Professor Jack Beermann

Police Misconduct and Race materials

Spring 2015

Preliminary Materials: What happened in the Michael Brown and Eric Garner Cases; Federal Civil Rights Statutes.

1. Constitutional standard on use of force in making arrest:

2. Constitutional standard governing denial of medical care for arrestees:

3. The Colfax Massacre and U.S. v. Cruikshank:

4. Civil suits to reform police departments:

5. STOP AND FRISK:

6. Deadly Force and Qualified Immunity:

7. Denial of Qualified Immunity and Deadly Force:

8. Traffic stops:

9. Racially-based stops:

10. Judge BERNICE BOUIE DONALD's dissent regarding the killing of an unarmed suspect:

11. Article on Police Misconduct in the United States:

Please note: These materials are very long and it is not necessary to read them all to participate in the classes. At a minimum, I suggest reading the preliminary materials and then items 1 and 2. Item 3 is for historical background. Item 4 illustrates how difficult it is to use a lawsuit to reform a police department. Item 5 is the widely known decision about New York City's stop and frisk policy, which was found to have a racial impact. The remainder of the material can be skimmed and read as you find it interesting. Item 8 includes a Supreme Court decision and commentary on that decision by Professor Tracey Maclin. Item 11 places the issue of police misconduct in the United States in an international context. JB

Materials for Unit on Police Misconduct and Race

Professor Jack Beermann

Summaries of Michael Brown and Eric Garner events:

Witnesses Saw Michael Brown Attacking–and Others Saw Him Giving Up

Officer Darren Wilson was spared criminal charges in part because of significant contradictions in the testimony of bystanders who saw the Ferguson, Missouri, teen get shot and killed.

CONOR FRIEDERSDORF NOV 25 2014, 6:18 AM ET

http://www.theatlantic.com/national/archive/2014/11/major-contradictions-in-eyewitness-accounts-of-michael-browns-death/383157/

A grand jury in St. Louis County, Missouri, has ruled that there is no probable cause to believe Officer Darren Wilson committed a crime when he killed Michael Brown. Put another way, in their estimation, the state doesn't possess enough facts to cause a reasonable person to conclude that criminal charges are true. This judgment was shaped in part by the testimony of eye-witnesses to the shooting. Prosecutor Robert McCulloch has now released transcripts of many witness interviews.

The main takeaway: Eyewitness testimony is highly unreliable. To read through the accounts is to see seemingly honest people contradict one another on basic, significant matters of fact. It is seemingly impossible to know what really happened.

But that doesn't mean nothing is clear.

Officer Wilson's account is a useful place to begin, especially since this is the first we've heard of it after all these months. Here's a condensed version that excises irrelevant details:

> I heard on the radio that there was a stealing in progress from the Ferguson Market on West Florissant. I heard a brief description of a black male with a black t-shirt. As I was driving out down Canfield westbound I observed two black males walking in the center of the roadway on the center yellow line ... I remember seeing two cars I believe go around them and they hadn't moved ... I told 'em, "Hey guys, why don't you walk on the sidewalk." The first one said, "we're almost to our destination" and pointed this direction. I said, "okay, but what's wrong with the sidewalk?" And that was as they were passing my window. The second subject said, "Fuck what you have to say." After that I put the vehicle in reverse, backed up about ten feet to 'em, and attempted to open my door. Prior to backing up I did a call out on the radio ...

I say, "Hey, come here." He said, "What the fuck are you gonna do?" And he shut my door on me. The door was only open maybe a foot. I didn't have a chance to get my leg out. He came up and approached the door. I opened the door again trying to push him back. He said something. I'm not exactly sure what it was and then started swinging and punching at me from outside the vehicle ...

He has his body against the door preventing me from opening it. His stomach was against the door. His hands were inside on me... he had to duck his head to come inside my vehicle and he entered my vehicle with his hands, his arms, his head ... assaulting me ... The first time he struck me somewhere in this area, but it was a glancing blow 'cause I was able to defend a little bit. After that I was just scrambling to get his arms out of my face and grabbing me and everything else. He turned to his left and handed the first subject ...a pack of several cigarillos which was just stolen from the Market Store. And when he did that I grabbed his right arm trying just to control something. As I was holding it he came around with his arm extended, fist made, and went like that straight at my face with a full swing with his left hand ...

It was closed. It was in a fist.

After that, it kinda jarred me back and I yelled at him numerous times to stop and get back. I believe somewhere in there I put my hand up trying to just get him away from me. I was already trapped and didn't know what he was gonna do to me but I knew it wasn't gonna be good ... I mentally started thinking what should I do next? I started off with my mace ... couldn't reach it with my right hand. I was using this hand to block and all that. My left hand was blocking.

I couldn't reach around my body to grab it and I know how mace affects me so if I used that in such close proximity I was gonna be disabled, per se. And I didn't know if it was even gonna work on him, if I would be able to get a clear shot or anything else. Then I was picturing my belt. I don't carry a taser so that option was gone and even if I had one with a cartridge on there, it probably wouldn't have hit him anywhere. I have a flashlight I carry in my bag. My duty bag was on the passenger seat. I wasn't willing to give up more of my vehicle and my body to him to lean over and grab it and turn away from him.

I thought I was already compromised enough.

I drew my firearm, I pointed at him... "stop I'm going to shoot you" is what I ordered him to get on the ground. He said, "You're too much of a fuckin' pussy to shoot me" and grabbed my gun. When he grabbed my gun, he twisted it, pointed at me and into my hip, pelvic area. I know his hand was on my trigger finger, which was inside the trigger guard. And when he grabbed it he pushed it down and angled it to where it was like this is my hip. My firearm was in his

> control and pointed directly into my hip. At that point I was guaranteed he was going to shoot me. That's what I thought his goal was.
>
> He had already manipulated [so that] I was not in control of the gun. I was able to tilt myself a little bit and push it down and away towards the side of my hip ... He had me completely overpowered while I was sitting in the car. Then I took my left arm and I pinned it against my back seat and pushed the gun forward ... it ended up being right about where the door handle is on the Tahoe ...
>
> When it got there it was somewhat lined up with his silhouette and I pulled the trigger. Nothing happened. Pulled it again, nothing happened. I believe his fingers were over in between from the hammer and the slide preventing it from firing. I tried again. It fired. Glass shot up. The first thing I remember seeing is glass flying and blood all over my right hand on the back side of my hand. He looked like he was shocked initially, but he paused for a second and then came back into my vehicle and attempted to hit me multiple times.
>
> He took a half step back and then he realized he was okay, I'm assuming. He came back towards my vehicle and ducked in again, his whole top half of his body came in and tried to hit me again. Fist, grab, I mean just crazy. Just random, anything he could get a hold of swinging wildly. And at that point I put my hand up like this and tried to fire again and my left hand was blocking my face. Just a click. Nothing happened. After the click I racked it and as I racked it just came up and shot again. When I turned and looked I realized I had missed ...
>
> He was running east ...

This is a useful place to break because the story up to this point is not inconsistent with what eyewitnesses saw. There's no way to know for sure what Officer Wilson said to Michael Brown, or what the young man said back. But witnesses saw him leaning into the window of the police car. They saw some kind of struggle. They heard a gunshot fired and they saw Michael Brown start running away.

What's really in dispute is what happened next.

Let's continue with Officer Wilson's version. He tries to radio that shots have been fired. He gets out of his police vehicle and turns in the direction Brown had run:

> I was yelling at him to stop and get on the ground. He kept running and then eventually he stopped in this area somewhere. When he stopped, he turned, looked at me, made like a grunting noise and had the most intensive face I've ever seen on a person. When he looked at me, he then did, like, the hop ... you know like people do to start running. And he started running at me. During his first stride, he took his right hand and put it into his shirt under his waistband.

> And I ordered him to stop and get on the ground again. He didn't. I fired multiple shots. After I fired the multiple shots I paused for a second, yelled at him to get on the ground again, he was still in the same state. Still charging, hands still in his waistband, hadn't slowed down. I fired another set of shots. Same thing, still running at me, hadn't slowed down, hands still in his waist band. He gets about eight to ten feet away, he's still coming at me in the same way. I fired more shots. One of those, however, many of them hit him on the head and he went down right there. When he went down his right hand was still under his body, looked like it was in his waistband.
>
> I never touched him.

How does this account compare to what other witnesses said?

Here's one eyewitness account (all of these are condensed):

> It looked like he attempted to run, but he ain't get anything but like ten, twelve steps before he stopped and turned around. That's when I heard all the gunshots. And the officer was standing there with his gun pointed at him ... it wasn't really a run because he didn't get far. Well, after he stopped, he turned around, and he put his hands about shoulder length. It wasn't in the air... you know when somebody's scared, like they're backing away from something like "whoa." [I say he was scared because] he was a big dude, and he was kinda hunched forward like he was in, with his hands up, like he was in a give up, you know, "I'm givin' up" stage ... I couldn't see facial expressions ... [Officer Wilson] wasn't firing any shots as he was running away.

Here is an account from a second witness:

> ... he stopped and when he stopped, he didn't get on the ground or anything. He turned around and he did some type of movement. I never seen him put his hands up or anything. I can't recall the movement that he did. I'm not sure if he pulled his pants up or whatever he did, but I seen some type of movement and he started charging toward the police officer. The police officer returned fire, well, not returned fire, opened fire on Mr. Brown. If I had to guess the shots and the distance between him and Mr. Brown, it would have to be five to ten yards and the shots that were fired was four, five to six shots fired. Mr. Brown was still sanding up. My thoughts was ... is he hitting him? Because Mr. Brown, there was no reaction from him to show that he was hit.
>
> After that Mr. Brown paused.
>
> He stopped running and when he stopped running the police officer stopped firing. And then Mr. Brown continued, started again to charge towards him and

> after that the police officer ... I'm seeing him coming at an aggressive speed and just in charge mode toward the police officer ... I feel like the police officer he didn't have time to really react and holster his weapon and then reholster with a taser ...

A third witness insists that Michael Brown was not charging the officer—he was "walking" back toward him "slow and curled up."A fourth describes the killing as an "execution."

Here's the longer version:

> The boy backed up and ran ... and he got to a certain spot that was 25 to 30 feet, maybe more. And when he turned to face the officer he raised his hands but he didn't raise them all the way up. He raised them up and looked down like he was looking at his side ... and then he turned and faced the officer like, what happen? Why ya know? I don't know what was going through his mind, but if I had a guy shot I would have came like, why did you shoot me or whatever?
>
> The officer exited the vehicle ... and he said "stop." Because the boy looked up at him and he took two steps, about two or three steps. Pow pow! He fired off about three rounds and he hit him. The boy kinda wiggled. And when he came back up he had the weirdest look on his face, and he started coming forward. Not like he was trying to attack him, it's like he was coming to him, like to plea with him, *stop*. The officer did say, 'stop, stop, stop.' Well after that third time, he let loose. And the boy was coming forward slowly. Real slowly.
>
> But you could see he was hurt, 'cause he was like this. And rocking back and forth. He wasn't in an upright position, he was kinda hunched over. And as he was coming forward and he fired off the volley, he was falling ... He was walking forward but it was not in a menacing way ... he did not have to fire that last volley. That's what killed him, to me. Because he didn't look like he was ready. You know. To me and I'm going to say it, he was executed. He had made up his mind he was going to kill him.

Yet another witness saw a more ambiguous scene: "All I could see was he was coming fast... I can't say either way but you know if I was the officer I would look nervous too."

This witness has Michael Brown kneeling in the street.

Did he have his hands up?

Another witness says no: "Now I've heard lots of people talking about how he had his hands up. He did not have his hands up. His hands were down at his sides. And he got to within maybe six or ten feet from the officer and ... the cop shot him."

And here's the witness statement most damning to Wilson, from one of Brown's friends (though it's so directly contradictory to all of the others that it seems less credible):

> I seen them shoot Michael Brown in the head as soon as the police officer exited his truck ... I seen my best friend in the middle of the street with his hands in the air and he said, "please don't shoot me." The officer got out of his car and shot him ... I seen him exit his car, shoot him in his head and then he shot him eight more times. It was four gunshots, and then there was a ten second pause, and then four more ... point blank range, like close ... like a step away ...
>
> I would never lie. I wouldn't lie on my best friend

After watching his best friend get shot, perhaps going into shock, and chatting with all the people around him as they spread facts and falsehoods, I don't think he necessarily lied. The confounding thing about eyewitness testimony is that all of these people may be earnestly describing exactly what they think that they witnessed.

How exactly would any of us remember if we saw a horrific scene unfold over mere seconds, whether from 50 yards away or peering suddenly out a window or driving by?

I haven't yet had time to go through all the documents released by St. Louis County, but based on these witness statements, I can see why the grand jury would have reason to doubt whether Officer Wilson committed a crime. At least some witnesses corroborate his story. Some that don't contradict one another. If the witnesses above all testified in a criminal trial, it's hard to imagine that a jury would fail to have reasonable doubts about what really happened. There are hundreds of pages to sift through that the grand jury saw. In coming days, we'll probably discover at least some eyewitness testimony contradicted by physical evidence. But it seems all but certain that we'll never know exactly what happened that day.

Death of Eric Garner

From Wikipedia, the free encyclopedia (Although I don't normally rely on Wikipedia, this was the best summary of the Eric Garner case that I could find.)

On July 17, 2014, **Eric Garner** died in Staten Island, New York, after a police officer put him in a chokehold. The New York City Medical Examiner's Office concluded that Garner died partly as a result of the chokehold. New York City Police Department (NYPD) policy prohibits the use of chokeholds, and law enforcement personnel contend that it was a headlock and that no choking took place.

After Garner expressed to the police that he was tired of being harassed and that he was not selling cigarettes, officers moved to arrest Garner on suspicion of selling "loosies" (single cigarettes) from packs without tax stamps. When officer Daniel Pantaleo took Garner's wrist behind his back, Garner swatted his arms away. Pantaleo then put his arm around Garner's neck and pulled him backwards and down onto the ground. After Pantaleo removed his arm from Garner's neck, he pushed Garner's head into the

ground while four officers moved to restrain Garner, who repeated "I can't breathe" eleven times while lying face down on the sidewalk. After Garner lost consciousness, officers turned him onto his side to ease his breathing. Garner remained lying on the sidewalk for seven minutes while the officers waited for an ambulance to arrive. The officers and EMTs did not perform CPR on Garner at the scene; according to a spokesman for thePatrolmen's Benevolent Association of the City of New York, this was because they believed that Garner was breathing and that it would be improper to perform CPR on someone who was still breathing. He was pronounced dead on arrival at the hospital approximately one hour later.

Medical examiners concluded that Garner was killed by "compression of neck (choke hold), compression of chest and prone positioning during physical restraint by police" though no damage to his windpipe or neck bones was found. The medical examiner ruled Garner's death a homicide, indicating that his death was caused by the intentional actions of another person or persons; however, the designation of homicide by itself means neither that the death itself was intentional nor that a crime was committed.

On December 3, 2014, a grand jury decided not to indict Pantaleo. The event stirred public protests and rallies with charges of police brutality. As of December 28, 2014, at least 50 demonstrations had been held nationwide specifically for Garner while hundreds of demonstrations against general police brutality counted Garner as a focal point. The Justice Department announced an independent federal investigation.

42 USC § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 18, U.S.C., § 249 - Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act: This statute makes it a federal crime to use "fire, a firearm, a dangerous weapon, or an explosive or incendiary device . . . to cause bodily injury to any person, because of the [victim's] actual or perceived race, color, religion, or national origin." The penalty is 10 years in prison or up to life in prison if the victim dies or if the defendant attempts to kill the victim. This could be used against private persons committing racial violence.

(a) In General.—

(1) Offenses involving actual or perceived race, color, religion, or national origin.— Whoever,

whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(i) death results from the offense; or

(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.—

(A) In general.— Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(I) death results from the offense; or

(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) Circumstances described.— For purposes of subparagraph (A), the circumstances described in this subparagraph are that—

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)—

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interstate or foreign commerce.

(3) Offenses occurring in the special maritime or territorial jurisdiction of the united states.— Whoever, within the special maritime or territorial jurisdiction of the United States, engages in conduct described in paragraph (1) or in paragraph (2)(A) (without regard to whether that conduct occurred in a circumstance described in paragraph (2)(B)) shall be subject to the same penalties as prescribed in those paragraphs.

(4) Guidelines.— All prosecutions conducted by the United States under this section shall be undertaken pursuant to guidelines issued by the Attorney General, or the designee of the Attorney General, to be included in the United States Attorneys' Manual that shall establish neutral and objective criteria for determining whether a crime was committed because of the actual or perceived status of any person.

(b) Certification Requirement.—

(1) In general.— No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or a designee, that—

(A) the State does not have jurisdiction;

(B) the State has requested that the Federal Government assume jurisdiction;

(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

(2) Rule of construction.— Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(c) Definitions.— In this section—

(1) the term "bodily injury" has the meaning given such term in section 1365 (h)(4) of this title, but does not include solely emotional or psychological harm to the victim;

(2) the term "explosive or incendiary device" has the meaning given such term in section 232 of this title;

(3) the term "firearm" has the meaning given such term in section 921 (a) of this title;

(4) the term "gender identity" means actual or perceived gender-related characteristics; and

(5) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or

possession of the United States.

(d) Statute of Limitations.—

(1) Offenses not resulting in death.— Except as provided in paragraph (2), no person shall be prosecuted, tried, or punished for any offense under this section unless the indictment for such offense is found, or the information for such offense is instituted, not later than 7 years after the date on which the offense was committed.

(2) Death resulting offenses.— An indictment or information alleging that an offense under this section resulted in death may be found or instituted at any time without limitation.

Title 18, U.S.C., § 241 - Conspiracy Against Rights: This statute makes it a federal crime for two or more persons to conspire or go in disguise on the highway or the premises of another with the intent to deprive the victim of federal constitutional or statutory rights. This statute was passed after the Civil War and was aimed at the Ku Klux Klan.

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Title 18, U.S.C., § 242 - Deprivation of Rights Under Color of Law: This statute, also passed after the Civil War, makes it a crime for persons acting under color of law to deprive the victim of any federal rights or to subject a person to different "punishments, pains or penalties" on account of the victim's "being an alien, or by reason of his color, or race." This is the most likely federal criminal statute that would be used against the officers involved in these cases. It was used to prosecute the officers who were acquitted in state court in the beating of Rodney King.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results

from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

1. Constitutional standard on use of force in making arrest:

Graham v. Connor, 490 U.S. 386 (1989)

Chief Justice REHNQUIST delivered the opinion of the Court.

This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person. We hold that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard.

In this action under 42 U.S.C. § 1983, petitioner Dethorne Graham seeks to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during the course of an investigatory stop. Because the case comes to us from a decision of the Court of Appeals affirming the entry of a directed verdict for respondents, we take the evidence hereafter noted in the light most favorable to petitioner. On November 12, 1984, Graham, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. Berry agreed, but when Graham entered the store, he saw a number of people ahead of him in the check outline. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend's house instead.

Respondent Connor, an officer of the Charlotte, North Carolina, Police Department, saw Graham hastily enter and leave the store. The officer became suspicious that something was amiss and followed Berry's car. About one-half mile from the store, he made an investigative stop. Although Berry told Connor that Graham was simply suffering from a "sugar reaction," the officer ordered Berry and Graham to wait while he found out what, if anything, had happened at the convenience store. When Officer Connor returned to his patrol car to call for backup assistance, Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.

In the ensuing confusion, a number of other Charlotte police officers arrived on the scene in response to Officer Connor's request for backup. One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." App. 42. Several officers then lifted Graham up from behind, carried him over to Berry's car, and placed him face down on

its hood. Regaining consciousness, Graham asked the officers to check in his wallet for a diabetic decal that he carried. In response, one of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it. Finally, Officer Connor received a report that Graham had done nothing wrong at the convenience store, and the officers drove him home and released him.

At some point during his encounter with the police, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day. He commenced this action under 42 U.S.C. § 1983 against the individual officers involved in the incident, all of whom are respondents here, alleging that they had used excessive force in making the investigatory stop, in violation of "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983."

We reject [the] notion that all excessive force claims brought under § 1983 are governed by a single generic standard. As we have said many times, § 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan,* 443 U.S. 137, 144, n. 3 (1979). In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. See *id.*, at 140 ("The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged").[9] In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard. See *Tennessee v. Garner, supra,* 471 U.S., at 7–22 (claim of excessive force to effect arrest analyzed under a Fourth Amendment standard); *Whitley v. Albers,* 475 U.S. 312, 318–326 (1986) (claim of excessive force to subdue convicted prisoner analyzed under an Eighth Amendment standard).

Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable ... seizures" of the person. . . .

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake. *Id.,* at 8, quoting *United States v. Place,* 462 U.S. 696, 703 (1983). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. See *Terry v. Ohio,* 392 U.S., at 22–27. Because "[t]he test of reasonableness under

9 The same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971).

the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish,* 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner,* 471 U.S., at 8–9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of ... seizure").

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry v. Ohio, supra,* 392 U.S., at 20–22. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, *Hill v. California,* 401 U.S. 797 (1971), nor by the mistaken execution of a valid search warrant on the wrong premises, *Maryland v. Garrison,* 480 U.S. 79 (1987). With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick,* 481 F.2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott v. United States,* 436 U.S. 128, 137–139 (1978); see also *Terry v. Ohio, supra,* 392 U.S., at 21 (in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard"). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. See *Scott v. United States, supra,* 436 U.S., at 138, citing *United States v. Robinson,* 414 U.S. 218 (1973).

Because petitioner's excessive force claim is one arising under the Fourth Amendment, the Court of Appeals erred in analyzing it under the four-part *Johnson v. Glick* test. That test, which requires consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm," is incompatible with a proper Fourth Amendment analysis. We do not agree with the Court of Appeals' suggestion, see 827 F.2d, at 948, that the "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances. Whatever the empirical correlations between "malicious and sadistic" behavior and objective unreasonableness may be, the fact remains that the "malicious and sadistic" factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is "unreasonable" under the Fourth Amendment. . . .

Because the Court of Appeals reviewed the District Court's ruling on the motion for directed verdict under an erroneous view of the governing substantive law, its judgment must be vacated

and the case remanded to that court for reconsideration of that issue under the proper Fourth Amendment standard.

2. Constitutional standard governing denial of medical care for arrestees:

Ortiz v. City of Chicago, 656 F.3d 523 (7th Cir. 2011)

WOOD, Circuit Judge.

May Molina, a prominent civil rights activist known for protesting police practices, died in custody over 24 hours after officers arrested her on drug charges at her home. Molina was disabled, obese, and in poor health. She took daily medications for several ailments, including diabetes, a thyroid condition, hypertension, and asthma. Pursuant to a Chicago Police Department (CPD) policy that prohibits arrestees from taking medications while in lockup unless they are taken to a hospital, Molina had no access to her medications while in custody. When she met with her lawyer about 16 hours into her detention, she could hardly speak, walk, or stand. He told the lockup keepers to get Molina to a hospital because she was clearly sick. None of the guards on duty responded. Instead, her health deteriorated and she died alone in her cell.

April Ortiz, who is Molina's daughter, is acting as the administrator of Molina's estate. (Appellant's opening brief represents that of the several plaintiffs who appeared in the district court, the only one remaining is the Estate. For convenience we refer to it as Ortiz.) First, Ortiz argues that the district court improperly granted summary judgment on her claim that the defendants, collectively the City of Chicago and the lockup officers, unreasonably denied Molina medical care by not taking her to the hospital so that she could resume her medications. Embedded in this claim is an evidentiary issue, because the court excluded Ortiz's expert witness. Second, Ortiz argues that the district court erred in granting summary judgment for the defendants on her claim that they unconstitutionally held Molina in custody for 27 hours without taking her before a judge for a probable cause hearing. We reverse the district court's grant of summary judgment on the denial of medical care claim but affirm on the delayed hearing claim.

I

Because Ortiz appeals from a grant of summary judgment against her, we construe the evidence and reasonable inferences from it in her favor. CPD officers searched Molina's home at 3526 N. Halsted Street pursuant to an uncontested search warrant on May 24, 2004. Officers apparently received a tip from a confidential informant stating that he had purchased small amounts of drugs from Molina and from her son, Michael Ortiz, who lived upstairs. Based on this information, 17 officers raided the two-flat apartments where Molina and her son lived. There they recovered a number of tinfoil packets and some brown putty. Officers later arrested the two, but all charges against Michael Ortiz were eventually dropped.

Molina required constant access to an array of medications to survive. She had Type II diabetes mellitus that required medication (including Glipizide and Metformin) and monitoring to ensure that her blood sugar was controlled. Otherwise, she risked slipping into either a hyperglycemic or hypoglycemic state, which could lead to a fatal coma. She also suffered from life-threatening hypertensive and thyroid conditions, both of which required medication (including Furosemide, Enalapril, and Potassium Chloride) and monitoring. She used a wheelchair or walker to get

around. At the time of her arrest (10:07 p.m. on May 24), Molina informed the officers that she took thyroid and diabetes medications and asked whether she could bring them along. The officers told her that medications were not permitted in lockup.

Initially, Molina was detained briefly at the 23rd District lockup, which does not have a women's unit. Ortiz brought Molina's medications to that facility, explaining to the officer on duty (who is not a defendant in this lawsuit) that her mother needed the medications "to save her life." The officer refused to accept the medications, stating that Molina would soon be transferred to the 19th District lockup and then taken to Cermak Hospital where she would be provided with medical care.

Molina arrived at the 19th District lockup at 4:25 a.m. on May 25. At that time, Officers Avis Jamison and Authurine Pryor were staffing the 9:30 p.m. to 5:30 a.m. overnight shift. Officer Jamison, in Pryor's presence, interviewed Molina upon arrival to create what the parties call the screening record. She asked if Molina had any "serious medical problems," and Molina responded that she did. Molina described her medical problems to Jamison, who noted on the screening record that Molina was taking medicine for diabetes, thyroid-related issues, and other conditions. Jamison did not inquire further about the type or frequency of Molina's *528 medications. After completing the screening record, Jamison took it to the front desk, where it remained accessible to all front desk personnel. Officer Pryor photographed and fingerprinted Molina, and also asked her routine questions about whether she was sick, injured, or in need of medical assistance. Pryor says that Molina responded that she was fine and did not want to go to the hospital.

During this time, another arrestee, Diane Rice, was detained at the 19th District lockup. She heard Molina yell several times for a doctor and a wheelchair, though exactly when is unclear. Rice recounted that after Molina yelled for a doctor, someone yelled back: "Ma'am, we asked you when you came in if you needed a doctor, and you said no." Rice also asserts that the officers did not conduct the requisite 15–minute cell checks.

After Molina was photographed and fingerprinted, CPD personnel transmitted her prints to the "10–print" unit for verification. Around 5:30 a.m., Officer Pryor observed Molina walk back to her cell after making a phone call. Pryor estimated that it took Molina five to seven minutes to walk a distance of about 30 feet. The next shift began at 5:30 a.m. on May 25, at which point Officers Catherine Ziemba and Tamara Lemon–Richmond took over. During the shift change, Pryor informed Ziemba that Molina had trouble walking and would need a "special needs" car to go to court because she was obese and moving slowly. By about 7:00 a.m., Molina's identity was manually verified and confirmed. CPD personnel then transmitted Molina's information to the "Instant Update Unit," which transferred her arrest history from a typewritten form to a computer database and checked for outstanding warrants. At 12:12 p.m. all administrative tasks that were needed before Molina could be taken to bond court were completed. Neither Ziemba nor Lemon–Richmond tried to send her to bond court before their shift ended at 1:30 p.m.

Another shift change took place at 1:30 p.m., at which point Officers Diane Yost and Beverly Gilchrist took charge of the lockup until 9:30 p.m. Around 4:00 p.m., Molina's long-time attorney, Jerry Bischoff, arrived to speak with his client. Yost and Gilchrist escorted Molina to meet with Bischoff. According to Yost, it took Molina several minutes to walk a few feet, and

she had to hold on to the wall to make any progress. Bischoff's testimony provides the clearest insight into Molina's health during this time. He said that Molina, whom he had never seen out of a wheelchair, was "having difficulty breathing" and "was breathing like someone who had just ... run up a flight of stairs." Bischoff further noted that Molina was groggy, exhausted, and could not stand up on her own. Upon making these observations, Bischoff concluded that it would be unproductive to discuss Molina's case with her at that time and instead he inquired about her health. He asked if she was diabetic, and Molina, unable to speak, nodded her head yes. Bischoff then asked how she took her medication, and she gestured that she did so orally. When Bischoff inquired whether she had been able to take her medications while in lockup, Molina gestured to indicate that she had not. Bischoff thought that Molina belonged in the hospital and terminated the meeting. He then told Yost and Gilchrist that Molina needed to go to Cermak Hospital because she was "clearly sick." According to Bischoff, the officers responded, "we are working on it, counsel." Yost denies being present at that time, and Gilchrist contends that this exchange never occurred.

Officer Maja Ramirez was working at the front desk, where Officer Jamison had *529 previously deposited Molina's screening record, on May 25. During her shift, Ramirez received five to ten calls from a number of different people informing her that Molina needed to take her medications or go see a doctor. Ramirez says she did not recall whether the callers told her about specific medications, nor did she ask any follow-up questions. Instead she told each caller that a request for medication must come from the detainee, not a third party. Ramirez also says that she informed one of her supervisors about the phone calls after receiving the first few. Ramirez did not take any further action, such as walking to the lockup to see if Molina was all right, because that was not her job. The plaintiffs say that the supervisors on duty at the time were Sergeant Debra Holmes and Lieutenant William Wallace. Neither of the supervisors took any responsive action.

Officer Jamison returned to work the 9:30 p.m. to 5:30 a.m. overnight shift on May 25 with Officer Martha Gomez. Jamison is the only officer who had direct contact with Molina on two different shifts. At 11:00 that night, another arrestee, Jasmine Vaccarello, arrived in lockup. Vaccarello says that she heard Molina yell for attention when she first arrived. While Vaccarello was being led to her cell, she heard Molina ask the guards for her medications, a walker, and a telephone call. According to Vaccarello, the officers on duty, Jamison and Gomez, ignored Molina. While Vaccarello was in her cell, she heard Molina call out for help, but to no avail. At some point, Vaccarello became concerned enough that she called out for help on Molina's behalf, at which point either Jamison or Gomez yelled back: "shut the f- - - up!" Vaccarello says that the officers on duty that night did not conduct the required 15–minute cell checks. Finally, Vaccarello explains that she heard what sounded like snoring coming from Molina's cell, but that over time the sound became shallower. Eventually, she could no longer hear Molina at all. At 2:45 a.m. on May 26, Jamison noticed Molina unresponsive in her cell. She had passed away.

A post-mortem examination conducted by the Cook County Medical Examiner, Dr. Eupil Choi, revealed that Molina had ingested six tinfoil packets before her demise. Toxicology reports showed that she had morphine in her blood at the time of death. Based on this information, Dr. Choi concluded that Molina died from opiate intoxication complicated by obesity and cirrhosis of the liver. Ortiz's expert witness, Dr. Adelman, whose testimony the district court excluded on Daubert grounds, offered a competing opinion about the deterioration of Molina's health while in

custody. Dr. Adelman concluded that the deprivation of her medications for diabetes and thyroid caused Molina to fall into a myxedematous or diabetic coma, which eventually led to her death. Dr. Adelman also stated that even if Molina died of a heroin overdose, which he did not think was the case, she could have survived had she been taken to the hospital for medical care.

II

This lawsuit began when Michael Ortiz and another plaintiff sued the City of Chicago and several police officers on November 16, 2004 for § 1983 constitutional and state law claims. On February 23, 2005, an amended complaint added April Ortiz, Molina's daughter, to the lawsuit. Initially, the claims related to the arrest and detention of Michael Ortiz and May Molina, but on appeal our concern is only with Ortiz's federal claims on behalf of her mother's estate, arising from Molina's detention and death. Unfortunately, this lawsuit has taken a long and choppy path. One consequence of this is that Ortiz's medical expert, Dr. Adelman, did not have access to all of the relevant materials until late in the game. That is why, Ortiz says, *530 Dr. Adelman submitted four different versions of his report to the court. Ortiz also asserts that the district court's grant of the defendants' motion for a stay of discovery prevented them from identifying two important witnesses, Rice and Vaccarello, until quite late in the proceedings. Finally, we note that there appears to be an unresolved dispute concerning whether the City of Chicago stipulated to accept liability in this lawsuit if any of the defendants was found to be liable.

Reflecting the staggered development of the case, the district court resolved the two substantive issues Ortiz raises on appeal in two different orders, and it addressed her evidentiary issue in two more orders. Disposing of the plaintiff's ineffective medical care claim on May 13, 2008, the court concluded that only two of the defendants were sufficiently on notice that Molina was in need of medical care. These defendants, it held, were entitled to summary judgment because the plaintiff failed to put forth enough evidence on the proximate cause of Molina's death. The absence of evidence on proximate causation, as the court acknowledged, stemmed from the court's prior exclusion of the plaintiff's expert witness in an order dated October 7, 2007. The court concluded that Ortiz had failed to remedy the weaknesses in Dr. Adelman's testimony by the time of summary judgment. On February 18, 2010, the court granted summary judgment for the two defendants named in conjunction with the plaintiff's Gerstein claim, concluding that they were not responsible for any delay in getting Molina to a bond hearing. We consider first the medical care claim, including the evidentiary point, and then the hearing claim.

III

A

The court rejected Ortiz's claim that Molina received constitutionally inadequate medical care in its order of May 13, 2008. Our review is de novo, and we construe all facts and reasonable inferences in the light most favorable to Ortiz, the nonmoving party. Stokes v. Bd. of Educ., 599 F.3d 617, 619 (7th Cir.2010). Before delving into the facts, the court determined that the Fourth Amendment's reasonableness standard governs this inquiry, rather than the deliberate indifference standard derived from the Eighth Amendment and applied to claims from detainees awaiting a trial by virtue of the Due Process Clause. Because Molina had not yet benefitted from a judicial determination of probable cause, otherwise known as a Gerstein hearing, we agree that

the Fourth Amendment applies. See Lopez v. City of Chicago, 464 F.3d 711, 719 (7th Cir.2006) ("Our cases thus establish that the protections of the Fourth Amendment apply at arrest and through the Gerstein probable cause hearing, due process principles govern a pretrial detainee's conditions of confinement after the judicial determination of probable cause, and the Eighth Amendment applies following conviction."); Williams v. Rodriguez, 509 F.3d 392, 403 (7th Cir.2007).

Four factors inform our determination of whether an officer's response to Molina's medical needs was objectively unreasonable: (1) whether the officer has notice of the detainee's medical needs; (2) the seriousness of the medical need; (3) the scope of the requested treatment; and (4) police interests, including administrative, penological, or investigatory concerns. Williams, 509 F.3d at 403. Ortiz must also show that the defendants' conduct caused the harm of which she complains. See Gayton v. McCoy, 593 F.3d 610, 620 (7th Cir.2010). The district court properly narrowed the analysis by concluding that third and fourth factors are off the table in this case because the defendants do not *531 assert that taking Molina to the hospital would have been burdensome or compromised any police interests. Our focus therefore is on whether each individual defendant was on notice of Molina's condition, the seriousness of her medical needs, and whether their failure to act caused her harm. As we explained in Williams, "[t]he severity of the medical condition under this standard need not, on its own, rise to the level of objective seriousness required under the Eighth and Fourteenth Amendments. Instead, the Fourth Amendment's reasonableness analysis operates on a sliding scale, balancing the seriousness of the medical need with the third factor—the scope of the requested treatment." 509 F.3d at 403.

The defendants do not dispute that the Williams framework should guide our analysis, but they urge us to focus primarily on another consideration. In light of the inquiry we have just described, the defendants contend that the conduct of the officers should be viewed in light of the "short detention period" that usually spans the time between arrest and the bond hearing. Since the detention period should not generally exceed 48 hours, see County of Riverside v. McLaughlin, 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), they contend that lockup keepers should not be required to whisk arrestees off to the hospital every time there is a complaint. We agree with the defendants that the relatively short period of time that a detainee spends in lockup is pertinent to the analysis. Some medical procedures are urgent, but many are not time-sensitive within a reasonable period. This general proposition, however, is not a license for lockup keepers to deny all arrestees all medical care simply because they will probably be transferred within 48 hours. To the contrary, "when the State takes a person into its custody and holds [her] there against [her] will, the Constitution imposes upon it a corresponding duty to assume some responsibility for [her] safety and general well-being." See DeShaney v. Winnebago Cnty. Dep't of Soc. Serv., 489 U.S. 189, 199–200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Each state actor who encounters a detainee must reasonably respond to medical complaints; a detainee cannot be treated like a hot potato, to be passed along as quickly as possible to the next holder.

The duty to respond reasonably to an arrestee's medical needs is affected by any police policies that may endanger the well-being of those in custody. Here, the CPD's policy of prohibiting detainees from taking medication in lockup unless the individual is transported to Cermak Hospital is central to our inquiry. We have no occasion to comment on whether that policy is wise as a general matter, but its existence cannot be ignored. When a state actor detains a known

diabetic in a facility that separates her from the drugs that keep her alive, it must take her medical needs into account in deciding what justifies a trip to the hospital. Presumably, at least part of the function served by creating a screening record for each detainee upon arrival is to gain the information about her health status that is needed to ensure that she remains safe while in custody. In short, in cases like this we must consider everything that each officer knew about Molina's deteriorating health in light of the amount of time she was in custody and the CPD's policy that detainees could not obtain any medication unless they were sent to the hospital.

