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Where is Equal Protection? Applying Strict Scrutiny to Use of Race by Law Enforcement.

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WHERE IS EQUAL PROTECTION? APPLYING STRICT SCRUTINY TO USE OF RACE BY LAW ENFORCEMENT

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Abstract

This article seeks to move the debate over the use of race by law enforcement beyond the current focus on racial profiling, arguing that the courts must apply strict scrutiny to all use of race by law enforcement, including the stopping and questioning of persons based on suspect descriptions that include race. The current debate implicitly (and sometimes explicitly) assumes that law enforcement’s use of race can be divided into unconstitutional racial profiling and all other uses of races, which are presumptively legitimate. However, when other institutions rely upon race, such as public universities implementing affirmative action programs, courts automatically apply strict scrutiny regardless of institutional good faith, the importance of the institutional goals, or the relevance of racial criteria to the achievement of those goals. This article asks why strict scrutiny is not similarly applied to all use of race by law enforcement and concludes that it should be applied. The argument is not that law enforcement should never be allowed to take race into account, but rather that all use of race should be subjected to strict scrutiny.

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INTRODUCTION

One of the most fundamental principles of constitutional law is that all persons must be equally protected under the law regardless of their race. Further, no part of the government more directly affects our personal liberty than law enforcement agencies. Yet the doctrines of constitutional equal protection are strangely inert regarding law enforcement’s use of race and ethnicity in stopping, questioning and searching American citizens. Much of the heavy lifting has been left to the Fourth Amendment, which, for reasons discussed below, is not well suited to providing meaningful legal equality. This article urges the courts to apply equal protection principles far more vigorously to these situations and argues that courts must apply strict scrutiny to all use of race by law enforcement, regardless of whether the police are “racially profiling.”

Law enforcement’s use of race and ethnicity goes well beyond the well known issue of racial profiling. This area of law is full of complex questions and has many facets. The following three examples illustrate some of the various forms it can take:

In United States v. Harvey the defendant appealed his conviction for drug and fire arm possession on the grounds that he had been stopped by the police on the basis of his race. As described in the dissenting opinion, the arresting officer testified as follows:

In the instant case, Officer Collardey admits repeatedly he stopped the vehicle because the occupants were African-Americans. On redirect he testified:

Q: Officer Collardey, you gave the Prosecutor two reasons for your effecting a traffic stop. One was the traffic infraction, speeding and equipment violation, and then you referred to something that I hadn't heard yet today, that was, fitting the general description of some sort of a profile?
A: It did, yeah, it did fit.

1 16 F.3d 109 (6th Cir. 1994).
Q: Was it a certain way that the damage had been on this car that made it look like it fit a profile for you?
A: No, I made that statement on the basis of my experience on that highway, and drug traffickers that I have arrested coming to the Flint area.

Officer Collardey continued:

Q: What else was it that made you think this fits some sort of a profile?
A: There were three young black male occupants in an old vehicle.

Q: Three young black male occupants in a car?
A: Yes, sir.

Q: And that was the basis or part of the basis for your stopping that car?
A: The age of the vehicle and the appearance of the occupants.

Under oath, Officer Collardey stated he stopped the vehicle because there were three African-American males in an old car. Recognizing Officer Collardey's use of the minor traffic violations as pretext for stopping the vehicle, the district judge improperly rehabilitated Officer Collardey's testimony:

Q (district judge): What was it about the appearance of the occupants that got your attention?

A: It wasn't so much the appearance. Almost every time that we have arrested drug traffickers from Detroit, they're usually young black males driving old cars.

Q (district judge): Was that why you stopped the car, or did you stop the car for traffic violations?
A: I stopped them for traffic violations. (emphasis added).

Only after the court gave Officer Collardey an either/or question did he give the appropriate response.2

Despite the officer’s candid admission that he had racially profiled the defendant, the Circuit Court upheld the constitutionality of the stop and search.

The second example is *Brown v. City of Oneonta*3, which starkly shows how the police can rely on suspect descriptions rather than profiles to engage in a racial sweep of an entire town

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2 16 F.3d at 113.
3 221 F.3d 329 (2nd Cir. 1999).
and its state university. The facts, as described by the Second Circuit Court of Appeals, were as follows:

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

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

The police immediately contacted SUCO and requested a list of its black male students. An official at SUCO supplied the list, and the police attempted to locate and question every black male student at SUCO. This endeavor produced no suspects. Then, over the next several days, the police conducted a 'sweep' of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended. Those persons whose names appeared on the SUCO list and those who were approached and questioned by the police, believing that they had been unlawfully singled out because of their race, decided to seek redress.4

The Circuit Court did not use the term “sweep” lightly. This was an all out racial dragnet of every young black man in the town, and in one case a black woman. They demanded a list of every black male student and questioned every young black male they could find—over two hundred of people in all. Nonetheless, the Circuit Court held that, even though it was unquestioned that the police were operating under no criteria other than the race, gender, and age of the young black students and citizens of Oneonta, there was no violation of the Equal Protection Clause:

4 221 F.3d at 334.
This case bears on the question of the extent to which law enforcement officials may utilize race in their investigation of a crime. We hold that under the circumstances of this case, where law enforcement officials possessed a description of a criminal suspect, even though that description consisted primarily of the suspect's race and gender, absent other evidence of discriminatory racial animus, they could act on the basis of that description without violating the Equal Protection Clause. Accordingly, we affirm the dismissal of plaintiffs' § 1983 claims under the Fourteenth Amendment as well as their claims under 42 U.S.C. §§ 1981, 1985(3) and 1986.5

The third example is from an ongoing class action suit against the New York City Police Department (NYPD). As of the time of this writing, a federal district judge had recently certified a class action law suit based upon the following findings of fact.6 Beginning in 2004, the NYPD dramatically increased the number of stops of residents and visitors in New York City. There were 2.8 million such stops between 2004 and 2009. “Over fifty Percent of those stops were of Black people and thirty percent were of Latinos, while only ten percent were of whites.”7 This dramatic increase in stops beginning in 2004 was “a direct consequence of a centralized and city-wide program.”8

At the class-certification stage, Judge Shira A. Scheindlin found that on at least 170,000 occasions the “police officers’ stated reasons for conducting the stop were facially insufficient to establish reasonable suspicion.”9 In 62,000 of those cases, police officers gave no reasons other than “furtive movement” as a reason for the stop and in 4000 other cases, police officers gave no other reason than “high crime area” to justify the stop.10

5 221 F. 3d at 333-34.
6 All of the following facts are from May 16, 2012 Opinion and Order of the Hon. Shira A. Scheindlin, U.S.D.J in Floyd v. City of New York (United States Southern District of New York).
7 Scheindlin Opinion at p. 3.
8 Id. At p. 23.
9 Id at p. 25.
10 Id. At p. 26.
Judge Scheindlin also found that the “percentage of documented stops for which police officers failed to list an interpretable ‘suspected crime’ has grown dramatically from 1.1 percent in 2004 to 35.9 percent in 2009.” Further, “‘High crime area’ is listed as a justification for a stop in approximately fifty-five percent of all recorded stops, regardless of whether the stop takes place in a precinct or census tract with average, high, or low crime.” While a “suspicious bulge” was cited as a reason for 10.4 percent of stops, guns were seized in only 0.15 percent of all stops.” In nearly 90 percent of the cases, the police did not find probable cause to either arrest the person stopped or issue a summons.

Perhaps most importantly, the court concluded, for the purposes of class certification, the “racial composition of a precinct, neighborhood, and census tract is a statistically significant, strong and robust predictor of NYPD stop-and-frisk patterns even after controlling for the simultaneous influences of crime, social conditions, and allocations of police resources.” As noted, the case was still in the early stages of litigation at the time of this writing and has attracted widespread media attention.

