

8-1-2016

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Recommended Citation

Christopher E. Smith, *The U.S. Supreme Court and the Nation's Post-Ferguson Controversies*, 6 U. Miami Race & Soc. Just. L. Rev. 53 ()
Available at: <http://repository.law.miami.edu/umrsjlr/vol6/iss1/5>

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The U.S. Supreme Court and the Nation’s Post-Ferguson Controversies

Christopher E. Smith*

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I. INTRODUCTION

In 2014 and 2015, the public’s attention was repeatedly drawn to highly-publicized incidents in which unarmed African Americans were killed or injured by police officers who used force under circumstances that generated strong debates about the officers’ methods and justifications.¹ A 12-year-old boy in Cleveland was shot to death by police while playing on a playground with a toy gun.² Elsewhere in Ohio, a young man was shot to death by police inside a Wal-Mart store after he picked up a pellet gun from a shelf and headed toward the

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¹ See, e.g., Michael Wines & Sarah Cohen, *Police Killings Rise Slightly, Though Increased Focus May Suggest Otherwise*, N.Y. TIMES (Apr. 30, 2015), <http://nyti.ms/1Q3aFD9>.

² See Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice within Seconds*, WASH. POST (Nov. 26, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/>.

cashier's station with the apparent intention of purchasing the item.³ A New York City man suspected of illegally selling unpackaged cigarettes died when wrestled to the ground by an officer using a chokehold.⁴ A police officer in South Carolina fired eight times at the back of an unarmed man fleeing on foot after a traffic stop and falsely claimed that he feared for his life because the man had seized the officer's Taser and was going to use it on the officer.⁵ The killing likely would have been ruled a justifiable homicide based on the officer's claims except that, unbeknownst to the officer, his actions were being filmed by a witness with a cellphone.⁶ A student leader at the University of Virginia bled profusely from his face when pushed roughly to the ground by alcohol control officers.⁷ Less well-known cases throughout the country became matters of intense local concern.⁸ These publicized events came on the heels of years of controversy and in New York City, culminated in the filing of a federal lawsuit over the police department's practice of making thousands of stops and searches of young minority men without a proper legal basis.⁹

The incident that generated the most national attention, as well as countless protest marches in cities throughout country,¹⁰ was the

³ See Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii/>.

⁴ See Marc Santora, *Eric Garner's Family to Sue New York City Over Chokehold Case*, N.Y. TIMES (Oct. 7, 2014), <http://www.nytimes.com/2014/10/08/nyregion/eric-garners-family-to-sue-new-york-city-over-chokehold-case.html>.

⁵ See Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://nyti.ms/1yTohXD>.

⁶ See *id.*

⁷ See Gary Robertson, *Bloody Arrest of Black Virginia Student Spurs Second Day of Protests*, N.Y. TIMES (Mar. 20, 2015), <http://www.nytimes.com/reuters/2015/03/20/us/20reuters-usa-police-virginia.html>.

⁸ See, e.g., L.L. Brasier, *Video Shows Police Beating During Traffic Stop*, DETROIT FREE PRESS (Mar 25, 2015), <http://on.freep.com/1buk47C>; Richard Fausset, *Police Shooting Victim in Georgia Tried to Follow 'Sensible' Path*, N.Y. TIMES (Mar 24, 2015), <http://www.nytimes.com/2015/03/25/us/atlanta-police-shooting-victim-tried-to-live-a-life-that-mattered.html>; J. David Goodman and Vivian Yee, *Officer Charged in Akai Gurley Case Debated Reporting Gunshot, Officials Say*, N.Y. TIMES (Feb 11, 2015), <http://www.nytimes.com/2015/02/12/nyregion/akai-gurley-shooting-death-arraignment.html>.

⁹ See Benjamin Weiser and Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>.

¹⁰ See generally Emily Brown, *Timeline: Michael Brown Shooting in Ferguson, MO*, USA TODAY (Aug. 10, 2015), <http://usat.ly/VpsbtG> (detailing the timeline of events, starting with the shooting of Michael Brown).

shooting death of unarmed, teenager Michael Brown of Ferguson, Missouri, in August 2014, by Officer Darren Wilson, who avoided criminal charges for the incident.¹¹ The unusual grand jury proceedings¹² that led Officer Wilson to avoid criminal charges sparked protests, civil disorder, and property damage in Ferguson.¹³ The U.S. Department of Justice subsequently issued a scathing investigative report detailing policing and court practices in Ferguson that targeted less-affluent African Americans with numerous citations, fines, and jailing fees as a means to generate revenue to fund city government.¹⁴ Thus, the controversy over the situation in Ferguson served to represent and embody widespread issues about race, policing, use of force, and discrimination in the justice system.¹⁵

The policing and court system issues raised by the events in Ferguson and comparable incidents throughout the nation are considered local matters albeit widespread and existing locally in cities and counties throughout the country¹⁶ due to fragmentation in the American justice system¹⁷ caused by federalism issues.¹⁸ Federal authorities responded in

¹¹ See William Freivogel, *What's Different About the Grand Jury in the Darren Wilson Process?*, ST. LOUIS PUBLIC RADIO (Nov. 24, 2014), <http://www.tinyurl.com/ololwm6>. (The unusual aspects of the grand jury proceedings included the lack of specific charges pursued by the prosecutor, the large amounts of information indiscriminately presented without prosecutorial guidance, and the presentation of witnesses that the prosecutor knew to be lying.) See, e.g., Peter Holley, *Ferguson Prosecutor Says He Knew Some Witnesses Were 'Clearly Not Telling the Truth.' They Testified Anyway*, WASH. POST (Dec. 20, 2014), <http://wapo.st/1wXOHIQ>; Jeffrey Toobin, *How Not to Use a Grand Jury*, THE NEW YORKER (Nov. 25, 2014), <http://www.newyorker.com/news/news-desk/use-grand-jury>.

¹² *Id.* See also Stephanie Francis Ward, *Public Was Misled About Ferguson Grand Jury Proceedings, According to Federal Complaint*, A.B.A.J. (January 5, 2015), http://www.abajournal.com/news/article/public_misled_about_ferguson_grand_jury_proceedings_according_to_federal_co.

¹³ See Aamer Madhani, *Protests Ease as Snow Falls on Ferguson*, USA TODAY (Nov. 27, 2014), <http://usat.ly/1zXRD8T>. See also David McCormack, *Protests Break Out Across NINETY Cities as Thousands March in Anger*, DAILY MAIL (Nov. 24, 2014), <http://dailym.ai/1vj8zq8>.

¹⁴ See generally U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.

¹⁵ Tierney Sneed, *Ferguson's Problems Are Not Ferguson's Alone*, U.S. NEWS & WORLD REP. (Aug. 22, 2014), <http://www.usnews.com/news/articles/2014/08/22/fergusons-racial-problems-are-not-unique-to-ferguson>.

¹⁶ *Id.*

¹⁷ See, e.g., GEORGE F. COLE, ET AL., THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 97 (14th ed. 2015) (“Because both state and federal systems operate in the United States,

limited ways to push toward reform through such means as President Obama's appointment of a national task force to quickly study problems and make recommendations for police reform.¹⁹ The Director of the FBI spoke publicly about problems with racial discrimination in policing.²⁰ In addition, the U.S. Department of Justice conducted an investigation of Ferguson, just as it had done with other cities whose police departments sparked concerns about improper use of force by officers.²¹

The federal judiciary, by contrast, cannot similarly respond in proactive fashion because of the need to wait for legal cases to be developed, presented, and work their way through the court system for judges' decisions about specific legal issues.²² Yet, this is not to say that the judicial branch lacks involvement in the contemporary controversies about race, policing, and use of force.²³ Indeed, decisions by the U.S. Supreme Court helped to shape and even facilitate the practices that gave rise to these highly-publicized, tragic incidents.²⁴ Thus, this article will examine the Supreme Court's role, by commission and omission, in generating the current historical moment of controversy and conflict.

criminal justice here is highly decentralized. . . . [A]lmost two-thirds of all criminal justice employees work for local governments.”).

¹⁸ See *id.* (“The majority of workers in all subunits of the [justice] system—except corrections—are tied to local governmentAs a result, local traditions, values, and practices shape the way criminal justice agencies operate.”).

¹⁹ See Exec. Order No. 13,684, 79 Fed. Reg. 76,865. (Dec. 18, 2014).

²⁰ Nia-Malika Henderson, *FBI Director Comey Gave a Bold Speech on Race and Police. Now What?*, WASH. POST (Feb. 12, 2015), <http://www.washingtonpost.com/blogs/the-fix/wp/2015/02/12/fbi-director-james-comey-gave-a-bold-speech-on-race-and-police-now-what/>.

²¹ See Matt Appuzo & Manny Fernandez, *Federal Inquiry of Ferguson Police Will Include Apparent Racial Profiling*, N.Y. TIMES (Sept. 4, 2014), http://www.nytimes.com/2014/09/05/us/racial-profiling-by-ferguson-police-to-be-part-of-federal-inquiry.html?_r=0 (“Broad Justice Department investigations like the one Mr. Holder announced on Thursday can lead to voluntary policy changes or agreements that give the federal government oversight over a police department. Before Ferguson, there have been 20 such broad investigations under Holder.”).

²² See, e.g., CHRISTOPHER E. SMITH, *COURTS AND PUBLIC POLICY* 41 (Nelson-Hall Pub. eds., 1993) (“The policy agendas of judges are determined by the cases initiated in court and judges do not have the same ability as other governmental officials to . . . consciously pursu[e] favored policy issues.”).

²³ See e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (finding that the NYPD's stop-and-frisk practices disproportionately targeted young minority males without a proper legal basis, and ordering immediate reforms to end the constitutional violations).

²⁴ See generally, e.g., *Illinois v. Wardlow*, 528 U.S. 119 (2000) (broadening the ability of police to conduct investigative stops, diluting *Terry v. Ohio*, 392 U.S. 1 (1968)).

