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Utah v. Strieff: Lemonade Stands and Dragnet Policing

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In February 2016, the United States Supreme Court heard arguments in *Utah v. Strieff*, a routine Fourth Amendment dispute involving a defendant
caught possessing a small amount of narcotics. This seemingly minor case was little anticipated, but Justice Sonia Sotomayor’s dissent did not go unnoticed. It received unusual attention from the mainstream media and was described as “ringing,” “fiery,” “thundering,” and even as an “Atomic Bomb.”

The media’s frenzied reaction was elicited less by what was said than by the fact that it was a Supreme Court Justice saying it. Justice Sotomayor merely repeated a claim made many times before: she inferred that the police engage in racial profiling. “It is no secret,” she wrote, “that people of color are disproportionate victims of this type of [police] scrutiny.” She also suggested the Court is itself responsible for the racial inequity that seemingly pervades America’s criminal justice system because it has failed to uphold the protections afforded under the Fourth Amendment. “When we condone officers’ use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.”

*Strieff* turned on a point of law most Americans have never heard of: the Fourth Amendment’s attenuation doctrine. A police officer had stopped Strieff without reasonable suspicion, and, after checking his identification, the officer discovered an arrest warrant had been issued because of an unpaid traffic violation. The officer arrested Strieff pursuant to that warrant, searched him incident to the arrest, and then discovered illegal contraband. The question was whether the drugs discovered during the search should be suppressed because the officer lacked the requisite level of suspicion to make the initial stop.

No one could have predicted that *Strieff*, which involved a white male defendant from Utah, would lead to a highly contentious dispute touching upon racial profiling and the Michael Brown shooting in Ferguson, Missouri.

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2. Id. at 2060.
5. Ford, supra note 3.
8. Id. at 2069.
9. Id. at 2058.
10. See id. at 2059–60 (majority opinion).
11. Id. at 2060.
12. See id.
However, Justice Sotomayor offered a scathing and uniquely personal critique of America's criminal justice system:

For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen... all out of fear of how an officer with a gun will react to them. . . . [T]his case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.\(^\text{3}\)

In addition to her racial profiling accusation, Justice Sotomayor also warned that condoning the officer's behavior in \textit{Strieff} could open the door to the type of police practices one would expect to find in an authoritarian police state.\(^\text{14}\) She predicted police would soon be making suspicionless stops of "joggers, dog walkers, and lemonade vendors."\(^\text{15}\) Dissenting Justices often make hyperbolic assertions. However, less than three weeks after \textit{Strieff} was decided, the shooting of Philando Castile seemingly substantiated Justice Sotomayor's argument. Castile's death received nationwide publicity because his fiancé began live streaming the incident immediately after he was shot.\(^\text{16}\) Viewers could see horrific images of Castile's bloody torso slumped over in the driver's seat.\(^\text{17}\)

The shooting was a tragedy, but we should not assume that the Mexican American officer who shot Castile was motivated by racial animus or that he intentionally meant harm. It appears the shooting was a terrible mistake.\(^\text{18}\) But, after giving this individual police officer the benefit of the doubt, we can still ask why so many other officers repeatedly stopped Castile for trivial traffic violations. The former cafeteria worker, paid less than $20 an hour, had been pulled over at least 49 times in 13 years\(^\text{19}\) and was charged with 79 different

\(^\text{13}\) \textit{Id.} at 2070-71.
\(^\text{14}\) See \textit{id.}
\(^\text{15}\) See \textit{id.} at 2067.
\(^\text{17}\) \textit{Id.}
minor traffic violations 48 of which were eventually dismissed.\textsuperscript{20} Those who have escaped such experiences can only imagine how frustrating this must have been. The more than $6,000 he accumulated in traffic violations would have cost Castile more than 300 hours of his pre-tax salary.\textsuperscript{21} It is unclear how many days he spent in traffic court, but we do know his car was repeatedly impounded.\textsuperscript{22} After his death, his mother recalled telling him, “Every time you get in that car and leave out the door you come back with another ticket . . .”\textsuperscript{23}

If Castile had been stopped for offenses such as speeding or reckless driving, we could conclude the police were only doing their job. However, according to an analysis conducted by NPR, only six of the stops were for “things a police officer would notice from outside a car—things like speeding or having a broken muffler.”\textsuperscript{24} Instead, most of Castile’s offenses were for matters that would not have been discovered until after the stop, such as not having proof of insurance.\textsuperscript{25} Perhaps the police were running his license plate on a computerized system before stopping him and seeing the car had been cited for previous violations. However, one would then have to ask why so many officers had chosen to run one particular motorist’s license plate out of all the vehicles on the highway. Moreover, no one even knows how many times Castile was stopped and given only a verbal warning.

There is good reason to believe Castile was targeted because the officers thought a young black man with dreadlocks was likely engaged in graver crimes than a turn signal violation. It was exactly these kinds of unwarranted stops during which an officer hopes “to fish further for evidence of wrongdoing” that Justice Sotomayor warned against in \textit{Strieff}\.\textsuperscript{26} The only difference is that the defendant in \textit{Strieff} was a pedestrian, not a motorist.\textsuperscript{27} And, as we shall see, prior to \textit{Strieff}, the Court had already condoned random investigatory “encounters”

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was stopped. The \textit{New York Times} reported 49 times. \textit{See id.} But the \textit{New York Times} has also reported 52 times. \textit{See Mitch Smith, Philando Castile’s Last Night: Tacos and Laughs, Then a Drive, N.Y. TIMES} (July 12, 2016), https://www.nytimes.com/2016/07/13/us/philando-castile-minnesota-police-shooting.html.
\textsuperscript{22} \textit{See} LaFrandier, \textit{supra} note 19.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} Peralta, \textit{supra} note 21.
\textsuperscript{25} \textit{Id.}
\textsuperscript{27} \textit{Id.} at 2060.
targeting domestic airline passengers and bus passengers. It then permitted pretext stops of motorists. In , Sotomayor was hoping to draw the line with pedestrians.

Justice Clarence Thomas, writing for the majority, disputed Justice Sotomayor’s assertions. He insisted that what had happened in was not a suspicionless fishing expedition ‘in the hope that something would turn up,’ and he blithely dismissed Justice Sotomayor’s warning that failure to suppress the evidence would encourage the police to conduct large-scale stops of pedestrians in the future: “argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. We think that this outcome is unlikely. Such wanton conduct would expose police to civil liability.”

The Court’s debate in reflects a larger division in American society over the issue of racial profiling and proactive policing. An overwhelming majority of African Americans have long claimed racial profiling is widespread, but only a bare majority of white Americans agree. Moreover, in a poll released last year, half of white Americans told researchers that discrimination against whites has become as big a problem today as discrimination against blacks and other minorities.

This Article challenges the skeptics of racial profiling, including the five Justices who signed an opinion declaring dragnet policing is not a threat in the United States, by tracing the 40-year history of something far worse: racially targeted dragnet policing. It contains the most comprehensive history of racial profiling yet published and proves the existence of systemic and institutionalized selective enforcement practices by chronicling how they have progressed in a series of four stages which have corresponded with different modes of transportation. The first three stages grew out of the “War on Drugs,” and the

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29 Florida v. Bostick, 501 U.S. 429, 431 (1991) (stating that the Court had previously ruled the Fourth Amendment “permits police officers to approach individuals at random in airport lobbies” and holding that “the same rule applies to police encounters that take place on a bus”).
31 , 136 S. Ct. at 2067 (Sotomayor, J., dissenting).
32 Id. at 2064 (majority opinion) (quoting Taylor v. Alabama, 457 U. S. 687, 691 (1982)).
33 Id.
34 According to Gallup News, the percentage of white Americans who believe racial profiling is widespread declined from 56% in 1999 to 54% in 2003. Jack Ludwig, Americans See Racial Profiling is Widespread, GALLUP NEWS (May 13, 2003), http://www.gallup.com/poll/8389/Americans-See-Racial-Profiling-Widespread.aspx?g_source=racial%20profiling&g_medium=search &g_campaign=tiles.
primary goal was drug interdiction. Racially targeted dragnet policing began in the Detroit Metropolitan Airport in 1974, and it quickly spread to airports nationwide. By the early 1980s, black and Latino passengers using long distance buses and trains were targeted; minority motorists came next. Finally, beginning in the mid-1990s, the primary aim became gun control, and the police began focusing primarily on pedestrians of color.

In recounting this history, this Article cites previously ignored sources to prove how law enforcement has purposefully designed and implemented racial profiling strategies. Prior scholars have relied on the testimonial accounts of victims, case law, statistical evidence, laws and consent decrees, political speeches, and policy makers' statements and decision-making. However, there is a critical voice missing in these accounts: the voice of the police. This Article draws upon a police training manual, memoirs written by the most respected law enforcement leaders in the country, and sworn testimony by lower level officers to prove that racial profiling policies and dragnet policing strategies have been purposefully designed and implemented for over 40 years.

These law enforcement sources provide a unique perspective from which to examine Supreme Court decisions which condoned the various stages of racial profiling. For example, the Court has ruled that "the Fourth Amendment permits police officers to approach individuals at random . . . to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate." Yet, according to a "classic" police manual, Tactics for Criminal Patrol ("Tactics"), "the reasons for giving consent are not affected by logic," and "[p]sychologically . . . the
chances are overwhelming that the average person won’t leave” when asked to do something by a police officer.47

This Article also illustrates how this “reasonable person” standard has eviscerated Fourth Amendment protections. Unlike other constitutional rights, the guarantee against unreasonable searches and seizures is today limited to “reasonable” people who are capable of distinguishing between an officer’s request and a politely worded order. However, as lower courts have warned, “a reasonable person might [incorrectly] read an officer’s ‘May I’ as the courteous expression of a demand backed by force of law.”48 No other constitutional right is so restricted. For example, the First Amendment protects our right to assert the most ridiculous arguments, associate with the most illogical people, and pray to the silliest of deities.49 Under the Court’s “reasonable person” approach however, the onus of upholding the Fourth Amendment becomes the responsibility of citizens who are confronted by the power of the state.

This Article proceeds along the following lines. Part II examines the underlying facts of Strieff, it defines the terms “racial profiling” and “dragnet policing,” and it explains how today’s racial profiling differs from Jim Crow era police practices. Part III chronicles the first three stages of racially targeted dragnet policing. It illustrates how the fiction of “consent” based stops and searches has been used to bypass the protections guaranteed under the Fourth Amendment. It also illustrates how the police have been trained to practice racially targeted dragnet policing while concealing it from judges. Part IV explores the fourth stage of racially targeted dragnet policing, the “stop-and-frisk” of pedestrians which was pioneered in New York City during the mid-1990s. It demonstrates that Justice Sotomayor’s warning of how the police might start making suspicionless stops of “joggers, dog walkers, and lemonade vendors” was no exaggeration.50 In fact, this has already come to pass. Joggers, unlicensed food vendors, and even children riding their bicycles on the sidewalk, if they were black or Latino, were regularly targeted by the police during the apex of New York City’s stop-and-frisk program. Lastly, Part V of this Article makes concluding points by reiterating how the Court’s holding in Strieff condones a racially targeted dragnet policing program.

47 Id. at 215.
48 Bustamonte v. Schneckloth, 448 F.2d 699, 701 (9th Cir. 1971).
II. DRAGNET POLICING AND RACIAL PROFILING

A. Strieff and the Threat of Dragnet Policing

Strieff began with an anonymous tip that “narcotics activity” was occurring at a residence in South Salt Lake City, Utah.\(^{51}\) Detective Douglas Fackrell subsequently conducted intermittent surveillance of the home for about a week.\(^{52}\) Since he saw a number of visitors leaving just a few minutes after entering the house, he became suspicious that the occupants were dealing drugs.\(^{53}\) Fackrell returned to the residence and observed the defendant, Edward Strieff, exit the house and walk toward a nearby convenience store.\(^{54}\) Fackrell followed him and then “ordered Strieff to stop in the parking lot.”\(^{55}\) Fackrell asked for identification, relayed Strieff’s information to a police dispatcher, and learned that Strieff had an outstanding arrest warrant for a traffic violation.\(^{56}\) Fackrell then arrested Strieff pursuant to that warrant, searched Strieff incident to the arrest, and discovered methamphetamine and drug paraphernalia.\(^{57}\)

Although the officer had witnessed Strieff coming out of the residence, he had not seen Strieff going in.\(^{58}\) The prosecution conceded that Fackrell lacked reasonable suspicion when he made the stop because he did not know if the defendant fell into the category of suspicious short-term visitors.\(^{59}\) When Strieff moved for the judge to suppress the evidence found against him, the state answered that the evidence should be deemed admissible because it fell under the doctrine of attenuation, one of the three exceptions to the exclusionary rule.\(^{60}\)

The Court’s main weapon in upholding the Fourth Amendment is the exclusionary rule, which suppresses the evidence of an illegal search.\(^{61}\) Not all illegal searches result in the application of the exclusionary rule. One such exception is the doctrine of attenuation. Under this doctrine, evidence discovered

\(^{51}\) Id. at 2059.

\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Id. at 2060.

\(^{55}\) State v. Strieff, 357 P.3d 532, 536 (Utah 2015).

\(^{56}\) Strieff, 136 S. Ct. at 2060.

\(^{57}\) Id.

\(^{58}\) Id. at 2063 (“[H]e had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there.”).

\(^{59}\) During oral argument, the Utah Solicitor General said, “We’ve admitted that this was a miscalculation, but it was a close call.” Transcript of Oral Argument at 4, Utah v. Strieff, 136 S. Ct. 2056 (2016) (No. 14-1373).

\(^{60}\) See, e.g., State v. Bailey, 338 P.3d 702, 708 (Or. 2014) (“There are three recognized exceptions to the Fourth Amendment exclusionary rule: (1) the inevitable discovery exception; (2) the independent source exception; and (3) the attenuation exception.”).

\(^{61}\) Strieff, 136 S. Ct. at 2061.
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through police misconduct is admissible if the link between an officer’s misconduct and the discovered evidence is “so attenuated as to dissipate the taint.”

For example, imagine after Strieff had been stopped, arrested, and discovered to have been carrying illegal drugs, he was read his Miranda rights, consulted with his attorney, was released on bail, and then a week later voluntarily returned to the police station with his lawyer and confessed to the crime of illegal drug possession. Perhaps the drugs should be excluded from evidence because the stop had been unconstitutional; that question certainly divided the Justices in Strieff. However, since the whole point of the exclusionary rule is to deter police misconduct, there would appear to be little gained by excluding the voluntary confession from being used as evidence against the defendant. Thus, the question is not simply whether the evidence would have come to light “but for” the illegal actions of the police. “Rather, the more apt question in such a case is ‘whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’”

The Court uses a three-pronged test to determine whether evidence discovered after a Fourth Amendment violation should be deemed admissible under the doctrine of attenuation. The first factor is temporal proximity. In our hypothetical scenario, the confession was not made until a week after the illegal stop, thus weakening the link. However, the evidence in Strieff was discovered almost immediately after the officer stopped Strieff, so there was little debate that this factor favored suppressing the evidence.

There was more disagreement regarding the second factor: the presence of intervening circumstances. Did the discovery of the arrest warrant attenuate the connection between the unlawful stop and the evidence that was seized incident to the warrant arrest? Before Strieff, the Court had discussed intervening circumstances in reference to “an intervening independent act of a free will,” and in a previous case, the suspect had, in fact, returned to the police station after his release to confess. Another example would be if, during the stop, a passerby alerted Officer Fackrell that Strieff had assaulted her the previous day.

In these scenarios, unlike in Strieff, the doctrine of attenuation is being triggered by an action committed by someone other than the arresting officer.

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64 Strieff, 136 S. Ct. at 2061 (citing Hudson v. Michigan, 547 U.S. 586, 593 (2006)).
65 Id. at 2062.
66 Id.
67 Id.
68 Wong Sun, 371 U.S. at 486.
According to the majority, the doctrine of attenuation was nonetheless applicable in *Strieff* because "the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop." According to Justice Sotomayor, however, the warrant check did not constitute an intervening event because the "sole purpose" of the stop was "to fish for evidence," and a warrant check of a pedestrian is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'

The Court's typical legal debate turned into a much broader examination of the criminal justice system when the Court reached the third prong of the attenuation test: "the purpose and flagrancy of the official misconduct." The majority argued Fackrell "was at most negligent" and that what had occurred was an "isolated" incident as opposed to "systemic or recurrent police misconduct." Justice Sotomayor answered that there had been no reason to run a warrant check, and she feared that condoning the stop would motivate the police to start routinely running warrant checks on pedestrians, as they already do on motorists.

The Court's rationale for allowing routine warrant checks of motorists is that "the legitimacy of a person's driver's license has a 'close connection to roadway safety.'" However, according to Justice Sotomayor, Fackrell had not run the warrant check on Strieff because of safety concerns. He had done so specifically to discover evidence of ordinary criminal wrongdoing and, as noted, she feared that if the Court were to condone the practice, police officers would soon start running random warrant-checks of "joggers, dog walkers, and lemonade vendors." It was this argument to which Thomas was responding when he wrote that "dragnet searches" are an "unlikely" possibility because "[s]uch wanton conduct would expose police to civil liability."