These three cases demonstrate the range of issues presented by police reliance on race. *U.S. v. Harvey* is a paradigmatic case of racial profiling. The officer candidly admitted that race was an important part of his profile and directly led him to stop Harvey’s vehicle. However the use of race by the police cannot be easily divided into “unacceptable” profiling and “acceptable” use of race merely as part of a specific suspect description. This is vividly illustrated by the *Brown* case.

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11 Id. At p. 27
12 Id.
13 Id at p. 28.
14 Id. At p. 27.
15 Id. At p. 28.
While the facts of Brown are extreme, they represent the consensus view that the use of race, along with little else, as part of a suspect description does not pose any equal protection problems.\(^\text{16}\) In fact, no court has ever applied strict scrutiny to the use of race by police, no matter how extreme, so long as it is part of a suspect description.\(^\text{17}\)

This constitutional free pass on suspect descriptions needs to be reexamined. It is not at all clear that racial profiling is a more significant problem for innocent minorities than is police reliance on race-based suspect descriptions. There are many more of the latter than of the former.\(^\text{18}\) Further, as the Brown decision vividly demonstrates, reliance upon heavily race-based suspect descriptions can lead to exactly the sort of racial sweeps that might be associated with racial profiling.

While it may seem that racial profiling is based upon racial stereotypes while suspect descriptions are based upon facts, the line is far blurrier than this. If the police have hard evidence that an African-American gang is selling drugs in a certain neighborhood, is it “profiling” for the police to focus on young, African American men? After all, few gangs are interracial, so the police are justified in assuming that any particular non-African American is not a member of that gang. The world cannot be so neatly divided into profiling and everything else.

Nor are suspect descriptions necessarily more accurate than profiles. Suspect descriptions by members of one racial group made by members of another racial group are especially prone to inaccuracy.\(^\text{19}\) Meanwhile the belief that persons of Mexican appearance are

\(^{\text{17}}\) Id. At 1077.
\(^{\text{18}}\) Id. At 1098.
\(^{\text{19}}\) Id. At 1103.
more likely than blond haired, blue eyed people to be undocumented immigrants has some undeniable truth, especially near the Mexican/American border. Like racial profiles, race-based suspect descriptions can easily be used as a tool of racial harassment by those officers inclined to do so.

The third case, *Floyd v. City of New York*, demonstrates the empirical complexity of this area. Unlike the situation with the first two cases, in *Floyd*, the police vehemently deny that race plays any role at all in determining whom to stop. According to the NYPD, any racial disparities are simply the result of police focusing their attention on high crime areas. According to a police department spokesman: “There’s more police assigned to a place like East New York than, say, a precinct in Riverdale, so the police are going to be in a position to observe suspicious behavior more frequently.”

I. The Impact on African Americans:

While the use of race in law enforcement impacts many minority groups, and even whites, its impact is most devastating among African Americans. As described below, the number of incarcerated African Americans, particularly young African American men, is shockingly high. This article makes no attempt to take a position on whether African Americans commit more crimes proportionally than white Americans do. What will we see is that *even conceding* different rates of criminal acts among racial groups, use of race by the police, *even if done in complete good faith and even if efficient in apprehending criminals*, has the effect of incarcerating African Americans at rates that are grossly disproportionate to

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20 Find cite that something like 83% of illegal immigrants in US are of Mexican descent.
the actual rate at which they are committing crimes and has other very important negative consequences as well.

A. The Ratchet Effect.

The most important point about the use of race by police is that it produces a “ratchet effect.” This effect is well explained by Bernard Harcourt:

The civil liberties scholars also fail to focus on the likely ratchet effect associated with racial profiling. A ratchet effect occurs when profiling produces a supervised population that is disproportionate to the distribution of offending by racial group. To give an example: if minority motorists represent 20 percent of motorists on the road, but 30 percent of the offenders (persons carrying drug contraband on the highway), then minority motorists are offending at a higher proportion than their representation in the general motorist population. If the police achieve equal hit rates by deploying 60 percent of their searches on minority motorists, then minority motorists will represent 60 percent of the population with negative police contacts resulting, in all likelihood, in some form of correctional relationship, whether a ticket, fine, arrest, probation revocation, supervision, or incarceration. The difference between minority motorists representing 30 percent of the offenders and 60 percent of the correctional population represents a ratchet that has significant negative effects on the minority population.22

It is important to emphasize that the argument about the evil consequences of the ratchet effect in no way depends upon the argument that police officers are motivated by racism or that whites and African Americans break the law at identical rates. As the Harcourt example explains, even if we assume that African Americans are fifty percent more likely to be transporting drugs on the highway than whites, if police focus more of their attention on African Americans purely out of the desire to catch criminals, this will ratchet up the proportion of African Americans arrested well beyond the proportion of African Americans who transport drugs on the highway.

To further illustrate this point, the following example uses simplified, hypothetical numbers. Imagine 100 white and 100 African American drivers on the road, with ten percent of the white drivers and twenty percent of the African American drivers carrying significant amounts of drugs. Assume that a police officer can pull over 40 cars in one day. If she has no other information about the drivers other than race and stops equal numbers of White and African American drivers, she will pull over twenty white drivers and catch 2 drugs carriers and will pull over twenty African American drivers and catch 4 drug carriers. Thus, she will have caught six drug carriers and will have caught twice as many African Americans as Whites. This would accurately reflect the difference in the offender rates for African Americans and whites in this theoretical example.

Now suppose instead that she decides to concentrate more of her attention on African Americans solely in a good faith attempt to catch more criminals. She pulls over thirty African Americans and ten whites. Applying simple math, she will catch seven drug carriers in all: six African Americans and one white. So she will have succeeded in catching more drug carriers but the cost will be that she will have caught six times as many African Americans as whites. Since, in this theoretical example, African Americans are only twice as likely as whites to be offenders, this result is grievously disproportionate.

A real world example of the ratchet effect comes from a study of police stops in New Jersey. The police did find contraband on a higher proportion of African American drivers than white drivers—13.5 percent compared to 10.5 percent. However 60-70 percent of the stops were of African Americans.23

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A great deal of attention has been devoted to the question of whether racial profiling is “efficient.”\textsuperscript{24} Defenders of the police point out that the hit rate for finding large quantities of drugs indicative of dealing is significantly higher for stops of African Americans than it is for whites.\textsuperscript{25} This article argues that equal protection of the law, not efficiency, should be the most important value. Even if one were to concede some efficiency in using race, the ratchet effect should render such profiling unconstitutional.

It would be difficult to exaggerate the magnitude of the rate of incarceration of young African American men or its impact upon African American communities. "One in three black men between the ages of 20 and 29 [are] either in prison or jail, on probation, or on parole."\textsuperscript{26} Further, according the Department of Justice 28.5 percent of African American men will be incarcerated in their lifetimes while the same is true for only 4.4 percent of white men.\textsuperscript{27}

As reported by Professor Richard Banks in the Stanford Law Review:

During the past quarter century, aggregate increases in incarceration coupled with growing racial disparities, have resulted in staggering and unprecedented levels of incarceration for black men in particular. A recent study by the Bureau of Justice Statistics found that in 2001 nearly seventeen percent of black men were currently or previously imprisoned. Black men are more than five times as likely as white men to enter prison. Black women are six times as likely as white women to enter prison, and nearly as likely as white men to do so. These disparities have grown dramatically in recent years. While a variety of factors account for these developments, the importance of the drug war is beyond dispute. From 1990 to

\textsuperscript{24} See, inter alia, articles cited at n.3 in Harcourt.
\textsuperscript{25} Harcourt at p. 1277. To be clear, Harcourt does not generally defend profiling, but argues that its complexities should be understood.
\textsuperscript{26} David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 301 (1999)
2000, drug offenders accounted for a greater proportion of prison population growth among black inmates than among any other racial group.\textsuperscript{28}

B. Impact upon the Innocent.

One defense of profiling might be that if a person goes to prison as a result of his or her own wrong doing, it is not a moral problem that their race made them more likely to get caught. The guilty should not complain since they would not be in trouble in the first place if they had simply obeyed the law.