II. THE U.S. SUPREME COURT AND GUIDELINES FOR POLICE PRACTICES

For much of American history, police officers were often unprofessional bullies acting on behalf of the local political regime rather than civil servants trained to carry out important functions for public safety.²⁵ As described by policing historian Samuel Walker, police officers were patronage appointees of mayors and other political leaders who “enforced the narrow prejudices of their constituencies, harassing ‘undesirables’ or discouraging any kind of ‘unwelcome’ behavior.”²⁶ However, in the mid-twentieth century, several influences pushed American police departments to professionalize and reform, including changing public expectations,²⁷ police executives’ growing interest in effective policing,²⁸ and later, the threat of lawsuits for improper use of force and other rights violations by police.²⁹ One additional factor had a significant impact on the professionalization of police policies and practices: U.S. Supreme Court decisions defining constitutional rights that simultaneously told law enforcement officers what they could and could not do.³⁰ Many of the police-behavior limiting decisions were produced during the Warren Court era of the 1960s³¹ by Supreme Court justices who came into adulthood carrying personal memories and experiences from encounters with the abusive behavior of pre-1940s police.³² The Supreme Court’s composition changed significantly beginning with President Richard Nixon’s election in 1968³³ and

²⁵ See SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM* 133 (1977) (“Brutality and uncivil conduct had long been part of the American police tradition.”).

²⁶ SAMUEL WALKER, *“Broken Windows” and Fractured History: The Use and Misuse of History in Recent Police Patrol Analysis*, 1 JUST Q. 75, 84 (1984).

²⁷ See *id.* at 80–83.

²⁸ COLE, ET AL., *supra* note 17, at 182–83.

²⁹ CHARLES R. EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE* 72–77 (2009).

³⁰ Christopher E. Smith, *Police Professionalism and the Rights of Criminal Defendants*, 26 CRIM. L. BULL. 155, 157–158 (1990).

³¹ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (establishing a bright-line exclusionary rule for evidence obtained through improper searches); *Miranda v. Arizona*, 384 U.S. 436, 492 (1966) (holding that police officers are obligated to inform suspects of constitutional rights prior to custodial questioning); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (requiring that specific factual circumstances must exist in order for police officers to conduct stop and frisk searches).

³² CHRISTOPHER E. SMITH, *THE REHNQUIST COURT AND CRIMINAL PUNISHMENT* 34–36 (1997).

³³ See CHRISTOPHER E. SMITH, *CRIMINAL PROCEDURE* 119 (2003) (“When Richard Nixon ran for president of the United States in 1968, he made law and order a central campaign issue, in part, by accusing the Supreme Court and other federal judges of being too soft on crime.”).

continuing for the next quarter century in which only Republican presidents³⁴ had the opportunity to appoint new justices to the nation's highest court.³⁵ A primary consequence of the Court's altered composition was that "decisions on criminal justice, abortion, and other issues changed significantly between the early 1970s and the early 1990s."³⁶ With respect to criminal justice, the Republican presidents³⁷ who appointed Supreme Court justices and other federal judges during this era sought to emulate Nixon's effort to "appoint new judges who would alter the balance between protection of rights and crime control by giving greater emphasis to the empowerment of law enforcement officers."³⁸ The majority opinions produced by the Supreme Court's new, more-conservative orientation led observers to view criminal justice decisions, in particular, as the area in which these presidents enjoyed success in triggering the alteration of constitutional law.³⁹ As subsequent sections of this article will explain, this diminution and dilution of rights affecting criminal justice,⁴⁰ along with the attendant expansion in police

³⁴ See THOMAS R. HENSLEY ET AL., *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 35 (1997) ("Presidents Nixon, Reagan, and Bush used their appointments to select justices whom they hoped would slow or reverse the liberal civil rights and liberties decisions of the earlier Warren Court era.").

³⁵ See LINDA GREENHOUSE, *THE U.S. SUPREME COURT: A VERY SHORT INTRODUCTION* 32 (2012) ("[N]o Democratic president made a Supreme Court nomination from 1967 until 1993 . . .").

³⁶ HENSLEY ET AL., *supra* note 34.

³⁷ See, e.g., HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 334 (2d ed. 1985) ("[President Reagan] insisted that his nominee meet his political ideological criteria. Thus the Reagan team had searched for a woman with demonstrable conservative political and judicial views."); CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY* 19 (2000) ("In sum, Bush wanted to nominate a politically conservative African American to the Supreme Court . . . [Clarence Thomas] received strong support from conservative interest groups that Bush sought to please . . .").

³⁸ SMITH, *supra* note 33.

³⁹ See, e.g., CHARLES M. LAMB & STEPHEN C. HALPERN, *THE BURGER COURT AND BEYOND*, IN *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 434 (Charles M. Lamb & Stephen C. Halpern ed. 1991) ("[T]he Burger Court significantly chipped away at Warren Court precedents in such constitutional areas as criminal procedure . . ."); JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 29 (2007) ("During [William] Rehnquist's remarkable thirty-three year judicial career, he eventually molded other justices to his strong law enforcement views.").

⁴⁰ See, e.g., WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 4 (2003) ("[T]he Warren Court interpreted the due process test so as to expand protections afforded suspects subjected to police interrogation, [but] the Burger and Rehnquist Courts have interpreted *Miranda* so as to diminish suspects' protections.").

officers' authority and discretionary actions,⁴¹ helped to create the environment that produced post-Ferguson controversies about contemporary policing.⁴²

From a rights-protective perspective, we have seen a downward slide over time from the specific requirements of Warren Court decisions, such as *Terry v. Ohio*⁴³ and *Miranda v. Arizona*.⁴⁴ In the contemporary era, research studies and news stories remind us that police often adapt their behavior to avoid legal requirements created by the Supreme Court⁴⁵ or, unfortunately, act with impunity in clear violation of the law and with the apparent belief that they will not be caught and held accountable.⁴⁶ The Supreme Court's role in this slide stems from numerous decisions that diluted the clarity and strength of the Warren Court's decisions creating clear, strong rights-protective rules to guide police conduct.⁴⁷ Consequently, the Supreme Court has abdicated, at least in part,⁴⁸ its role for sending messages to the law enforcement community about the importance of rights, the constitutional requirement

⁴¹ See, e.g., SMITH, CONSTITUTIONAL RIGHTS: MYTH & REALITIES 107 (2004) (“[T]he Supreme Court during the Burger Court (1969–1986) and Rehnquist Court (1986–[2005]) eras made many of the decisions that increased police officers’ opportunities to undertake and justify warrantless searches.”).

⁴² See *infra* notes 62–180 and accompanying text.

⁴³ Compare *Terry v. Ohio*, 392 U.S. 1 (1968) (requiring specific facts and circumstances to justify a stop-and-frisk), and *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring specific warnings to detained suspects prior to custodial detentions), with *infra* notes 50–63 and accompanying text (analyzing *Terry*’s narrow ruling and its effect on police actions).

⁴⁴ In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Warren Court required specific warnings be given to detained suspects prior to custodial interrogations. See SMITH, *supra* note 32 at 213–20.

⁴⁵ RICHARD A LEO, POLICE INTERROGATION AND AMERICAN JUSTICES 119–64 (2008).

⁴⁶ See, e.g., Jason Molinet, *10 San Bernardino County Deputies Suspended After Video Shows Beating of Suspect Who Fled on Horseback*, N.Y. DAILY NEWS (Apr. 10, 2015), <http://www.nydailynews.com/news/crime/california-deputies-investigation-brutal-beating-article-1.2180308> (news helicopter filmed from overhead as numerous sheriff deputies hit and kicked a handcuffed arrested man after he led them on a chase through a mountainous wilderness area); David von Drehle, *Line of Fire*, TIME (Apr. 20, 2015), at 24–31 (police officer in North Charleston, South Carolina, was unknowingly filmed by a bystander as he shot an unarmed, fleeing man in the back after a traffic stop).

⁴⁷ See *infra* notes 62–180 and accompanying text.

⁴⁸ The contemporary Supreme Court issues decisions that support rights in the context of criminal justice, but these rights-protective decisions are not as numerous as its decisions that reject suspects’ and defendants’ claims and thereby increase the flexibility and authority for decision making by police and prosecutors. See Madhavi M. McCall et al., *Criminal Justice and the 2010–2011 U.S. Supreme Court Term*, 53 S. TEX. L. REV. 307, 312 (2011); Madhavi M. McCall et al., *Criminal Justice and the 2008–2009 U.S. Supreme Court Term*, 29 MISS. COLL. REV. 1, 4 (2010).

of individualized suspicion, and the threat of legal accountability for improper police conduct.⁴⁹

A. *The Diminution of Individualized Suspicion for Police Stops*

The Warren Court addressed police officers' legal authority to stop and frisk pedestrians in its seminal decision *Terry v. Ohio* in 1968.⁵⁰ The decision was made by the Supreme Court at the height of its most liberal composition with respect to the relatively large number of justices who regularly supported suspects' and defendants' claims in two-thirds or more of criminal justice cases.⁵¹ It is instructive to revisit the Court's holding in *Terry* because it defined very specific factual circumstances and officers' reasonable conclusions from those circumstances that were needed in order to justify a stop-and-frisk.⁵² Chief Justice Warren's majority opinion said the following:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.⁵³

Within this holding there are very specific elements that officers must observe and use as the basis for reasonable conclusions about the suspect being armed and dangerous in order to justify a warrantless stop-and-frisk search.⁵⁴ Clearly, Chief Justice Warren's opinion sought to

⁴⁹ The idea that the Supreme Court sends messages that instruct the public about values and democracy has been embodied in political science literature that characterizes the Supreme Court as a "republican schoolmaster." Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 751 (1989).

⁵⁰ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁵¹ SMITH, *supra* note 32, at 7.