**B. Defining "Dragnet Policing" and "Racial Profiling"**

Although "dragnet policing" was central to the debate in *Strieff*, the term was never defined. According to the Merriam-Webster online dictionary, the term has two meanings, the first of which is "a net drawn along the bottom of a

69 *Strieff*, 136 S. Ct. at 2062.
70 *Id.* at 2067 (Sotomayor, J., dissenting).
72 *Id.* at 2058 (quoting Brown v. Illinois, 422 U.S. 590, 604 (1975)).
73 *Id.* at 2058, 2063.
74 *Id.* at 2066 (Sotomayor, J., dissenting).
75 *Id.* at 2067 (Sotomayor, J., dissenting) (quoting Rodriguez v. United States, 135 S. Ct. 1609, 1615 (2015)).
76 *Id.*
77 *Id.* at 2064 (majority opinion).
body of water" or "a net used on the ground (as to capture small game); the
second definition is "a network of measures for apprehension (as of
criminals)." In addition to these two definitions, there is a third possible
meaning, one borrowed from the famous Dragnet radio and television series.
Rather than running a dragnet to catch multiple criminals, the police might
employ large-scale coordinated measures to apprehend a particularly dangerous
individual. However, such measures were not at issue. The use of the term
"dragnet" in Strieff was closer to its original meaning: a net used for fishing that
randomly sweeps up all in its path, the guilty as well as the innocent.

Dragnet policing may be understood by comparing wild game hunting
with dragnet fishing. If a hunter stalks wild game, she will use a rifle's cross hairs
to kill a targeted animal. When fishermen use a dragnet, they presumably target
areas where they expect the best haul to be, but the net randomly captures
everything in its path that is not too small to escape through the netting.

Traditional policing is reactive and similar to wild game hunting; the
police receive a crime report and then search for the perpetrator. Dragnet
policing, on the other hand, is proactive; the police target neighborhoods and
groups in which crime is thought to be clustered. Jack Maple, a legendary figure
behind the development of the New York Police Department's Compstat
program, often said that it is unusual to catch a criminal in the act of committing
a crime. Therefore, the police must seek "to catch crooks when the crooks are
off-duty." To do so, the police "must be sent where the maps show
concentrations of crime or criminals," and they must vigorously enforce
"relatively minor violations" once they get there.

Neither dragnet policing nor racial profiling relies on individualized
suspicion as is generally demanded by the Fourth Amendment. The police
neither seek to catch a particular suspect who committed a specific crime nor
stop individuals based on suspicious behavior. Dragnet policing is closely
associated with racial profiling, but there are distinctions. If the police stop and
search every person at a roadblock to check for narcotics, this would constitute
a dragnet search. If the police stop a motorist not because of his driving, but
because he is a young black man with dreadlocks, that would be an example of
racial profiling. If New York City police officers systematically stop large
numbers of black and Latino young men at random because they live where "the
maps show concentrations of crime," this would constitute both racial profiling
and dragnet policing, or racially targeted dragnet policing.

78 Dragnet, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-
webster.com/dictionary/dragnet.
80 JACK MAPLE WITH CHRIS MITCHELL, THE CRIME FIGHTER: HOW YOU CAN MAKE YOUR
COMMUNITY CRIME FREE 155 (1999).
81 Id. at 155–57.
82 MAPLE, supra note 80, at 155.
Although dragnet policing is generally impermissible, when it is race neutral, it is not necessarily unconstitutional or even controversial. For example, consider domestic passenger screening at airport security gates or sobriety checkpoints.\(^3\) There is no individualized suspicion, but all are subjected to questioning, identification checks, and searches. Other than terrorists and alcoholics, most Americans appear to support these measures.

Although society generally accepts such race neutral dragnet policing measures, they nonetheless constitute exceptions to the Fourth Amendment’s requirement of individualized suspicion to affect a stop and/or search. Dragnet policing obviously becomes even more constitutionally suspect when it is used to target individuals based on their race, age, and/or gender because such policing measures also raise Equal Protection considerations.

It is sometimes argued that racial profiling has been practiced since the Jim Crow era.\(^4\) However, the type of institutionalized racial profiling, which began roughly 40 years ago, is markedly different than what preceded it. What happened to Philando Castile is qualitatively different than what occurred in the infamous 1932 Scottsboro Case. The distinction between the two incidents is made clear when one considers the federal government’s definition of racial profiling:

The term “racial profiling” means the practice of a law enforcement agent or agency relying, to any degree, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except when there is trustworthy information, relevant to the locality and timeframe, that links a person of a particular race, ethnicity, national origin, or religion to an identified criminal incident or scheme.\(^5\)

Under this definition, if a rape victim identifies her assailant as a Caucasian, it is perfectly acceptable for law enforcement agents to ignore all

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\(^4\) It is often claimed that “racial profiling is not a new experience. Racial profiling continues the historical goals of the black codes by having a chilling effect on a black person’s freedom of movement.” L. Darnell Weeden, *Johnnie Cochran Challenged America’s New Age Officially Unintentional Black Code; A Constitutionally Permissible Racial Profiling Policy*, 33 T. MARSHALL L. REV. 135, 137 (2007).

black, Latino and Asian men in their investigation. What is not permitted would be to selectively target a racial group in “routine or spontaneous investigatory activities” without “trustworthy information” which can link the suspect to an “identified criminal incident or scheme.”86 The Scottsboro Case began with a crime report. Two women claimed they had been raped by a group of black males on a train.87

Philando Castile, on the other hand, was not stopped 52 times based on police reports; he was undoubtedly stopped because of factors completely unrelated to individualized suspicion: his race, age, gender, and hair style.88 The fact that he was stopped so many times was not an aberration; numerous studies have shown that the police have been systematically targeting minority motorists for decades.89

Although the Scottsboro Case defendants were not victims of racial profiling as we understand that term today, it is true that racially targeted dragnet policing did occur on an ad hoc basis prior to the 1970s. The Japanese internment during World War II is the most obvious example. And, as Terry v. Ohio90 reveals, racially targeted dragnet policing became a concern in northern inner cities after World War II.91 In fact, Chief Justice Earl Warren’s Terry opinion

86 Id.
88 Smith, supra note 16.
90 392 U.S. 1 (1968).
91 Id. at 14 n.11 (stating that “in many communities, field interrogations are a major source of friction between the police and minority groups.” (quoting PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967))).
even addressed how the exclusionary rule is sometimes incapable of preventing illegal searches and seizures.

Warren explained the exclusionary rule is "powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."\(^{92}\) Considering how Justice Thomas denied even the possibility of dragnet policing in *Strieff*, it is rather ironic that the seminal *Terry* decision uses examples of dragnet policing to illustrate the limitations of exclusionary rule. Warren discussed how the police sometimes conduct a "dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight."\(^{93}\) Warren’s example also illustrates how, under some circumstances, even racially targeted dragnet policing may be morally justified, if not legally permissible.

This Author has been told by older neighbors living in Park Slope, Brooklyn, that ethnic gangs once staged knife fights in Prospect Park at night. If 50 years ago unsubstantiated rumors swirled that an Italian gang and a Puerto Rican gang were planning such a battle, should it have been constitutionally impermissible for the police to try and prevent bloodshed by running a “dragnet search” that focused on young men who looked Italian or Puerto Rican? *Terry* demonstrates that the Supreme Court was once willing to acknowledge the existence of such practices and the difficult moral and legal questions which sometimes arise. Recently, controversial police shootings, violent protests, and now ambush attacks on police officers have once again made policing a discussion of national importance. Yet, until *Strieff*, the Court had remained silent on the subject of racial profiling for decades.\(^{94}\)

This paper does not condemn non-racially targeted dragnet policing. The threat of terrorism and the prevalence of handguns perhaps demand we reassess the constitutional requirement of individualized suspicion to conduct stops and searches. Jeffrey Bellin has argued that there is an "inverse relationship" between the effectiveness of the New York City stop-and-frisk program and its constitutionality,\(^{95}\) while Bernard Harcourt and Tracey Meares have even advocated eliminating the "individualized suspicion" requirement in favor of greater randomization of stops, a viewpoint this Author largely supports.\(^{96}\)

\(^{92}\) *Id.* at 14.

\(^{93}\) *Id.* at 13 n.9 (emphasis added).

\(^{94}\) A Lexis search reveals the term “racial profiling” has appeared in only three Supreme Court cases and all in passing: Ashcroft v. al-Kidd, 563 U.S. 731, 739 (2011); Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001); and Illinois v. Wardlow, 528 U.S. 119, 133 nn. 9 & 10 (2000).


Racially targeted dragnet policing is troubling less because it is random than because it targets people by skin color. Subjecting all Americans to random searches is considerably easier to accept than the idea that the police will only subject particular races to such measures. These issues, however, have not been addressed by the Court because the majority presently denies the possibility of dragnet policing and, until Strieff, it had largely avoided even mentioning the term “racial profiling.”

II. THE RISE AND SPREAD OF RACIAL PROFILING IN AMERICA

The next two Sections of this Article demonstrate that racially targeted dragnet policing has existed for more than 40 years. During this period, lower courts overwhelmingly declared such practices to be unconstitutional, but they were repeatedly overruled by the Supreme Court. This battle between lower courts and the Supreme Court is one of the untold chapters in the history of racial profiling.

A. Stage One of Racial Profiling in America: The Airport Drug Courier Profile

Modern day racially targeted dragnet policing began in 1974 after the Drug Enforcement Agency (“DEA”), assigned a single agent, Paul Markonni, to interdict drugs at Detroit Metropolitan Airport. From today’s perspective, security measures at airports used to be shockingly lax. Metal detectors were not installed in airports nationwide until January 5, 1973. Until then, it was possible to enter an airport and proceed to one’s boarding gate without encountering an X-ray machine, a metal detector, or even a uniformed security guard. Identification was not required, and some flights even permitted passengers to pay their fares after take-off as commuter trains do today. Family members or friends could accompany a passenger to the boarding gate and wave goodbye.

It is unclear how the DEA expected Markonni to distinguish drug couriers from other passengers as they passed through the terminal. Markonni himself later admitted that “when we started this detail at the airport, we didn’t really know what we were looking for.” However, Markonni eventually compiled what he called a “number of deviant characteristics” to identify

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97 See supra note 94.
99 Id. at 7–8.
100 Id.
101 Id.
potential drug couriers. Prosecutors began referring to the list as a “profile,” and Markonni eventually became credited with having created the world’s first drug courier profile.

Based on trial testimony, it is obvious that Markonni and other agents considered skin color to be the most reliable indicator of “deviance.” In fact, it appears that any minority travelling from or to any major city was automatically considered to be “suspicious.” For example, Markonni once testified that most drug couriers were in his opinion black women; in a second case, according to the judge, Markonni “implied” that “the confluence of . . . two factors[,] defendant’s arrival from Los Angeles and his race [(African American)] is to be considered as particularly significant.” Another agent testified that the “suspicious traits” he looked for were “people travelling from a source city . . . [and] people who are Hispanics (especially Mexicans);” when asked whether the fact that a passenger is of Hispanic descent arouses his suspicion, an agent testified that “it is something we take cognizance of;” and, in 1990, Agent Carl B. Hicks testified that he had been on the lookout for “sharply dressed black female couriers,” but two years later, the same agent testified that a disembarking passenger caught his attention because he was “a roughly dressed young black male.”

Some judges noted, without protest, that a criterion of the profile includes “appearing to be a person of Hispanic background,” while others expressed their “uncomfortable impression . . . that, but for the Hispanic appearance of [the defendants], they might not have been stopped.” Perhaps the best evidence that the DEA had begun a form of dragnet policing targeting minority airline passengers is found in the testimony of Memphis agents who said that 75% of the individuals followed were black at a time when only 4% of

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104 See United States v. Ehlebracht, 693 F.2d 333, 335 n.3 (5th Cir. 1982) (identifying Markonni as the composer of the profile); United States v. Berry, 636 F.2d 1075, 1079 n.6 (5th Cir. 1981) (same); United States v. Elmore 595 F.2d 1036, 1039 n.3 (5th Cir. 1979) (citing Markonni’s testimony listing the characteristics of the profile).
105 McClain, 452 F. Supp. at 199 (Markonni stating on direct examination that “[i]n the majority of cases the courier has been a black female”).
108 United States v. Vasquez, 612 F.2d 1338, 1353 n.10 (2d Cir. 1979).
109 United States v. Condelee, 915 F.2d 1206, 1208 (8th Cir. 1990).
110 United States v. Weaver, 966 F.2d 391, 394 (8th Cir. 1992).
112 Vasquez, 612 F.2d at 1352–53 (Oakes, J., dissenting).
the airline travelers were black, according to the Federal Transportation Association. If the agents had any empirical basis to substantiate their assumption that blacks and Latinos were more likely to be drug couriers than were white passengers, they failed to offer that evidence in any of the cases quoted above or anywhere else as far as this Author can determine. Although race has long been equated with criminality in the United States, the DEA's airport “drug courier profile” program was unprecedented because Markonni’s profile, with its racial criteria, became incorporated into a federal agency’s training program.

Since the airport “drug courier profile” was implemented at a time when many cases still went to trial, it is possible to trace the development and spread of this initial stage of racially targeted dragnet policing through case law. It is evident that the DEA did not one day abandon traditional police work in favor of randomly targeting black and Latino passengers; racial profiling became a prevalent practice in airports more by accident than by design. As Markonni once testified, “[t]he majority of our cases, when we first started, involved cases we made based on information from law enforcement agencies or from airline personnel.” Moreover, it appears that the agents were initially using the “profile” as a supplement, as opposed to a substitute, for traditional police work.

_United States v. Van Lewis_116 was the first published case examining Markonni’s airport “drug courier profile.”_117 Van Lewis_ was a consolidated case involving three sets of defendants.118 The first two, Van Lewis and Hughes, had been traveling individually.119 The third set, which we will collectively refer to as McCaleb, comprised three companions traveling together. A ticket agent had alerted Markonni about the named defendant, Van Lewis, after he triggered the profile’s criteria.120 Van Lewis had used cash to purchase a short-term round-trip ticket to Los Angeles.121 While Van Lewis was flying to Los Angeles, Markonni was investigating the address that Van Lewis had provided.122

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114 United States v. Rogers, 436 F. Supp. 1, 3 (E.D. Mich. 1976). (“Little testimony was presented concerning the source and content of the profile other than Agent Back’s assertion that it is a composite given to him by his superiors.”).


117 _Id._ at 535.

118 See _id._

119 _Id._ at 537.

120 _Id._ at 539.

121 _Id._

122 _Id._ at 539–40.
discovered that Van Lewis's apartment was already under local police surveillance and that the suspect had been previously arrested for heroin possession. By the time Van Lewis returned to Detroit, Markonni was waiting for him.

Unlike Van Lewis, the third set of defendants was stopped solely on the basis of the profile (the second defendant was stopped on the basis of mistaken identity). The "suspicious behavior" ascribed to the McCaleb party was typical of later cases. An agent testified McCaleb had been stopped because a member of the party "either made a local telephone call or went to the restroom on the way to the baggage claim area [and that] [t]he group walked together through the concourse but did not converse as normal people do when they depart a plane." The trial judge held the "profile" provided a "founded suspicion" to detain McCaleb, and that he had "consented" to the search of his luggage. However, consider how this "request" was phrased. The agent told McCaleb that "he would like permission to search the suitcase but that if he refused he would proceed immediately to the magistrate's office and attempt to obtain a search warrant." The judge ruled McCaleb had "consented" to the search because he had unlocked the suitcase for the agent and silently stepped back. But did McCaleb have any choice? The agents had also "requested" to search the luggage of the second defendant, Hughes. When Hughes declined, "[s]he was placed under arrest and the bag was opened, searched, and heroin was found." These requests bring to mind the famous line in the Godfather, "I'll make him an offer he can't refuse."

McCaleb's appeal of his conviction marked the first time a federal appellate court heard a case involving the airport "drug courier profile." McCaleb was asking the appellate court to overturn a factual determination. During the suppression hearing, Judge Joiner had been asked to decide whether McCaleb had consented to be searched. As the Sixth Circuit explained, "the

123 Id.
124 Id. at 541.
125 The agents confused the suspect with her sister. Id. at 540.
126 Id. at 541.
127 Id. at 544.
128 Id. at 541.
129 Id. at 545 ("McCaleb obtained the key to the bag from Page, unlocked the suitcase, and stepped back for the agent to open the case.").
130 Id. at 540.
131 Id.
133 United States v. McCaleb, 552 F.2d 717, 719 (6th Cir. 1977).
134 Id. at 720.
135 Id.
question of voluntariness of a consent is ‘a question of fact’ . . . and as such requires this court to hold the district judge’s finding of voluntary consent to be clearly erroneous before it can be overruled.”136 Despite the exceedingly high burden of proof, the Sixth Circuit still overruled Joiner’s holding that conformity to the drug “‘courier profile’ gave rise to a ‘founded suspicion’” which permitted the limited interrogation.137 And it reversed the lower court’s holding that McCaleb had consented to the search.138 Judge Joiner was not just wrong, he was clearly erroneous.

