



1999

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Recommended Citation

L. Darnell Weeden, *It Is Not Right Under the Constitution to Stop and Frisk Minority People because They Don't Look Right*, 21 U. ARK. LITTLE ROCK L. REV. 829 (1999).

Available at: <https://lawrepository.ualr.edu/lawreview/vol21/iss4/8>

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IT IS NOT RIGHT UNDER THE CONSTITUTION TO STOP AND FRISK MINORITY PEOPLE BECAUSE THEY DON'T LOOK RIGHT

*L. Darnell Weeden**

I. INTRODUCTION

The issue to be addressed is whether a routine detention can be a reasonable seizure of a person under the Fourth Amendment where race may be an unarticulated factor in the police officer's decision to detain, frisk, or search.

As a general matter, a decision to stop a car by a police officer is reasonable when she has probable cause to believe a traffic violation has occurred.¹ The goal of the Fourth Amendment is to guarantee people the right to be secure against unreasonable searches and seizures by the government.² A temporary detention during a stop of one's vehicle by the police, for only a brief period, is a seizure of the person under the Fourth Amendment.³ The Supreme Court has stated that the constitutional reasonableness of traffic stops and other detentions of individuals does not depend on the actual motivation of the police officers involved in the stop or detention.⁴ Because the Court has failed to acknowledge that motivation should be a factor in deciding whether a traffic stop is reasonable under the circumstances, some racial minorities allege that traffic stops and other detentions are mere pretexts for selective enforcement of the law based on considerations such as race. The Court rejected the argument that the constitutional reasonableness of a traffic stop depends on the actual motive of the officers involved while conceding "the Constitution prohibits the selective enforcement of the law based on considerations such as race."⁵ The Court stated that if an otherwise reasonable search or seizure of an individual was racially motivated, the constitutional basis for opposing an intentional discriminatory use of the probable cause process is the Equal Protection Clause of the Fourteenth Amendment and not the Fourth Amendment.⁶ The Court unfortunately concluded that subjective intentions of police officers play no role in ordinary probable cause Fourth Amendment analysis.⁷

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1. See *Delaware v. Prouse*, 440 U.S. 648, 659 (1979).

2. See *id.* at 653-54.

3. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

4. See *Whren v. United States*, 517 U.S. 806, 812 (1996).

5. *Id.*

6. See *id.*

7. See *id.*

There are good reasons for supporting the idea that police conduct involving a reasonable suspicion challenge based on race should be subjected to an Equal Protection challenge. A Fourth Amendment reasonable suspicion analysis should be subjected to Equal Protection standards in order to discourage selective enforcement of the law where race appears to be the predominant factor explaining the police conduct.⁸

This article will include: (1) an analysis of the historical use of reasonable suspicion rather than probable cause as a requirement for detaining persons for temporary seizures, searches or frisks; (2) A discussion of the impact the watering down of the reasonable suspicion standard has had on African Americans and others;⁹ (3) A brief analysis of race based pretext traffic stops and probable cause as presented in the *Whren v. United States* opinion;¹⁰ (4) A rather pointed recommendation on when to use the Equal Protection Clause to determine whether a police officer's Fourth Amendment activity is a violation of a person's right to equal protection of the law.

II. *TERRY V. OHIO* AND CRIMINAL INVESTIGATIONS BASED ON SUSPICION RATHER THAN PROBABLE CAUSE

In *Terry v. Ohio* the United States Supreme Court gave express approval to the rule that a police officer investigating possible criminal conduct may approach, seize, and frisk a person without probable cause based on reasonably suspicious inferences.¹¹ Before the landmark *Terry v. Ohio* decision any detention of the person amounting to a seizure of a person was not valid unless justified by probable cause.¹² The Fourth Amendment gives a person the right not to be searched or seized in an unreasonable manner whether he is at home or on the streets of our cities.¹³ The Supreme Court has properly noted that the right to be protected against unreasonable searches and seizures was carefully guarded by the common law and not a single right was held more sacred than the right to be secure in one's person and property.¹⁴ *Terry v.*

8. See *Miller v. Johnson*, 515 U.S. 900 (1995). *Miller* is a race-conscious congressional voting district case where the Court held that the government cannot make race a predominant factor unless it satisfies strict scrutiny. See *id.*

9. See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994). Being stopped for nothing or almost nothing has become a common experience for many minorities after the Supreme Court adopted the reasonable suspicion test in *Terry v. Ohio*. See *id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

10. See *Whren*, 517 U.S. at 806.

11. 392 U.S. 1, 22-23 (1968).