There are two flaws with this argument. The first is that racially disproportionate rates of incarceration, even if we assume that all convicts are actually guilty, have a racially disproportionate impact on entire communities. Having so many young black men incarcerated has had a terrible impact upon black communities:

Incarceration may impose especially harmful social, economic, and political consequences on racial minority communities because drug offenders tend to be drawn predominantly from the same racially isolated and socioeconomically disadvantaged neighborhoods. As a result of the race and class segregation of most American cities, the racial concentration of incarceration reflects a spatial concentration as well. The families of inmates lose the social and economic support that the person might otherwise have provided. Community stability may be impaired both by the loss of so many adults and, paradoxically, by their reentry into the community after having endured the conditions of prison. The organization and stability of families may be undermined. Oddly enough, increased incarceration may even increase crime rates. Also, because imprisonment often results in loss of the right to vote even after release, a high rate of imprisonment will substantially diminish a group's political power, including its ability to influence the laws that disenfranchise so many of its members.\textsuperscript{29}

\textsuperscript{28} Banks, "Beyond Racial Profiling: Race, Policing, and the Drug War," 56 Stanford L. Review 571-603, 594-95 (December 2003). (Citations omitted.)
\textsuperscript{29} Id. (Citations omitted.)
Reliance on race impacts innocent people in other ways as well. Even the best police officer has many more misses than hits. As noted above, the great majority of the 2.8 million people stopped by the NYPD were not guilty of anything as far as the police could determine, and recall that the hit rate in New Jersey for African Americans pulled over and searched for drugs was less than 13.5 percent. Thus the great majority of people who are stopped and searched by the police are apparently innocent.

For those who have never been stopped and searched, it might be difficult to understand the impact such searches can have. In the course of a search, a police officer may order you to stand outside of your car even if it is cold or raining. The officer can order your children or elderly parents out of the car even if it is cold or raining. You can be forced to stand out in full public view while dogs are called in to search your car. (Using dogs to sniff a vehicle does not require a warrant.\textsuperscript{30}) You can be forced to lean against the car with your legs spread in full public view while you are patted down. While many humiliating encounters have been reported by innocent African Americans, a pair of examples helps to illustrate the potential gravity of even stops that do not result in an arrest:

On May 8, 1992, Robert Wilkins, an African American lawyer who at the time worked at the District of Columbia Public Defender Service, was driving from Chicago to Washington, D.C. with several family members on a trip to his grandfather’s funeral. They were stopped by a Maryland State Police trooper in an instance of racial profiling that triggered a major lawsuit against the Maryland State Police. Eight years later, Mr. Wilkins described the experience in testimony before the United States Senate:

“So there we were. Standing outside the car in the rain, lined up along the road, with police lights flashing, officers standing guard, and a German Shepherd jumping on top of, underneath, and sniffing every inch of our vehicle. We were criminal suspects; yet we were just trying to use the interstate highway to travel from our homes to a funeral. It is hard to describe the frustration and pain you feel

\textsuperscript{30} Harris at p. 317.
when people presume you to be guilty for no good reason and you know that you are innocent.”31

Another illustrative example follows, although many others could have been used:

Karen Brank, a licensed social worker in her early thirties with a young son, had never been in trouble with the police. But one morning, on her way to work for a monthly staff meeting, all of that changed when Brank was pulled over for speeding. Brank recalls being one of several cars that were traveling down a main thoroughfare at about the same rate of speed. The officer who stopped her told her she was going too fast. He then asked for her license and registration and took these items to the squad car. When he returned, the officer told Brank that there were outstanding warrants for her arrest for unpaid traffic tickets. Brank remembered the tickets because she did not get many and told the officer that she had paid them weeks before. But when she could not produce a receipt to prove payment (and who could have?), the officer said he would have to arrest her.

Brank was stunned. Arrest me? she thought. What do you mean arrest me? I'm not a criminal - I'm on my way to work! This could not be happening - and yet it was. It turned out later that the warrants were incorrect. Brank had paid, but a clerical error had kept the tickets in the computer system. Additional squad cars arrived, making the area around her car look like a crime scene. Mistake or not, minutes later Brank stood by the side of the road in handcuffs so tight that they left ugly red marks on her wrists for several days. She was distraught, breaking down in tears standing next to a public street.32

Of course, not all stops are as dramatic as these, but they illustrate the point that not only guilty people are affected by police use of race. Moreover, these are examples of the traumatic impact that just one stop can have. In densely populated urban areas such as New York City where the police utilize an aggressive approach, minority residents might be stopped numerous times. One situation, described in a 2012 New York Times Op Ed piece, illustrates the impact that police focus on young black men can have:

32 Harris at p. 270.
Tyquan Brehon is a young man who lives in one of the most heavily policed neighborhoods in Brooklyn. By his count, before his 18th birthday, he had been unjustifiably stopped by the police more than 60 times. On several occasions, merely because he asked why he had been stopped, he was handcuffed, placed in a cell and detained for hours before being released without charges. These experiences were scarring; Mr. Brehon did whatever he could to avoid the police, often feeling as if he were a prisoner in his home. His fear of the police also set back his education. At one high school he attended, he recoiled at the heavy presence of armed officers and school security agents. “I would do stuff that would get me suspended so I could be, like, completely away from the cops,” he recalled. He would arrive late, cut classes and refuse to wear the school uniform. Eventually, he was expelled.  

C. Racial Incongruity.

Further, use of race by law enforcement can significantly hamper minorities’ right to move freely about their city and to visit white neighborhoods. There is both statistical and anecdotal evidence that minorities are more likely to be stopped and searched when they are “racially out of place,” i.e. visiting mostly white neighborhoods. For example, minorities in New York have good reason to fear that travel to a white neighborhood puts them at risk. In defending the tactics of the NYPD, including the racial disproportionality of the stops, a New York State Assemblyman explicitly praised the tactic of stopping people who are racially out of place:

If you were spotted in an affluent section of Oneida County where we don’t have minority people living, and you were driving around through these houses, and I was a law enforcement officer and a highway patrol, I would stop you to say, No. 1: ‘Are you lost? Is there something we can help you with, or what are you doing here?’

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34 Eligon, supra. The statement was made by Republican Assemblyman David R. Townsend Jr. while debating the use of racial profiling with another assemblyman.
A 1999 study in New York compared the stops of African Americans in mostly black areas and mostly white areas. It found “hugely disproportionate stops by race in the white areas of the city, while stops in the African American areas were roughly proportionate to the population in those areas.”

Another study, published in 2007, of New York police practices also found evidence that “racial incongruity” puts African Americans at increased risk of being stopped:

We did find evidence of stops that are best explained as ‘racial incongruity’ stops: high rates of minority stops in predominantly White precincts. Indeed, being ‘out of place’ is often a trigger for suspicion (Alpert et al. 2005; Gould and Mastrofski 2004). Racial incongruity stops are most prominent in racially homogeneous areas. For example, we observed high stop rates of African-Americans in the predominantly white 19th Precinct, a sign of race-based selection of citizens for police interdiction.

It is important to be clear that this article is not arguing that these practices always occur or that there is proof beyond doubt that they are the norm. The main argument of this article is prescriptive rather than empirical. The courts should make it crystal clear that being “racially out of place” or “racially incongruent” can never be any part of a reason for a police stop or search. This argument, along with other suggestions for legal reform, will be fleshed out below.