With these principles in mind, we examine whether the conduct of each defendant was objectively reasonable under the circumstances. As our discussion of the facts indicates, each of them had some notice that Molina's health was bad. The question on summary judgment is whether a jury could find that it was objectively unreasonable *532 for each defendant to take no action to seek medical care for Molina based on what she knew at the time. We will evaluate the case against each officer in the order that she encountered Molina.

The evidence against Jamison, who worked two 9:30 p.m. to 5:30 a.m. shifts, first on the night Molina was booked and then on the night she died, consists of the following: (1) She created Molina's screening record, making note of the fact that Molina suffered from and took medications for various serious medical conditions, including diabetes; (2) According to Rice, Molina yelled out a request for a doctor after she was placed in her cell while Jamison was on duty; (3) Molina was still in custody on May 26, when Jamison began her shift that day, and Jamison knew Molina had not yet been taken to her bond hearing (and thus could infer that, because Molina had never left the lockup, she had not had access to any of her medications); and (4) On the night of May 26, according to Vaccarello, Molina again yelled for help and asked for her medications.

The defendants respond by attacking the credibility of Rice and Vaccarello, who were in lockup with Molina. But none of their arguments undercuts the value of this testimony at summary judgment, where we resolve all disputed facts and make all reasonable inference in favor of the plaintiff and do not weigh the credibility of witnesses. We decline the defendants' invitation to disregard Rice's and Vaccarello's statements. We acknowledge that Jamison and Pryor assert that Molina said she did not need to go to the hospital when she first arrived. But a jury would not be required to believe this account, particularly since Molina's death precludes her from testifying on her own behalf. See Cobige v. City of Chicago, Ill., 651 F.3d 780, 783–84 (7th Cir.2011). Rice's testimony, if credited by a jury, establishes that Molina requested a doctor shortly after she was booked, and Vaccarello's testimony establishes that she called out for her medications shortly before she died. Based on the evidence in the record, a jury could conclude that Jamison was on notice that Molina was suffering from a serious medical condition that required attention. See Egebergh v. Nicholson, 272 F.3d 925, 927–28 (7th Cir.2001).

Officer Pryor, like Jamison, first encountered Molina in the early morning hours of May 25. The evidence against her is a subset of the evidence against Jamison—Pryor asked Molina about her health when she first arrived, observed her condition at the time, was present when Jamison interviewed Molina to create her screening record, and was present when (according to Rice) Molina called out for a doctor. For largely the same reasons that apply to Jamison, we think that a reasonable jury could infer from this evidence that Pryor was on notice that Molina was suffering from a serious medical condition that required attention. When an officer knows that an

arrestee has an array of medical conditions as serious as Molina's, a call for help from the arrestee asking to see a doctor is sufficient to create notice of a serious medical need. Thus, we hold that there is a genuine issue of fact with respect to Jamison's and Pryor's notice of Molina's need for prompt medical attention. A jury could thus find that their failure to get Molina to the hospital was unreasonable.

We need not linger too long on whether Officers Yost and Gilchrist, who staffed the following shift from 1:30 p.m. to 9:30 p.m. on May 25, were on notice that Molina needed help. They were on duty when Bischoff, Molina's attorney, met with her that afternoon. Bischoff says that he directly told them that Molina was "clearly sick" and needed to be taken to the hospital. Given that (according to Bischoff) Molina *533 was unable to speak at the time, we cannot imagine more direct notice that she needed medical care. Yost's assertion that she was not present when Bischoff spoke to Gilchrist, and Gilchrist's denial that Bischoff ever made that statement, are immaterial to our present inquiry. We of course resolve these disputed facts in Ortiz's favor.

Although the district court ultimately concluded that Yost and Gilchrist were on notice, the court appeared to doubt the import of Bischoff's testimony because "it is unclear whether Ms. Molina's problems observed by Mr. Bischoff ... were symptomatic of diabetes or a thyroid condition." But whether Bischoff or anyone else knew precisely what was the root cause of Molina's physical distress is not at issue here. Lockup keepers are not medical professionals; neither are attorneys or other detainees who happen to observe an arrestee in jail. The question is not whether a particular defendant knew what was wrong with Molina, but rather whether the defendant, based on what she observed herself and learned from others, should reasonably have known that Molina needed medical care. We therefore reject the defendants' assertion that Yost and Gilchrist should be excused because they could not have known why Bischoff thought that Molina needed to be hospitalized. We conclude that there is triable issue as to whether they were on notice that Molina needed medical care.

We turn next to Ortiz's related claims against Ramirez, Wallace, and Holmes. The claim against Ramirez arises solely from the fact that while she worked the front desk on May 25, she received five to ten calls stating that Molina needed either her medication or a doctor. The defendants say that this alone is insufficient to put Ramirez on notice that Molina needed medical care because Ramirez could not have known who was calling or if the caller was lying about Molina's need for medication. And, they assert, Ramirez herself did not have the authority to dispense medication to Molina or personally to take her to the hospital. All she could do was notify her supervisors, which she did.

The contention that the calls did not put Ramirez on notice that Molina needed her medication because the caller could have been lying is nonsensical. That explanation may shed light on why Ramirez failed to act once she was on notice—because she thought the caller was lying—but it does not refute the receipt of notice. Was it reasonable to do nothing aside from notifying her supervisors after receiving the calls? That, in our view, is the very question that the jury should decide. So we conclude that there is a triable issue as to whether Ramirez was on notice that Molina needed medical care. For the same reason, we conclude that Ramirez's supervisors, Wallace and Holmes, were also on notice. We recognize that the defendants now contend, for the first time, that Ramirez worked during the daytime, not the evening, and so she could not have informed supervisors Wallace and Holmes (who apparently worked nights) about the phone

calls. Evidence on this issue is not part of the record. To the contrary, the district court was under the impression that Ramirez worked during the evening, supporting the plaintiff's narrative of the sequence of events. The parties should resolve this issue on remand.

Finally, we turn to Officer Gomez, who with Jamison worked the shift beginning at 9:30 p.m. on the night that Molina died. As discussed above, the testimony of Vaccarello, the detainee housed in the cell next to Molina's that last night, provides the best evidence that the officers working that shift were on notice that she needed medical care. Indeed, the district court concluded that Vaccarello's testimony creates *534 a triable issue with regard to the officers on duty at the time, but the court appears erroneously to have believed that Yost and Gilchrist, not Jamison and Gomez, were on duty then. The defendants contend that Gomez never saw Molina awake or spoke to her, and so she could not have known that Molina needed any medical care. Without Vaccarello's testimony, that may have been undisputed. But in light of Vaccarello's statement that Molina called out for her medications, we conclude that Gomez too was on notice that Molina needed medical attention.

Thus, we conclude that defendants Jamison, Pryor, Yost, Gilchrist, Ramirez, Wallace, Holmes, and Gomez had sufficient notice that Molina needed medical care to treat a serious medical condition. This, combined with the fact that it would not have been difficult to transport Molina to the hospital and no police interests stood in the way of that treatment, leads us to conclude that Ortiz has put forth enough facts to survive summary judgment. Certainly, the evidence is of varying strength against each defendant, but at this stage we do not weigh the proof, make credibility determinations, or resolve narrative disputes. Those tasks are left for the trier of fact.

B

We must, however, resolve another issue before any of these defendants can be compelled to face a jury. Ortiz must present evidence sufficient to permit a jury to infer that the defendants' failure to act was a source of harm for Molina. The district court initially framed the causation inquiry as follows: "whether the admissible evidence does create a genuine issue as to whether, had [the defendants] done what they should have done in light of what they observed about May Molina, and seen to it that she was taken to a hospital where she could have been diagnosed and treated, she would not have died or have experienced pain and suffering prior to her death." This is the proper issue for analysis, but it is not the one that the court pursued. Instead, it looked at a much narrower issue: whether the plaintiff could prove that the failure of the defendants to provide Molina with access to her medications proximately caused her death. With the issue thus framed, the court focused its attention on the plaintiff's expert witness, Dr. Adelman. After excluding Dr. Adelman's testimony under Federal Rule of Evidence 702, the court concluded that the plaintiff's case necessarily failed on the issue of causation. We think the district court misunderstood the proximate cause inquiry and, relatedly, abused its discretion in excluding Dr. Adelman's testimony. We also conclude it was an error for the court to disregard the testimony of Ortiz's second expert, Dr. Joye M. Carter. [The court's discussion of these issues is omitted.]

C

In light of our decision to reverse the grant of summary judgment in favor of the seven defendants mentioned above, we must address the defendants' qualified immunity defense. They

argue that the uncertainty over whether the "deliberate indifference" or "objectively unreasonable" standard governs the medical care claim entitles them to qualified immunity. They argue that until 2007, when we decided Williams v. Rodriguez, 509 F.3d 392 (7th Cir.2007), and Sides v. City of Champaign, 496 F.3d 820 (7th Cir.2007), no decision had applied the Fourth Amendment to analyze the reasonableness of the provision of medical care to arrestees. While that may be true, we have long held that the Fourth Amendment protects a person's rights until she has had a probable cause hearing. See Luck v. Rovenstine, 168 F.3d 323, 326 (7th Cir.1999) ("There is, to be sure, a difference between the constitutional provisions that apply to the period of confinement before and after a probable cause hearing: the Fourth Amendment governs the former and the Due Process Clause the latter."); Villanova v. Abrams, 972 F.2d 792, 797 (7th Cir.1992) (same). The multifactor test announced in Sides and clarified in Williams was unannounced at the time of Molina's death, yet it was quite clear that the Fourth Amendment applied to her stage of the criminal process.

But even if we were to assume that the standard we have applied in this case was not clearly established at the time Molina died, the outcome of this case would be unaffected. To survive summary judgment, Ortiz would then be required to satisfy the more stringent deliberate indifference standard. This, however, is not a case that turns on the difference between the two standards. Ortiz's argument, if credited by a jury, satisfies the deliberate indifference standard because she argues that defendants were subjectively aware that Molina had a serious medical condition that needed care and they failed to respond adequately. See Sherrod v. Lingle, 223 F.3d 605, 610 (7th Cir.2000). The defendants do not argue that Molina did not suffer from an objectively serious medical condition. The question is only whether the officers' failure to act was not only negligent, but deliberately indifferent. Yet it is well settled that providing no medical care in the face of a serious health risk constitutes deliberate indifference. See Walker v. Benjamin, 293 F.3d 1030, 1037 (7th Cir.2002). This is not a case *539 where prison officials provided substandard medical care and we must decide whether they crossed the line from medical malpractice (negligence) to deliberate indifference (recklessness). Ortiz's claim is that each of the defendants knew that Molina suffered from a serious medical condition, yet they failed to take any step in response. At this stage, she has done enough to defeat summary judgment even if the higher standard applied. We therefore conclude that the defendants are not entitled to qualified immunity on this claim.

IV

Finally, we address Ortiz's Gerstein claim. A person arrested without a warrant is entitled to a timely "judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Gerstein v. Pugh, 420 U.S. 103, 114, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). In County of Riverside, 500 U.S. at 56–57, 111 S.Ct. 1661, the Supreme Court adopted a burden-shifting approach using 48 hours as its benchmark. Detentions over 48 hours are presumptively unreasonable and the state bears the burden of proving that specific circumstances justified the delay, while the plaintiff bears the burden of showing any detention under 48 hours is unreasonable. See Portis v. City of Chicago, 613 F.3d 702, 704 (7th Cir.2010). [The court's discussion of this claim is omitted.]

For these reasons, we AFFIRM the district court's grant of summary judgment for defendants Ziemba and Lemon–Richmond. We REVERSE the grant of summary judgment for defendants

Jamison, Pryor, Yost, Gilchrist, Ramirez, Wallace, Holmes, and Gomez and REMAND for further proceedings consistent with this opinion. We also instruct the district court to determine whether the parties have entered into a valid stipulation regarding the City's acceptance of liability if any of the defendants are found liable to Ortiz.

3. The Colfax Massacre and U.S. v. Cruikshank:

From: http://www.blackpast.org/aah/colfax-massacre-1873

The Colfax Massacre occurred on April 13, 1873. The battle-turned-massacre took place in the small town of Colfax, Louisiana as a clash between blacks and whites. Three whites and an estimated 150 blacks died in the conflict. The massacre took place against the backdrop of racial tensions following the hotly contested Louisiana governor's race of 1872. While the Republicans narrowly won the contest and retained control of the state, white Democrats, angry over the defeat, vowed revenge. In Colfax Parish (county) as in other areas of the state, they organized a white militia to directly challenge the mostly black state militia under the control of the governor. Colfax Parish reflected the political and racial divide in Louisiana. Its 4,600 voters in the 1872 election were split between approximately 2,400 hundred mostly black Republican voters and 2,200 white Democratic voters. One incident however, touched off the Colfax massacre. On March 28, local white Democratic leaders called for armed supporters to help them take the Colfax Parish Courthouse from the black and white GOP officeholders on April 1. The Republicans responded by urging their mostly black supporters to defend them. Although nothing happened on April 1, the next day fighting erupted between the two groups.

On April 13, Easter Sunday, more than 300 armed white men including members of white supremacist organizations such as the Knights of White Camellia and the Ku Klux Klan, attacked the Courthouse building. When the militia maneuvered a cannon to fire on the Courthouse, some of the sixty black defenders fled while others surrendered. When the leader of the attackers, James Hadnot, was accidentally shot by one of his own men, the white militia responded by shooting the black prisoners. Those who were wounded in the earlier battle, particularly black militia members, were singled out for execution The indiscriminate killing spread to African Americans who had not been at the courthouse and continued into the night. All told, approximately 150 African Americans were killed including 48 who were murdered after the battle. Only three whites were killed, and few were injured in the largely one-sided battle of Colfax. On April 14, the state militia under the control of Republican Governor William Kellogg arrived at the scene and recorded the carnage. New Orleans police and federal troops also arrived in the next few days to reestablish order. A total of 97 white militia men were arrested and charged with violation of the U.S. Enforcement Act of 1870 (also known as the Ku Klux Klan Act). A handful of them were convicted but were eventually released in 1875 when the U.S. Supreme Court in United States v. Cruikshank ruled the Enforcement Act was unconstitutional. No one was ever arrested by the state of Louisiana or by intimidated local officials. - See more at: http://www.blackpast.org/aah/colfax-massacre-1873#sthash.wxjI1C3D.dpuf

U.S. v. Cruikshank, 92 U.S. 542 (1875)

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows:——

> 'That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed $5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States.' 16 Stat. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether 'the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States.'

The general charge in the first eight counts is that of 'banding,' and in the second eight, that of 'conspiring' together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges 'granted and secured' to them 'in common with all other good citizens of the United States by the constitution and laws of the United States.'

The offences provided for by the statute in question do not consist in the mere 'banding' or 'conspiring' of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-House Cases*, 16 Wall. 74.

Citizens are the members of the political community to which they belong. They are the people

who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason, the people of the United States, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty' to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the pepole. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a State, it may be an offence against the United States and the State: the United States, because it discredits the coin; and the State, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their 'lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.' The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons* v. *Ogden*, id. 203, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging 'the right of the people to assemble and to petition the government for a redress of grievances.' This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone. *Barron* v. *The City of Baltimore*, 7 Pet. 250; *Lessee of Livingston* v. *Moore*, id. 551; *Fox* v. *Ohio*, 5 How. 434; *Smith* v. *Maryland*, 18 id. 76; *Withers* v. *Buckley*, 20 id. 90; *Pervear* v. *The Commonwealth*, 5 Wall. 479; *Twitchell* v. *The Commonwealth*, 7 id. 321; *Edwards* v. *Elliott*, 21 id. 557. It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in *Twitchell* v. *The Commonwealth*, 7 Wall. 325, 'the scope and application of these amendments are no longer subjects of discussion here.' They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of,

and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York* v. *Miln*, 11 Pet. 139, the 'powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,' 'not surrendered or restrained' by the Constituton of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and liberty of person without due process of law.' This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia* v. *Okely*, 4 Wheat. 244, it secures 'the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in 'the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said

State of Louisiana and the United States, for the protection of the persons and property of said white citizens.' There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

Another objection is made to these counts, that they are too vague and uncertain. This will be considered hereafter, in connection with the same objection to other counts.

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored, 'in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid.' In *Minor* v. *Happersett*, 21 Wall. 162, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States* v. *Reese et al., supra*, p. 214, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the lat has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Every thing essential must be charged positively, and not inferentially. The

defect here is not in form, but in substance.

The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted 'at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law.' There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duly in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (art. 4, sect. 4); but it applies to no case like this.

We are, therefore, of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. The intent charged in the fifth and thirteenth is 'to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana,' 'for the reason that they, . . . being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof;' and in the eighth and sixteenth, to hinder and prevent them 'in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States.' The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. The statute provides for the punishment of those who conspire 'to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.' These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every, each, all, and singular' the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States* v. *Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth

the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States* v. *Cook*, 17 Wall. 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. *State* v. *Parker*, 43 N. H. 83; *State* v. *Keach*, 40 Vt. 118; *Alderman* v. *The People*, 4 Mich. 414; *State* v. *Roberts*, 34 Me. 32. In Maine, it is an offence for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison (*State* v. *Roberts*); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been 'unlawfully and wickedly to commit each, every, all, and singular the crimes punishable by imprisonment in the State prison.' All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appears from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offence alleged.

But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them

The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.

MR. JUSTICE CLIFFORD dissenting.[Omitted.]

4. Civil suits to reform police departments.

Rizzo v. Goode, 423 U.S. 362 (1976)

Mr. Justice REHNQUIST delivered the opinion of the Court.

The District Court for the Eastern District of Pennsylvania, after parallel trials of separate actions1 filed in 1970, entered an order in 1973 requiring petitioners "to submit to (the District) Court for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct" in accordance with a comprehensive opinion filed together with the order. The proposed program, negotiated between petitioners and respondents for the purpose of complying with the order, was incorporated six months later into a final judgment. Petitioner City Police Commissioner was thereby required, inter alia, to put into force a directive governing the manner by which citizens' complaints against police officers should henceforth be handled by the department.2 The Court of Appeals for the Third Circuit, upholding the District Court's finding that the existing procedures for handling citizen complaints were "inadequate," affirmed the District Court's choice of equitable relief: "The revisions were . . . ordered because they appeared to have the potential for prevention of future police misconduct." 506 F.2d 542, 548 (1974). We granted certiorari to consider petitioners' claims that the judgment of the District Court represents an unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions. We find ourselves substantially in agreement with these claims, and we therefore reverse the judgment of the Court of Appeals.

I

The central thrust of respondents' efforts in the two trials was to lay a foundation for equitable intervention, in one degree or another, because of an assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers. This mistreatment was said to have been directed against minority citizens in particular and against all Philadelphia residents in general. The named individual and group respondents were certified to represent these two classes. The principal petitioners here the Mayor, the City Managing Director, and the Police Commissioner were charged with conduct ranging from express authorization or encouragement of this mistreatment to failure to act in a manner so as to assure that it would not recur in the future.

Hearing some 250 witnesses during 21 days of hearings, the District Court was faced with a staggering amount of evidence; each of the 40-odd incidents might alone have been the piece de resistance of a short, separate trial. The District Court carefully and conscientiously resolved

often sharply conflicting testimony, and made detailed findings of fact,3 which both sides now accept, with respect to eight of the incidents presented by the Goode respondents and with respect to 28 of those presented by COPPAR.4

The principal antagonists in the eight incidents recounted in Goode were Officers DeFazio and D'Amico, members of the city's "Highway Patrol" force. They were not named as parties to the action. The District Court found the conduct of these officers to be violative of the constitutional rights of the citizen complainants in three5 of the incidents, and further found that complaints to the police Board of Inquiry had resulted in one case in a relatively mild five-day suspension and in another case a conclusion that there was no basis for disciplinary action.

In only two of the 28 incidents recounted in COPPAR which ranged in time from October 1969 to October 1970) did the District Court draw an explicit conclusion that the police conduct amounted to a deprivation of a federally secured right; it expressly found no police misconduct whatsoever in four of the incidents; and in one other the departmental policy complained of was subsequently changed. As to the remaining 21, the District Court did not proffer a comment on the degree of misconduct that had occurred: whether simply improvident, illegal under police regulations or state law, or actually violative of the individual's constitutional rights. Respondents' brief asserts that of this latter group, the facts as found in 14 of them "reveal (federal) violations."6 While we think that somewhat of an overstatement, we accept it, arguendo, and thus take it as established that, insofar as the COPPAR record reveals, there were 16 incidents occurring in the city of Philadelphia over a year's time in which numbers of police officers violated citizens' constitutional rights. Additionally, the District Court made reference to citizens' complaints to the police in seven of those 16; in four of which, involving conduct of constitutional dimension, the police department received complaints but ultimately took no action against the offending officers.

The District Court made a number of conclusions of law, not all of which are relevant to our analysis. It found that the evidence did not establish the existence of any policy on the part of the named petitioners to violate the legal and constitutional rights of the plaintiff classes, but it did find that evidence of departmental procedure indicated a tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct. It found that as to the larger plaintiff class, the residents of Philadelphia, only a small percentage of policemen commit violations of their legal and constitutional rights, but that the frequency with which such violations occur is such that "they cannot be dismissed as rare, isolated instances." COPPAR v. Rizzo, 357 F. Supp. 1289, 1319 (1973). In the course of its opinion, the District Court commented:

> "In the course of these proceedings, much of the argument has been directed toward the proposition that courts should not attempt to supervise the functioning of the police department. Although, contrary to the defendants' assertions, the Court's legal power to do just that is firmly established, . . . I am not persuaded that any such drastic remedy is called for, at least initially, in the present cases." Id., at 1320.

The District Court concluded by directing petitioners to draft, for the court's approval, "a comprehensive program for dealing adequately with civilian complaints", to be formulated along the following "guidelines" suggested by the court:

> "(1) Appropriate revision of police manuals and rules of procedure spelling out in some detail, in simple language, the 'dos and don'ts' of permissible conduct in dealing with civilians (for example, manifestations of racial bias, derogatory remarks, offensive language, etc.; unnecessary damage to property and other unreasonable conduct in executing search warrants; limitations on pursuit of persons charged only with summary offenses; recording and processing civilian complaints, etc.). (2) Revision of procedures for processing complaints against police, including (a) ready availability of forms for use by civilians in lodging complaints against police officers; (b) a screening procedure for eliminating frivolous complaints; (c) prompt and adequate investigation of complaints; (d) adjudication of nonfrivolous complaints by an impartial individual or body, insulated so far as practicable from chain of command pressures, with a fair opportunity afforded the complainant to present his complaint, and to the police officer to present his defense; and (3) prompt notification to the concerned parties, informing them of the outcome." Id., at 1321.

While noting that the "guidelines" were consistent with "generally recognized minimum standards" and imposed "no substantial burdens" on the police department, the District Court emphasized that respondents had no constitutional right to improved police procedures for handling civilian complaints. But given that violations of constitutional rights of citizens occur in "unacceptably" high numbers, and are likely to continue to occur, the court-mandated revision was a "necessary first step" in attempting to prevent future abuses. Ibid. On petitioners' appeal the Court of Appeals affirmed.

II

These actions were brought, and the affirmative equitable relief fashioned, under the Civil Rights Act of 1871, 42 U.S.C. § 1983. It provides that "(e) very person who, under color of (law) subjects, or causes to be subjected, any . . . person within the jurisdiction (of the United States) to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law (or) suit in equity . . . ." The plain words of the statute impose liability whether in the form of payment of redressive damages or being placed under an injunction only for conduct which "subjects, or causes to be subjected" the complainant to a deprivation of a right secured by the Constitution and laws.

The findings of fact made by the District Court at the conclusion of these two parallel trials in sharp contrast to that which respondents sought to prove with respect to petitioners disclose a central paradox which permeates that court's legal conclusions. Individual police officers not named as parties to the action were found to have violated the constitutional rights of particular individuals, only a few of whom were parties plaintiff. As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the

adoption of any plan or policy by petitioners express or otherwise showing their authorization or approval of such misconduct. Instead, the sole causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, not with respect to them, but as to the members of the classes they represented. In sum, the genesis of this lawsuit a heated dispute between individual citizens and certain policemen has evolved into an attempt by the federal judiciary to resolve a "controversy" between the entire citizenry of Philadelphia and the petitioning elected and appointed officials over what steps might, in the Court of Appeals' words, "(appear) to have the potential for prevention of future police misconduct." 506 F.2d, at 548. The lower courts have, we think, overlooked several significant decisions of this Court in validating this type of litigation and the relief ultimately granted.

A

We first of all entertain serious doubts whether on the facts as found there was made out the requisite Art. III case or controversy between the individually named respondents and petitioners. In O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), the individual respondents, plaintiffs in the District Court, alleged that petitioners, a county magistrate and judge, had embarked on a continuing, intentional practice of racially discriminatory bond setting, sentencing, and assessing of jury fees. No specific instances involving the individual respondents were set forth in the prayer for injunctive relief against the judicial officers. And even though respondents' counsel at oral argument had stated that some of the named respondents had in fact "suffered from the alleged unconstitutional practices," the Court concluded that "(p)ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects." Id., at 495-496, 94 S.Ct., at 676. The Court further recognized that while "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury", the attempt to anticipate under what circumstances the respondents there would be made to appear in the future before petitioners "takes us into the area of speculation and conjecture." Id., at 496-497, 94 S.Ct., at 676. These observations apply here with even more force, for the individual respondents' claim to "real and immediate" injury rests not upon what the named petitioners might do to them in the future such as set a bond on the basis of race but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures. This hypothesis is even more attenuated than those allegations of future injury found insufficient in O'Shea to warrant invocation of federal jurisdiction. Thus, insofar as the individual respondents were concerned, we think they lacked the requisite "personal stake in the outcome," Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), i. e., the order overhauling police disciplinary procedures.

B

That conclusion alone might appear to end the matter, for O'Shea also noted that "if none of the named plaintiffs . . . establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class" which they purport to

represent. 414 U.S., at 494, 94 S.Ct., at 675. But, unlike O'Shea, this case did not arise on the pleadings. The District Court, having certified the plaintiff classes,7 bridged the gap between the facts shown at trial and the classwide relief sought with an unprecedented theory of § 1983 liability. It held that the classes' § 1983 actions for equitable relief against petitioners were made out on a showing of an "unacceptably high" number of those incidents of constitutional dimension some 20 in all occurring at large in a city of three million inhabitants, with 7,500 policemen.

Nothing in Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), the only decision of this Court cited by the District Court,8 or any other case from this Court, supports such an open-ended construction of § 1983. In Hague, the pattern of police misconduct upon which liability and injunctive relief were grounded was the adoption and enforcement of deliberate policies by the defendants there (including the Mayor and the Chief of Police) of excluding and removing the plaintiff's labor organizers and forbidding peaceful communication of their views to the citizens of Jersey City. These policies were implemented "by force and violence" on the part of individual policemen. There was no mistaking that the defendants proposed to continue their unconstitutional policies against the members of this discrete group.

Likewise, in Allee v. Medrano, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974), relied upon by the Court of Appeals and respondents here, we noted:

> "The complaint charged that the enjoined conduct was but one part of a single plan by the defendants, and the District Court found a pervasive pattern of intimidation in which the law enforcement authorities sought to suppress appellees' constitutional rights. In this blunderbuss effort the police not only relied on statutes . . . found constitutionally deficient, but concurrently exercised their authority under valid laws in an unconstitutional manner." Id., at 812, 94 S.Ct., at 2198 (emphasis added).

The numerous incidents of misconduct on the part of the named Texas Rangers, as found by the District Court and summarized in this Court's opinion, established beyond peradventure not only a "persistent pattern" but one which flowed from an intentional, concerted, and indeed conspiratorial effort to deprive the organizers of their First Amendment rights and place them in fear of coming back. Id., at 814-815, 94 S.Ct., at 2199-2200.

Respondents stress that the District Court not only found an "unacceptably high" number of incidents but held, as did the Court of Appeals, that "when a pattern of frequent police violations of rights is shown, the law is clear that injunctive relief may be granted." 357 F.Supp., at 1318 (emphasis added). However, there was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere; indeed, the District Court found "that the problems disclosed by the record . . . are fairly typical of (those) afflicting police departments in major urban areas." Ibid. Thus, invocation of the word "pattern" in a case where, unlike Hague and Medrano, the defendants are not causally linked to it, is but a distant echo of the findings in those cases. The focus in Hague and Medrano was not simply on the number of violations which occurred but on the common thread running through them: a "pervasive pattern

of intimidation" flowing from a deliberate plan by the named defendants to crush the nascent labor organizations. Medrano, supra, 416 U.S., at 812, 94 S.Ct., at 2198. The District Court's unadorned finding of a statistical pattern is quite dissimilar to the factual settings of these two cases.

The theory of liability underlying the District Court's opinion, and urged upon us by respondents, is that even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners' failure to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in Hague and Medrano. Respondents posit a constitutional "duty" on the part of petitioners (and a corresponding "right" of the citizens of Philadelphia) to "eliminate" future police misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions, and we decline to do so now.

Respondents claim that the theory of liability embodied in the District Court's opinion is supported by desegregation cases such as Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). But this case, and the long line of precedents cited therein, simply reaffirmed the body of law originally enunciated in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954):

> "Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings.
>
> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

Swann, supra, 402 U.S., at 11, 15, 91 S.Ct., at 1274.

Respondents, in their effort to bring themselves within the language of Swann, ignore a critical factual distinction between their case and the desegregation cases decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights. Those against whom injunctive relief was directed in cases such as Swann and Brown were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their own conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent

classes of any rights secured under the Constitution. Under the well-established rule that federal "judicial powers may be exercised only on the basis of a constitutional violation," Swann, supra, 402 U.S., at 16, 91 S.Ct., at 1276, this case presented no occasion for the District Court to grant equitable relief against petitioners.

C

Going beyond considerations concerning the existence of a live controversy and threshold statutory liability, we must address an additional and novel claim advanced by respondent classes. They assert that given the citizenry's "right" to be protected from unconstitutional exercises of police power, and the "need for protection from such abuses," respondents have a right to mandatory equitable relief in some form when those in supervisory positions do not institute steps to reduce the incidence of unconstitutional police misconduct.9 The scope of federal equity power, it is proposed, should be extended to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees. However, on the facts of this case, not only is this novel claim quite at odds with the settled rule that in federal equity cases "the nature of the violation determines the scope of the remedy," ibid., but important considerations of federalism are additional factors weighing against it. Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." Stefanelli v. Minard, 342 U.S. 117, 120, 72 S.Ct. 118, 120, 96 L.Ed. 138 (1951), quoted in O'Shea v. Littleton, 414 U.S., at 500, 94 S.Ct., at 678.

Section 1983 by its terms confers authority to grant equitable relief as well as damages, but its words "allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding." Giles v. Harris, 189 U.S. 475, 486, 23 S.Ct. 639, 642, 47 L.Ed. 909 (1903) (Holmes, J.). Even in an action between private individuals, it has long been held that an injunction is "to be used sparingly, and only in a clear and plain case." Irwin v. Dixion, 9 How. 10, 33, 13 L.Ed. 25 (1850). When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs,' Cafeteria and Restaurant Workers Union Local 473 A.F.L.-C.I.O. v. McElroy, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961)," quoted in Sampson v. Murray, 415 U.S. 61, 83, 94 S.Ct. 937, 950, 39 L.Ed.2d 166 (1974). The District Court's injunctive order here, significantly revising the internal procedures of the Philadelphia police department, was indisputably a sharp limitation on the department's "latitude in the 'dispatch of its own internal affairs.' "

When the frame of reference moves from a unitary court system, governed by the principles just stated, to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief. Doran v. Salem Inn, Inc., 422 U.S. 922, 928, 95 S.Ct. 2561, 2566, 45 L.Ed.2d 648 (1975).

So strongly has Congress weighted this factor of federalism in the case of a state criminal proceeding that it has enacted 28 U.S.C. § 2283 to actually deny to the district courts the authority to issue injunctions against such proceedings unless the proceedings come within narrowly specified exceptions. Even though an action brought under § 1983, as this was, is within those exceptions, Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), the underlying notions of federalism which Congress has recognized in dealing with the relationships between federal and state courts still have weight. Where an injunction against a criminal proceeding is sought under § 1983, "the principles of equity, comity, and federalism" must nonetheless restrain a federal court. 407 U.S., at 243, 92 S.Ct., at 2162.

But even where the prayer for injunctive relief does not seek to enjoin the state criminal proceedings themselves, we have held that the principles of equity nonetheless militate heavily against the grant of an injunction except in the most extraordinary circumstances. In O'Shea v. Littleton, supra, 414 U.S., at 502, 94 S.Ct., at 679, we held that "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted." And the same principles of federalism may prevent the injunction by a federal court of a state civil proceeding once begun. Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as petitioners here. Indeed, in the recent case of Mayor v. Educational Equality League, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974), in which private individuals sought injunctive relief against the Mayor of Philadelphia, we expressly noted the existence of such considerations, saying: "There are also delicate issues of federal-state relationships underlying this case." Id., at 615, 94 S.Ct., at 1331.

Contrary to the District Court's flat pronouncement that a federal court's legal power to "supervise the functioning of the police department . . . is firmly established," it is the foregoing cases and principles that must govern consideration of the type of injunctive relief granted here. When it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts.

For the foregoing reasons the judgment of the Court of Appeals which affirmed the decree of the District Court is

Reversed.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice BLACKMUN with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

To be sure, federal-court intervention in the daily operation of a large city's police department, as the Court intimates, is undesirable and to be avoided if at all possible. The Court appropriately observes, however, ante, at 602, that what the Federal District Court did here was to engage in a careful and conscientious resolution of often sharply conflicting testimony and to make detailed findings of fact, now accepted by both sides, that attack the problem that is the subject of the respondents' complaint. The remedy was one evolved with the defendant officials' assent, reluctant though that assent may have been, and it was one that the police department concededly could live with. Indeed, the District Court, in its memorandum of December 18, 1973, stated that "the resolution of all the disputed items was more nearly in accord with the defendants' position than with the plaintiffs' position," and that the relief contemplated by the earlier orders of March 14, 1973, see COPPAR v. Rizzo, 357 F.Supp. 1289 (E.D. Pa.), "did not go beyond what the defendants had always been willing to accept." App. 190a. No one, not even this Court's majority, disputes the apparent efficacy of the relief or the fact that it effectuated a betterment in the system and should serve to lessen the number of instances of deprival of constitutional rights of members of the respondent classes. What is worrisome to the Court is abstract principle, and, of course, the Court has a right to be concerned with abstract principle that, when extended to the limits of logic, may produce untoward results in other circumstances on a future day. See Hudson County Water Co. v. McCarter, 209 U.S. 349, 355, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908) (Holmes, J.).

But the District Court here, with detailed, careful, and sympathetic findings, ascertained the existence of violations of citizens' constitutional rights, of a pattern of that type of activity, of its likely continuance and recurrence, and of an official indifference as to doing anything about it. The case, accordingly, plainly fits the mood of Allee v. Medrano, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974), and Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), despite the observation, 357 F.Supp. at 1319, that the evidence "does not establish the existence of any overall Police Department policy to violate the legal and constitutional rights of citizens, nor to discriminate on the basis of race" (emphasis supplied). I am not persuaded that the Court's attempt to distinguish those cases from this one is at all successful. There must be federal relief available against persistent deprival of federal constitutional rights even by (or, perhaps I should say, particularly by) constituted authority on the state side. . . .

The Court today appears to assert that a state official is not subject to the strictures of 42 U.S.C. § 1983 unless he directs the deprivation of constitutional rights. Ante, at 606-607. In so holding, it seems to me, the Court ignores both the language of § 1983 and the case law interpreting that language. Section 1983 provides a cause of action where a person acting under color of state law "subjects, or causes to be subjected," any other person to a deprivation of rights secured by the Constitution and laws of the United States. By its very words, § 1983 reaches not only the acts of an official, but also the acts of subordinates for whom he is responsible. In Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the Court said that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," id., at 187, 81 S.Ct., at 484, and:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." Id., at 180, 81 S.Ct., at 480. (Emphasis added.)

I do not find it necessary to reach the question under what circumstances failure to supervise will justify an award of money damages, or whether an injunction is authorized where the superior has no consciousness of the wrongs being perpetrated by his subordinates.1 It is clear that an official may be enjoined from consciously permitting his subordinates, in the course of their duties, to violate the constitutional rights of persons with whom they deal. In rejecting the concept that the official may be responsible under § 1983, the Court today casts aside reasoned conclusions to the contrary reached by the Courts of Appeals of 10 Circuits.2

In the instant case, the District Court found that although there was no departmental policy of racial discrimination, "such violations do occur, with such frequency that they cannot be dismissed as rare, isolated instances; and that little or nothing is done by the city authorities to punish such infractions, or to prevent their recurrence," 357 F.Supp., at 1319, and that it "is the policy of the department to discourage the filing of such complaints, to avoid or minimize the consequences of proven police misconduct, and to resist disclosure of the final disposition of such complaints." Id., at 1318. Needless to say, petitioners were under a statutory duty to supervise their subordinates. See Philadelphia Home Rule Charter, c2, § 5-200. I agree with the District Court that its findings are sufficient to bring petitioners within the ambit of § 1983.

