. Also, data from non-law enforcement sources confirms this disparity. For example, public health data shows that Blacks are more likely to commit violent crimes. *See* Jessica H. Beard et al., *Quantifying Disparities in Urban Firearm Violence by Race and Place in Philadelphia, Pennsylvania: A Cartographic Study*, 107 AM. J. PUB. HEALTH 371, 372 (2017) ("Firearm assaults were concentrated in low-income areas with predominantly Black residents. Although living in a higher-income area was protective for the population overall, it did not protect Black residents from firearm violence to the same degree as white residents. . . . [O]ur findings echo those . . . [that] found that nationally, Black children were more likely than white children to be hospitalized with firearm injury regardless of neighborhood income level.").

On the other hand, there appears to be no significant difference between different races for drug crimes. *See, e.g.*, R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 578 (2003) ("Numerous commentators have rejected the possibility of substantial racial differences in drug crime on the basis of survey findings regarding rates of illicit drug use among various racial groups."); Paul Butler*, One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1058 (2010) ("The increase in racial disparities in incarceration can be attributed mainly to selective enforcement of drug laws. . . . [T]here is no evidence that African Americans disproportionately commit drug offenses.").

124. The reasons posited for higher violent crime rates among Blacks include: (1) structural and cultural disorganization and isolation, stemming from poverty, family disruption, and residential instability, Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, *in* RACE, CRIME, AND JUSTICE 177, 182 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005); (2) "social and environmental conditions such as poverty, miserable schools, broken families, lack of access to health care, and even lead poisoning"—all factors that are "linked to racial subordination," Butler, *supra* note 123, at 1058–59 (footnotes omitted); and (3) a lack of "community-level social processes such as the level of supervision of teenage peer groups, the prevalence of friendship networks, and the level of residential participation in formal organizations," Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry*, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 474 (2000) (quoting Tracey Meares, *Place and Crime*, 73 CHI.-KENT. L. REV. 669, 673 (1998)).

demonstrable link between race and specific criminal activity, it is a legitimate factor to consider in determining reasonable suspicion or probable cause.[125] There are also contexts in which a suspect's race makes it *less* likely that the police have reasonable suspicion—for example, due to a known pattern of racial profiling and police brutality against Black suspects, a Black person fleeing from the police is probably less likely to be guilty than a non-Black person fleeing from the police.[126]

However, police and prosecutors alike almost never explicitly link race to a likelihood of criminal activity in the context of *Terry* stops or traffic stops. Not only would such an effort likely fail under the Equal Protection Clause, but it would also create strong political backlash. And yet there is one area in which police openly and explicitly use race as a factor in justifying their searches and seizures, and in which the Supreme Court has legitimized the practice: the investigation of immigration violations.

D. *Immigration: The Hard Cases that Make Bad Law*

Although numerous lower courts have considered the question of whether race can be a legitimate factor in determining individualized suspicion, the Supreme Court has addressed the issue only twice, both in the context of immigration violations. In *United States v. Brignoni-Ponce*,[127] the Court held that "Mexican ancestry" can be a factor in determining reasonable suspicion for illegal immigration.[128] A year later in *United States v. Martinez-Fuerte*,[129] the Court held that once cars had been legally stopped at a checkpoint, it was constitutional for border patrol agents to select cars for further investigation based in large part on the perceived race of the driver.[130]

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125. Although gender and race are treated differently under the law, it is worth noting that gender is often considered a legitimate factor in sex offender classification hearings, under the presumption that men are statistically more likely to commit this crime than women. *Cf.* Doe v. Sex Offender Registry Bd., 999 N.E.2d 478, 480 (Mass. 2013) (holding that it was "arbitrary and capricious" for the Sex Offender Registry Board to classify the female defendant's risk of re-offense and degree of dangerousness without considering the effect of gender on recidivism).

126. *See* Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016); Miles v. United States, 181 A.3d 633, 641–44, 641 n.14 (D.C. 2018); *cf.* United States v. Smith, 794 F.3d 681, 687–88 (7th Cir. 2015) (noting that a Black citizen may feel less free to leave a supposedly consensual encounter with police).

127. 422 U.S. 873 (1975).

128. *Id.* at 886–87.

129. 428 U.S. 543 (1976).

130. *Id.* at 563–64, 564 n.17. The Court decided that the procedure being used by the border patrol was effective:

> Of the 820 vehicles referred to the secondary inspection area during the eight days surrounding the arrests . . . roughly 20% contained illegal aliens. Thus, to

As the only Supreme Court cases on the question of race as a factor in generating individualized suspicion, these two cases have had an enormous influence on lower courts who wrestle with this question. At a minimum, these cases have been cited to prove that there is statistical evidence linking ethnic appearance to immigration violations.[131] Furthermore, nearly every court that allows the use of race as a factor in determining individualized suspicion outside of the immigration context relies on these cases to justify its decision.[132] Many scholars see these cases as an infection, spreading from a context in which race is undeniably relevant to the criminalized conduct in the immigration context and corrupting the analysis of other types of cases, where they are used to support theories of racial incongruity, criminal profiling, and racial propensity.[133] Many scholars attempt to quarantine the immigration cases, conceding that racial background is a legitimate factor in the immigration context but arguing that immigration cases are *sui generis*.[134] However, there are two reasons to question the validity of these two cases: first, they engage in erroneous statistical analysis to support their Fourth Amendment argument; second, they give insufficient weight to the Equal Protection argument. This Section considers the first critique, and Part III discusses the Equal Protection question.

> the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint, that reliance clearly is relevant to the law enforcement need to be served.

Id. at 564 n.17 (citations omitted).

131. *See, e.g.*, Farag v. United States, 587 F. Supp. 2d 436, 464 (E.D.N.Y. 2008) (citing the statistics from *Brignoni-Ponce* and then stating that "[t]o the Court's knowledge, no court has ever marshaled statistics to conclude that racial or ethnic appearance is correlated with, and thus probative of, any type of criminal conduct *other than* immigration violations").

132. *See, e.g.*, United States v. Ramos, 629 F.3d 60, 67 (1st Cir. 2010) (citing *Brignoni-Ponce* and *Martinez-Fuerte* as precedent for the proposition that "in a reasonable suspicion inquiry, a person's appearance is not per se an impermissible or irrelevant consideration").

133. *See, e.g.*, Johnson, *supra* note 112, at 1039–43, 1075.

134. *See, e.g.*, Johnson, *supra* note 60, at 248–49 (conceding that race is a legitimate factor in the immigration context under the Fourth Amendment but saying it should be illegal under the Equal Protection Clause); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 733 (2002) (stating that the context of *Brignoni-Ponce* and *Martinez-Fuerte* are different from ordinary law enforcement activities because "Mexican ethnicity is uniquely important for immigration policing on the southern border, and the Border Patrol has the unusual authority to detain people without individualized suspicion at the border itself or at checkpoints in the border area"). *But see* Maclin, *supra* note 19, at 365–69 (accepting the use of race in the immigration context and arguing that courts should apply the rationales of *Brignoni-Ponce* and *Martinez-Fuerte* when analyzing the reasonableness of the disparate use of *Terry* stops and traffic stops against non-whites).

1. Statistical Fallacies

As discussed earlier, under the Fourth Amendment a suspect's race can be considered in the reasonable suspicion or probable cause analysis only if the state proves a correlation between a suspect's race and criminal activity.[135] In the case of immigration violations, many courts appear to assume that such a correlation exists without empirical evidence. When courts rely on empirical evidence, they often misuse or misinterpret it.

A prominent example of this misuse can be found in *Brignoni-Ponce*, the first major Supreme Court Fourth Amendment immigration case.[136] In *Brignoni-Ponce*, the Court held that, although a suspect's race alone could not justify a stop for immigration violations, the suspect's race could be a relevant factor among other factors in determining whether reasonable suspicion existed since "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."[137] In his concurring opinion, Chief Justice Warren Burger supported this holding by stating how many illegal aliens are of Mexican descent rather than arguing how many individuals of Mexican descent are illegal aliens.[138]

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135. *See supra* notes 123–125 and accompanying text.

136. *See* 422 U.S. 873, 874 (1975).

137. *Id.* at 885–87. This statement highlights another, broader problem with immigration stops. Section 287(a)(1) of the Immigration and Nationality Act allowed law enforcement officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." Immigration and Nationality Act, ch. 477, § 287(a)(1), 66 Stat. 163, 233 (1952) (codified as amended at 8 U.S.C. § 1357(a)(1)). Thus, on its face, the statute allowed law enforcement officers to indiscriminately stop aliens who are legally in the country (and presumably have committed no crime) alongside aliens who are illegally in this country. The Court assumed for the purposes of its decision that Congress's broad power over immigration "authorize[d] Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country." *Brignoni-Ponce*, 422 U.S. at 883. Not only does this assumption reduce the Fourth Amendment rights of all non-citizens residing in this country, but it also reduces the rights of any citizen in this country who may be "believed to be an alien." Whether or not the Court's assumption is correct is a very significant question, since it could dramatically increase the probability that race is a useful factor in making an immigration stop. Assuming that legal aliens and illegal aliens could both be legally stopped also allowed the *Brignoni-Ponce* Court to be somewhat sloppy with the numbers that it cited: at one point the Court noted that there were 3.8 million "persons of Mexican origin" living in the four border states and that 624,000 of them had "registered as aliens," which means that 16% of all individuals of Mexican origin in that region were legal aliens. *Id.* at 886 n.12. If border police are permitted to stop any alien rather than only illegal aliens, then Hispanic heritage becomes much more likely to be a legitimate factor under the Fourth Amendment.