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II. The Need for Judicial Action.

This is a classic area for judicial action. Racial profiling and other uses of race by law enforcement enjoys increased public support since the attacks of September 11th, while its burdens fall most heavily on a small subset of the population. Prior to the September 11th terrorist attacks, there was widespread condemnation of racial profiling. President Bill Clinton called the practice “morally indefensible” and President George W. Bush pledged to end racial profiling.37 This sentiment changed dramatically after the 9/11 attacks, with fifty-eight percent of Americans supporting such measures as special airport screening for those of Arab appearance and about half of Americans even supporting a requirement that Americans of Arab ethnicity carry special identification cards. Ironically, African Americans were even more supportive of these ideas than the general public.38

Predictably, the new popularity of racial profiling derailed legislative initiatives to curtail it and “Congressional efforts to combat racial profiling gradually faded from the media spotlight in the wake of September 11th and the commencement of the war on terror.”39 As one scholar starkly concluded: “the events of September 11th have derailed Congress’s motivation to pass federal legislation banning racial profiling.”40 Indeed, even before the September 11th attacks, police officials successfully lobbied against state legislation designed to combat racial profiling.41 Further, other uses of race by law enforcement such as reliance of vague suspect

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38 Id.
41 Rudovsky at 305.
descriptions containing little more than race, gender and age, have attracted virtually no legislative attention at all.\footnote{See Richard Banks, “Beyond Profiling: Race, Policing, and the Drug War,” 56 Stanford University Law Review,” 571 (December 2003).}

It would be difficult to think of a more important area for judicial action. Use of race by law enforcement is supported, or at least passively condoned, by a frightened majority while the burdens disproportionately fall on historically oppressed minorities. Courts must perform their “check and balance” function in order to protect “discrete and insular minorities” from being singled out as scapegoats.

Yet, the courts have been mostly unwilling to use the Equal Protection Clause to limit use of race by law enforcement. Rather, the courts have relied heavily upon the 4th Amendment in examining police practices that rely upon race. Unfortunately, for the reasons discussed below, Fourth Amendment jurisprudence is poorly suited to deal with the complexity of these questions.

\textbf{III. The Limits of the Fourth Amendment.}

Early on, the Supreme Court applied the Equal Protection Clause to issues such as police brutality, but since then, questions of use of race by law enforcement have been judged under the Fourth Amendment.\footnote{Priyamvada Sinha, “Police Use of Race in Suspect Descriptions: Constitutional Considerations, 31 N.Y.U. Law Review, 131-181, 169-170 (2006).} “Claims of discriminatory policing under the Equal Protection Clause have generally been hard to bring.”\footnote{Id. At 171. The reasons for this will be discussed below.}
Under the Fourth Amendment, the general rule is that race can be used as a factor by the police in deciding whom to stop, but race is not, in and of itself, sufficient to establish reasonable suspicion. “Reliance upon race, whether pursuant to a profile or a suspect description, is permitted under the Fourth Amendment. In the view of most courts, race is neither a sufficient nor a prohibited factor in the reasonable suspicion calculus.”45

This consensus does not offer any real protection to racial minorities. Very few officers would pull someone over merely because they are African American. Presumably factors such as the person’s gender and age would matter too, as might factors such as whether a young black male was racially out of place in the neighborhood or driving with other young black men in the car.46 As the constitutional law scholar Albert W. Alschuler has pointed out, even lynch mobs and other ardent racists did not rely solely on race:

Even in our nation’s shameful old days, only a small minority of blacks were lynched, and blacks were not alone in being lynched. Lynch mobs considered not only race but also gender, religion, attitude, and allegations of criminal conduct. These mobs, however, employed racial classifications. Even old-style racists often have reasons in addition to race for hating people; we call someone a racist because race provides one of his reasons for judging other people, not because it provides the only one.47

Since police officers are unlikely to stop someone merely because they are African American, the Fourth Amendment offers little help to young African American men who are stopped and searched in significant part because they are young African American men. “In the Fourth Amendment context, judges . . . distinguish between using race exclusively and as one

45 Banks (2001) at 1086.
46 See various examples cited above.
factor among others, and tend to disregard claims that fall in the latter category, which captures most of the cases.”

The Fourth Amendment is inadequate to protect the legal equality of minorities because it embodies different values than the Equal Protection Clause. The goal of equal protection doctrine is to eliminate use of race by the government unless such use is narrowly tailored to further a compelling governmental purpose. By contrast, “fourth amendment doctrine evaluates a challenged practice by weighing its instrumental usefulness to law enforcement against its burden on privacy and liberty interests.”

Applying this balancing test, the Supreme Court has held in the context of immigration enforcement that race may be a factor, so long as it is not the sole factor in stopping and questioning individuals. This reasoning has been extended beyond immigration to such issues as drug trafficking. For example the Eighth Circuit has held that being a person’s status as an African American can, when coupled with other factors, serve as a reason for stopping and questioning that person when the police have information that African American gangs are involved in smuggling drugs into a particular city:

Regarding the matter of race, Hicks testified that several different factors caused him to suspect that Weaver might be carrying drugs: ‘Number one, we have intelligence information and also past arrest history on two black -- all black street gangs from Los Angeles called the Crips and the Bloods. They are notorious for transporting cocaine into the Kansas City area from Los Angeles for sale. Most of them are young, roughly dressed male blacks.’

We agree with the dissent that large groups of our citizens should not be regarded by law enforcement officers as presumptively criminal based upon their race. We would not hesitate to hold that a solely race-based suspicion of drug courier status would not pass constitutional muster. Accordingly, had Hicks relied solely

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48 Harcourt at 1278.
49 Banks (2001) at 1088-89.
50 U.S. v. Bringoni-Ponce, 422 U.S. 873, 886-87 (1975). The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.
upon the fact of Weaver's race as a basis for his suspicions, we would have a
different case before us. As it is, however, facts are not to be ignored simply
because they may be unpleasant—and the unpleasant fact in this case is that Hicks
had knowledge, based upon his own experience and upon the intelligence reports
he had received from the Los Angeles authorities, that young male members of
black Los Angeles gangs were flooding the Kansas City area with cocaine. *To
that extent, then, race, when coupled with the other factors Hicks relied upon, was
a factor in the decision to approach and ultimately detain Weaver. We wish it
were otherwise, but we take the facts as they are presented to us, not as we would
like them to be.*

The Ninth Circuit has deviated from this rule to some extent. In *U.S. v. Montero-
Camargo* border patrol agents conducted an investigatory stop of a car based in part upon the
ethnic appearance of the driver and passengers. The Ninth Circuit upheld the stop, but rejected
the use of race as even a partial reason for the stop: “In concluding that reasonable suspicion
existed, both the district court and the panel majority relied in part upon the Hispanic appearance
of the three defendants. We hold that they erred in doing so.”

However, even this apostasy from the general rule that race may be a factor in
determining reasonable suspicion is quite limited. The Ninth Circuit emphasized that a very large
percentage of the relevant population was Latino, which meant that race had little value in
distinguishing those who were in the country illegally. It did not treat race any differently than
any other characteristic of low probative value.