Further, the applicability of § 1983 to controlling officers allows the district courts to avoid the necessity of injunctions issued against individual officers and the consequent continuing supervision by the federal courts of the day-to-day activities of the men on the street. The District Court aptly stated:

> "Respect and admiration for the performance of the vast majority of police officers cannot justify refusal to confront the reality of the abuses which do exist. But deference to the essential role of the police in our society does mandate that intrusion by the courts into this sensitive area should be limited, and should be directed toward insuring that the police themselves are encouraged to remedy the situation." 357 F.Supp., at 1320.

I would regard what was accomplished in this case as one of those rightly rare but nevertheless justified instances just as Allee and Hague of federal-court "intervention" in a state or municipal executive area. The facts, the deprival of constitutional rights, and the pattern are all proved in sufficient degree. And the remedy is carefully delineated, worked out within the administrative structure rather then superimposed by edict upon it, and essentially, and concededly, "livable." In the City of Brotherly Love or in any other American city no less should be expected. It is a matter of regret that the Court sees fit to nullify what so meticulously and thoughtfully has been evolved to satisfy an existing need relating to constitutional rights that we cherish and hold dear.

5. STOP AND FRISK:

Floyd v. City of New York, 959 F. Supp.2d 540 (2013) (excerpts—footnotes all omitted)

SHIRA A. SCHEINDLIN, District Judge: . . .

I. INTRODUCTION . . .

This case is about the tension between liberty and public safety in the use of a proactive policing tool called "stop and frisk." The New York City Police Department ("NYPD") made 4.4 million stops between January 2004 and June 2012. Over 80% of these 4.4 million stops were of blacks or Hispanics. In each of these stops a person's life was interrupted. The person was detained and questioned, often on a public street. More than half of the time the police subjected the person to a frisk.

Plaintiffs—blacks and Hispanics who were stopped—argue that the NYPD's use of stop and frisk violated their constitutional rights in two ways: (1) they were stopped without a legal basis in violation of the Fourth Amendment, and (2) they were targeted for stops because of their race in violation of the Fourteenth Amendment. Plaintiffs do not seek to end the use of stop and frisk. Rather, they argue that it must be reformed to comply with constitutional limits. Two such limits are paramount here: first, that all stops be based on "reasonable suspicion" as defined by the Supreme Court of the United States;1 and second, that stops be conducted in a racially neutral manner. . . .

The Supreme Court has recognized that "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security."6 In light of the very active and public debate on the issues addressed in this Opinion—and the passionate positions taken by both sides—it is important to recognize the human toll of unconstitutional stops. While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police. This alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone.

II. EXECUTIVE SUMMARY

Plaintiffs assert that the City, and its agent the NYPD, violated both the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In order to hold a municipality liable for the violation of a constitutional right, plaintiffs "must

prove that ‘action pursuant to official municipal policy’ caused the alleged constitutional injury.”8 “Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.”9

The Fourth Amendment protects all individuals against unreasonable searches or seizures.10 The Supreme Court has held that the Fourth Amendment permits the police to “stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.”11 “Reasonable suspicion is an objective standard; hence, the subjective intentions or motives of the officer making the stop are irrelevant.”12 The test for whether a stop has taken place in the context of a police encounter is whether a reasonable person would have felt free to terminate the encounter.13 “ ‘[T]o proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.’ ”14

The Equal Protection Clause of the Fourteenth Amendment guarantees to every person the equal protection of the laws. It prohibits intentional discrimination based on race. Intentional discrimination can be proved in several ways, two of which are relevant here. A plaintiff can show: (1) that a facially neutral law or policy has been applied in an intentionally discriminatory manner; or (2) that a law or policy expressly classifies persons on the basis of race, and that the classification does not survive strict scrutiny. Because there is rarely direct proof of discriminatory intent, circumstantial evidence of such intent is permitted. “The impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point.”15

The following facts, discussed in greater detail below, are uncontested:16

• Between January 2004 and June 2012, the NYPD conducted over 4.4 million Terry stops.

• The number of stops per year rose sharply from 314,000 in 2004 to a high of 686,000 in 2011.

• 52% of all stops were followed by a protective frisk for weapons. A weapon was found after 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.

• 8% of all stops led to a search into the stopped person’s clothing, ostensibly based on the officer feeling an object during the frisk that he suspected to be a weapon, or immediately perceived to be contraband other than a weapon. In 9% of these searches, the felt object was in fact a weapon. 91% of the time, it was not. In 14% of these searches, the felt object was in fact contraband. 86% of the time it was not.

• 6% of all stops resulted in an arrest, and 6% resulted in a summons. The *559 remaining 88% of the 4.4 million stops resulted in no further law enforcement action.

• In 52% of the 4.4 million stops, the person stopped was black, in 31% the person was Hispanic, and in 10% the person was white.

• In 2010, New York City's resident population was roughly 23% black, 29% Hispanic, and 33% white.

• In 23% of the stops of blacks, and 24% of the stops of Hispanics, the officer recorded using force. The number for whites was 17%.

• Weapons were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites.

• Contraband other than weapons was seized in 1.8% of the stops of blacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites.

• Between 2004 and 2009, the percentage of stops where the officer failed to state a specific suspected crime rose from 1% to 36%.

Both parties provided extensive expert submissions and testimony that is also discussed in detail below.17 Based on that testimony and the uncontested facts, I have made the following findings with respect to the expert testimony.

With respect to plaintiffs' Fourth Amendment claim,18 I begin by noting the inherent difficulty in making findings and conclusions regarding 4.4 million stops. Because it is impossible to individually analyze each of those stops, plaintiffs' case was based on the imperfect information contained in the NYPD's database of forms ("UF–250s") that officers are required to prepare after each stop. The central flaws in this database all skew toward underestimating the number of unconstitutional stops that occur: the database is incomplete, in that officers do not prepare a UF–250 for every stop they make; it is one-sided, in that the UF–250 only records the officer's version of the story; the UF–250 permits the officer to merely check a series of boxes, rather than requiring the officer to explain the basis for her suspicion; and many of the boxes on the form are inherently subjective and vague (such as "furtive movements"). Nonetheless, the analysis of the UF–250 database reveals that at least 200,000 stops were made without reasonable suspicion.

The actual number of stops lacking reasonable suspicion was likely far higher, based on the reasons stated above, and the following points: (1) Dr. Fagan was unnecessarily conservative in classifying stops as "apparently unjustified." For example, a UF–250 on which the officer checked only Furtive Movements (used on roughly 42% of forms) and High Crime Area (used on roughly 55% of forms) is not classified as "apparently unjustified." The same is true when only Furtive Movements and Suspicious Bulge (used on roughly 10% of forms) are checked. Finally, if an officer checked only the box marked "other" on either side of the form (used on roughly 26% of forms), Dr. Fagan categorized this as "ungeneralizable" rather than "apparently unjustified." (2) Many UF–250s did not identify any suspected crime (36% of all UF–250s in

2009). (3) The rate of arrests arising from stops is low (roughly 6%), and the yield of seizures of guns or other contraband is even lower (roughly 0.1% and 1.8% respectively). (4) "Furtive Movements," "High Crime Area," and "Suspicious Bulge" are vague and subjective terms. Without an accompanying narrative explanation for the stop, these *560 checkmarks cannot reliably demonstrate individualized reasonable suspicion.

With respect to plaintiffs' Fourteenth Amendment claim,19 I reject the testimony of the City's experts that the race of crime suspects is the appropriate benchmark for measuring racial bias in stops. The City and its highest officials believe that blacks and Hispanics should be stopped at the same rate as their proportion of the local criminal suspect population. But this reasoning is flawed because the stopped population is overwhelmingly innocent—not criminal. There is no basis for assuming that an innocent population shares the same characteristics as the criminal suspect population in the same area. Instead, I conclude that the benchmark used by plaintiffs' expert—a combination of local population demographics and local crime rates (to account for police deployment) is the most sensible.

Based on the expert testimony I find the following: (1) The NYPD carries out more stops where there are more black and Hispanic residents, even when other relevant variables are held constant. The racial composition of a precinct or census tract predicts the stop rate above and beyond the crime rate. (2) Blacks and Hispanics are more likely than whites to be stopped within precincts and census tracts, even after controlling for other relevant variables. This is so even in areas with low crime rates, racially heterogenous populations, or predominately white populations. (3) For the period 2004 through 2009, when any law enforcement action was taken following a stop, blacks were 30% more likely to be arrested (as opposed to receiving a summons) than whites, for the same suspected crime. (4) For the period 2004 through 2009, after controlling for suspected crime and precinct characteristics, blacks who were stopped were about 14% more likely—and Hispanics 9% more likely—than whites to be subjected to the use of force. (5) For the period 2004 through 2009, all else being equal, the odds of a stop resulting in any further enforcement action were 8% lower if the person stopped was black than if the person stopped was white. In addition, the greater the black population in a precinct, the less likely that a stop would result in a sanction. Together, these results show that blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites.

With respect to both the Fourth and Fourteenth Amendment claims, one way to prove that the City has a custom of conducting unconstitutional stops and frisks is to show that it acted with deliberate indifference to constitutional deprivations caused by its employees—here, the NYPD. The evidence at trial revealed significant evidence that the NYPD acted with deliberate indifference.20

As early as 1999, a report from New York's Attorney General placed the City on notice that stops and frisks were being conducted in a racially skewed manner. Nothing was done in response. In the years following this report, pressure was placed on supervisors to increase the number of stops. Evidence at trial revealed that officers have been pressured to make a certain number of stops and risk negative consequences if they fail to achieve the goal.21 Without a system to ensure that stops are justified, such pressure is a predictable formula for producing

unconstitutional stops. As one high ranking police official noted in 2010, this pressure, without a comparable emphasis on ensuring that the activities are legally justified, *561 "could result in an officer taking enforcement action for the purpose of meeting a quota rather than because a violation of the law has occurred."22

In addition, the evidence at trial revealed that the NYPD has an unwritten policy of targeting "the right people" for stops. In practice, the policy encourages the targeting of young black and Hispanic men based on their prevalence in local crime complaints.23 This is a form of racial profiling. While a person's race may be important if it fits the description of a particular crime suspect, it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group are criminals. The Equal Protection Clause does not permit race-based suspicion.

Much evidence was introduced regarding inadequate monitoring and supervision of unconstitutional stops. Supervisors routinely review the productivity of officers, but do not review the facts of a stop to determine whether it was legally warranted. Nor do supervisors ensure that an officer has made a proper record of a stop so that it can be reviewed for constitutionality. Deficiencies were also shown in the training of officers with respect to stop and frisk and in the disciplining of officers when they were found to have made a bad stop or frisk. Despite the mounting evidence that many bad stops were made, that officers failed to make adequate records of stops, and that discipline was spotty or non-existent, little has been done to improve the situation.

One example of poor training is particularly telling. Two officers testified to their understanding of the term "furtive movements." One explained that "furtive movement is a very broad concept," and could include a person "changing direction," "walking in a certain way," "[a]cting a little suspicious," "making a movement that is not regular," being "very fidgety," "going in and out of his pocket," "going in and out of a location," "looking back and forth constantly," "looking over their shoulder," "adjusting their hip or their belt," "moving in and out of a car too quickly," "[t]urning a part of their body away from you," "[g]rabbing at a certain pocket or something at their waist," "getting a little nervous, maybe shaking," and "stutter[ing]."24 Another officer explained that "usually" a furtive movement is someone "hanging out in front of [a] building, sitting on the benches or something like that" and then making a "quick movement," such as "bending down and quickly standing back up," "going inside the lobby ... and then quickly coming back out," or "all of a sudden becom[ing] very nervous, very aware."25 If officers believe that the behavior described above constitutes furtive movement that justifies a stop, then it is no surprise that stops so rarely produce evidence of criminal activity.

I now summarize my findings with respect to the individual stops that were the subject of testimony at trial.26 Twelve plaintiffs testified regarding nineteen stops. In twelve of those stops, both the plaintiffs and the officers testified. In seven stops no officer testified, either because the officers could not be identified or because the officers dispute that the stop ever occurred. I find that nine of the stops and frisks were unconstitutional—that is, they were not based on reasonable suspicion. I also find that while five other stops were constitutional, the frisks following those stops were unconstitutional. Finally, I find that plaintiffs have failed to prove an

unconstitutional stop (or frisk) in five of the nineteen stops. The individual stop testimony corroborated much of the evidence about the NYPD's policies and practices with respect to carrying out and monitoring stops and frisks. . . .

In making these decisions I note that evaluating a stop in hindsight is an imperfect procedure. Because there is no contemporaneous recording of the stop (such as could be achieved through the use of a body-worn camera), I am relegated to finding facts based on the often conflicting testimony of eyewitnesses. This task is not easy, as every witness has an interest in the outcome of the case, which may consciously or unconsciously affect the veracity of his or her testimony. Nonetheless, a judge is tasked with making decisions and I judged the evidence of each stop to the best of my ability. I am also aware that a judge deciding whether a stop is constitutional, with the time to reflect and consider all of the evidence, is in a far different position than officers on the street who must make split-second decisions in situations that may pose a danger to themselves or others. I respect that police officers have chosen a profession of public service involving dangers and challenges with few parallels in civilian life.27

In conclusion, I find that the City is liable for violating plaintiffs' Fourth and Fourteenth Amendment rights. The City acted with deliberate indifference toward the NYPD's practice of making unconstitutional stops and conducting unconstitutional frisks. Even if the City had not been deliberately indifferent, the NYPD's unconstitutional practices were sufficiently widespread as to have the force of law. In addition, the City adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data. This has resulted in the disproportionate and discriminatory stopping of blacks and Hispanics in violation of the Equal Protection Clause. Both statistical and anecdotal evidence showed that minorities are indeed treated differently than whites. For example, once a stop is made, blacks and Hispanics are more likely to be subjected to the use of force than whites, despite the fact that whites are more likely to be found with weapons or contraband. I also conclude that the City's highest officials have turned a blind eye to the evidence that officers are conducting stops in a racially discriminatory manner. In their zeal to defend a policy that they believe to be effective, they have willfully ignored overwhelming proof that the policy of targeting "the right people" is racially discriminatory and therefore violates the United States Constitution. One NYPD official has even suggested that it is permissible to stop racially defined groups just to instill fear in them that they are subject to being stopped at any time for any reason—in the hope that this fear will deter them from carrying guns in the streets. The goal of deterring crime is laudable, but this method of doing so is unconstitutional.

I recognize that the police will deploy their limited resources to high crime areas. This benefits the communities where the need for policing is greatest. But the police are not permitted to target people for stops based on their race. Some may worry about the implications of this decision. They may wonder: if the police believe that a particular group of people is disproportionately responsible for crime in one area, why should the police not target that group with increased stops? Why should it matter if the group is defined in part by race?28 Indeed, there are contexts in which the Constitution permits considerations of race in law enforcement operations.29 What is clear, however, is that the Equal Protection Clause prohibits the practices described in this case. A police department may not target a racially defined group for stops in general—that is,

for stops based on suspicions of general criminal wrongdoing—simply because members of that group appear frequently in the police department's suspect data.30 The Equal Protection Clause does not permit the police to target a racially defined group as a whole because of the misdeeds of some of its members.

To address the violations that I have found, I shall order various remedies including, but not limited to, an immediate change to certain policies and activities of the NYPD, a trial program requiring the use of body-worn cameras in one precinct per borough, a community-based joint remedial process to be conducted by a court-appointed facilitator, and the appointment of an independent monitor to ensure that the NYPD's conduct of stops and frisks is carried out in accordance with the Constitution and the principles enunciated in this Opinion, and to monitor the NYPD's compliance with the ordered remedies. . . .

C. Equal Protection Under the Fourteenth Amendment

The Fourteenth Amendment's Equal Protection Clause declares that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."84 The Clause "is essentially a direction that all persons similarly situated should be treated alike."85 It prohibits intentional discrimination on the basis of race, but not government action that merely has a disproportionate racial impact.86

The Second Circuit has outlined "several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause."87 First, "[a] plaintiff could point to a law or policy that 'expressly classifies persons on the basis of race.' "88 Second, "a plaintiff could identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner."89 Third, "[a] plaintiff could also allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus."90 In none of these three cases is a plaintiff "obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection."91

In order to show intentional discrimination under the second and third models of pleading above, plaintiffs need not prove that the " 'challenged action rested solely on racially discriminatory purposes,' "92 or even that a discriminatory purpose "was the 'dominant' or 'primary' one."93 Rather, plaintiffs must prove that "a discriminatory purpose has been a motivating factor" in the challenged action.94 That is, plaintiffs must show that those who carried out the challenged action "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."95 As the Supreme Court and the Second Circuit have explained:

> Because discriminatory intent is rarely susceptible to direct proof, litigants may make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point."96

The consequences of government action are sometimes evidence of the government's intent: "proof of discriminatory intent must necessarily usually rely on objective factors.... The inquiry is practical. What a legislature or any official entity is 'up to' may be plain from the results its *572 actions achieve, or the results they avoid."97 " 'Once it is shown that a decision was motivated at least in part by a racially discriminatory purpose, the burden shifts to the defendant to show that the same result would have been reached even without consideration of race.' "98 " 'If the defendant comes forward with no such proof or if the trier of fact is unpersuaded that race did not contribute to the outcome of the decision, the equal protection claim is established.' "99 . . .

3. The Fourteenth Amendment Claim

a. Overview of Key Issues

The crux of plaintiffs' Fourteenth Amendment claim is that blacks and Hispanics are stopped more frequently than they would be if police officers did not discriminate based on race when deciding whom to stop. Assessing this claim required comparing statistics about rates of stops of blacks and Hispanics to "[a] standard, or point of reference, against which [those statistics] can be compared, assessed, measured or judged"—what is known in statistics as a "benchmark."170 In this case, the benchmark was meant to capture "what the racial distribution of the stopped pedestrians would have been if officers' stop decisions had been racially unbiased."171

Conclusions regarding racial bias drawn from statistics "may vary drastically based on which benchmark is used."172 As such, a central dispute between the experts regarding the Fourteenth Amendment claim was the appropriate benchmark for measuring racial bias in stops.

b. Competing Benchmarks

Each expert submitted voluminous reports and testified at trial in support of his choice of benchmark. Of necessity, I must simplify their very detailed and complex submissions and testimony to focus on the question at the heart of the parties' dispute: is there statistical evidence of racial discrimination in the NYPD's stop practices? With that caveat, I endeavor to summarize their differing benchmarks.

Dr. Fagan explained his choice of benchmark as follows:

[A] valid benchmark requires estimates of the supply of individuals of each racial or ethnic group who are engaged in the targeted behaviors and who are available to the police as potential targets for the exercise of their stop authority. Since police often target resources to the places where crime rates and risks are highest, and where populations are highest, some measure of population that is conditioned on crime rates is an optimal candidate for inclusion as a benchmark.173

Accordingly, Dr. Fagan's "analyses use both population and reported crime as benchmarks for understanding the racial distribution of police-citizen contacts."174 *584 While there is scholarly disagreement regarding the best benchmark to use in such measurements, none of the sources Drs. Smith and Purtell cited criticized the benchmark used by Dr. Fagan. In addition, at least one other study of a police department's stop patterns—a study of stop patterns in Los Angeles by Dr. Ian Ayres, the William K. Townsend Professor of Law at Yale Law School—used an "[a]lmost identical" benchmark to Dr. Fagan's.175

The City's experts, by contrast, used a benchmark consisting of the rates at which various races appear in suspect descriptions from crime victims—in other words, "suspect race description data."176 The City's experts assumed that if officers' stop decisions were racially unbiased, then the racial distribution of stopped pedestrians would be the same as the racial distribution of the criminal suspects in the area.177

I conclude that Dr. Fagan's benchmark is the better choice. The reason is simple and reveals a serious flaw in the logic applied by the City's experts: there is no basis for assuming that the racial distribution of stopped pedestrians will resemble the racial distribution of the local criminal population if the people stopped are not criminals. The City defends the fact that blacks and Hispanics represent 87% of the persons stopped in 2011 and 2012 by noting that "approximately 83% of all known crime suspects and approximately 90% of all violent crime suspects were Black and Hispanic."178 This might be a valid comparison if the people stopped were criminals, or if they were stopped based on fitting a specific suspect description. But there was insufficient evidence to support either conclusion. To the contrary, nearly 90% of the people stopped are released without the officer finding any basis for a summons or arrest,179 and only 13% of stops are based on fitting a specific suspect description.180 There is no reason to believe that the nearly 90% of people who are stopped and then subject to no further *585 enforcement action are criminals. As a result, there is no reason to believe that their racial distribution should resemble that of the local criminal population, as opposed to that of the local population in general. If the police are stopping people in a race-neutral way, then the racial composition of innocent people stopped should more or less mirror the racial composition of the areas where they are stopped, all other things being equal. Dr. Fagan's benchmark captures what the NYPD's stops would look like in the absence of racial discrimination: his use of local population data reflects who is available to be stopped in an area (assuming, as the evidence shows, that the overwhelming majority of stops are not of criminals), and his use of local crime rates reflects the fact that stops are more likely to take place in areas with higher crime rates.

By contrast, Dr. Smith rejected the assumption that 88% of those stopped were innocent. "[H]ow do we know ... [i]f they were utterly innocent [?]" Dr. Smith asked at trial. He then proposed a "hypothetical" in which "the stop prevents a crime."181 If one assumes that those stopped with no further enforcement action are nevertheless criminals, then it is natural to conclude, as Dr. Smith did, that a valid benchmark for measuring racial disparities in stops must "enable us to know who is committing the crime in [an] area."182 Thus, he concludes that the best benchmark for the population of people who will be stopped in the absence of racial discrimination is the local criminal population. As Dr. Smith testified, "the best proxy for the share of the population by race engaged in the targeted behaviors that lead officers to make Terry stops" is the

percentage of each racial category that appears in crime suspect data, or more precisely a combination of crime suspect data and arrestee data, because "[t]hat's what we know about who is committing crime."183

Based on this analysis, Dr. Smith concludes that the disproportionate stopping of black people can be explained by the disproportionately black composition of the pool of criminals.184 But even if all stops by the NYPD were based on reasonable suspicion—which is highly unlikely for reasons already stated—the low hit rate would undermine the assumption that the stopped people were in fact engaged in criminal activity, and thus members of the criminal population. The City failed to establish that a significant number of the approximately 3.9 million stops that resulted in no further enforcement action were stops of people who were about to commit, *586 but were prevented from committing, a crime.185 Dr. Smith's theory that a significant number of these stops resulted in the prevention of the suspected crime is pure speculation and not reliable.

Crime suspect data may serve as a reliable proxy for the pool of criminals exhibiting suspicious behavior. But there is no reason to believe that crime suspect data provides a reliable proxy for the pool of non-criminals exhibiting suspicious behavior. Because the overwhelming majority of people stopped fell into the latter category, there is no support for the City's position that crime suspect data provides a reliable proxy for the pool of people exhibiting suspicious behavior. Moreover, given my finding that a significant number of stops were not based on reasonable suspicion—and thus were stops drawn from the pool of non criminals not exhibiting suspicious behavior—the use of crime suspect data as a benchmark for the pool of people that would have been stopped in the absence of racial bias is even less appropriate.186

When confronted by plaintiffs' counsel with similar reasoning, Dr. Smith ultimately appeared willing to entertain the possibility that black people, even when they are law-abiding, might simply be more likely to engage in suspicious behavior than white people:

Q. So is it your testimony that law-abiding black people in New York City are more likely to engage in suspicious behavior than law-abiding white people?

A. I'm only saying that that's the evidence from the stop patterns, which we have said, according to Professor Fagan, are ninety percent apparently justified.

Dr. Smith's position, while surprising, is not illogical once his premises are accepted. Dr. Smith apparently does not find it plausible that officers' decisions regarding whether to stop a person may be swayed by conscious or unconscious racial bias.188 *587 If a researcher begins with this premise, he will attempt to find a credible, race-neutral explanation for the NYPD's stopping of blacks and Hispanics out of proportion to their share of the population. For example, the researcher may seek to explain the disproportionate stopping of minorities as the result of the characteristics of the criminal population. However, as already explained, there is no evidence that 88% of the people stopped are, in fact, members of the criminal population. Next, the researcher may analyze the deployment of police to high crime areas or "hot spots." If these areas happen to be disproportionately minority, then heavy deployment to these areas will

provide a race-neutral basis for the disproportionate stopping of minorities. But Dr. Fagan's "Table 5" analysis showed that blacks and Hispanics are overstopped even after controlling for police deployment to high crime areas.189 In the end, if the researcher cannot think of any relevant race-neutral factors for which Dr. Fagan did not control, the only remaining race-neutral explanation for the NYPD's stop patterns may be that members of the overstopped racial groups have a greater tendency to appear suspicious than members of other racial groups, even when they are not breaking the law.

Rather than being a defense against the charge of racial profiling, however, this reasoning is a defense of racial profiling. To say that black people in general are somehow more suspicious-looking, or criminal in appearance, than white people is not a race-neutral explanation for racial disparities in NYPD stops: it is itself a racially biased explanation. This explanation is especially troubling because it echoes the stereotype that black men are more likely to engage in criminal conduct than others.

c. Findings Based on Dr. Fagan's Analyses

Because I accept Dr. Fagan's benchmark for measuring racial disparity and *589 find his statistical analyses generally reliable, I make the following findings.

First, as reflected in Dr. Fagan's Table 5, the NYPD carries out more stops in areas with more black and Hispanic residents, even when other relevant variables are held constant. The best predictor for the rate of stops in a geographic unit—be it precinct or census tract—is the racial composition of that unit rather than the known crime rate.195 These findings are "robust," in the sense that the results persist even when the units of analysis are changed from precincts to census tracts, or from calendar quarters to months.

Second, as reflected in Dr. Fagan's Table 7, within any area, regardless of its racial composition, blacks and Hispanics are more likely to be stopped than whites. This is different from the first finding—that the best predictor for the stop rate in a geographic area is the racial composition of that area. Table 7, by contrast, shows that blacks and Hispanics are more likely to be stopped than whites within precincts and census tracts, even after controlling for the racial composition, crime rate, patrol strength, and various socioeconomic characteristics of the precincts or census tracts where the stops take place. These findings are also robust. They apply not only when the spatial and temporal units of the analysis are changed, but also when the analysis is limited to areas with low crime rates, racially heterogenous populations, or predominately white populations.196

Third, for the period 2004 through 2009, blacks who were subject to law enforcement action following their stop were about 30% more likely than whites to be arrested (as opposed to receiving a summons) after a stop for the same suspected crime, even after controlling for other relevant variables.197

Fourth, for the period 2004 through 2009, after controlling for suspected crime and precinct characteristics, blacks who were stopped were about 14% more likely—and Hispanics 9% more likely—than whites to be subjected to the use of force.198

Fifth, for the period 2004 through 2009, all else being equal, the odds of a stop resulting in any further enforcement action were 8% lower if the person stopped was black than if the person stopped was white. In addition, the greater the black population in a precinct, the less likely that a stop would result in a sanction. These results show that blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites.199

C. Institutional Evidence of Deliberate Indifference

The previous two sections addressed the statistical evidence of unconstitutional stops. This section addresses the evidence *590 regarding the NYPD's awareness of and response to those unconstitutional stops. In short, I find that the "institutional evidence"—evidence regarding the actions or inactions of the NYPD—shows that the City has been deliberately indifferent to violations of the plaintiff class's Fourth and Fourteenth Amendment rights. . . .

3. Targeting "the Right People"

The role of race in stop and frisk has been a source of contention since the Supreme Court first sanctioned the practice in 1968. In Terry, the Supreme Court recognized that " '[i]n many communities, field interrogations are a major source of friction between the police and minority groups,' " and that friction " 'increases as more police departments [encourage] officers ... routinely to stop and question persons on the street.' "277 In 1996, the Ninth Circuit noted that these stops "are humiliating, damaging to the detainees' self-esteem, and reinforce the reality that racism and intolerance are for many African–Americans *603 a regular part of their daily lives."278

The NYPD maintains two different policies related to racial profiling in the practice of stop and frisk: a written policy that prohibits racial profiling and requires reasonable suspicion for a stop279—and another, unwritten policy that encourages officers to focus their reasonable-suspicion-based stops on "the right people, the right time, the right location."280

Based on the evidence summarized below, I find that the NYPD's policy of targeting "the right people" encourages the disproportionate stopping of the members of any racial group that is heavily represented in the NYPD's crime suspect data. This is an indirect form of racial profiling. In practice, it leads NYPD officers to stop blacks and Hispanics who would not have been stopped if they were white. There is no question that a person's race, like a person's height or weight, is a permissible consideration where a stop is based on a specific description of a suspect.281 But it is equally clear that it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group appear more frequently in criminal complaints. The Equal Protection Clause does not permit race-based

suspicion. . . .

VI. CONCLUSION

For the foregoing reasons, the City is liable for the violation of plaintiffs' Fourth and Fourteenth Amendment rights. In a separate opinion, I will order remedies, including immediate changes to the NYPD's policies, a joint-remedial process to consider further reforms, and the appointment of an independent monitor to oversee compliance with the remedies ordered in this case. I conclude with a particularly apt quote: "The idea of universal suspicion without individual evidence is what Americans find abhorrent and what black men in America must constantly fight. It is pervasive in policing policies—like stop-and-frisk, and ... neighborhood watch—regardless of the collateral damage done to the majority of innocents. It's like burning down a house to rid it of mice."

6. Deadly Force and Qualified Immunity:

Tolan v. Cotton, 713 F.3d 299 (5th Cir. 2013)

Before JONES, BARKSDALE, and SOUTHWICK, Circuit Judges.

Opinion

RHESA HAWKINS BARKSDALE, Circuit Judge.

Primarily at issue in this appeal from a summary judgment is qualified immunity's being granted for a police officer's use of deadly force against a felony suspect, injuring him. This action concerns the various claims of four plaintiffs against numerous defendants; the appeal is from a Federal Rule of Civil Procedure 54(b) judgment (partial final judgment capable of immediate appeal). This appeal involves only two of the plaintiffs and one of the defendants.

After summary judgment, based on qualified immunity, was awarded police officers Jeffrey Wayne Cotton and John C. Edwards against the four plaintiffs, the Rule 54(b) judgment was entered for the two Officers. Only Robert R. Tolan (Robbie Tolan) and his mother, Marian Tolan, appeal from that judgment, however; and they challenge only the judgment in favor of Sergeant Cotton. In doing so, they contest the underlying summary judgment, based on qualified immunity, awarded Sergeant Cotton against their excessive-force claims. Because no genuine dispute of material fact exists for whether Sergeant Cotton's directing deadly force at Robbie Tolan and non-deadly force at Marian Tolan was objectively unreasonable in the light of clearly-established law, the Rule 54(b) judgment in favor of Sergeant Cotton is AFFIRMED.

I.

For the reasons provided *infra,* the following facts are presented, as they must be on summary-

judgment review, in the light most favorable to Robbie and Marian Tolan.

While patrolling shortly before two o'clock in the morning on 31 December 2008, in Bellaire, Texas, Officer Edwards noticed a black Nissan turn abruptly onto a residential street. Officer Edwards became suspicious immediately because 12 vehicles had been burglarized in Bellaire the previous night, and he knew the street terminated in a cul-de-sac. Surveilling the Nissan from a distance, Officer Edwards observed Robbie Tolan and Anthony Cooper park on the street in front of a house and exit the vehicle. Officer Edwards drove past the vehicle and entered its license-plate number into his mobile data terminal (MDT). Officer Edwards mistakenly keyed an incorrect character; his entry resulted in a match with a stolen vehicle of the same make and approximate year of manufacture. The MDT sent a message automatically to other police units, alerting them Officer Edwards had identified a stolen vehicle.

Officer Edwards next approached the vehicle and, observing Robbie Tolan and Cooper carrying items from the vehicle to the house, illuminated them with his cruiser's spotlight. Officer Edwards exited his cruiser, drew his service pistol and flashlight, identified himself as a police officer, and ordered Robbie Tolan and Cooper to "come here". When Robbie Tolan and Cooper cursed Officer Edwards and refused to comply, Officer Edwards stated to them his belief the black Nissan was stolen and ordered them onto the ground.

Shortly thereafter, Robbie Tolan's parents, Bobby and Marian Tolan, exited the house through the front door. Again, Officer Edwards stated his belief that Robbie Tolan and Cooper had stolen the Nissan; Robbie Tolan and Cooper complied with Officer Edwards' ordering them onto the ground only after Marian and Bobby Tolan ordered them to do so. Bobby Tolan identified Robbie Tolan as his son, and Marian Tolan stated the Nissan belonged to them. Bobby Tolan yelled at Cooper and Robbie Tolan to stay down; and Marian Tolan walked repeatedly in front of Officer Edwards' drawn pistol, insisting no crime had been committed. Dealing with four people in a chaotic and confusing scene, Officer Edwards radioed for expedited assistance. Sergeant Cotton responded and, hearing the tension in Officer Edwards' voice, believed him to be in danger. Sergeant Cotton arrived approximately one and one-half minutes after Officer Edwards' arrival.

Upon his arrival, Sergeant Cotton observed: Officer Edwards with pistol drawn; Bobby Tolan standing to Officer Edwards' left, next to a sport-utility vehicle parked in the Tolans' driveway, where Officer Edwards had ordered him to stand; Marian Tolan "moving around" in an agitated state in front of Officer Edwards; and Cooper lying prone. Sergeant Cotton drew his pistol and moved in to assist. Although Sergeant Cotton did not immediately observe Robbie Tolan, whose form was obscured by a planter on the front porch, Officer Edwards informed Sergeant Cotton that "the two on the ground had gotten out of a stolen vehicle". A single gas lamp in front of the house and two motion lights in the driveway illuminated the scene. In his deposition, Sergeant Cotton described the gas lamp as "decorative" and the front porch, where Robbie Tolan was lying, as "fairly dark"; in his deposition, Bobby Tolan stated the gas lamp provided enough light to identify a person in the front yard "within reason".

Robbie Tolan was lying face-down on the porch, with his head toward the front door and his arms extended. As noted, a planter on the front porch obscured Robbie Tolan's position from

Sergeant Cotton's view.

Sergeant Cotton recognized the immediate need to handcuff and search the felony suspects, but Marian Tolan's movement and demeanor frustrated the Officers' doing so; moreover, Marian Tolan continued to insist the car was not stolen, and stated they had lived in the house for 15 years. In an attempt to control the situation, Sergeant Cotton ordered Marian Tolan to move to the garage door; she refused, and became argumentative. Sergeant Cotton again requested Marian Tolan to move out of the Officers' way, and stated the situation would be worked out after they concluded their investigation. Marian Tolan's protestations continued; when Sergeant Cotton ordered her to "get against the garage", she refused, stating: "Me? Are you kidding?".

In response, Sergeant Cotton holstered his pistol, clutched Marian Tolan's arm, placed his other hand in the small of her back, and attempted to move her to the garage door. Despite her jerking her arm away and screaming "get your hands off me", Sergeant Cotton physically moved her to the garage door so a search of Robbie Tolan and Cooper could be conducted. From this angle, Sergeant Cotton then observed Robbie Tolan lying prone and facing away from Sergeant Cotton; the complaint for this action alleges the distance between Sergeant Cotton and Robbie Tolan was approximately 15 to 20 feet.

Sergeant Cotton's method of handling Marian Tolan angered Robbie Tolan; upon seeing his mother pushed into the garage door and hearing a metallic impact, Robbie Tolan yelled "get your fucking hands off my mom!", pulled his outstretched arms to his torso, and began getting up and turning toward Sergeant Cotton. Fearing Robbie Tolan was reaching towards his waistband for a weapon, Sergeant Cotton drew his pistol and fired three rounds at Robbie Tolan, striking him once in the chest and causing serious internal injury. At the time, Robbie Tolan was wearing a dark zippered jacket, known as a "hoodie", which was untucked and hung over the top of his trousers, concealing his waistband. A subsequent search revealed Robbie Tolan was unarmed. Between Sergeant Cotton's arriving on the scene and his discharging his pistol, a mere 32 seconds elapsed.

In April 2009, Sergeant Cotton was charged in a state-court indictment with one count of aggravated assault by a public servant. A jury acquitted Sergeant Cotton in May 2010. As noted *infra*, excerpts from Sergeant Cotton's criminal trial, including testimony by Sergeant Cotton, Officer Edwards, and the Tolans, are in the summary-judgment record.

In May 2009, following Sergeant Cotton's being indicted that April, the Tolans and Cooper filed this action, *inter alia*, pursuant to 42 U.S.C. § 1983 against Sergeant Cotton, Officer Edwards, and the City of Bellaire, claiming, *inter alia:* Sergeant Cotton and Officer Edwards violated Robbie and Marian Tolan's right to freedom from excessive force (under Fourth Amendment, incorporated in Fourteenth); and both Officers acted in furtherance of a City of Bellaire official policy of racial profiling and discrimination. The Officers invoked qualified immunity in their answer, and, after discovery, moved for summary judgment on that basis.