⁵² *Terry*, 392 U.S. at 30.

⁵³ *Id.*

⁵⁴ SMITH, *supra* note 33, at 154–55.

narrowly define and limit the circumstances in which individuals' liberty and reasonable expectations of privacy could suffer intrusions based on police officers' suspicions and desire to stop and frisk a pedestrian.⁵⁵

By contrast, if we fast forward to the second decade of the twenty-first century, little may remain, in practice, of Chief Justice Warren's specific, careful requirements for stops as, in New York City, for example, where litigation revealed that officers made stop-and-frisk searches based merely on marking a checklist box for "furtive movement."⁵⁶ In a lawsuit against New York City, officers testified that they used the "furtive movement" category to stop people who were merely "being fidgety, changing directions, walking in a certain way, grabbing at a pocket, or looking over one's shoulder,"⁵⁷ a far cry from the specific observations required by the *Terry* standard.⁵⁸ New York's practices resulted in stops of hundreds of thousands of pedestrians, most of whom were African American and Hispanic.⁵⁹ The practice was driven by police administrators' use of recorded stops as a quantitative performance measure for officers,⁶⁰ a belief that such numerous stops deterred people from carrying firearms,⁶¹ and explicit instructions from supervisors for officers to target young minority men for investigation.⁶²

⁵⁵ *Id.*

⁵⁶ *Behind the Decision on the Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/interactive/2013/08/12/nyregion/10-years-of-stop-and-frisk.html?_r=0; GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES 54 (2007).

⁵⁷ Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 13, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html>.

⁵⁸ See *supra* notes 50–52 and accompanying text.

⁵⁹ Joseph Goldstein & Wendy Ruderman, *Street Stops in New York Fall as Unease Over Tactic Grows*, N.Y. TIMES (Aug. 4, 2012); Jennifer Gonnerman, *Officer Serrano's Hidden Camera; The Stop-and-Frisk Trials of Pedro Serrano: NYPD Rat, NYPD Hero*, N.Y. MAG. (May 19, 2013), <http://nymag.com/news/features/pedro-serrano-2013-5/>.

⁶⁰ Joseph Goldstein, *In Its Defense, Police Dept. Cites Laziness of Its Officers*, N.Y. TIMES, Apr. 30, 2013, at A15.

⁶¹ Michael Cooper, *The Diallo Shooting: The Stop-and-Frisk: Procedure Was Once to Protect the Police*, N.Y. TIMES, Mar. 29, 1999, at B3.

⁶² See Gonnerman, *supra* note 59 (description of tape recorded meeting between Officer Serrano and his precinct commander, Deputy Inspector McCormack. Serrano tried to defend himself, but McCormack continued, "For the 4-12s in the 4-0, you know, I could see in Central Park maybe that would be fine, but this ain't Central Park." The longer the conversation continued, the more heated both men became. Serrano: "Mott Haven, full of blacks and Hispanics. Okay . . . So what am I supposed to do? Is it stop every black and Hispanic?" He repeated the question several times. McCormack: "This is about stopping the right people, the right place, the right location . . . [t]ake Mott Haven, where we had the most problems. And the most problems we had there were robberies and grand larcenies." Serrano: "And who are those people robbing?" McCormack: "The

The use of pretextual, racially-skewed investigative stops by police is not limited to pedestrian-focused New York City as it is also used in other locations where it is most evident in traffic stops and searches.⁶³

While the police abuses that gained public attention in 2014 and 2015 are the product of law enforcement practices that self-consciously and aggressively investigate people deemed “suspicious” by police officials,⁶⁴ decisions by the Supreme Court also contributed to officers’ greater sense of discretionary freedom that has contributed to improper conduct. During the Burger Court era, in *United States v. Mendenhall*,⁶⁵ for example, police officers approached a woman at an airport, asked for identification, questioned her, and ultimately escorted her to a private area where a search of her clothing revealed that she was carrying illegal narcotics.⁶⁶ Seven justices, including the four dissenters, treated her encounter with the police as a “seizure” according to the principles of *Terry*.⁶⁷ However, a total of five justices concluded that she had consented to the search and therefore, no violation of rights occurred.⁶⁸ The decision effectively endorsed the notion of profiling suspects based on limited facts that fell well short of the required factual observations specified in *Terry*.⁶⁹ The officers in *Mendenhall* approached the suspect based on a claim that she fit a “drug courier” profile,⁷⁰ even though the four dissenters found her behavior to be lacking indicators of suspiciousness.⁷¹ The dissenters specifically referenced language from

problem was, what, male blacks. And I told you at roll call, and I have no problem telling you this: male blacks, 14 to 20, 21.”

⁶³ See Jeff Rojek, Richard Rosenfeld & Scott Decker, *Policing Race: The Racial Stratification of Searches in Police Traffic Stops*, 50 CRIMINOLOGY 993 (2012) (study of police and racial profiling in St. Louis); CHARLES EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014) (study of police and racial profiling in Kansas City).

⁶⁴ Goldstein, *supra* note 9; Gonnerman, *supra* note 59; Cooper, *supra* note 61; Charles Epp & Steven Maynard-Moody, *Driving While Black*, WASH. MONTHLY (Jan./Feb. 2014), http://www.washingtonmonthly.com/magazine/january_february_2014/ten_miles_square/driving_while_black048283.php?page=all.

⁶⁵ *United States v. Mendenhall*, 446 U.S. 544 (1980).

⁶⁶ *Id.* at 549.

⁶⁷ *Id.* at 560 (Powell, J., concurring in part and concurring in judgement); *id.* at 571 (White, J., dissenting).

⁶⁸ *Id.* at 559–60.

⁶⁹ See *id.* at 567–68 (White, J., dissenting) (“[T]he Government sought to justify the stop by arguing that Ms. Mendenhall’s behavior had given rise to reasonable suspicion because it was consistent with portions of the so-called ‘drug-courier profile’ an informal amalgam of characteristics thought to be associated with persons carrying illegal drugs.”).

⁷⁰ *United States v. Mendenhall*, 446 U.S. 544 (1980).

⁷¹ *Id.* at 572.

*Terry*⁷² in observing that “[w]hat the agents observed Ms. Mendenhall do in the airport was not ‘unusual conduct’ that would lead an experienced officer reasonably to conclude that criminal activity was afoot, . . . but rather the kind of behavior that could reasonably be expected of anyone changing planes in an airport terminal.”⁷³

Indeed, several facts that the officers regarded as “suspicious,” such as the fact that she was changing airlines and carried no luggage, should have been free from any inferences of suspicion when officers quickly learned that this was an interim stop so that any luggage would have been transferred between planes by airline baggage handlers and ticketed through to her final destination.⁷⁴

The *Mendenhall* decision effectively invited officers to stop individuals in circumstances that did not provide the factual basis required for stopping people in *Terry v. Ohio*.⁷⁵ In addition, the *Mendenhall* opinion explicitly expressed the presumption that people know that they are free to walk away from police officers,⁷⁶ even though officers do not inform them about their rights in Fourth Amendment contexts.⁷⁷ This convenient bit of fiction, namely that people know they can walk away from police officers and decline requests to answer questions and consent to searches,⁷⁸ contributed to the dilution of Fourth Amendment protections, including those in *Terry* that focused on an affirmative obligation of police to have specific observations in order to justify a stop.⁷⁹ By diminishing the recognition of and emphasis on stops

⁷² See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

⁷³ *United States v. Mendenhall*, 446 U.S. at 572 (White, J., dissenting).

⁷⁴ *Id.* at 573.

⁷⁵ *Id.*

⁷⁶ *Id.* at 554.

⁷⁷ See *Robinette v. Ohio*, 519 U.S. 33 (1996) (officer at a traffic stop who requests permission to search a car does not need to inform the driver of his right to say “no”).

⁷⁸ See, e.g., *Ohio v. Robinette*, 519 U.S. at 47–48 (Stevens, J., dissenting) (“The Ohio Supreme Court was surely correct in stating: ‘Most people believe that they are validly in a police officer’s custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accoutrements of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.’” 73 Ohio St. 3d, at 655, 653 N.E.2d, at 698 The fact that this particular officer successfully used a similar method of obtaining consent to search roughly 786 times in one year, *State v. Retherford*, 93 Ohio App. 3d 586, 591592, 639 N.E.2d 498, 502, *dism’d*, 69 Ohio St. 3d 1488, 635 N.E.2d 43 (1994), indicates that motorists generally respond in a manner that is contrary to their self-interest. Repeated decisions by ordinary citizens to surrender that interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.”)

⁷⁹ See *supra* note 56 and accompanying text.

that constitute Fourth Amendment “seizures,”⁸⁰ the Court moved away from the *Terry* approach of highlighting the requirements that officers must fulfill before intruding on the liberty of individuals.⁸¹ Instead, the language of the Supreme Court increasingly emphasized officers’ freedom to approach and question individuals without any basis in suspicion,⁸² notwithstanding citizens’ evident actual lack of knowledge about their Fourth Amendment rights.⁸³

In *Illinois v. Wardlow*,⁸⁴ the Supreme Court majority said that officers’ claim that an individual ran at the sight of police in a “high crime” area could provide a critical fact for forming the necessary reasonable suspicion for a stop-and-frisk search.⁸⁵ Yet, the majority opinion ignored the fact that police officers could not know for certain that the individual was running away from the sight of police officers since the officers claimed that they could not even remember whether they were driving down the street in an unmarked car or a clearly-identifiable, marked police cruiser.⁸⁶ Moreover, the majority’s assumption that running is suspicious behavior broadens police authority without acknowledging the many innocent reasons that someone may move quickly at any given moment.⁸⁷ In addition, notwithstanding the

⁸⁰ The expressed support for broad, flexible discretionary police authority to intrude on citizens’ liberty in order to stop them with inquiries and questions, including those that might lead to a search, was premised on the unproven assumption that citizens know that they can ignore and walk away from police officer blocking their path and posing questions to them. *See generally*, *Mendenhall v. United States*, 446 U.S. at 554. (defining Fourth Amendment “seizures” quite narrowly).