McCaleb set a very important precedent. The Sixth Circuit eventually heard over a dozen “drug courier profile” cases, and it consistently held that mere conformity to the “rather loosely formulated list of characteristics used by the Detroit . . . agents” did not “indicate ‘suspicious’ persons.”139 Three other circuit courts looked at pure “drug courier profile” cases before the Supreme Court’s first airport “drug courier profile” decision, United States v. Mendenhall.140 The Second and Fifth Circuits agreed with the Sixth Circuit that mere conformity to the profile criteria was insufficient to form the basis for an investigative stop, let alone probable cause to effect a search.141 The Ninth Circuit ruled it would not decide whether conformity to the profile alone would constitute reasonable suspicion for a stop because it held that the search was the “critical issue.”142 It held that the defendant’s “conformity to some of the drug courier profile factors and his nervous behavior when stopped were insufficient to ‘warrant a prudent

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136 Id. at 720–21 (emphasis added).
137 Id. at 720.
138 Id. at 721 (“This court concludes that such consent as was here involved was not shown by the government to have been ‘freely and voluntarily’ given and that therefore, the conclusion of the district court to the contrary was clearly erroneous.”).
139 Id. at 719. For examples of subsequent cases in which the Sixth Circuit relied on McCaleb to declare the “drug courier profile” could not form the basis of probable cause, see United States v. Daniels, 588 F.2d 831, 831 (6th Cir. 1978) (“Upon consideration of the briefs and oral arguments of counsel together with the record and transcript the court concludes that this case is indistinguishable from United States v. McCaleb.”); United States v. Pope, 561 F.2d 663, 667 (6th Cir. 1977) (“As we stated in United States v. McCaleb . . ., satisfaction of a drug courier profile, in itself, does not establish probable cause.”); and United States v. McClain, 452 F. Supp. 195, 201 (E.D. Mich. 1977) (“The decision of the Court of Appeals in United States v. McCaleb . . . requires that the evidence obtained by the government from the search of McClain’s baggage on November 25, 1975, be suppressed at trial since the stop and detention of McClain were illegal.”).
140 446 U.S. 544 (1980).
141 United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2d Cir. 1980); United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978). But see United States v. Vasquez, 612 F.2d 1338, 1340 (2d Cir. 1979), where the Second Circuit arguably upheld a stop and search involving nothing more than mere conformity to the “drug courier profile” criteria.
142 United States v. Allen, 644 F.2d 749, 751 (9th Cir. 1980).
In addition to these four appellate courts, the Eighth Circuit, in a case involving an informant’s tip, dismissed the profile’s criteria as having “little or no probative value.” Although circuit courts upheld searches where DEA agents used independent police work to gather more evidence, or when additional factors such as x-ray machine discoveries were made, these five circuit courts unanimously agreed that mere conformity to the profile could not constitute probable cause to effect a search. And the three circuit courts that ruled on the issue of whether the police were justified in making the stop all agreed that the profile alone could not be used to establish even reasonable suspicion.

Although several trial judges upheld stops based solely on the “profile,” federal appellate courts unanimously rejected this new approach to policing. These appellate courts did not simply reject the “profile,” they treated it with disdain. Consider, for example, how the Sixth Circuit characterized the profile in *United States v. Andrews*:

This is yet another case involving a stop, frisk and subsequent arrest by DEA agent Paul Markonni at the Detroit Metropolitan Airport. Unlike the “typical” Detroit Metro Airport case, this case does not involve a stop based on the much abused drug courier profile, but presents a rare instance of an anonymous tip providing the basis for the stop.

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143 *Id.* at 752.
144 *United States v. Scott*, 545 F.2d 38, 40 n.2 (8th Cir. 1976) (determining that “[t]he other ‘suspicious’ circumstances cited by the government, that the appellant was a female (it being ‘common for females to carry narcotics on their person’) and that she was traveling from Los Angeles (it being known ‘that Los Angeles, California is a major distribution area for Mexican heroin’) have little or no probative value”).
145 However, after the Supreme Court issued *Mendenhall* in 1980, the 8th Circuit explicitly condoned the use of race as a criterion of suspicion in an airport “drug courier profile” case:

> Facts are not to be ignored simply because they may be unpleasant—and the unpleasant fact in this case is that [the DEA agent] 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 [the agent] relied upon, was a factor in the decision to approach and ultimately detain [the suspect]. We wish it were otherwise, but we take the facts as they are presented to us, not as we would like them to be.

*United States v. Weaver*, 966 F.2d 391, 394 n.2 (8th Cir. 1992).
146 600 F.2d 563 (6th Cir. 1979).
147 *Id.* at 564 (citations omitted).
The reason why Markonni’s profile was “much abused” was because DEA agents were stopping passengers based on factors that could not objectively be viewed as suspicious, such as taking a taxi to the airport or walking too quickly or too slowly through the airport. There is no denying that innocent behavior is sometimes indicative of criminality. For example, the suspects in Terry were also doing nothing illegal, but that officer could articulate why their innocent actions—repeatedly walking by and peering into the display window of jewelry store and then furtively conferring on a street corner—appeared to be suspicious. The DEA agents, in contrast, were often unable to articulate reasons for suspicion so the agents increasingly testified that judges should simply defer to their “trained eye.” The trend was best described in a Second Circuit opinion, United States v. Buenaventura-Ariza, decided the same year the Supreme Court issued its Mendenhall decision:

The line of cases in our Court from [Oates] to [Vasquez] has resulted in a requirement of progressively fewer objective facts to satisfy the threshold requirement of reasonable suspicion. In [Oates] the agent had prior knowledge of the suspect’s drug connections to use as a framework for evaluating unusual behavior. In [Rico] there was no prior knowledge but, in addition to the complex of suspicious or unusual behavior, the agent noted the suspect’s unnatural walk and tugging at her trousers, facts which objectively can be viewed as indicating hidden contraband. Still the [Rico] Court recognized that the facts only “narrowly sufficed” to justify the stop. [Price], [Vasquez-Santiago], and [Vasquez], however, contain even fewer objective facts linking the suspects to narcotics trafficking. As a result, the agent’s perception of objectively neutral conduct has taken on an added importance. The “trained eye” of the narcotics agent has loomed more prominently in our most recent analyses of airport stops, as nervous behavior and perceived attempts by

148 United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979) (citing “the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport” as being a criterion in Markonni’s profile).

149 United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978) (noting that agent testified that he observed “the defendant leave the plane and walk hurriedly down the concourse”).

150 United States v. Mendenhall, 446 U.S. 544, 564 (1980) (noting the agent testified that he observed the defendant walking “very, very slowly” toward the baggage area).

151 Terry v. Ohio, 392 U.S. 1, 6 (1968).

152 United States v. Buenaventura-Ariza. 615 F.2d. 29, 35 (2d Cir. 1980).

153 Id.
passengers to appear “separate” have emerged as the principal conduct justifying the stop.154

B. Mendenhall’s Radical Reinterpretation of the Fourth Amendment

When the Supreme Court heard Mendenhall in 1980, it had the perfect opportunity to end racially targeted dragnet policing. Mendenhall had also been arrested in Detroit Metropolitan Airport, and the violation was so flagrant that the Sixth Circuit ruled against the state in a two-sentence unpublished decision.155 Agent Thomas Anderson and his partner approached Mendenhall after she disembarked, asked to see her identification and ticket, noticed a discrepancy in the ticketed name she was traveling under and her identification, and then “asked” her to accompany them to their office.156 The state did not argue that the officers had probable cause to place Mendenhall under arrest.157 Anderson’s testimony reveals why the prosecution was wise to concede this issue:

Q: When you first saw Sylvia Mendenhall, what drew your attention to her was that she was a black woman traveling alone, and she was the last to get off the airplane, is that right?
A: Additionally that she appeared to be very nervous as she came off the airplane.158

The Sixth Circuit’s opinion contained no analysis. However, as the Supreme Court explained, the lower court apparently had concluded that “the agents’ request that the respondent accompany them converted the situation into an arrest requiring probable cause.”159 The appellate court undoubtedly reached that conclusion because the only way Mendenhall could have avoided going to

154 Id.; see also United States v. Coleman, 450 F. Supp. 433, 440–41 (E.D. Mich. 1978) (“The government makes much of the skill, training, experience, and record of Agent Markmoni and urges that in the light of those considerations the facts articulated in justification of the intrusion here at issue are to be imbued with a particular, added significance. . . . [T]he Court is not persuaded that those accomplishments and qualities of Agent Markmoni, even taking the government’s characterization of them at face value, are sufficient to elevate the impulse which led him to make the stop here in issue from a mere, albeit educated hunch to the level of a prudent, reflective ratiocination.”).
156 Mendenhall, 446 U.S. at 547–48.
157 Id. at 550 (The prosecution explicitly “concede[d] that its agents had neither a warrant nor probable cause”).
158 Appendix at 14, Mendenhall, 446 U.S. 544 (1980) (No. 78-1821).
159 Mendenhall, 446 U.S. at 557.
the office would have been to forcibly resist the officers. As Anderson conceded, after they requested Mendenhall accompany them, she was no longer "free to leave."\textsuperscript{160}

\textit{Mendenhall} largely turned on whether the defendant had been subjected to a "custodial interrogation." It is impossible to precisely define this term because every arrest is fact specific. Perhaps the Court's most detailed attempt to define "custodial interrogation" was offered in \textit{Miranda v. Arizona}.\textsuperscript{161} \textit{Miranda}, a consolidated case involving four defendants, quoted from a police manual to explain why a suspect should be understood as having been placed under effective arrest once she has been taken into a private room for questioning.\textsuperscript{162} "[C]oercion can be mental as well as physical," and the "principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation."\textsuperscript{163} As one of the manuals explained,

If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.\textsuperscript{164}

Questioning Mendenhall in a private office without counsel closely matched \textit{Miranda}'s definition of a custodial interrogation. And what happened inside that office perfectly illustrates how police officers can coerce a frightened

\textsuperscript{160} \textit{Id.} at 575 n.12. Agent Anderson gave the following testimony:

\begin{quote}
\begin{tabular}{l}
Q. All right. Now, when you asked her to accompany you to the DEA office for further questioning, if she had wanted to walk away, would you have stopped her? \\
A. Once I asked her to accompany me? \\
Q. Yes. \\
A. Yes, I would have stopped her. \\
Q. She was not free to leave, was she? \\
A. Not at that point.
\end{tabular}
\end{quote}

\textit{Id.}

\textsuperscript{161} 384 U.S. 436 (1966).

\textsuperscript{162} \textit{Id.} at 448.

\textsuperscript{163} \textit{Id.} at 448-49.

\textsuperscript{164} \textit{Id.} at 449–50 (quoting \textsc{Charles E. O'Hara}, \textsc{Fundamentals of Criminal Investigation} 99 (1956)).
defendant into complying with their "requests" in the absence of physical force. Anderson testified that he and a second male agent took Mendenhall to a private locked office with no other occupants. The agent asked Mendenhall to take a seat and then told her, "I would like your consent to search your person as well as your handbag, and you have the right to decline this search if you so desire." When Anderson asked Mendenhall for her "consent," he did not indicate a female agent would conduct the search. It appears Mendenhall did not understand the meaning of the term "your person," or she was so frightened that she "consented" to be strip-searched alone in a locked office by two male agents. A female officer was summoned, but Anderson again conceded he would have "stopped" Mendenhall had she tried to leave the room where the search took place. Stewart claimed Mendenhall had acted "voluntarily in a spirit of apparent cooperation," but she complained that she had a "plane to catch." Mendenhall, in other words, had no choice but to submit to a strip search in a situation in which the state conceded the officers lacked probable cause.

Prior to Mendenhall, Fourth Amendment disputes naturally focused exclusively on the suspect and the arresting officer. Did the suspect's behavior objectively give rise to probable cause; did the officer legally "seize" or "search" the suspect? If the Court in Mendenhall had applied this traditional approach to Fourth Amendment adjudication, it would not have granted certiorari because conducting a strip search without probable cause is about as flagrant a violation as one can imagine. This is why the Sixth Circuit's Mendenhall decision was just two sentences long. No analysis was necessary.

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165 See Appendix at 12, 19, Mendenhall, 446 U.S. 544 (1980) (No. 78-1821).
166 Id. at 25.
167 See id.
168 Id. at 12–13, 21. Agent Anderson gave the following testimony:

Q. Had she tried to leave that room when she was being accompanied by the female officer, would you have known?
A. If she had attempted to leave the room?
Q. Yes.
A. Well yes, I could say that I would have known.
Q. And if she had tried to leave prior to being searched by the female officer, would you have stopped her?
A. Yes.

Mendenhall, 446 U.S. at 575 n.13.
169 Mendenhall, 446 U.S. at 549.
170 Id. at 559.
171 The prosecution "concede[d] that its agents had neither a warrant nor probable cause to believe that the respondent was carrying narcotics." Id. at 550.
172 See infra text accompanying notes 228–29.
173 Petition for a Writ Of Certiorari at 8a, Mendenhall, 446 U.S. 544 (No. 78-5064).
To understand how the Supreme Court arrived at a different conclusion, we must refer back to the landmark *Schneckloth v. Bustamonte*, which established the constitutionality of “consent” based searches in the absence of probable cause. In sanctioning “consent” based searches, *Schneckloth* demanded judges answer a new question: did the suspect voluntarily comply with the arresting officer’s “requests?” This question demands that judges shift their focus from the objective actions taken by the police officer, to the subjective reaction of the suspect. It constituted the first critical step in eviscerating Fourth Amendment rights. A suspect may not have behaved in a manner giving rise to probable cause but, if she consented to be stopped, interrogated and searched, she has waived her constitutional rights.

In *Mendenhall* however, even under *Schneckloth*’s novel approach to Fourth Amendment adjudication, the application of the exclusionary rule was still appropriate. The arresting officer testified that the defendant had been effectively placed under arrest; the prosecution conceded the agents had lacked probable cause to do so; and *Mendenhall* apparently felt she had to comply with the officer’s orders.

Justice White succinctly characterized the majority’s opinion as simply “unbelievable.” He was dumbfounded that the majority could conclude “this sequence of events involved no invasion of a citizen’s constitutionally protected interest in privacy.” To make sense of *Mendenhall*, one must appreciate how the ruling turned on a question unprecedented in the history of Fourth Amendment adjudication. This new approach introduced a new hypothetical actor into Fourth Amendment disputes.

The subtle but pivotal shift in the Court’s Fourth Amendment jurisprudence is best illustrated by comparing *Schneckloth* with *Mendenhall*. Both cases were authored by Justice Potter Stewart and both applied a “totality of the circumstances” test. However, after *Mendenhall*, judges no longer viewed

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175 See id.
176 Id. at 229 (“In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.”).
177 Id.
178 See supra note 158.
179 See supra note 171.
180 See United States v. Mendenhall, 446 U.S. 544, 551 (1980) (“Evidently, the Court of Appeals concluded that the respondent’s apparent consent to the search was in fact not voluntarily given and was in any event the product of earlier official conduct violative of the Fourth Amendment.”).
181 Id. at 577 (White, J., dissenting).
182 Id.
these circumstances through the eyes of the suspect, but from the perspective of a hypothetical “reasonable person.”

[Schneckloth:] “In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.”

[Mendenhall:] “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”

Mendenhall’s “reasonable person” doctrine does not immediately appear to be a radical new concept because it is found throughout the law; tort law in particular is dependent on it. However, focusing on a suspect’s reaction as opposed to an officer’s action, makes the citizen, when confronted by armed officers of the law, solely responsible for upholding her constitutional rights. Prior to Mendenhall, the Court had never before restricted constitutional rights to those citizens who could conform to a “reasonable person” standard. As noted, the First Amendment protects our right to assert the most ridiculous arguments, associate with the most illogical people, and pray to the silliest of deities. Some might argue such a test is wholly appropriate in terms of the Second Amendment because only “reasonable people” should have access to firearms. However, the Fourth Amendment is different because a frightened citizen is being asked to make a potentially life-altering decision upon a moment’s notice when confronted with the legal power of the state.

If a law enforcement agent uses polite language, “may I see your identification,” it becomes the responsibility of the citizen to determine whether these five words constitute a request or an order. An incorrect determination may lead to unfortunate consequences, as Eric Garner discovered when he was arrested for selling loose cigarettes in Staten Island, New York. As his surviving family members can attest, misinterpreting an order as a request may result in resisting arrest charges, grievous bodily harm, and even death. Misinterpreting a request as an order, on the other hand, may result in an innocent individual waiving her Fourth Amendment rights and submitting to stressful

184 Mendenhall, 446 U.S. at 554 (emphasis added).
185 See supra note 49.
187 See id.
interrogations and demeaning searches. Moreover, as illustrated later in this Article, the police are very much aware of how to manipulate the vulnerable psychological state of a person confronting a police officer, an agent of the state granted the legal authority to use physical force to control a suspect.  