The district court, in an extremely detailed and well-reasoned opinion, granted the Officers' summary-judgment motion, based on qualified immunity; it held the Tolans and Cooper had not shown a constitutional violation, as required by the first of two prongs for qualified-immunity

analysis, discussed *infra. Tolan v. Cotton,* 854 F.Supp.2d 444, 478 (S.D.Tex.2012). Finding there was "no just reason for delay", it entered final judgment for the Officers under Federal Rule of Civil Procedure 54(b).

II.

. . . A summary judgment is reviewed *de novo. Burge v. Parish of St. Tammany,* 187 F.3d 452, 464 (5th Cir.1999). Summary judgment is proper if movant shows: no genuine dispute as to any material fact; and being entitled to judgment as a matter of law. FED.R.CIV.P. 56(a). "A dispute is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Poole v. City of Shreveport,* 691 F.3d 624, 627 (5th Cir.2012) (internal citation and quotation marks omitted). "A fact issue is material if its resolution could affect the outcome of the action." *Id.* (internal citation and quotation marks omitted). In that regard, all facts and inferences are construed in the light most favorable to non-movants. *E.g., Cooper Tire & Rubber Co. v. Farese,* 423 F.3d 446, 454 (5th Cir.2005). But, for review of a summary judgment upholding qualified immunity, plaintiff bears the burden of showing a genuine dispute of material fact. *Michalik v. Hermann,* 422 F.3d 252, 262 (5th Cir.2005) (qualified-immunity defense alters summary judgment burden of proof).

Extensive discovery has been conducted. Sergeant Cotton supported his summary-judgment motion with, *inter alia:* portions of his, Officer Edwards', and Robbie, Marian, and Bobby Tolan's depositions; and portions of Doctor William Lewinski's and Lieutenant Albert Rodriguez' expert-witness depositions, as well as their declarations, to which their expert reports were attached. Robbie and Marian Tolan supported their opposition to that motion with, *inter alia:* portions of Sergeant Cotton's and Officer Edwards' depositions and trial testimony; portions of Robbie Tolan's deposition and trial testimony, and his declaration; portions of Marian and Bobby Tolan's depositions and trial testimony; portions of Dr. Lewinski's deposition; and portions of Lt. Rodriguez' expert report and deposition.

Qualified immunity promotes the necessary, effective, and efficient performance of governmental duties, *Harlow v. Fitzgerald,* 457 U.S. 800, 807, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), by shielding from suit all but the "plainly incompetent or those who knowingly violate the law", *Brumfield v. Hollins,* 551 F.3d 322, 326 (5th Cir.2008) (internal citation and quotation marks omitted); *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (qualified immunity is immunity from suit, not merely an affirmative defense to liability). As noted, after defendant properly invokes qualified immunity, plaintiff bears the burden to rebut its applicability. *McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir.2002). To abrogate a public official's right to qualified immunity, plaintiff must show: first, the official's conduct violated a constitutional or statutory right; and second, the official's "actions [constituted] objectively unreasonable [conduct] in [the] light of clearly established law at the time of the conduct in question". *Brumfield,* 551 F.3d at 326.

For an excessive-force claim, plaintiff clears the first prong of the qualified-immunity analysis at the summary-judgment stage by showing a genuine dispute of material fact for whether plaintiff sustained: "(1) an injury (2) which resulted from the use of force that was clearly excessive to the need and (3) the excessiveness of which was clearly unreasonable". *Rockwell v. Brown,* 664

F.3d 985, 991 (5th Cir.2011) (quoting *Hill v. Carroll Cnty.*, 587 F.3d 230, 234 (5th Cir.2009)). For the second prong at the summary-judgment stage, plaintiff must similarly show a genuine dispute of material fact for two distinct, but intertwined, elements. "The second prong of the qualified immunity test is [ ] understood as two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident;* and, if so, whether the [defendant's conduct] was *objectively unreasonable* in the light of that then clearly established law." *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir.1998) (first emphasis in original) (second emphasis added).

In the excessive-force context at issue here, although the long-established two prongs of qualified-immunity analysis contain "objective reasonableness" elements, those prongs remain distinct and require independent inquiry. *Brumfield*, 551 F.3d at 326. Importantly, the sequence of analysis is immaterial, *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); qualified immunity may be granted without deciding the first prong if plaintiff fails to satisfy the second, *Kovacic v. Villarreal*, 628 F.3d 209, 213 (5th Cir.2010). Deciding the second prong first is often advisable; for example, if, as here, a constitutional right is claimed to have been violated (first prong), "this approach [of first addressing the second prong] comports with [the] usual reluctance to decide constitutional questions unnecessarily". *Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012).

A.

Contesting the summary judgment based on qualified immunity, Robbie Tolan contends a genuine dispute of material fact exists for whether Sergeant Cotton could have reasonably perceived him as a threat which justified the use of deadly force. He asserts a reasonable officer on the scene should have possessed information that Robbie Tolan was neither armed nor dangerous, thereby reducing the perceived threat level and negating any belief deadly force was necessary. Along that line, he relies on Marian and Bobby Tolan's exiting the house wearing pajamas and insisting Robbie Tolan and Cooper did not steal the vehicle. Robbie Tolan cites case law from other circuits for the proposition that this "updated information" negated any impression Sergeant Cotton may have had that deadly force could be reasonable. He disputes also Sergeant Cotton's maintaining Marian Tolan was shoved into the garage door so Sergeant Cotton could address a perceived threat; instead, Robbie Tolan contends he reacted *because* his mother was shoved into the garage door. Finally, asserting he never reached toward or into his waistband as claimed by Sergeant Cotton, Robbie Tolan relies on our court's unpublished opinion in *Reyes v. Bridgwater*, 362 Fed.Appx. 403 (5th Cir.2010), for the proposition that this disputed location of his hands is a genuine dispute of material fact, precluding summary judgment and, accordingly, mandating reversal.

The undisputed summary-judgment evidence, however, shows: Officer Edwards and Sergeant Cotton believed they were dealing with a felony vehicle theft; multiple burglaries of vehicles had occurred in the area the night prior; the Tolans' front porch was not well lit; Robbie Tolan, in spite of Officer Edwards' having drawn his pistol, disobeyed orders to remain prone while the Officers attempted to establish order and investigate the situation; and Robbie Tolan's moving to intervene in Sergeant Cotton's separating his mother was preceded by his shouting "get your fucking hands off my mom!".

Viewing the summary-judgment record in the light most favorable to him, Robbie Tolan has not met his burden to show a genuine dispute of material fact, *Michalik*, 422 F.3d at 262, for whether Sergeant Cotton's conduct was objectively unreasonable in the light of clearly established law, *Brumfield*, 551 F.3d at 326. Accordingly, as discussed *infra*, and although based on a prong of qualified-immunity analysis different from that relied upon by the district court, Sergeant Cotton is entitled to qualified immunity; his actions being required to "be judged from the perspective of a reasonable officer on the scene" steers the analysis to that conclusion. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

1.

Exercising the above-referenced "usual reluctance to decide constitutional questions unnecessarily", *Reichle*, 132 S.Ct. at 2093, we do not reach whether Sergeant Cotton's shooting Robbie Tolan violated his Fourth Amendment right against excessive force (as noted, the district court relied on this first prong of qualified-immunity analysis). As discussed above, showing violation of a constitutional right does not end the inquiry when qualified immunity properly has been invoked. Sergeant Cotton is entitled, through summary judgment, to qualified immunity under the second prong of the analysis.

2.

A right is sufficiently clear, and therefore "clearly established", when "every 'reasonable official would have understood that what he is doing violates that right' ". *Ashcroft v. al-Kidd*, —— U.S. ——, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). "[E]xisting precedent must [ ] place[ ] the statutory or constitutional question beyond debate". *al-Kidd*, 131 S.Ct. at 2083. This "clearly-established" standard balances the vindication of constitutional or statutory rights and the effective performance of governmental duties by ensuring officials can "reasonably ... anticipate when their conduct may give rise to liability for damages". *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). As discussed *supra*, this second-prong question of whether the law was *clearly established* cannot be untethered from the concomitant question of whether the challenged conduct was *objectively unreasonable* in the light of that clearly-established law. *Poole*, 691 F.3d at 630; *see also Saucier v. Katz*, 533 U.S. 194, 205, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), *modified by Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (qualified immunity under the second prong may attach irrespective of constitutional violation under the first, which in the excessive-force context includes a separate objective-reasonableness inquiry).

It is undisputed that, when Sergeant Cotton shot Robbie Tolan, it was also clearly established that an officer had the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an "immediate threat to [his] safety". *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir.2009); *see also Ontiveros v. City of Rosenberg*, 564 F.3d 379 (5th Cir.2009); *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir.1985). Therefore, for Robbie Tolan to prevent Sergeant Cotton's having qualified immunity, he must show a genuine dispute of material fact on whether "every 'reasonable official would have understood' "

Sergeant Cotton's using deadly force was objectively unreasonable under the circumstances and clearly-established law. *al-Kidd,* 131 S.Ct. at 2083; *Poole,* 691 F.3d at 630. To be sure, it was clearly established that shooting an unarmed, non-threatening suspect is a Fourth–Amendment violation. *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). But, that is only half of the equation for second-prong analysis; the remainder depends upon the totality of the circumstances as viewed by a reasonable, on-the-scene officer without the benefit of retrospection. *Poole,* 691 F.3d at 628.

As explained above, an objectively-reasonable officer in Sergeant Cotton's position would have had neither knowledge of, nor reason to suspect, Officer Edwards' having mistakenly identified Robbie Tolan's vehicle as stolen. Justified in his believing—however erroneously in hindsight—Robbie Tolan and Cooper had stolen a vehicle, an objectively-reasonable officer in Sergeant Cotton's position could have also believed Robbie Tolan's verbally threatening him and getting up from his prone position presented an "immediate threat to the safety of the officers". *Deville,* 567 F.3d at 167. Compounding that threat were the surrounding circumstances: the late hour; recent criminal activity in the area; a dimly-lit front porch; Marian Tolan's refusing orders to remain quiet and calm; and the Officers' being outnumbered on the scene. Robbie Tolan admitted that he drew his outstretched arms toward his chest, did a push-up maneuver, and began turning to his left to face Sergeant Cotton; under the above-described circumstances, these actions could have placed an objectively-reasonable officer in, as Sergeant Cotton testified, fear for his life. Accordingly, whether Robbie Tolan reached into or toward his waistband does *not* create a genuine dispute of material fact on objective reasonableness *vel non.*

As part of the support for his summary-judgment motion, Sergeant Cotton presented expert testimony from Dr. Lewinski and Lt. Rodriguez. In his expert report, Dr. Lewinski stated that, as a matter of science, an officer has only one-quarter of one second to recognize a threat and respond accordingly. Likewise, Lt. Rodriguez stated in his deposition that officers have but a fraction of a second to react to threats. Further, and in the light of these scientific principles, they maintained officers cannot be trained to positively identify a weapon before resorting to deadly force. Robbie Tolan provided no evidence rebutting this expert evidence; yet, even if he had, an officer's right to use deadly force when objectively reasonable under the circumstances is also clearly established and "beyond debate", *al-Kidd,* 131 S.Ct. at 2083—even when, as here, hindsight proves underlying assumptions to be erroneous. *E.g., Young,* 775 F.2d 1349 (qualified immunity where officer fatally shot unarmed driver who reached under seat); *Ontiveros,* 564 F.3d 379 (same, where officer fatally shot unarmed suspect who reached into boot). In short, Sergeant Cotton's split-second decision to use deadly force does not amount to the type of "plain[ ] incompeten[ce]" necessary to divest him of qualified immunity. *Brumfield,* 551 F.3d at 326.

Along that line, Robbie Tolan had clear and obvious warning of Officer Edwards' and Sergeant Cotton's believing deadly force might be required under the circumstances: both made clear their belief Robbie Tolan's vehicle was stolen; Sergeant Cotton drew his pistol upon his arriving on the scene; and Officer Edwards continually covered Robbie Tolan and Cooper with pistol drawn throughout the sequence of events. *E.g., Garner,* 471 U.S. at 11–12, 105 S.Ct. 1694 (deadly force not unconstitutional when probable cause to believe crime involving threat of serious physical harm has been committed and, if feasible, suspect warned deadly force may be used).

Noteworthy here, Robbie Tolan's refusing to obey a direct order to remain prone violated Texas Penal Code § 38.15 and Texas Transportation Code § 542.501 in Sergeant Cotton's presence; those sections provide: "[a] person commits an offense" by disrupting or impeding "a peace officer ... performing a duty or exercising authority imposed ... by law", § 38.15(a)(1); and "[a] person may not wilfully fail or refuse to comply with a lawful order ... of a police officer", § 542.501. Such refusal, under the circumstances, could have reinforced an officer's reasonably believing Robbie Tolan to be a non-compliant and potentially threatening suspect. Robbie Tolan could have avoided injury by remaining prone as Officer Edwards, with pistol drawn, had ordered him to do. Instead, his shouting and abruptly attempting to approach Sergeant Cotton inflamed an already tense situation; in the light of his actions at the scene, a genuine dispute of material fact does not exist regarding whether Sergeant Cotton acted objectively unreasonably. *E.g., Deville,* 567 F.3d at 167; *Ontiveros,* 564 F.3d 379; *Young,* 775 F.2d 1349.

It goes without saying that this occurrence was tragic. But, the Officers' mistake of fact and Robbie Tolan's injury do not permit deviating from controlling law. Accordingly, and because Robbie Tolan has not shown a genuine dispute of material fact for whether Sergeant Cotton's shooting him was objectively unreasonable under clearly-established law, summary judgment based on qualified immunity was proper.

B.

Marian Tolan contends the summary judgment for Sergeant Cotton was improper because a genuine dispute of material fact exists for whether her right to freedom from excessive force was violated by Sergeant Cotton's grabbing her arm and shoving her against the garage door. Viewing the summary judgment record in the light most favorable to her, Marian Tolan has not created a genuine issue of material fact on whether Sergeant Cotton's conduct was objectively unreasonable in the light of clearly-established law.

1.

For the reasons stated above, and because the undisputed, material facts show Sergeant Cotton is entitled to qualified immunity under the second prong of the qualified-immunity analysis, we need not decide the first prong.

2.

Officers have a clearly-established right to use "measured and ascending" responses to control volatile situations while in the discharge of their official duties. *Poole,* 691 F.3d at 629 (internal citation and quotation marks omitted). Marian Tolan likewise violated Texas Penal Code § 38.15 and Texas Transportation Code § 542.501 by refusing to remain calm and move to the garage door as Sergeant Cotton ordered, thereby, as provided in § 38.15, impeding his performing a duty imposed by law and, as provided in § 542.501, "refus[ing] to comply with [his] lawful order".

There is no genuine dispute of material fact that this is what happened. Sergeant Cotton first used voice commands in an attempt to gain Marian Tolan's compliance and to facilitate his securing and searching two felony suspects. *E.g., Deville,* 567 F.3d at 167–68 (officers should attempt voice commands before resorting to physical force when circumstances permit). Those commands having proved ineffectual, Sergeant Cotton used minimal physical force to move

Marian Tolan away from Officer Edwards' line of sight in an attempt to restore order to a chaotic and confusing scene and to conduct the necessary investigation.

Accordingly, Sergeant Cotton's actions were not objectively unreasonable in the light of clearly-established law. Summary judgment based on qualified immunity was proper regarding Marian Tolan.

III.

For the foregoing reasons, the Rule 54(b) judgment in favor of Sergeant Cotton is AFFIRMED.

Tolan v. Cotton, 134 S. Ct. 1861 (2014)

PER CURIAM. . . .

B

In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson*, 477 U.S., at 249, 106 S.Ct. 2505.

First, the court relied on its view that at the time of the shooting, the Tolan's front porch was "dimly-lit." 713 F.3d, at 307. The court appears to have drawn this assessment from Cotton's statements in a deposition that when he fired at Tolan, the porch was " 'fairly dark,' " and lit by a gas lamp that was " 'decorative.' " *Id.*, at 302. In his own deposition, however, Tolan's father was asked whether the gas lamp was in fact "more decorative than illuminating." Record 1552. He said that it was not. *Ibid.* Moreover, Tolan stated in his deposition that two floodlights shone on the driveway during the incident, *id.*, at 2496, and Cotton acknowledged that there were two motion-activated lights in front of the house. *Id.*, at 1034. And Tolan confirmed that at the time of the shooting, he was "not in darkness." *Id.*, at 2498–2499.

Second, the Fifth Circuit stated that Tolan's mother "refus[ed] orders to remain quiet and calm," thereby "compound[ing]" Cotton's belief that Tolan "presented an immediate threat to the safety of the officers." 713 F.3d, at 307 (internal quotation marks omitted). But here, too, the court did not credit directly contradictory evidence. Although the parties agree that Tolan's mother repeatedly informed officers that Tolan was her son, that she lived in the home in front of which he had parked, and that the vehicle he had been driving belonged to her and her husband, there is a dispute as to how calmly she provided this information. Cotton stated during his deposition that Tolan's mother was "very agitated" when she spoke to the officers. Record 1032–1033. By contrast, Tolan's mother testified at Cotton's criminal trial that she was neither "aggravated" nor "agitated." *Id.*, at 2075, 2077.

Third, the Court concluded that Tolan was "shouting," 713 F.3d, at 306, 308, and "verbally

threatening" the officer, *id.*, at 307, in the moments before the shooting. The court noted, and the parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, "[G]et your fucking hands off my mom." Record 1928. But Tolan testified that he "was not screaming." *Id.*, at 2544. And a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm. Cf. *United States v. White*, 258 F.3d 374, 383 (C.A.5 2001) ("A threat imports '[a] communicated intent to inflict physical or other harm' " (quoting Black's Law Dictionary 1480 (6th ed. 1990))); *Morris v. Noe*, 672 F.3d 1185, 1196 (C.A.10 2012) (inferring that the words "Why was you talking to Mama that way" did not constitute an "overt threa[t]"). Tolan's mother testified in Cotton's criminal trial that he slammed her against a garage door with enough force to cause bruising that lasted for days. Record 2078–2079. A jury could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother.

Fourth, the Fifth Circuit inferred that at the time of the shooting, Tolan was "moving to intervene in Sergeant Cotton's" interaction with his mother. 713 F.3d, at 305; see also *id.*, at 308 (characterizing Tolan's behavior as "abruptly attempting to approach Sergeant Cotton," thereby "inflam [ing] an already tense situation"). The court appears to have credited Edwards' account that at the time of the shooting, Tolan was on both feet "[i]n a crouch" or a "charging position" looking as if he was going to move forward. Record 1121–1122. Tolan testified at trial, however, that he was on his knees when Cotton shot him, *id.*, at 1928, a fact corroborated by his mother, *id.*, at 2081. Tolan also testified in his deposition that he "wasn't going anywhere," *id.*, at 2502, and emphasized that he did not "jump up," *id.*, at 2544.

Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," *Boag v. MacDougall* 454 U.S. 364, 366, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982) (O'Connor, J., concurring), we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents. Cf. *Brosseau*, 543 U.S., at 197–198, 125 S.Ct. 596 (summarily reversing decision in a Fourth Amendment excessive force case "to correct a clear misapprehension of the qualified immunity standard"); see also *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 150, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (*per curiam*) (summarily reversing an opinion that could not "be reconciled with the principles set out" in this Court's sovereign immunity jurisprudence).

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. This is not to say, of course, that these are the

only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law. . . .

The petition for certiorari and the NAACP Legal Defense and Educational Fund's motion to file an *amicus curiae* brief are granted. The judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice SCALIA joins, concurring in the judgment.

The Court takes two actions. It grants the petition for a writ of certiorari, and it summarily vacates the judgment of the Court of Appeals.

The granting of a petition for plenary review is not a decision from which Members of this Court have customarily registered dissents, and I do not do so here. I note, however, that the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. See, *e.g.*, this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari").

In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment. The present case falls into that very large category. There is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here. See 713 F.3d 299, 304 (C.A.5 2013). Thus, the only issue is whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party. In the courts of appeals, cases presenting this question are utterly routine. There is no question that this case is important for the parties, but the same is true for a great many other cases that fall into the same category.

On the merits of the case, while I do not necessarily agree in all respects with the Court's characterization of the evidence, I agree that there are genuine issues of material fact and that this is a case in which summary judgment should not have been granted.

I therefore concur in the judgment.

7. Denial of Qualified Immunity and Deadly Force:

Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007)

Before BOGGS, Chief Judge; and DAUGHTREY and GIBBONS, Circuit Judges.

Opinion

BOGGS, Chief Judge.

This civil rights case stems from the shooting death of Michael Newby by Officer McKenzie Mattingly in West Louisville. It comes before us on an interlocutory appeal from the district court's denial of the appellant's motion for summary judgment on qualified immunity and state-law immunity grounds. Before the district court, Angela Bouggess, the administrator of Newby's estate, raised a Fourth Amendment claim under 42 U.S.C. § 1983 and various state-law tort claims. To decide this case, we need only ask whether an officer who employs deadly force against a fleeing suspect without reason to believe that the suspect is armed or otherwise poses a serious risk of physical harm is entitled to either qualified immunity or immunity under the law of Kentucky. We hold that he is entitled to neither. Accordingly, we affirm the judgment of the district court.

Bouggess raises a Fourth Amendment claim under 42 U.S.C. § 1983, a statute that provides a cause of action for redress against persons acting under color of law for "deprivation[s] of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. The Supreme Court has held that defendants in such suits are entitled to qualified immunity from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights. Saucier v. Katz, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). A plaintiff can overcome that immunity only by showing that (1) the defendant violated his constitutional or statutory rights and (2) the right at issue was sufficiently clear that a reasonable official would have understood that what he was doing violated that right. Baranski v. Fifteen Unknown Agents of the BATF, 452 F.3d 433, 438 (6th Cir.2006) (en banc). . . .

II

Because this case comes to us on summary judgment, we construe the facts in the light most favorable to Bouggess. Fed.R.Civ.P. 56(c). If Bouggess can prevail under those facts, the case is inappropriate for resolution on interlocutory appeal and must be remanded. As we have held, when "the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury," the "jury becomes the final arbiter of [a] claim of immunity." Brandenburg v. Cureton, 882 F.2d 211, 215–16 (6th Cir.1989).

On the evening of January 3, 2004, Officer McKenzie Mattingly of the Louisville Metro Police Department was involved in a drug-sting operation. He had planned to stage a drug transaction with some individuals in the parking lot of H & S Foods at 46th and West Market Streets in

Louisville. Mattingly had backup officers listening over a wire transmitter. Officer Thomerson was the “eye” of the operation. As Mattingly waited in his vehicle, he was approached by a number of individuals who may have offered to sell him narcotics. Nineteen-year-old Michael Newby was one of those individuals. Mattingly did not think Newby was armed.1

During the operation, the other suspects on the scene reached into Mattingly’s car and took some of Mattingly’s money. They then ran away. Mattingly thought at this point that none of the suspects remained near the car. He then got out of the car to see which way the suspects ran so that he could radio that information to his fellow officers. Mattingly did not radio for help or in any way indicate to other officers that they should be concerned that any of the suspects (including Newby) might be armed.

Upon Mattingly’s exit from the vehicle, he saw Newby nearby, bending down to pick up a twenty-dollar bill. Mattingly sought to arrest Newby, but a struggle ensued between the two men. No guns were drawn and no shots were fired during the struggle.2

After the struggle, Newby broke free from Mattingly and ran directly away from Mattingly toward three eyewitnesses in a car, and also within view of the H & S Foods manager. Mattingly then drew his gun and fired at least three shots at Newby.3 According to the medical examiner’s report, three shots struck Newby in the back.

Newby, now struck three times by bullets from Mattingly’s firearm, fled around a corner and sat down. Mattingly and Thomerson then approached Newby. Mattingly did not warn Thomerson that Newby might have a weapon. JA 156. Another officer on the scene, with his gun holstered, then approached Newby to handcuff him. Mattingly did not warn that officer that Newby might be armed. When Newby struggled with the officers during handcuffing and following handcuffing, Mattingly did not alert the officers that Newby might be armed. Newby died from his injuries soon after the shooting.

Newby was, in fact, carrying a firearm in his waistband. JA 227

III

Viewing the facts as given above, the question is whether Mattingly violated Newby’s clearly established constitutional rights.

A

[“[A]pprehension by use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.” Tennessee v. Garner, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). This court assesses the reasonableness of a seizure in distinct stages. An officer’s prior errors in judgment do not make a shooting unreasonable as long as the officer acted reasonably during the shooting itself and the few moments directly preceding it. Dickerson v. McClellan, 101 F.3d 1151, 1161 (6th Cir.1996). In other words, whether the use of deadly force at a

particular moment is reasonable depends primarily on objective assessment of the danger a suspect poses at that moment. The assessment must be made from the perspective of a reasonable officer in the defendant's position. Brosseau v. Haugen, 543 U.S. 194, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). That objective assessment requires asking whether "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Garner, 471 U.S. at 11, 105 S.Ct. 1694. Under that standard, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." Ibid. Absent such probable cause, however, a police officer may not seize a fleeing felon by employing deadly force. Id. at 11–12, 105 S.Ct. 1694.

In applying Garner's "probable cause" standard, the Sixth Circuit has focused on the following non-exhaustive list of factors: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Sigley v. City of Parma Heights, 437 F.3d 527, 534 (6th Cir.2006) *890 (citing Dunigan v. Noble, 390 F.3d 486, 492 (6th Cir.2004)) (quoting Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).4 Using those factors and other relevant facts, it is our task to determine whether Mattingly had an objectively reasonable belief that Newby posed an imminent threat of serious physical harm to him or to others. If Mattingly did not have such a belief, then his use of deadly force violated the Fourth Amendment. Saucier, 533 U.S. at 205, 121 S.Ct. 2151.

B

Thus, the question in this case is whether, under the foregoing standard, Mattingly had probable cause to believe that Newby posed a threat of serious physical harm to Mattingly or to others. Garner, 471 U.S. at 11–12, 105 S.Ct. 1694; Dickerson, 101 F.3d at 1161–63. The facts, when viewed in the light most favorable to Bouggess, demonstrate that Mattingly did not have such probable cause.

1

It is crucial for the purposes of this inquiry to separate Officer Mattingly's decision-points and determine whether each of his particular decisions was reasonable. Dickerson, 101 F.3d at 1162. Officer Mattingly made two decisions. First, he decided to arrest Newby, and second, after Newby broke free, he decided to shoot Newby. It cannot reasonably be contended (and plaintiff-appellee does not contend) that merely arresting Newby would have been a violation of the Fourth Amendment. See Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). Even under the facts as we must view them, Mattingly had probable cause to believe Newby was committing at least some crime.

The question of whether Mattingly's second decision was reasonable is the nub of this case. The relevant time for the purposes of this inquiry is the moment immediately preceding the shooting. Dickerson, 101 F.3d at 1162. That is, we must focus whether Officer Mattingly had probable cause to believe that Newby posed a serious danger to him or to others while Newby was running away. Ibid. See also Estate of Bing v. City of Whitehall, 456 F.3d 555, 570 (6th Cir.2006).

2

After Newby had broken free from Mattingly's custody and had run about ten feet from Mattingly, did Mattingly have probable cause to believe that Newby posed an imminent danger of serious physical harm to him or to others? Examining the information available to Mattingly at the time, precedent binding on this court, and viewing the facts in the light most favorable to the Bouggess, it is clear that Mattingly did not have probable cause sufficient to open fire.

Under the facts properly viewed at this stage, Mattingly did not know or suspect that Newby had a firearm. Too much evidence throws doubt on Mattingly's bare *891 assertion that he suspected that Newby had a weapon. Moreover, Mattingly's arguments on this point amount to disputes over the factual inferences made by the district court on summary judgment.5 As such, under Johnson, we cannot consider them on this interlocutory appeal. 515 U.S. at 317–20, 115 S.Ct. 2151.

Newby's only crimes, so far as Mattingly suspected, were dealing crack and physically resisting arrest. If an officer seeks to arrest someone for dealing crack cocaine and the suspect resists, using his hands, and then flees, may the officer shoot him? Under the governing doctrine, the answer is clearly "no." Officers cannot open fire in such circumstances absent more evidence that the suspect poses a danger to officers or to the public. Garner, 471 U.S. at 11, 105 S.Ct. 1694.

Newby's first crime was dealing crack. On appeal, Mattingly contends in his reply brief that "trained police officers know that drug dealers, especially crack cocaine dealers, usually carry guns." Reply Br. of Appellant, at 5 (citing United States v. Swafford, 385 F.3d 1026, 1030 (6th Cir.2004)). Mattingly seems to imply that a general notion that crack dealers are dangerous, rather than a particularized and supported sense of serious danger about a particular confrontation, justifies the use of deadly force. The Supreme Court and this court have never accepted such a sweeping generalization. Garner, 471 U.S. at 11–12, 105 S.Ct. 1694; Dickerson, 101 F.3d at 1162. We will not do so today.

Newby's second crime was resisting arrest and fleeing the scene. It cannot reasonably be contended that physically resisting arrest, without evidence of the employment or drawing of a deadly weapon, and without evidence of any intention on the suspect's part to seriously harm the officer, could constitute probable cause that the suspect poses an imminent danger of serious physical harm to the officer or to others. Cf. Garner, 471 U.S. at 11, 105 S.Ct. 1694 ("It is not

better that all felony suspects die than that they escape."). Merely resisting arrest by wrestling oneself free from officers and running away would justify the use of some force to restrain the suspect. For example, this court has held that officers may tackle a suspect who resists. Lyons v. City of Xenia, 417 F.3d 565, 577 (6th Cir.2005); Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir.2002).

However, while such action by a suspect justifies force, it does not justify deadly force, especially when the struggle has concluded and the suspect is in flight. Garner, 471 U.S. at 10–12, 105 S.Ct. 1694. See also Griffith v. Coburn, 473 F.3d 650, 659–60 (6th Cir.2006) (denying qualified immunity when officer used a "vascular neck restraint," i.e. a choke hold, to restrain an individual who posed no threat to the officers or to anyone else); Sigley v. Kuhn, 205 F.3d 1341, 2000 WL 145187(6th Cir. Jan.31, 2000), 2000 U.S.App. LEXIS 1465, at *2–3, * 15 (unpublished) (denying summary judgment on qualified immunity grounds when deadly force was employed after a suspect tackled an officer and wrestled him to the ground because there was a disputed issue of fact as to whether the *892 suspect tried to take away the officer's gun); Cardona v. City of Cleveland, 129 F.3d 1263, 1997 WL 720383 (6th Cir. Nov. 10, 1997), 1997 U.S.App. LEXIS 32113, at *9–14 (unpublished) (denying qualified immunity where officer and suspect struggled, and the suspect was shot during the struggle, where there was a disputed issue of fact as to whether the officer and suspect struggled over a gun). Cf. Donovan v. Thames, 105 F.3d 291, 297 (6th Cir.1997) (holding that conviction for resisting arrest did not preclude the bringing of a § 1983 action for excessive force in violation of the Fourth Amendment); Ewolski v. City of Brunswick, 287 F.3d 492, 508 (6th Cir.2002) (determining that the officers' employment of deadly force was reasonable because the suspect, in resisting arrest, had "demonstrated that he would fire on any officers who entered the house.").

Finally, Mattingly never warned Newby that he might shoot, as required by Garner when feasible under the circumstances. Nothing indicates that a warning was infeasible. Craighead, 399 F.3d at 962 (denying qualified immunity, in part, because "[t]he facts we are required to assume show that a warning was feasible but not given"). Moreover, nothing in the facts as they must be viewed at this stage indicates that Newby ever threatened Mattingly or anybody else in the area with serious harm. Mattingly has offered only a hunch, a crack deal, a hand-to-hand struggle, and a "look in [Newby's] eyes" to support his claim that his choice to shoot Newby three times in the back was reasonable under the Fourth Amendment. Other facts that Mattingly has offered are disputed and must be read in the light most favorable to Bouggess at this stage. As a result, it is clear under Garner and its progeny that Newby's Fourth Amendment rights were violated.

3

To resist this conclusion, Mattingly argues that Newby struggled with him and thus that Newby "assaulted a police officer." That is a subject of dispute. A reasonable fact-finder could conclude that Mattingly tried to arrest Newby and that Newby merely resisted and ran away. We cannot view the facts in the light most favorable to the defendant on this appeal. Moreover, "resisting

arrest," without probable cause to believe that the suspect poses a serious danger to anyone, cannot be enough to justify deadly force. Cf. Garner, 471 U.S. at 10–12, 105 S.Ct. 1694. In any case, when Mattingly began to fire, the "resisting" would have concluded and Newby merely would have been in flight. A suspect's flight on foot, without more, cannot justify the use of deadly force. . . .

One case decided by this court after briefing was complete in this case might provide support for Mattingly's claim that he did not violate Newby's Fourth Amendment rights. In Livermore v. Lubelan, 476 F.3d 397 (6th Cir.2007), this court held that it was not a violation of the Fourth Amendment for a police sniper to shoot a suspect armed with a rifle during an armed standoff between the suspect and police. Id. at 404–06. The suspect who was shot and killed had been present when an accomplice fired shots at a news helicopter. Id. at 401. The suspect had set the farmhouses on fire and had sought to escape with his rifle through the woods. Ibid. Moments after aiming his rifle at police, he was shot by a police sniper. Ibid. There were disputed issues of fact as to whether, at the exact moment when the sniper fired the shots, the suspect's rifle was aimed at an exposed officer.

This case is distinguishable from Livermore on at least two grounds, each pertinent to the Garner excessive force standard. First, while in Livermore the suspect was known by every officer on the scene to have a rifle, Mattingly did not know Newby had a weapon. Second, the crimes committed by the Livermore suspect go to the heart of Garner's standard—"crime[s] involving the infliction or threatened infliction of serious physical harm." Despite the disputed issue of fact about whether the Livermore suspect was aiming at the police at the precise instant he was shot, he had aimed his weapon at them only moments before. He had set buildings on fire. He had participated in an armed standoff with the police in which shots were fired at a passing helicopter. None of those aggravating facts is present in this case.

4

We acknowledge that in challenges to official action, particularly police action in the heat of the moment, courts must be careful to avoid unduly burdening officers' ability to make split-second decisions. Effective policing requires that courts accord police officers a certain latitude to make mistakes. There seems to be little doubt that Mattingly was flustered and nervous. We might well have been nervous in his situation. The legal standard, however, is objective. Even a split-second decision, if sufficiently wrong, may not be protected by qualified immunity.

Viewing the facts in the light most favorable to Bouggess, Mattingly lacked probable cause to believe Newby posed a serious danger to him or to the public. On an interlocutory appeal of the denial of summary judgment on qualified immunity grounds, our jurisdiction generally extends only to resolving issues of law. Johnson, 515 U.S. at 319–20, 115 S.Ct. 2151. There are disputed issues of fact that go to the heart of this case. They "should be reserved for the jury." Sigley v. City of Parma Heights, 437 F.3d at 536.

C

Our next step is to determine whether the right at issue was clearly established on the date of the shooting. Baranski, 452 F.3d at 438 (quoting Saucier, 533 U.S. at 202, 121 S.Ct. 2151). Qualified immunity shields an officer from suit even when his action violates constitutional rights, as long as he "reasonably misapprehends the law governing the circumstances." Brosseau, 543 U.S. at 198, 125 S.Ct. 596. It is designed to provide "ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). In other words, an officer will be denied qualified immunity if he violates a statutory or constitutional right that was "so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct." Dominque v. Telb, 831 F.2d 673, 676 (6th Cir.1987).

The question in this case, therefore, is whether Mattingly reasonably could have thought that he had probable cause to believe that Newby posed a serious danger to Mattingly or to others. Under the facts viewed in the light most favorable to Bouggess, Newby was (a) present at a crack deal; (b) uttered no threatening remarks toward Mattingly or anybody else; (c) never drew a weapon; (d) struggled with Mattingly in order to flee; (e) did not reach for Mattingly's gun; (f) did not fire Mattingly's gun at Mattingly's foot; (g) broke free from Mattingly and ran away, facing away from Mattingly; and (h) was shot three times in the back.

1

Viewing the facts that way, no reasonable officer could have thought he had probable cause to use deadly force against Newby. In Garner, 471 U.S. at 11–12, 105 S.Ct. 1694, the Supreme Court wrote:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Certainly, Garner's statement of the governing law may be applied differently in particular sets of circumstances, and reasonable minds can disagree over precisely which circumstances justify the use of deadly force.

Nevertheless, the Supreme Court has recognized that there are obvious cases in which an officer should have been on notice that his conduct violated constitutional rights, despite the generalized nature of that Court's pronouncements of constitutional standards. Hope v. Pelzer, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Our circuit and others have held that some cases can be so obvious under Garner and governing circuit precedent that officers should be presumed to have been aware that their conduct violated constitutional standards. Sample v. Bailey, 409 F.3d 689, 699 (6th Cir.2005) (citing Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir.1988) and Dickerson, 101 F.3d at 1163). See also Craighead, 399 F.3d at 962 (denying qualified immunity when an officer shot an individual holding a gun when testimony diverged as to whether the gun was pointed upward or at the officer).