12. See *Florida v. Royer*, 460 U.S. 491, 498 (1983).

13. See *Terry*, 392 U.S. at 8-9.

14. See *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual

Ohio was a revolutionary decision because it was always assumed that any search or seizure without probable cause was unreasonable on its face and therefore violated both the common law and the Fourth Amendment.¹⁵ The definition for probable cause was historically applied only to those cases where a police officer had reasonable grounds to believe that a crime had occurred, was about to occur, or was occurring.¹⁶ Common sense advises us that police officers do not have to wait until they see a person committing a crime before seizing her.¹⁷ Since police officers may seize a person before a crime is committed, basic respect for our constitutional democracy and personal freedom of movement demands that such a seizure be made only upon probable cause.¹⁸

More than thirty years ago the demise of probable cause as a basis for a quick stop or search or frisk appeared to be reasonable enough and an acceptable accommodation of police safety concerns under the limited rationale and facts articulated by the Supreme Court in *Terry v. Ohio*.¹⁹ One could take a very narrow reading of *Terry v. Ohio* and state that a *Terry* stop or seizure based on something less than probable cause can only be applied to discover weapons which might be used to harm an officer or others.²⁰ If the *Terry* stop and frisk theory based on suspicion rather than probable cause was limited to a search for weapons to protect the safety of officers in their interaction with people, it may not have generated such a strong protest and dissent from Justice Douglas.²¹ A close examination of the facts, from the perspective of an African American male, may very well suggest that Detective McFadden's conduct was not reasonable under the circumstances. I doubt that three white males would have been rather routinely characterized as planning a robbery for engaging in that great inner city past time of window-shopping by those who are either unemployed or under-employed.

to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority." *Id.*

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

The infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him. Only that line draws a meaningful distinction between an officer's mere inking and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime.

Id.

16. See *The Thompson*, 3 Wall. 155, 18 L. Ed. 55 (1865).

17. See *Terry*, 392 U.S. at 35 n.2 (Douglas, J., dissenting). "[T]here is no war between the Constitution and common sense." See *id.* (citing *Mapp v. Ohio*, 367 U.S. 643, 657 (1961)).

18. See *id.* (Douglas, J., dissenting).

19. See *id.* at 25-26.

20. See *id.*

21. See *id.* at 35. (Douglas, J., dissenting).

In *Terry*, the Court said it would examine the conduct of Detective McFadden to determine whether his search and seizure of Terry was reasonable at its inception and as conducted.²²

A. Facts

Terry was convicted of carrying a concealed weapon.²³ After the denial of a pretrial motion to suppress, the prosecution introduced in evidence two pistols and some bullets taken from Terry and codefendant Richard Chilton by Cleveland Police Detective McFadden.²⁴ At the motion to suppress hearing, McFadden stated that while he was patrolling in plain clothes in downtown Cleveland his attention was attracted to two males, Chilton and Terry.²⁵ Detective McFadden had never seen the two men before, and he was unable to articulate a reasonable basis as to what first drew his attention to these two African American males.²⁶ Detective McFadden testified that he had served as policeman for thirty-nine years and he worked for thirty-five years as a detective, with thirty of those years working this area of downtown looking for shoplifters and pickpockets.²⁷ In spite of Detective McFadden's many years of experience observing and watching people, he could only say that his eye was drawn to these two men because "when I looked over they didn't look right to me at the time."²⁸ It is interesting to note that in the real world of a suppression hearing, Detective McFadden did not articulate either an objective or subjective reasonable basis for directing his experienced suspicious eye at two African American males. The basis of Detective McFadden's "some African American men don't look right to me" profile was never seriously analyzed by the court as a justifiable basis for attaching criminal motive to their innocent act of walking while black in downtown Cleveland. What was the profile of people who do not look right to the experienced Detective McFadden? Do you have to be black not to look right to Detective McFadden? Is being black and poor or white and poor or brown and poor a necessary prerequisite for meeting the Detective McFadden "they don't look right" profile? Maybe Detective McFadden thought only middle class people of color look right to him. Who knows the basis of Detective McFadden's "they don't look right" observation. After concluding that the

22. *See Terry*, 392 U.S. at 27-28.

23. *See id.* at 4.

24. *See id.* at 5.