⁸¹ *See supra* note 56 and accompanying text.

⁸² *See Mendenhall*, 446 U.S. at 555 (“The events took place in the public concourse. The agents wore no uniforms, and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand, to see the respondent’s identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest.”); *Florida v. Bostick*, 501 U.S. 429, 435-38 (1991) (“*Bostick* maintains that a reasonable bus passenger would not have felt free to leave under the circumstances of this case because there is nowhere to go on a bus. Also, the bus was about to depart. Had Bostick disembarked, he would have risked being stranded and losing whatever baggage he had locked away in the luggage compartment . . . [T]he mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him Our Fourth Amendment inquiry in this case -- whether a reasonable person would have felt free to decline the officers’ requests or otherwise terminate the encounter -- applies equally to police encounters that take place on trains, planes, and city streets.”).

⁸³ *See supra* note 78.

⁸⁴ *Illinois v. Wardlow*, 528 U.S. 119, 120 (2000).

⁸⁵ *Id.* at 125.

⁸⁶ *Illinois v. Wardlow*, 528 U.S. at 138 (Stevens, J., dissenting).

⁸⁷ *See id.* at 128–29, 131 (Stevens, J., dissenting): (“A pedestrian may break into a run for a variety of reasons—to catch up with a friend a block or two away, to seek shelter

decision's focus on the suspiciousness of "unprovoked" flight from the police, the majority appeared to accept that police officers, through their own behavior, could create the reasonable suspicion that they may desire by targeting individuals for investigative attention in order to see if the individuals might run.⁸⁸

In other examples of the Supreme Court's endorsement of expansive discretionary law enforcement authority to intrude on the liberty of individuals, the Court approved a traffic stop of a minivan traveling down a back country road, in part, because children in the van were waving at the officer in what he regarded as a "mechanical" fashion.⁸⁹ The Court's opinion conceded that the conduct of the driver and passengers could be entirely innocent,⁹⁰ yet was willing to defer to the officer's totality-of-circumstances conclusion that reasonable suspicion existed despite any articulable facts that pointed specifically to illegal conduct.⁹¹ The Court also approved officers' authority to order passengers out of vehicles during traffic stops without any basis for suspicion that they had engaged in wrongful conduct.⁹² This decision led Justice John Paul Stevens, joined by Justice Anthony Kennedy, to complain that "the Court takes the unprecedented step of authorizing seizures that are unsupported by any individualized suspicion whatsoever."⁹³ When the Court empowered police officers to decide for themselves whether probable cause existed to search closed containers within automobiles, Justice Stevens issued a sharp criticism: "It is too early to know how much freedom America has lost today. The magnitude of the loss is, however, not nearly as significant as the Court's

from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a pause for rest, to avoid contact with a bore or a bully, or simply to answer the call of nature-any of which might coincide with the arrival of an officer in the vicinity [In addition,] a reasonable person may conclude that an officer's sudden appearance indicates nearby criminal activity. And where there is criminal activity there is also a substantial element of danger-either from the criminal or from a confrontation between the criminal and the police. These considerations can lead to an innocent and understandable desire to quit the vicinity with all speed.").

⁸⁸ *See id.* at 130 (Stevens, J., dissenting) ("Nowhere in Illinois' briefs does it specify what it means by 'unprovoked.' At oral argument, Illinois explained that if officers precipitate a flight by threats of violence, that flight is 'provoked.' But if police officers in a patrol car-with lights flashing and siren sounding-descend upon an individual for the sole purpose of seeing if he or she will run, the ensuing flight is 'unprovoked.'").

⁸⁹ *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

⁹³ *Id.* at 422 (Stevens, J., dissenting).

willingness to inflict it without even a colorable basis for its rejection of prior law.”⁹⁴

In addition, the Court also approved the stop of a vehicle based on an anonymous tip⁹⁵ even when officers following the vehicle did not personally observe any suspicious conduct or traffic violations.⁹⁶ In another decision, the Roberts Court supported the permissibility of a vehicle stop even when the officer wrongly believed that his state’s law had been violated by the vehicle’s equipment.⁹⁷ In effect, it was a stop that was not based on any legal reason,⁹⁸ leading one commentator to quip that “ignorance of the law is no excuse for breaking the law—unless you’re a police officer.”⁹⁹ The cumulative effect of such decisions affecting pedestrians and drivers led Professor David Rudovsky to observe that “the power of police stop and frisk has greatly expanded and now encompasses all suspected criminal activity, no matter how trivial, and under circumstances where the conduct observed may be fully consistent with innocence.”¹⁰⁰

B. *Insufficient Recognition of the Problems of Racial Discrimination*

The Supreme Court’s decisions have made it difficult to prove the existence of racial discrimination in the decisions of criminal justice officials.¹⁰¹ For example, in *McCleskey v. Kemp*,¹⁰² the Court rejected an equal protection challenge to the death penalty system in Georgia based on strong statistical evidence indicating the existence of racial discrimination.¹⁰³ Justice Lewis Powell’s majority opinion said statistics cannot be used to prove the existence of racial discrimination for capital

⁹⁴ *California v. Acevedo*, 500 U.S. 565, 602 (1991) (Stevens, J., dissenting).

⁹⁵ *Prado Navarette v. California*, 134 S. Ct. 1683 (2014).

⁹⁶ *Id.* at 1692 (Scalia, J., dissenting).

⁹⁷ *Heien v. North Carolina*, 135 S. Ct. 530 (2014).

⁹⁸ Mark Joseph Stern, *The Ferguson Effect*, SLATE (April 21, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/rodriguez_v_unit_ed_states_a_huge_win_against_police_overreach_at_the_supreme.html.

⁹⁹ *Id.*

¹⁰⁰ David Rudovsky, *Stop-and-Frisk: The Power of Data and the Decision in Floyd v. City of New York*, 162 U. PA. L. REV. 117, 118 (2013).

¹⁰¹ *See McCleskey v. Kemp*, 481 U.S. 279 (1987) (studies showing statistically significant racial disparities in the application of the death penalty cannot be used to prove the existence of racial discrimination in a state’s capital cases); *See also United States v. Armstrong*, 517 U.S. 456 (1996) (holding that anecdotal evidence of disparate treatment by race in criminal prosecutions is insufficient to justify existing evidence to determine whether racial discrimination exists).

¹⁰² *McCleskey*, 481 U.S. at 279.

¹⁰³ *Id.* at 292.

prosecutions¹⁰⁴ even though such evidence is accepted for proving racial discrimination in the presumably less-important, non-life-and-death contexts of jury selection and employment discrimination.¹⁰⁵ Justice Powell justified the rejection of using statistics to prove discrimination in criminal justice by the asserted need to preserve broad discretionary authority for officials' decisions in the context of criminal justice.¹⁰⁶ As Justice Stevens noted in his dissent, members of the majority seemed more concerned with preserving capital punishment and discretionary decision-making than with stamping out equal protection violations in the criminal justice system.¹⁰⁷ Despite widely-recognized research establishing the existence of racial bias in decision-making,¹⁰⁸ the Court's decision seemed to preclude any finding of an equal protection violation in the context of criminal justice, no matter how glaring the racial disparities in treatment and outcomes, except in the unlikely event that "decision makers openly express their biases."¹⁰⁹ Thus, the majority opinion "facilitated an expansion in discretion and concomitant discrimination in applying capital punishment."¹¹⁰

A further limitation on proving the existence of racial discrimination came from *United States v. Armstrong*.¹¹¹ Defense attorneys brought forth anecdotal information about a federal prosecutor's office that apparently only prosecuted minority group members and never whites for crack cocaine crimes despite whites' use of the drug within that jurisdiction.¹¹² The attorneys sought access to records that would enable them to learn whether this anecdotal information indicated the existence of improper racial discrimination by the prosecutor's office.¹¹³ However, the Court barred access to the prosecutor's records that would have provided a basis for discovering whether discrimination occurred.¹¹⁴ Instead of treating racial discrimination in criminal prosecution as a scourge that must be eradicated at every opportunity, the majority

¹⁰⁴ *Id.* at 292–93 (“[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.”).

¹⁰⁵ *Id.* at 293–94.

¹⁰⁶ Smith, *supra* note 32, at 76–78.

¹⁰⁷ *McCleskey v. Kemp*, 481 U.S. 279, 367 (Stevens, J., dissenting).

¹⁰⁸ See Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797, 830 (1990).

¹⁰⁹ *Id.*

¹¹⁰ Smith, *supra* note 32, at 76.

¹¹¹ *United States v. Armstrong*, 517 U.S. 456 (1996).

¹¹² *Id.* at 460–61.

¹¹³ *Id.* at 459.

¹¹⁴ *Id.* at 470.

maintained difficult-to-establish standards for pursuing selective prosecution claims.¹¹⁵ In his dissent, Justice Stevens pointed to the demonstrated differential impact of sentencing for crack cocaine convictions as opposed to powder cocaine convictions,¹¹⁶ with severe consequences for African American defendants who predominated among those given long prison sentences for crack cocaine offenses.¹¹⁷ Justice Stevens argued that it was proper for judges to open examinations of racially-discriminatory selective prosecutions because “Evidence tending to prove that black defendants charged with distribution of crack . . . are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny by the federal judges in that District.”¹¹⁸

The Supreme Court’s decisions in *McCleskey* and *Armstrong* raise fears that a critical mass of justices may share Justice Scalia’s view that racial discrimination is an “ineradicable” problem in the criminal justice system and therefore, the Court should not bother with trying to address it.¹¹⁹ Justice Scalia revealed his viewpoint in an internal memorandum to the other justices during the Court’s consideration of the *McCleskey* case, a memorandum that became public when a professor discovered it after Justice Thurgood Marshall’s papers were made available at the Library of Congress after his death in 1993.¹²⁰ In Scalia’s words, “Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [ones] is real, acknowledged by the [cases] of this court and ineradicable, I cannot honestly say that all I need is more proof [of discrimination].”¹²¹ Justice Scalia’s subsequent vote with the *McCleskey* majority to reject the use of powerful statistical evidence for proving the existence of equal protection violations led one commentator to observe that Scalia’s memorandum “trivialize[ed] [discriminatory practices] by

¹¹⁵ *Id.* at 463–69.