138. United States v. Ortiz, 422 U.S. 891, 901 (1975) (Burger, C.J., concurring) (noting that 85% of illegal aliens come from Mexico). This statistic, which was submitted by the Government as evidence that it was appropriate to target individuals of "Mexican descent," was also cited in the majority opinion, though it is unclear the degree to which the majority relied upon it. *See Brignoni-Ponce*, 422 U.S. at 879, 886.

This flawed statistical argument justifying race as a factor in immigration investigations has trickled down to the lower courts. For example, in *United States v. Vandyck-Aleman*,[139] the U.S. Court of Appeals for the Fifth Circuit held that it is appropriate for law enforcement officers to consider ethnicity in deciding whether to question a suspect for an immigration violation:

> Although ethnicity generally may play no role in the enforcement of criminal laws of this country, enforcement of the immigration laws demands that the officials focus on individuals most likely to violate those laws. In the poultry-producing region of Scott County, Mississippi . . . the population of illegal aliens is predominantly Hispanic, not (non-Hispanic) white.[140]

Thus, the analysis used by the Supreme Court in *Brignoni-Ponce*, and by lower courts in cases like *Vandyck-Aleman*, focuses on whether people who commit immigration violations are more likely to be of Hispanic descent. But this logic is backwards: the question is not whether people who commit immigration violations tend to be of a certain race but rather the likelihood that a member of that race has committed the crime. To see the difference, assume the population of individuals who commit the crime of driving under the influence is predominantly white—that is, of all the individuals who commit the crime of drunk driving in a certain jurisdiction, 90% of them are white and 10% are not. This would surely not allow police to use a person's white ethnicity as a factor in determining whether to pull them over. Likewise, if in a certain neighborhood 90% of the people who sell drugs are Black, that fact alone would not allow police to use a person's ethnicity as a factor in deciding whether to conduct a *Terry* stop for drugs. The significant number for Fourth Amendment purposes is what percentage of people of that given ethnicity are committing the crime in question and the discrepancy between that percentage and the percentage of people of other ethnicities who are committing the crime.

Thus, in our hypothetical it is irrelevant that 90% of the people who drive under the influence are white. Instead, the numbers that police and courts need to focus on are (1) the percentage of white people who are driving under the influence, and (2) the percentage of non-white people who are driving under the influence. Both the absolute numbers and the ratio between the numbers are significant. For example, assume that at any given moment .06% of white people are driving under the influence, while .03% of non-whites are driving under the influence. It is true that a white person is twice as likely to be committing the crime as a non-white

139. 201 F. App'x 215 (5th Cir. 2006).
140. *Id.* at 218.

person, but the person's ethnicity is still almost useless in helping the officer achieve reasonable suspicion because the absolute number of white people committing the crime is so low.[141] Or perhaps at a certain time of the night in a certain part of town, the likelihood of drunk driving increases substantially, such that 20% of all white people and 19% of all non-white people are driving under the influence. In this case, even though the percentage of white people committing the crime is relatively high, it is so close to the percentage of other ethnicities committing the crime that once again the suspect's ethnicity is useless in making a reasonable suspicion determination. In order for ethnicity to be a useful factor under the Fourth Amendment, there must be evidence of both a significant percentage of people of that ethnicity who commit the crime and a significant difference in the rate of committing that crime between people of that ethnicity and other ethnicities.[142] In *Brignoni-Ponce*, the Supreme Court had no such data.

This is not the only statistical fallacy to which courts fall victim when determining whether race is a legitimate factor to use under the Fourth Amendment. Outside the immigration context, this Article identified how the *Oneonta* court incorrectly used the percentage of individuals of the suspect's race compared to the general population.[143] Still another fallacy—this one common in the immigration context—is to cite the total number of individuals of a certain race that live in the jurisdiction. For

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141. Ironically, the Supreme Court recognized this statistical principle one year after *Brignoni-Ponce* in an Equal Protection case involving gender discrimination. In *Craig v. Boren*, the Court considered the constitutionality of an Oklahoma law that permitted women to purchase 3.2% beer at the age of eighteen but prohibited men from purchasing it until they reached the age of twenty-one. 429 U.S. 190, 191–92 (1976). The Court applied intermediate scrutiny to the statute, stating that any gender-based classifications must serve "important governmental objectives" and be "substantially related to achievement of those objectives." *Id.* at 197. The State sought to meet this standard with studies that showed that 0.18% of females and 2% of males in the 18–20 age group were arrested for drunk driving. *Id.* at 201. The Court agreed that this was a significant disparity but held that the absolute number of 2% was too low to support any link between "maleness" and drunk driving. *Id.* at 201–02.

142. Professors Gross and Livingstone come close to this conclusion but fail to come to the statistically correct conclusion. They note:

> Even if race or ethnicity is a strong predictor of criminal behavior, an individual member of the relevant groups is very unlikely to be a criminal. For example, it could simultaneously be true that 90% of major cocaine traffickers on I-95 are black and Hispanic, and that 99.9% of black and Hispanic motorists on that highway are not drug traffickers of any description.

Gross & Livingstone, *supra* note 60, at 1423 (footnote omitted). They conclude that under these conditions, choosing suspects by race will increase the efficiency of the police, but "the benefit to law enforcement may be slight." *Id.* However, they fail to consider the other significant factor: the difference between the rate of committing the given crime for people of the given ethnicity and the rate of committing the given crime for other ethnicities.

143. *See supra* notes 74–77 and accompanying text.

example, in *United States v. Montero-Camargo*,[144] the U.S. Court of Appeals for the Ninth Circuit held that law enforcement officers cannot use Hispanic heritage in determining whether reasonable suspicion existed for a traffic stop to look for immigration violations.[145] However, in doing so, it relied in part on the large number of Hispanics who were present in the jurisdiction.[146] Given the fact that the majority of individuals who lived in the county were Hispanic, the court concluded that "Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens."[147] But the total number of Hispanics is irrelevant to the analysis; if 80% of all Hispanics in the county were undocumented immigrants, and only 10% of non-Hispanics were undocumented immigrants, then Hispanic heritage would be a legitimate factor regardless of how many individuals shared that characteristic.[148] The Ninth Circuit used the same logic to make a mistake in the other direction in *United States v. Manzo-Jurado*.[149] The *Manzo-Juardo* court approved of the use of race as a factor when immigration officials were looking for illegal immigrants in the town of Havre, Montana, distinguishing the case from its earlier decision rejecting race as a factor in *Montero-Camargo.*[150] The Ninth Circuit noted that unlike the town in *Montero-Camargo*, Havre is "sparsely populated" with Hispanics.[151] Therefore, it was somehow more likely that being of Hispanic heritage in Havre was correlated with undocumented status.

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144. 208 F.3d 1122 (9th Cir. 2000) (en banc).

To the Court's knowledge, no court has ever marshaled statistics to conclude that racial or ethnic appearance is correlated with, and thus probative of, any type of criminal conduct other than immigration violations.

145. *Id.* at 1131.

146. *See id.* at 1133 ("The population of Imperial County, in which El Centro is located, is 73% Hispanic. In Imperial County, as of 1998, Hispanics accounted for 105,355 of the total population of 144,051.").

147. *Id.* at 1134.

148. The *Montero-Camargo* court tried to argue that the large percentage of Hispanic residents meant that Hispanic heritage could not be used to generate *particularized* suspicion, since race was shared among so many potential suspects. *See id.* at 1134 ("Reasonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination."). It is correct that a widely shared characteristic cannot be sufficient on its own to generate particularized suspicion, but as long as the individual also engages in suspicious individualized behavior, the particularized suspicion requirement will be met.

149. 457 F.3d 928 (9th Cir. 2006).

150. *Id.* at 935 & n.6.

151. *Id.* at 935 n.6 (noting that Hispanics only made up 1.5% of the population of Havre).

2. Actual Correlation and the Need for Empirical Evidence

The failure of most courts to cite and properly use statistical evidence when reviewing immigration stops is particularly disheartening, since this is one area where statistics should be particularly useful. Many probable cause or reasonable suspicion determinations are so fact-based and subjective that they are nearly impossible to quantify, but others, such as the link between racial background and immigration status, are susceptible to statistical analysis. Professor Andrew Crespo recently created a useful Fourth Amendment taxonomy to respond to the increased use of empirical data and statistical analysis in our criminal justice system.[152] Professor Crespo divides search and seizure fact patterns into four categories: primary and ultimate facts, thin scripts, narrative mosaics, and mixed claims.[153] The first category encompasses cases in which a witness personally observes criminal activity; thus, assuming the source of the information is credible and accurate, the evidence positively proves the existence of illegal activity.[154] Examples include a victim reporting to the police that the suspect assaulted her, or a police officer asserting that she purchased narcotics from the suspect. The second category includes cases in which a single fact, or small set of interrelated facts, establish the constitutionally required standard of suspicion.[155] Examples include cases based on probability, such as when the police pull over a car for drunk driving and then find nobody in the driver's seat but observe three drunk men apparently asleep in the back seat.[156] They also include "profile" cases that were discussed earlier in the article, when police claim that certain characteristics or patterns of behavior indicate a high probability of criminal activity.[157] The third category is comprised

152. *See* Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L. J. 1276, 1282 (2020).

153. *Id.* at 1289 fig.1.

154. *Id.* at 1290.

155. *Id.* at 1291.