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51 U.S. v. Weaver, 966 F.2d 391, 394 n.2 (8th Cir. 1992) (emphasis added.)
52 208 F.3d 1122 (9th Cir. 2000).
53 208 F.3d at 1131.
54 “The likelihood that in an area in which the majority— or even a substantial part—of the population is Hispanic,
any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make
Hispanic appearance a relevant factor in the reasonable suspicion calculus. As we have previously held, factors
that have such a low probative value that no reasonable officer would have relied on them to make an
investigative stop, must be disregarded as a matter of law.” 208 F.3d at 1132.
Even in the Ninth Circuit, it is the rule that “[r]ace, however, can be a relevant factor under certain circumstances.”\textsuperscript{55} It is far from clear that the Ninth Circuit would have come to a different conclusion than the Eighth Circuit in a case where there was evidence that African American gangs were smuggling drugs into the city. Since the police in most major cities are likely to have reports of some sort of criminal activities by gangs with mostly minority members, the police have broad discretion to use race as a factor even in the Ninth Circuit.

Even more importantly, the Fourth Amendment doesn’t apply at all to most police stops. If a person consents to being searched, the Fourth Amendment does not require that the police officer demonstrate reasonable suspicion for the stop or search. Very few people are willing to decline a police officer’s request to search them. As Gordan Alschuler states: “The officer understands that few Americans believe that they are entitled to reply, ‘Sorry Officer, not today.’”\textsuperscript{56} According to David Harris, “Whether out of desire to help, fear, intimidation, or a belief that they cannot refuse, most people consent.”\textsuperscript{57} Further, as noted earlier, even in those cases where a person refuses consent, the police officer has the power to call in drug sniffing dogs without any Fourth Amendment requirement of reasonable suspicion.\textsuperscript{58}

Moreover, “Police conduct that does not rise to the level of a stop or arrest . . . is unregulated by the Fourth Amendment. Such police activity therefore does not need to be justified by any quantum of suspicion. This broad category of unregulated police activity, which can generally be termed ‘encounters,’ may include requests such as requests for identification and questioning.”\textsuperscript{59} As Alschuler puts it: “Notice too, that when the police target people for


\textsuperscript{56} Alschuler at 171.

\textsuperscript{57} Harris at 316.

\textsuperscript{58} Id. At 317. See also, Rudovsky at 318.

\textsuperscript{59} Sinha at 156.
investigation and questioning on the basis of race but do not seize them, they glide beneath the radar of the Fourth Amendment and the Equal Protection Clause has work to do."\(^{60}\)

Further the Supreme Court has made clear that it considers the Equal Protection Clause, rather than the Fourth Amendment to be the appropriate vehicle for alleging racial bias in police stops. In *Whren v. United States*\(^{61}\) the United States Supreme Court upheld the practice of "pretextual stops", i.e., using the pretext of a minor traffic violation to stop a person for whom they lacked reasonable suspicion to stop and search for a more serious crime. The Court held that the subjective intent or motivation of the police officer was irrelevant to Fourth Amendment analysis: "We think [our] cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."\(^{62}\) Since most people commit some number of minor traffic infractions in the course of a typical day, the carte blanche to use traffic infractions as a cover for race-based stops was obvious to the Court. However, the Court averred that such claims were the sole province of the Equal Protection Clause:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.\(^{63}\)

We see then that if there is to be any meaningful constitutional limitations on use of race by law enforcement, it must come from judicial enforcement of the Equal Protection Clause. Therefore the next section focuses on the current state of equal protection jurisprudence as applied to this area.

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\(^{60}\) Alschuler at 185.
\(^{62}\) 517 U.S. at 813.
\(^{63}\) Id.
IV. The Essential Equal Protection Clause.

Unlike the Fourth Amendment, the Equal Protection Clause protects people from racial discrimination by the government at all stages of law enforcement. So, for example, when a young African American man, Cortez Avery, claimed that narcotics agents had singled him out for questioning based upon his race, he had no Fourth Amendment claim because “Fourth Amendment principles regarding unreasonable seizures do not apply to consensual encounters . . .” Nonetheless, the same appellate court held that: “The Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection against unreasonable searches and seizures. This protection becomes relevant even before a seizure occurs.”

Furthermore, at least in theory, the Equal Protection Clause subjects government use of race to a much higher standard of scrutiny than does the Fourth Amendment. Racial classifications by the government must be “narrowly tailored to further a compelling government interest.”

In short, it would be difficult to think of an area where there is greater need for a coherent, clear, strong, understanding of how the Equal Protection Clause protects minorities from being treated differently on account of their race. Unfortunately, it is equally difficult to think of an area where Equal Protection doctrine is more under-theorized or less useful. In a 2002 article entitled “Racial Profiling and the Constitution,” professor Albert Alschuler wrote:

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64 United States v. Avery, 137 F. 3d 343, 352 (6th Cir. 1995).
65 137 F.3d at 352.
66 Id. (Emphasis added.) See also, United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995) (“The government concedes that consensual encounters and searches based solely on race may violate the Equal Protection Clause even though they are permissible under the Fourth Amendment.”)
“Many of America’s most notable constitutional law scholars, however, seem uninterested in doctrinal issues of the sort discussed in this article except, perhaps, as they bear on larger questions. . . . Profiling issues have left the pedestrian laborers in the field of criminal procedure like me, and the commitments of many criminal procedure scholars apparently preclude them from acknowledging that any of the issues are debatable.”68

Alschuler concludes that the courts have also failed to grapple with these issues in a meaningful way: “The Supreme Court’s current interpretation of the Equal Protection Clause should be declared a federal disaster area. . . . As the various opinions in Brown v. City of Oneonta illustrate . . . these courts typically exempt the use of racial classifications by law enforcement officers from even the scrutiny they deserve. The alternative to ‘strict’ scrutiny appears to be no scrutiny at all.”69 Other constitutional law scholars have come to the same conclusion, albeit more moderately stated, that “equal protection doctrine in this area has not been well developed.”70

The most significant problem with how the Equal Protection Clause has been applied to the use of race by law enforcement has to do with the standards for what triggers “strict scrutiny.” If a law or governmental action or policy is subjected to strict scrutiny, that law will be struck down unless it is “narrowly tailored to further a significant governmental interest.” 71 The main alternative to strict scrutiny is “rational basis scrutiny” which will uphold a governmental law, action or policy so long as it is “rationally related to a legitimate governmental interest.”72

68 Alschuler at 263.
69 Id. At 266-67.
70 Sinha at 171. See also, Gross and Livingston at 1417. (“equal protection law in this area is not well developed.”)
72 Id. There is also “intermediate scrutiny”, sometimes called “heightened scrutiny”, but it is rarely used outside of issues of gender discrimination, and it is unclear if even gender discrimination is still consistently analyzed under the intermediate scrutiny. See Gerstmann and Shortell at p. 44.
Since the latter standard is so much more lax than the former, cases often turn on the question of which level of scrutiny is applied.\(^{73}\)

Ordinarily, strict scrutiny will be applied when race plays any part in a government actor’s decision-making process—there is no requirement that race must be the sole factor. For example in the context of alleged housing discrimination, the Supreme Court has flatly stated that application of strict scrutiny “does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.”\(^{74}\) Similarly, in affirmative action cases, the Supreme Court has been clear that it will apply strict scrutiny to university admissions decisions in which race is a factor even when it is undisputed that the university looks at many other factors in addition to race.\(^{75}\)

Yet, in the context of law enforcement, the courts have refused to apply strict scrutiny, or even to acknowledge any equal protection claim at all, unless the police were acting solely on the basis of the plaintiff’s race. In a case discussed at the beginning of this article, *United States v Harvey*\(^{76}\), the arresting officer candidly admitted that race played a significant role in his decision to stop the defendant. However, the majority refused to consider the defendant’s equal protection claim despite the vehement dissent of Judge Damon Keith:

Equal Protection principles absolutely and categorically prohibit state actors from using race to differentiate between motorists. Yet, the majority acquiesces to an officer’s substitution of race for probable cause and essentially licenses the state to discriminate. Moreover, the majority states race-based motivation is irrelevant under these or any circumstances. Not only is the officer’s race-based motivation relevant, it is patently unconstitutional. . . .The Fourteenth Amendment of the United States Constitution prohibits state actors from denying persons equal protection of the laws.\(^{77}\)

\(^{73}\) Gerstmann (1999) at 34-37.