25. *See id.*

26. *See id.*

27. *See id.*

28. *Terry*, 392 U.S. at 5.

black men did not look right, Detective McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men.²⁹ After observing Terry and Chilton and a third man, Katz, for ten to twelve minutes Detective McFadden became even more suspicious that the men who did not look right were now planning a daylight robbery.³⁰ Detective McFadden testified that after watching the men survey a store window, he suspected the two men who did not look right of 'casing a job, a stick-up,' and that he considered it his job as a police officer to investigate further.³¹ Detective McFadden also stated that he feared that the men who did not look right to him might have a gun.³² Detective McFadden followed Chilton and Terry and saw them talk to Katz, the third man in the alleged robbery scheme in front of Zucker's store.³³ Detective McFadden approached the three black men, identified himself as a policeman, and requested their names.³⁴ When the men gave a mumbled response to his questions, Detective McFadden grabbed Terry and patted down his outside clothing.³⁵ As a result of the pat down Detective McFadden removed a pistol from Terry's overcoat pocket.³⁶ Detective McFadden also patted down the outer clothing of Chilton and Katz. Detective McFadden found another gun in the outer pockets of Chilton's overcoat, but no guns were found on Katz.³⁷ All three men were taken to the police station, where the two men who originally did not look right to Detective McFadden, Terry and Chilton, were formally charged with carrying concealed weapons.³⁸ At the motion to suppress hearing, the prosecution argued that the guns had been taken as the result of a search incident to a lawful arrest.³⁹ The trial court rejected the prosecution's argument, concluding that it would take an unreasonable stretch of the imagination to find that Detective McFadden had probable cause to arrest these men before he patted them down for guns.⁴⁰ The trial court denied the defendants' motion to suppress on the theory that Detective McFadden's experience gave him reasonable cause to believe that the defendants were acting suspiciously and should be subjected to interrogation.⁴¹ The trial court stated that for his own

29. *See id.* at 5-6.

30. *See id.* at 6.

31. *See id.*

32. *See id.*

33. *See id.*

34. *See Terry*, 392 U.S. at 6-7.

35. *See id.* at 7.

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See Terry*, 392 U.S. at 7-8.

41. *See id.* at 8.

protection, Detective McFadden had the right to pat down the outer clothes of these men he reasonably believed to be armed.⁴² The United States Supreme Court held that the admission of the guns into evidence did not violate Terry's rights under the Fourth Amendment and affirmed his conviction.⁴³

B. Analysis

Terry was entitled to the protection of the Fourth Amendment as he walked down the city streets in Cleveland.⁴⁴ However, Terry's right against being stopped and frisked on the streets did not offer reasonable constitutional protection after Detective McFadden's routine police activity concluded that he did not look right.⁴⁵ The legitimate power of the police to engage in stop and frisk tactics should be permitted where they are truly designed to protect the safety of police officers where the officer lacks probable cause but has a reasonable suspicion of specific criminal activity.⁴⁶ However, where the officer lacks probable cause to stop and or frisk a person, but reasonable suspicion exists for the police to frisk the person, any evidence that is produced which is not narrowly tailored to support the officer's reasons for the stop and frisk must be excluded. For example, in the *Terry* case the evidence of the two guns possessed by Terry and Chilton must not be admitted unless the prosecution can prove that the guns demonstrated probable cause evidence of either an attempted robbery or a conspiracy to commit robbery.⁴⁷ One must not forget Detective McFadden's alleged real motive in grabbing Terry and frisking him and the other men was to dispel his theory of a robbery.⁴⁸ There was not sufficient evidence to present probable cause for robbery by the mere possession of a gun. Evidence of the gun must be excluded because the nexus between the gun and the robbery is too remote to

42. *See id.*

43. *See id.*

44. *See id.* at 9 (citing *Beck v. Ohio*, 379 U.S. 89 (1964)).

45. *See id.* at 10.

46. *See Terry*, 392 U.S. at 24. The Court stated:

[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take the necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id.