156. *See id.* at 1291–92. The Supreme Court decided a similar case in *Maryland v. Pringle*, in which the police pulled over a car for speeding and found cocaine hidden in the car after a consent search. 540 U.S. 366, 368 (2003). All three occupants of the car denied knowledge of the cocaine, but the Supreme Court held that there was probable cause to arrest each of them. *Id.* at 372. *Pringle* is distinguishable from the drunk driving case, since in the latter only one of the three can be guilty, whereas in *Pringle* it was possible for all three individuals to have knowledge of, and thus constructively possess, the cocaine. *Id.*

157. Crespo, *supra* note 152, at 1292. Professor Crespo gives the following examples:

> Some common examples include claims that "people carrying significant amounts of illegal drugs" tend "to be carrying guns" or tend to have additional evidence of drug dealing in their houses; that people who engage in child molestation tend to possess child pornography on their computers; that people who flee from the police in so-called high-crime areas tend to possess

of unique stories told about the defendant's behavior that defy statistical analysis.[158] These cases involve detailed fact patterns that require holistic evaluation and intuitive analysis.[159] The final category, "mixed claims," includes cases in which police use statistical data as a factor but then add a narrative to achieve the necessary level of suspicion.[160]

A key benefit of using this taxonomy is that it isolates the types of cases in which courts should require empirically valid statistical evidence from the prosecutor. If law enforcement officers claim a correlation between an observed condition (such as the race of the suspect) and the illegal activity being investigated (such as the undocumented status of the suspect), and the correlation can be empirically demonstrated, then courts should set a standard that requires the government to produce that empirical analysis in court.[161] Setting a standard that requires the government to cite empirical evidence in these cases is especially important when the government is using race as a factor, given the long history of inaccurate correlations that police have made between race and criminal activity when relying on subjective factors. As Professor Barbara Underwood noted: "[D]ecisionmakers may be influenced by negative views about minority racial groups to make negative predictions even when the predictive power of race is nonexistent."[162]

Indeed, in *Brignoni-Ponce*, the Supreme Court rejected the use of ethnicity as the sole factor to establish probable cause because the government had not established the requisite statistical evidence to prove the correlation.[163] As noted above, the Court's own calculations in determining the statistical correlation were suspect, but the Court did explicitly acknowledge that more statistical data would be necessary before using ethnicity as the sole factor to prove probable cause.[164]

The holding of *Brignoni-Ponce* places the reasonable suspicion/probable cause inquiry for undocumented immigrants squarely into Professor Crespo's "Mixed Claims" category: a person's race may

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> contraband; or that Latinos driving certain vehicles near the border tend to be engaged in illegal smuggling.

Id. at 1292–93 (footnotes omitted). Professor Crespo also includes in this category certain mechanical processes, such as fingerprint analysis or drug-dog sniffing, that depend upon the reliability of the machine to create a sufficient statistical link between the positive result and criminal activity. *Id.* at 1292.

158. *Id.* at 1309–10.

159. *Id.* at 1310.

160. *Id.* at 1318–21.

161. *See id.* at 1319–20 ("If [the Government] claims that its search or seizure is supported by statistical probabilities rather than a mere 'hunch,' it must come forward with the relevant data to back up that claim.").

162. Underwood, *supra* note 59, at 1434–35.

163. 422 U.S. 873, 886–87, 886 n.12 (1975).

164. *See supra* notes 136–139 and accompanying text.

be considered as a factor, but it may not be used on its own to establish the constitutionally required level of suspicion. And as long as the government is relying on an empirically testable correlation as a factor, the courts should require the government to provide relevant data to support its use of race as a factor.

The necessary data to test this correlation either exists or could be obtained. The percentage of Hispanics in a given jurisdiction that are undocumented immigrants is a quantifiable number—perhaps impossible to state with exact precision but certainly a number that can be estimated with reasonable accuracy. Indeed, national estimates of the numbers and race of undocumented immigrants are readily available,[165] and they can be compared to the total population of different demographic groups in the country.[166] For example, as of 2017, roughly 13.5% of the Hispanics living in the United States were undocumented immigrants, compared to 8.4% of the Asian Americans living in the country, 0.6% of Blacks living in the country, and 0.2% of the non-Hispanic white individuals living in the country.[167] If courts require statistics more narrowly tailored to the specific case—for example, the percentage of Hispanics who are undocumented in Arizona,[168] or the percentage who are undocumented in

165. As of 2016, there are approximately 10.7 million undocumented immigrants in the United States. *See* JEFFREY S. PASSEL & D'VERA COHN, PEW RSCH. CTR., U.S. UNAUTHORIZED IMMIGRANT TOTAL DIPS TO LOWEST LEVEL IN A DECADE 5 (2018), https://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/ [https://perma.cc/VHZ3-YSC3]. Of those, approximately half a million are Caucasian; nearly 8 million are Hispanic, 1.3 million are Asian, and the rest are from the Middle East, Africa, or the Caribbean. *Id.* at 6.

166. 58.8 million residents in the United States are Hispanic, 197.2 million are non-Hispanic white residents, 40.1 million are Black, and 22.4 million are Asian American. *Hispanic or Latino Origin by Race*, U.S. CENSUS BUREAU (2017), https://data.census.gov/cedsci/table?q=B03&d=ACS%201-Year%20Estimates%20Detailed%20Tables&tid=ACSDT1Y2017.B03002 [https://perma.cc/9K6V-NTX]; *Asian Alone or in Any Combination by Selected Groups*, U.S. CENSUS BUREAU (2018), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https://perma.cc/2W68-EALU]; *2011-2015 ACS 5-Year Estimates*, U.S. CENSUS BUREAU (June 7, 2019), https://www.census.gov/programs-surveys/acs/technical-documentation/table-and-geography-changes/2015/5-year.html [https://perma.cc/62C8-E82E].

167. *See* PASSEL & COHN, *supra* note 165, at 6; Elaine Kamarck & Christine Stenglein, *How Many Undocumented Immigrants Are in the United States and Who Are They?*, BROOKINGS INST. (Nov. 12, 2019), https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/ [https://perma.cc/QCS3-MHZH]; *ACS Demographic and Housing Estimates*, U.S. CENSUS BUREAU (2017), https://data.census.gov/cedsci/table?d=ACS%205-Year%20Estimates%20Data%20Profiles&table=DP05&tid=ACSDP5Y2017.DP05 [https://perma.cc/J5JU-SGFA].

168. For example, the estimated percentage of Arizona's population that consisted of undocumented immigrants in 2016 was 3.9% (275,000 people). *See* PASSEL & COHN, *supra* note 165, at 31; *Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU (2019),

a specific county in Arizona—the government should have the burden of calculating those statistics and presenting them to the court.

Instead, the government—when it presents any empirical information at all—offers incomplete statistics that fail to prove the necessary correlation. For example, in *Melendres v. Arpaio*[169] plaintiffs brought a class action suit against the local sheriff on behalf of all Hispanics in Maricopa County, Arizona who "have been or will be in the future stopped, detained, questioned or searched" by the sheriff's office.[170] In its defense, the sheriff called an expert who testified that "8.9% of the population of the state of Arizona was made up of unauthorized immigrants," and that he therefore "assumed that approximately one in three Hispanic residents of Maricopa County was here without authorization."[171] This assumption takes a number of logical steps unsupported by data, including that the demographic breakdown of Maricopa County is identical to that of all of Arizona and that all undocumented immigrants are of Hispanic descent.[172]

E. *Race as a Legitimate Fourth Amendment Factor*

Under certain circumstances, race could be a relevant factor for consideration in the Fourth Amendment analysis, especially in the immigration context. But since the correlation between race and criminal

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https://www2.census.gov/programs-surveys/popest/tables/2010-2019/state/totals/nst-est2019-01.xlsx. Applying the 2016 national average of 74% of all undocumented immigrants being Hispanic, *see* PASSEL & COHN, *supra* note 165, at 20; Kamarck & Stenglein, *supra* note 167, that would mean about 203,500 people of Arizona's undocumented immigrant population is Hispanic, out of a total Arizona Hispanic population of 2.1 million, *Latinos in the 2016 Election: Arizona*, PEW RSCH. CTR. (Jan. 19, 2016), https://www.pew research.org/hispanic/fact-sheet/latinos-in-the-2016-election-arizona/ [https://perma.cc/NY6R-89MG]. This means that about 9.7% of Hispanic residents of Arizona are undocumented immigrants. Of course, the percentage of undocumented immigrants who are Hispanic could be different in Arizona than it is for the country at large; the burden of calculating those numbers would be on the government, who is trying to demonstrate the relevance (if any) of race to status as an undocumented immigrant.

169. 989 F. Supp. 2d 822 (D. Ariz. 2013), *adhered to by* No. CV–07–02513–PHX–GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013), *aff'd in part, vacated in part*, 784 F.3d 1254 (9th Cir. 2015).

170. *Id.* at 826.

171. *Id.* at 828 n.4.

172. *Id.* Indeed, the court made this second assumption explicit, holding that "if Dr. Camarota's testimony is applied, and one assumes that virtually all of the unauthorized residents in the state are of Latino ancestry, about 73% of the Latino residents of Maricopa County are legal residents of the United States." *Id.* The district court ultimately rejected the sheriff's defense, holding that under Ninth Circuit law, race could not be a factor in determining probable cause, notwithstanding the Supreme Court's *Brignoni–Ponce* dicta. *Id.* at 897–99. The district court cited the Ninth Circuit's decision in *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (en banc). *Melendres*, 989 F. Supp. 2d at 896–97. As noted above, *Montero-Camargo* engages in a flawed analysis, since it relied on the total number of Hispanics in the region, which is irrelevant to the individualized suspicion analysis. *See supra* notes 144–148 and accompanying text.

conduct is an empirically measurable number (a "thin script," in Professor Crespo's taxonomy),[173] the courts should demand empirical evidence from the government before allowing law enforcement to rely upon it. As noted above, the first step in analyzing this empirical evidence will be to ensure that it is not tainted by pre-existing bias in the criminal justice system.[174] Much of the existing data may need to be abandoned, or at least recalibrated, to take into account the disproportionate rates of arrests and convictions of non-white defendants.