¹¹⁶ *Id.* at 478–80 (Stevens, J., dissenting).

¹¹⁷ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 112–19, 188 (2010) (racial discrimination and adverse consequences for African American defendants and offenders in the criminal justice system, including severe impact of differential sentencing for cocaine offenses).

¹¹⁸ *United States v. Armstrong*, 517 U.S. 456, 480 (1996) (Stevens, J., dissenting).

¹¹⁹ Smith, *supra* note 32, at 79–80.

¹²⁰ See Dennis Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia’s McCleskey Memorandum*, 45 *MERCER L. REV.* 1035 (1994) (discussion of the discovery, content, and implications of Justice Scalia’s memorandum).

¹²¹ SMITH, *supra* note 32, at 80.

saying, in a single-paragraph, that they were merely an unavoidable and legally unassailable, part of life for African-Americans.”¹²²

In his opinion, concurring in part, and dissenting in part in *Illinois v. Wardlow*,¹²³ concerning stop-and-frisk searches, Justice Stevens pointed his colleagues to the real-world experiences of African Americans who encounter police officers.¹²⁴ The majority concluded that when the police see someone run as officers drive down a street, such behavior can be considered an important element of reasonable suspicion to justify a stop-and-frisk search.¹²⁵ Justice Stevens, by contrast, noted that “[a]mong some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer’s sudden presence.”¹²⁶ Justice Stevens also cited various surveys about African Americans’ perceptions of discrimination by police as well as officers’ own admissions about the potential existence of bias.¹²⁷ In a footnote, Stevens expressed concern about the need to “account for the experiences of many citizens of this country, particularly those who are minorities” in evaluating encounters between individuals and police.¹²⁸ In light of his other words and footnotes, he clearly did not believe that his colleagues in the majority had adequately understood and accounted for the experiences of minority group members.¹²⁹ Thus, racially-discriminatory behavior can be practiced by the police in stopping individuals and, “[s]o long as officers refrain from uttering racial epithets and so long as they show the good sense not to say ‘the only reason I stopped him was ‘cause he’s black,’ courts generally turn a blind eye to patterns of discrimination by the police.”¹³⁰

Decades ago, the Supreme Court presented a powerful, widely-recognized voice against racial discrimination with its pronouncements concerning impermissible racial segregation and discrimination in American society¹³¹ as well as in criminal justice processes.¹³²

¹²² Dorin, *supra* note 120, at 1077.

¹²³ *Illinois v. Wardlow*, 528 U.S. 119 (2000).

¹²⁴ *See id.* at 132 (Stevens, J., concurring in part and dissenting in part).

¹²⁵ *See id.* at 124.

¹²⁶ *Id.* at 132 (Stevens, J., concurring in part and dissenting in part).

¹²⁷ *Id.* at 132–33 nn.7–9.

¹²⁸ *Illinois v. Wardlow*, 528 U.S. 119, 129 n.3 (2000).

¹²⁹ *See id.*

¹³⁰ ALEXANDER, *supra* note 117, at 133.

¹³¹ *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976) (interpretation of statute to prohibit racial discrimination by certain private schools); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (endorsement of congressional power to prohibit racial discrimination by

Arguably, the Supreme Court was the most visible “public actor clothed with the appearance of legitimacy, neutrality, and principle to . . . advance equality.”¹³³ Today, there is a question as to whether police officers and other justice system officials have any reason to perceive the Supreme Court as communicating strong concerns about racial discrimination against African Americans and other minorities.¹³⁴ Indeed, Professor Michelle Alexander argues that “[b]ecause the Supreme Court has authorized the police to use race as a factor when making decisions regarding whom to stop and search, police departments believe that racial profiling exists only when race is the *sole* factor” (emphasis in original).¹³⁵ As a result, rather than receive a message about the need to take care to avoid race-based, discriminatory decision making, police officers have instead perceived the Court to say that “if race is one factor [in a stop and search] but not the only factor, then it doesn’t really count as a factor at all.”¹³⁶ Yet, as Professor Alexander observes, “[t]he problem is that although race is rarely the sole reason for a stop and search, it is frequently a *determinative* reason” (emphasis in original).¹³⁷

The most prominent messages presented by the contemporary Supreme Court majority imply that racial discrimination in American society is primarily a problem of the past and that heightened sensitivity and remedial measures are no longer needed.¹³⁸ When the Supreme Court majority blocked recent school integration measures in Seattle and

certain private businesses); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (unconstitutionality of racial segregation in federally-administered public schools due to the Fifth Amendment’s Due Process Clause); *Brown v. Board of Education*, 347 U.S. 483 (1954) (unconstitutionality of racial segregation in states’ public schools due to the Fourteenth Amendment’s Equal Protection Clause).

¹³² See *United States v. Paradise*, 480 U.S. 149 (1987) (approval of hiring requirements to remedy racial discrimination in employment by a police agency); *Lee v. Washington*, 390 U.S. 333 (1968) (prohibition on Alabama’s use of racial segregation in correctional institutions).

¹³³ Smith, *supra* note 108, at 844.

¹³⁴ See, e.g., ALEXANDER, *supra* note 117, at 131 (“The [Supreme] Court’s quiet blessing of race-based traffic stops has led to something of an Orwellian public discourse regarding racial profiling.”).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* 34 (2012) (“Others, including some current members of the Supreme Court, see anxiety about [police] discretion and worries about racially biased policing as products of a distinctive period in our history; they argue that these concerns have been rendered obsolete by progress in race relations.”).

Louisville,¹³⁹ Justice Breyer's dissenting opinion pointed directly to the contrast between the Court's prior role in providing guidance on counteracting discrimination and the contemporary change in a contrary direction: "Yesterday, the citizens of this nation could look for guidance to this Court's unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a full range of means to combat segregated schools. Today, they do not."¹⁴⁰

A separate dissenting opinion by Justice Stevens underscored the change in the Court's position and role on matters of race by saying, "The Court has changed significantly since . . . 1968. It was then more faithful to *Brown* . . . It is my firm conviction that no member of the Court that joined in 1975 would have agreed with today's decision."¹⁴¹ Other decisions by the contemporary Court, such as proactively reducing the impact of the Voting Rights Act's protections against discrimination¹⁴² and raising impediments for people wishing to file employment discrimination claims,¹⁴³ have similarly reduced its image as an institution committed to counteracting racial discrimination.¹⁴⁴ Thus, the contemporary Court majority is susceptible to the same criticism that Justice Harry Blackmun applied to his colleagues after the Court's major shift toward conservatism in the 1970s and 1980s: "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was."¹⁴⁵

C. *Shift in Perspective to De-Emphasize Remedies for Rights Violations*

The changes in the Supreme Court's composition after the rights-protective Warren Court era contributed to expansions in police authority that invite suspicionless stops and race-based assertions of police

¹³⁹ *Parents Involved in Community Sch. v. Seattle Sch. Dist.*, No. 1, 551 U.S. 701 (2007).

¹⁴⁰ *See id.* at 865 (Breyer, J., dissenting).

¹⁴¹ *See id.* at 803 (Stevens, J., dissenting).

¹⁴² *Shelby Cty. v. Holder*, 133 S.Ct. 2612 (2013).

¹⁴³ *Vance v. Ball St. Univ.*, 133 S.Ct. 2434 (2013).

¹⁴⁴ *See, e.g.*, Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013) (Prior to striking down Section 4 of the Voting Rights Act in 2013, "[t]he Supreme Court had repeatedly upheld the law in earlier decisions, saying that the preclearance requirement was an effective tool to combat the legacy of lawless conduct by Southern officials bent on denying voting rights to blacks."), <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html>.

¹⁴⁵ *Ward's Cove Packing Co. v. Antonio*, 490 U.S. 642, 662 (1989) (Stevens, J., dissenting).

power.¹⁴⁶ In particular, the Court majority evinced a shift in perspective from focusing on preventing and remedying rights violations during the Warren Court¹⁴⁷ era to focusing on whether police did anything wrong.¹⁴⁸ The new perspective in the Burger, Rehnquist, and Roberts Court eras forgives officers for good faith errors, creates exceptions to previously-established rules, and thereby fails to remedy rights violations.¹⁴⁹

For example, when police conduct unjustified searches in reliance on judges' errors in issuing warrants,¹⁵⁰ errors in police databases,¹⁵¹ errors in court databases,¹⁵² and misperceptions about whether an individual has actual authority to consent to a search of a residence,¹⁵³ officials are allowed to use incriminating evidence found in those searches despite violations of Fourth Amendment rights.¹⁵⁴ Under the perspective driving decisions since the end of the Warren Court era, the question of providing remedies for rights violations "turns on the culpability of the police,"¹⁵⁵ not on the question of whether rights violations occurred.¹⁵⁶ Such rulings may decrease incentives for police to gather as much information as possible since they can gain the benefit of broadened search authority by claiming ignorance of all relevant facts and therefore use self-interested ignorance to avoid culpability for rights violations.¹⁵⁷

¹⁴⁶ See Smith, *supra* note 32, at 6–29.

¹⁴⁷ *Id.* at 12, 36.

¹⁴⁸ SMITH, CONSTITUTIONAL RIGHTS, *supra* note 41, at 102.