47. *See id.* at 4. Terry was convicted of carrying a concealed weapon and sentenced to one to three years in the penitentiary. *See id.*

48. *See id.* at 7.

justify the admissibility of the gun in the absence of the probable cause standard being met. The issue presented in *Terry* is not simply a focus on police conduct, but the admissibility of the discovered gun as a result of the stop and frisk encounter.⁴⁹ The rule excluding evidence seized in violation of the Fourth Amendment has been recognized as the main method to discourage unlawful conduct by the police.⁵⁰

I am now proposing an exclusionary rule based on evidence seized as a result of a reasonable suspicion, stop, or frisk that is not subsequently supported by probable cause of criminal activity at the conclusion of the on the site police activity. The general rule of law only excludes evidence when the police officer violates the Fourth Amendment rights of the "suspect" regarding searches and seizures. My proposal will allow for the exclusion of evidence where the officer has not violated the Constitution, but has encountered a person on grounds less than probable cause. For example, if the officer has reasonable articulated suspicion to believe someone is smoking crack cocaine, the officer may make an allowable *Terry* inquiry. If after the *Terry* inquiry the officer ultimately discovers that this person possesses counterfeit United States currency, an offense unrelated to the officer's initial reasonable articulated suspicion, the counterfeit money could not be admitted as evidence in a subsequent prosecution of the person for possessing counterfeit currency. The officer may confiscate the counterfeit currency, but it must be excluded in a subsequent prosecution because it was discovered without probable cause or reasonable suspicion to believe that he possessed the counterfeit currency. However, if the officer does find crack cocaine based on his *Terry* inquiry, that evidence may be admitted because of the close nexus between the original suspicion and the evidence actually seized during the frisk.

The rationale for excluding evidence based on a reasonable articulated suspicion where there is no reasonable connection between the motive for the stop and the evidence actually seized is to deter police from expanding a reasonable stop and frisk into a general search for crime by abusing the *Terry* inquiry. Experience has taught us that a rule excluding evidence is an effective means to impacting police conduct.⁵¹ The exclusionary rules also serve the vital function of preserving the integrity and prestige of the judiciary.⁵² The *Terry* inquiry approved by the Court is not unconstitutional,

49. See *id.* at 12.

50. See *Terry*, 392 U.S. at 12. See also *Weeks v. United States*, 232 U.S. 383 (1914), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961).

51. See *Terry*, 392 U.S. at 12. See also *Linkletter v. Walker*, 381 U.S. 618, 629-635 (1965).

52. See *Terry*, 392 U.S. at 12. See also *Elkins v. United States*, 364 U.S. 206, 222 (1960).

but when there is not a reasonably close connection between the articulated suspicion and the item seized the *Terry* inquiry expands into a "a lawless invasion of the of the constitutional rights of citizens."⁵³ A ruling by the court on the admissibility of evidence sends a very powerful message about constitutional approval of the process.⁵⁴ A ruling admitting evidence in a criminal proceeding has the effect of approving the conduct which produced the evidence, while application of the exclusionary rule denies constitutional approval.⁵⁵ It is conceded that the exclusionary rule may not be able to stop police harassment of racial minorities.⁵⁶ However, it is one thing to be harassed and it is another thing to be harassed and have evidence seized during the harassment to be admitted in trial when there is no reasonable explanation for the search but harassment after an initial *Terry* inquiry. Courts have a responsibility to protect against police conduct that interferes with a person without either reasonable suspicion for a stop, or a safety motive for a brief frisk under *Terry*.⁵⁷ A justifiable *Terry* safety frisk must not be turned to an expansive search for evidence of a crime without probable cause. When the *Terry* safety frisk is expanded to a search for evidence of a crime without probable cause, its fruits must be excluded from evidence in criminal trials.⁵⁸

III. THE IMPACT OF WATERING DOWN THE *TERRY* REASONABLE SUSPICION STANDARD ON THE AFRICAN AMERICAN COMMUNITY AND OTHERS

In his dissent, Justice Douglas was very hostile to the *Terry* rationale.⁵⁹ Justice Douglas said the Supreme Court in *Terry* gave the police greater power than a judicial magistrate under the Fourth Amendment, and has taken "a long

53. See *Terry*, 392 U.S. at 13. "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of . . . such invasions." *Id.*

54. See *id.*

55. See *id.*

56. See *id.* at 14-15. "The harassment by certain elements of the police community of minority groups will not be stopped by the exclusion of any evidence from any criminal trial." *Id.* "The President's Commission on Law Enforcement and Administration of Justice found that 'in many communities, field interrogations are a major source of friction between the Police and minority groups.'" *Id.* at n.11 (citing PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967)).