This is such an obvious case. Within this circuit, Dickerson established, more than ten years ago, that conduct like that committed by Mattingly violates the Fourth Amendment. In that case, there was uncontroverted evidence of serious danger to the officers stemming from the suspect's clear possession of a weapon, his recent firing of his weapon, and his threatening language toward the police. Nevertheless, examining the moment immediately preceding the shooting, the Dickerson court determined that, because it was disputed whether the suspect was non-threatening when he was shot, the officer was not entitled to qualified immunity. 101 F.3d at 1162. See also Bibb, 840 F.2d at 350 (holding that where an officer caught a suspect dismantling the officer's car and then warned the suspect to stop, the officer was not entitled to qualified immunity for shooting and killing the suspect mid-flight).

. . . Mattingly and Newby struggled, perhaps over a gun, perhaps not. Newby fled, maybe posing a serious risk to Mattingly or to others, maybe not. We cannot resolve those doubts on an interlocutory appeal. Johnson, 515 U.S. at 319–20, 115 S.Ct. 2151. Viewing the facts in the light most favorable to Bouggess, Mattingly should have been aware that his actions violated clearly established constitutional rights. See, e.g., *896 Garner, 471 U.S. at 10–12, 105 S.Ct. 1694; Dickerson, 101 F.3d at 1152–62; Sigley, 205 F.3d 1341, 2000 WL 145187 , 2000 U.S.App. LEXIS at *2–3. . . .

In this case, viewing the facts in the light most favorable to Bouggess, Mattingly violated Newby's Fourth Amendment rights by shooting him dead without "probable cause to believe" that he posed "a threat of serious physical harm, either to the officer or to others." Garner, 471 U.S. at 11–12, 105 S.Ct. 1694. That right was clearly established at the time the shooting took place. Ibid. See also Dickerson, 101 F.3d at 1162; Sova, 142 F.3d at 903. When "the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury," the "jury becomes the final arbiter of [a] claim of immunity." Brandenburg, 882 F.2d at

215–16. See also Sova, 142 F.3d at 903. We thus agree with the district court. Mattingly was not entitled to summary judgment on Bouggess's § 1983 claim. . . .

. . . Under the facts as we must construe them, Mattingly violated Newby's clearly established constitutional rights. We thus AFFIRM the judgment of the district court and REMAND the case for further proceedings.

8. Traffic stops

Whren v. U.S., 517 U.S. 806 (1996)

Justice SCALIA delivered the opinion of the Court.

In this case we decide whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer **1772 would have been motivated to stop the car by a desire to enforce the traffic laws.

I

On the evening of June 10, 1993, plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department were patrolling a "high drug area" of the city in an unmarked car. Their suspicions were aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signaling, and sped off at an "unreasonable" speed. The policemen followed, and in a short while overtook the Pathfinder when it stopped behind other traffic at a red light. They pulled up alongside, and Officer Ephraim Soto stepped out and approached the driver's door, identifying himself as a police officer and directing the driver, petitioner Brown, to put the vehicle in park. When Soto drew up to the driver's *809 window, he immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands. Petitioners were arrested, and quantities of several types of illegal drugs were retrieved from the vehicle.

Petitioners were charged in a four-count indictment with violating various federal drug laws, including 21 U.S.C. §§ 844(a) and 860(a). At a pretrial suppression hearing, they challenged the legality of the stop and the resulting seizure of the drugs. They argued that the stop had not been justified by probable cause to believe, or even reasonable suspicion, that petitioners were engaged in illegal drug-dealing activity; and that Officer Soto's asserted ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual. The District Court denied the suppression motion, concluding that "the facts of the stop were not

controverted," and "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop." App. 5.

Petitioners were convicted of the counts at issue here. The Court of Appeals affirmed the convictions, holding with respect to the suppression issue that, "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation." 53 F.3d 371, 374–375 (C.A.D.C.1995). We granted certiorari. 516 U.S. 1036, 116 S.Ct. 690, 133 L.Ed.2d 595 (1996).

II . . .

Petitioners accept that Officer Soto had probable cause to believe that various provisions of the District of Columbia traffic code had been violated. See 18 D.C. Mun. Regs. §§ 2213.4 (1995) ("An operator shall ... give full time and attention to the operation of the vehicle"); 2204.3 ("No person shall turn any vehicle ... without giving an appropriate signal"); 2200.3 ("No person shall drive a **1773 vehicle ... at a speed greater than is reasonable and prudent under the conditions"). They argue, however, that "in the unique context of civil traffic regulations" probable cause is not enough. Since, they contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.

A

Petitioners contend that the standard they propose is consistent with our past cases' disapproval of police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas. We are reminded that in Florida v. Wells, 495 U.S. 1, 4, 110 S.Ct. 1632, 1635, 109 L.Ed.2d 1 (1990), we stated that "an inventory search" must not be a ruse for a general rummaging in order to discover incriminating evidence"; that in Colorado v. Bertine, 479 U.S. 367, 372, 107 S.Ct. 738, 741, 93 L.Ed.2d 739 (1987), in approving an inventory search, we apparently thought it significant that there had been "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation"; and that in New York v. Burger, 482 U.S. 691, 716–717, n. 27, 107 S.Ct. 2636, 2651, n. 27, 96 L.Ed.2d 601 (1987), we observed, in upholding the constitutionality of a warrantless

administrative inspection, that the search did not appear to be "a 'pretext' for obtaining evidence of ... violation of ... penal laws." But only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. In each case we were addressing the validity of a search conducted in the absence of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative *812 regulation, is not accorded to searches that are not made for those purposes. See Bertine, supra, at 371–372, 107 S.Ct., at 740–741; Burger, supra, at 702–703, 107 S.Ct., at 2643–2644.

. . .

We think these cases [discussed in a portion of the opinion omitted] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis. . . .

Petitioners argue that our cases support insistence upon police adherence to standard practices as an objective means of rooting out pretext. They cite no holding to that effect, and dicta in only two cases. In Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), the petitioner had been arrested by the Immigration and Naturalization Service (INS), on the basis of an administrative warrant that, he claimed, had been issued on pretextual grounds in order to enable the Federal Bureau of Investigation (FBI) to search his room after his arrest. We regarded this as an allegation of "serious misconduct," but rejected Abel's claims on the ground that "[a] finding of bad faith is ... not open to us on th[e] record" in light of the findings below, including the finding that " 'the proceedings taken by the [INS] differed in no respect from what would have been done in the case of an individual concerning whom [there was no pending FBI investigation],' " id., at 226–227, 80 S.Ct., at 690–691. But it is a long leap from the proposition that following regular procedures is some evidence of lack of pretext to the proposition that failure to follow regular procedures proves (or is an operational substitute for) pretext. Abel, moreover, did not involve the assertion that pretext could invalidate a search or seizure for which there was probable cause—and even what it said about pretext in other contexts is plainly inconsistent with the views we later stated in Robinson, Gustafson, Scott, and Villamonte–Marquez. In the other case claimed to contain supportive dicta, United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), in approving a search incident to an arrest for driving without a license, we noted that the arrest was "not a departure from established police department practice." Id., at 221, n. 1, 94 S.Ct., at 470, n. 1. That was followed, however, by the statement that "[w]e leave for another day questions which would arise on facts different from

these." Ibid. This is not even a dictum that purports to provide an answer, but merely one that leaves the question open.

III

In what would appear to be an elaboration on the "reasonable officer" test, petitioners argue that the balancing inherent in any Fourth Amendment inquiry requires us to weigh the governmental and individual interests implicated in a traffic stop such as we have here. . . .

Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, see Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), unannounced entry into a home, see Wilson v. Arkansas, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), entry into a home without a warrant, see Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), or physical penetration of the body, see Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken "outbalances" private interest in avoiding police contact.

Petitioners urge as an extraordinary factor in this case that 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. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.

* * *

Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct. The judgment is

Affirmed.

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4

United States v. Whren

The Fourth Amendment Problem with Pretextual Traffic Stops

Tracey Maclin

The traffic violator is, of course, the easiest offender for the patrolman to apprehend and he can be apprehended in large numbers if departmental policies require it.[1]

Introduction

As late as the mid-1970s, police had unfettered discretion to stop a motorist who was obeying all the traffic laws to determine whether the motorist had a valid driver's license and vehicle registration. This practice was known as a "spot check" or random stop. Not surprisingly, such stops were often motivated by an officer's suspicion or hunch that the driver or an occupant of the vehicle was involved with unrelated criminal conduct.[2] Indeed, some police departments instructed officers that "'[s]pot checks' shall generally be made in connection with some minor violations *or other suspicious circumstance.*"[3]

As a matter of legal principle, police no longer have unlimited authority to stop vehicles for license and registration checks. Every police officer (and almost every driver) knows that a car cannot be "pulled over" or stopped, unless there is probable cause to believe that the motorist has committed a traffic offense or reasonable suspicion that the motorist (or someone inside the vehicle) is involved in some other criminal conduct. In this context, "probable cause" means a good reason to believe that the motorist has violated the traffic code.

United States v. Whren[4] addressed a controversial Fourth Amendment question, whether it is legal for the police to use a traffic offense as a pretext to conduct a search for drugs. A unanimous Court ruled that the constitutional validity of a traffic stop does not depend on the actual

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Avery, Michael. We Dissent : Talking Back to the Rehnquist Court. New York, NY, USA: New York University Press (NYU Press), 2008. ProQuest ebrary. Web. 19 December 2014.
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motivations of the officers. Thus, police can use a minor traffic offense as a pretext to initiate a criminal investigation, even when officers have no intent to enforce the traffic code and lack a legitimate basis for suspecting that the motorist has committed a crime. In criminal procedure circles, this type of police seizure is known as a "pretext stop."[5]

Whren involved issues of racial profiling, traffic enforcement, and how much discretion police officers should have to initiate criminal investigations that intrude upon the liberty and privacy of motorists, even where they have no reasonable suspicion that a crime was committed. Despite these contentious issues, the Court made both the question and the result in *Whren* look easy. In doing so, the Court gave police officers carte blanche to use the traffic code as a means to initiate criminal investigations and to evade otherwise applicable Fourth Amendment safeguards designed to protect motorists from arbitrary police intrusions. As Wayne LaFave, the nation's foremost scholar on the Fourth Amendment, put it, "the Court managed to trivialize what in fact is an exceedingly important issue regarding a pervasive law enforcement practice."[6]

The Fourth Amendment protects against unreasonable searches and seizures by government officials. *Whren* decided whether a seizure of a "motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws."[7] The Court ruled that when the police have probable cause to believe a motorist has violated traffic laws, a stop is always constitutionally reasonable.[8] The Court held that the subjective intent or motivation, including police motives based on racial stereotypes or bias, are irrelevant in this context.

The dissent presented in this chapter argues that the Fourth Amendment requires that when there is a departure from standard police procedure during a traffic stop and the stop becomes a pretext for a narcotics investigation, then the court should determine if the stop was objectively reasonable in the light of the totality of the circumstances that were present. Where the police actions were arbitrary or discriminatory, the court should conclude that the stop violated the motorist's Fourth Amendment rights.

Whren was significant for three reasons. First, the pretext claim raised by the defendants "touched on an issue of persistent ambiguity in constitutional criminal procedure–the relevance of a police officer's motivations."[9] Since 1932, the Court had sent conflicting signals as to the significance of an officer's subjective intent in determining whether a search

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or seizure was constitutional.[10] Language in some rulings indicated that pretextual searches and seizures were disfavored, if not unconstitutional. In one such case, decided in 1932, the Court commented that "[a]n arrest may not be used as a pretext to search for evidence."[11] For almost sixty years prior to *Whren*, the Court, as well as individual Justices, had intimated that police intrusions conducted with the intent to evade constitutional safeguards violated the Fourth Amendment's prohibition against unreasonable searches and seizures.[12]

More recently, however, the modern Court had questioned the wisdom and practicality of having Fourth Amendment issues turn on the subjective intent of police officers, particularly when trial courts rule on a contested search or seizure at a suppression hearing, inevitably occurring weeks or months after the actual search or seizure. By the late 1960s, some of the Justices believed that "sending state and federal courts on an expedition into the minds of police officers would produce grave and fruitless misallocation of judicial resources."[13] The Court's discomfort with inquiring into the minds of police officers is not unique to Fourth Amendment cases. Questions surrounding the "intent" of governmental actors are notoriously complex in constitutional settings, and the Court has been reluctant to have the results in constitutional cases turn on the subjective intent or motive of governmental actors.[14] This concern is especially pronounced in search-and-seizure scenarios because of the well-known difficulties in ascertaining a police officer's motive and because, in many cases, the Justices believe that bad motives should not invalidate searches or seizures that are objectively reasonable.

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At the same time, even the conservative Justices of the Burger and Rehnquist Courts had issued opinions appearing to confine certain types of intrusions—inventory searches of cars and administrative searches of businesses, for example—to situations where there was no police bad faith or pretext.[15] Moreover, the same law-and-order Justices curtailed application of the exclusionary rule, requiring the suppression of criminal evidence obtained in violation of the Fourth Amendment, in cases where the police acted in "good faith" reliance that their conduct complied with constitutional requirements. If "conduct in violation of the Fourth Amendment need not result in suppression because of the 'good faith' of the police,"[16] then a plausible argument could be raised that the "bad faith" of the police should also matter.

In sum, prior to *Whren*, the Court had not definitively resolved when or whether an officer's motive or subjective intent matters in Fourth

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Amendment cases. *Whren* gave the Court an opportunity to address one frequently occurring pretext scenario: using a traffic stop as a ruse for conducting a narcotics investigation.

The second important aspect of *Whren* concerned racial profiling. The defendants in *Whren* were African American; in addition, there was no objective evidence that the defendants were involved in narcotics activity. Throughout the proceedings, the defendants contended that police had stopped their car not because there was a legitimate basis for suspecting they were involved with narcotics but because they were black. In their Supreme Court brief, the defendants argued that racially biased traffic enforcement was pervasive on the nation's highways and streets. They contended that if a traffic violation always provides justification for stopping a motorist, police will abuse their power and use traffic offenses to evade otherwise applicable Fourth Amendment safeguards that prevent stopping and questioning motorists unless police have probable cause or reasonable suspicion that the motorist is engaged in criminal conduct.[17]

The defendants' assertions about racially motivated traffic enforcement were hardly novel; their claims had both empirical, as well as anecdotal, support. The targeting of black people for search and seizure predates the founding of the nation.[18] During the late 1700s, blacks, both slave and free, were targeted for searches and seizure solely because of their race, a phenomenon never experienced by white colonists.[19] In modern times, police departments across the country continue to target black motorists for selective traffic enforcement, hoping to discover evidence of criminal conduct. Evidence of this practice is not hard to find. Often, police officers provide the most convincing proof that black motorists are routinely selected for pretextual traffic stops. For example, in 1992, a Maryland State Police intelligence report warned troopers in Allegheny County to be alert for "dealers and couriers (traffickers) [who] are predominately black males and black females . . . utilizing Interstate 68."[20]

The year the Court decided *Whren*, other data and reports indicated that black motorists were targeted for pretextual traffic stops in various jurisdictions. A New Jersey trial court found that New Jersey state troopers had a "*de facto* policy" of targeting black motorists for investigation and arrest on the southern portion of the New Jersey Turnpike.[21] The *News & Observer*, a newspaper in Raleigh, North Carolina, conducted a study of the 1995 patrol records of the Special Emphasis Team of the North Carolina Highway Patrol, whose goal was to interdict narcotics through traffic stops on Interstate 85 and 95. The study found that the Team "charged

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black male drivers [with traffic offenses] at nearly twice the rate of other troopers working the same roads."[22] The study found that black male drivers received almost 45 percent of the traffic citations issued by the Team, while black male drivers received only 24.2 percent of the traffic citations issued by other North Carolina troopers patrolling the same highways. The report explained that an independent statistical expert believed that it was "'wildly improbable'" that two groups of troopers patrolling the same highways would produce such disparate results by chance.[23]

While the Court was deliberating in *Whren*, these and other statistical data provided *prima facie*, if not persuasive, evidence that police departments and individual officers across the country were targeting black (and sometimes Hispanic) motorists for unwarranted narcotics investigations under the guise of traffic enforcement. The combination of these reports, empirical and anecdotal, demonstrated large-scale, arbitrary, and biased police seizures across the nation. Tellingly, the decision in *Whren* did not question the defendants' claim that racial profiling had occurred in their case or was occurring nationwide.

The third important element of *Whren* concerned the practical aspects of traffic enforcement by the police. Prior to 1979, in many parts of the country, police were permitted to stop vehicles operating on roadways to check the registration of the vehicle and the license of the driver without having observed a traffic infraction.[24] Moreover, many of these so-called spot checks or random stops were far from random. Spot or random stops were frequently used to investigate criminal conduct unrelated to vehicle license and registration laws. As Professor LaFave observed, in 1978, pretextual stops of vehicles occurred "with some frequency."[25] According to LaFave, lower court rulings involving spot checks for license and registration compliance "indicate[ ] that often the selection of the vehicle which was stopped was not a matter of pure chance but rather was because the officer suspected the driver of being engaged in some criminal conduct."[26] Even in cases involving actual traffic offenses, there was ample evidence that police used traffic stops "as a subterfuge" to question motorists about more serious criminal conduct[27] or as a pretext to search the vehicle.[28]

In 1979, the United States Supreme Court ruled, in *Delaware v. Prouse*, that "spot checks" were illegal because they gave police too much discretion to detain motorists. The *Prouse* ruling held that, unless police have "at least articulable and reasonable suspicion that a motorist is unlicensed or that automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law," stopping a vehicle

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to check a motorist's license and registration violates the Fourth Amendment.[29] The upshot of *Prouse* is that before police can conduct a vehicle stop, they must have objective evidence that the motorist (or an occupant of the vehicle) has committed a traffic offense or some other crime.

While the result in *Prouse* might have been initially seen as an obstacle for the police, it soon became apparent that *Prouse*'s holding would not check the discretion of police to stop and interrogate motorists or to obtain authority to search vehicles for criminal law purposes. The reason is simple enough: every motorist, sooner or later, violates the traffic laws. Professor David Harris has aptly described what every police officer knows: "*No* driver can go for even a short drive without violating *some* aspect of the traffic code. And since there are no perfect drivers, everyone's a violator."[30] Moreover, discretionary stops are not checked by the requirement that police have probable cause of a traffic offense before pulling over a motorist. Data out of New Jersey, for example, show that 98.1 percent of the vehicles traveling on a section of the New Jersey Turnpike exceeded the speed limit.[31] If nearly every vehicle on the New Jersey Turnpike is violating the law, it is easy for the police to be selective in deciding which motorists to stop. It is similar to shooting fish in a barrel.[32] Interestingly, Justice Scalia's opinion in *Whren* did not dispute the defense claim that traffic violations are ubiquitous and thus it is easy for the police to develop an argument that there is probable cause of a traffic offense in order to justify stopping a motorist.

The incident that gave rise to the *Whren* opinion occurred on June 10, 1993, when two young black men, Michael Whren and James Brown, were riding in Washington, D.C., in a Nissan Pathfinder with temporary tags. The men attracted the attention of two plainclothes vice officers, Efrain Soto, Jr., and Homer Littlejohn, who were patrolling for narcotics activity in an unmarked car in a "high drug area" of the city.[33] The officers claimed that their suspicions were aroused when the Pathfinder paused at a stop sign for what they believed was an inordinate amount of time, more than twenty seconds. The officers observed Brown, the driver, looking into the lap of Whren, the passenger. The officers decided to stop the car, ostensibly because the pause at the stop sign violated a District of Columbia traffic regulation that drivers must pay "full time and attention" to their vehicle while driving.

When the officers made a U-turn in order to stop the Pathfinder, Brown allegedly turned right without signaling and sped off at an "unreasonable" speed.[34] Officer Soto later testified that he had no intention of

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issuing a citation to the driver but merely wanted to "talk to" him about why he had stopped for so long at the sign.[35] Officer Soto acknowledged that it was not usually the job of vice officers to issue traffic citations, unless a driver was clearly endangering others or engaged in blatantly reckless driving. In fact, plainclothes officers like Soto were prohibited by a Police Department regulation from making traffic stops, unless a motorist committed a violation "so grave as to pose an immediate threat to the safety of others."[36] Nonetheless, the officers stopped the vehicle. When Officer Soto approached the driver's side of the vehicle, he immediately observed Whren holding two plastic bags of what appeared to be crack cocaine. The officers arrested both Brown and Whren and searched the Pathfinder, revealing additional quantities of illegal narcotics.

Whren and Brown were indicted on various federal drug offenses. At a pretrial suppression hearing, they argued that the police seizure of their vehicle violated the Fourth Amendment. The defendants contended that the police lacked probable cause or reasonable suspicion to believe that they were involved with narcotics activity. They argued that Officer Soto's claimed justification for stopping their vehicle, to provide a warning for traffic violations, was pretextual. The federal district court denied their motion, concluding that "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop."[37]

Whren and Brown were convicted for narcotics offenses, and the Court of Appeals affirmed the convictions. The appellate court rejected the claim that the stop was unconstitutional. The court reasoned that regardless of whether police subjectively believe that a motorist may be involved in criminal activity, "a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation."[38]

The defendants' argument to the Supreme Court was straightforward. It contended that virtually every motorist commits a traffic violation every time he or she drives a vehicle. Because the typical traffic code contains hundreds of provisions regulating driving, the condition of a vehicle, and the equipment on the vehicle, no driver can go very far without committing some traffic infraction. Thus, they argued, "given the ease with which an officer so inclined can identify technical traffic infractions, merely limiting stops to those circumstances in which the police can say they witnessed such a violation is, as a practical matter, no limitation at all."[39]

Since probable cause of a traffic violation is easy to obtain, the argument continued, officers will use traffic stops as a pretext for investigating

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other crimes, particularly narcotics offenses, for which they possess no probable cause or even reasonable suspicion. Furthermore, empirical data and other reports show that African Americans and members of other racial or ethnic minorities are disproportionately selected for these pretext stops.

Recognizing the modern Court's general reluctance to have Fourth Amendment issues turn on the subjective motive of the police, the defendants proposed a rule that would not depend upon proof of "bad faith" or improper intent of the officer conducting the challenged stop. Rather, they proposed that a stop be considered unconstitutional when facts showed a deviation from the usual or standard practices of the police. Therefore, where an officer's conduct in making a traffic stop deviated materially from the usual or standard police procedure, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given, then the officer's conduct would be objectively unreasonable under the Fourth Amendment. As Professor LaFave analyzed the theory prior to the *Whren* decision, the concern of judges would be "not with *why* the officer deviated from the usual practice in this case but simply that he *did* deviate."[40] What matters, then, is not the subjective motive of the police but whether the officer *in fact* deviated from the standard practice. If the officer's conduct was a departure from standard practice, then that conduct was arbitrary, "and it is the arbitrariness which in this context constitutes the Fourth Amendment violation."[41]

Under the facts in *Whren*, proving deviation from standard police practices, and thus arbitrariness, was easy. Notwithstanding a police department regulation barring traffic stops by plainclothes officers, Officer Soto stopped the defendants' car for traffic offenses that did not threaten public safety. Under the defendants' theory, no reasonable officer in Officer Soto's shoes would have conducted such a stop because of the departmental prohibition. The Court, however, rejected the defendants' test for determining whether the stop was unconstitutional.

Justice Scalia's opinion for a unanimous Court in *Whren* first explained why the Court's previous precedents undermined the defendants' pretext argument. Justice Scalia acknowledged that a handful of the Court's cases expressed disapproval of pretextual searches. For example, the ruling in *New York v. Burger* upheld the validity of a warrantless administrative search of a vehicle dismantling business.[42] While nevertheless ruling for the government, *Burger* emphasized that the challenged search was not a "pretext" for obtaining evidence of criminal conduct.[43] Similarly, in *Florida*

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v. Wells[44] and *Colorado v. Bertine*,[45] the Court approved inventory searches, but it specifically noted that such searches "must not be a ruse for a general rummaging in order to discover incriminating evidence"[46] and cautioned that police conducting inventory searches could not act in "bad faith or for the sole purpose of investigat[ing]" criminal conduct.[47] But Justice Scalia chided the defendants for relying on these cases because, as he put it, "only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred."[48] Cases like *Burger*, *Wells*, and *Bertine* addressed the validity of searches conducted without probable cause. Passages from those cases that are critical of pretextual motives have no application to situations where police possess probable cause for a search or seizure.

Putting inventory and administrative searches aside, Justice Scalia further explained that the defendants' pretext argument was flawed because the Court had never ruled "that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment."[49] Indeed, according to Justice Scalia, the Court had "repeatedly held and asserted the contrary."[50] As proof of his point, Justice Scalia cited three cases: *United States v. Villamonte-Marquez*,[51] *United States v. Robinson*,[52] and *Scott v. United States*.[53] In *Villamonte-Marquez* the Court held that an otherwise valid boarding of a ship by customs officers to inspect the vessel's documents was not rendered illegal, either because Louisiana state police officers accompanied the customs officials or because the law enforcement officers were pursuing a tip that the ship might be carrying contraband narcotics. According to Justice Scalia, *Villamonte-Marquez* "flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification."[54]

Similarly, the rulings in *Robinson* and *Scott* did not aid the pretext argument. In Justice Scalia's view, the Court in *Robinson* held that an arrest for a traffic violation was not unconstitutional simply because the arrest was "a mere pretext for a narcotics search"[55] and that a valid search incident to arrest "would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches."[56] *Scott* involved a challenge to the admissibility of wiretap evidence allegedly obtained in violation of a federal statutory requirement that FBI agents undertake reasonable efforts to minimize the calls they intercept. According to Scalia, *Scott* also undercut the *Whren* defendants' argument because it

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stated that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[57]

In sum, Justice Scalia concluded that the Court's precedents "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."[58] He agreed with the defendants' claim that race-based enforcement of traffic laws offends the Constitution but explained that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[59] According to Scalia, the subjective intentions of the police, including police motives based on racial stereotypes or bias, are irrelevant to ordinary Fourth Amendment analysis.

The next section focused on why the defendants' proposed solution to the pretext issue, that is, asking whether a reasonable officer *would* have made the challenged stop instead of whether an officer *could* have made the stop, was not an objective standard after all. In Justice Scalia's view, the defendants' proposal "is plainly and indisputably driven by subjective considerations."[60] Their solution was designed "to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons."[61] A proposal to identify pretextual conduct through objective means "might make sense" if the Court's previous cases disavowing reliance on police bad faith were based "upon the evidentiary difficulty of establishing subjective intent."[62] But Justice Scalia explained that the Court's main reason for not inquiring into an officer's subjective intent was "simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent" of the police.[63]

Moreover, Justice Scalia doubted the practicality of the defendants' proposal. He thought it "somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation."[64] The latter approach would require judges to speculate "about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."[65] Justice Scalia also concluded that reliance upon police manuals and other objective standards of police enforcement practices would not promote consistent Fourth Amendment rulings or sound legal analysis. Because police procedures and department regulations "vary from place to place

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and from time to time," Justice Scalia asserted that Fourth Amendment rules could not turn "upon such trivialities."[66]

To illustrate this concern, he noted that the pretext argument rested on the existence of the District of Columbia Police Department regulation that forbids plainclothes officers in unmarked police cruisers to undertake traffic stops unless there is an immediate threat to the safety of others. Scalia countered that this argument would be unavailable "in jurisdictions that had a different practice"[67] and would not have been successful "even in the District of Columbia, if Officer Soto had been wearing a uniform or patrolling in a marked police cruiser."[68]

Finally, Justice Scalia rejected the argument that the Court should resolve this case by conducting a traditional balancing analysis that weighs the respective governmental and individual interests at stake. Under such a balancing model, the defendants contended, a motorist's interest in not being stopped for arbitrary reasons outweighs the government's interest in advancing traffic safety. Justice Scalia blithely dismissed this argument. Rather, he explained that a balancing analysis is appropriate where police affect a search or seizure without probable cause to believe that an offense has occurred. No balancing is required, however, where a search or seizure is based upon probable cause. Where probable cause exists, the Court employs a balancing analysis only in those few cases involving searches or seizures conducted "in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests."[69] Such intrusions include the use of deadly force, unannounced entries into private homes, entries into private homes without a warrant for minor offenses, or a physical penetration of the body. Officer Soto's stopping of the defendants' vehicle "does not remotely qualify as such an extreme practice."[70] Thus, the stop is controlled by the traditional rule that probable cause that an offense has been committed "outbalances" the individual's interest in avoiding a police intrusion.[71]

Justice Scalia brushed aside the claim that an extraordinary factor existed because it was impossible for a motorist to perfectly comply with the "multitude of applicable traffic and equipment regulations" contained in the typical traffic code.[72] He asserted that no legal principle permitted the Court "to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."[73] And, even if "such exorbitant codes" could be identified, Justice Scalia continued, no legal standard existed for identifying "which particular provisions are sufficiently important

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to merit enforcement."[74] Therefore, for the "run-of-the-mill case, which this surely is," probable cause justifies the stop whatever the subjective intent of the police.[75]

Dissent by Tracey Maclin

Since its ratification, in 1791, "a paramount purpose of the [F]ourth [A]mendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures."[76] History shows that the Framers believed the best way to guard against arbitrary and unjustified governmental intrusions was to control the discretion of law enforcement officers.[77] "The power asserted by the English messengers and colonial customs officers and condemned by history was 'a discretionary power . . . to search wherever their suspicions may chance to fall,' 'a power that places the liberty of every man in the hands of every petty officer.'"[78] Today's ruling by the Court ignores these fundamental principles. By allowing police officers to use any traffic violation as a subterfuge to conduct an arbitrary and unjustified narcotics investigation, the Court has given police officers across the nation virtually unchecked discretion to interfere with the liberty and privacy of any motorist.

We know, of course, that police officers will not use the discretion granted by today's decision against *every* motorist. Reports from the press, as well as judicial decisions, increasingly indicate that police will utilize this discretionary power selectively. As in this case, African American male motorists will bear the brunt of this arbitrary police power. Astonishingly, the Court's ruling asserts that the Fourth Amendment has nothing to say about this type of arbitrary and race-based traffic enforcement. Disappointingly, the Court implies that the Equal Protection Clause provides constitutional redress for the capricious and selective traffic stop conducted in this case. As I explain later, even a cursory review of our recent equal protection rulings shows that a motorist's chances of succeeding on an equal protection challenge against the conduct at issue here are so remote as to be negligible.

As framed by the Court, the issue addressed in this case may seem technical to the layperson. But the technical quality of the Court's language should not obscure the significance of today's ruling. The Court has permitted police to conduct arbitrary traffic seizures in order to pursue drug investigations unsupported by objective evidence of criminality.

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As the nation's foremost scholar on the Fourth Amendment has already noted, such a result "cannot be squared with the fundamental point that arbitrary action is unreasonable under the Fourth Amendment."[79] Because I believe that the Court's reasoning is contrary to these fundamental principles, I must respectfully dissent.

A. Why Pretextual Motive Should Matter When Resolving Fourth Amendment Issues

The Court forcefully asserts that our prior cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."[80] This is a curious conclusion. Many of our search and seizure cases contain statements from the Court, as well as from individual Justices, suggesting that pretextual police intrusions performed to avoid the warrant or probable cause requirements will not be tolerated; at other times, we have noted that pretextual intrusions raise serious Fourth Amendment issues.[81] Moreover, if our prior cases truly did "foreclose any argument" that the constitutional reasonableness of a traffic stop turns on police motive, one would expect that the lower courts would have understood the import of our cases. In the past few years, however, the lower courts have reached divergent results on the issue we confront today. Furthermore, criminal procedure scholars with differing views on the validity of pretextual searches and seizures agree that our prior precedents have not spoken definitively on the validity of pretextual intrusions generally, nor have cases offered clear guidance on the issue presented in this case.

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1. Jones v. United States

The Court insists that our prior cases foreclose inquiry into police motive, but *Jones v. United States*,[82] a case not cited by the Court, is to the contrary. In *Jones*, federal officers entered Jones's home at night, under the authority of a search warrant, searching for an illicit distillery. The search revealed the illegal equipment. This Court explained that the warrant did not authorize a nighttime entry. Therefore, the warrant could not justify the entry and seizure of the evidence. The Court also rejected the government's belated argument that the seizure should be upheld because the officers had probable cause to arrest Jones. Under the government's theory, because the officers had probable cause to arrest Jones, their warrantless entry "was justified and, once in the house, while searching for [Jones], they could properly seize all contraband material in plain sight."[83]

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The *Jones* Court succinctly dismissed this claim because the "testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, and not to arrest [Jones]."[84] Concededly, the *Jones* Court did not directly address the pretext issue presented here. Nonetheless, *Jones* demonstrates that motive is not an irrelevant factor when assessing the reasonableness of a search or seizure.[85] At a minimum, the result in *Jones* cannot be reconciled with the Court's conclusion that none of our prior precedents justifies judicial examination of an officer's intent when conducting a search or seizure.

2. *Missouri v. Blair*

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Furthermore, if our prior decisions "foreclose any argument" that the constitutional reasonableness of a traffic seizure turns on the motivation of the police, why, *ten years* ago, did we undertake review of *Missouri v. Blair*? The issue in *Blair* was whether the police may use "evidence in a homicide case that has been obtained after an arrest for a traffic violation, where the police lacked probable cause to arrest the defendant for homicide, and the traffic arrest was made at the request of the police homicide unit."[86] As one scholar noted, the facts in *Blair* "posed pretext conundra in a clear-cut fashion" and presented the Court "a golden opportunity . . . to make clear what its position actually is with respect to the constitutionality of pretext[ual]" searches and seizures.[87] Of course, the pretext issue raised in *Blair* was never resolved.[88] But if the Court is correct, that prior cases "foreclose any argument" that the legality of a traffic seizure depends on the motivation of the police, there was no reason to grant review in *Blair* and hear oral arguments. Instead, the Court simply should have summarily reversed the ruling of the Missouri Supreme Court in a *per curiam* opinion and explained that motive is irrelevant when the police have probable cause.

Moreover, if our prior cases did indeed "foreclose any argument" that motive is relevant to the constitutionality of a traffic stop, why did Justice White urge the Court, five years after we dismissed the writ of certiorari in *Blair* in 1991, to review three companion cases where the petitioners alleged that police used a traffic stop as a pretext for conducting a narcotics search?[89] As Justice White noted, the defendants in the three cases raised a "recurring issue" on which the federal courts of appeals had reached divergent results.[90] In sum, the Court misleads when it asserts that our precedents "foreclose any argument" that motive is irrelevant when police have probable cause of an offense. The Court has not spoken clearly on

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the constitutionality of pretextual searches or seizures. In fact, our prior rulings sent mixed signals on the permissibility of pretextual intrusions. This lack of clarity is reflected in the decisions of the lower courts, and it has been recognized by Fourth Amendment scholars.[91]

3. *Inventory & Administrative Search Cases*

The Court asserts that statements in our inventory and administrative search cases, which disapprove of pretextual intrusions, have no applicability to police seizures supported by probable cause. According to the Court, "only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred."[92] The Court opines that this case is distinguishable from the inventory and administrative search cases because those cases addressed the validity of a search "conducted in the *absence* of probable cause."[93]

The Court correctly notes that the inventory and administrative search cases—*Florida v. Wells*, *Colorado v. Bertine*, and *New York v. Burger*—involved searches performed in the absence of probable cause. In contrast, the traffic stop here was supported by probable cause. But the Court fails to explain why this distinction matters.[94] No one suggests, not even the Court, that perfect compliance with the traffic code is possible. More important, police officers have known for a long time that the traffic code provides a readily available device to stop and question any motorist.[95] "There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic offense. In fact, '[p]olice officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation.'"[96] Because the police can easily obtain probable cause of a traffic offense against any motorist, the distinction identified by the Court between this case and inventory and administrative search cases is not compelling. In both contexts, the Fourth Amendment's purpose in preventing arbitrary invasions of privacy and security requires us to focus on the discretion accorded to law enforcement officers in the field by the challenged intrusion.[97]

Indeed, in *Camara v. Municipal Court*, the Court explained that the constitutional evil of warrantless administrative searches of homes is that such a system has the practical effect of leaving the homeowner "subject to the discretion of the official in the field."[98] Similarly, in *South Dakota v. Opperman*, the leading inventory search case, Chief Justice Burger's

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majority opinion emphasized that the inventory search performed in that case was dictated by standard police procedure, and it was not "a pretext concealing an investigatory police motive."[99] What was implicit in Chief Justice Burger's opinion was explicit in Justice Powell's concurring opinion. Relying on the passage in *Camara*, quoted earlier, Justice Powell explained that the important constitutional factor justifying inventory searches was that "no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope."[100]

In sum, although the Court is correct to note that our inventory and administrative search rulings addressed police intrusions performed "in the *absence* of probable cause,"[101] that fact does not justify dismissing statements from those rulings disapproving pretextual police intrusions. As we recognized in *Camara* and in *Opperman*, administrative and inventory searches present the same constitutional concerns inherent in the police seizure challenged in this case: leaving the individual subject to the arbitrary discretion of the officer in the field.