Courts will also need to refine the exact nature of the requirement for empirical evidence, such as how specifically tailored the evidence must be (for example, whether national numbers are sufficient, or whether county-level numbers are necessary). And when courts conduct their statistical analysis, only two questions are relevant: (1) what percentage of individuals of the suspect's race commit the crime in question (the "commission percentage"), and (2) the differential between that number and the percentage of individuals who are not of the suspect's race who commit the crime (the "percentage differential"). Courts will still need to determine what commission percentage and percentage differential is required to establish reasonable suspicion or probable cause.

III. REGULATING RACE PART II: THE EQUAL PROTECTION QUESTION

While the Fourth Amendment is only concerned with whether a search is supported by the requisite level of individualized suspicion,[175] the Equal Protection Clause is concerned with preventing the disparate treatment of certain protected classes on the basis of certain protected characteristics.[176] At times, the Supreme Court has supported a broad

173. Crespo, *supra* note 152, at 1289–91.

174. *See supra* notes 39, 123 and accompanying text.

175. Technically, the Fourth Amendment requires that searches be "reasonable"; the Supreme Court has linked the reasonableness of the search to, among other factors, whether law enforcement has reasonable suspicion or probable cause. *See* Terry v. Ohio, 392 U.S. 1, 20–25 (1968).

176. Unlike the Fourth Amendment, which does not protect individuals in the "pre-contact stage" before the police actually engage with the subject, *supra* note 42 and accompanying text, the Equal Protection Clause applies in the pre-contact stage of the investigation when the police are first making a decision of whom to target for investigation. United States v. Jennings, 985 F.2d 562, 1993 WL 5927, at *4 (6th Cir. 1993) (unpublished table opinion); United States v. Avery, 137 F.3d 343, 353 (6th Cir. 1997) ("A citizen's right to equal protection of the laws, however, does not magically materialize when he is approached by the police. Citizens are cloaked at all times with the right to have the laws applied to them in an equal fashion—undeniably, the right not to be exposed to the unfair application of the laws based on their race."); *see also* Farm Lab. Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523, 536, 538 (6th Cir. 2002) (distinguishing *Avery* because *Avery* involved a consensual police encounter); *infra* notes 201–203 and accompanying text (discussing *Farm Labor Organizing Committee*). Commentators have

interpretation of the Equal Protection Clause, stating in dictum that "the Constitution prohibits selective enforcement of the law based on considerations such as race."[177] Commentators have almost unanimously agreed with the principle that any use of race as a factor in criminal investigations should violate the Equal Protection Clause.[178] In reality, however, many courts—including the Supreme Court—have been more forgiving of the practice.[179]

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almost unanimously agreed with the principle that any use of race as a factor in criminal investigations violates the Equal Protection Clause, but most of them also concede that the courts have not consistently enforced it. *See, e.g.*, Gross & Barnes, *supra* note 134, at 744 (stating that "[t]he use of race as a factor in decisions to stop, search, or arrest is clearly prohibited by the Equal Protection Clause," but acknowledging that "few cases have been litigated under that provision, and the law on the issue remains sparse and undeveloped" and noting that a number of lower courts have allowed the use of evidence from drug searches that were based in part on the suspect's race); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause*, 3 U. PA. J. CONST. L. 296, 363–66 (2001); Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 124 (2001). Other commentators make arguments against the use of race on primarily policy grounds. Professor Chris Slobogin has argued, "the symbolic and actual effect of this type of government action damages societal institutions regardless of its empirical justification." Chris Slobogin, *The World Without A Fourth Amendment*, 39 UCLA L. REV. 1, 85–86 (1991); *see also* Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 304 (2004) (arguing that the most "valid objections to profiling . . . involve policy considerations independent of the empirical validity of the profiles").

177. Whren v. United States, 517 U.S. 806, 813 (1996). With regard to the use of race as a factor in sentencing, the Supreme Court has used equally strong language, stating that race is a factor "that [is] constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 885 (1983). Many lower courts have applied an equally broad test. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 603 (S.D.N.Y. 2013) ("[I]t is equally clear that it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group appear more frequently in criminal complaints. The Equal Protection Clause does not permit race-based suspicion.").

178. *See, e.g.*, Gross & Barnes, *supra* note 134, at 744 (stating that "[t]he use of race as a factor in decisions to stop, search, or arrest is clearly prohibited by the Equal Protection Clause," but acknowledging that "few cases have been litigated under that provision, and the law on the issue remains sparse and undeveloped" and noting that a number of lower courts have allowed the use of evidence from drug searches that were based in part on the suspect's race); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 363–66 (2001); Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 124 (2001).

Other commentators make arguments against the use of race primarily on policy grounds. Professor Christopher Slobogin has argued that "the symbolic and actual effect of this type of government action damages societal institutions regardless of its empirical justification." Slobogin, *supra* note 176, at 84–86; *see also* Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 301 (2004) ("[V]alid objections to profiling . . . involve policy considerations independent of the empirical validity of the profiles.").

179. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975); United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976); United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995) (stating that Equal Protection rights are not violated when "officers . . . decide to interview

Under the Equal Protection Clause, the use of race as a factor in criminal investigations could trigger strict scrutiny in one of two ways. The first way is if the government explicitly uses race as a basis to treat similarly situated individuals differently.[180] As noted in the previous section, the government rarely admits to intentionally using race as a factor, but even when it does, the courts do not automatically apply strict scrutiny to the government's actions.[181]

The legal landscape becomes even more complicated if the decision-maker does not admit to discriminating based on race. In order to trigger strict scrutiny in such cases, the defendant must prove by a preponderance of the evidence that the government's application of supposedly race-neutral factors produced a disparate impact and that the government acted with a discriminatory purpose.[182]

Courts have been inconsistent when applying these standards in the criminal justice context. Under one line of cases, any disproportionate effect on a suspect class shifts the burden to the government to prove a race-neutral reason for its action.[183] Under another line of cases, the burden of proof never shifts, and the plaintiff must prove the state had a discriminatory motivation.[184] A third line of cases provides that even an explicit finding of discriminatory intent is insufficient as long as the government also used other race-neutral factors.[185]

Even if the plaintiffs convince the court to apply strict scrutiny, the government still has the opportunity to demonstrate that the

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a suspect for many reasons, some of which are legitimate and some of which may be based on race"). *But see* United States v. Taylor, 956 F.2d 572, 578–79 (6th Cir. 1992) (en banc) (stating that if the state's drug courier profile "had incorporated a racial component" it would raise Equal Protection questions). As one pair of commentators noted:

> In practice, the value of the Equal Protection Clause as a remedy for discrimination in criminal investigations is deeply compromised by the near impossibility of proof. As a result, few cases are litigated, and the legal doctrine remains undeveloped. Even the central issue of remedy is unsettled. The Supreme Court has explicitly left the question open, and few lower court opinions address the issue.
>
> The few reported cases that are available are often muddled.

Gross & Barnes, *supra* note 134, at 741 (footnote omitted).

180. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879), *abrogated in part by* Taylor v. Louisiana, 419 U.S. 522 (1975); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (plurality opinion).

181. *See supra* notes 117–121 and accompanying text.

182. *See* McCleskey v. Kemp, 481 U.S. 279, 292 (1987); Wayte v. United States, 470 U.S. 598, 608 (1985).

183. *See* Batson v. Kentucky, 476 U.S. 79, 97–98 (1986); *infra* notes 228–231 and accompanying text.

184. *See McCleskey*, 481 U.S. at 292–93; *infra* notes 221–226 and accompanying text.

185. *See* United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995).

discrimination was narrowly tailored to meet a compelling state interest and that a race-neutral alternative was not available.[186]

A. *Suspect Classification*

Many commentators argue that the explicit use of race in any facet of the criminal justice system should trigger strict scrutiny because any state-sponsored "racial classification" invokes the protections of the Equal Protection Clause.[187] This argument finds some support in caselaw. For example, in *Strauder v. West Virginia*[188] the Supreme Court struck down a statute that disqualified Blacks from jury duty because of their race, since such explicit race-based discrimination "amounts to a denial of the equal protection of the laws."[189]

However, the Supreme Court has never directly held that using race as one factor among many in the criminal investigation context amounts to a "suspect classification" akin to the bright-line tests in cases like *Strauder*. In the sentencing context, the Court has stated in dicta that it would be "constitutionally impermissible" or "patently unconstitutional" to consider the race of the defendant as an aggravating circumstance in the penalty phase of a capital case.[190] But in the investigative context, courts have often held that the government is permitted to use race as one of multiple factors in deciding whom to target for investigation, as long

186. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235, 237 (1995); United States v. Avery, 137 F.3d 343, 356 (6th Cir. 1997); Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720, 735 (2007); Grutter v. Bollinger, 539 U.S. 306, 326, 339 (2003); Gratz v. Bollinger 539 U.S. 244, 270 (2003); Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2208 (2016).