57. See *id.* at 15.

58. See *id.*

59. See *Terry*, 392 U.S. at 38. (Douglas, J., dissenting) "To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if is taken, it should be the deliberate choice of through a constitutional amendment." *Id.* (Douglas, J., dissenting).

step down the totalitarian path.”⁶⁰ Today the police exercise so much power to stop and frisk in poor inner city neighborhoods the original *Terry* rules have all but disappeared.⁶¹

Under current Fourth Amendment law, a police officer may detain a person living in a high crime neighborhood if the person exhibits the evasive behavior of avoiding the police.⁶² Police today exercise their power to stop people and perform searches without probable cause and very few facts to base a *Terry* suspicion on, primarily in poor inner city neighborhoods where a disproportionate number of African Americans and Hispanic Americans live.⁶³ The terms “inner city neighborhood” and “high crime area” are synonymous for a number of Americans including some of those who work in the criminal justice system, according to Professor Harris.⁶⁴

The new look to *Terry* is mean spirited because its suspicious rationale allows police officers that don't play by the rules to target minorities because of where they live, work, and play. Here is how Professor Harris properly describes the catch 22 burden the lean and mean illegitimate sons of *Terry* place on a disproportionate number of inner city minorities:

In many courts an individual's presence in a high crime location plus evasion of the police equals suspicion reasonable enough to allow a stop under *Terry*. African Americans, Hispanic Americans, and poor people are likely to find themselves in such high crime areas, simply because they live and work there. If these people choose to avoid the police—a choice they have the constitutional right to make—the police may stop them. If the location is not just a high crime area but a location known for drug activity, the police may go further: They may search the individual, performing a *Terry* pat down. In other words, every person who works or lives in a high crime area and who avoids the police is subject to automatic seizure, and to automatic search if the crime suspected involves drugs. Due to the disproportionately high number of African Americans and Hispanic

60. See *id.* (Douglas, J., dissenting).

61. See Harris, *supra* note 9, at 659.

62. See Harris, *supra* note 9, at 674. See, e.g., *State v. Taylor*, 363 So. 2d 699, 703 (La. 1978) (existence in a high crime area and change in speed of movement equals reasonable suspicion); see also *State v. Williams*, 416 So. 2d 91 (La. 1982) (departing from the vicinity upon seeing the police in a high crime area equals reasonable suspicion); *State v. Rice*, 795 P.2d 739, 741-42 (Wash. Ct. App. 1990) (reasonable suspicion was created when the defendant was found in a high crime area where shots were fired and the defendant appeared to be thinking about running away).

63. See Harris, *supra* note 9, at 677.

64. See Harris, *supra* note 9, at 677. “African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas.” Harris, *supra* note 9, at 677-78.

Americans living in those areas, they are subject to this treatment much more often than are whites.⁶⁵

You may recall that Detective McFadden stated that the suspects in *Terry* caught his attention initially because they did not look right.⁶⁶ The African American experience demonstrates a long history of police officers seizing and frisking African Americans without the benefit of either probable cause or reasonable articulated suspicion before *Terry*.⁶⁷ Today, successful African Americans like Dean Williams at Ohio State University Law School share their experience of having encountered unreasonable stops and seizures many years before the *Terry* decision.⁶⁸ While reading the *Terry* decision as a law student in 1968, Dean Williams recalled the police abuse he witnessed his father experience from a black police detective in Muncie, Indiana, in 1956.⁶⁹ Dean Williams' understanding of the facts gave him a familiar black experience chill of knowing that his father had been stopped, abused, arrested, and jailed for seven days on a Muncie street without reasonable suspicion.⁷⁰ Professor Harris states that the Supreme Court's ruling in *Terry* gave legitimacy to a standing police practice of seizing and searching African Americans with very little evidence.⁷¹

Being stopped for little or nothing has been a common part of the African American experience ever since we entered this country under less than ideal circumstances. Throughout our history African Americans have always known that "race has an undue influence on who is stopped" and searched by the police.⁷² Being stopped and frisked, is not limited to being black and poor because race still has an undue influence on who is stopped whenever an African American does not look right to an officer of the law. It is not unusual for the police to state that a person's race influenced their decision to seize him.⁷³ Not a single case expressly approves race as the only basis for a

65. See Harris, *supra* note 9, at 680-681.

66. See *Terry*, 392 U.S. at 5.

67. See Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 How. L.J. 567 (1991).

68. See *id.* at 567.

69. See *id.* at 567, 570.

70. See *id.* at 570. "Justice Douglas' concern that the Court in *Terry* was watering down the Fourth Amendment and allowing the police "discretion" to seize and search "whenever they do not like the cut of [a person's] jib was the reality of the world of [Dean Williams'] youth." *Id.*

71. See Harris, *supra* note 9, at 659. n.6.

72. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 56, at 184.