Mendenhall's radical reinterpretation of the Fourth Amendment may be reduced to the following: if a law enforcement agent lacks probable cause to seize a suspect, but does so nonetheless, and if that suspect subsequently complies with the officer's requests, that suspect waives her rights under the Fourth Amendment if a "reasonable person" would have believed she could have refused the officer's "requests."

Mendenhall's "reasonable person" is such an unreasonable doctrine that even an unapologetic racist might have had second thoughts after the Court's second airport "drug courier profile" decision: Reid v. Georgia. The underlying facts of Mendenhall and Reid were essentially identical. DEA agents sought to detain Reid based on his conformity to the airport "drug courier profile," and they also lacked the requisite level of reasonable suspicion to do so. There was only one key factual difference. After the agents approached him and identified themselves, Reid did what any "reasonable" person would do in a similar situation. Reid ran as fast as his legs would carry him and "abandoned" his cocaine-laden shoulder bag. By fleeing, Reid precluded the Court from finding he "voluntarily in a spirit of apparent cooperation had consented to be stopped and searched. Since Reid indisputably had not "waived" his constitutional rights, he received a favorable ruling from the Court.  

With Reid, the Supreme Court may have become the first adjudicatory body in the history of mankind to reward criminal suspects for resisting arrest. Perhaps the "reasonable person" doctrine survived nonetheless because the overwhelming majority of Americans comply with police officers' "requests," only a small fraction demand to see a warrant or an attorney, and even fewer resist arrest. The outcome in Reid thus could be ignored, and that case has been

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188 See infra text accompanying notes 326–34.
189 448 U.S. 438 (1980).
190 Id. at 441 ("We conclude that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity . . . .").
191 Id. at 439.
193 The Court issued a limited ruling in Reid. The lower court decision had been issued prior to Mendenhall, and the lower courts had not considered the issue of whether the defendant had been seized. Reid, 448 U.S. at 443 (Powell, J., concurring). The Supreme Court therefore also did not consider that question, and it simply ruled that "the agent could not as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances." Id. at 441 (majority opinion). The case was remanded back to the Georgia Supreme Court on that basis, and the state court then determined that there had in fact been no seizure. State v. Reid, 276 S.E.2d 617, 622 (Ga. 1981). Had Reid first waited for the police to seize him, and then attempted to run away, the exclusionary rule would presumably have been invoked.
long forgotten. The importance of *Mendenhall*, on the other hand, can hardly be overstated.

*Mendenhall* condoned racially targeted dragnet policing in an extreme case: a woman had been stopped based almost entirely because of her race and gender, interrogated in a private office, and strip-searched without probable cause. The police conceded that she had no choice but to comply with all their orders. One cannot help but wonder if the Court selected *Mendenhall* to be its first airport “drug courier profile” case precisely because it involved such flagrant constitutional violations. This would have sent a very clear message to law enforcement officers and lower courts: “consent” based searches are constitutionally permissible in all but the most egregious of cases. It may seem unfathomable today that Justice Thomas could claim dragnet policing does not exist in the United States, but *Mendenhall* demonstrates the Court has been turning a blind eye to racially targeted dragnet policing for almost forty years.

The Court’s intentional disingenuousness in these airport “drug courier profile” cases is perhaps best illustrated by a particularly duplicitous rationale asserted by two Justices in two different cases. Justice Powell in *Mendenhall* made an argument that Rehnquist repeated three years later in *Florida v. Royer*.194 “Few statistics have been kept on the effectiveness of ‘profile’ usage,” Rehnquist wrote, “but the data available suggests it has been a success.”195 The data Powell and Rehnquist both cited had first appeared in *Van Lewis*: “agents have searched 141 persons in 96 airport encounters prompted by their use of the courier profile and independent police work.... Agents found controlled substances in 77 of the 96 encounters and arrested 122 persons for violations of the narcotics laws.”196

The figures appear impressive, but Justice White had completely debunked this argument in his *Mendenhall* dissent when he explained that “there is no indication that the asserted successes of the ‘drug courier program’ have been obtained by reliance on the kind of nearly random stop involved in [*Mendenhall*].”197 In other words, the claim in *Van Lewis* that “[the] agents have searched 141 persons in 96 airport encounters prompted by their use of the courier profile and independent police work” conflates searches done as the result of “independent police work” with searches resulting solely from a passenger’s conformity to the “drug courier profile.”198 It is possible that all 77 searches in which drugs were found resulted from “independent police work,” and that all 19 cases in which innocent passengers were searched were triggered

195 *Royer*, 460 U.S. at 525 n.6.
197 *Mendenhall*, 446 U.S. at 573 n.11 (White, J., dissenting).
198 *See id.*
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by the profile. Thus, the Van Lewis data could not be used to verify the effectiveness of the stops in Mendenhall and Rover.

A second problem with relying on the Van Lewis data is that security measures prior to 1973 had been so lax in airports that some drug couriers were almost comically amateurish. During the first few years of the program, agents described spotting drug couriers because they were walking through the airport with an “unusual limp” or a “very obvious bulge” that turned out to be illegal contraband. In other cases, individuals even tried to pass through metal detectors with drugs or currency wrapped in aluminum foil. However, it appears criminals eventually became more sophisticated because agents in the 1980s and 1990s testified they were stopping roughly two to three people a day and discovering drugs between two to five percent of the time.

Besides attempting to use discredited arrest data to mislead his reader, Rehnquist also ignored the implications of another set of figures. It appears the amount of drugs DEA agents were seizing rapidly diminished with the passage of time. The DEA agents seized 66 pounds of heroin, 7 pounds of cocaine, and 189.5 pounds of marijuana at Detroit Metropolitan Airport in 1976. However, in 1978, DEA agents seized just 10 pounds of heroin, 4.8 pounds of cocaine, and 47.5 pounds of marijuana. It could be argued this illustrates the program was successful, but it is unlikely the DEA thought so. Law enforcement officers are generally rewarded for making big arrests.

199 See, e.g., United States v. Buenaventura-Ariza, 615 F.2d 29, 33 (2d Cir. 1980) (“The agent noticed ‘distinct bulges’ in the clothing of the suspect’s traveling companion when the two men returned to the airport after concluding their business in New York.”); United States v. Roundtree, 596 F.2d 672, 673 (5th Cir. 1979) (“Roundtree had an unusual limp which drew Agent Markonni’s attention.”); United States v. Smith, 574 F.2d 882, 883–884 (6th Cir. 1978) (“An additional salient factor was an abnormal and obvious bulge around Appellant’s abdomen, which in Agent Seward’s experience suggested that she was carrying illegal drugs.”).

200 See, e.g., United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971) (stating the defendant passed through the metal detector with a “tinfoil-covered plastic envelope tightly packed with white powder”).

201 See United States v. Hooper, 935 F.2d 484, 500 (2d Cir. 1991) (Pratt, J., dissenting) (stating that the arresting agent had testified that he had “detained 600 suspects in 1989” but arrested only 10); United States v. Moya, 561 F. Supp. 1, 4 (N.D. Ill. 1981) (stating that an agent testified that “he routinely approaches two or three people a day” but based on the number of arrests he had, he estimated the stops had “result[ed] in arrests only 3–5% of the time”).

202 United States v. Mendenhall, 596 F.2d 706, 708 n.1 (6th Cir. 1979) (en banc) (Weick, J., dissenting).

203 Id.

204 See, e.g., Douglas A. Campbell & Howard Goodman, The Path to Glory for N.J. Troopers: Arrests, Arrests, PHILA. INQUIRER (Mar. 7, 1999), http://crab.rutgers.edu/~goertzel/njtroopers.htm (“The surest way to become ‘trooper of the year’ has been to make more drug arrests and seize more contraband than anyone else. In 31 years, the award has gone 19 times to troopers who have chalked up huge numbers of drug seizures or arrests.”).
people being searched in airports may have been rapidly increasing because the percentage caught carrying illegal contraband was dramatically decreasing.

C. Stage Two of Racial Profiling in America: Bus and Train Sweeps

Less is known about the second chapter of racially targeted dragnet policing than any of the other three stages. Cases involving bus and train sweep cases began appearing by 1984, and countless people were eventually subjected to these searches.205 However, the media paid little attention. If more reporters travelled Greyhound, perhaps the practice would have received more coverage.

There is also less information available on the bus sweeps because far fewer cases were published as compared with the airport “drug courier profile.” A total of 140 published opinions involving the airport “drug courier profile” were issued between 1976 and 1986.206 The Supreme Court issued Mendenhall and Reid in 1980 and three more airport “drug courier profile” decisions before the end of the decade.207 It is difficult to get an exact count on the number of lower court decisions involving the bus and train sweeps. However, this Author is currently writing a book on the history of racial profiling and, after three years of research, it is clear that far more people were subjected to the bus and train searches, but many fewer cases resulted. The Supreme Court heard only two: Florida v. Bostick208 and United States v. Drayton.209

Fewer cases were published during the second stage of racially targeted dragnet policing because convictions are increasingly obtained through plea-bargaining. In fact, the advent of modern dragnet policing perfectly coincides with the declining number of criminal trials. As noted, Van Lewis was published in 1976.210 Beginning in 1977, the ratio of federal criminal defendants who opt for a jury trial decreased from about 25% to just 3% in 2012.211 State felony cases decreased from 8% in 1976 to just 2.3% by 2009.212 As noted more than 20 years

206 Charles L. Becton, The Drug Courier Profile: All Seems Infected That Th’Infected Spy, as All Looks Yellow to the Jaundic’d Eye, 65 N.C. L. REV. 417, 417 (1987).
212 Id.
ago, plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."

Dragnet policing has also coincided with a second even more dramatic change in the country’s criminal justice system: the rise of mass incarceration. As the reader will recall, Markonni was assigned to Detroit Metropolitan Airport in 1974. From 1974 to 2009, America went from having one of the world’s most lenient criminal justice systems to having one of the harshest. The state and federal prison populations during this period rose from 200,000 to 1.5 million.

Although the incarceration rate of all Americans increased dramatically, blacks were incarcerated at six times and Latinos at three times the rate for non-Hispanic whites. As dragnet policing became more pervasive in America, considerably more people were arrested, and the adjudicatory process necessarily became more streamlined with plea-bargaining replacing jury trials.

It appears dragnet policing at bus and train stations originated in Florida, which has long been a premier entry point for illegal narcotics coming into the United States. Local law enforcement agencies apparently conceived of the idea after beginning “drug courier profile” details in Florida airports around the spring of 1977. Dragnet searches on buses and trains passing through Florida were in full swing by August 27, 1985. On that date, Terrance Bostick was arrested on a Greyhound bus in Fort Lauderdale, Broward County. Bostick reached the Supreme Court 11 years after Mendenhall had been published. Doctrinally, it broke no new ground. The facts, as accepted by the lower courts as well as the Supreme Court, were as follows:

On August 27, 1985, Terrance Bostick was a passenger on a Greyhound bus traveling from Miami to Atlanta. While the bus was stopped for a layover in Fort Lauderdale, it was boarded by

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215 Id.


Officers Joseph Nutt and Steven Rubino of the Broward County Sheriff’s Department. . . “Eyeing the passengers, the officers, admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification.” When the officers approached Bostick, he was lying down on the very last bench-style seat at the rear of the bus. . . .

Officer Nutt asked Bostick if the red bag that he was using as a cushion was his, and if so, could he have permission to search it. . . [F]ollowing the search of the red bag, Officer Rubino noticed a blue bag in the overhead storage area near Bostick. Again, Bostick was asked if he owned the bag and if he would give permission for its search. . . . [According to the police,] Bostick consented to the search of the blue bag and [ ] the search subsequently yielded 400 grams of cocaine.

Bostick’s recollection of the event is somewhat different. Bostick testified that he was asleep in the rear of the bus and that he was woken up when something came in contact with his feet. He soon discovered that it was, in fact, Officer Nutt. Officer Nutt asked for his bus ticket and identification. Bostick stated that, upon the officer’s request, he consented to the search of the red bag, but that he did not consent to the search of the blue bag. Furthermore, Bostick denied that either officer ever informed him that he had the right to decline their requests.220

The difference between the Florida Supreme Court’s opinion and that of the United States Supreme Court is startling. The former compared what was happening in Broward County, Florida, to Nazi Germany:

[T]he evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation’s roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers—in short a raison d’etre—is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler’s Berlin, nor Stalin’s Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains (‘that time permits’) and check identification, tickets, ask to search luggage—all in the name of ‘voluntary cooperation’ with law enforcement—to the shocking extent that just one officer, Damiano, admitted that during the previous nine months, he,

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220 Reed, Jr., supra note 218, at 836–38.
himself, had searched in excess of three thousand bags! In the Court’s opinion, the founders of the Republic would be thunderstruck.\textsuperscript{221}

The state court took the highly unusual step of adopting a \textit{per se} rule prohibiting a program which it claimed conjured up images of South African apartheid. Justice Sandra Day O’Connor’s majority opinion, on the other hand, explained in the most anodyne language that the police can “approach” individuals at “random” under \textit{Mendenhall}’s “reasonable person” doctrine:

\begin{quote}
We have held that the Fourth Amendment permits police officers to approach individuals at \textit{random} in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate.\textsuperscript{222}
\end{quote}

The sentence above reveals the full ramifications of \textit{Mendenhall}. It begins by indirectly referring to \textit{Mendenhall} as allowing for the police to “approach” people at “random.”\textsuperscript{223} Random stops conducted on a large enough scale by definition constitute “dragnet policing.” Perhaps there is no exact agreed upon number to define when dragnet policing begins, but the police by their own admission were stopping and searching as many people in the bus sweeps as time permitted.\textsuperscript{224} The second half of O’Connor’s sentence illustrates how \textit{Mendenhall} supplanted the probable cause requirement of the Fourth Amendment with a “reasonable person” doctrine.

The issue in \textit{Bostick}, as O’Connor explained, was “whether the same rule applies to police encounters that take place on a bus.”\textsuperscript{225} The answer is obvious. If random “encounters” are permissible in airports, they must also be permissible on buses.\textsuperscript{226} If the police may ask one woman to “agree” to be strip searched, they may make the same request of all Americans. The Constitution does not protect the rights of groups; it protects the rights of the individual.

The bus and train sweeps thus differed little from the airport stops. While it is true that DEA agents rarely if ever boarded planes, it is obviously easier to hop off a bus than an airplane; it is also easier to access a passenger’s luggage on a bus or a train.\textsuperscript{227} However, these are not legal issues, they are logistical

\textsuperscript{221} Bostick v. State, 554 So. 2d 1153, 1158 (Fla. 1989) (quoting State v. Kerwick, 512 So. 2d 347 (Fla. Dist. Ct. App. 4th Dist. 1987)).


\textsuperscript{223} Id. at 434.

\textsuperscript{224} Id. at 443 (Marshall, J., dissenting) (citation omitted).

\textsuperscript{225} Id. at 431.

\textsuperscript{226} Id.

\textsuperscript{227} See, e.g., Florida v. Royer, 460 U.S. 491, 494 (1983) (stating that the agents had to retrieve the suspect’s luggage from the airline).
considerations. Thus, Justice Thurgood Marshall was wrong to argue the scale of the bus sweeps rendered them unconstitutional:

These sweeps are conducted in "dragnet" style. The police admittedly act without an "articulable suspicion" in deciding which buses to board and which passengers to approach for interviewing. By proceeding systematically in this fashion, the police are able to engage in a tremendously high volume of searches. . . . (single officer employing sweep technique able to search over 3,000 bags in nine-month period). The percentage of successful drug interdictions is low. . . . (sweep of 100 buses resulted in seven arrests).\(^{228}\)

Rather than focusing on the number of people subjected to random stops, Marshall should have made the broader argument that the "reasonable person" doctrine is incompatible with traditional Fourth Amendment analysis. He should have vociferously rejected O'Connor's claim, as quoted below, that *Mendenhall*'s reasonable person doctrine is compatible with *Terry*:

The dissent reserves its strongest criticism for the proposition that police officers can approach individuals . . . and ask them potentially incriminating questions. But this proposition is by no means novel; it has been endorsed by the Court any number of times. *Terry, Royer, Rodriguez,* and *Delgado* are just a few examples. As we have explained, today's decision follows logically from those decisions and breaks no new ground. Unless the dissent advocates overruling a long, unbroken line of decisions dating back more than 20 years, its criticism is not well taken.\(^{229}\)

*Mendenhall*'s "reasonable person" test, and the subsequent cases which adopted it, are completely at odds with *Terry*. *Terry* explicitly warned against adopting any judicially constructed tests to govern Fourth Amendment analysis because arrests are always fact specific: "there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'"\(^{230}\) Rather than using a test, *Terry* stated the police officer must simply be able to articulate why the suspect's behavior could be viewed as suspicious: "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably

\(^{228}\) *Bostick*, 501 U.S. at 441-42 (Marshall, J., dissenting) (internal citations omitted).

\(^{229}\) *Id.* at 439 (majority opinion).

warrant that intrusion." Yet the prosecutors in *Mendenhall* did not even attempt to argue that the DEA agents had acted upon probable cause.