¹⁴⁹ *Id.* at 102–107. In the Burger Court era, *see, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984) (holding that officers could use evidence from an improper search based on a warrant improperly issued by a judicial officer). In the Rehnquist Court era, *see, e.g.*, *Arizona v. Evans*, 514 U.S. 1 (1995) (holding that police officers could use incriminating evidence found incident to an arrest even though the arrest was based on a nonexistent warrant erroneously recorded in a court database). In the Roberts Court era, *see, e.g.*, *Herring v. United States*, 555 U.S. 135 (2009) (holding that police officers could use incriminating evidence found incident to an arrest even though the arrest was based on a nonexistent warrant erroneously recorded in a law enforcement database).

¹⁵⁰ *United States v. Leon*, 468 U.S. 897 (1984).

¹⁵¹ *Herring v. United States*, 555 U.S. 135 (2009).

¹⁵² *Arizona v. Evans*, 514 U.S. 1 (1995).

¹⁵³ *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

¹⁵⁴ See SMITH, *supra* note 41, at 98, 102, 105.

¹⁵⁵ *Herring*, 555 U.S. at 135.

¹⁵⁶ See, *e.g.*, *United States v. Leon*, 468 U.S. 897 (1984) (holding that a Fourth Amendment violation occurred when a search warrant was issued based on stale information that could not constitute probable cause, but the evidence found during the improper search could be used to prosecute the defendant because a judicial officer rather than the police was responsible for the error.).

¹⁵⁷ See *id.* at 955 (Brennan, J., dissenting). ("If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form

This emphasis on overlooking police errors that lead to intrusions on individuals' liberty recently expanded even further with the Court's 2014 decision in *Heien v. North Carolina* permitting traffic stops that may lead to a search to be based on an officer's erroneous assumption about possessing the authority to enforce a nonexistent statute.¹⁵⁸

The creation of exceptions to the Warren Court's rights-protective rulings¹⁵⁹ and the recognition of increasing numbers of situations for which the Supreme Court approves warrantless searches¹⁶⁰ expanded police discretionary authority and contributed to the risk of abuses.¹⁶¹ Moreover, by providing a variety of avenues for after-the-fact manufactured narratives to rationalize unjustified stops, searches and decisions to use force,¹⁶² Supreme Court decisions enable dishonest police officers to hide from judicial scrutiny their knowingly improper and race-based discretionary intrusions on individuals' liberties.¹⁶³

of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements. After today's decisions, however, that institutional incentive will be lost. Indeed, the Court's 'reasonable mistake' exception to the exclusionary rule will tend to put a premium on police ignorance of the law.").

¹⁵⁸ *Heien v. North Carolina*, 135 S.Ct. 530 (2014).

¹⁵⁹ See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 26 (4th ed. 2000) ("Most important in this regard has been the Court's inexorable movement toward the position that the exclusionary rule should not apply when police are 'reasonably' unaware they are violating Fourth Amendment principles . . ."). See also HENSLEY ET AL., *supra* note 34, at 448 ("However, the landmark precedent [*Mapp v. Ohio*, 367 U.S. 644 (1961)] had begun to experience a 'swiss cheese' effect as the Burger Court created exceptions that increasingly permitted improperly obtain evidence to be used against criminal defendants.").

¹⁶⁰ Categories of permissible warrantless searches resting on police discretion rather than the approval of a judicial officer include stop-and-frisk, exigent circumstances, incident to an arrest, and various scenarios involving automobiles. SMITH, *supra* note 41, at 100–107.

¹⁶¹ New York City's widespread stop-and-frisk practices targeting young minority men for hundreds of thousands of suspicionless stops represent the kind of abuse that can follow from widening opportunities for discretionary, warrantless searches. See *supra* notes 56–64 and accompanying text.

¹⁶² See, e.g., WHITEBREAD & SLOBOGIN, *supra* note 159, at 46 ("The elasticity of the majority's standard [for the inevitable discovery exception to the exclusionary rule] creates significant potential for . . . at worst encouraging police to take illegal shortcuts in the belief that legal investigatory methods can be imagined by the time of the suppression hearing.").

¹⁶³ For example, police officers who have found incriminating evidence during an improper search have a period time from the search or arrest until preliminary hearings in court to create a description of a situation or event that may, for example, let them claim that they had sufficient reasonable suspicion to conduct a stop-and-frisk search or that exigent circumstances required them to take immediate action—whether or not that actual description is true. See Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES (May 12, 2008) at B1.

An additional aspect of deficiencies in the Supreme Court's protection of rights can be seen in rulings that make it difficult to hold criminal justice officials accountable for possible rights violations. In *Scott v. Harris*,¹⁶⁴ for example, based on the justices' own subjective interpretation of a police-car video of the chase, the Supreme Court ruled that a fleeing speeder who was permanently disabled when his car was intentionally rammed by a police cruiser at high speed could not proceed to trial in his lawsuit against the police.¹⁶⁵ In his dissent, Justice Stevens criticized the majority for usurping the role of a jury by making a fact-finding determination in a case for which the police arguably did not need to give chase and cause the victim to flee because the police had the speeder's license plate number and could simply have gone to his home to ticket or arrest him.¹⁶⁶ The Supreme Court took the same approach in a subsequent case in which police officers fired fifteen bullets into a vehicle, killing both the driver and a passenger, after the driver sped away from a traffic stop.¹⁶⁷ In both cases, the Court denied any opportunity for the police liability claims to go to trial even though lower courts had ordered that the claims be presented to juries.¹⁶⁸ In such use-of-force cases, other avenues of accountability can be blocked by police departments' relationships with prosecutors when prosecutors use their discretionary authority to decline to pursue criminal charges against officers, even in troubling cases that result in the deaths of innocent individuals under questionable circumstances.¹⁶⁹ Prosecutors can also orchestrate the grand jury proceedings to protect police officers from prosecution.¹⁷⁰

In another example concerning accountability through civil liability, the Roberts Court strengthened prosecutorial immunity, even under shocking circumstances, by overturning a \$14 million jury verdict won

¹⁶⁴ *Scott v. Harris*, 550 U.S. 372 (2007).

¹⁶⁵ *Id.* at 384–86.

¹⁶⁶ *Id.* at 389–97 (Stevens, J., dissenting).

¹⁶⁷ *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014).

¹⁶⁸ *Scott v. Harris*, 550 U.S. at 372 (Stevens, J., dissenting); *Plumhoff*, 132 S. Ct. at 2012. See Adam Liptak, *Justices Unite on Key Point in Chase Ending in Fatal Police Shooting*, N.Y. TIMES (Mar 4, 2014), <http://www.nytimes.com/2014/03/05/us/justices-seem-united-on-key-argument-in-fatal-police-chase.html>.

¹⁶⁹ See, e.g., Tony Pipitone, *Miami-Dade Police Launch Criminal Investigation Into Missing Evidence; No Discipline for Officers in Redland Killings*, NBC MIAMI (Mar. 21, 2015), <http://www.nbcmiami.com/news/local/Miami-Dade-Police-Launch-Criminal-Investigation-Into-Missing-Evidence-No-Discipline-for-Officers-in-Redland-Killings-297080891.html> (prosecutors decline to prosecute police officers for shooting police informant and three burglars under circumstances in which video evidence showed a victim raise his hands to surrender and none of the victims had a rifle as reported by police).

¹⁷⁰ See *supra* note 12, and accompanying text.

by a man who spent many years on death row due to prosecutorial misconduct involving hiding and destroying exculpatory evidence.¹⁷¹ Police typically work closely with prosecutors and may be involved in hiding or distorting evidence that might have cast doubt on a particular defendant's guilt.¹⁷² According to the Supreme Court, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."¹⁷³ Because it is prosecutors rather than police who are supposed to have obligations under *Brady v. Maryland*¹⁷⁴ for sharing exculpatory evidence with defense attorneys, prosecutorial responsibility and immunity may effectively shield police, as when claims are directed at immunity-protected prosecutors for information never revealed by police.¹⁷⁵

In addition, the Supreme Court has further contributed to criminal justices officials' avoidance of accountability and consequences in certain situations, such as the failure to preserve evidence that might be favorable to the defendant, by requiring the defendant to prove "bad faith" on the part of police in order to prove a rights violation.¹⁷⁶ The Court's failure to make police responsible for preserving evidence led, for example, to a *Denver Post* investigation that found 141 cases in which Colorado police and prosecutors destroyed evidence that convicted offenders sought to have tested.¹⁷⁷ In one Colorado case, in violation of their own department's policies and a court order, police tossed into a dumpster DNA evidence labeled "DO NOT DESTROY"

¹⁷¹ *Connick v. Thompson*, 131 S.Ct. 1350 (2011).

¹⁷² See, e.g., Joaquin Sapien, *Watching the Detectives: Will Probe of Cop's Cases Extend to Prosecutors?*, PRO PUBLICA (June 21, 2013, 9:52 AM) <http://www.propublica.org/article/watching-the-detectives-will-probe-of-cops-cases-extend-to-prosecutors>

(Brooklyn detective worked closely with prosecutors for many years before having several murder convictions reexamined and overturned after defendants had served years in prison).

¹⁷³ *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

¹⁷⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁷⁵ See, e.g., Robert S. Mahler, *Extracting the Gate Key: Litigating Brady Issues*, NATL. ASS'N OF CRIMINAL DEF. LAWYERS (May 2001) at n.3, <http://www.nacdl.org/Champion.aspx?id=22712> ("Professor Rosen's article . . . had no occasion to address the times when exculpatory information in possession of law enforcement agencies was never disclosed to either the defense or the prosecutor . . .").

¹⁷⁶ *Arizona v. Youngblood*, 488 U.S. 51 (1988).