4. *Prior Precedents Do Not Resolve the Question Surrounding Pretextual Traffic Stops*

After insisting that we have never held that an officer's motive invalidates objectively justifiable behavior, the Court goes further by declaring, "we have repeatedly held and asserted the contrary."[102] To bolster this claim, the Court cites three cases: *United States v. Robinson*, *Scott v. United States*, and *United States v. Villamonte-Marquez*. In none of these cases, however, did the Court hold that objectively justifiable police conduct is *per se* reasonable under the Fourth Amendment, regardless of an officer's intent. In fact, not one of these cases dictates the conclusion that police motive is constitutionally irrelevant, let alone compels that same result in a case where the challenged seizure is an obvious and blatant deviation from standard police practice. Although a reader would never know it, each of these cases resolved questions that are fully distinguishable from the issue before us today.

Robinson, decided in 1973, does not support the Court's conclusion that motive is irrelevant under the Fourth Amendment. *Robinson* involved the arrest of a motorist for driving a vehicle after revocation of his operator's permit. A search incident to arrest revealed illegal narcotics. In this Court, Robinson contested the constitutionality of the search. *Robinson* merely held that "in the case of a lawful custodial arrest a full search of the

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person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."[103]

In fact, *Robinson* expressly stated that it was "leav[ing] for another day" the question whether the Fourth Amendment permits an officer to use a "traffic violation arrest as a mere pretext for a narcotics search." Significantly, *Robinson* explained that "it is sufficient for purposes of our decision that [Robinson] was lawfully arrested for an offense, and that [the officer's] placing him in custody following that arrest was not a *departure from established police department practice*." Indeed, the arrest in *Robinson* was *required* by departmental regulation, and the search incident to arrest was in accord with departmental instructions. Put simply, *Robinson* not only expressly left open whether an officer's intent to use a traffic violation as mere pretext for a narcotics search might violate the Fourth Amendment. It is also plainly distinguishable from the facts here because, unlike Officer's Soto's actions, the arrest and search in *Robinson* were mandated by police department practices.

Five years later, *Scott* was decided. *Scott* addressed whether FBI agents violated the minimization provision of the federal wiretap statute, which required that agents make reasonable efforts to minimize the telephone conversations they record when conducting electronic surveillance. The agents made no attempt to minimize the calls they intercepted. *Scott* concluded that the agents' subjective intent was irrelevant in determining whether the statute was violated. The Court explained that the statute's minimization provision "made it clear that the focus was to be on the agents' actions not their motives."[104] And the Court ultimately concluded, applying an objective reasonableness standard, that the facts showed that the agents' conduct had not exceeded statutory requirements. Clearly, then, *Scott* did not raise the issue, much less decide, whether officer motive is never relevant when deciding a Fourth Amendment claim.[105]

What the Court's opinion does not acknowledge is that *Scott* was not a "pretext" case for Fourth Amendment purposes.[106] *Scott* simply held that the agents' actions did not violate the statute "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."[107] When read properly, *Scott* merely held that "improper intent that is not acted upon does not render unconstitutional an otherwise constitutional search."[108]

Villamonte-Marquez is the third case cited by the Court for the proposition that motive never trumps objectively justifiable police behavior. *Villamonte-Marquez* addressed whether customs officials violated the Fourth

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Amendment when, without suspicion of wrongdoing, they boarded a vessel under the authority of a federal statute to examine the manifest and other documents. While examining the documents, a customs official smelled marijuana, looked through an open hatch, and discovered burlap-wrapped bales containing marijuana. *Villamonte-Marquez* held that a suspicionless boarding of a vessel to examine documents did not violate the Fourth Amendment. In reaching this conclusion, the Court dismissed, in a footnote, the defendants' argument "that because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, [customs officials] may not rely on the statute authorizing boarding for inspection of the vessel's documentation."[109] With no elaboration, the *Villamonte-Marquez* Court asserted that the defendants' pretext argument had already been rejected by *Scott*.

The Court declares that *Villamonte-Marquez* "flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification."[110] This is true enough under the facts in *Villamonte-Marquez*, but the result reached in *Villamonte-Marquez* does not come close to establishing the larger proposition that motive never matters under the Fourth Amendment. For example, customs agents cannot use the authority approved in *Villamonte-Marquez* to conduct a warrantless search of vessel with no intent to check the vessel's manifest and other documents. Indeed, there is nothing in *Villamonte-Marquez* that "suggests that its holding would justify a warrantless search of a vessel where the officers neither make a document inspection nor follow a course of action suggesting that they would have made such an inspection if their plain view observations of incriminating evidence had not intervened."[111]

At most, the footnote in *Villamonte-Marquez*, rejecting the defendants' pretext argument, stands for the limited rule that customs officers may use their authority to board all vessels, including vessels suspected of engaging in narcotics activity, in order to inspect documents. There is no disputing, however, that *Villamonte-Marquez* did not involve a seizure where law enforcement officers deviated from standard procedure and procedures, which makes it a very different case from the facts presented in this case.

Although the Court may think that the cases it cites "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved,"[112] none of these cases establishes the principle that motive never matters in Fourth Amendment cases. More important, none of the cases cited by the Court

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is a controlling precedent for a pretextual seizure that is a clear departure from standard police procedure. To be sure, these cases contain language disfavoring judicial inquiry into police motive. But only the most unorthodox interpretation of these cases would conclude that they "foreclose any argument" that "pretext" never matters under the Fourth Amendment.

B. The Defendants' Test

The Court's analysis of the defendants' argument is cursory and even somewhat misleading. The Court accurately states that, under defendants' test, the constitutionality of a traffic stop would turn on "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given."[113] Although it is framed in objective terms, the Court insists that this test "is plainly and disputably driven by subjective considerations" and is designed "to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons."[114]

The Court misleadingly asserts that defendants' test is "driven by subjective considerations." On the contrary, the test is an objective standard, designed to identify arbitrary traffic stops. As Professor LaFave has already explained, this standard is fully consistent with the Court's precedents, including the dicta from *Robinson* and *Scott*, and does not depend upon the subjective intent of the officer:

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> [T]he proper basis of concern is not with *why* the officer deviated from the usual practice in this case but simply that he *did* deviate. It is the *fact* of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation.[115]

The defendants' test is grounded in a concern that dates back to the Framers and continues to govern our Fourth Amendment rulings, preventing arbitrary searches and seizures.[116] The Court does not, and indeed cannot, deny the defendants' claim that police officers are afforded vast discretion to enforce traffic laws. What Professor Kenneth Culp Davis has documented about police discretion generally, certainly applies to traffic enforcement: "The police are among the most important policy-makers of

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our entire society. . . . [T]hey make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second."[117]

Obviously, the defendants' test does not purport to eliminate all discretionary decisions by officers. Defendants proposed merely to identify traffic stops that a reasonable officer would not conduct because his department has already determined that such stops are unnecessary, improper, or too intrusive on the basis of the totality of the circumstances. Put simply, the test is aimed at identifying traffic stops that are capricious and conducted without standards. If, as this Court has reaffirmed over the years, arbitrary searches and seizures violate the purpose of the Fourth Amendment, then defendants' test promotes Fourth Amendment principles because it identifies and declares illegal traffic stops which are unauthorized by departmental rules. Therefore, it is not only consistent with, but also promotes, one of the fundamental purposes of the amendment:

> Arbitrary searches and seizures are "unreasonable" searches and seizures; ruleless searches and seizures practiced at the varying and unguided discretion of thousands of individual peace officers are arbitrary searches and seizures; therefore, ruleless searches and seizures are "unreasonable" searches and seizures.[118]

Indeed, as one perceptive scholar has written about the issue facing us today, this Court should encourage constitutional analysis that utilizes departmental rules and standard practices of police officers to identify arbitrary intrusions. Otherwise, whether any of us who drive automobiles will be subject to a traffic stop and how that stop will unfold will too often turn on "the state of digestion of any officer who stops us—or, more likely, upon our obsequiousness, the price of our automobiles, the formality of dress, the shortness of our hair or the color of skin."[119]

The Court too quickly dismisses the benefits of the defendants' test. While conceding that departmental rules may help to identify arbitrary police action, the Court believes that, in many cases, judges "would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."[120] Moreover, because departmental rules and police enforcement practices "vary from place to place and from time to time,"[121] the Court implies that the defendants' test will produce different Fourth Amendment rules

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depending upon where a search or seizure occurs. Such a result is unacceptable because Fourth Amendment protection should not "turn upon such trivialities."[122]

These objections are weak. The point about "virtual subjectivity" is a red herring. The defendants' test does not purport to control every type of discretionary decision by an officer, even in the traffic enforcement context. Instead, their test is limited to assessing the constitutionality of search or seizure activity that is subject to abuse by the officer in the field and is regulated by departmental rules. Defendants challenge only the initial decision to stop their vehicle for a traffic offense. In this case, there was a departmental rule specifically controlling that discretionary decision. In other cases, where there are no controlling departmental rules or objective enforcement practices for the challenged search or seizure, the defendants' test would not apply. Thus, the Court's stated fear, under the defendants' test, that judges "would be reduced to speculating about the hypothetical action of a hypothetical constable—an exercise that might be called virtual subjectivity," is not even remotely present in this case and does not undermine the workability of defendants' test in future cases.

Another problem with the defendants' test, according to the Court, is that police enforcement differs across the country, and constitutional protection should not "turn upon such trivialities." To illustrate the point, the Court notes that the traffic stop in this case would be permissible in a jurisdiction that had a practice different from that of the District of Columbia, and the stop would be permissible "even in the District of Columbia, if Officer Soto had been wearing a uniform or patrolling in a marked police cruiser."[123]

This is not a serious objection. As the Court well knows, current Fourth Amendment doctrine already permits a considerable amount of variation in police enforcement practices. Often, the result in a Fourth Amendment case depends upon whether police are following departmental rules or standardized procedures. In other contexts, seizures that are exactly similar in scope and operational procedures are distinguished on constitutional grounds depending upon the intent of the police. In still other cases, the legality of the search or stop sometimes turns on the presence or absence of minute factual detail.

For example, an inventory search of a car conducted in Alabama pursuant to standardized policy is permissible under the Fourth Amendment, while the same inventory search conducted in Arizona in the absence of

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standardized policy is impermissible. Similarly, under our precedents, a roadblock that seizes vehicles is permissible if established with the intent to detect drunk driving or to check the license and registration documents of the motorist.[124] On the other hand, we have not yet decided whether a roadblock that utilizes the same officers and operational procedures, but with the intent to detect narcotic trafficking or gun possession is permissible. Thus, the Court proffers an exaggerated and unconvincing objection when it states that the seizure in this case would be permissible in a jurisdiction that did not have a departmental policy against plainclothes officers making traffic stops and would have been permissible even in the District of Columbia had Officer Soto been in uniform and driving a marked patrol cruiser. The law books are full of Fourth Amendment rulings that turn on fact-bound distinctions. The important point here is that Officer Soto's actions deviated from the usual practice in the District of Columbia. What an officer would have done in New Jersey or Alaska is irrelevant in determining whether *this* stop was arbitrary. Likewise, had Officer Soto been in uniform or driving a marked patrol cruiser is beside the point. Officer Soto was in plainclothes and in an unmarked cruiser, and the traffic offense did not pose an immediate threat to the safety of others. That is all that matters under the applicable departmental regulation.

C. Why Probable Cause Is Not Always Sufficient to Make a Traffic Stop Reasonable Under the Fourth Amendment

The defendants' test provides a workable solution to the pretext issue presented in this case. While I would favor adopting their standard to resolve the Fourth Amendment issue raised by the specific facts here, the Court is right that defendants' test would be useless in a jurisdiction that does not have a similar regulation barring traffic stops by plainclothes officers. In such a jurisdiction, motorists could still be targeted for pretextual traffic stops, and the defendants' test would not be available to resolve whether the stop satisfies the Fourth Amendment. Moreover, the traffic stop executed by Officer Soto is not the only type of pretextual stop subject to abuse. Officers have been known to use traffic infractions as an excuse to stop and search motorists for a variety reasons, including because vehicles had Black Panther, ACLU, or NRA bumper stickers[125] or because the occupants of a vehicle had long hair.[126] For these and other types of pretextual traffic stops, the defendants' test would be ineffectual. But, before outlining the legal framework that should be utilized for handling

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such cases, I must first address the Court's argument that the existence of probable cause for a traffic offense eliminates the need for additional judicial scrutiny of an officer's conduct.

The Court explains that where probable cause exists, judicial scrutiny of the manner in which a search or seizure is conducted is required only where the challenged intrusion is "conducted in an extraordinary manner, unusually harmful to the individual's privacy or even physical interests."[127] A routine traffic stop by plainclothes officers, the Court says, "does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact."[128] Thus, the Court sees no reason to conduct a traditional balancing analysis to consider the competing interests at stake in this case.

Practically speaking, the rule adopted by the Court means that a routine traffic stop supported by probable cause is *per se* reasonable under the Fourth Amendment. Apparently, there are no limits to this principle. For example, if a municipal trash collector had conducted the traffic stop in this case, the Government concedes that the seizure would still be permissible under the Fourth Amendment.[129] After all, the trash collector *could* have been a police officer. How the city divides the responsibilities of its employees or the fact that a challenged seizure violates state or local law has no bearing on the Fourth Amendment. The trash collector "could have been a cop. He (just) happens not to be."[130]

Similarly, the principle adopted by the Court would not prohibit the enforcement of traffic stops pursuant to the following hypothetical departmental rules: Rule A mandates that all patrol officers are not to waste their time enforcing minor provisions of the traffic code, such as regulations that require motorists always use their turn signals or that prohibit the hanging of fuzzy dice or air fresheners on rear-view mirrors. Rule B mandates that, to assist vice officers, violation of every provision of the traffic code be considered grounds for a traffic stop. Even though the city has put its traffic stop policy in written form, it is obvious that the traffic policy is a sham, designed solely to facilitate suspicionless drug investigations. The Government, however, contends that this hypothetical practice would not violate the Fourth Amendment.[131] Presumably, under the rule adopted by the Court, the Fourth Amendment would not bar the police from enforcing the traffic code only against automobiles with license plates ending with odd numbers or cars painted in rainbow colors.

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Evidently, the Court considers evaluating the reasonableness of pretextual traffic stops a waste of judicial time and resources. The Court views the stop in this case—officers brazenly violating departmental rules to stop a vehicle occupied by two black males on pretextual traffic charges in order to pursue a hunch that the occupants were drug dealers—as "the run-of-the-mine case."[132] But many black motorists may find the Court's analysis disturbing, to say the least. Indeed, the defendants contend that a traffic stop based on racial profiling is arbitrary and unreasonable.

The Court's rebuttal to this concern is that the need for probable cause of a traffic offense sufficiently checks police discretion. This reply is illusory. In many contexts, probable cause for a traffic offense not only fails to diminish the discretion possessed by officers but also may actually facilitate arbitrary seizures. A recent empirical study of traffic stops on the New Jersey Turnpike proves the point. Ninety-eight percent of the drivers on a section of the Turnpike were committing traffic offenses. Only 15 percent of those violators were black motorists, but 46 percent of the stops by state troopers on that section of the Turnpike were of black motorists. There was no race-neutral explanation for this disparity.[133] It is evident that the probable cause requirement was not acting as a check on police discretion nor preventing arbitrary seizures. Rather than protecting motorists, under the Court's view of the Fourth Amendment, probable cause acts as a trigger to initiate an arbitrary seizure and then insulates the decision from judicial review.

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The Court is untroubled by this reality. It claims that no legal rule permits it "to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."[134] And the Court adds that, even if it could identify "such exorbitant codes," it does not "know by what standard (or what right) [it] would decide, . . . which particular provisions are sufficiently important to merit enforcement."[135]

As the Court is fully aware, the defendants' complaint concerns not the expansiveness of the District of Columbia traffic code but the arbitrary and selective seizures effectuated pursuant to the code. Nor is there an absence of legal "principle" to handle this symptom of discretionary and arbitrary power. This Court has repeatedly stated that the main purpose of the Fourth Amendment is to protect the liberty and privacy of persons against arbitrary governmental intrusions.[136] Half a century ago,

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Justice Robert Jackson explained why the judiciary must remain alert to official abuses under the guise of discretionary authority:

> [N]othing opens the door to arbitrary action so effectively as to allow [government] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[137]

Justice Jackson's logic certainly applies to police officers who enforce the traffic laws. The problem in this case is not, as the Court puts it, deciding "at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." Rather, the problem is deciding whether officers jeopardize Fourth Amendment norms when they conduct seizures under a traffic code in a manner that brazenly deviates from normal procedures or departmental regulations. As Professor Davis has already noted, the police can execute arbitrary seizures even under an otherwise reasonable and neutral law: "If the police enforce a statute against one out of a hundred known violators, and no can know in advance which one will be selected or why, does not the system of enforcement encourage arbitrariness and discrimination, and is it not therefore unconstitutional?"[138]

Finally, the Court will not have to search in vain to determine which provisions of the traffic code are "sufficiently important to merit enforcement." Where police discretion produces arbitrary seizures under a facially valid provision, the remedy is not to invalidate the particular provision of the code but to nullify the official conduct itself.

We did as much in *Batson v. Kentucky*.[139] In *Batson*, when confronted with evidence that individual prosecutors were using their discretionary power via the peremptory challenge to arbitrarily remove black jurors from the trial jury, the Court did not nullify peremptory challenges entirely. Instead, it required prosecutors to provide race-neutral explanations where defendants show a *prima facie* case of discrimination.

Under the legal framework established in *Batson*, a defendant can establish a *prima facie* case by showing that the totality of the circumstances raises an inference of purposeful discrimination—that a prosecutor has used his peremptory strikes in a discriminatory manner. Although "*Batson* itself gave no specific direction as to the measure of a prima facie case,"[140]

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the Court did explain, as examples, that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination," or the "prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose."[141] Once a *prima facie* case is shown, the state must "come forward with a neutral explanation" for the official action.[142] "The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties."[143] Rather, the prosecutor must provide race-neutral explanations for his or her selection criteria.

A *Batson*-like model could be employed to challenge the constitutionality of pretextual traffic stops. Just as *Batson* allows a defendant to make a *prima facie* case by demonstrating a pattern of discriminatory strikes or from the specific conduct of prosecutors during *voir dire*, so too should a motorist, at a pretrial suppression hearing, be permitted to raise an inference of discriminatory or arbitrary enforcement of the traffic code either through statistical data that indicate race-based enforcement or by arguing that the police made an arbitrary stop on the basis of the facts of his case. For example, a motorist could argue that the officer's decision to stop his vehicle for failure to signal a lane change was pretextual considering the totality of the facts, including the officer's past conduct.[144] Alternatively, a *prima facie* case of discriminatory or arbitrary traffic enforcement could be shown by documenting the type of flagrant violation of internal police regulations that occurred in this case.

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To be sure, applying a *Batson* framework in this context will not end pretextual traffic stops or eliminate racial profiling by police officers. The protections announced in *Batson* certainly have not prevented prosecutors from exercising their peremptory challenges in a discriminatory manner. "Even a prosecutor who has dismissed jurors for racial reasons can concoct a neutral explanation for his actions that the courts will accept as proof that his strikes were not racially motivated."[145] Thus, if a *Batson* model were applied to pretextual traffic stops, it would not catch every arbitrary traffic stop. But a *Batson*-type framework should identify the worst cases, and is undoubtedly better than the Court's alternative, which endorses a *per se* rule that any traffic stop based on probable cause is always reasonable under the Fourth Amendment.

While *Batson* applied the Equal Protection Clause to a prosecutor's use of peremptory challenges, incorporating the equality norm of our Equal Protection cases into Fourth Amendment analysis certainly

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promotes the amendment's purpose. Like other provisions of the Bill of Rights that have been interpreted to incorporate equality norms as part of the substantive right accorded by the provision,[146] the Fourth Amendment right against unreasonable searches and seizures is sufficiently important and spacious to include a concern with equality. Furthermore, the history and purpose of the Fourth Amendment provide ample justification for embracing equality norms when deciding the reasonableness of a search or seizure. At its core, the amendment is aimed at discretionary police power. Traffic enforcement obviously affords police officers "a good deal of low visibility discretion. In addition, officers are likely, in such situations, to be sensitive to social station and other factors that should not bear on the decision."[147] Accordingly, Fourth Amendment values would be advanced by asking whether the traffic stop in this case was conducted in an arbitrary and discriminatory manner.

D. Racially Based Pretextual Traffic Stops

What I have said so far is enough to reverse the ruling of the Court of Appeals. Although there is sufficient evidence in the record to support a judgment in favor of the defendants, I would remand the case and instruct the Court of Appeals to decide whether Officer Soto's stop deviated from written police departmental regulations. If it is determined that the stop was a departure from standard practice such that a reasonable officer would not have made the stop, then the seizure was arbitrary and in violation of the Fourth Amendment's bar against unreasonable seizures. Accordingly, the defendants would be entitled to have the evidence revealed by that stop excluded from trial.

While rejecting the defendants' Fourth Amendment claim, the Court suggests defendants' should have raised a Fourteenth Amendment equal protection challenge against the type of race-based pretextual stop conducted in this case. This comment deserves a brief reply.

As the Court well knows, a black motorist who challenges official action under the Equal Protection Clause confronts significant doctrinal hurdles. First, before a black motorist can obtain access to or challenge a police officer's past practices regarding traffic stops under the Equal Protection Clause, he has to overcome a heavy evidentiary burden. Three weeks ago, in *United States v. Armstrong*,[148] the Court addressed "the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of race."[149] *Armstrong* held that the essential elements of a selective prosecution claim

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must be shown before the prosecution is required to provide access to its files for discovery purposes. Therefore, a defendant must show both a discriminatory effect and a purpose to discriminate by governmental actors before discovery will be allowed. "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."[150]

A black motorist might contend that *Armstrong*'s holding was grounded in the Court's unwillingness to second-guess executive branch decisions on whom to prosecute. *Armstrong*'s holding, the argument would continue, is inapplicable where the enforcement practices of the police are challenged under the Equal Protection Clause because the police are not entitled to the same degree of deference accorded prosecutors. I doubt that most judges will read *Armstrong* in such a narrow fashion. More important, *Armstrong* itself noted that the "requirements for a selective prosecution claim draw on 'ordinary equal protection standards,'"[151] a provision that presumably would also apply to an equal protection challenge brought by a black motorist.

Second, even if a black motorist is able to overcome the obstacles to discovery erected by *Armstrong*, to prevail on the merits of an equal protection claim, he will have to show that (1) he was stopped because of his race, and (2) similarly situated white motorists were not stopped.[152] Put simply, this means that the defendant must prove that the police had a specific intent to stop him because of his race. Unless an officer admits that a driver was stopped for racial reasons, the specific intent standard of our equal protection doctrine will doom the typical pretextual traffic stop case involving a black motorist. In the atypical case involving a defense able to conduct a systematic study of the enforcement practices of a particular police department, there is a slightly better chance of success, if statistics demonstrate that officers are targeting black motorists.

But even where statistics show a strong correlation between race and a particular outcome, the Court has still required the individual criminal defendant to prove that the government officials in *his* case were motivated by a discriminatory intent. For example, in *McCleskey v. Kemp* we ruled that a complex statistical study indicating that racial considerations were affecting capital sentencing decisions during a nine-year period in Georgia were not sufficient to establish an equal protection violation in a single defendant's case.[153] "[T]o prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmaker in *his* case acted with discriminatory purpose."[154]

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Finally, even if a black motorist challenging a pretextual traffic stop is able to obtain discovery and to prevail on the merits of an equal protection claim, there is the question of remedy. The Court has shown no signs that it interprets the Equal Protection Clause to embody an exclusionary rule remedy or that the Clause even requires the dismissal of criminal charges in a case involving a race-based prosecution. To illustrate, the *Armstrong* Court observed that whether "dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of race" was an open question.[155]

To conclude, a successful Equal Protection challenge to a race-based pretextual traffic stop would be extremely difficult to mount. Because of the doctrinal limitations of our Equal Protection cases, black motorists who have been the targets of racial profiling have no incentive to file equal protection claims. Thus, while the Court holds out the possibility that a black defendant could raise a Fourteenth Amendment challenge to the police conduct in this case, a less sentimental and more realistic view of the law indicates that very few such challenges will be raised and even fewer will prevail. Therefore, the Court's sympathetic observation that "We of course agree with defendants that the Constitution prohibits selective enforcement of the law based on considerations such as race"[156] rings hollow. The end result, of course, is that black motorists, like defendants, who are the subjects of racial profiling are left without an effective constitutional remedy. With today's holding, the Fourth Amendment does not proscribe this type of arbitrary and race-based traffic enforcement, and an Equal Protection claim offers no realistic chance of success.

E. Conclusion

Because I believe that the Fourth Amendment's bar against unreasonable seizures forbids the type of arbitrary police seizure involved in this case, I would reverse the ruling of the Court of Appeals.

NOTES

1. James Q. Wilson, Varieties of Police Behavior 51 (1973).

2. 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 10.8 at 386–87 (1978).

3. United States v. Robinson, 471 F.2d 1082, 1111, n.16 (D.C. Cir. 1973) (Bazelon, C. J., concurring specially), *overruled*, United States v. Robinson, 414 U.S.

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218 (1973), quoting Metropolitan Police Department, Memorandum: Subject: Traffic Enforcement (June 9, 1964) (emphasis added by Judge Bazelon).

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

5. Police have used pretextual stops for a long time. *See* LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 131 (1967) (reporting statements of police officers on how minor traffic infractions are used as justification to search and question motorists: "You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made." "You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway." "In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search."); *cf.* Wilson, *supra* note 1, at 54 ("A traffic 'stop' serves purposes other than enforcing the traffic laws, and these other purposes place the traffic officer in the role of a patrolman deciding whether he has grounds for intervening in a situation that may be more serious than merely speeding or running a red light.").

6. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(f), at 149 (4th ed. 2004).

7. *Whren*, 517 U.S. at 808.

8. When discussing the constitutionality of stopping a motorist, the terms "stop," "seizure," and "detention" are used interchangeably. In 1979, the Court ruled that a random spot check of a motorist to check his license and registration violated the Fourth Amendment. *See* Delaware v. Prouse, 440 U.S. 648 (1979). *See infra* notes 124–25 and accompanying text. Consequently, motorists have a constitutional right to drive unimpeded by the police. In order to stop, seize, or detain a motorist, the police must have probable cause that the motorist has committed a traffic offense or a reasonable suspicion that the motorist is involved with criminal conduct.

9. David Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 285 (1997).

10. *See, e.g.*, Daniel B. Yeager, *The Stubbornness of Pretext*, 40 SAN DIEGO L. REV. 611, 612 (2003) (explaining that the "pretext problem has been percolating in the [Supreme Court] for at least four decades before its putative burial in 1996 by *Whren*"); Ed Aro, Note, *The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases*, 70 B.U. L. REV. 111, 111 (1990) (noting that the Court's "inconsistent and sometimes opaque treatment of the pretext problem, combined with the fourth amendment's general doctrinal complexity and the uncertain role of subjective intent in search and seizure cases, makes resolution of pretext claims a troubling and frustrating task"); John M. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363, 364 (1989)

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(asserting that there are few Fourth Amendment rulings "more tangled" than the cases and doctrine relating to pretextual Fourth Amendment activity); James B. Haddad, *Pretextual Fourth Amendment Activity: Another View*, 18 U. MICH. J. L. REF. 639, 653–81 (1985) (describing Court's rulings related to pretext issues); John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 72–84 (1982) (same).

11. United States v. Lefkowitz, 285 U.S. 452, 467 (1932).

12. *See, e.g.,* New York v. Class, 475 U.S. 106, 122 (1986) (Powell, J., concurring) (stating that an officer may not use a vehicle identification number inspection "as a pretext for searching a vehicle contraband or weapons"); Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring) (explaining that if "the evidence clearly suggested that [an] arrest was effectuated as a pretext for collateral objectives, [the provision of *Miranda* warnings to the arrestee would] rarely [be] sufficient to dissipate the taint"); Ker v. California, 374 U.S. 23, 42–43 (1963) (noting that "an arrest may not be used merely as the pretext for a search without a warrant"); Abel v. United States, 362 U.S. 216, 226 (1960) ("The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts"); Jones v. United States, 357 U.S. 493, 500 (1958) (rejecting the government's argument that entry and seizure of evidence inside of a home was valid as search incident to arrest because officials' purpose in entering home was to search and not arrest); United States v. Lefkowitz, 285 U.S. 452, 467 (1932) (stating that an "arrest may not be used as a pretext to search for evidence"); *see also* BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE REHNQUIST COURT 48 (1996) (providing the dissenting opinion of Justice Powell in Missouri v. Blair, wherein Powell provides additional citations supporting the conclusion that "police conduct undertaken for the sole purpose of evading the probable cause or warrant requirements could render the police conduct unreasonable and therefore unconstitutional").

13. Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (*per curiam*) (White, J., dissenting).

14. *See, e.g.,* Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 125–34 (1980).

15. *See, e.g.,* Florida v. Wells, 495 U.S. 1, 4 (1990) (noting that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"); Colorado v. Bertine, 479 U.S. 367, 372 (1987) (while upholding an inventory, acknowledging that there was "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of [criminal] investigation"); New York v. Burger, 482 U.S. 691, 716–717, n.27 (1987) (approving administrative search of business premises by police officers, in part because the search was not "a 'pretext' for obtaining evidence" of criminal

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offenses); South Dakota v. Opperman, 428 U.S. 364, 376 (1976) ("[T]here is no suggestion whatever that this standard [inventory] procedure . . . was a pretext concealing an investigatory police motive.").

16. LaFave, *supra* note 6, §1.4, at 113.

17. Brief for the Petitioners' Brief at 21–29, United States v. Whren, 517 U.S. 806 (1996) (No. 95–5841).

18. *See* A. Leon Higginbotham, Jr., In the Matter of Color 276 (1978).

19. *See generally*, Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the CArolinas (2001); *see also* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1602–1791, 437–449 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

20. David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544, 565 (1997) (*quoting* Maryland State Police, Criminal Intelligence Report (April 27, 1992)). *See also The Color of Suspicion*, N.Y. Times, Magazine, June 20, 1999, at 57 ("'Racial profiling is a tool we use, and don't let anyone say otherwise, [Deputy Bobby] Harris says. 'Like up in the valley,' he continues, referring to the San Fernando Valley, 'I knew who all the crack sellers were—they look like Hispanics who should be cutting your lawn. They were driving cars like this one'—he points to an aging Chevy parked in the [police] station's lot—'and all the cars had DARE stickers on them. That's just the way it is.'"); *id.* ("'Of course we do racial profiling at the train station,' says Gary McLhinney, the president of the Baltimore Fraternal Order of Police. 'If 20 people get off the train and 19 are white guys in suits and one is a black female, guess who gets followed? If racial profiling is intuition and experience, I guess we all racial-profile.'"). *Cf.* Peter Verniero & Paul H. Zoubek, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling, N.J. Att'y Gen. Rep. at 49–50 (stating that the "phenomena of racial profiling and other forms of disparate treatment of minorities [on New Jersey's highways] are not just a matter of perception; the evidence . . . clearly shows that the problem is real."); Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 Duke L.J. 1089 (2005) (offering an empirical analysis and model that demonstrates, according to the author, that the Maryland State Police engaged in racial profiling on a section of Interstate 95 between May 1, 1997, and December 31, 2003); *id.* at 1118 ("The category of driver facing the highest overall probability of being searched is a black male motorist from a non–East Coast state, stopped in an older luxury car, traveling southbound."). *See generally*, David A. Harris, Profiles in Injustice: Why Racial Profiling cannot work 48–72 (2002).

21. State v. Pedro Soto, 734 A.2d 350, 360 (N.J. Super. L. 1999) (finding that the defendants "have proven at least a *de facto* policy on the part of the State Police . . . of targeting blacks for investigation and arrest between April 1988 and May 1991 both south of exit 3 and between exits 1 and 7A of the Turnpike.").

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22. Joseph Neff & Pat Stith, *Highway Drug Unit Focuses on Blacks*, News & Observer (Raleigh, North Carolina), July 28, 1996, at A1.

23. Joseph Neff & Pat Stith, *Could It Happen by Chance?* News & Observer (Raleigh, North Carolina), July 28, 1996, at A15.

24. *See* 3 LaFave, *supra* note 2, § 10.8, at 380 (1978) (explaining that several lower-court rulings have recognized that a traffic stop "in order to check for a driver's license or vehicle registration is permissible even in the absence of the observation of any traffic violation or other prohibited conduct by the driver or of any facts or circumstances which would give the officer cause to suspect that the individual stopped is in violation of the driver's license or vehicle registration laws"); Note, *Automobile License Checks and the Fourth Amendment*, 60 Va. L. Rev. 666, 673 (1974) (noting that "the most common view [among the lower courts] is that the Constitution permits an absolute power in the police to initiate stops of motorists to check licenses and registrations, a power which the police may use to serve general crime detection objectives") (footnote omitted).

25. 3 LaFave, *supra* note 2, § 10.8, at 386. As one close observer of the Philadelphia police described the practice in 1973:

> A policeman has an unqualified right to stop any car moving on a public street to check the operator's license and registration. . . . Most stops are made for violations of traffic regulations or to point out some fault in the car, and all of them are made under the umbrella of the patrolman's writ to check licensing, but often these reasons are incidental to his real interest. When a patrolman refers to a car stop, he usually means a stop he has made for suspicion. While these stops frequently reveal infractions of the codes regulating the ownership and use of cars, these violations are incidental to the officer's interest in finding stolen cars, cars carrying contraband, illegally armed people, and persons sought by the police.
>
> Jonathan Rubinstein, City Police 249–50 (1973).

26. 3 LaFave, *supra* note 2, § 10.8, at 386.

27. *See, e.g.*, Lawrence P. Tiffany et al., Detection of Crime 30, n.16 (1967) (noting that observation of police conduct "makes it clear that a violation of the traffic code is often used as a subterfuge by officers who desire to interrogate a person about a more serious offense. Because of this, traffic regulations which normally are unenforced are asserted as justification for field interrogations.").

28. *Id.* at 15 (stating that "[m]inor traffic infractions are . . . often used by the police to justify stopping for questioning or searching). *See also id.* at 131–32 (describing that in high-crime areas of large cities, the typical traffic offender is rarely stopped, and if stopped is typically issued only a verbal warning; however, "[w]hen motorists are stopped for minor traffic offenses in high-crime areas, the

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purpose of the officer is usually to conduct a field interrogation, to search for weapons, or to search for evidence of a suspected crime.").

29. Delaware v. Prouse, 440 U.S. 648, 663 (1979). Only Justice Rehnquist dissented from the majority's judgment.

30. HARRIS, PROFILES, *supra* note 20, at 31. *See also* Harris, *"Driving While Black," supra* note 20, 557–58 ("There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation."); Sklansky, *supra* note 9, at 298–99 ("Because almost everyone violates traffic rules sometimes, this means that the police, if they are patient, can eventually pull over anyone they are interested in questioning"); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 223 (1989) ("The innumerable rules and regulations governing vehicular travel make it difficult not to violate one of them at one time or another. 'Very few drivers can traverse any appreciable distance without violating some traffic regulation.'") (footnote omitted).

31. *Pedro Soto*, 734 A.2d at 352.

32. According to UsingEnglish.com, "[i]f something is like shooting fish in a barrel, it is so easy that success is guaranteed."

33. Officers Soto and Littlejohn were "from the Metropolitan Police Departments' Sixth District station, know locally as 6D. Years later, this precinct's vice squad was the subject of a newspaper expose reporting that the officers, including Littlejohn and Soto, had engaged in excessive use of force, planted evidence, and perjured themselves to secure drug convictions." Kevin R. Johnson, *The Story of Whren v. United States: The Song Remains the Same, in* RACE LAW STORIES (Foundation Press 2008) (footnote omitted).

34. Petitioners' Brief at 6, n.7, United States v. Whren, 517 U.S. 806 (1996) (No. 95–5841) (Another officer in the patrol car, Officer Littlejohn, made no mention of either the failure of the Pathfinder to signal or any speeding violations by the driver of the Pathfinder. Officer Littlejohn testified that there was reasonable suspicion of drug activity to justify the stopping of the vehicle, and it was on that basis that the Pathfinder was stopped.).

35. Brief for the Petitioners at 7, United States v. Whren, 517 U.S. 806 (1996) (No. 95–5841).

36. *See* District of Columbia Metropolitan Police Department General Order 303.1 (effective April 30, 1992), which specifically provided that "[m]embers who are not in uniform or are in unmarked vehicles may take [traffic] enforcement action only in the case of a violation that is so grave as to pose an immediate threat to the safety of others." Gen. Order 303.1(A)(4).

37. *Whren*, 517 U.S. at 809.