73. See Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 225 (1983).

suspicion stop.⁷⁴ However, the remarkable occurrence of the suspect's and the lawbreaker's race appears to be the only factor supporting a suspicious stop.⁷⁵ In one case a federal appellate court upheld the stop on an African American male alone in a white Cadillac based on information that a bank several miles away had been robbed by three African American males in a brown Cadillac.⁷⁶ It is indeed not wise for race to be a basis of reasonable suspicion because in many instances if police officers are as honest as Detective McFadden in *Terry*, the real reason for a great deal of stopping and frisking of minorities is they don't look right to the suspicious police officer.⁷⁷

The courts have consistently considered the crime rate in a given neighborhood as a relevant factor in justifying a police officer's increased suspiciousness of a suspect.⁷⁸ Professor Johnson believes that the courts have been too generous in allowing police to describe a neighborhood as a high crime area for purposes of a suspicion stop.⁷⁹ The courts should exercise more caution because the basis for declaring a neighborhood high crime may be frivolous.⁸⁰ Some police officers describe all areas as "crime-prone."⁸¹ Portraying a neighborhood as a high crime area will have a hostile impact on an honest minority person living there.⁸² An honest minority person living in a neighborhood with a large number of criminals increases the chance that he will mistakenly identified as a criminal by the police.⁸³ When the police are allowed to factor in the character of the neighborhood as the basis for a reasonable suspicion stop they are likely to make more errors.⁸⁴ Professor Johnson thinks that giving too much weight to the police characterization of a neighborhood allows the reasonable suspicion standard to be accepted by a court without a proper probability analysis of the indication of criminal activity.⁸⁵ Information that a particular neighborhood has a lot of illegal drug activity does not ensure that a street exchange occurring in that neighborhood

74. See *id.* See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-887 (1975) (implying that race cannot be the only basis for reasonable suspicion).

75. See Johnson, *supra* note 73, at 226.

76. See Johnson, *supra* note 73, at 226 (citing *United States v. Collins*, 532 F.2d. 79, 81, 83 (8th Cir.), *cert. denied*, 429 U.S. 836 (1976)).

77. See *Terry*, 392 U.S. at 5.

78. See Johnson, *supra* note 73, at 222.

79. See Johnson, *supra* note 73, at 222 & n.42.

80. See Johnson, *supra* note 73, at 222 & n.42.

81. See Johnson, *supra* note 73, at 222 & n.42. (citing *Racine v. State*, 286 So. 2d 890, 894 (Ala. Crim. App. 1973) (approving the description of an upper class neighborhood as burglary-prone)).

82. See J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 218 (2d ed. 1975).

83. See *id.*

84. See *id.*

85. See Johnson, *supra* note 73, at 222 & n.42.

is more likely to be a drug deal than is an exchange in a neighborhood that has not been designated as high crime area.⁸⁶ In order to justify an increased probability of suspicion of a particular exchange being drug related, a higher proportion of street activity in the high drug area (not merely a higher number) must involve drug transactions.⁸⁷ With little or no probability of suspicion of crime, other than living in a high crime area and avoiding police, the criminal justice system treats African Americans and Hispanics as inherently suspect if they give the slightest indication of evading contact with police officers in their economically disadvantaged neighborhoods.

Terry started out with a goal of focusing upon the governmental interest which justifies official governmental intrusion into the constitutionally protected interests of private citizens.⁸⁸ There is no ready test for determining reasonableness other than by balancing the government's need to search and seize against the invasion caused by the search or seizure.⁸⁹ The *Terry* court assured us that such an intrusion based on suspicion without probable cause could not be taken without specific facts that reasonably warrant the intrusion.⁹⁰ However it is not rational and reasonable to infer suspicion of criminal activity based on where a person lives and her neighborhood instinctive desires to avoid all strangers including the police. The neighborhoods where minority and poor people live, which are habitually described by the police as either high crime, high drug, or both, are sometimes tough places to be and local residents generally avoid all strangers as a matter of survival—including police officers they do not know. Honest people who reside in low-income inner city neighborhoods tend not to avoid police officers they know and trust.