¹⁷⁷ Susan Greene & Miles Moffeit, *Bad Faith Difficult to Prove: Through Carelessness or by Design, Tiny Biological Samples Holding Crucial DNA Fingerprints Often Disappear on Authorities' Watch. Innocent People Languish in Prison, and Criminals Walk Free*, DENVER POST (July 22, 2007), http://www.denverpost.com/evidence/ci_6429277.

and thereby stopped a prisoner from seeking to prove his innocence.¹⁷⁸ Nationally-known criminal defense attorney Abe Hutt said about his client in that case:

You don't scream about your innocence from a jail cell for 10 years and finally get the money together to have this stuff tested only to have so many people at the police department be careless, negligent, bad faith, reckless, whatever you want to call it, and thereby destroy forever your ability to prove your innocence and then have a court look at you and say, well, tough, that's kind of the way it goes.¹⁷⁹

The issue of holding police responsible for preserving evidence may seem distant from the post-Ferguson debates about excessive use of force, improper stops and searches, and race-based discriminatory decisions by police.¹⁸⁰ Yet, in reality, this issue provides further evidence that the Supreme Court's decisions may have facilitated, and perhaps even encouraged, police officers and other criminal justice officials to freely act with impunity in the absence of any fear of accountability and adverse consequences.¹⁸¹

III. CONCLUSION

It is unquestionably true that seeking to prevent and remedy the wrongs evident in the pervasive problem of unjustified police stops, searches, and uses of force against African American men in every strata of society¹⁸² will require action by officials throughout the justice

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Issues about evidence preservation arise during or after criminal prosecutions while debates about the Ferguson, Missouri, shooting of Michael Brown and other controversial police use-of-force incidents against unarmed African Americans concern police encounters prior to prosecution. *See supra* notes 1–11, and accompanying text.

¹⁸¹ *See, e.g.*, CHRISTOPHER E. SMITH, MADHAVI MCCALL, & CYNTHIA PEREZ MCCLUSKEY, LAW AND CRIMINAL JUSTICE: EMERGING ISSUES IN THE TWENTY-FIRST CENTURY 32–33 (2005) (“Because of the [Supreme] Court’s reputation for conservatism and consistent record of generally endorsing expanded governmental powers in criminal justice, police officers, prosecutors, corrections officials, and lower court judges may feel encouraged to push and test the limitations created by prior precedents. Their observations and experiences may indicate to them that the Rehnquist Court is likely to eliminate, diminish, or create exceptions to rights-enforcing rules established in prior Supreme Court decisions.”).

¹⁸² Racially discriminatory actions by police officers do not merely affect the politically powerless people in poor communities such as Ferguson, Mo. Such actions are an ever-

system.¹⁸³ Moreover, progress will require the cultivation of greater tolerance, self-awareness, and honesty within future police officers among American young people through lifelong developmental processes affected by school systems, news media, and other broad societal influences.¹⁸⁴ The U.S. Supreme Court also has a role to play in addressing the problems that are at the forefront of public consciousness following the events in Ferguson, Missouri, and elsewhere in reaction to police violence.¹⁸⁵ The Court played a key role in facilitating recent injustices and tragedies¹⁸⁶ and, although it cannot cure pervasive

present fact of life for African American graduates of Harvard and other elites. See Christopher E. Smith, *What I Learned About Stop-and-Frisk from Watching My Black Son*, THE ATLANTIC (Apr. 1, 2014), <http://www.theatlantic.com/national/archive/2014/04/what-i-learned-about-stop-and-frisk-from-watching-my-black-son/359962/> (describing Harvard student's experience when targeted by New York City stop-and-frisk practices); See also, Byronn Bain, *Walking While Black: The Bill of Rights for Black Men*, THE VILLAGE VOICE (Apr. 25, 2000), <http://www.villagevoice.com/2000-04-25/news/walking-while-black> (detailing unjust arrest of a Harvard Law School student walking down the sidewalk in New York City).

¹⁸³ For example, essential elements of reform must include closer supervision and skepticism by trial judges who evaluate police officers' rationalizations for their actions. Weiser, *supra* note 162. Reforms must also include police administrators' allocation of resources for purchasing and monitoring effective body camera systems. Stav Ziv, *Study Finds Body Camera Reduce Police's Use of Force*, NEWSWEEK (Dec. 28, 2014, 2:31 PM) <http://www.newsweek.com/amidst-debate-study-finds-body-cameras-decrease-polices-use-force-295315>.

¹⁸⁴ See, e.g., David Brandwein & Christopher Donoghue, *A Multicultural Grassroots Effort to Reduce Ethnic & Racial Social Distance among Middle School Students*, 19 MULTICULTURAL ED. 38 (2012) (detailing study of program designed to increase racial tolerance among school children).

¹⁸⁵ For example, virtually every year the Supreme Court considers and issues decisions on Fourth Amendment issues that inform law enforcement officials about how to train and supervise their officers. In the 2012–2013 Supreme Court Term, for example, the justices issued five widely-discussed decisions concerning the Fourth Amendment: *Florida v. Harris*, 133 S.Ct. 1050 (2013) (rejection of challenge to drug-sniffing dog's training and certification); *Bailey v. United States*, 133 S.Ct. 1031 (2013) (limitation on police authority to stop and frisk a suspect who was a distance away from where a search warrant was being executed at his residence); *Florida v. Jardines*, 133 S.Ct. 1409 (2013) (an officer's intentional investigatory act of bringing a drug-sniffing dog to the front porch of a home was a "search" that requires a warrant or other recognized justification for a reasonable Fourth Amendment search); *Maryland v. King*, 133 S.Ct. 1958 (2013) (approval of DNA sample swabs involuntarily taken from arrestees under state law); *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) (normally police should seek a warrant when they want to have blood drawn to test blood alcohol level of suspected drunk driver). See also, Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2012–2013 United States Supreme Court Term*, 5 CHARLOTTE L. REV. 35 (2014) (description and analysis of U.S. Supreme Court's criminal justice decisions).

¹⁸⁶ See *supra* notes 61–180, and accompanying text.

problems that reflect the nation's long history of racial bias and discrimination,¹⁸⁷ its symbolic voice and rule-making authority can contribute to aspects of needed police reforms.¹⁸⁸

We need a Supreme Court that is skeptical of police officers, their potential biases, their potential self-interested motives, and their honesty.¹⁸⁹ The foregoing statement should not be construed as fulfilling Rudolph Giuliani's phony political statement about President Obama in which Giuliani claimed that the president spread "propaganda" telling "everybody to hate the police."¹⁹⁰ It is merely a recognition that the nation needs to see the Court return to James Madison's observation in Federalist No. 51 that "If men were angels, no government would be necessary."¹⁹¹ In this regard, the specific governmental need is for stricter judicial rulemaking, skepticism, and scrutiny regarding the inherently imperfect, "non-angel" human beings who are law enforcement officers.¹⁹² As Professor Stephen Schulhofer has explained,

¹⁸⁷ Even when the Supreme Court speaks strongly against racial discrimination, its action alone has limited impact on curing such a deeply entrenched problem. *See* ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 250–68 (1987) (discussion of the years' long challenge of ending racial segregation in public schools even after the Supreme Court outlawed the practice in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

¹⁸⁸ *See, e.g.,* CAROLYN N. LONG, *MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES* (2006) ("Despite complaining bitterly about *Mapp v. Ohio*, police, whether they like it or not, had to change their way of conducting searches . . . Other jurisdictions observed how *Mapp* prompted the law enforcement community to professionalize its officers.").

¹⁸⁹ *See Judge Says Remarks on 'Gorillas' May Be Cited in Trial on Beating*, N.Y. TIMES (Jun. 12, 1991), <http://www.nytimes.com/1991/06/12/us/judge-says-remarks-on-gorillas-may-be-cited-in-trial-on-beating.html>, for an example of police officers' self-interested motives, and instances of dishonesty. (Reporting that the prevalence of recording devices regularly provides evidence of individual police officers' biases, such as officers in the Rodney King beating and their radio transmission references to gorillas); *Attorney: Officer Who Shot Man Saturday Believes He Followed Proper Procedure*, ABC 4 NEWS (Apr. 5, 2015, 4:52 PM), <http://www.abcnews4.com/story/28725562/coroner-identifies-man-shot-killed-by-north-charleston-police-officer>. (With respect to individual officers' honesty, in the immediate aftermath of the North Charleston, South Carolina, shooting of Walter Scott, Officer Michael Slager claimed that Scott had taken the officer's Taser in a struggle and implied that he had to shoot in self-defense.); William M. Welch, *S.C. Police Officer Charged in Fatal Shooting*, USA TODAY (Apr. 8, 2015, 2:39 PM), <http://www.usatoday.com/story/news/2015/04/07/charges-in-sc-police-shooting/25430473/> (However, the video of the incident taken by on a cellphone by a bystander showed Scott running away with the Taser, with which he had been shot, trailing along behind him as Officer Slager shot him the back while firing multiple times.).

¹⁹⁰ Michelle Ye Hee Lee, *Giuliani's Claim that Obama Launched Anti-Police Propaganda*, WASH. POST (Dec. 23, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/12/23/giulianis-claim-that-obama-launched-anti-police-propaganda/>.

¹⁹¹ THE FEDERALIST NO. 51 (James Madison).