By the time the search in *Bostick* took place, *Terry’s* demand of articulable suspicion had become so inconsequential that the police had even dispensed with the pretense of a “profile.” In the earliest bus and train cases, officers claimed the suspects actions had conformed to a “profile.” However, this rationale was not raised in *Bostick*. Perhaps officers abandoned their “profile” after they began barging into sleeping compartments, as happened in Fort Lauderdale:

> The officers had no warrant to search any part of the train and no articulable reason to believe that any passenger on the train might be transporting illegal drugs. The officers knocked on the door of the private sleeping compartment occupied by Alvarez, who was lying in bed in his stocking feet. After he opened the door, the officers positioned themselves in the doorway partially blocking the exit. The officers then identified themselves and requested and obtained Alvarez’ train ticket and identification.

These bus and train sweeps undoubtedly constituted a form of dragnet policing, and there is strong reason to suspect that minorities were again targeted. Some officers in other cases testified that they had focused on the suspects because “they were young and black” or that “[they] knew that the couriers, more often than not, were young black males.” As Marshall suggested, “the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable.”

**D. Stage Three of Racial Profiling in America: Operation Pipeline**

The third stage of racially targeted dragnet policing may be traced back to an exact time and location. On June 5, 1985, at 3:00 a.m., Florida Highway Patrol (“FHP”) Trooper Bob Vogel’s marked patrol car was sitting on the median

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231 *Id.*

232 See State v. Bullock, 460 So. 2d 517, 518 (Fla. Dist. Ct. App. 3d Dist. 1984). (Although the word “profile” does not appear in *Bullock*, the judge listed the same behavioral criteria found in the airport “drug courier profile” cases: “(a) the defendant was traveling under an assumed name, (b) the defendant denied that the luggage in question was his, although he had been previously observed by the police arriving at the station in a taxicab in possession of the luggage, (c) the defendant claimed that someone else present nearby owned the luggage, although no one else was in the lobby area of the station, and (d) the defendant was extremely nervous during his consensual encounter with the police”).


235 *Id.* (emphasis omitted).
of Interstate 95.\textsuperscript{236} Vogel was using its headlights to illuminate northbound vehicles so he could observe the occupants.\textsuperscript{237} Vogel spotted two individuals in their thirties travelling at 50 mph in a car with out-of-state plates.\textsuperscript{238} United States \textit{v. Smith}\textsuperscript{239} marks the advent of the third stage of racial profiling in America. It is the first published case involving Vogel and the use of his "drug courier profile."\textsuperscript{240}

There is no doubt that Vogel considered a motorist’s race to be a criterion of suspicion. Local newspapers declared Vogel “looks for a black man in his early 30s who dresses casually and drives an out of state rental car north on I-95 at or below the speed limit;”\textsuperscript{241} and that Vogel’s drug smuggler is “usually a black man in his early 30s.”\textsuperscript{242} Other troopers conceded in trial testimony “that the profile targets black men between 20 and 50.”\textsuperscript{243} In March, 1986, a copy of Vogel’s profile was published by the Orlando Sentinel.\textsuperscript{244} Before looking at the profile, the reader is invited first to guess how many of the twelve criteria would be triggered by the following hypothetical scenario. At 8:00 p.m., a casually dressed 30-year-old black male, with no passengers, is spotted driving north on I-95, at or below the speed limit:

- Rental cars;
- Out-of-state tags;
- Traveling north on I-95;
- At or slower than the speed limit;
- From 6:30 p.m. to 4:30 a.m. Peak hour is 3 a.m.;
- Occupied by one or two people; two is most common;
- Mean age: 32;
- Sixty percent blacks, 40 percent others;
- Nearly all males;

\textsuperscript{236} United States \textit{v. Smith}, 799 F.2d 704, 705–06 (11th Cir. 1986).
\textsuperscript{237} \textit{Id}.
\textsuperscript{238} \textit{Id}. at 706.
\textsuperscript{239} 799 F.2d 704 (11th Cir. 1986).
\textsuperscript{240} See \textit{id}.
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Usually casually dressed[;]
Nervous behavior, such as hands shaking[,] and
Vehicle weaving.\(^{245}\)

Although Vogel usually worked alone, a DEA agent was with him when he stopped Smith.\(^{246}\) Vogel and the federal agent were working on a “special operation to intercept drug couriers on Interstate 95.”\(^{247}\) That “special operation” was, no doubt, the origins of Operation Pipeline, a DEA training program, which taught local law enforcement agencies in 48 states to use a “drug courier profile” to identify motorists who might be transporting narcotics.\(^{248}\) The program included a training video also named Operation Pipeline, in which 29 of the 30 traffickers depicted were Latinos.\(^{249}\) According to most accounts, Vogel “was the creator” of the program’s “modus operandi”;\(^{250}\) he personally claims to have been its “inspiration”;\(^{251}\) and he conducted training classes for the DEA.\(^{252}\) He spoke at the official launch of the program,\(^{253}\) and he may even have helped produce the infamous Operation Pipeline video because he has said he “created a video that became a prominent training tool” for the DEA.\(^{254}\) Ultimately, the DEA trained some 27,000 officers across the country in how to use Vogel’s techniques.\(^{255}\)

Since law enforcement in the United States is so decentralized, and agencies maintain independent record keeping policies, there are no national statistics available regarding Operation Pipeline. It is known that California patrol units made 34,000 stops in 1997.\(^{256}\) It also appears that the program was no more effective than the first two stages of racially targeted dragnet policing. A state investigator who participated in the program reported that drugs were

\(^{245}\) Id.

\(^{246}\) United States v. Smith, 799 F.2d 704, 705–06 (11th Cir. 1986).

\(^{247}\) Id. at 705.


\(^{251}\) DAVID A. HARRIS, PROFILES IN INJUSTICE 22 (2002).

\(^{252}\) Id.

\(^{253}\) ROB VOGEL WITH JEFF SADLER, FIGHTING TO WIN 67 (2001).

\(^{254}\) Id. at 61.


\(^{256}\) Id.
being discovered in just two to five percent of the searches made in various states.257

Operation Pipeline relied on the procedure of using minor traffic violations as a pretext to stop motorists, but when Vogel developed its techniques he first experimented with stopping drivers purely on the basis of his “profile.” “For six weeks in 1985,” according to the Orlando Sentinel, “Vogel, with approval from his department and the state attorney’s office in Volusia, made stops solely on the profile to see if the profile would stand up in court.”258 It was during this period that Vogel made the stop that led to Smith, and he testified that it was an “investigative stop” for drugs based purely on the motorist’s conformity to his profile.259

The Eleventh Circuit’s decision in Smith makes an interesting contrast with the Supreme Court’s decision in Mendenhall. The term had yet to be invented, but in both cases the defense essentially alleged that the police had engaged in racial profiling. In Mendenhall, Stewart constructed the “reasonable person” test and sanctioned the program. The Eleventh Circuit, in comparison, thought it more appropriate to require the police to act reasonably, and therefore they applied a “reasonable officer” standard.

The Eleventh Circuit wrote in Smith that “in determining when an investigatory stop is unreasonably pretextual, the proper inquiry ... is not whether the officer could validly have made the stop but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose.”260 The Smith court correctly predicted that if it were to uphold Vogel’s methods, “police officers could easily make the random, arbitrary stops denounced in Terry.”261 The problem with permitting pretext stops would be that “[w]ith little more than an inarticulate ‘hunch’ of illegal activity an officer could begin following a vehicle and then stop it for the slightest deviation from a completely steady course.”262

In 1987, the Eleventh Circuit decided a second case involving Vogel, United States v. Miller.263 In Miller, the prosecutors argued Vogel had stopped a motorist because of an alleged traffic violation.264 Vogel had testified that Miller had “allowed his right wheels to cross over the white painted lane marker about

257 Id.
259 United States v. Smith, 799 F.2d 704, 706 (11th Cir. 1986).
260 Id. at 709 (emphasis added and omitted).
261 Id. at 711.
262 Id.
263 821 F.2d 546 (11th Cir. 1987).
264 Id. at 547.
four inches” after he had changed lanes. The court held that Smith controlled and the stop in Miller was therefore unconstitutional. The major difference between Smith and Miller is that Miller signed a consent form allowing Vogel to search his vehicle.

The government maintained that the consent “excuses the unreasonable stop and sufficiently attenuates the taint of the search so as to legitimate the search.” Thus, Miller was very similar to Strieff. The prosecution argued that the illegal drugs discovered after an illegal stop should be admitted into evidence under the attenuation doctrine. However, the argument that there had been no intervening circumstance prevailed in Miller. The Eleventh Circuit, quoting Supreme Court precedent, ruled that a traffic stop is an “unsettling show of authority” that may “create substantial anxiety.” It held that the consent form was “invalid” because there was “no significant lapse of time between the unlawful detention and the consent,” and no “intervening circumstances dissipated the effect of the unlawful detention.”

Miller illustrates how many lower courts initially resisted adopting Mendenhall’s “reasonable person” test to determine the constitutionality of consent based searches. The Eleventh Circuit also demonstrated a concern that had escaped the attention of the Supreme Court in its airport “drug courier profile” cases. How many innocent people were being stopped?

The record does not reveal how many unsuccessful searches Trooper Vogel has conducted or how many innocent travelers the officer has detained. Common sense suggests that those numbers may be significant. As well as protecting alleged criminals who are wrongfully stopped or searched, the Fourth Amendment of the Constitution protects these innocent citizens as well.

Dragnet policing is based on volume, not suspicion, and the leaders of Operation Pipeline were surprisingly candid about this. The key to the program, a veteran sergeant explained, is “sheer numbers . . . . Our guys make a lot of stops. You’ve got to kiss a lot of frogs before you find a prince.”

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265 Id.
266 Id. at 549.
267 See id. at 550.
268 Id. at 549.
270 Id. at 550.
271 Id. (citing Delaware v. Prouse, 440 U.S. 648, 657 (1979)).
272 Id. (citation omitted).
273 Id.
274 Driving While Black, supra note 255.
Pipeline supervisors encouraged troopers to make at least eight to 10 stops a day.\textsuperscript{275}

Ironically, Vogel explains in his autobiography that while he was constructing his "profile" he considered setting up a narcotics roadblock but decided against the idea because roadblocks are "intrusive" and would result in "stopping a great number of innocent people and delaying them unnecessarily."\textsuperscript{276} Thus, in order to avoid inconveniencing the general population, Vogel was considerate enough to target only certain types of people.

Unlike the Eleventh Circuit, the majority of federal appellate courts eventually upheld the constitutionality of pretext stops.\textsuperscript{277} These courts, in other words, adopted the "could have" test, rather than the Eleventh Circuit's "would have" test. However, the problem judges confronted with pretext stops was considerably more difficult to adjudicate than the first two stages of dragnet policing.

An officer who witnesses a traffic violation has probable cause to stop the motorist, and the "multitude of applicable traffic and equipment regulations" is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop.\textsuperscript{278} Traffic regulations can be exploited by the police to selectively enforce generally unenforced laws. However, to regulate this type of state action, a judge must question the subjective intent of a police officer. It is not clear this is even possible.

The inability of judges to control the police was illustrated when "20/20" ran a segment on Vogel after he had been elected Volusia County Sheriff in 1988.\textsuperscript{279} Although the Eleventh Circuit had already ruled against profile stops in Smith and struck down pretext stops in Miller, it was abundantly clear that Vogel's men were still stopping motorists because of factors unrelated to traffic violations. Moreover, Sheriff Vogel permitted his men to be filmed on national television while doing so. His men never said race was a factor in their decision to stop a motorist, but as one officer explained, they focused on two somewhat

\textsuperscript{275} Gary Webb, Operation Pipeline: Pulling Over Minority Motorists as an Excuse to Search Their Cars, in ABUSE YOUR ILLUSIONS 149 (Russ Kick ed., 2003).

\textsuperscript{276} VOGEL, supra note 253, at 49–50.

\textsuperscript{277} See United States v. Johnson, 63 F.3d 242, 245–47 (3d Cir. 1995); United States v. Jeffus, 22 F.3d 554, 556–57 (4th Cir. 1994); United States v. Scoop, 19 F.3d 777, 782–84 (2d Cir. 1994); United States v. Ferguson, 8 F.3d 385, 392 (6th Cir. 1993); United States v. Meyers, 990 F.2d 1083, 1085 (8th Cir. 1993); United States v. Mitchell, 951 F.2d 1291, 1295 (D.C. Cir. 1991); United States v. Trigg, 925 F.2d 1064, 1065 (7th Cir. 1991); United States v. Causey, 834 F.2d 1179, 1184–85 (5th Cir. 1987).

\textsuperscript{278} Whren v. United States, 517 U.S. 806, 818 (1996).

\textsuperscript{279} The 20/20 episode is available on YouTube. 20/20, Drug Interdiction on Volusia County Roadways in Early 1990’s Sheriff Robert Vogel, YOUTUBE (Mar. 19, 2011), https://www.youtube.com/watch?v=2NyRIC_gzk. All dialogue from this episode has been transcribed by this Author.
indistinguishable indicators: "We’ll get a person that doesn’t actually match a
car, or a car doesn’t match a person."\footnote{\textit{Id.}}

At one point during the segment, a trooper is seen sitting on the side of
a highway; watching an endless stream of cars passing by. As the cars rush past
the patrol car, the reporter can be heard asking with disbelief, “Sitting on the
interstate, watching cars whizz by, one or two a second, how do they know which
ones to stop?”\footnote{\textit{Id.}} Vogel then appears on screen and he responds by saying, “Well,
Deputies stop vehicles based on a traffic violation.” “But Sheriff, just about
everybody is out there speeding . . . going 60, 65 miles an hour, doesn’t it give
you a broad mandate . . . ?”\footnote{\textit{Id.}} The reporter never suggests the troopers are using
a profile, but Vogel’s Freudian slip of a convoluted reply certainly raises that
possibility: “Well I’m not certainly stating, or denying the fact that, our personnel
are using a profile of any sort, which they do.”\footnote{\textit{Id.}}

E. \textit{Whren} and Tactics for Criminal Patrol

The Supreme Court resolved the federal circuit split over the use of
pretext stops in \textit{Whren v. United States}.\footnote{517 U.S. 806 (1996).} In \textit{Whren}, the police observed an SUV
sitting at a stop sign for an “unusually long time.”\footnote{\textit{Id.} at 808.} The SUV then made a turn
without signaling and sped off at “an unreasonable” speed.\footnote{\textit{Id.} \footnote{\textit{Id.}} at 808–09.} After the officers
stopped the truck, they observed plastic bags of what appeared to be crack
cocaine in Whren’s hands.\footnote{\textit{Id.} \footnote{\textit{Id.}} at 808.} Thus, Whren’s arrest was based on the plain view
exception to the Fourth Amendment and the constitutionality of the search was
not at issue.

The officers who stopped \textit{Whren} were undercover narcotic officers
driving an unmarked vehicle.\footnote{\textit{Id.}} Under local police regulations they were
prohibited from enforcing traffic laws unless the violation was “so grave as to
Homer Littlejohn, testified at the suppression hearing. Soto stated under oath that
he and his fellow vice-squad officers stopped the SUV not to issue a ticket, but
to ask why the driver had stopped at the stop sign for such a long time and just “to talk to him.”

The only circumstances that I would issue tickets—I’m a vice investigator; I’m not out there to give tickets—is just for reckless, reckless driving, something that in my personal view would somehow endanger the safety of anybody who’s walking around the street or even the occupants of a vehicle, maybe children or whoever . . . . I wasn’t going to issue a ticket to him at all. That was not my intention at all. My intentions [sic] was to pull him over and talk to him. 290

Defense counsel then asked: “Isn’t it true that your decision to stop that Pathfinder was because you believed that two young black men in a Pathfinder with temporary tags were suspicious; isn’t that true?” 291 It is unclear exactly how long Officer Soto paused before answering this question; perhaps as long as the Pathfinder had sat at the stop sign. In any event, Soto’s pause also raised suspicions, and the judge asked him why he had “hesitate[d] a long time” before answering that “very straightforward question.” 292 Soto stated that he had “wanted to really think” and “analyze the question.” 293 Interestingly, when he finally answered, Soto did the same thing Vogel had done on “20/20.” He defended himself against an accusation that had not been alleged. Soto denied the stop was based on a “racial profile.” 294 Soto’s partner, Officer Littlejohn, had an easier time on the witness stand. He simply admitted that they had stopped the Pathfinder to investigate for drugs. 295 “Sir, they were leaving a high drug area. We did not know they had drugs in that vehicle at that time, just had a reasonable suspicion as to their actions as to why they were stopped at the stop sign for so long.” 296

At the conclusion of the suppression hearing the trial judge ruled the stop was constitutional because “[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop.” 297 The District of Columbia Circuit Court of Appeals affirmed the decision, ruling that the district court judge had chosen the appropriate test to determine whether traffic stops

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291 Id. at 19 n.11.
292 Id.
293 Id.
294 Id.
295 Id. at 13 n.7.
296 Id.
were constitutional. The appellate court argued that the advantage of the “could have” test is that “it eliminates the necessity for the court’s inquiring into an officer’s subjective state of mind.” But if this is true, it seems fair to ask: why was the only issue in Whren the arresting officer’s subjective state of mind?