\(^{76}\) 16 F.3d 109 (6th Cir. 1993)

\(^{77}\) 16 F.3d at 114.
The majority relegated its response to the dissent to a disturbingly dismissive footnote, stating: “We are constrained to respond briefly to the dissent . . . It does not follow from the fact that [the arresting officer] testified that race was a factor in his ‘why I stopped the vehicle’ calculus that the suspects’ race was a ‘necessary’ cause of the stop.”\textsuperscript{78}

This insistence that there is no equal protection violation unless race is the sole motivating factor for a stop applies to suspect descriptions as well as to profiling decisions. Recall that in \textit{Brown v. Oneonta}, also discussed at the beginning of this article, the police stopped and questioned every single black male they could find in the City of Oneonta, including all of the black male students at the local university. The Second Circuit dismissed the equal protection claims of these black men: “We hold that under the circumstances of this case, where law enforcement officials possessed a description of a criminal suspect, even though that description consisted primarily of the suspect’s race and gender, absent other evidence of discriminatory racial animus, they could act on the basis of that description without violating the Equal Protection Clause.”\textsuperscript{79}

It should be noted that the Supreme Court has never explicitly endorsed this approach, although it has not rebuked it either. This article will argue that the courts should find that any use of race, be it as a part of a profile or as part of a suspect description, should be subjected to strict scrutiny.

\textsuperscript{78} 16 f.3d at 112, n.3.
\textsuperscript{79} 221 F. 3d at 333-34 (emphasis added.)
V. Moving Past the Racial Profiling Debate.

Much of the debate about use of race by law enforcement has centered around the issue of whether police engage in racial profiling. There has been little resolution of this question in part because there is no consensus over what racial profiling actually means, and in part because it is very difficult to definitively determine why a police officer has decided to pull over a particular vehicle or stop a particular pedestrian. There has also been significant debate about whether racially profiling is a wise or efficient policy assuming that the police engage in it.

This article argues that certain basic principles need to be established about any use of race by law enforcement. This would include racial profiling, using race as part of a suspect description, or focusing on certain minorities because gangs of a certain racial composition are known to be in the area. It is impossible to coherently analyze racial profiling or any other use of race by law enforcement without establishing certain underlining principles. The courts have been shockingly willing to simply read the Equal Protection Clause out of the Constitution in cases such as Harvey and Brown. Therefore, the rest of article will attempt to set out certain basic principles in this area.

A. Reinvigorating Strict Scrutiny.

As noted, a good deal of the literature on profiling has been empirical in nature: do the police use racial profiles or do they not? While this is of course an important question, it is not the only important question. An equally important issue is what limits the law, particularly the

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80 See, Gelman, Fagan, and kiss and cases cited therein.
81 See Alschuler at 168. (“The opponents of racial profiling often have failed to define the term, and the definitions provided by legislatures and scholars have differed substantially.”)
Equal Protection Clause, should put on any sort of use of race by police. Also, preventing racial profiling is not the only issue. It is also essential to prevent the widespread *perception* that racial profiling takes place. In Constitutional law, perceptions and appearances matter and have constitutional significance. For example in the well known case of *Buckley v. Valeo*, 424 U.S. 1 (1976) the Supreme Court considered the constitutionality of various limits on contributions and expenditures in support of political campaigns. While the Court has rejected certain proffered government interests in support of spending restrictions such as “leveling the playing field"\(^{83}\), it unequivocally accepted the argument that the government’s interest in preventing the appearance of corruption is on a constitutional par with preventing provable corruption:

> Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the *appearance of corruption* stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. In *CSC v. Letter Carriers*, supra, the Court found that the danger to "fair and effective government" posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees’ right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical… if confidence in the system of representative Government is not to be eroded to a disastrous extent."\(^{84}\)

> Just as the mere appearance of corruption is “disastrous” to confidence in the system of representative Government, the appearance of racial profiling is disastrous to public confidence in law enforcement.\(^{85}\) In fact, belief that racial profiling takes place is widespread.\(^{86}\)

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\(^{83}\) *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) (“We have repeatedly rejected the argument that the government has a compelling state interest in “leveling the playing field” that can justify undue burdens on political speech.”)

\(^{84}\) *Buckley*, 424 U.S. at 27. (Emphasis added.)


\(^{86}\) Id.
In order to help restore confidence in the fairness of law enforcement, the courts, especially the Supreme Court must clarify certain things. First of all, the Court must clearly state that all use of race by law enforcement is subject to strict scrutiny review and will never be allowed unless it can be narrowly tailored to furthering a compelling government interest.

This should be an unproblematic proposition. As noted earlier, the Court has repeatedly held that, in the context of affirmative action, when race is used as any part of the criteria in admitting students to a public university, the policy is subject to strict scrutiny review. For example in *Gratz v. Bollinger*\(^87\), it was uncontroverted that the University of Michigan’s College of Literature, Science, and the Arts (“LSA”) used a broad variety of factors in evaluating candidates including high school grades, standardized test scores, quality of their high school curriculum, state residency status, personal essay and demonstrated qualities of personal leadership.\(^88\) Yet, since race was also a factor in admission, the Court did not hesitate to apply strict scrutiny to the LSA admissions criteria:

To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admission program employs ‘narrowly tailored measures that further compelling governmental interests.’ Because ‘racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,’ our review of whether such requirements have been met must entail ‘a most searching examination.’ (plurality opinion of Powell, J.) We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.\(^89\)

It is worth noting that even in the companion case, *Grutter v. Bollinger*,\(^90\) where the use of race was much less heavy handed and was actually upheld, the Court still applied strict scrutiny.

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\(^87\) 539 U.S. 244 (2003).
\(^88\) 539 U.S. at 255.
\(^89\) 539 U.S. at 270. (Citations omitted.)
The level of scrutiny does not turn upon the wisdom of the policy. Any use of race whatsoever, wise or foolish, is supposed to trigger strict scrutiny because, as the Court held in *Gratz*, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification . . .".\(^{91}\)

Therefore, the courts should soundly reject the idea that police reliance on race only presents a constitutional issue if the police rely *solely* on race, which, as noted earlier, has been the dominant approach of the Courts so far. Just as use of race as part of university admissions criteria triggers strict scrutiny, use of race by the police as part of their criteria for stopping and questioning someone should trigger strict scrutiny.

**B. Moving Past the Fear of Applying Strict Scrutiny.**

Prior to setting out some suggested basic rules for use of race by law enforcement, it is worth exploring why the courts have taken so stingy an approach to applying equal protection to such a crucial issue. While judicial mind-reading is always a tricky task, the judges in the *Oneonta* case offered some revealing insights in the dynamics of how judges view equal protection and use of race by law enforcement. As noted, police often rely on race in questioning suspects, either because a victim describes the race of the assailant or because a crime was committed by a gang with a particular racial makeup, for example. If the courts applied strict scrutiny to this practice, the fear is that the courts would either straitjacket the police or, by allowing the practice, dilute strict scrutiny protection against other forms of discrimination. As Judge Calabresi wrote in his dissenting opinion in the *Oneonta* case:

> If an action is deemed a racial classification, it is very difficult, under the Supreme Court precedents, ever to justify it. And, were such justification made

\(^{91}\) 539 U.S. 270.
easier in cases of police following a victim's description, the spillover to other racial classification contexts would be highly undesirable. In other words, were the requirements of strict scrutiny to be relaxed in the police/victim's description area, it would be hard indeed to keep them from also being weakened in other areas in which racial classifications ought virtually never to be countenanced.\textsuperscript{92}