¹⁹² *See supra* note 189 and accompanying text.

a key trend that facilitated the problems illustrated by the Ferguson shooting and other recent events concerns the commitment of the Supreme Court's majority since the end of the Warren Court era to be overly trusting of police officers:¹⁹³

A similar inversion of Fourth Amendment values—positing police trustworthiness and resisting judicial oversight—is reflected in the Court's recent attitude toward remedies for a Fourth Amendment violation . . . On this subject as on so many others, the Court is once again turning our Fourth Amendment tradition and the commitments of the Framers inside out. The claim that law enforcement can be trusted to follow the law is of course politically appealing, and no doubt most police officers are persons of goodwill and decent intentions. Nonetheless, the premise that such probity will persist without independent checks, and that executive officers can be trusted to exercise search-and-seizure powers fairly, in the absence of judicial oversight, is precisely the assumption that the Fourth Amendment rejects.¹⁹⁴

During prior eras, there were justices on the Court whose personal exposure to abusive police conduct taught them that police need firm, strong rules in order for individuals' rights to be protected. Justice Thurgood Marshall was nearly lynched by police officers in Tennessee when he was a roving civil rights attorney in the South prior to his judicial career.¹⁹⁵ In his youth, Justice William Brennan saw his labor-union-organizer father beaten bloody by the police.¹⁹⁶ Looking back on his career as an attorney, Justice John Paul Stevens was never able to forget a client's description of being brutally beaten by the Chicago police until he confessed to a murder that he did not commit.¹⁹⁷ Without personal experiences of their own with abusive police conduct, contemporary justices need to look closely at the nature and number of controversial police incidents that emerge with unfortunate regularity as the means to remind themselves that it is a mistake to facilitate the risk of

¹⁹³ SCHULHOFER, *supra* note 138, at 66–67.

¹⁹⁴ *Id.*

¹⁹⁵ JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 131–32, 139–40 (1998).

¹⁹⁶ KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN AND THE DECISIONS THAT TRANSFORMED AMERICA 19 (1993).

¹⁹⁷ JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 79–80 (2011).

abuse by being too trusting of the imperfect human beings who serve as police officers.¹⁹⁸

We need a Supreme Court that seeks to understand the lives of all Americans, rich and poor, so that the Court's decisions will not make erroneous assumptions as a means to defer to police actions.¹⁹⁹ For example, why assume that someone running in a poor neighborhood is guiltily fleeing from the police rather than understand that the arrival of the police in such areas may mean that something bad is happening and careful citizens would be wise to leave the area?²⁰⁰ Why assume that Americans know that they can say "no" when police officers ask for consent to search their vehicles?²⁰¹ Why assume that Americans know that they can say "no" when asked by police officers to accompany the officers to an office at the airport?²⁰² If the Court majority is incapable of seeking a realistic view of people's possible innocent motives and deficiencies in knowledge, there is a grave risk that the Court effectively abdicates its judicial role in favor of lending its authority and power to the effort to combat crime at the cost of constitutional rights.²⁰³

¹⁹⁸ See *supra* notes 1–15 and accompanying text.

¹⁹⁹ See, e.g., *Florida v. Bostick*, 501 U.S. 429 (1991) (assuming that seated bus passengers are sufficiently aware of their rights to know that they can decline to answer police officers' questions and terminate the officers' inquiries).

²⁰⁰ *Illinois v. Wardlow*, 528 U.S. 119, 131 (2000) (Stevens, J., concurring in part and dissenting in part) ("[A] reasonable person may conclude that an officer's sudden appearance indicates nearby criminal activity. And where there is criminal activity there is also a substantial element of danger—either from the criminal or from a confrontation between the criminal and the police. These considerations can lead to an innocent and understandable desire to quit the vicinity with all speed.").

²⁰¹ *Ohio v. Robinette*, 519 U.S. 33, 48 (1996) (Stevens, J., dissenting) ("The fact that this particular officer successfully used a similar method of obtaining consent to search roughly 786 times in one year . . . indicates that motorists generally respond in a manner that is contrary to their self-interest. Repeated decisions by ordinary citizens to surrender that interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.").

²⁰² See, e.g., *United States v. Mendenhall*, 446 U.S. 544, 577 (White, J., dissenting) ("On the record before us, the Court's conclusion can only be based on the notion that consent can be assumed from the absence of proof that a suspect resisted police authority. This is a notion that we have squarely rejected.").

²⁰³ Justice Stevens was critical of the Court's majority that granted police officers the authority to make their own determinations of probable cause to justify searches of containers inside automobiles. *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting). ("No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one this Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime. Even if the warrant requirement does inconvenience the police to some extent, that fact does not distinguish this constitutional requirement from any other procedural protection secured by the Bill of Rights. It is merely a part of the price that our society must pay in order to preserve its freedom.")

In addition, we need justices to have greater awareness of the continuing problems of racial discrimination and the salience of race for triggering adverse treatment of young men, in particular, at the hands of the police.²⁰⁴ There is plenty of empirical evidence to demonstrate this reality.²⁰⁵ Moreover, they need only listen to the words of their colleague Justice Sotomayor to learn about the impact of race and ethnicity in American society.²⁰⁶ They need to learn from her words and experience that “Race also matters because of persistent racial inequality in society—inequality that has produced stark socioeconomic disparities”²⁰⁷ and that their responsibility is to “apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”²⁰⁸

There are individual cases in which the majority of contemporary Roberts Court justices identify needed limitations on police officers’ discretionary actions involving stops and searches,²⁰⁹ such as the 2015 decision in *Rodriguez v. United States* barring police officers from holding drivers after a completed traffic stop without a basis for reasonable suspicion.²¹⁰ Such individual decisions are necessary but woefully insufficient as a means for the Court to play its needed role because police officers must see the nation’s highest court consistently

²⁰⁴ See *supra* notes 1–15 and accompanying text.

²⁰⁵ See *supra* notes 56–64 and accompanying text.

²⁰⁶ See *Schuetz v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1676 (Sotomayor, J., dissenting) (“Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities. . . . Race matters to a young man’s view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman’s sense of self when she states her hometown, and then is pressed, “No, where are you really from?” regardless of how many generations her family has been in the country Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.” In my colleagues’ view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society”).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See *Riley v. California*, 134 S.Ct. 2473 (2014) (forbidding warrantless searches of a driver’s cellphone based solely on the arrest of the driver); *Florida v. Jardines*, 133 S.Ct. 1409 (2013) (holding that police officers who bring a drug-sniffing dog to the porch of a home are engaged in a search and therefore need a warrant or an appropriate warrantless search justification).

²¹⁰ *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).

display a strong commitment to eradicating racial discrimination and properly limiting officers' discretionary authority.²¹¹ Given the unthoughtful statements made by members of the contemporary Court's conservative majority related to race,²¹² crime,²¹³ and police power,²¹⁴ there is little reason for optimism about the Roberts Court's role in the nation's current post-Ferguson efforts to address glaring problems with police practices.²¹⁵ Indeed, there is little likelihood that the Court will play its needed role unless and until election results for the White House and U.S. Senate coincide with justices' retirements in a manner that leads

²¹¹ The Supreme Court can have a powerful symbolic voice when, as described by Laurence Tribe, "the Court exert[s] the one thing it clearly can control—its rights-declaration powers . . ." Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 30 (1989).

²¹² For example, when the Supreme Court considered an issue of racial discrimination in jury selection, Justice Scalia pointedly criticized Justice Marshall: "Justice Marshall's dissent rolls out the ultimate weapon, the accusation of insensitivity to racial discrimination—which will lose its intimidating effect if it continues to be fired so randomly." *Holland v. Illinois*, 493 U.S. 474, 486 (1990). In one sarcastic sentence written on behalf of himself and four colleagues, Scalia implied that claims of racial discrimination are often illegitimate, used improperly in an attempt to intimidate other justices, thereby providing proof that "the Supreme Court must, in fact, curtail its attention and responsiveness to such issues." Smith, *supra* note 108, at 839.

²¹³ For example, when a five-member majority endorsed a lower court decision requiring California to reduce its prison population because the system was unable to provide adequate medical and mental health care to prisoners in overcrowded institutions, thereby leading to needless deaths and physical suffering, Justice Alito issued a dire warning about the results of the order: "The three-judge court ordered the premature release of approximately 46,000 criminals—the equivalent of three Army divisions . . . I fear that today's decision, like prior prisoner release orders, will lead to a grim roster of victims." *Brown v. Plata*, 131 S.Ct. 1910, 1959, 1968 (2011). Despite Justice Alito's frightening claims about the impending release of a veritable "Army" of criminals to inflict harm on the citizens of California, in fact, California developed a realignment plan to reduce prison populations by having prisoners with shorter sentences serve their time in county jails. In the aftermath of realign, the violent crime rate in California was at its lowest level in nearly 50 years. MAGNUS LOFSTROM & BRANDON MARTIN, CALIFORNIA'S FUTURE: CORRECTIONS, PUB. POL'Y INST. OF CAL. (Feb. 2015), http://www.ppic.org/content/pubs/report/R_215_MLR.pdf.

²¹⁴ For example, Justice Thomas claimed that the fact that an officer sees and smells an air freshener in a car can serve as a key element in forming reasonable suspicion that the vehicle contains drugs. *Rodriguez v. United States*, 135 S. Ct. 1609, 1622 (Thomas, J., dissenting).

²¹⁵ One commentator speculated that "[p]erhaps the savvy, media-aware [Chief Justice] Roberts has finally learned the lessons of Ferguson" when he supported the individual's Fourth Amendment rights in *Rodriguez*, Stern, *supra* note 98. However, the same commentator observed that "[w]hatever epiphany struck Roberts . . . seems to have missed Justice Anthony Kennedy, Clarence Thomas, and Alito." *Id.* Even if this speculative comment about Roberts proves to be accurate, increased sensitivity by one justice alone will have little impact on the direction of the Court's decisions.

to changes in the Court's composition, and thereby positions thoughtful new justices to employ their skepticism of police authority in rights-declaring decisions that strengthen constitutional protections.²¹⁶

²¹⁶ As demonstrated by the protracted process for confirming President Obama's nominee Loretta Lynch as U.S. Attorney General in 2015, even the election of a liberal Democrat as president in 2016 or subsequent elections may not lead to rights-defending nominees to the Supreme Court if the Senate is controlled by Republicans who are committed to resisting such appointments. See Jennifer Steinhauer, *Senate Confirms Loretta Lynch as Attorney General After Long Delay*, N.Y. TIMES (Apr. 23, 2015), http://www.nytimes.com/2015/04/24/us/politics/loretta-lynch-attorney-general-vote.html?_r=0.