The Supreme Court’s decision in Whren quickly “launched a firestorm of virtually unanimous criticism.” Most legal scholars have excoriated it for being “legally incorrect, technically flawed, and fundamentally unfair.” However, the importance of Whren has been greatly exaggerated. Unlike the first two stages of racial profiling, it is far from clear how judges can prevent racial profiling on the highways. As the 20/20 profile on Vogel illustrated, the “reasonable officer” test was largely if not completely ineffective because it demands that judges second guess an officer’s subjective motivations. A study of Washington State offers empirical evidence of the test’s futility.

Three years after Whren, the Washington State Supreme Court adopted the reasonable officer test based on its interpretation of its state constitution. In 2009, a scholar concluded, based on her review of almost 10 years of available case law, that Washington courts rarely seem to find that an officer acted for pretextual reasons unless the officer either testifies to her use of pretext or the court finds that the officer is lying about the reasons for the stop, both of which are relatively uncommon. While, on the one hand, this might suggest that the use of pretext by the police is less prevalent than thought, it could also suggest that courts are reluctant to pick apart an officer’s motivations for making a stop, with the possible accompanying risk of elevating a pretextual motive over a valid, constitutional one, and suppressing validly recovered evidence.

Although reviewing almost a decade of traffic stop case law is certainly an impressive feat, the 15-minute segment on Sheriff Vogel broadcast by “20/20” had already proven the point. Vogel’s men were obviously still targeting minority motorists, and this fact became indisputable after the Orlando Sentinel

298 Id. at 375–76.
299 Id. at 375.
300 Margaret M. Lawton, The Road to Whren and Beyond: Does the ‘Would Have’ Test Work?, 57 DePaul L. Rev. 917, 917 (2008).
301 Id. at 917–18 (internal citations omitted); see also Honorable Phyllis W. Beck & Patricia A. Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns, 72 Temp. L. Rev. 597, 597 (1999).
303 See Lawton, supra note 300, at 957.
later obtained and reviewed police recorded videotapes of 1,084 stops. According to a contemporaneous study of the stretch of I-95 patrolled by Vogel’s men, roughly 5% of the motorists were “dark-skinned.” However, 69% of the motorists stopped on the videotapes were black or Hispanic, 82% of the motorists searched were black or Hispanic, and only 9 of the 1084 drivers stopped, less than 1%, received traffic tickets. Vogel and his men were obviously undeterred by the “reasonable officer” test.

Further evidence of the ineffectiveness of the “would have” test, as well as the scale of racially targeted dragnet policing in the United States, is found in the above mentioned police training manual, Tactics. Tactics has been used by law enforcement agencies throughout the nation, and is widely considered a classic in the field. Remarkably, Strieff is the first published case, federal or state, to refer to it. In addition, of the countless law review articles available on Lexis, only one (as of the date of this writing) has previously referred to it, and that reference is buried in a footnote.

Not only does Tactics instruct officers on how to make pretext stops, but it also offers advice on how to conceal that practice. In a section entitled “How can I protect myself against accusations of profiling or pretextual stops,” the manual instructs officers to maintain a written log of all these stops so if “you’re accused of profiling or [pretextual] stops, you can bring your daily logbook to court and document that pulling over motorists for ‘stickler’ reasons is part of your customary pattern—not a glaring exception conveniently dusted off in the defendant’s case.” In other words, the best defense against a racial profiling allegation is to practice racial profiling on a regular and consistent basis.

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305 Id.
307 REMSBERG, supra note 46.
308 See EPP, supra note 38 (citation omitted).
310 Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting) (citing Tactics for its advice that “officers looking for drugs to ‘run at least a warrants check on all drivers you stop’”).
312 REMSBERG, supra note 46, at 70.
Tactics also offers informative advice regarding the "could have" test by summarizing the level of discretion permitted by the test: "Is it legal to be curious about a car or driver first, then find a traffic infraction to justify pulling him over so I can make contact and check him out? Most places, yes." Moreover, since virtually all motorists commit traffic violations every time they drive, officers are advised to acquire an "intimate and resourceful working knowledge of the motor vehicle codes, as well as knowing the outer limits of what prosecutors and courts in your jurisdiction will stand for." The manual lists a few helpful examples of "more trivial [traffic] infractions" that will justify a stop: "having a taillight out or a cracked windshield, changing lanes without signaling, impeding traffic, following too closely, failing to dim lights, speeding 3 to 5 mph over the limit . . . and so on." As an Operation Pipeline instructor once proclaimed, "the vehicle code gives me fifteen hundred reasons to pull you over." Another officer, who apparently had mastered the vehicle code as well as the "outer limits" of what judges in his jurisdiction would stand for, even more memorably declared: "I've got that supercharged knowledge of the Constitution that allows me to do this right."

Although the constitutionality of the search in Whren was not disputed, few drug couriers greet police officers while holding two bags of cocaine in their hands. Thus, the challenge facing an officer after making a pretext stop is how to effect a search in the absence of probable cause. Fortunately, Tactics also offers illuminating advice on how to gain a motorist's consent to be searched after a "trivial" traffic violation stop. The "Consent to Search" chapter begins with the proud declaration that various troopers have between a 96% and 100% success rate in getting motorists to grant them consent. The rate is so high because "The reasons for giving consent are not affected by logic." Tellingly, the manual criticizes those officers who "try to search every vehicle they stop, as a hedge against offenders who are successfully deceptive during dialogue" because it is "generally a waste of valuable time."

Tactics also teaches an important lesson apparently gleaned from the Supreme Court's airport drug courier "profile" decisions. In Mendenhall, after the agent had stopped the defendant and saw that the name on her ticket did not match her identification, he returned the driver's license and airline ticket and

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313 Id. at 68.
314 Id. at 69.
315 Id.
316 Driving While Black, supra note 255.
318 REMSBERG, supra note 46, at 211.
319 Id.
320 Id. at 213.
asked Mendenhall “if she would accompany him to the airport DEA office for further questioning.” In Royer, where the stop was ruled unconstitutional, the detectives also stopped the defendant and discovered the name on his ticket did not match his identification. However, these officers did not return the documents before interrogating him. And, Justice White, who wrote the Royer decision, explained “the detectives’ possession of Royer’s airline ticket and their retrieval and possession of his luggage made it clear . . . that Royer was not free to leave.” Tactics incorporates this lesson in its detailed instruction on what is called “The Magic Moment.”

Consent must be asked for and granted when a “reasonable” person would believe he is legally free to disregard further contact with you and leave your presence. . . . Legally this period begins when you have concluded the reason for the stop (issued him a ticket or warning, for example) and have returned his license, registration, insurance card, and any other documents. . . . You may want to mark the end of your official detention by saying casually, as a “throw-away line:” “Okay, you’re free to go, have a safe trip,” as you hand him the papers . . . . [Most] courts presume that a reasonable citizen knows that constitutionally he does not have to remain once the purpose for the stop is ended. If he does stay after that point, it’s presumed he’s sticking around by “choice” and engaging in “consensual conversation” with you. Whatever he agrees to then, in the courts’ view, is more likely to be voluntary.

Remsberg explains how most officers seek to avoid an “abrupt break when the detention technically ends and the contact de-escalates into a voluntary encounter.” They do so by keeping “the conversation flowing as they’re filling out the paperwork” and when giving the documents back to the driver. As an example, Remsberg quotes an officer who liked to ask about “the weather in whatever locale the suspect says he has come from . . . .” The advantage is that this keeps the driver “focused on something nonthreatening at that moment.”

323 Id. at 496.
324 Remsberg, supra note 46, at 211.
325 Id. at 213–14.
326 Id.
327 Id.
328 Id. at 215.
Such a “seamless” transition makes the “suspect [sic] less likely to register the fact that his status has officially changed.”

Psychologically though, the chances are overwhelming that the average person won’t leave at that “break” point, even if he understands intellectually that he could. After all you’re the police and you’re still talking to him. As a practical matter, his freedom to disregard your questions and split simply don’t [sic] occur to him.

Another technique is to “pretend the idea of searching has occurred to you as an afterthought.”

If you’re at the driver’s window or standing outside with him, turn as if you’re going to walk away after you’ve returned his papers, then, still acting the good ol’ boy, turn back and broach the subject cordially, almost as a joke: ‘Say can I ask you a question?’ Wait for him to agree, then: ‘You know, I sure run into a lot of strange things out here. You don’t have any bazookas or drugs or atomic bombs in the car, do you?’

Technically, you’ve confirmed that he’s agreeable to talking to you. Your tone conveys that you’re posing a strictly routine, even stupid, question to which you are of course expecting a negative answer. When the driver says “No,” then casually but quickly pop the $64,000 question: “Well, you wouldn’t mind if I took a look, would you?”

This phrasing, too, employs psychology in your favor. The implication is that the subject will look guilty if he does mind. An assumption is built into the question. It’s psychologically harder to decline than a straight-forward: “Can I search your car.”

Six more pages of psychological advice are offered to gain consent in more specific types of circumstances. An interesting question is that of who pioneered this approach to gaining a motorists’ consent to search their vehicle. The first published mention of these methods that this author has seen occurred in 1992 after the _Orlando Sentinel_ reviewed videotapes of more than 1,000 stops that had been recorded by Sheriff Vogel’s men. A typical stop was described as follows:

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329  Id.
330  Id.
331  Id.
332  Id. at 215–16.
333  Steve Berry, Legal Experts Say Seizures Appear Illegal: A Sample of Videotaped Roadside Stops by Volusia’s Drug Squad Gets Poor Reviews From 4 Lawyers, _ORLANDO SENTINEL_ (Aug.
In the tape, [Officer] Jones informs each driver that he or she has been stopped for a minor traffic violation and asks to see a driver’s license. He is polite and chatty and returns the license before popping the surprise question: “By the way, you’re not carrying any drugs, guns or bombs, are you?” he asks. “You mind if I take a quick look?”334

IV. STOP AND FRISK IN NEW YORK CITY

When one considers the facts of Mendenhall, Bostick and Whren, it is rather astounding that the Supreme Court managed to avoid a public debate over racial profiling until 2016.335 Moreover, even when the issue was finally addressed in Strieff, the majority still disputed indisputable facts. Justice Thomas discounted any danger of “dragnet searches” because such “wanton conduct would expose police to civil liability.”336 Yet, as we have seen, police officers participating in Operation Pipeline and the Florida bus sweeps had previously acknowledged that their programs were based on “sheer numbers”337 or stopping as many people as “time permits.”338

No one expected that the Court would debate racial profiling in Strieff, but Justice Sotomayor realized the significance of two critical facts. First, even the prosecution had conceded that there was insufficient legal basis for the arresting officer to have stopped the defendant.339 Therefore, the Court was considering extending the type of random stops or “encounters,” which it had previously permitted in airports and on buses, to pedestrians. Second, running a warrant check on people suspected of committing a minor infraction or, in many cases, having committed no criminal wrongdoing whatsoever, has become a common strategy in today’s new system of “mass misdemeanor” justice.340

The strategy was originated by the NYPD in 1994, when it decreed that all summonses would be backed by a warrant.341 The aggressive use of stop-and-frisk has proven to be the principle tool used to increase arrests for low-level

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334 Id.
336 Id.
337 See Driving While Black, supra note 255.
338 Bostick v. State, 554 So. 2d 1153, 1158 (Fla. 1989).
339 See Strieff, 136 S. Ct. at 2063.
offenses.\textsuperscript{342} Thus, Justice Sotomayor recognized how, by upholding the stop in \textit{Strieff}, the Court would essentially sanction the latest form of racially targeted dragnet policing. In this section of the Article, we will first examine the origins and theory underlying stop-and-frisk policing. Afterwards, we will turn our attention to the toll stop-and-frisk has taken on its targeted population. Finally, we will explore whether stop-and-frisk can be justified as an effective crime fighting measure.

\textbf{A. Stage Four of Racial Profiling in America: Stop-and-Frisk}

Stop-and-frisk, as an institutionalized proactive crime fighting tool, was first implemented after Mayor Rudolph Giuliani and Police Commissioner William Bratton were sworn into office on January 1, 1994.\textsuperscript{343} At the time, New York City was in the midst of a crime wave which had lasted more than three decades.\textsuperscript{344} Crime figures are notoriously unreliable, but criminologists agree that the most reliable statistics relate to homicide.\textsuperscript{345} And the number of homicide victims in New York City had risen from 548 in 1963\textsuperscript{346} to nearly 2,000 in 1993, the final year of Mayor David Dinkins' administration.\textsuperscript{347} Although Giuliani is often credited for the improved crime figures, it was Bratton and his Deputy Commissioner, Jack Maple, who designed and implemented policing reforms. As a federal prosecutor once said, "[t]he Mayor hired Bratton, and Bratton hired Maple, and that created a paradigm shift in policing."\textsuperscript{348}

Crime declined beyond what anyone dreamed possible during the 28 months Bratton served as New York City Police Commissioner.\textsuperscript{349} The murder rate decreased by 20\% his first year in office, and another 24\% in 1995.\textsuperscript{350} The number of murder victims dropped from 1,946 to 1,177, a 42\% reduction.\textsuperscript{351} Bratton's success is often incorrectly ascribed to the famous "Broken Windows" strategy, which had been advanced by George L. Kelling and James Q. Wilson

\textsuperscript{342} See generally MAPLE, supra note 80, at 166.
\textsuperscript{343} See generally Bellin, supra note 95, at 1503–04.
\textsuperscript{345} See Bellin, supra note 95, at 1498.
\textsuperscript{347} \textit{New York City Crime Rates 1960–2015}, supra note 344.
\textsuperscript{349} \textit{William Bratton with Peter Knobler}, \textit{Turnaround} 294 (1998).
\textsuperscript{350} \textit{Uniform Crime Reporting}, FBI, https://ucr.fbi.gov/ (last visited Nov. 3, 2017). All the crime statistics in these two paragraphs are compiled from this source.
\textsuperscript{351} \textit{Id.}
in their *Atlantic Monthly* article. Their “Quality of Life” theory claims that by focusing on minor infractions, such as prostitution or graffiti, the police can have a disproportionate effect in reducing the overall crime rate.

In his memoir, *Turnaround*, Bratton explained it would be too “simplistic” to attribute the rapid decline in crime in New York City to the quality-of-life enforcement efforts because it was just “one of a number of strategies that were deployed.” Maple, who also wrote a memoir, *The Crime Fighter*, was even more dismissive of the theory.

If a building has all its windows intact, the theory goes, it can sit vacant and undisturbed for an indefinite period of time. But if one window is broken and not quickly repaired, all hell breaks loose. The implication is, if the police would take care of the little things, the big things would take care of themselves . . . . That’s not how it works. Rapists and killers don’t head for another town when they see that graffiti is disappearing from the subway. The average squeegee man doesn’t start accepting contract murders whenever he detects a growing tolerance for squeegeeing.

Bratton’s success as Police Commissioner can be attributed to six sometimes overlapping strategies and policies: an increase in police manpower (which largely resulted from an expansion initiated by Giuliani’s predecessor, Mayor David Dinkins); getting guns off the streets; anti-corruption campaigns; 

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353 *Bratton*, supra note 349, at 229. Bratton’s statements on Quality of Life policing have not been entirely consistent. After returning to serve as Police Commissioner under Mayor Bill De Blasio, Bratton wrote the following in a department report: “More than any other factor, what caused this amazing change was Broken Windows, or quality-of-life policing.” See Ken Auletta, *Fixing Broken Windows*, NEW YORKER (Sept. 7, 2015), https://www.newyorker.com/magazine/2015/09/07/fixing-broken-windows.

354 *Maple*, supra note 80, at 154.

355 *Id.*


358 *Bratton*, supra note 349, at 254–55; *Maple*, supra note 80, at 88.
improved management and information systems; shutting down public drug markets; and an emphasis on policing high crime locations (in which stop-and-frisk played a large role). It is hardly surprising that the NYPD never publicly announced a plan to randomly stop-and-frisk young black and Latino males on a massive scale. However, there can be no doubt that this is eventually what occurred. The aggregated data revealed the following: The NYPD made over 4.4 million recorded stops from January, 2004, to June, 2012, and conducted 2.3 million frisks for weapons (which were successful only 1.5% of the time); the NYPD used force in 23% of the stops of blacks and 24% of Hispanics; the NYPD issued a summons or made an arrest in only 12% of the stops; the most common arrest was for marijuana.