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38. 53 F.3d 371, 374–75 (D.C.Cir. 1995).
39. Brief for the Petitioners at 7, United States v. Whren, 517 U.S. 806 (1996) (No. 95–5841).
40. 1 LaFave, *supra* note 6, § 1.4 (e), at 130.
41. *Id.* As Professor LaFave explained after the *Whren* ruling, the "petitioners' position is grounded in deviation from usual practice, which of course means that improper motivation unaccompanied by such deviation is not asserted to be 'unreasonable' under the Fourth Amendment." LaFave, *supra* note 6, §1.4 (f), at 139.
42. New York v. Burger, 482 U.S. 691 (1987).
43. *Id.* at 716, n.27.
44. Florida v. Wells, 495 U.S. 1 (1990).
45. Colorado v. Bertine, 479 U.S. 367 (1987).
46. *Wells*, 495 U. S. at 4.
47. *Bertine*, 479 U.S. at 372.
48. *Whren*, 517 U.S. at 811.
49. *Id.* at 812.
50. *Id.*
51. United States v. Villamonte-Marquez, 462 U.S. 579 (1983).
52. United States v. Robinson, 414 U.S. 218 (1973).
53. Scott v. United States, 436 U.S. 128 (1978).
54. *Whren*, 517 U.S. at 812.
55. *Id.* at 813, quoting *Robinson*, 414 U.S. at 221, n.1.
56. *Whren*, 517 U.S. at 813.
57. *Id.*, quoting *Scott*, 436 U.S. at 138.
58. *Whren*, 517 U.S. at 813.
59. *Id.*
60. *Id.* at 814.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 815.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 818.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 818–19.
75. *Id.* at 819.

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76. Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417 (1974) (footnote omitted); *cf. Camara v. Municipal Court*, 387 U.S.523, 528 (1967) ("The basic purpose of th[e] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

77. *See generally*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547,556, 736 (1999) (larger purpose for which the Framers adopted the Fourth Amendment was to curb the exercise of discretionary authority of government officers).

78. Amsterdam, *supra* note 76, at 396 (quoting *Wilkes v. Wood*, 19 Howell St. Tr. 1153, 1167 (1763); *Legal Papers of John Adams*, 106–147 (1965)).

79. LAFAVE, *supra* note 6, § 1.4(e), at 132.

80. *Whren*, 517 U.S. at 813.

81. *See, e.g., Wells*, 495 U.S. at 4 ("an inventory search must not be a ruse for general rummaging in order to discover incriminating evidence"); Arizona v. Hicks, 480 U.S. 321, 334 (1987) ("If an officer could indiscriminately search every item in plain view, a search justified by limited purpose . . . could be used to eviscerate the protections of the Fourth Amendment.").

82. Jones v. United States, 357 U.S. 493 (1958).

83. *Id.* at 499.

84. *Id.* at 500.

85. *See* Amsterdam, *supra* note 76, at 373 (interpreting *Jones* to mean that "if an officer's conduct would be lawful in pursuit of one purpose but unlawful in pursuit of another, it is unlawful when directed to the wrong pursuit") (footnote omitted); Burkoff, *Bad Faith Searches*, *supra* note 10, at 81 (explaining that *Jones* "refused to sanction search and seizure on the basis of a proffered 'objective' legal analysis of the officers' actions, relying instead on the true (improper) intentions of the officers") (footnote omitted).

86. Schwartz, *supra* note 12, at 30.

87. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, *supra* note 10, at 365 (1989).

88. The Court ultimately decided that the writ of certiorari granted in *Blair* was "improvidently granted." Missouri v. Blair, 480 U.S. 698 (1987).

89. Cummins v. United States, 502 U.S. 962 (1991).

90. *Id.* at 963 (White, J. dissenting).

91. *See, e.g.*, Aro, *supra* note 10, at 152 (noting that the problems related to pretextual searches and seizures "[have] clearly had a long, if somewhat undistinguished and ambiguous history before the Court"); *see also* LAFAVE, *supra* note 6, § 1.4(e), at 127 (explaining that the ruling in *United States v. Scott* "can hardly be read as a definitive analysis settling that in *all* circumstances Fourth Amendment suppression issues are to be resolved without assaying 'the underlying intent or motivation of the officers involved'").

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92. *Whren*, 517 U.S. at 811.

93. *Id.*

94. *Cf.* Sklansky, *supra* note 9, at 285, n.67 (making the same point).

95. Tiffany et al., *supra* note 5, at 131 (1967) (quoting one officer saying, "You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made.").

96. Harris, *supra* note 20, at 558.

97. *See* LaFave, *supra* note 6, § 1.4(e), at 133. Professor LaFave has explained that while traffic stops differ from administrative searches in that the former are supported by probable cause of a specific offense, while the latter are not, he concludes that that difference is unimportant: "[G]iven the pervasiveness of [minor traffic offenses] and the ease in which law enforcement agents may uncover them in the conduct of virtually everyone, that difference hardly matters, for here as well as there exists 'a power that places the liberty of every man in the hands of every petty officer,' precisely the kind of arbitrary authority which gave rise to the Fourth Amendment." *Id.* (footnote omitted).

98. *Camara*, 387 U.S. at 532; *see also* See v. City of Seattle, 387 U.S. 541, 545 (1967) (applying *Camara*'s reasoning to business premise, noting "the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field").

99. *Opperman*, 428 U.S. at 376 (footnote omitted).

100. *Id.* at 384 (Powell, J., concurring) (footnote omitted).

101. *Whren*, 517 U.S. at 811.

102. *Id.* at 812.

103. U.S. v. Robinson, 414 U.S. 218, 235 (1973).

104. *Scott*, 436 U.S. at 139.

105. *See* LaFave, *supra* note 6, § 1.4 (a), at 115 (explaining that *Scott* "can hardly be read as a definitive analysis settling that in *all* circumstances Fourth Amendment suppression issues are to be resolved without assaying 'the underlying intent or motivation of the officers involved.'").

106. *See* James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 Mich. J. L. Ref. 639, 674 (1985) ("Simply put, *Scott* did not involve a pretext claim."); Burkoff, *Bad Faith Searches*, *supra* note 10, at 83–83 (asserting that *Scott* "merely held that improper intent that is not acted upon does not render unconstitutional an otherwise constitutional search") (footnote omitted). After the quotations just noted, *Scott* explained that the defendants' argument concerning the agents' bad faith were not primarily grounded on Fourth Amendment principles. Indeed, *Scott* itself acknowledged that "[the defendants] do not appear, however, to rest their argument entirely on Fourth Amendment principles. Rather, they argue in effect that regardless of the search-and-seizure analysis conducted under the Fourth Amendment, the statute regulating wiretaps requires the agents to make good-faith efforts at minimization, and the failure to

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make such efforts is itself a violation of the statute which requires suppression." *Scott*, 436 U.S. at 138–39.

107. *Scott*, 436 U.S. at 138 (footnote omitted).

108. Burkoff, *Bad Faith Searches*, *supra* note 10, at 83–84.

109. *Villamonte-Marquez*, 462 U.S. at 584, n.3.

110. *Whren*, 517 U.S. at 812.

111. Schwartz, *supra* note 12, at 60, *quoting* the concurring opinion of Justice O'Connor in *Missouri v. Blair*.

112. *Whren*, 517 U.S. at 813.

113. *Id.* at 814.

114. *Id.* at 814.

115. 1 LaFave, *supra* note 6, §1.4 (e), at 130 (footnote omitted).

116. *See* Amsterdam, *supra* note 76, at 411. Professor Amsterdam explained that the Framers of the Fourth Amendment were concerned with "indiscriminate" searches or seizures. Indiscriminate intrusions were problematic partly because they were "conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize. This . . . concern runs against *arbitrary* searches and seizures: it condemns the petty tyranny of unregulated rummagers." *Id.*

117. Kenneth Culp Davis, Discretionary Justice 88 (1969).

118. Amsterdam, *supra* note 76 at 417

119. *Id.* at 416. *See also* Wayne R. LaFave, *Controlling Discretion By Administration Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442, 449 (1990) ("Protection against arbitrary searches and seizures lies in controlling police discretion, which requires a determination that the police action taken against a particular individual corresponds to that which occurs with respect to other persons similarly situated.").

120. *Whren*, 517 U.S. at 815.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See* Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (upholding a sobriety roadblock); *Prouse*, 440 U.S. at 663 (dicta stating that "[q]uestioning of all oncoming traffic at roadblock-type stops [for license and registration check] is one possible alternative" to the unconstrained exercise of discretion inherent in random or spot check by officers).

125. *See* Appendix A at 9a in Brief for Respondent in *Delaware v. Prouse* (describing 1969 study of fifteen college students representing a cross-section of the population. None of the students had received a traffic ticket in the preceding twelve months, and all had cars in satisfactory condition. Within seventeen days of placing "Black Panther" bumper stickers on their vehicle, the students were given thirty-three traffic citations.) (citing Heusenstamm, *"Bumper Stickers and*

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the Cops," Transaction Magazine, February 1971); Esquire Magazine article discussing ACLU bumper stickers; Estep v. Dallas County, Tex., 310 F. 3d 353, 357, n.3 (5th Cir. 2002) (officer searched pickup truck, in part, because he saw NRA bumper sticker on truck).

126. *See* Frank Askin, *When Long Hair Was a Crime*, N.Y. Times, March 2, 1994.

127. *Whren*, 517 U.S. at 818.

128. *Id.*

129. Transcript of Oral Argument at 34–35, United States v. Whren, 517 U.S. 806 (1996) (95–5841).

130. *Id.* at 35.

131. *Id.* at 36–38.

132. *Whren*, 517 U.S. at 819.

133. *Pedro Soto*, 734 A.2d at 352–57.

134. *Whren*, 517 U.S. at 818.

135. *Id.* at 818–19.

136. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 66 (1991); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 459 (1990).

137. Railway Express Agency v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

138. Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 Tex. L. Rev. 703, 714 (1974).

139. Batson v. Kentucky, 476 U.S. 79 (1986).

140. Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 470 (1996).

141. *Batson*, 476 U.S. at 97.

142. *Id.*

143. *Id.* at 94.

144. United States v. Roberson, 6 F. 3d 1088 (5th Cir. 1993) In *Roberson*, shortly after midnight, on a highway, Texas State Trooper Barry Washington passed a minivan that had four black occupants. After climbing a hill, the trooper then pulled over to the shoulder, doused his lights, and waited for the van to pass. When the minivan neared the trooper's cruiser, it was the only moving vehicle on the road. The minivan "changed lanes to distance itself as it passed the [trooper's cruiser] on the right shoulder" but failed to signal the lane change. *Id.* at 1089. Stopping the van for failing to signal a lane change was upheld as reasonable. The court rejected the defendants' claim that the stop was a pretext to search for drugs and thus unreasonable under the Fourth Amendment. The claim was rejected *not* because there wasn't sufficient evidence of pretext. On the contrary, the court observed that Trooper Washington had a "remarkable record" of converting traffic stops into drug arrests in 250 prior incidents, and the court acknowledged its "familiar[ity] with Trooper Washington's propensity for patrolling the fourth

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amendment's outer frontier." *Id.* at 1092. In fact, the court quietly admitted that Trooper Washington's seizure in *Roberson* was pretextual but insisted that there was nothing it could do about it. "[W]hile we do not applaud what appears to be a common practice of some law enforcement officers to use technical violations as a cover for exploring for more serious violations, we may look no further than the [trial] court's finding that Trooper Washington had a legitimate basis for stopping the van." *Id.*

145. Michael J. Raphael & Edward J. Ungvarsky, *Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J. L. REF. 229, 266 (1993). *Cf.* Melilli, *supra* note 140, at 465 (stating that an empirical analysis of lower court rulings "show[s] that, when call upon to do so, *Batson* respondents offer acceptable neutral explanations in almost four out of five situations. This, of course, tends to confirm the hypothesis that the odds are not with the *Batson* complainant ultimately prevailing. On the other hand, the success rates for *Batson* respondents offering explanations is not so high as to suggest that the courts merely rubber stamp virtually all such explanations as satisfactory.").

146. The Court's concern with equal treatment by governmental actors has not been confined to equal protection cases. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–1, at 1437 (2d ed. 1988) ("[N]o single clause or provision [of the Constitution] is the exclusive fount of [equality] doctrine."). Several parts of the Constitution and provisions of the Bill of Rights have been interpreted to incorporate equality norms as part of the substantive right accorded by the provision. For example, the scope of the First Amendment's right of speech is informed by equality norms. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972). Likewise, the Eighth Amendment's ban on cruel and unusual punishment has been read to incorporate a principle of equality. *See* Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring) (noting that the challenged death penalty statutes "are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments"); *id.* at 310 (Stewart, J., concurring) (concluding that although racial discrimination was not proven, the Eighth Amendment "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"); Ely, *supra,* note 14 at 97 (noting that the protection against cruel and unusual punishment "surely had to do with a realization that in the context of imposing penalties . . . there is tremendous potential for the arbitrary or invidious infliction of 'unusually' severe punishments on persons of various classes other than 'our own.'"). In a different context, the modern Court reads the Fifth Amendment's Due Process Clause to impose on federal officials the same equality norms that the Fourteenth Amendment imposes upon the states. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213–17 (1995); Bolling v. Sharpe, 347 U.S. 497 (1954). Finally, equality norms were a major component

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of the Court's rationale in *Miranda v. Arizona*, 384 U.S. 436 (1966), when the Court read the Fifth Amendment's Self-Incrimination Clause to require that police provide specific warnings to subjects undergoing custodial interrogation. *See Miranda*, 384 U.S. at 472–73. *See also* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From* Powell *to* Gideon, *From* Escobedo *to . . ., in* Criminal Justice in Our Time 68–76 (A. E. Dick Howard ed., 1965) (recognizing that equality norms, articulated in the Court's Equal Protection Clause cases, were latent in the constitutional debate concerning police interrogation and confessions).

147. Ely, *supra* note 14, at 97.

148. United States v. Armstrong, 517 U.S. 456 (1996).

149. *Id.* at 458.

150. *Id.* at 465. In *Armstrong*, the Court reserved the question of whether a criminal defendant must satisfy the similarly situated requirement in a case where the prosecutor admits a "discriminatory purpose." *Id.* at 469, n.3. Of course, Officer Soto has never directly admitted that he stopped the petitioners because they were black. *Cf.* Johnson, *supra,* note 33 (explaining that the trial court in *Whren* had been concerned about the "'lengthy pause'" before Officer Soto answered "no" to a "'very straightforward question'" from defense counsel on whether Soto stopped the defendants' vehicle because he believed that two young black men in a Pathfinder with temporary tags were suspicious) (footnote omitted).

151. *Id.* at 465, quoting Wayte v. United States, 470 U.S. 598, 608 (1985).

152. *See id.* at 476 (stating that a selective prosecution claimant must demonstrate that the prosecution policy "'had a discriminatory effect and that it was motivated by a discriminatory purpose'"); Washington v. Davis, 426 U.S. 229 (1976) (finding that disparate racial impact, standing alone, does not constitute equal protection violation and the challenger must show a discriminatory intent or purpose).

153. McCleskey v. Kemp, 481 U.S. 279 (1987).

154. *Id.* at 292.

155. *Armstrong*, 517 U.S. at 461, n.2.

156. *Whren*, 517 U.S. at 813.

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9. Racially-based stops.

Brown v. City of Oneonta, New York, 221 F.3d 329 (2d Cir. 1999).

Before: OAKES and WALKER, Circuit Judges, and GOLDBERG,* Judge.

JOHN M. WALKER, Circuit Judge:

Plaintiffs-appellants, black residents of Oneonta, New York, appeal from the September 9, 1998 judgment of the United States District Court for the Northern District of New York (Thomas J. McAvoy, Chief Judge). Plaintiffs' claims arise from their interactions with police authorities during an investigation conducted by the New York State and Oneonta Police Departments based on a victim's description of a suspect that consisted primarily of the suspect's race. Plaintiffs asserted claims under 42 U.S.C. § 1983 alleging violations of the Equal Protection Clause and the Fourth Amendment, claims under 42 U.S.C. §§ 1981, 1985(3) and 1986, and other related federal and state causes of action. The district court granted summary judgment for defendants on some of plaintiffs' claims and dismissed others on the pleadings, and the parties stipulated to the discontinuance and dismissal of the remaining claims.

This case bears on the question of the extent to which law enforcement officials may utilize race in their investigation of a crime. We hold that under the circumstances of this case, where law enforcement officials possessed a description of a criminal suspect, even though that description consisted primarily of the suspect's race and gender, absent other evidence of discriminatory racial animus, they could act on the basis of that description without *334 violating the Equal Protection Clause. Accordingly, we affirm the dismissal of plaintiffs' § 1983 claims under the Fourteenth Amendment as well as their claims under 42 U.S.C. §§ 1981, 1985(3) and 1986.

Police action is still subject to the constraints of the Fourth Amendment, however, and a description of race and gender alone will rarely provide reasonable suspicion justifying a police search or seizure. In this case, certain individual plaintiffs were subjected to seizures by defendant law enforcement officials, and those individuals may proceed with their claims under the Fourth Amendment.

BACKGROUND

I. Factual Background

Oneonta, a small town in upstate New York about sixty miles west of Albany, has about 10,000 full-time residents. In addition, some 7,500 students attend and reside at the State University of New York College at Oneonta ("SUCO"). The people in Oneonta are for the most part white. Fewer than three hundred blacks live in the town, and just two percent of the students at SUCO are black.

On September 4, 1992, shortly before 2:00 a.m., someone broke into a house just outside Oneonta and attacked a seventy-seven-year-old woman. The woman told the police who responded to the scene that she could not identify her assailant's face, but that he was wielding a knife; that he was a black man, based on her view of his hand and forearm; and that he was young, because of the speed with which he crossed her room. She also told the police that, as they struggled, the suspect had cut himself on the hand with the knife. A police canine unit tracked the assailant's scent from the scene of the crime toward the SUCO campus, but lost the trail after several hundred yards.

The police immediately contacted SUCO and requested a list of its black male students. An official at SUCO supplied the list, and the police attempted to locate and question every black male student at SUCO. This endeavor produced no suspects. Then, over the next several days, the police conducted a "sweep" of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended. Those persons whose names appeared on the SUCO list and those who were approached and questioned by the police, believing that they had been unlawfully singled out because of their race, decided to seek redress. . . .

DISCUSSION

On appeal, plaintiffs raise several contentions of error: first, that the district court improperly dismissed their § 1983 claims under the Equal Protection Clause using an incorrect pleading standard; second, that the district court made the same error in dismissing their § 1981 claims; third, that the district court erroneously dismissed or granted summary judgment against plaintiffs on their § 1983 claims under the Fourth Amendment; and finally, that the district court improperly dismissed their "derivative" claims under §§ 1985(3) and 1986. We affirm the dismissal of plaintiffs' equal protection and § 1981 claims, but we reverse in part the district court's rulings on plaintiffs' claims under the Fourth Amendment. We will discuss the particulars of each of plaintiffs' claims in turn.

I. Equal Protection Claims

The Fourteenth Amendment to the United States Constitution declares that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To state a race-based claim under the Equal Protection Clause, a plaintiff must allege that a government actor intentionally discriminated against him on the basis of his race. See Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir.1999).

There are several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause. A plaintiff could point to a law or policy that "expressly classifies persons on

the basis of race." Id. (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213, 227–29, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). Or, a plaintiff could identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner. See Yick Wo v. Hopkins, 118 U.S. 356, 373–74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). A plaintiff could also allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264–65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); Johnson v. Wing, 178 F.3d 611, 615 (2d Cir.1999).

Plaintiffs seek to plead an equal protection violation by the first method enumerated above. They contend that defendants utilized an express racial classification by stopping and questioning plaintiffs solely on the basis of their race. Plaintiffs assert that the district court erred in requiring them to plead the existence of a similarly situated group of non-minority individuals that were treated differently in the investigation of a crime.

When pleading a violation of the Equal Protection Clause, it is sometimes necessary to allege the existence of a similarly situated group that was treated differently. For example, if a plaintiff seeks to prove selective prosecution on the basis of his race, he "must show that similarly situated individuals of a different race were not prosecuted." United States v. Armstrong, 517 U.S. 456, 465, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996).

Plaintiffs are correct, however, that it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification. These classifications are subject to strict judicial scrutiny, see Able v. United States, 155 F.3d 628, 631–32 (2d Cir.1998), and strict scrutiny analysis in effect addresses the question of whether people of different races are similarly situated with regard to the law or policy at issue. This does not avail plaintiffs in this case, however, because they have not identified any law or policy that contains an express racial classification.

Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black. Nor do they allege that the defendant law enforcement agencies have a regular policy based upon racial stereotypes that all black Oneonta residents be questioned whenever a violent crime is reported. In short, plaintiffs' factual premise is not supported by the pleadings: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by the victim of the assault—a description that included race as one of several elements—defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state

but with the victim, was a legitimate classification within which potential suspects might be found.

Plaintiffs cite to cases holding that initiating an investigation of a person based solely upon that person's race violates the Equal Protection Clause. In United States v. Avery, 137 F.3d 343 (6th Cir.1997), the defendant claimed that he was stopped by law enforcement solely on the basis of his race. While the court affirmed his conviction, citing other factors utilized by the police in choosing to follow the defendant, the court stated that "[i]f law enforcement ... takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred." Id. at 355; see also United States v. Scopo, 19 F.3d 777, 786 (2d Cir.1994) (Newman, J., concurring) (speculating that while pretextual traffic stops based on probable cause are not Fourth Amendment violations, their selective use based on race could violate the Equal Protection clause). Here, the police were not routinely patrolling an airport for possible drug smuggling, as in Avery.8 Instead, it is alleged that they were searching for a particular perpetrator of a violent assault, relying in their search on the victim's description of the perpetrator as a young black man with a cut on his hand. As the police therefore are not alleged to have investigated "based solely upon ... race, without more," id., plaintiffs have failed to state an actionable claim under the Equal Protection Clause.

Police practices that mirror defendants' behavior in this case—attempting to question every person fitting a general description—may well have a disparate impact on small minority groups in towns such as Oneonta. If there are few black residents who fit the general description, for example, it would be more useful for the police to use race to find a black suspect than a white one. It may also be practicable for law enforcement to attempt to contact every black person who was a young male, but quite impossible to contact every such white person. If a community were primarily black with very few white residents and the search were for a young white male, the impact would be reversed. The Equal Protection Clause, however, has long been interpreted to extend to governmental action that has a disparate impact on a minority group only when that action was undertaken with discriminatory intent. See Washington v. Davis, 426 U.S. 229, 239–41, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Without additional evidence of discriminatory animus, the disparate impact of an investigation such as the one in this case is insufficient to sustain an equal protection claim.

In this case, plaintiffs do not sufficiently allege discriminatory intent. They do allege that at least one woman, Sheryl Champen, was stopped by law enforcement officials during their sweep of Oneonta. This allegation is significant because it may indicate that defendants considered race more strongly than other parts of the victim's description. However, this single incident, to the extent that it was related to the investigation, is not sufficient in our view to support an equal protection claim under the circumstances of this case.

We are not blind to the sense of frustration that was doubtlessly felt by those questioned by the police during this investigation. The actions of the police were understandably upsetting to the

innocent plaintiffs who were stopped to see if they fit the victim's description of the suspect. The plaintiffs have argued that there is little difference between what occurred here and unlawful profiling based on a racial stereotype. While we disagree as a matter of law and believe that the conduct of the police in the circumstances presented here did not constitute a violation of the equal protection rights of the plaintiffs, we do not establish any rule that would govern circumstances giving rise to liability that are not present in this case. Any such rule will have to wait for the appropriate case. Nor do we hold that under no circumstances may the police, when acting on a description of a suspect, violate the equal protection rights of non-suspects, whether or not the police only stop persons conforming to the description of the suspect given by the victim.

We are also not unmindful of the impact of this police action on community relations. Law enforcement officials should always be cognizant of the impressions they leave on a community, lest distrust of law enforcement undermine its effectiveness. Cf. Sean Hecker, Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards, 28 Colum. Hum. Rts. L.Rev. 551, 552 (1997) (describing the impact on the community of race-based pretextual traffic stops). Yet our role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause. We hold that it did not, and therefore affirm the district court's dismissal of plaintiffs' § 1983 claims alleging equal protection violations.9

II. Section 1981 Claims [OMITTED]

III. Fourth Amendment Claims

Plaintiffs' § 1983 claims also allege a violation of their Fourth Amendment rights during defendants' sweep of Oneonta. The district court dismissed many of these claims and granted summary judgment for defendants on other claims because, in its view, plaintiffs had not been subject to "seizures" under the Fourth Amendment.10 For the reasons that follow, we vacate the summary judgment against plaintiffs Jamel Champen, Jean Cantave, Ricky Brown, and Sheryl Champen, and affirm the district court's dismissal or grant of summary judgment with regard to the remaining claims. . . .

To prevail on a § 1983 claim under the Fourth Amendment based on an allegedly unlawful Terry stop, a plaintiff first must prove that he was seized. "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). However, a seizure does occur when, "by means of physical force or show of authority," United States v. Hooper, 935 F.2d 484, 491 (2d Cir.1991) (quoting Terry, 392 U.S. at 19 n. 16, 88 S.Ct. 1868), a police officer detains a person such that "a reasonable person would have believed that he was not free to leave," id. (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). Pertinent factors identifying a police seizure can include

> the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room.

Hooper, 935 F.2d at 491 (quoting United States v. Lee, 916 F.2d 814, 819 (2d Cir.1990)). Whether a seizure occurred is a question of law to be reviewed de novo, while the factual findings underlying that determination are reviewed for clear error. See, e.g., United States v. Peterson, 100 F.3d 7, 11 (2d Cir.1996); United States v. Tehrani, 49 F.3d 54, 58 (2d Cir.1995)

Jamel Champen, in his affidavit, alleges that a police officer pointed a spotlight at him and said "What, are you stupid? Come here. I want to talk to you." He was then told to show his hands. While it is arguably a close case, we conclude that a reasonable person in Champen's circumstances would have considered the police officer's request to be compulsory. Accordingly, we hold that Champen was seized and vacate the summary judgment for defendants on his Fourth Amendment claim. [For similar reasons, the court vacated summary judgment against a few additional plaintiffs.] . . .

CONCLUSION

We affirm the dismissal of plaintiffs' § 1983 claims under the Equal Protection Clause. We also affirm the dismissal of plaintiffs' claims under §§ 1981, 1985(3) and 1986. With regard to the plaintiffs' § 1983 claims under the Fourth Amendment, we affirm the district court's dismissal of these claims except those of plaintiffs Jamel Champen, Jean Cantave, Ricky Brown and Sheryl Champen. We vacate the district court's grant of summary judgment on those claims, and remand the case to the district court for further proceedings. Jamel Champen, Jean Cantave, Ricky Brown, and Sheryl Champen may continue to litigate their § 1983 claims of Fourth Amendment violations *342 against all law enforcement defendants except Redmond and Olsen, against whom their claims were previously dismissed.

Affirmed in part, vacated in part, and remanded. Each party shall bear its own costs.

10. Judge BERNICE BOUIE DONALD's dissent regarding the killing of an unarmed suspect.

Sheffey v. City of Covington, 564 Fed. Appx. 783 (6th Cir. 2014)

FREDERICK P. STAMP, JR., Senior District Judge.

Plaintiff-appellant, Ruby Sheffey ("Sheffey"), appeals the opinion and judgment of the United States District Court for the Eastern District of Kentucky ("district court") granting summary judgment in favor of the defendants/appellees Ron Allen ("Allen"), Robert Bacon ("Bacon"), Eric Higgins ("Higgins"), Steve Bohman ("Bohman"), *785 and Sergeant William Webster ("Webster") (collectively "the responding officers") and dismissing Sheffey's federal civil-rights claims against them, claims which she filed in her capacity as executor of the estate of her son, Leroy Hughes ("Mr. Hughes"). On appeal, Sheffey argues that the district court erred in finding that the responding officers were entitled to qualified immunity relating to her allegations against them. For the reasons stated below, we affirm.

I. Background

This civil action arises from an incident occurring on December 3, 2008, in Covington, Kentucky, which resulted in the death of Leroy Hughes.1 On that Wednesday afternoon, Mr. Hughes, who at the time was fifty-two years old, stood six feet six inches tall, and weighed 410 pounds, was walking down a residential street located in the vicinity of two elementary schools. A witness who observed Mr. Hughes noticed him carrying a handgun and quickly placing the handgun in one pocket and clips and ammunition in a separate pocket upon the approach of a bus. The witness, believing that this behavior was abnormal and suspicious, called 911 to report a suspicious subject. Police then responded to the call, but did not find anyone matching the description given by the witness.2 The same witness subsequently called 911 a second time, after noticing officers passing Mr. Hughes without stopping, to report that Mr. Hughes was now walking in the vicinity of two local elementary schools, and that responding officers would find him on the sidewalk in the school zone. At around 11:00 a.m., the responding officers arrived at the scene and, having received a report that Mr. Hughes was armed with a concealed weapon and was acting suspiciously in a school zone, attempted to stop Mr. Hughes.

Officer Allen was the first responding officer to locate Mr. Hughes. Officer Allen stopped his vehicle, opened his car door, and, standing behind the door for cover, drew his gun and ordered Mr. Hughes to the ground. Mr. Hughes ignored Officer Allen's orders, and instead shuffled back and forth on his feet and moved his hands around the area of his waistband, repeating the word "dynamite." Based upon this reaction to his commands, Officer Allen informed the dispatcher that Mr. Hughes was noncompliant, and that he was possibly a "Signal 2," which means that he was either intoxicated or mentally disturbed.3 Around this same time, Officer Bacon, who had arrived at the scene contemporaneously to Officer Allen and had parked his vehicle behind Officer Allen's, *786 drew his gun and also began to issue commands to Mr. Hughes.

Officers Bohman and Higgins then arrived at the scene and began to provide backup for Officers Allen and Bacon and clear the crowd of individuals and vehicles that had formed. Officer Allen then lowered his voice and began to approach Mr. Hughes, continuing to command him, verbally and with hand signals, to show his hands and get onto the ground. Officer Bacon offered backup to Officer Allen as he approached Mr. Hughes, who continued to react to the officers' commands

as he originally had, by rocking on his feet, moving his hands around the area of his waistband, and repeating the word “dynamite.” At Officer Allen’s direction, Officer Bacon reholstered his firearm and removed his taser in anticipation of a less-than-lethal-force confrontation. As the officers approached, Mr. Hughes said, “fuck it, I’m out of here” and began to walk toward Officer Bacon. Accounts differ as to whether or not Mr. Hughes had his hands clenched as he approached Officer Bacon, but all accounts agree that he began to move to either approach Officer Bacon or to attempt to flee. Officer Bacon then, at the same time that Officer Allen directed him to do so, deployed his taser in probe mode, striking Mr. Hughes in the upper left shoulder/chest area. Witnesses agree that Mr. Hughes did not react to the deployment of the taser, except to say “ouch” and to reach to remove the probes.4 Id. at *14. Mr. Hughes continued to approach Officer Bacon and, upon instruction from Officer Allen, Officer Bacon cycled the taser and attempted to utilize the device a second time through the prongs already deployed. After the second attempt also failed, Officer Bacon dropped his taser, believing it to be ineffective against Mr. Hughes.

Mr. Hughes next reached into his pocket and threw a box of ammunition at Officer Allen, saying “fuck it, it’s not loaded.” Officer Higgins, at this time, fired his taser in probe mode twice into Mr. Hughes’s back, which action, again, had little effect on Mr. Hughes, aside from causing him to turn to look at Officer Higgins. However, even as Mr. Hughes turned to face Officer Higgins, he continued to reach for his waistband, and Officer Higgins warned the other officers of this. As Mr. Hughes turned to look at Officer Higgins, the other officers present decided to use the opportunity of Mr. Hughes’s diverted attention to take him to the ground by force. After a struggle, the officers successfully forced Mr. Hughes to the ground and ordered him to put his hands behind his back. When Mr. Hughes refused to comply with this command, the officers on the scene began what would prove to be a roughly five-minute struggle to gain control of Mr. Hughes and place him in handcuffs.

After Mr. Hughes was taken to the ground and the struggle to place him in handcuffs commenced, Sergeant Webster arrived on the scene and witnessed the officers’ continued verbal commands, as well as the physical struggle, which included further attempts by Mr. Hughes to reach for his waistband and attempts to push himself up to a standing position. During this struggle, Mr. Hughes also attempted to bite Officer Bacon’s hand, prompting Officer Bacon to warn the other officers, “He’s biting!” Sergeant Webster observed that Mr. Hughes was wearing *787 particularly heavy clothing which Webster believed may have caused the failure of the previous attempts to subdue him by way of a taser. He accordingly lifted Mr. Hughes’s shirt and drive stunned Mr. Hughes in the lower back. After this first attempt failed, he attempted to drive stun Mr. Hughes in the right hip, but again failed to elicit a response from Mr. Hughes.5 Officer Higgins also attempted to use his taser in drive-stun mode over Mr. Hughes’s clothing between his shoulder blades, but did not receive a response. As the struggle between all five responding officers and Mr. Hughes continued, Officer Higgins tased Mr. Hughes in drive-stun mode two more times above his clothing. Then, seeing an exposed patch of skin on his lower back, Officer

Higgins tased Mr. Hughes on this patch of exposed skin. At that point, finding that Mr. Hughes continued to have no reaction to the repeated tasings, Officer Higgins abandoned the use of his taser. As Officer Higgins was tasing Mr. Hughes, Sergeant Webster also utilized his taser in drive-stun mode two more times before he concluded that the taser was ineffective, and ceased to use it. During the time that Mr. Hughes was on the ground, Officer Higgins and Sergeant Webster utilized their tasers in drive-stun mode eight times over a period of 47 seconds. During the entire incident, Mr. Hughes received an electrical current from the responding officers' tasers a total of twelve separate times.

At some point, the officers were finally able to bring Mr. Hughes under control and, through the utilization of three pairs of handcuffs to secure his arms behind his back and a pair of shackles to stop him from kicking his legs, fully restrained him on the ground. After this occurred, the officers attempted to clean a laceration on Mr. Hughes's hand, and Sergeant Webster performed a pat-down. In Mr. Hughes's pockets, the officers found a handgun with a live round in the chamber, a speed loader, three magazines loaded with bullets, three boxes of ammunition, assorted loose bullets, and a knife. Although Mr. Hughes would not respond to the officers' questions, he was conscious, breathing, and alert as he was rolled over, patted down, and attended to. However, a short time later, Officer Allen noticed that Mr. Hughes began to exhibit signs of medical distress, and the officers called for an ambulance. Despite attempts at cardiopulmonary resuscitation by both the officers and the responding emergency medical technicians, Mr. Hughes stopped breathing in the ambulance and was pronounced dead at 12:17 p.m. at St. Elizabeth Medical Center in Covington. Charles L. Stephens, M.D. of the Northern Kentucky Regional Medical Examiner's Office, indicated in the autopsy report that Mr. Hughes's cause of death was "a cardiac event, due to myocardial hypertrophy and coronary atherosclerosis. The pattern of circumstances with contributing morbid obesity and hypertrophic heart disease, and the use of electrical stun devices suggests that this death could be assigned to excited delirium syndrome."

Sheffey, as the executor of Mr. Hughes's estate, thereafter filed this civil action against the responding officers, the City of Covington, and a number of unknown officers. Sheffey's amended complaint raised federal claims under 42 U.S.C. § 1983 that responding Officers Bacon, Higgins, and *788 Webster used excessive force against Mr. Hughes in violation of the Fourth Amendment, and that responding Officers Allen and Bohman violated Mr. Hughes's civil rights in failing to intervene in the excessive force used by the other officers. The complaint also raised state-law tort claims against the defendants. The district court, following discovery and the filing of motions for summary judgment by all defendants except the unserved and unidentified "unknown officers" defendants, dismissed the unknown officers pursuant to Federal Rule of Civil Procedure 4(m). The district court also granted summary judgment in favor of the named responding officer defendants on the grounds that it found that no constitutional violation had occurred and that, even if constitutional violations occurred, the officers had all acted in an objectively reasonable manner under the circumstances and thus were entitled to qualified

immunity. Finally, the district court granted summary judgment in favor of the City of Covington finding that, even if the responding officers had violated Mr. Hughes's constitutional rights, no genuine issue of material fact existed as to municipal liability. . . .

[The Court's discussion of the merits is omitted.]

IV. Conclusion

For the foregoing reasons, the district court's grant of summary judgment in favor of the responding officers is AFFIRMED.

BERNICE BOUIE DONALD, Circuit Judge, dissenting.

Let us recall, for a moment, that a man is dead; that the cause of his death was the use of "electrical stun devices," or tasers, by three different officers, at twelve different times, in five undifferentiated minutes. Recall that eight of those times occurred in less than one minute and that one officer alone used his taser on the man six times. Neither the two officers who originally joined that officer, nor the two others who later arrived, interceded on the man's behalf. Recall further that the man was fifty-two years old.

Let us consider that the deceased was mentally ill; that he had lived alone in Covington, Kentucky for twenty-five years with no arrests, indictments, or convictions. Consider that in responding to a 911 call about his unusual behavior, police officers failed even to notice the deceased, much less to register him as a threat, and drove benignly by him without stopping despite his six-foot, six-inch, four-hundred-pound frame. Only after a second call did police officers finally search out, repeatedly *797 shock, and forcefully subdue Leroy Hughes. The suspected crime that precipitated their conduct was a misdemeanor.