In his concurring opinion Chief Judge Walker, made a similar point:

For better or worse, it is a fact of life in our diverse culture that race is used on a daily basis as a short hand for physical appearance. This is as true in police work as anywhere else. The theories suggested by the dissenters would require a police officer, before acting on a physical description that contains a racial element, to balance myriad competing considerations, one of which would be the risk of being subject to strict scrutiny in an equal protection lawsuit . . . . In addition to potentially chilling police protection, and tying up officers in added court proceedings, these new rules would be implicated in many ordinary police investigations. As a result, these rules would likely undermine the strict scrutiny standard itself, because apprehending dangerous criminals in almost all instances would constitute a compelling state interest. Frequent satisfaction of strict scrutiny as police go about their daily work of investigating crime would likely have spillover effects into other areas of equal protection law, diluting the standard's efficacy where we would want it to retain its power.\textsuperscript{93}

In other words, judges are fearful of applying strict scrutiny to use of race by law enforcement because they fear that they would either unduly hamper police work, or, if they consistently allowed police to rely upon race, they would dilute the force of strict scrutiny in other areas. This author has argued previously that it is a myth that there is a single unified strict scrutiny test and that it is perfectly possible for the courts to develop a form of strict scrutiny specifically focused on use of race by law enforcement.\textsuperscript{94} Further, while police work is important, this article argues that the importance of police work does not excuse law

\textsuperscript{92} 235 F.3d at 786 (dissenting opinion).
\textsuperscript{93} Id. at 771-772 (concurring opinion).
\textsuperscript{94} Gerstmann and Shortell.
enforcement officials from the same obligation as other parts of the government to use race only when it is absolutely essential to do so.

C. Setting Out Basic Equal Protection Standards.

Assuming that the courts vigorously applied equal protection doctrine to law enforcement, what would the result be? First and foremost, it would be absolutely clear that “racial incongruity” could not play any role whatsoever in any decision by law enforcement to stop, search, or even approach and question any person. While, theoretically, stops for racial incongruity can apply to whites as well as to minorities, this does not shield this practice from strict scrutiny. In *Loving v. Virginia*[^95], the State of Virginia argued that its laws against interracial marriage laws did not violate the Equal Protection Clause because it applied to all races. The Court soundly rejected that argument. Similarly, in *Anderson v. Martin*[^96] the fact that a statute requiring that the race of candidates for elective office be on the ballot applied equally to candidates of all races did not save that statute from being struck down under the Equal Protection Clause.

Questioning African Americans, even briefly and politely, because they are in a white neighborhood is intolerable infringement of their equality, dignity, and freedom of movement and creates an unacceptable echo of Jim Crow segregation. It should be considered a per se violation of the Equal Protection Clause.

Similarly, using race as any part of a criminal profile where the profile is based upon a general presumption that people of a certain race commit certain crimes more frequently should be per se unconstitutional. Like stops based upon “racial incongruity,” highway stops

[^95]: 388 U.S. 1 (1967).
based upon the presumption that certain minority motorists are more likely to be carrying
large quantities of illegal drugs poses an unacceptable burden on the equality, dignity, and
freedom of movement of those minorities.

There are two possible objections to this argument. The first would be that no such racial
profiling takes place. The police are skilled at spotting drug dealers and because more drug
dealers are minorities, they end up stopping more minorities without engaging in any deliberate
targeting of minorities.97 This is an extremely complex question and is beyond the scope of this
article. The New York litigation discussed earlier in this article centers around this question as
have other lawsuits. The argument in this article is that the courts should clarify that the Equal
Protection Clause applies with full force to racial profiling when race plays any role in a decision
to stop a motorist just as it applies with full force when race plays any role in deciding who gets
a government contract or who gets admitted to a public university.

It is vitally important to clearly establish that law enforcement may not act upon “racial
incongruity” or profiles based upon the presumed proclivities of certain minorities to commit
certain crimes. It is essential to remember that under the Equal Protection Clause the goal is not
merely to exclude seized evidence as it is under the Fourth Amendment. The argument here is
that the Equal Protection Clause should protect minorities against such practices even if they are
not arrested or have not had anything seized.

If minorities are going to be genuinely protected against stops based in part upon their
race, there must be a realistic possibility of legal liability on the part of law enforcement for
engaging in such practices. The federal Civil Rights Act 42 U.S.C. 1983 creates this liability but

only when the constitutional violation is “clearly established.” 98 Unfortunately, it is far from “clearly established” that law enforcement is forbidden from targeting citizens for such things as racial incongruity or presumed racial proclivities. 99

Further, equal protection doctrine should prohibit the use of race in profiles, even when those profiles are based on information from informants unless the information includes a specific suspect description. The Constitution should protect minorities from profiling based largely upon their race and gender even when the profile is based on more than beliefs about their proclivities.

A good illustrative example is U.S. v. Condelee 100, in which the Drug Enforcement Agency (DEA) received a tip that Los Angeles street gangs were using “sharply dressed black female couriers” to smuggle drugs through Kansas City International Airport. A DEA agent displayed his badge and stopped and questioned Chareou Caprice Condalee because she had arrived from Los Angeles and was a well dressed black female. The other factors cited by the

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98 Rudovsky at p. 353. Section 1983 reads: “Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

99 See, e.g., State v. Dean, 543 P.2d 425, 427 (Ariz. 1975) (noting fact that when a person is observed in a neighborhood not frequented by persons of his ethnic background it “is quite often a basis for an officer’s initial suspicion”); State v. Ruiz, 504 P.2d 1307, 1310 (Ariz. Ct. App. 1973) (holding that officers were justified in stopping a person based on police testimony that it was “unusual to see a person of either ‘white’ or Mexican descent” in the area and that the few people police had noticed in the past “were there for the purpose of purchasing narcotics”); cf. United States v. Magda, 409 F. Supp. 734, 740 (S.D.N.Y. 1976), rev’d, 547 F.2d 756, 759 (2d Cir. 1976) (reversing trial court that had suppressed evidence where defendant was stopped entirely because he participated in an interracial interaction in "narcotics-prone" area).

100 915 F.2d 1206 (8th Cir. 1990).
agent was that she “walked quickly, looking straight ahead, across the concourse from the arrival
gate to the exit door.” Then the following took place:

As they conversed, Condelee walked back inside the terminal. Agent Hicks followed. Condelee stopped at a trash can inside the terminal. Agent Hicks and Condelee continued to converse. In response to Agent Hicks' questions, Condelee was very specific about her itinerary. Condelee's one-way ticket was purchased in her own name for cash through a travel agent several days before the flight. Agent Hicks then asked Condelee for identification. A nervous Condelee, with hands shaking and an accelerated pattern of speech, placed her purse on the trash can, tilted the purse toward her for obvious concealment purposes, and removed her wallet. Several items accidently fell out of the purse and into the trash can. After showing Agent Hicks her California driver's license, Condelee put the wallet back in her purse, once again tilting it so that Agent Hicks could not observe the contents. Condelee then placed the purse on the trash can, and Agent Hicks heard a noise indicating that something heavy was in the purse.

Agent Hicks displayed his badge a second time and informed Condelee that he was a DEA agent watching for drugs being smuggled into KCI. Agent Hicks asked Condelee if she brought drugs from Los Angeles. She denied having any drugs. Condelee then consented to a search of her garment bag. Agent Hicks searched the bag but did not discover any drugs. Agent Hicks then asked Condelee if she had any drugs in her purse. She again denied having any drugs. When Agent Hicks requested permission to search her purse, Condelee told him he would have to get a search warrant. Condelee then told Agent Hicks that she wanted to go to the bathroom with her purse. Agent Hicks responded that Condelee could not take her purse to the bathroom but could remove any necessary items. Condelee asked to make a phone call. Agent Hicks and the two detectives accompanied her to the phone bank. At this point, Agent Hicks asked Condelee if there was something in her purse that would get her in trouble. Condelee began to cry. Agent Hicks asked Condelee if there was cocaine in her purse, and she replied, "Yes." Agent Hicks seized Condelee's purse and placed her under arrest.