2011 marked the apex of stop-and-frisk in New York City, and, that year, the police recorded 686,000 stops of a population totaling less than nine million. Although the stops were largely random, they were not randomly distributed amongst the population. Approximately 87% of those stopped were blacks or Hispanics, roughly 93% of those stopped were male, and about 51% were under 25 years of age. The number of recorded stops of young black men in 2011 was so massive that it exceeded the total number of young black men living in New York City. If the police were stopping people on the basis of "reasonable suspicion," one would presume that a reasonable number of those stopped would be found to have engaged in unlawful behavior. Yet, in 2011, 88% of the people stopped were neither arrested nor even issued a summons. 55.7% of persons stopped were frisked. The police are supposed to have reasonable belief that a

359 BRATTON, supra note 349; MAPLE, supra note 80, at 108.
361 See, e.g., MAPLE, supra note 80, at 153–56.
363 Id.
364 Id. at 559.
365 Id. at 583.
366 Id. at 576.
367 Id. at 558.
369 Id. at 7.
370 Id. at 17.
371 Id. at 2.
suspect is armed and dangerous before conducting a frisk, yet 98.5% of those frisked had no weapons.\textsuperscript{372}

To understand why one of the most repressive police operations in the nation’s history was implemented in one of the country’s most liberal cities, we must turn to an important lesson Bratton learned while serving as the Chief of the Transit Police in New York City (Bratton had started this position in April 1990, and he left in January 1992).\textsuperscript{373} At the time, fare evasion was rampant, and the solution Bratton came up with was “the fare-evasion mini-sweep.”\textsuperscript{374} These sweeps implemented Maple’s theory that since it is very difficult to catch a crook in the act of a crime, the police must try “to catch crooks when the crooks are off-duty”\textsuperscript{375} by “running warrant checks on every arrest or summons, including those for minor quality-of-life violations.”\textsuperscript{376}

The fare-evasion mini-sweep consisted of assigning numerous undercover officers to the same station.\textsuperscript{377} As Bratton explained, the officers ended up arresting scores of people, but the “unanticipated by-product of the sweeps came when we checked the identification and warrant status of everybody we were arresting.”\textsuperscript{378}

During the early stages of the initiative, we found that one out of every seven people arrested for fare evasion was wanted on an outstanding warrant for a previous crime. One out of twenty-one was carrying some type of weapon, whether a box cutter, a knife, or a gun. As so often happens in policing, we had focused on one problem to the exclusion of others. Now we were beginning to understand the linkage between disorder and more serious crimes. We hadn’t thought of it, but it stands to reason that someone coming into the system with the intention to commit a crime is not likely to pay for the privilege.\textsuperscript{379}

The problem with using minor infractions to check for warrants and conduct body searches is that people will take notice of what is happening and modify their behavior.\textsuperscript{380} Consider the first few words of Bratton’s quote above, “\textit{During the early stages} of the initiative, we found that . . . .”\textsuperscript{381} The fare-evasion

\textsuperscript{372} \textit{Floyd}, 959 F. Supp. 2d at 558.
\textsuperscript{373} \textit{Bratton}, supra note 349, at 142.
\textsuperscript{374} \textit{Id.} at 153.
\textsuperscript{375} \textit{Maple}, supra note 80, at 155.
\textsuperscript{376} \textit{Id.} at 166.
\textsuperscript{377} \textit{Id.}
\textsuperscript{378} \textit{Bratton}, supra note 349, at 154.
\textsuperscript{379} \textit{Id.}
\textsuperscript{380} \textit{Id.}
\textsuperscript{381} \textit{Id.} (emphasis added).
mini sweep was successful in part because of the abundance of low hanging fruit.\textsuperscript{382} In time, however, the bad guys wised up and began to leave their weapons home and pay their fares. If the cops were going to be out in force, it was better all around not to be armed on the subway. Fewer weapons, fewer robberies and armed robberies, fewer murders, fewer perpetrators, fewer victims.\textsuperscript{383}

When Bratton became Police Commissioner, there were an ample sufficiency of minor infractions to justify stops and possible misdemeanor arrests. “Boom boxes, squeegee people, street prostitutes, public drunks, panhandlers, reckless bicyclists, illegal after-hours joints, graffiti—New York was overrun.”\textsuperscript{384} And aggressive enforcement against these minor infractions helped prevent violent crime.

Time and time again, when cops interrupt someone drinking on the street or a gang of kids drinking on the corner, pat them down, and find a gun or a knife, they have prevented what would have happened two or three hours later when that same person, drunk, pulled out that gun or knife. We prevented the crime before it happened. New York City police would be about prevention, and we would do it lawfully.\textsuperscript{385}

Bratton was not applying Broken Windows by enforcing minor infractions and hoping more serious crime would also abate. His officers used minor infractions as the justification to stop people, demand identification, run warrant checks, and possibly frisk them for illegal weapons. And, since the NYPD was more interested in nabbing off-duty crooks than reducing minor infractions, “Quality of Life” enforcement was concentrated in high crime neighborhoods.\textsuperscript{386} Maple defended this approach by offering the following rationale:

A bunch of young Wall Street analysts doing Jell-O shots during a pub crawl along Madison Avenue may be just as likely to piss in the street as a crew of robbers drinking malt liquor on a corner in East New York. . . . But only one of those groups is likely to

\textsuperscript{382} See generally id.

\textsuperscript{383} Id.

\textsuperscript{384} Id. at 228.

\textsuperscript{385} Id. at 229.

\textsuperscript{386} MAPLE, supra note 80, at 155–56.
include somebody wanted on a warrant or somebody carrying a nine in their waistband.\footnote{Id. at 155.}

Although Maple contended in his memoir that Wall Street analysts “should have to clear the same hurdles before they’re let off with just summonses,” just three paragraphs afterwards, he argued police need “to be more selective about who we [are] arresting on quality-of-life infractions.”\footnote{Id.} Essentially, certain infractions committed by certain types of people should be ignored.\footnote{Id.}

When a team of cops fills up a van with arrestees, the booking process can take those cops out of service for a whole day in some cities. The public can’t afford to lose that much police protection for a bunch of first-time offenders, so the units enforcing quality-of-life laws must be sent where the maps show concentrations of crime or criminals, and the rules governing the stops have to be designed to catch the sharks, not the dolphins. “Quality-of-Life Plus” is not “zero tolerance.”\footnote{Id. at 155–56.}

Maple may have advocated targeting “sharks,” but what eventually occurred was considerably different. By concentrating their efforts in high crime neighborhoods, the NYPD increasingly fined and arrested the most economically disadvantaged people for behavior which others engaged in with impunity. For example, between 2008 and 2011, Brooklyn officers “issued an average of eight bike-on-the-sidewalk summonses per year” in upscale Park Slope, but 2,050 in Bedford-Stuyvesant.\footnote{Allegra Kirkland, There Are Over 1.2 Million Open Arrest Warrants in New York City, and Most People Who Have Them Don’t Even Know It, BUS. INSIDER (Aug. 6, 2015, 11:42 AM), http://www.businessinsider.com/12-million-open-arrest-warrants-in-nyc-2015-8.} A second example occurred in 2003, when police officers ticketed people drinking beer at a Fourth of July party on Rockaway Beach in Queens. Later that weekend, countless people openly imbibed in Central Park during a free New York Philharmonic concert.\footnote{Michael Daly, Wine’s Cool – Beer’s a Fine: Park Drinkers Escape Beach Crowd’s Fate, N.Y. DAILY NEWS (July 9, 2003, 12:00 AM), http://www.nydailynews.com/archives/news/wine-cool-beer-fine-park-drinkers-escape-beach-crowd-fate-article-1.519983.} Someone even offered a cocktail to Mayor Bloomberg, who also was in attendance.\footnote{Id.} To this
day, the official Central Park website advises Philharmonic fans that “alcohol is generally tolerated, but there are police around, so keep it low-key.”

Arresting subway turnstile jumpers and frisking them for weapons is like sending Al Capone to prison on tax evasion charges. Neither event raises a public outcry. Targeting young black males for drinking on street corners, while ignoring the same infraction when committed by classical music aficionados in Central Park is more problematic. Arguably, classical music lovers should be allowed to sip their chardonnay because there have never been problems related to public inebriation at these performances. But how does one justify the moral incongruity of issuing thousands of bike-on-sidewalk summonses in one of the city’s poorest neighborhoods, while ignoring the same infraction in one of the richest? Or, how does one defend the hypocrisy of arresting thousands for putting their feet up on the subway, at a time when Mayor Bloomberg, much to the annoyance of nearby residents, was repeatedly landing and taking off on his private helicopter from a helipad during restricted hours?

B. The Toll Exacted by Stop-and-Frisk

Since stop-and-frisk was conducted on such a massive scale, involving literally millions of people, the only way the human mind can comprehend the toll it exacted is to examine it at the community and individual level. Brownsville is a small predominantly black neighborhood in Brooklyn, with a population of 14,000. Between January 2006 and March 2010, the police made 52,000 stops in Brownsville.

Young black males between 15 to 34 years of age comprised 11% of the total population, but they accounted for 68% of the stops. That would mean 1,550 young black men had been stopped more than 35,000 times or about 8 times a year during this period. It is certainly possible that a number of these stops consisted of non-Brownsville residents who were passing through the neighborhood, but the young men who lived in Brownsville were also

397 Id.
398 Id.
399 Id.
presumably stopped additional times outside their neighborhood. The stops were either being made randomly, or the police were exceedingly poor evaluators of suspicious behavior. In 2009, the police made 13,200 stops in Brownsville, which resulted in the arrests of only 109 people.  

The high percentage of arrest-less stops is easily explained. Supervisors were essentially imposing quotas. A number of police officers interviewed by the New York Times said that “certain performance measures were implicitly expected in their monthly activity reports.”  

“[T]he floor number was 10 a month” in New York, according to one officer. Another officer said that the “pressure was felt more overtly to get an arrest or a criminal summons, but in lieu of those, extra [stops] would compensate.” Officers reported that fulfilling their quotas was easy: “Just go to the well.”  

The “well” was the lobby of one of the many public housing buildings. A retired officer reported said that his supervisors considered the lobby to be a “legitimate” source for a stop. In at least three of the buildings “the [front] door locks had been broken for weeks.” Not surprisingly, residents were not in the habit of using a key to open an unlocked door. However, failing to use a key gave the police a pretext for making suspected trespassing stops. It was reported that 90% of the stops were of residents who lived in the building and resulted in neither a summons nor an arrest. However, the stop would be duly recorded and the officer could fulfill her monthly quota.  

These numbers may initially sound reassuring, but it also means that 10% of the people stopped were either given a summons for trespassing or even arrested. It is impossible to know how many of these people simply lacked identification to prove their residency or were visiting a friend or family member. However, patrol officers did complain that they were being pressured to make arrests and issue criminal citations. Other news organizations, in addition to the New York Times, also received complaints alleging commanding officers...
“constantly want you to violate people’s rights and make false statements in order to get the arrest.”

Some patrolmen were so opposed to these practices that they began secretly recording their commanding officers. In one example, a sergeant said, “you can always articulate later,” meaning legal justification could be created after a stop had been made. On another occasion, the commander wanted everyone exiting a particular building to be stopped regardless of individualized suspicion: “Anybody moving, anybody coming out that building, 250.” (Police officers in New York City are required to fill out a UF-250, or the “Stop-Question-Frisk” form, every time they make a stop.) Another commander, a keen observer of sartorial styles, was recorded saying following:

I’m tired of bandanas on their waist and I’m tired of these beads. Red and black beads mean Bloods. Their bandanas—if they’re walking down the street and they’ve got a bandana sticking out their ass, coming out there—they’ve got to be stopped. A 250 at least. At least.

Officer Pedro Serrano was told that he had to stop “the right people, the right place, the right location.” In case Serrano failed to understand, the Deputy Inspector explained exactly who the “right people” are—male blacks. “And I told you at roll call, and I have no problem telling you this, male blacks 14 to 20, 21.”

Commanding officers in these recordings often referred to numbers which correlated to the number of arrests and summonses patrol officers were expected to issue every month. “If you think one and 20 is breaking your balls, guess what you’ll be doing. You’ll be doing a lot more,” said one supervisor.

Yet another supervising officer reinforced this message while injecting a bit of

413 NYCResistance, What You Didn’t Know About NYPD’s Stop & Frisk Program!, at 7:20, YOUTUBE (Jan. 15, 2013), https://www.youtube.com/watch?v=rJHx0Gj6ys&list=FLlH8n59eGmYtWwuCJe1DSUA&index=4&t=47s.
415 Id. at 598.
416 Id.
418 Floyd, 959 F. Supp. 2d at 599.
419 Id. at 604.
420 Id.
career counseling advice into his diatribe: “Next week, [it’ll be] 25 and one, 35 and one, and until you decide to quit this job and go to work at Pizza Hut, this is what you are going to do until then.”

These commanding officers did not constitute just “a few bad apples.” They were implementing policies enacted at the highest levels of city government. For example, according to the sworn testimony of a New York State Senator, Police Commissioner Ray Kelly told him that he had his officers focus on young blacks and Hispanics “because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police.” Mayor Bloomberg even publicly pronounced that not enough black people were being stopped. “I think we disproportionately stop whites too much and minorities too little. It’s exactly the reverse of what they say.”

The most surprising aspect of these policies and statements is that they were made after New York City had already experienced “the largest crime drop ever documented during periods of social and governmental continuity.” The pressure of electoral politics explains this strange phenomenon. It is impossible to reduce crime, year after year, decade after decade, but try explaining this fact to mayors whose electoral fate is often determined by their ability to improve upon the prior year’s crime figures. This dynamic even occurred during Bratton’s short tenure as Police Commissioner, as revealed by a conversation Maple had with Giuliani:

Maple tried to explain to the mayor that because of the success of our Gun Strategy, fewer people were carrying guns, and that the more we continued to pursue this strategy, the fewer gun arrests we could expect. “No!” he said, gritting his teeth. “This number goes down and this number goes up!” Meaning, the higher the number of arrests, the lower the amount of crime.

In our federal system of government, mayors are primarily responsible for crime and education. Maple’s theory that the police must strive to “catch

422 Id.
423 See Floyd, 959 F. Supp. 2d at 562.
424 Id.
425 Id. at 606.
427 ZIMRING, supra note 356, at x.
428 BRATTON, supra note 349, at 271.
crooks when the crooks are off-duty”\textsuperscript{430} by “running warrant checks on every arrest or summons, including those for minor quality-of-life violations” enjoyed great success initially, but the tactic was eventually plagued by the law of diminishing returns.\textsuperscript{431} Petty criminals modified their behavior, guns were taken off the streets, and crime was reduced dramatically. But unrelenting pressure to reduce crime explains why commanders began demanding patrol officers make suspicionless stops and why quotas were increased from “one and twenty,” to “twenty-five and one,” to “thirty-five and one.”\textsuperscript{432}

Patrol officers began stopping people for the most innocent of activities not because of racial animus, but because they were being ordered to do so. For example, one resident who lived in public housing was quoted as saying that the police will “give you a ticket for trespassing ‘cause you’re sitting on the bench that’s in front of your building. I can’t sit on the bench in front of my building? Why’s the bench there?”\textsuperscript{433} Another equated it to living “in an ‘outside prison.”\textsuperscript{434}

These allegations sound outlandish, but they were confirmed by patrol officers who were asked in court to define the term “furtive movements.”\textsuperscript{435} One officer explained that “usually” a furtive movement is someone “hanging out in front of [a] building, sitting on the benches or something like that.”\textsuperscript{436} Another explained that the term “is a very broad concept” that could include a person “changing direction,” “walking in a certain way,” or “[a]cting a little suspicious.”\textsuperscript{437}

When millions of people are stopped under these circumstances, false arrests will inevitably occur. Consider just one such example. In May 2011, Charles Bradley, a black 51-year-old man, went to visit his fiancée in the Bronx.\textsuperscript{438} A resident recognized him and let him into the building.\textsuperscript{439} Bradley knocked on his fiancée’s door, but she is partly deaf and did not hear him.\textsuperscript{440} Since he did not have a key, he went downstairs and exited the building.\textsuperscript{441} Officer Miguel Santiago saw him leaving, questioned him, and then arrested him.