187. *See, e.g.*, Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 302, 310 (2020). Many commentators have argued that using racial classifications as a factor in the sentencing context would automatically trigger (and fail) the strict scrutiny test. *See, e.g.*, Sonja Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 811–12 (2014) (noting that "risk prediction instruments used by some parole boards included race until as late as the 1970s," but no state now formally uses risk assessment software that uses race as a factor because "[t]here appears to be a general consensus that using race would be unconstitutional"); Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 696 (2015) ("The Supreme Court's jurisprudence leaves no room for race-conscious risk-assessment tools."); Christopher Slobogin, *Risk Assessment and Risk Management in Juvenile Justice*, CRIM. JUST., Winter 2013, at 10, 14 ("[M]ost courts have accepted the proposition that race may not be considered in determining dangerousness.").

188. 100 U.S. 303 (1879), *abrogated in part by* Taylor v. Louisiana, 419 U.S. 522 (1975).

189. *Id.* at 310.

190. Zant v. Stephens, 462 U.S. 862, 885 (1983); Buck v. Davis, 137 S. Ct. 759, 775 (2017) (holding that it was ineffective assistance of counsel for a defense attorney to introduce expert testimony showing a connection between his own client's race and future dangerousness in the sentencing phase); *see also* Sidhu, *supra* note 187, at 696–97 (arguing that a majority of Justices in 2011 would support this position based on their language in denying a petition for certiorari in a precursor to the *Buck v. Davis* case).

as they do not target an individual *solely* on the basis of race.[191] In *United States v. Travis*,[192] the U.S. Court of Appeals for the Sixth Circuit held that "[i]n some instances, officers may decide to interview a suspect for many reasons, some of which are legitimate and some of which may be based on race. In such instances . . . the use of race in [the targeting] stage does not give rise to any constitutional protections."[193]

As in the Fourth Amendment context, the source of this judicial leniency towards racial discrimination originates in the Supreme Court's controversial pair of immigration cases: *Brignoni-Ponce* and *Martinez-Fuerte*. In *Brignoni-Ponce*, the Court approved in dicta the use of race as a factor in the targeting stage.[194] In *Martinez-Fuerte*, the Court went even further by approving law enforcement's *post-contact* use of race as a factor. The *Martinez-Fuerte* Court upheld the procedure of prolonging a pre-existing detention based in part on race, noting that "even if it be assumed that [the prolonged detentions] . . . are made *largely on the basis of* apparent Mexican ancestry, we perceive no constitutional violation."[195] In neither case did the Court explicitly consider an Equal Protection claim, but lower courts have used the language from these cases in evaluating Equal Protection questions.[196]

Some commentators have argued that the immigration cases are *sui generis* because "the border brings a unique set of circumstances that place these cases in a different category altogether."[197] But there is no language in the immigration cases to support that assertion.[198] If the

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191. *See, e.g.*, United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995). This lenient standard stands in stark contrast not just to Equal Protection claims in other criminal contexts, but also to Equal Protection claims in the civil context, in which the Supreme Court has stated that the Equal Protection Clause is triggered "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision." Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

192. 62 F.3d 170 (6th Cir. 1995).

193. *Id.* at 174.

194. 422 U.S. 873, 886–87 (1975).

195. 428 U.S. 543, 563 (1976) (emphasis added) (footnote omitted).

196. *See, e.g.*, United States v. Avery, 137 F.3d 343, 353–55 (6th Cir. 1997) (forbidding the use of race in the "pre-contact" stage of criminal investigations if race is the *only* factor).

197. Sidhu, *supra* note 187, at 697; *see* sources cited *supra* note 134. The distinctive aspect of the border may make sense if the immigration cases were based on a special needs argument, but *Brignoni-Ponce* and *Martinez-Fuerte* are both cases involving crime control, not the special needs doctrine. *See Brignoni-Ponce*, 422 U.S. at 874–75; *Martinez-Fuerte*, 428 U.S. at 545.

198. Professor Dawinder Sidhu argues that these cases are distinct because the Court stated: "Our decision in this case takes into account the special function of the Border Patrol." Sidhu, *supra* note 187, at 697 (quoting *Brignoni-Ponce*, 422 U.S. at 883 n.8). But this language is taken out of context; the Court actually used that phrase to explain why the Border Patrol had *less* power to stop motorists than other law enforcement agencies. The rest of the footnote in the case explains that:

searches in the immigration cases were grounded in the special needs doctrine, based on the need to secure the border, then the lax constitutional standards they set out could be cabined off from the rest of Fourth Amendment or Equal Protection jurisprudence. Unfortunately, the *Brignoni-Ponce* Court is unclear as to whether the unique purpose of the border stops affects its legal analysis in the case.[199]

Under *Brignoni-Ponce* and *Martinez-Fuerte*, a suspect who brings an Equal Protection challenge cannot prevail unless he demonstrates that he was targeted *solely* because of his race.[200] Some later courts have tried to limit this rule by holding that it only applies in the pre-contact stage, when officers are deciding whom to approach. For example, in the Sixth Circuit case of *Farm Labor Organizing Committee v. Ohio State Highway Patrol*,[201] the police officer defendants testified that they treated Hispanic motorists differently than white motorists in that "they would refer Hispanic motorists to the Border Patrol when, in precisely the same circumstances, they would not refer someone who was white (i.e., not of

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> Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters.

Brignoni-Ponce, 422 U.S. at 883 n.8.

199. On the one hand, the Court does state that stops based in part on race are justified "because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border." *Brignoni-Ponce*, 422 U.S. at 881. On the other hand, the Court refuted the Government's argument that the proximity to the border gave law enforcement officers special powers:

> The Government also contends that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens for questioning about their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

Id. at 883–84 (citation omitted).

200. *See, e.g.*, United States v. Woods, 213 F.3d 1021, 1022–23 (8th Cir. 2000); United States v. Travis, 62 F.3d 170, 174–75 (6th Cir. 1995).

201. 308 F.3d 523 (6th Cir. 2002).

Hispanic appearance)."[202] The court found that the plaintiffs had made out a prima facie Equal Protection claim because "[t]he 'sole motive' requirement . . . is an anomaly in equal protection law, and should not be applied outside the narrow factual context of purely consensual encounters."[203] However, this is not consistent with the holding in *Martinez-Fuerte*, in which the Court approved of using race as a factor in a non-consensual encounter after the suspect was detained.

Since law enforcement officers can almost always testify as to some additional factors other than race that led them to stop or search a suspect, defendants rarely prevail under the *Martinez-Fuerte* test. One exception is *State v. Maryland*,[204] in which two transit police officers stopped a Black suspect after they observed him "shove a brown paper bag into the waistband of his pants as he exited the train."[205] The New Jersey Supreme Court held that once the defendant raised a selective law enforcement claim under the Equal Protection Clause, "the State was required to have established a non-discriminatory basis for the officers to conduct a field inquiry."[206] The court held that the mere act of placing a paper bag in one's waistband does not create any level of individualized suspicion and thus there was no non-discriminatory basis for the field inquiry.[207]

B. *Proving Discriminatory Intent*

Although law enforcement officers occasionally acknowledge that race is a factor in their investigative process, such admissions are rare, and statutes that explicitly discriminate on the basis of race are long

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202. *Id.* at 536. One of the state troopers who testified in the case said that "when he found Hispanic passengers hiding under a blanket, he called the Border Patrol, but that if he found white people hiding under a blanket, he would not;" another testified that she "once had contacted the Border Patrol after coming across two Hispanic men whose car had broken down, but that she wouldn't do the same for a white man." *Id.* at 535.

203. *Id.* at 538; *see also* United States v. Taylor, 956 F.2d 572, 578 (6th Cir. 1992) (en banc) (explaining that because the encounter between the police and the defendant was consensual, "it is unnecessary to consider or decide either the specific factual question of whether the officers' surveillance of Taylor was motivated to any degree by his race, or the broader constitutional issue of whether the alleged incorporation of a racial component into the DEA's drug courier profile would, if true, violate an individual's rights to due process and equal protection of the laws").

204. 771 A.2d 1220 (N.J. 2001).

205. *Id.* at 1223–24.

206. *Id.* at 1229.

207. *See id.* However, one of the reasons why the defendant won the case was that the New Jersey Supreme Court did not properly apply the *Martinez-Fuerte* test. Although the court correctly states the test, *see id.* at 1228, it uses a somewhat different test in its analysis later on, stating that "[b]ecause the totality of the record suggests that the hunch itself was, in our view, *at least in part* based on racial stereotyping, it was insufficient to rebut the inference of selective law enforcement that tainted the police conduct," *id.* at 1229 (emphasis added). If the reason for the field inquiry was only *in part* based on racial stereotyping, then it would pass the *Martinez-Fuerte* test.

gone.[208] Thus, most cases that challenge police conduct on Equal Protection grounds cannot rely on suspect classification to trigger strict scrutiny. Instead, defendants who bring Equal Protection cases must prove that the law enforcement action "had a discriminatory effect and . . . was motivated by a discriminatory purpose."[209] Outside the law enforcement setting, such Equal Protection claims are brought in a number of contexts in the criminal justice system. For example, the defendant could show that the prosecutor used her peremptory strikes disproportionately against prospective jurors of a certain race;[210] that prosecutors selectively prosecute certain defendants based on their race;[211] that prosecutors disproportionately seek the death penalty for defendants of a certain race;[212] or that members of a certain race are underrepresented in the jurisdiction's grand juries.[213]

In perhaps the most famous case alleging racial profiling in criminal investigations, the plaintiffs in *Floyd v. City of New York*[214] successfully used a statistical discrepancy in the racial breakdown of stop-and-frisks to prove that the New York Police Department acted with discriminatory purpose.[215] In that case, the statistical discrepancy was stark: although Blacks made up only 23% of the population of the city, they were the target of 52% of the frisks during the relevant eight-year period.[216] The defendant's expert explained this discrepancy by arguing that although the number of Black people who were stopped was disproportionate to the percentage of Black residents in the overall population, it was consistent with the percentage of Black individuals who were committing

208. *See, e.g.*, United States v. Avery, 137 F.3d 343, 355 (6th Cir. 1997) ("The government has maintained for years, and equally asserts in this case, that it does not use race to select individuals for investigation."). This is not exactly true—as this Article has shown, the government sometimes *does* acknowledge that it uses race as part of a profile to select individuals for investigation—but such acknowledgements are rare. *See supra* notes 96–114 and accompanying text.