Let us bear in mind that when police officers encountered Leroy Hughes, he did not appear armed—the misdemeanor at issue was, after all, concealment. Yet upon encountering him, the officers asked no questions. Instead, the encounter that ended in a man's death began with an order to get on the ground, issued by an officer crouching behind a car door with his gun drawn. Bear in mind that only after officers had delivered more than 14,400 volts to his body,1 driven him to the ground, and shackled his arms and legs did they "sp[eak] to [Leroy] Hughes in an effort to find out his name and other identifying information[.]" (Appellee Br. at 23.)

Let us acknowledge the obvious tension between the inference that Leroy Hughes sought to flee and the fact that he "took several fast-paced steps" toward one of the officers. (Appellee Br. at 16.) Even assuming that Leroy Hughes sought to flee, quickness was not likely a defining characteristic of his six-foot, six-inch, four-hundred-pound frame. Acknowledge the irony in the representation that Leroy Hughes "violently resisted arrest" when he had not fully turned to view the second officer who shocked him before he was tackled by two or three others. Acknowledge further that his lone attempt to use any of the ordnance later recovered from his pockets—a

handgun, a speed loader, four magazines, two boxes of ammunition, assorted loose bullets, and a knife—came after the first two of the twelve taser shocks and consisted of his throwing a box of ammunition at an officer as he stated that the handgun was not loaded.

As the majority recounts, we are charged by the Supreme Court to consider three factors in assessing claims of excessive force that arise from investigatory stops or arrests: (1) the severity of the crime at issue; (2) whether the claimant posed an immediate threat of safety to the officers or others; and (3) whether the claimant actively resisted arrest or attempted to flee. Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1969). The dispositive inquiry, however, is "whether the totality of the circumstances justified [the] particular sort of search or seizure" that is alleged to have violated the Fourth Amendment. Tennessee v. Garner, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). If we recall, consider, bear in mind, and acknowledge the totality of the circumstances that led to the death of Leroy Hughes, we cannot fail to recognize that it is error to affirm the grant of summary judgment in favor of the officers who seized him.

We who sit in relative safety behind a bench, garbed in black robes and guarded by federal marshals and county sheriffs sworn to protect us, must never forget "that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force necessary in a particular situation." Graham, 490 U.S. at 397, 109 S.Ct. 1865. That Leroy Hughes was allegedly armed, mentally ill, and in the vicinity of two elementary schools is a searing indictment in an age framed by horrific tragedies in Aurora and Columbine, Colorado; Tucson, Arizona; and Newtown, Connecticut.2 *798 And combined with his uncommonly large size and continuous reaching toward his waistband, it is little wonder that police officers found it necessary to intervene. Less clear, however, is whether the officers' chosen intervention, which resulted in the death of Leroy Hughes, was reasonable.3

For as much as the deaths in Colorado, Arizona, and Connecticut thread the tapestry of rapidly evolving circumstances that police officers must consider, so, too, do the deaths of Amadou Diallo,4 Sean Bell,5 Oscar Grant,6 and Jonathan Ferrell.7 And while a hundred reasonable arrests may go unmentioned for every egregious exception, we cannot ignore the seeds of systemic inequalities sown in our Nation's history and lain bare by diligent review. See, e.g., Floyd v. City of New York, No. 08 Civ. 1034, 2013 U.S. Dist. LEXIS 113271 (S.D.N.Y. Aug. 12, 2013) (Scheindlin, J.), stayed by Ligon v. City of New York, 538 Fed.Appx. 101 (2d Cir.2013). Nor can we fail to mourn the bitter fruit those seeds have spawned,8 even as we strive to root it out.

Leroy Hughes may have been confused, due to his schizophrenia, rather than resistant or non-compliant. This is a factor *799 that the trier of fact must weigh along with all the other evidence. See Eldridge v. City of Warren, 533 Fed.Appx. 529, 533 (6th Cir.2013) (citing Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505, 509 (6th Cir.2012)) ("[U]nder our precedent it is unreasonable to tase a nonresisting suspect."). When confronted by police, Leroy Hughes, who

moved toward, rather than away from, an arresting officer, may or may not have attempted to flee. Although Leroy Hughes carried considerable concealed ordnance, he neither threatened nor attempted to use it. And any violence attributable to Leroy Hughes appears to have been precipitated by, rather than having provided a reason for, the use of force against him. But Leroy Hughes is dead.

Whatever actually happened on December 3, 2008, the determination of the facts on which the reasonableness of the police officers' conduct in this case depends is reserved for the jury, as the finder of fact. See, e.g., Vetters v. Berry, 575 F.2d 90, 95 (6th Cir.1978) ("When the evidence is in dispute it is singularly within the province of the jury to decide which version of the facts is to be accepted." (Citation and internal quotation marks omitted)). And even assuming a definite set of facts, until all inferences have been drawn in favor of Leroy Hughes, whether the officers' conduct was reasonable remains, itself, a material question of fact. See Chappell v. City of Cleveland, 585 F.3d 901, 909 (6th Cir.2009) (quoting, inter alia, Scott v. Harris, 550 U.S. 372, 381 n. 8, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)). My colleagues in the majority fail to respect the role that the jury should play in this matter and, consequently, endorse the usurpation of that role in the face of genuine issues of material fact. Because I cannot reconcile such an endorsement with the distinct roles of the trial judge and the jury, I respectfully dissent.

11. Article on Police Misconduct in the United States:

. **Police Misconduct Series**

Andrea J. Ritchie, Esq., Joey L. Mogul, Esq., IN THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE OF PEOPLE OF COLOR IN THE UNITED STATES, 1 DePaul J. for Soc. Just. 175 (2008)

EDITED VERSION ALL FOOTNOTES OMITTED

A report prepared for the United Nations Committee on the Elimination of Racial Discrimination on the occasion of its review of The United States of America's Second and Third Periodic Report to the Committee on the Elimination of Racial Discrimination December 2007

I. Introduction

Since the advent of the first state-sponsored police forces in the United States - slave patrols1 - racialized policing has been a feature of the American landscape. Indeed, racial profiling and police brutality have their roots in enforcement of Slave Codes, and later Black Codes and Jim Crow segregation laws. We Charge Genocide, a petition submitted to the United Nations (UN) by the Civil Rights Congress in 1951, documented thousands of incidents of police violence

against African Americans alone.2Police brutality against Native Americans was also a constant of colonial culture in the United States.3 Official studies, as well as those of domestic and international civil and human rights organizations, have consistently found that people and communities of color are disproportionately subjected to human rights violations at the hands of law enforcement officers, ranging from pervasive verbal abuse and harassment, racial profiling, routine stops and frisks based solely on race or gender to excessive force, unjustified shootings and torture.

Increased national and international attention was brought to bear on the issue of police brutality, its widespread nature, and its disproportionate impact on people of color in the United States in the 1990s following the release of a videotape documenting the beating of Rodney King by Los Angeles police. Over the course of the ensuing decade, U.S. Non-Governmental Organizations (NGO), including the National Association for *178 the Advancement of Colored People (NAACP), Human Rights Watch and Amnesty International documented widespread abuses by law enforcement agents across the country. Indeed, the UN Special Rapporteur on contemporary forms of racism has stated that '[t]he use of excessive force by police against African Americans, Asian Americans, Arabs and Indians has been cited as one of the most pressing human rights problems facing the United States.'4 In 2000, the U.S. Civil Rights Commission [hereinafter Commission], an independent, bipartisan agency established by Congress in 1957, reviewed the findings of its 1981 report Who is Guarding the Guardians: A Report on Police Practices, and concluded that "[m]any of its findings and recommendations still ring true today," noting that "[r]eports of alleged police brutality, harassment, and misconduct continue to spread throughout the country. People of color, women, and the poor are groups of Americans that seem to bear the brunt of the abuse..."5

Since this Committee's 2001 review of the United States, during which it expressed concern regarding incidents of police brutality and deaths in custody at the hands of U.S. law enforcement officers, there have been dramatic increases in law enforcement powers in the name of waging the "war on terror" in the wake of September 11, 2001. Consequently, both public discussion and accountability with respect to the use of excessive force against people of color and racial profiling have eroded significantly.6 Systemic abuse of people of color by law enforcement *179 officers has not only continued since 2001 but has worsened in both practice and severity. According to a representative of the National Association for the Advancement of Colored People (NAACP), "the degree to which police brutality occurs...is the worst I've seen in 50 years."7

Moreover, racial profiling by law enforcement officials and racially disproportionate concentration of law enforcement efforts continues to afflict African American, Latino/a and Native American communities in the United States. Post 9/11 has escalated this profiling and concentration with respect to Arab, South Asian, Middle Eastern and Muslim men and women. As recognized by the Declaration of the World Conference Against Racism, Racial Discrimination, Xenophobia and related intolerance, such racially discriminatory conduct, policies, and practices on the part of law enforcement agencies substantially contribute to persistent racial disparities in the criminal justice system and in the incarcerated population.8 As law enforcement officers typically represent the initial point of contact with the criminal justice system, racially discriminatory stops, searches and arrests, particularly in the context of the "war

on drugs" and 'quality of life' strategies, fuel racial disparities in incarceration rates in the United States.

This report addresses the U.S. government's failure to comply with its obligations under the Convention for the Elimination of Racial Discrimination (Convention) to prevent and punish acts of excessive force, rape, sexual abuse and racial profiling committed by law enforcement officers against people of color. *180 While the U.S. government references various law enforcement training programs in its report, it is clear that that these are ineffective in addressing and deterring violations of the Convention by law enforcement officers. This report will also examine the failure of existing legislative and judicial remedies cited by the United States as evidence of its compliance with the Convention to afford victims of racially discriminatory law enforcement practices vindication of their human rights, financial compensation or systemic change. It concludes by offering concrete recommendations to bring the United States into compliance with the Convention.

II. Use of Excessive force (Articles 1, 2, and 5)

The U.S. government has failed to fulfill its obligations under article 5(b) of the Convention to ensure people of color are "secure from violence or bodily harm" inflicted by government officials.9 The U.S. government has also failed to adequately address the concerns expressed by this Committee in its Concluding Observations on the United States in 2001 regarding "incidents of police violence and brutality, including cases of deaths as a result of excessive force by law enforcement officials, which particularly affect minority groups and foreigners."10 . . .

It is clear from the statistics and cases discussed in this section that disproportionate use of excessive force by law enforcement officers against people of color remains endemic across the United States. While the U.S. government acknowledges the existence of police brutality in its current report to the Committee, it maintains that existing judicial remedies are sufficient to meet its obligations under the Convention.13

In reality, law enforcement officials enjoy impunity with respect to the use of excessive force against people of color. Criminal investigations are rarely convened, charges are seldom brought and convictions are rarely sought or obtained against officers responsible for such violations. The Federal Department of Justice, limited by the high standard of intent imposed by legislation,14 as well as the limited resources devoted to investigation *182 and prosecution of law enforcement misconduct,15 is often unable or unwilling to bring federal criminal charges against law enforcement officers who engage in race-based policing and abuse or to initiate civil actions where a pattern and practice of such abuse exists. Police department disciplinary investigations are often conducted by the very same law enforcement agencies which employ the offending officers, or by civilian review agencies with little or no authority to discipline officers.16 Given the likely lack of any criminal, civil or professional repercussions, law enforcement officers feel free to commit racist acts of violence and to engage in disproportionate use of force against people of color on a daily basis.

Moreover, complaints of police misconduct remain private and confidential and governmental agencies resist efforts to obtain full disclosure or transparency in agency investigations. Thus,

members of the public do not have access to the information necessary to determine the effectiveness, or lack thereof, of law enforcement departments' training, monitoring and disciplinary systems.

Therefore, it is clear that the United States has failed to satisfy its obligations under the Convention to "prevent and severely punish," and to take effective measures to prevent and eliminate, racially discriminatory violence by law enforcement officials.17

*183 While the U.S. government has failed to comply with its obligations to comprehensively document incidents of excessive force by law enforcement officers,18 what information does exist confirms that racial minorities are disproportionately subject to police misconduct and abuse.

In 1998, Amnesty International concluded in its report Rights For All that:

> Members of racial minorities [including African Americans, Latino/as, and Native Americans] bear the brunt of police brutality and excessive force in many parts of the USA. . . evidence of racially discriminatory treatment and bias by police has been widely documented by commissions of inquiry, in court cases, citizen complaint files, and countless individual testimonies. Reported abuses include racist language, harassment, ill-treatment, unjustified stops and searches, unjustified shootings, and false arrests.19

Reports received by U.S. NGOs indicate that law enforcement officers continue to violate individuals' rights under the Convention with alarming regularity and impunity. Police brutality against people of color is particularly common in the context of strategies used in the "war on drugs," the "war on terror," "zero tolerance" and "quality of life" policing initiatives and policing of protests.20 Violations, enumerated below, include the use of *184 torture, use of electro-shock weapons ("TASERs"), unjustifiable shootings, beatings and abusive searches.

A. The Reality: Torture and Other Cruel Inhuman and Degrading Treatment

Torture and cruel, inhuman or degrading treatment by law enforcement agents during interrogations and in police custody continue to take place within the United States.21 Law enforcement officers who have engaged in torture for the purpose of extracting confessions continue to escape prosecution while individuals who were tortured continue to be prosecuted or languish in prison based on the use of coerced confessions in their criminal cases.

1) The Chicago Police Torture Cases (Burge Cases)

From 1972 to 1991, more than 100 African Americans were tortured by former Police Commander Jon Burge (a former military police officer who served in Vietnam) and detectives under his command at Area 2 and 3 Police Headquarters in Chicago, Illinois. The torture was intentionally inflicted to extract confessions, and techniques included electrically shocking men's genitals, ears and lips with cattle prods or an electric shock box, anally raping men with cattle prods, suffocating individuals with plastic bags, mock executions, and beatings with telephone *185 books and rubber hoses, as well as routinely depriving the victims of bathroom facilities,

sleep and nourishment.22

The torture was clearly racially motivated. Many of the victims were subjected to racist epithets and slurs throughout their interrogations.23 Numerous victims were repeatedly called “nigger,” while others were threatened or subjected to what detectives referred to as the “nigger box.” - the electric shock box. In one instance a victim was threatened with hanging, “like they had other niggers”--an obvious reference to lynchings.24 Often, Burge or other detectives would taunt the victims stating “Who are people going to believe - a ‘nigger’ like you or a cop like me.”25 All of the detectives who committed the torture are white; all of the known victims are Black. . . .

Throughout Burge’s command, governmental officials were repeatedly provided concrete and credible information of the torture and asked to take action. Most notably, Richard M. Daley, then the lead prosecutor for Chicago’s Cook County State’s Attorney’s office, now Mayor of the City of Chicago, was advised of allegations of torture by Burge and his men as early as 1982.30 Instead of initiating an investigation, Daley prosecuted *187 the individual tortured, Andrew Wilson, for the murders of two white police officers, explicitly relying on his confession elicited by torture. As a result of Daley’s failure to take any action in 1982, police tortured an additional 68 known victims over the next decade with impunity.31

Moreover, as Mayor of Chicago, Daley has failed to take action to rectify this serious pattern and practice of torture.32 Daley, along with the Chicago City Council, have violated article 2(1)(b) of the Convention prohibiting Government sponsorship or defense of racial discrimination by paying more than $7 million in legal fees to private law firms to defend Burge and other detectives in civil rights cases brought by victims seeking financial compensation for their torture and wrongful convictions.33

Although there is no doubt that these officers committed racist acts of torture, not a single officer has been prosecuted for the torture or for their subsequent efforts to cover up these crimes. Most of the officers have never been sanctioned in any manner whatsoever. While Burge was ultimately fired from the police department, he continues to live free and receive a police pension. No other officer involved was terminated, and many were promoted and allowed to retire with full pensions.34

Unlike the torturers, their victims continue to suffer the lasting effects of these egregious violations. At least 26 individuals *188 are still incarcerated as a result of convictions based in whole or in part upon coerced confessions. . . .

2) San Francisco Eight Cases (SF8)

Another example of the domestic use of torture against African Americans by law enforcement officers involves the case of the San Francisco 8 (SF8). In 1973, John Bowman (deceased in December 2006), Harold Taylor and Ruben Scott were tortured by the New Orleans Police Department, with the assistance of two San Francisco detectives, Frank McCoy and Edward Erdelatz. The torture, which lasted for several days, included ‘stripping] the men, blindfold[in]g them, beat[ing] them and covering them in blankets soaked in boiling water. The detectives also used electric prods on their genitals.”39

As a result of the torture, the men confessed and signed pre-written statements. They were then charged with various crimes, including the 1971 death of Sergeant John Young, a San Francisco Police officer.40 In 1974, a federal court ruled that the statements of the three men were inadmissible because they *190 were obtained through torture.41 Subsequently, a California court dismissed the charges against Bowman, Taylor and Scott.42

The perpetrators of this torture have never been brought to justice, and the torture victims have not obtained any vindication of their human rights.43 . . .

3) The Gross Misuse of TASERS by Law Enforcement Officials

The UN Committee Against Torture has recognized that the use of TASERs48 can amount to cruel, inhuman, and degrading treatment or punishment.49 TASER use by law enforcement agents has become increasingly widespread in the United States. Since June 2001, more than 150 have people died in police custody in the United States after being shocked with TASERs.50 There have been hundreds more instances of non-fatal cases of *193 inappropriate and excessive TASER use, including incidents involving non-violent and unarmed children, elderly persons and pregnant women. Despite the dangerous nature of this weapon, the considerable physical pain it inflicts and the mounting death toll in cases where it has been used, the U.S. government has failed to regulate TASERs at the national level.

With respect to excessive force generally, existing evidence suggests that TASERs are disproportionately used against people of color. For instance, recent reports from Houston, Texas, where 3700 officers have been issued TASERs, indicate that nearly 90% of cases in which they are used involve Latino/as and African Americans.51 In Minneapolis, Minnesota in 2006, 62% of the people shocked with TASERs by members of the Minneapolis Police Department were Black, in a city where Black people comprise 18% of the population.52 In Seattle, Washington, almost half the people shocked with TASERs were African American, in a city where the Blacks represent less than 10% of the population.53
“They [the police officers] could have hurt my unborn fetus. . . . All because of a traffic ticket. Is this what it’s come down to?” --Malaika Brooks, an African American woman who was “TASED” three times by a traffic enforcement officer when 8-months pregnant because she refused to sign a traffic ticket.54

*194 • In 2007, Lillian Fletcher, an unarmed 82-year-old African American grandmother, was shocked with a TASER gun when Chicago Police Officers forced their way into her home and was subsequently hospitalized for five days.55

• A 2004 police videotape shows Gwinett County, Georgia police shocking Deacon Frederick Williams, a 31-year-old African American man in handcuffs and leg restraints five times in 43 seconds just four minutes after he was brought into the jail by police who responded to an ambulance call reporting an epileptic seizure. His last words were ‘Don’t kill me man. Don’t kill me.‘ No charges have been filed against the officers.56

It is also clear that TASERs are used on unarmed children with alarming frequency. Thirty two percent of police departments interviewed by TASER International used TASERs in schools.57 Tony Hill, a Florida State Senator, noted that many incidents of TASER use on children in his district were against African American youth.58

• Between late 2003 and early 2005, at least 24 Central Florida elementary school students were shocked with TASERs by police officers placed in public schools. Some of the students were as young as 12 years old. A typical scenario involved officers wading in through a crowd to break up a fight and using TASERs to "get them to move."59 In other *195 cases, police repeatedly shocked students already in handcuffs.60

• In October 2004, Miami-Dade police used a TASER to subdue a 55-pound first grade Latino boy, and, just weeks later, shocked a 12-year-old girl who was skipping school.61

B. The Reality: Shootings and Beatings by Law Enforcement Agents

1) Deadly Excessive force

Use of excessive force by law enforcement officers all too frequently results in the death of civilians and people of color who are disproportionately killed by law enforcement officials. According to the U.S. Department of Justice, 29.9% of individuals killed by law enforcement officers between 2003 and 2005 were Black or African American and 20.2% were Latino/a.62

The following cases are illustrative of persistent patterns of deadly use of excessive force against people of color. In far too many cases, people of color have been unjustifiably shot and killed when unarmed, non-violent and law-abiding. In most incidents, despite the egregious nature of the use of force, the culpable police officers have not been brought to justice.

• On November 26, 2006, on the eve of his wedding, members of the New York City Police Department (NYPD) killed Sean Bell, a 23-year-old African American man, in a hail of 50 bullets as he left his bachelor party.63 Two other *196 African American men were severely wounded.64 The police contended that they fired into the car that Bell and his friends had entered after leaving the club because they believed they had a weapon.65 However, no weapons were recovered from the scene.66

• On June 29, 2004, Gus Rugley, a 21-year-old African American youth, was shot approximately 35 times after an alleged high speed chase with the police.67 The San Francisco Police Department claimed that Rugley opened fire at a police car.68 Autopsy results, however, revealed no gun powder traces on his skin or clothing, and a toxicological screen confirmed that Rugley was not under the influence of alcohol or drugs at the time of his death.69

• In July 2003, Cau Bich Tran, a 25-year-old Vietnamese woman, was shot to death by police responding to a call for help opening a locked door at her San Jose home.70Police claimed that they mistook the vegetable peeler she was using to try to open the door for a weapon.71

• On March 8, 2003, Michael Pleasance, a 23-year-old unarmed African American man, was

unjustifiably shot in the head and killed by Chicago Police Officer Alvin Weems.72*197 Officer Weems falsely alleged that Pleasance attacked him to justify the shooting, although video footage refutes the allegation and police reports completed by other officers provide contradictory accounts of the alleged attack.73 Although Officer Weems was suspended for 30 days, he was subsequently promoted to detective.74

People of color with mental and physical disabilities are often killed by police, at times due to the impacts their disabilities have upon their ability to comply with police orders, as well as their ability to survive excessive force. For instance:

• On December 7, 2005, Rigoberto Alpizar, a 44-year-old Costa Rican man, was shot and killed by undercover air marshals after running off a plane onto a jetway at Miami International Airport.75 After having an argument with his wife, Alpizar ran towards the exit of the plane wearing a backpack.76 His wife pursued, yelling that her husband was suffering from bipolar disorder and had not taken his medication.77 The air marshals ordered him to the ground but when he did not comply, they shot him several times.78 While crucial aspects of the marshals' action have been criticized,79 an official investigation concluded in May 2006, *198 that the use of lethal force was justified and declined to press charges against the marshals.80

• On April 16, 2002, Santiago "Chago" Villanueva was experiencing an epileptic episode at work, prompting his co-workers to call for an ambulance.81 Instead of paramedics, police responded first to the scene, handcuffed Villanueva, shouted profanities at him, claimed he was a drug addict, and forced him to the ground.82 When police arrived on the scene they saw a Black man with dreads seizing on the ground and assumed he was on drugs.83 Officers harassed Villanueva and insisted that he speak English.84 They threw him on the ground and one officer put his knee on Villanueva's neck while another officer put a knee on his back85 Although the officers were subsequently indicted for reckless manslaughter and a medical examiner ruled the cause of death "mechanical asphyxiation," the charges were later dropped.86

• In 2002, Jihad Akbar, a 28-year-old Black gay man who suffered from a mental disability, entered a café in Oakland, CA while in the midst of a mental health crisis.87 He picked *199 up two knives and began smiling and dancing in the street.88Police responded to the scene, ran up to him, and shouted and pointed their guns at him.89 Two minutes later, Akbar was dead.90 At no time did Akbar threaten anyone with the knives he was holding.91 A year later, no action had been taken against the officers involved.92

2) Physical Beatings

As suggested by available national data concerning traffic stops, excessive force is disproportionately used against people of color across the United States.93 For instance, a recent investigation revealed that use of force by officers in San Francisco police department- defined as any physical restraint causing injury up to shooting a person to death - was alarmingly high, and that 40% of cases in which force was used involved African *200 Americans, who make up less than 8% of the City's population.94

The following cases of excessive force are representative of hundreds of similar cases, many

unreported by the media. In most incidents, the culpable police officers have not been brought to justice. [The report discusses cases.]

*204 C. Lack of Nationwide Statistics Concerning Use of force by Law Enforcement Officials

The U.S. Government has failed to comply with article 5(a), which, as interpreted by General Recommendation XXXI, requires state parties both to collect and have access to "comprehensive statistical or other information on complaints, prosecutions, and convictions relating to acts of racism and xenophobia as well as compensation awarded to the victims," including those committed by law enforcement officials.108 It is no surprise that the U.S. government fails to reference any statistics pertaining to racial disparities and discrimination in misconduct by law enforcement officials, because it fails to collect such any "comprehensive statistical information" with respect to acts of excessive force, racial profiling, or false arrests and wrongful prosecutions.

*205 III. Racial Profiling (Articles 1, 2, and 5)

The U.S. government report maintains that racially discriminatory actions by law enforcement agents are prohibited by domestic law.110 However, in reality, no federal legislation binding on federal, state and local law enforcement officers monitors or prohibits racial profiling by law enforcement agents.111 The federal guidelines cited by the U.S. government are neither mandatory nor applicable to the vast majority of law enforcement agents in the country. Moreover, remedies for racial discrimination by law enforcement under existing legislation cited by the United States require proof of intent to discriminate, and, for the most part, do not prevent or redress law enforcement practices with racially discriminatory effects.112

As recently noted by the UN Human Rights Committee,113 the U.S. government does not monitor or collect comprehensive data concerning the racial distribution of individuals stopped, searched, and arrested by law enforcement agents across the country. However, existing data demonstrates ongoing racial profiling by law enforcement agents across the United States. *206 The disproportionate rates at which people of color are stopped, searched, and arrested by police, along with the concentration of law enforcement efforts in communities of color, make a significant contribution to the disproportionate representation of minorities in the prison population, a concern this Committee expressed in its 2001 Concluding Observations and Recommendations.114 . . .

A. Racial Profiling of Women of Color

Contrary to the Committee's General Recommendation XXV, the U.S. report fails to provide information on the gender-specific impacts of racial profiling and race-based policing practices in its Report. Although racial profiling data reported by federal and state governments is rarely, if ever, disaggregated by race and sex, racial profiling studies which do analyze the experiences of women of color separately from those of men of color conclude that "for both men and women there is an identical pattern of stops by race/ethnicity."120 . . .

Women of color also experience gender specific impacts of current law enforcement policies and practices. For instance, women of color are routinely profiled as drug couriers by law enforcement officers in the context of the "war on drugs," leading to arbitrary stops, strip

searches, and detentions. While the use of this practice at the nation's airports is well documented by a 2000 General Accounting Office study,124 it also extends into streets and homes across the country. Moreover, women of color's experiences of traffic and street stops are often uniquely gendered, as sexual harassment and assault and rape of women stopped by police for traffic offenses is reported with alarming regularity. For instance:

• A 2002 report, Driving While Female, documented more than 400 cases of sexual harassment and abuse by law enforcment officers in the context of traffic stops across the United States. Only 100 of these cases resulted in any kind of sanction. . . .

IV. Rape & Sexual Assault (Articles 1, 2 and 5)

It is well established that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result the State's failure to prevent these crimes, violates the human right to physical and mental integrity.173 Notwithstanding its obligation under the Committee's General Recommendation XXV to report on gendered manifestations of racial discrimination,174 the U.S. government's report did not address this gender specific experience of police brutality.175 Moreover, the federal government currently has no measures in place to systematically document, monitor and prevent rape and sexual abuse by law enforcement officers.

Credible evidence exists to suggest that rape, sexual assault and sexual harassment of women, as well as of transgender and gender non-conforming individuals, by on-duty law enforcement officers is a serious problem. Such evidence suggests that officers target women who are vulnerable and unlikely to be believed should they attempt to report the abuse, including women of color, immigrant women, transgender women, domestic violence survivors, women who use controlled substances, homeless women, sex workers and women labeled as mentally ill. Latina immigrants, both documented and undocumented, report routine rapes by local law enforcement and Border Patrol in the borderlands between Mexico and the United States.177

While several high profile criminal prosecutions of officers charged with sexual assaults or rapes of women have taken place, reports indicate that such abuses are far more pervasive than the limited number of prosecutions would suggest, and take place with impunity in many instances. Yet the U.S. government has failed to even acknowledge or take steps to monitor or address this issue at the federal level as would seem to be required under General Recommendation XXXI, which states, with respect to the questioning or arrests of persons, 'State parties should bear in mind the special precautions to be taken when dealing with women or minors because of their particular vulnerability.' . . .

VI. Lack of Remedies and Redress (Articles 1, 2, 5 and 6)

As delineated throughout this report, the U.S. government has failed to comply with its obligations to prevent human rights violations committed by law enforcement officials against people of color under article 5(b) of the Convention. The United States has also failed to comply with its obligations to "most severely punish violence, acts of torture, cruel, inhuman or degrading treatment and all violations of human rights"221 in conformance with article 5 of the Convention and General Recommendation XXXI. Moreover, the U.S. government has failed to satisfy its obligations to provide victims an adequate tribunal to seek financial compensation for

their injuries, as required by article 6 of the Convention.

In the United States, victims of racial profiling and racially discriminatory use of excessive force, violence, abuse and harassment generally have three potential avenues through which to vindicate their rights, only one of which provides for financial compensation. First, victims may request that the appropriate governmental body criminally prosecute the law enforcement officer(s) who violated their rights, but they are wholly reliant on that agency to actually initiate a criminal prosecution. Second, civilians can file a complaint with an internal disciplinary agency or civilian complaint board, if such exists. However, this *233 rarely results in a fair investigation or adequate resolution. Third, civilians may file civil suits under 42 U.S.C. § 1983, cited at P 157 of the U.S. Report as evidence of its compliance with article 6 of the Convention. However, due to restrictive laws, judicial interpretations, and a post-9/11 climate that serves to limit police accountability, such suits are often unsuccessful, and even where successful, rarely lead to individual or systemic changes in police personnel or practices. Overall, these mechanisms are largely ineffective and insufficient to meet the U.S. government's obligations to provide remedies and redress for violations of rights under the Convention. . . .

C. Limitations of Civil Suits

Federal statute 42 U.S.C. §1983 provides a federal civil remedy against state actors for violation of Constitutional and federal rights.240 Yet, the reality is that such remedies are both limited and ineffectual. Even where individuals are willing and able to come forward and assert claims under § 1983 for racial profiling and racially discriminatory use of excessive force, false arrest, and illegal searches or detentions, a number of judicial doctrines hamper their ability to assert a successful claim. Moreover, the availability of civil suits has failed to deter individual officers from continuing to engage in racially discriminatory acts of police abuse or to remedy systemic patterns and practices of racially discriminatory misconduct.

Plaintiffs who pursue §1983 claims for police misconduct and abuse shoulder the burden of proving two central elements: 1) *240 the offender must have acted under color of state law, and 2) the conduct must have deprived the plaintiff of a right, privilege, or immunity under the Constitution or federal law.241 Additionally, under § 1983police officers can successfully raise the affirmative defense of qualified immunity so long as a "reasonable official" would not have known that the challenged conduct would violate a constitutional right that was "clearly established" at the time of the incident."242 Federal courts have so narrowly defined the scope of a "clearly established" constitutional violation that this doctrine often poses an insurmountable burden to redress.243 Moreover, the right to be free of racial discrimination by law enforcement officers "clearly established" under the Constitution does not include the right to be free of law enforcement conduct with racially discriminatory effects absent a showing of racially discriminatory intent. Finally, while a plaintiff may be successful in asserting a claim against a police officer in their individual capacity, additional barriers may preclude a finding of liability on the part of the municipality that employs them or a grant of injunctive relief, both of which are essential tools for obtaining systemic changes necessary to prevent future violations.244

Victims, organizers and activists are severely limited in attempting to address patterns and practices of racial profiling in the courts. In order to prove such a claim under the U.S. Constitution (Amendment XIV), a party must prove both that people of color are

disproportionately stopped, detained, arrested and/or searched (i.e. disparate impact), and that the accused officers and/or departments who engaged or condoned in such behavior *241 had a discriminatory intent. Such proof of discriminatory intent often presents an insurmountable obstacle to prevailing in such cases.245

The officers against whom civil suits are brought often continue to act with impunity. More often than not, the municipalities that employ the offending officers not only cover the costs of mounting a defense to any civil action and of any compensation awarded, but also fail to take effective disciplinary action against the offending officers. As a result, officers who regularly engage in excessive force (i.e. “repeater beaters”) continue to abuse and harass people on a daily basis no matter how many civil suits are brought. . . .

VII. Recommendations

In light of the persistent and pervasive violations of the Convention outlined in this report, we respectfully ask the Committee find the U.S. government in violation of articles 1, 2, 5(b) and 6 of the Convention with respect to law enforcement violations enumerated above and to call on the United States to ensure that appropriate state and federal authorities:

• Enact a federal crime of torture with no statute of limitations and allocate sufficient and impartial resources to document, investigate, and prosecute allegations of torture by local, state and federal law enforcement officers;

• Take immediate steps to document, systemically review, and prevent rape, sexual assault and abusive and unlawful strip searches by law enforcement officers;

*247 • Immediately cease the prosecution and dismiss the criminal charges against the SF8;

• Immediately initiate a federal criminal prosecution to fully hold all officers implicated in Chicago Police Torture cases criminally responsible;

• Take action to provide relief to the Chicago torture victims who remain behind bars due to their wrongful convictions and provide all victims with financial compensation for their torture violations;

• Impose an immediate moratorium on TASER use by law enforcement officers and order a rigorous, independent, and impartial inquiry into their use and effects, or, at a minimum, implement federal regulation of TASERs restricting their use to instances in which they would substitute for lethal force in a manner consistent with the Basic Principles on the Use of force and Firearms by Law Enforcement Officials;

• Enact federal legislation that requires the federal government to record complaints of all allegations of police violence, abuse and misconduct (including excessive force, rape and sexual assault, illegal searches, false arrest, wrongful prosecution, and racial profiling) against state and federal law enforcement, and explicitly provide such information also be made available to the public in an online database. The information be collected should include the (a) officer name, agency, employment number; (b) complainant name, contact information, allegations and

demographic information; (c) witness name, contact information, and allegations; (d) all related agency internal investigation records; (e) all related agency internal disciplinary decisions; (f) all related police reports, such as arrest, incident, or follow-up reports; (g) identification of all related criminal or civil litigation, investigators, witnesses, and attorneys; (h) indication of any criminal investigation, prosecution or convictions of the law enforcement officer;

*248 • Support the elimination of state laws that preclude public access to civilian complaints and investigations against law enforcement officers;

• Provide adequate resources to the U.S. Department of Justice to effectively and comprehensively pursue and enforce "pattern and practice" actions against police departments engaging in widespread or systematic abuses;

• Develop and mandate national training standards for federal, state and local law enforcement agents consistent with the Committee's General Recommendation XIII;

• Actively address issues of law enforcement violence and abuse in the wake of Katrina and the disastrous response of government authorities in violation of Articles 2, 4, 7 and 10 of the Covenant during the Committee's formal review of the current report.

Signatories

Organizations

American Friends Service Committee (AFSC)
Bay Area Sex Workers Advocacy Network (BAYSWAN), San Francisco, California
Bronx Defenders' Association, New York City, NY
Center for Constitutional Rights, NYC
Champagne-Urbana Citizens for Peace and Justice, IL
Chicago Justice Project
Citizens Alert, Chicago, Illinois
Committee for the Defense of Human Rights (CDHR)
Communities Against Rape and Abuse, Seattle, WA
Communities United Against Police Brutality (CUAPB), Minneapolis, MN
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Jewish Council on Urban Affairs, Chicago, IL
MacArthur Justice Center, Chicago, IL
Malcolm X Grassroots Movement, New York City, NY

Massachusetts Statewide Harm Reduction Coalition
Minnesota Advocates for Human Rights
National Association of Criminal Defense Lawyers
National Black Police Association
National Police Accountability Project
New York University School of Law Center for Human Rights and Global Justice
NOW (National Organization of Women)
October 22 Coalition to Stop Police Brutality
Penal Reform International
Prostitutes of New York
RFR Researchers
Sex Workers' Outreach Project- USA
Sex Workers Project at the Urban Justice Center, New York City, NY
South Asian American Leaders of Tomorrow, Silver Spring, MD
Sylvia Rivera Law Project, New York City
Welfare Warriors, Detroit, Michigan

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Renee Byrd, director/producer, System Failure: Violence, Abuse and Neglect in the California Youth Authority
Jody Dodd, Leadership and Outreach Coordinator, Women's International League for Peace and Freedom
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Barbara Frey, Director Human Rights Program, University of Minnesota
Nicholas Heyward, Sr., father of Nicholas Heyward, Jr. (Killed by housing police September 1994)
David Holder
Tonya McClary, Esq.
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Bret Thiele, Coordinator - ESC Rights Litigation Programme, Centre on Housing Rights and Evictions (COHRE), Minneapolis, Minnesota
Rev. Harriet Walden, Mothers Against Police Brutality, Seattle, WA
Juanita Young, mother of Malcolm Ferguson (killed by NYPD March 1, 2000)

It should be noted that all of the signatories to this submission strongly believe in the importance of adherence to the CERD and share strong concerns about the Unites States' failure to comply fully with its international human rights obligations. The issues raised in this report constitute a compilation of the concerns of the various signatories, each of whom has a unique mandate and expertise. However, its contents do not necessarily reflect the precise position of each of these organizations. Finally, it is important to note that the issues identified herein are not exhaustive.

[Footnotes Omitted.]