As a law student more than thirty years ago Dean Williams believed that the *Terry* opinion indicated that the Supreme Court had adopted a reasonable suspicion balance of interest test because it was seriously concerned about police practices which often rode over the individual rights of minorities.⁹¹ However, by 1991 as a law professor at the University of Iowa, Dean Williams would write as early as 1972 in the case of *Adams v. Williams*, the Supreme Court started back-tracking on the minimal stop and frisk requirements of *Terry*, but also indicated that factors like race and high crime area could be used to meet the reasonable suspicion standard.⁹² I agree with Dean

86. See Johnson, *supra* note 73, at 222 & n.42.

87. See Johnson, *supra* note 73, at 222 & n.42.

88. See *Terry*, 392 U.S. at 20-21.

89. See *id.* at 21 (citing *Camera v. Municipal Court*, 387 U.S. 523, 534-535, 536-537 (1967)).

90. See *id.*

91. See Williams, *supra* note 67, at 576.

92. See Williams, *supra* note 67, at 576 (citing *Adams v. Williams*, 407 U.S. 143 (1972)).

Williams' statement that *Adams* was a very problematic decision because of a "total absence of discussion of any of the effect that diluting *Terry* might have on America's minority communities."⁹³ Professor Harris believes that the dilution of *Terry* has given the police so much discretion to stop and frisk that the police may have declared open season on poor African Americans and Hispanic Americans who live in the inner city.⁹⁴ Dean Williams, a former deputy sheriff and Chair of the Iowa Law Enforcement Academy Council⁹⁵ expressed the concerns of many African Americans when he said:

[W]hite America fails to understand that the black community has just as strong a desire to root out crime and violence as any other community However, what the general public and often the police do not understand is that, despite everyone's need to curb crime, it must be undertaken fairly, evenly and impartially.⁹⁶

I believe that crime cannot be curbed fairly or impartially if the racial identity of a person is allowed to be used to increase the suspicion that a person has engaged in criminal activity.

IV. PRETEXT TRAFFIC STOPS AND THE RATIONALE OF *WHREN*

A. Facts

Plain clothes policemen patrolling a "high drug area" in an unmarked car watched a truck driven by defendant Brown waiting at a stop sign at an intersection for an unusually long time.⁹⁷ The truck turned suddenly, without signaling, and sped off at an "unreasonable speed." The officers stopped the truck to warn the driver about traffic violations, and upon approaching the truck saw plastic bags of crack cocaine in defendant Whren's hands. Defendants were arrested.⁹⁸ Before the trial on federal drug charges, defendants moved for suppression of the evidence, contending that the stop

and *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979) (indicating that race, combined with other factors, has been used by many courts as a basis for raising the level of suspicion of criminal activity)).

93. See Williams, *supra* note 67, at 577. Justice Marshall attacked the *Adams* decision as a betrayal of the balance that *Terry* struck between a citizen's right to privacy and his government's responsibility for effective law enforcement and expanding the concept of warrantless searches far beyond anything previously recognized as legitimate. See *Adams*, 407 U.S. at 154-55 (Marshall, J., dissenting).

94. See Harris, *supra* note 9, at 677.

95. See Williams, *supra* note 67, at 588.

96. See Williams, *supra* note 67, at 588.

97. See *Whren*, 517 U.S. at 806.

98. See *id.*

had not been justified by either a reasonable suspicion or probable cause to believe defendants were engaged in illegal drug-dealing activity, and that the officers' traffic-violation justification for approaching the truck was pretextual. The motion to suppress was denied and both African American defendants were convicted.⁹⁹ The Court held that temporary detention of a motorist based upon probable cause to believe that he has violated a city's traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist without other law enforcement objectives.¹⁰⁰

B. Analysis

The defendants conceded that the officer had probable cause to believe that certain provisions of the District of Columbia traffic laws had been violated.¹⁰¹ The defendants' argument that police may use minor traffic violations as a pretext for obtaining evidence of violation of penal laws was rejected by the Court in the opinion delivered by Justice Scalia.¹⁰² Where probable cause exists the Supreme Court only engages in the fourth balancing of interest analysis in cases involving searches or seizures conducted in a manner very harmful to an individual. An out-of-uniform officer making a traffic stop does not remotely qualify as such an extreme practice.¹⁰³ The Court concluded that the constitutional reasonableness of a traffic stop does not depend on the actual motivations of the individuals officers involved and the Constitution does not allow selective race based enforcement of the law.¹⁰⁴

C. Equal Protection Remedy for Race Based Pretextual Traffic Stops

Justice Scalia, speaking for a unanimous Court, was pretty straightforward in advising litigants that the constitutional basis for objecting to intentionally discriminatory laws is the Equal Protection Clause and not the Fourth Amendment.¹⁰⁵ In race-conscious voting in majority/minority districts the Court has held that a state acts unconstitutionally if its conduct is "unexplainable on grounds other than race."¹⁰⁶ When it is clear that the police officer's denial of a person living in a majority/minority high crime district of

99. *See id.* at 806.