209. Wayte v. United States, 470 U.S. 598, 608 (1985); *see* Washington v. Davis, 426 U.S. 229, 240 (1976). If the law enforcement policy is race neutral on its face, a discriminatory effect is not sufficient for an Equal Protection claim unless there is also discriminatory intent. *See* Melendres v. Arpaio, 989 F. Supp. 2d 822, 901–02 (D. Ariz. 2013) ("[T]he discriminatory intent requirement arises when law enforcement operations that are race-neutral nevertheless produce racially disparate results. In those circumstances, the Supreme Court has determined that such policies are not violations of the Fourteenth Amendment if there is no discriminatory intent." (citation omitted)), *adhered to by* No. CV–07–02513–PHX–GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013), *aff'd in part, vacated in part*, 784 F.3d 1254 (9th Cir. 2015).

210. *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986).

211. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 465, 470 (1996).

212. *See* McCleskey v. Kemp, 481 U.S. 279, 291–92 (1987).

213. *See* Castaneda v. Partida, 430 U.S. 482, 494 (1977).

214. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

215. *Id.* at 667.

216. *Id.* at 573–74.

crimes.[217] The district court rejected this reasoning, arguing that the defendant's numbers would only be relevant if the police were in fact stopping criminals; instead, the vast majority of individuals stopped by the police during the relevant period were innocent of any crime.[218] Thus, it was inappropriate to use the racial breakdown of the criminal population as a benchmark. The *Floyd* court then went a step further and stated that the very argument being made by the defendant proved that the police officers acted with a discriminatory purpose; the city had, in effect, admitted that it was using race as at least one of the factors in determining who to stop:

> Rather than being a defense *against* the charge of racial profiling, however, this reasoning is a defense *of* racial profiling. To say that black people in general are somehow more suspicious-looking, or criminal in appearance, than white people is not a race-neutral explanation for racial disparities in NYPD stops: it is itself a *racially biased explanation*.[219]

However, *Floyd* is an outlier. As with Equal Protection claims in other contexts, defendants often find it difficult to use statistical discrepancy to prove discriminatory intent in the criminal justice context.[220] The seminal case on racial bias in the criminal justice system is *McCleskey v. Kemp*,[221]

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217. *Id.* at 584 ("The City defends the fact that blacks and Hispanics represent 87% of the persons stopped in 2011 and 2012 by noting that 'approximately 83% of all known crime suspects and approximately 90% of all violent crime suspects were Black and Hispanic.'").

218. *Id.* at 585 ("As a result, there is no reason to believe that their racial distribution should resemble that of the local criminal population, as opposed to that of the local population in general. If the police are stopping people in a race-neutral way, then the racial composition of innocent people stopped should more or less mirror the racial composition of the areas where they are stopped, all other things being equal.").

219. *Id.* at 587.

220. The Supreme Court explained this difficulty in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another"—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion*[, 364 U.S. 339 (1960)] or *Yick Wo*[, 118 U.S. 356 (1886)], impact alone is not determinative, and the Court must look to other evidence.

429 U.S. 252, 266 (1977) (footnotes omitted) (citations omitted) (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

221. 481 U.S. 279 (1987).

in which a Black defendant argued that the state of Georgia engaged in racial discrimination when administering the death penalty.[222] The defendant relied on a study that showed that defendants who killed white victims were far more likely to be sentenced to death than those who killed Black victims.[223] The study also showed that Black defendants who killed white victims were more than twice as likely to get the death penalty than white defendants who killed white victims.[224] The Supreme Court rejected the defendant's arguments, holding that to prevail on an Equal Protection claim, the defendant had to demonstrate that the decisionmakers in the process acted with a "discriminatory purpose."[225] The Justices were concerned with interfering with the discretion that is given to prosecutors, judges, and juries, and thus said it required "exceptionally clear proof before [the Court] would infer that the discretion has been abused."[226]

In the investigative context, plaintiffs might face an additional hurdle in demonstrating discriminatory "purpose" since the language of the Equal Protection test provides a very narrow definition of that term. The Supreme Court has held that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[227] An empirically demonstrable link between the suspect's race and the likelihood of criminal activity would make it even harder to satisfy this test.

This narrow definition of "discriminatory purpose" is not borne out in other areas of criminal procedure. For example, in the context of jury

222. *Id.* at 291–92.

223. *Id.* at 293 & n.11.

224. *Id.* at 286.

225. *Id.* at 292–93.

226. *Id.* at 297. The Court noted that, in some criminal procedure cases, it had accepted a statistical discrepancy alone as proof of an Equal Protection violation, but it said that statistical proof "must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent." *Id.* at 293, 296. As an example of this "stark pattern," the Court cited *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), in which laundry operators had to apply for a permit to continue operation and "all but one of the white applicants received permits, but none of the over 200 Chinese applicants were successful." *McCleskey*, 481 U.S. at 293 n.12.

227. *McCleskey*, 481 U.S. at 298 (first and second alterations in original) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)). In *Feeney*, the Court considered a Massachusetts law in which veterans were given hiring preferences for certain civil service positions. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 261–62 (1979). The Court found that over 98% of the veterans in Massachusetts were male. *Id.* at 270. Noting that the Fourteenth Amendment "guarantees equal laws, not equal results," *id.* at 273, the Court held that the strong disparate impact on women caused by the veteran's preference was not sufficient evidence of a discriminatory purpose, *id.* at 279–80.

selection, the Court held in *Batson v. Kentucky*[228] that if a defendant established a pattern of racial discrimination in peremptory jury challenges, the prosecutor could only prevail if she could provide a racially neutral reason for making those challenges.[229] The Court further noted that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race."[230] Thus, in the jury selection context, any use of race as a factor was sufficient to establish a discriminatory intent, even if it had the "legitimate" purpose of winnowing out jurors who would be less sympathetic to the prosecutor's case.[231] This rule is far less forgiving of the state than the traditional Equal Protection test as applied in *McCleskey*, and it stands in stark contrast to the extremely tolerant *Martinez-Fuerte* rule, which explicitly allows the use of race as a factor as long as the police can argue that race is related to criminal activity.[232]

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228. 476 U.S. 79 (1986).

229. *Id.* at 97–98.

230. The Court argued:

> Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

Id. at 97–98 (citation omitted).

231. *See id.* at 138 (Rehnquist, J., dissenting) (explaining that using group affiliations such as race as a proxy for potential partiality was long viewed as "legitimate"). The *Batson* test was essentially the test used by the district court in *Floyd v. City of New York*, which alleged racial profiling in the city's stop-and-frisk program:

> Once it is shown that a decision was motivated at least in part by a racially discriminatory purpose, the burden shifts to the defendant to show that the same result would have been reached even without consideration of race. If the defendant comes forward with no such proof or if the trier of fact is unpersuaded that race did not contribute to the outcome of the decision, the equal protection claim is established.

959 F. Supp. 2d 540, 572 (S.D.N.Y. 2013) (footnote omitted) (quoting United States v. City of Yonkers, 96 F.3d 600, 612 (2d Cir. 1996)).

232. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563–64 (1976). Other commentators have leveraged similar critiques against the *Martinez-Fuerte* rule. *See, e.g.*, Gross & Barnes, *supra* note 134, at 740–41 ("[N]o American court would ever uphold a death sentence under the Equal Protection Clause if the prosecutor admits that she asked for the death penalty in

The *Martinez-Fuerte* test appears to be even more of an outlier when compared to other Supreme Court cases involving racial discrimination in the criminal justice context. In two recent decisions, the Court has treated race-based decision-making as uniquely destructive to the criminal justice system. For example, in *Buck v. Davis*,[233] an expert called by the defense attorney during the sentencing phase of a capital case testified that the fact that the defendant was Black increased the likelihood that he would commit a violent felony in the future.[234] Nevertheless, the defendant argued in a subsequent ineffective assistance of counsel claim that the original defense attorney's conduct in calling the expert was deficient, and that his isolated comments during the sentencing phase constituted prejudice.[235] The prejudice prong required a court to find "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[236] However, the expert only mentioned the alleged correlation between race and future dangerousness once on direct and once on cross examination, and overall the expert gave testimony that was positive to the defendant, opining that the defendant was unlikely to pose a danger in the future.[237] Furthermore, the jury heard a substantial amount of evidence from the prosecutor supporting a finding of future dangerousness, including the horrific nature of his crime, the defendant's apparent lack of remorse, and his multiple prior acts of violence against his girlfriend.[238] Consequently, the district court reviewing Davis's claim classified the defense attorney's error as "*de minimis*,"[239] and the circuit court termed it "unremarkable."[240] The Supreme Court strongly disagreed since "a basic premise of our criminal justice system" is to punish "people for what they do, not who they are."[241] The Court continued:

> This departure from basic principle was exacerbated because it concerned race. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." Relying on race to impose a

part because of the defendant's race, regardless of any nonracial factors that entered into that decision. . . . *McCleskey*, however troublesome, made it difficult to *prove* discrimination in capital charging; it did not reach the absurd conclusion that equal protection is satisfied as long as a black defendant is not plucked at random from the population and executed *solely* because of his race.").