\textsuperscript{430} MAPLE, supra note 80, at 155.
\textsuperscript{431} Id. at 166.
\textsuperscript{432} Sauchelli et al., supra note 421.
\textsuperscript{434} Id. at 19.
\textsuperscript{436} Id.
\textsuperscript{437} Id.
\textsuperscript{439} Id.
\textsuperscript{440} Id.
\textsuperscript{441} Id.
for trespass.\textsuperscript{442} The officer’s version of the arrest would later be discredited because the paperwork he filled out contradicted his trial testimony on four key points.\textsuperscript{443} Moreover, he also admitted to having lied on two previous UF-250s to get revenge against an individual with whom his friend was having a dispute.\textsuperscript{444}

Bradley would spend several hours in police custody; he was stripped, searched, fingerprinted, and held in a cell.\textsuperscript{445} He was eventually given a Desk Appearance Ticket with a court date and released.\textsuperscript{446} As a security guard, Bradley’s arrest was automatically shared with his licensing authority.\textsuperscript{447} In order to keep his license and his job, Bradley was required to provide documentation of the status of his case within one month of his arrest.\textsuperscript{448} However, after being issued a Desk Appearance Ticket, as had happened to Bradley, the average person has to wait four months before the initial court date.\textsuperscript{449}

Bradley was exceptionally fortunate because a non-profit legal organization, the Bronx Defenders, took his case and assigned two lawyers to assist him.\textsuperscript{450} They advised him to get his fiancée to write a notarized letter explaining he had been her invited guest, and they advocated on his behalf with his employer, his licensing agency in Albany, and the District Attorney’s Office.\textsuperscript{451} His attorneys eventually persuaded the prosecutor to drop the charges, and Bradley kept his license and his job.\textsuperscript{452} However, as Bradley later related with a “quavering” voice and eyes full of tears, “I could have lost everything in my life because of this arrest.”\textsuperscript{453}

One would hope that Bradley’s situation was unusual and that the vast majority of the people arrested under the NYPD’s stop-and-frisk program were guilty. However, the penalties imposed for those guilty of minor infractions are

\textsuperscript{442} Id. at 497–98.
\textsuperscript{443} Id. at 498–99.
\textsuperscript{444} Id. at 499.
\textsuperscript{445} Id. at 498.
\textsuperscript{446} Id.
\textsuperscript{450} A Plaintiff Reflects, supra note 447.
\textsuperscript{451} Id.
\textsuperscript{452} Id.
\textsuperscript{453} Id.
truly draconian, especially for those who are unable to make bail.\textsuperscript{454} According to a report which analyzed arrest data from 2008, roughly 75\% of non-felony defendants were released on their own recognizance.\textsuperscript{455} However, of the 19,137 defendants who were required to post bail, which was typically set at $1,000 or less, 87\% could not do so and were sent to jail.\textsuperscript{456} There were over 16,000 such defendants in 2008, and they spent on average over two weeks in the notoriously dangerous Rikers Island awaiting trial.\textsuperscript{457}

As punitive as misdemeanor criminal penalties sometimes are, the civil penalties, for many, are even worse. Criminal records are available in every state.\textsuperscript{458} They can be accessed on commercial databases, and most employers run background checks.\textsuperscript{459} Landlords, educational institutions, loan officers, and many others routinely check an applicant's criminal record.\textsuperscript{460} A poor person of color is born with two strikes against her. Add a criminal conviction, and she is quite possibly out: out of a job, out of her apartment, or, for immigrants, possibly kicked out of the country.

The American criminal justice system is incredibly decentralized. There are over 12,000 independently operating police departments employing almost a half million full-time sworn personnel.\textsuperscript{461} Therefore, it is well beyond the scope of this article to document the number of agencies which have instituted a stop-and-frisk approach to policing. However, scholars agree the NYPD "mass


\textsuperscript{455} Id.

\textsuperscript{456} Id.

\textsuperscript{457} Id.

\textsuperscript{458} See generally James B. Jacobs, \textit{Mass Incarceration and the Proliferation of Criminal Records}, 3 \textit{U. ST. THOMAS L.J.} 387, 395 (2006) ("There are laws in every state mandating or authorizing the release of individual criminal history records to certain non-criminal justice government agencies – agencies charged with granting licenses to individuals and firms in diverse businesses, ranging from liquor stores and bars to banks and private security firms as well as to agencies that provide programs and services to vulnerable populations including children, the elderly, and the handicapped."); see also DOJ, \textit{The Attorney General's Report on Criminal History Background Checks} 2 (2006) (noting that most private employers conduct background searches through private enterprises or through commercial databases that aggregate criminal records).

\textsuperscript{459} DOJ, \textit{supra} note 458; Jacobs, \textit{supra} note 458; see also DOJ, \textit{The Attorney General's Report on Criminal History Background Checks} 2 (2006) (noting that most private employers conduct background searches through private enterprises or through commercial databases that aggregate criminal records).


misdemeanor" tactics are now used nationwide and statistics prove the point: 49% of black men and 44% of Latino men will be arrested by the age of 23. In an age when a well-paying job has become perhaps the most sought-after goal in society, a system has arisen in which an increasing percentage of already disadvantaged citizens are eliminated from the competition. Justice Sotomayor wrote such an emotional dissent in Strieff because she understood that the majority was sanctioning the NYPD’s stop-and-frisk approach to policing, and she feared the toll such measures would take on the targeted population.

Perhaps the most disturbing part of the Strieff decision was how unaware the Justices are of the basic operation of the American criminal justice system. During the oral argument in Strieff, for example, Justice Elena Kagan admitted she was “surprised beyond measure” by the number of outstanding warrants in America. Justice Samuel Alito also appeared to have no conception of the central role warrant checks play in today’s mass misdemeanor justice system. As the reader will recall, there was an arrest warrant for Strieff because he had failed to pay a “minor traffic violation.” During oral argument, counsel for the defendant warned that failure to invoke the exclusionary rule would “create an incentive to have even more warrants for even more infractions.” Justice Alito scoffed at this idea and rhetorically asked, “Do you think the judges in the traffic — in the traffic courts are going to start issuing a lot of warrants because they want to provide the basis for — for randomly stopping people?” But, as Justice Sotomayor pointed out, Alito had a shockingly antiquated conception of this process; the issuance of these warrants is now largely automatic and computerized. This was another of Bratton’s innovations, he ordered that all criminal summonses be backed by a warrant.

See generally Kohler-Hausmann, supra note 340, at 613.


See generally id.


Id. at 52.

Id.

Id.

Id. at 52–53.

NYPD, supra note 360.
C. Did Stop-and-Frisk Reduce Crime?

In 2013, stop-and-frisk came to a halt. It had already become a central issue in the mayoral campaign when Judge Shira Scheindlin declared the program unconstitutional in Floyd v. City of New York. Three months later, Bill DeBlasio, who had promised to curb the practice, was elected Mayor. Although the program has been halted in New York City, the same approach in various manifestations has already spread to countless other jurisdictions. Therefore, rather than analyzing the Floyd decision, we will ask a question which Judge Shira Scheindlin refused to consider in Floyd. Did stop-and-frisk help reduce crime in New York City?

It must be acknowledged that the NYPD’s stop-and-frisk program, unlike the first three stages of racially targeted dragnet policing, was based on reliable statistics. Young men of color were targeted because over 90% of the suspects in shootings in New York City involve young black and Latino men, as do over 90% of the victims. It was these statistics that led Mayor Bloomberg to claim the police were stopping “whites too much and minorities too little.”

Moreover, Maple was entirely correct when he argued that it is very difficult to catch a criminal in the act of committing a crime. This is particularly true with shootings. Murder and violent crime usually result from impulsive and “emotionally charged and spontaneous events” as opposed to premeditation and deliberate planning. Therefore, the police chose pretext

473 Id. at 562.
475 Kohler-Hausmann, supra note 340.
476 See Transcript of Hearing at 58, Floyd, 959 F. Supp. 2d 540 (08 Civ. 1034 (SAS)) (“I will not take the crime statistics in this trial. Whether it reduces crime or not is not my concern.”).
477 See Raymond W. Kelly, NYPD, Crime and Enforcement Activity in New York City 11 (2012) (reporting racial demographics for over 97% of shootings where race was known). The shooting victims were 74% black, 22% Hispanic, 2.8% white, and 0.5% Asian, while 96.4% of known shooting suspects were described as black or Hispanic. Bratton has also noted how “[o]ur statistics told us clearly that a large percentage of crime in New York was being perpetrated by blacks and Hispanics.” Bratton, supra note 349, at xxviii.
478 Gonen, supra note 426.
479 See Maple, supra note 80, at 155.
480 Ruth D. Peterson & William C. Bailey, Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research, in America’s Experiment with Capital Punishment, 251–52 (James R. Archer et al. eds., 1998); see also Ralph D. Ellis & Carol S. Ellis, Theories of Criminal Justice: A Critical Reappraisal 28 (1990) (pointing out that “70% of all murders are what are called ‘sudden murders,’” which “usually occur as the result of some very powerful emotion, such as anger, frustration or depression”); Lorraine H. Freed et al.,
infractions to justify stopping young men of color and searching them for weapons. This explains why marijuana arrests increased by 6,500% from 1991 to 2001 while prostitution arrests declined by 15%. The NYPD was not enforcing all Quality of Life violations; they were concentrating on infractions which provided a legal justification for them to target their preferred cohort. However, as minor infractions decreased, the police were eventually reduced to stopping people for making “furtive movements” while sitting on benches outside their apartment buildings.

If we look at stop-and-frisk from a moral and not a legal perspective, it is certainly possible to argue that the imposition of random stops is a small price to pay for fewer murders and an overall reduction in crime. And, it is theoretically possible to reform the severe criminal and civil penalties imposed upon those who have committed misdemeanor infractions. Criminal records can be sealed, and cash bail can be eliminated. Therefore, the question of whether stop-and-frisk reduced crime in New York City remains a vital question.

To answer this question, we must first ask whether the NYPD was responsible for reducing crime in New York City, or if some other factor was the cause. It is hardly surprising that an unprecedented crime decline occurring in the media capital of the world has led to competing theories explaining the phenomenon. Our review of the vast literature is necessarily brief.

The most sophisticated analysis of whether socio-economic factors were responsible for the decline has been offered by Professor Franklin Zimring. Zimring analyzed socio-economic data in New York City on a borough to borough basis, and he has shown how conditions in the “outer boroughs”—Brooklyn, Queens, and the Bronx—remained relatively stable during the city’s near 20 year crime decline. He concluded the evidence that “some combination of policing variables account[ed] for much of the New York difference is overwhelming.”

A second alternative explanation to police reforms can also be eliminated. Reduced drug consumption patterns were not responsible because cocaine and heroin abuse also remained remarkably constant over time. Since precise data on narcotics consumption are not available, criminologists often use overdose deaths to estimate the level of drug abuse. The number of cocaine and


481 ZIMRING, supra note 356, at 121, 127.
482 See id. at 119.
484 ZIMRING, supra note 356, at xi.
485 Id. at 78–79.
486 Id. at 101.
487 Id. at 90–91.
heroin overdose deaths in the mid-2000s had decreased by only 10% since 1990, and Zimring therefore concludes only a marginal decrease in consumption took place.\textsuperscript{488}

If socio-economic factors and drug consumption cannot account for the reduction in crime, law enforcement measures presumably provide the explanation. The incarceration rate is usually the starting point of discussion when considering whether law enforcement measures are effectively discouraging crime.\textsuperscript{489} In fact, for a long time, “incapacitation was not merely the dominant mode of crime control endorsed by a broad segment of the policy community but the only mechanism . . . ”\textsuperscript{490} However, the rates of crime and incarceration in New York City decreased simultaneously.\textsuperscript{491} Beginning in 1997, the total prison and jail population of New Yorkers began a long decline.\textsuperscript{492} “By 2002, a smaller number of persons were confined than in the 1990 base year, and by 2008, there were 10,000 fewer criminals being incapacitated from New York City than in 1990.”\textsuperscript{493} Thus, while an increased incarceration rate may or may not have contributed to improvements in the national crime rate, such an explanation is inapplicable in New York City.

It is apparent that policing strategies, possibly including stop-and-frisk, accounted for a large percentage of the New York City crime decline. Zimring has concluded that since these reforms were instituted simultaneously, it is impossible to “apportion crime control credit” amongst them.\textsuperscript{494} However, not all reforms were in fact instituted concurrently.\textsuperscript{495}

As noted, NYPD officers have long been required to fill out a form, a UF-250, when they make a stop.\textsuperscript{496} Officers record the time and the location where the incident occurred, as well as the names and physical descriptions of the persons stopped.\textsuperscript{497} The form lists potential legal justifications, including “Fits Description,” [“Actions Indicative of ‘Casing’ Victim or Location,”] and

\textsuperscript{488} Id. The continued use of drugs is also evident on the national level. Drug-abuse related emergency department episodes have increased every year from 1994 to 2002. See \textit{Substance Abuse & Mental Health Admin. Dep’t. Of Health & Human Services., Emergency Department Trends from the Drug Abuse Warning Network, Final Estimates 1995–2002}, at 53 fig.3 (July 2003), https://ia802703.us.archive.org/25/items/emergencydepartm00offi/emergencydepartm00offi.pdf.

\textsuperscript{489} Zimring, \textit{supra} note 356, at 168.

\textsuperscript{490} Id. at 165.

\textsuperscript{491} Id. at 166.

\textsuperscript{492} Id.

\textsuperscript{493} Id. at 74.

\textsuperscript{494} See id. at 101.

\textsuperscript{495} Id. at 100.

\textsuperscript{496} See AG Report, \textit{supra} note 417, at 65.

\textsuperscript{497} Id.
"Furtive Movements." Compliance remained uneven until 2003, when Judge Scheindlin ordered the NYPD to comply with its internal regulations by completing the forms. Nonetheless, pre-2003 UF-250 data still offers a rough indication of when the aggressive use of stop-and-frisk as a proactive policy began.

The data reveals that the number of completed UF-250s averaged 43,758 during the years from 1990 to 1993. There was a slight uptick to 47,665 in Bratton's first year, 1994, but the number fell the following year to 44,654. It was not until after Bratton left office that stop-and-frisk began its exponential rise. The number of completed UF-250s increased to 114,825 in 1998, by 2003 it had risen to 160,851, and then peaked at 680,000 in 2011. Even if the figures prior to 2003 are somewhat unreliable, they are still indicative of how little emphasis Bratton placed on the policy. The figures are miniscule compared with what followed, and, since Bratton's overarching approach to law enforcement is based on the accumulation of accurate crime data, the fact that UF-250s were not always completed during his tenure supports the idea that he did not view stop-and-frisk as an essential strategy. Moreover, murder was reduced by almost 40% during his two years in office. Thus, it appears that the


500 U.S. COMM’N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY 92 n.63 (2000).

501 Id.

502 Id.

503 Id.

504 Id.


aforementioned policing strategies were quite effective without the pervasive use of stop-and-frisk.

Not only was the aggressive use of stop-and-frisk instituted after the murder rate had dramatically declined, the program was curtailed after Mayor DeBlasio was elected and he asked Bill Bratton to return to his old job.508 Contrary to the repeated warnings that had been issued by Mayor Bloomberg and Commissioner Kelly, the murder rate continued declining after stop-and-frisk was largely eliminated.509 There were 515 murders in New York City in 2011510 and over 686,000 recorded stops.511 By 2015, there were only 22,563 recorded stops,512 but only 333 murders occurred in the previous year,513 a 35% decline. Thus, based on the available evidence, it appears that the aggressive use of stop-and-frisk was an ineffective crime fighting tool. Of course, one might ask, why would anyone think that stopping people while they are sitting on benches or walking through unlocked doors was a good way to fight crime?

V. CONCLUSION

A reader unfamiliar with America’s long history of racially targeted dragnet policing might casually dismiss Justice Sotomayor’s warning that, if the Court sanctioned the kind of stop which had occurred in Strieff, police officers across America might soon start making suspicionless stops of “joggers, dog walkers, and lemonade vendors.”514 However, this was no hyperbolic claim, such stops had already been occurring in New York City for years.515 Issuing a summons to unlicensed vendors was one of the types of violations that the police began specifically targeting in New York City.516 Not only were the police targeting unlicensed vendors and bicyclists who rode on the sidewalk (in Bedford-Stuyvesant at least), they were also targeting joggers. In 2014, Reuters randomly sampled 25 black New York City police officers.517 "All but one said

509 See CRIME REPORTING STAT., supra note 507; see also BRATTON, supra note 349, at 224.
510 See CRIME REPORTING STAT., supra note 507; see also BRATTON, supra note 349, at 224.
511 Floyd, 959 F. Supp. 2d at 558.
513 CRIME REPORTING STAT., supra note 507.
515 Kohler-Hausmann, supra note 340, at 630.
516 See id.
that, when off duty and out of uniform, they had been victims of racial profiling."\(^{518}\) One particular incident experienced by an off-duty officer further illustrates how Justice Sotomayor's worst fears have already been confirmed. A retired sergeant said he had been taking a jog through Prospect Park and had been stopped. "I had my ID on me so it didn't escalate.... [b]ut what’s suspicious about a jogger? In jogging clothes?"\(^{519}\)

*Strieff* can be seen as representing the final nail in the coffin. Racially targeted dragnet policing has been extended to the fourth and final mode of transportation, simply walking down the street, and the Court has once again declared such measures to be constitutional. However, the protections of the Fourth Amendment have already been so eviscerated that we should not pretend that a different ruling would have turned the tide. If an officer "requests" a pedestrian to stop and produce their identification, most people will "agree." Justice Thomas even reminded the police of this fact in *Strieff:* "Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so."\(^{520}\)

Secondly, when an officer says the suspect has made "furtive movements," one of the most common explanations given for the stops in New York City, the stop may be justifiable under *Terry.*\(^{521}\) *Strieff* was unusual because the officer failed to invoke one of these two justifications.\(^{522}\) Perhaps the importance of *Strieff* was largely symbolic, but the symbolism of the decision is most disheartening. For the fourth time since 1980, the Court has condoned a racially targeted dragnet policing program.

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\(^{518}\) *Id.*

\(^{519}\) *Id.*


\(^{522}\) See *Strieff*, 136 S. Ct. at 2070.