100. *See id.*

101. *See id.* at 810.

102. *See Whren*, 517 U.S. at 807.

103. *See id.* (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

104. *See id.* at 813.

105. *See id.* at 813.

106. *See Shaw v. Reno*, 509 U.S. 630 (1993).

her Fourth Amendment right against unreasonable searches and seizures is unexplainable on any basis other than race, the Court must find that the officer has acted unconstitutionally.

V. CONCLUSION

Those who believe that the only reason for avoiding the police is to escape crime are viewing a distorted picture according to Professor Harris.¹⁰⁷ The post-*Terry* cases give the impression that minorities living in the inner city avoid police only to escape apprehension for a crime.¹⁰⁸

After all, the cases all end in a seizure of some evidence, which seizure the defendant then contests as unconstitutional. These opinions, however, represent only one part of the universe of cases in which people are stopped because they avoided the police. The point is that while people may avoid the police for a variety of reasons, reported cases focus only on those with guilty motivations. Others who are without guilt are nevertheless stopped and frisked. They are not charged because the search yields no evidence and no reported case ever results.¹⁰⁹

It is simply not true that the trained police eye only stops and frisks those with illegal contraband or those engaged in illegal activity. Many innocent minorities are stopped and frisked and never ever go to a criminal court because there was no evidence to be seized or evidence of criminal activity. Unfortunately, many innocent minorities suffer the fate of travel agent Patricia Appleton.¹¹⁰ Appleton traveled quite a bit as a travel agent. For a long time she did not think much of it when U.S. Customs Service inspectors routinely frisked her and searched her bags when she returned home to Chicago from several vacations to the Caribbean.¹¹¹ Appleton's attitude regarding the routine nature of the stops and searches changed in February, 1997, after being stripped-searched at the Chicago O'Hare International Airport.¹¹² In Appleton's case there is no illegal evidence to suppress at a motion to suppress hearing because this innocent African American is not a criminal, but had been treated like one. Appleton is one of about 85 African American Women suing the Customs Service in federal court on the theory they were strip-searched at O'Hare simply because they were black.¹¹³ Critics contend

107. See Harris, *supra* note 9, at 679.

108. See Harris, *supra* note 9, at 679.

109. See Harris, *supra* note 9, at 679.

110. See John Gibeaut, *Marked for Humiliation*, A.B.A. J., Feb. 1999, at 46.

111. See *id.*

112. See *id.*

113. See *id.*

that the searches at O'Hare are the result of a pattern of racial profiling that law enforcement illegally uses to stop blacks and other minorities in airports, on highways, and at other public places just because they look like they don't belong.¹¹⁴

The courts and commentators have come to accept race as a factor in deciding a criminal profile for law enforcement officers. "The problem is that if race is one of the criteria, it can be the tipping point to making the officer stop somebody," according to Professor Harris.¹¹⁵ I believe that race should never be a factor in governmental decision, whether we are talking about a race based affirmative action profile or a race based criminal profile. In a recent *ABA Journal/National Bar Association Magazine* survey 74.6 percent of black lawyers opposed race as a profiling factor as a legitimate law enforcement method.¹¹⁶

I am strongly opposed to any governmental use of race profiling because the government cannot be trusted to use race fairly for the benefit of society as a whole.¹¹⁷ What would happen if some of my white colleagues were told that the mere incidence of their race tipped the scales in favor of them having a criminal profile for drug use? The scales of justice are never balanced when the government can use race as a factor in deciding whether anyone has a suspicious criminal profile.

114. *See id.*

115. *See id.*

116. *See* Gibeaut, *supra* note 110, at 46.

117. *See* L. Darnell Weeden, Yo, Hopwood, *Saying No to Race-Based Affirmative Action Is The Right Thing to Do from an Afrocentric Perspective*, 27 CUMB. L. REV. 533, 543 (1996-1997). "The time to ensure that race is not a factor in governmental decisions has arrived. When the government uses race in its decision making process, it is inherently stimulating racial prejudice because of this country's hostile and polarized racial environment." *Id.*