233. 137 S. Ct. 759 (2017).

234. *Id.* at 768–69.

235. *Id.* at 770, 772.

236. *Id.* at 776 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

237. *See id.* at 768–69.

238. *Id.* at 768.

239. *Id.* at 778 (quoting Buck v. Stephens, H–04–3965, 2014 WL 11310152, at *5 (S.D. Tex. Aug. 29, 2014)).

240. *Id.* at 778 (quoting Buck v. Stephens, 623 F. App'x 668, 673 (5th Cir. 2015)).

241. *Id.*

> criminal sanction "poisons public confidence" in the judicial process. It thus injures not just the defendant, but the "law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts."[242]

Less than one month later, the Court decided *Peña-Rodriguez v. Colorado*,[243] in which a Hispanic defendant challenged his conviction because a member of the jury made racist comments during deliberations.[244] Rule 606(b) of the Federal Rules of Evidence states that evidence regarding internal jury deliberations are never admissible in a future proceeding;[245] in the fifty-plus years since the rules were promulgated, the Supreme Court had never allowed any substantive exceptions to this rule.[246] But the juror misconduct alleged in *Peña-Rodriguez* was different:

> The behavior in [past cases challenging Rule 606(b)] is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course. . . .
>
> The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.[247]

Both *Buck* and *Peña-Rodriguez* held that the defendant's constitutional rights were violated if a defendant's race could have in any way affected the jury's decision.[248] In this way, they flatly contradict *Martinez-Fuerte*.[249] To be sure, neither *Buck* nor *Peña-Rodriguez* were Equal Protection cases.[250] But the two cases do imply that if a future

242. *Id.* (citations omitted) (first quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979); then quoting Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015); and then quoting *Rose*, 443 U.S. at 556).

243. 137 S. Ct. 855 (2017).

244. *Id.* at 861–62.

245. FED. R. EVID. 606(b)(1).

246. *See, e.g.*, Tanner v. United States, 483 U.S. 107, 122, 125–26 (1987) (forbidding jurors from testifying that other jurors were using drugs and alcohol during deliberations). The rules were amended to allow for testimony regarding whether a clerical mistake was made on the jury form. *See Peña-Rodriquez*, 137 S. Ct. at 864–65 (quoting FED. R. EVID. 606(b)(2)(C)).

247. *Peña-Rodriquez*, 137 S. Ct. at 868.

248. Buck v. Davis, 137 S. Ct. 759, 775–77 (2017); *Peña-Rodriguez*, 137 S. Ct. at 869–70.

249. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563–64 (1976).

250. Of course, *Martinez-Fuerte* was technically not an Equal Protection case either, since the Court inexplicably never discussed the Equal Protection Clause in the decision.

Supreme Court is applying the Equal Protection Clause and needs to choose between a permissive *Martinez-Fuerte* standard that allows police to use race as a factor and a standard *McCleskey* test that triggers the Equal Protection Clause as soon as race is explicitly used as a factor, it should choose the latter.[251]

C. *Narrowly Tailored to Meet a Compelling State Interest*

Even if a defendant is able to demonstrate discriminatory intent, the state can still win an Equal Protection challenge by arguing that the use of race was narrowly tailored to meet a compelling state interest.[252] Although the strict scrutiny test was once famously described as "'strict' in theory and fatal in fact,"[253] the reality is that the government is often able to prevail under the strict scrutiny standard.[254] This is especially true in cases involving criminal procedure since courts routinely determine that deterring and detecting criminal activity is a compelling state interest, and they rarely examine whether the investigative practice is narrowly tailored to meet that interest.

Courts have been sympathetic to government claims that deterring criminal activity is a compelling state interest. With regard to investigations into drug trafficking, Justice Lewis Powell stated in a concurring opinion in *United States v. Mendenhall*[255] that "[t]he public has a compelling interest in detecting those who would traffic in deadly

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251. Civil cases which allege Equal Protection violations in the context of criminal investigations provide little guidance. As Professors Gross and Barnes note, many civil cases are dismissed for lack of proof or on summary judgment; almost all of those that do survive result in a settlement in which the police department agrees it will not use race as a factor in its criminal investigations. *See* Gross & Barnes, *supra* note 134, at 743. Civil cases brought by the Department of Justice result in similar consent decrees restricting the defendant police departments. *Id.*

252. *See supra* note 186 and accompanying text.

253. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The Court itself has adopted this terminology. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 n.6 (1984); *see also* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (defining "conventional 'strict scrutiny"' as "scrutiny that is strict in theory, but fatal in fact" (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (joint opinion of Brennan, White, Marshall, & Blackmun, JJ.))), *overruled in part by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

254. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96 (2006). Professor Winkler studied every strict scrutiny decision by the federal courts between 1900 and 2003 and found that 27% of the applications of strict scrutiny based on racial classification resulted in the law being upheld. *Id.* at 795, 839 tbl.6. However, most of the cases that survive strict scrutiny in the Winkler study may not have much applicability to the use of race in criminal investigations, since most of the laws which survive strict scrutiny are those that are remedial affirmative action laws meant to remedy past discrimination. *See id.* at 839–40. In contrast, the use of race in criminal investigations almost always reinforces past invidious discrimination against non-whites.

255. 446 U.S. 544 (1980).

drugs for personal profit."[256] The *Mendenhall* Court was not considering an Equal Protection claim, but lower courts have adopted this language in Equal Protection cases to prove that detecting drug dealing is a compelling state interest. In *Travis*,[257] for example, the trial court upheld a law enforcement practice that disproportionately targeted Blacks by quoting from Justice Powell's *Mendenhall* concurrence.[258]

In keeping with the pattern seen elsewhere, judicial deference to law enforcement regarding the compelling nature of the interest is even greater in the immigration context. In a recent immigration pre-emption case, the Supreme Court cited statistics from an anti-immigration group as evidence that unauthorized aliens are "responsible for a disproportionate share of serious crime."[259] The Court went on to cite the state of Arizona's arguments, which claimed that the influx of illegal migration into the state was responsible for an "epidemic of crime, safety risks, serious property damage, and environmental problems," to conclude that "[t]he problems posed to the State by illegal immigration must not be underestimated."[260]

Even if the state's goal is a compelling interest, the government should fail a strict scrutiny test unless the law or practice is a narrowly tailored means of furthering those governmental interests. What does this mean in the context of criminal investigations? At the very least, it must mean

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256. *Id.* at 561 (Powell, J, concurring). Justice Powell justified his compelling interest finding by arguing:

> Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

Id. at 561–62.

257. 837 F. Supp. 1386 (E.D. Ky. 1993), *aff'd*, 62 F.3d 170 (6th Cir. 1995).

258. *Id.* at 1389, 1395–96; *see supra* note 179 and accompanying text.

259. Arizona v. United States, 567 U.S. 387, 398 (2012) (citing statistics from the Center for Immigration Studies which estimated that unauthorized aliens constitute 8.9% of the population and are responsible for 21.8% of the felonies in Maricopa County). The Center for Immigration Studies is a strongly partisan anti-immigrant organization that was co-founded by a white nationalist and has been described as a hate group by the Southern Poverty Law Center. *See* Jason DeParle, *The Anti-Immigration Crusader*, N.Y. TIMES (Apr. 17, 2011), https://www.nytimes.com/2011/04/17/us/17immig.html [https://perma.cc/RP79-Y6PV]; Amy Sherman, *Is the Center for Immigration Studies a Hate Group, as the Southern Law Poverty Center Says?*, POLITIFACT (Mar. 22, 2017), https://www.politifact.com/florida/article/2017/mar/22/center-immigration-studies-hate-group-southern-pov/ [https://perma.cc/54HU-FHPF].

260. *Arizona*, 567 U.S. at 398; *see also* Melendres v. Arpaio, 989 F. Supp. 2d 822, 901 (D. Ariz. 2013) ("The enforcement of immigration-related civil or criminal offenses amounts to a compelling governmental interest."), *adhered to by* No. CV–07–02513–PHX–GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013), *aff'd in part, vacated in part*, 784 F.3d 1254 (9th Cir. 2015).

more than the fact that using race increases the accuracy of law enforcement's predictions of criminal behavior, which is the standard under the Fourth Amendment.[261] In a seminal article on racial profiling, Professor Bernard Harcourt proposes that using race as a factor in criminal investigations is narrowly tailored "only if the policing practices do not create a ratchet effect on the profiled population."[262] A "ratchet effect" means that the practice produces hit rates disproportionate to the actual crime rate of the profiled population.[263] In other words, if 25% of the criminals who commit a certain crime are Black, but Black citizens are being stopped, searched, or arrested at a rate higher than 25%, then the race-based investigative technique is not narrowly tailored.

Professor Harcourt's test is surely a good method for evaluating the practice of racial profiling generally,[264] but it does not find much support in the actual Equal Protection Clause caselaw. Instead, it focuses primarily on the accuracy of the criminal investigative technique, which is related to whether the search is legitimate under the Fourth Amendment.[265] Professor Adam Winkler has proposed a better test for whether the use of race is "narrowly tailored" to meet the compelling state interest of crime control: ask whether the state action "capture[s] within its reach no more activity . . . than is necessary to advance those compelling ends."[266] In other words, courts should determine whether using race is the "least restrictive" alternative to achieve the compelling state interest.[267]

The U.S. Court of Appeals for the Third Circuit applied this test in *Hassan v. City of New York*,[268] when Islamic citizens alleged that they were subjects of widespread police surveillance in New York City based on their religious beliefs.[269] *Hassan* applied strict scrutiny and agreed with the government that providing security from terrorism was a

261. *See supra* notes 51–60 and accompanying text.

262. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1280 (2004).

263. *Id.* at 1280, 1329.

264. *See id.* at 1329–35 (explaining the ratchet effect test and making a compelling argument that racial profiling techniques which violate this test have numerous negative effects on society).

265. *See id.* at 1335, 1341.

266. Winkler, *supra* note 254, at 800.

267. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (plurality opinion) ("[T]he classification at issue must 'fit' with greater precision than any alternative means." (quoting John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 n.26 (1974))); *see* Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) (describing strict scrutiny in the First Amendment context).

268. 804 F.3d 277 (3d Cir. 2015).

269. *See id.* at 284–85.

compelling state interest.[270] However, the court held that the state had the burden of proving a link between the means and the end:

> [H]eightened scrutiny requires that the relationship between the asserted justification and discriminatory means employed "be substantiated by objective evidence." "[M]ere speculation or conjecture is insufficient," as are appeals to "'common sense' which might be inflected by stereotypes."
>
> And "[e]ven in the limited circumstance" where a suspect or quasi-suspect classification "is permissible to further [an important or] compelling state interest, the government is still 'constrained in how it may pursue that end.'" While "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality," strict scrutiny requires that "the classification at issue . . . 'fit' with greater precision than any alternative means."[271]

Unfortunately, *Hassan* is an outlier. In fact, most courts do not even consider an Equal Protection argument when evaluating the use of race in criminal investigations.[272] When courts do discuss the Equal Protection

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270. *Id.* at 306.

271. *Id.* (all alterations except the first in original) (citations omitted) (first quoting Patrolmen's Benevolent Ass'n v. City of New York, 310 F.3d 43, 53 (2d Cir. 2002); then quoting Reynolds v. City of Chicago, 296 F.3d 524, 526 (7th Cir. 2002); and then quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003); and then quoting Heller v. Doe, 509 U.S. 312, 321 (1993); and then quoting *Wygant*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion)). The Third Circuit was ruling on the Government's appeal of a motion to dismiss, so it did not reach the question of whether the Government met this burden. *Id.* The Government later settled the case, agreeing to cease its suspicionless surveillance based on religion and pay damages to mosques and businesses for income lost as a result of the surveillance. *See Settlement Reached in NYPD Muslim Surveillance Lawsuit*, CTR. FOR CONST. RTS. (Apr. 9, 2018), https://ccrjustice.org/home/press-center/press-releases/settlement-reached-nypd-muslim-surveillance-lawsuit [https://perma.cc/BW5M-H5KR].

272. *Martinez-Fuerte* is probably the most prominent example of this phenomenon; although the border patrol officers were using race as a factor in deciding whether to pull over suspects, the Supreme Court did not discuss the Equal Protection Clause. *See* 428 U.S. 543, 563–64 (1976). Instead, it treated the use of race as it would any other factor under the Fourth Amendment, allowing border patrol agents to rely in part on the race of the suspect as long as it was "relevant to the law enforcement need." *Id.* at 564 n.17 ("Thus, to the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint, that reliance clearly is relevant to the law enforcement need to be served." (citation omitted)). For an example of a case in which the Supreme Court allowed the INS to conduct "surveys" to check for undocumented aliens at certain workplaces, see *INS v. Delgado*, 466 U.S. 210, 212 (1984). The Court held that these surveys did not constitute "seizures" under the Fourth Amendment, *id.* at 221, but it never considered the Equal Protection question as to why the INS was focused on this specific workplace. Indeed, the propriety of using race as a factor in immigration enforcement was so uncontroversial that the dissent did not even raise the issue. *See id.* at 225–26 (Brennan, J., concurring in part and dissenting in part).

claims, however, they usually do not require the state to produce objective evidence to link the discriminatory means to the compelling state interest of crime control.[273]

CONCLUSION

When considering the constitutionality of race as a factor in criminal investigations, courts need to analyze the practice under both the Fourth Amendment and the Equal Protection Clause. Courts have generally done a poor job with both analyses. For the use of race to be a legitimate factor under the Fourth Amendment, the government must prove that the suspect's race makes criminal activity more likely. This means the government must provide evidence that a significant percentage of people of that ethnicity commit the crime and that there is a significant difference in the crime rate between people of that ethnicity and people of other ethnicities. Even in the immigration context, where the link between race and criminal conduct may seem the most intuitive, the government has consistently failed to present such evidence.

For the Equal Protection context, the courts must choose among the various different tests they have been using in the criminal justice context. Under the *Batson* rule used in jury selection, any use of race is impermissible under the Equal Protection Clause, even if it is correlated to a legitimate purpose. According to *Batson*, any disproportionate effect on a suspect class triggers a burden shifting that requires the state to prove the disparity is merely a coincidence, and that a race-neutral reason explains the real motivation for the statistical anomaly. But under the standard Equal Protection test as applied in *McKleskey*, a showing that the state's action disproportionately affects a suspect class is insufficient; the defendant must also prove that the state made its choices at least in part because of the suspect's race, and even a dramatic statistical disparity

273. *See Patrolmen's Benevolent Ass'n*, 310 F.3d at 53. It is worth noting that even if a defendant were able to prove a violation of the Equal Protection Clause, the appropriate remedy in the criminal law context is unclear. The Supreme Court has explicitly left the question of remedy open, while lower courts have held that the proper remedy is to bring a § 1983 action against the police. *See* United States v. Armstrong, 517 U.S. 456, 461 n.2 (1996) ("We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race."); United States v. Nichols, 512 F.3d 789, 794 (6th Cir. 2008), *abrogated on other grounds*, Arizona v. Gant, 556 U.S. 332 (2009), *as recognized in* United States v. Buford, 632 F.3d 264 (6th Cir. 2011). Some commentators have proposed applying the exclusionary rule to Equal Protection violations. *See* Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1110, 1118–19 (2000); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2004–05 (1998). However, no court has ever accepted this proposal, and the Supreme Court has moved in the opposite direction, seeking to limit the applicability of the exclusionary rule in the Fourth Amendment context. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 591 (2006).

may not be enough. Under the *Martinez-Fuerte* rule used in immigration cases, the state can explicitly use race as a factor in their criminal investigation as long as it can prove that race is related to criminal activity and that law enforcement used other factors as well. This Article argues that courts should conform the Equal Protection Clause doctrine in the criminal context to its application in civil cases, as it did in *McCleskey*. Thus, statistical disparity on its own will likely not be enough evidence to apply the Equal Protection Clause, not even to shift the burden as in *Batson*. But any explicit use of race—as part of a profile or as part of an argument that members of that race are more likely to commit the suspected crime—should trigger strict scrutiny.

Once the Equal Protection Clause is triggered, the court should move to the second part of the Equal Protection analysis: whether the targeting of the suspect class is narrowly tailored to meet a compelling government interest. In the jury selection context governed by *Batson*, the Court has determined that targeting a suspect class can never pass this test. But in the criminal investigation context, the state could conceivably make the necessary showing. Courts seem willing to find that crime control is a compelling state interest; to pass the narrowly tailored prong, police or prosecutors must be required to demonstrate that using race is the least restrictive alternative to achieving the compelling state interest. Unfortunately, most courts have failed to demand the evidence necessary to conduct the appropriate analysis to confirm that the government policy survives strict scrutiny.

Given the long history of police officers improperly using race in criminal investigations, and the strong policy interest in deterring the practice, the Supreme Court could create a requirement of judicial pre-clearance before the police are permitted to use race as an explicit factor in determining probable cause.[274] For example, if law enforcement officers want to institute an interdiction program that uses a profile for drug smuggling, terrorism, immigration violations, or any other crime, they must first go to a judge and prove that their profiling conforms to both the Fourth Amendment and the Equal Protection Clause. To pass the Fourth Amendment test, the police must show that using race as a factor increases the likelihood that the individual is engaged in criminal activity in the context of the profile. Ordinarily this would mean that the police have evidence that a significant percentage of people of that ethnicity commit the crime and that there is a significant difference in the crime rate between people of that ethnicity and people of other ethnicities. In order to comply with the Equal Protection Clause, law enforcement would have to pass strict scrutiny, demonstrating that no other means are

274. Thanks to Professor Laurent Sacharoff for the suggestion of judicial pre-clearance.

available for meeting the compelling state interest of crime control in this context.

Under this rule, police who conduct a warrantless arrest could not explicitly cite the race of the defendant as a factor in justifying the arrest. Criminal defendants could still seek to prove that race was an implicit or hidden factor, but they would then have to meet the *McCleskey* standard and demonstrate a disparate impact and discriminatory purpose. This would conform the criminal procedure law with the Equal Protection standards from other fields. And, as *Floyd* shows,[275] it is difficult but not impossible for criminal defendants to meet this standard.

It is entirely feasible—perhaps likely—that predictive algorithms used by police in the future will produce demonstrably greater accuracy if race is used as a factor. Thus, the only way to prohibit this practice will be to consistently enforce the appropriate Equal Protection test and force the state to pass a strict scrutiny test if race is ever used as a factor in a criminal investigation. Unfortunately, the courts have already shown their willingness to accept the use of race in immigration cases without the appropriate evidence to pass muster under the Fourth Amendment and without applying the appropriate Equal Protection test. As long as these cases remain good law, their flawed statistical analysis and lenient Equal Protection treatment will continue to seep into general criminal procedure jurisprudence, paving the way for a more systematic use of race in criminal investigations.

275. *See supra* notes 214–219 and accompanying text.