While law enforcement agencies deny engaging in racial profiling based on supposed criminal proclivities, in cases such as Condelee and Weaver (which involved a tip about “roughly dressed” black males) law enforcement openly touts their reliance upon race as effective law

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101 915 F.2d at 1208. The agent also ascertained that she had purchased the ticket for cash from a travel agent using her own name. Even if this somehow created reasonable suspicion, he learned of this fact only after stopping and questioning her based on little more than her race and gender.

102 Id.
enforcement with the imprimatur of the courts. Therefore, the constitutionality of these informant-based profiles is a key question for equal protection doctrine.

This article argues that the use of race under these circumstances should be prohibited as a violation of the Equal Protection Clause because of the great burdens they place on the equality and freedom of movement of racial minorities. The ruling in Condelee, for example, allows law enforcement to stop and question virtually any well-dressed African American woman traveling by air from Los Angeles International Airport.

It is striking how little the DEA agent had to go on besides Condelee’s race and gender. She was “sharply dressed”, an extremely vague term that could apply to any African American woman on her way to a business meeting, a job interview, a funeral, or a wedding, or who simply decides to wear something other than jeans and a sweat shirt or tee shirt. The other factors such as using carry-on luggage and walking quickly while looking straight ahead could probably describe the majority of business travelers or any other traveler in a hurry.

While the Condelee arrest did result in the seizure of cocaine, the benefits of such tactics cannot justify their injury to innocent African Americans. The Condelee decision makes it constitutional for DEA agents to stop and question almost any African American woman who meets a few vague criteria. Similarly, the Weaver case does the same thing for “roughly dressed” African American males. Such an approach simply is not compatible with a racially equal society.

D. Taking Racial Burden Into Account.

Under the Equal Protection Clause, the courts are supposed to take into account the race-based burden of a governmental policy. An excellent example of this is the United States
Supreme Court case *Wygant v. Jackson Bd. of Education*\(^{103}\). In that case, the Jackson Board of Education and the teachers union agreed to the following provision in its collective bargaining agreement:

In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance.\(^{104}\)

As a result of this provision of the Collective Bargaining Agreement, when layoffs occurred, some tenured white teachers were laid off while less senior, probationary minority teachers were retained. Both the district and appellate courts upheld the Board’s action because “the racial preferences were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing ‘role models’ for minority schoolchildren . ..”\(^{105}\)

In sum, the Board, acting out of a good faith attempt to maintain the racial diversity of their group of teachers, followed a policy that placed a racially disproportionate impact upon the white teachers who were laid off. It is worth noting that the policy was indeed essential to maintaining teacher diversity. While universities might be able to pursue numerous methods to enhance student diversity, given that the minority teachers were mostly junior to the white teachers, there was no other way to maintain diversity. The Board also asserted that it was attempting to compensate for prior discrimination.

\(^{103}\) 476 U.S. 267 (1986).
\(^{104}\) 476 U.S. at 270.
\(^{105}\) 476 U.S. at 272.
Nonetheless, the Supreme Court struck down the policy because of the burden it placed on the white teachers:

We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy . . . . Significantly, none of [these cases] involved layoffs. Here, by contrast, the means chosen to achieve the Board's asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties . . . In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

. . . .While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, 11 layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored.106

Wygant demonstrates that under the Equal Protection Clause, it is not enough that the government is acting in good faith. Even if the government were acting in good faith to combat the effects of prior discrimination, principles of equal protection forbid the government from placing a disproportionate burden on innocent white teachers. A disproportionate racial burden indicates that the means are not narrowly tailored.

Similarly, the courts should make clear that innocent minorities, whether travelling by car, plane or foot, are entitled to the same level of protection as the white teachers who were laid off in Wygant. To this end, there should be a clear rule that,

106 476 U.S. at 280-283.
under the Equal Protection Clause, police may not stop and question someone for reasons even partially based upon their race. The police must be able to articulate a basis for reasonable suspicion that does not in any way depend upon the person’s race.

While it is one thing for the DEA to act on a tip that a person of a specific description will be arriving on a specific flight, it is quite another to stop and question African American women based on such vagaries as using carry-on luggage or “walking quickly,” as so many white Americans do without fear of being stopped and questioned.

Randall Kennedy has famously described racial profiling as a form of racial tax: “As it stands now, this burden [of police intrusion] falls with unfair severity upon minorities—imposing on Mexican-Americans, blacks and others a special kind of tax for the war against illegal immigration, drugs, and other forms of criminality. The racial character of that tax should be repealed.”

It should be emphasized that the point here is not that police are racist or that reliance on race can never be effective. The point is that under principles of equal protection, any efficiency gained by targeting minorities cannot justify the infringement of their right to legal equality. As Kennedy puts it:

The point here is that racial equality, like all good things in life, costs something; it does not come for free. Politicians often speak as if all that Americans need to do in order to attain racial justice is forswear bigotry. They must do that. But they must do more as well. They must be willing to demand equal treatment before the law even under circumstances in which unequal treatment is plausibly defensible in the name of nonracist goals. They must be willing to do so when their effort will be costly.108

108 Id.
Finally, the courts should be clear that strict scrutiny should apply when police use race as part of a suspect description, i.e., if the victim describes an assailant’s race and the police use that description to decide whom to stop and question. This is perhaps the most counter-intuitive suggestion. After all, if a victim says they were robbed by an African American man, it would be foolish to stop and question white women.

Further, the racial description is being furnished by the victim, not the government. The court in the Oneonta case repeatedly mentioned that the primarily racial description originated “not with the state, but with the victim.”

Nonetheless, if the police are stopping and questioning African Americans in part because they are African Americans, that should trigger strict scrutiny. Although private citizens are giving the description, it is the government that is soliciting and acting upon the description. It is a governmental choice to ask victims to identify the race of the perpetrator. Given the number of mixed race people as well as the great diversity of skin tones, eye shape, and other features within any particular race or ethnicity, it is far from obvious that police need to be asking the assailant’s race at all. The police officer could simply ask the victim to describe the perpetrator and allow the victim to make his or own decision about whether to rely on race as a descriptor. If the perpetrator looked like, for example, George Zimmerman, the man who famously shot Trayvon Martin, it would

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109 221 F.3d at 338.
110 Most law enforcement agencies have policies requiring law enforcement officials to ask victims the race of the perpetrator. Banks (2001) at p. 1113.
probably be better not to ask his race since a victim is unlikely to guess that Zimmerman is half white, and half Peruvian, probably with some Mestizo Indian in his background.\footnote{Trayvon Martin Case: George Zimmerman’s Race Is a Complicated Matter (http://www.huffingtonpost.com/2012/03/29/trayvon-martin-case-georg_n_1387711.html).}

To be clear, the argument here is not that the police must be banned from asking a victim about the race of the perpetrator. The argument is that such a question is a deliberate choice by a government actor to rely upon race and should trigger strict scrutiny. While apprehending criminals is presumably a compelling governmental interest, the use of race must be narrowly tailored.

The Oneonta court refused to apply the Equal Protection Clause because the police’s “policy was race-neutral on its face.”\footnote{221 F.3d at 337.} But when the police solicit a race-based description from a victim and stop and question citizens based on their race, this is a de jure racial classification that should trigger strict scrutiny regardless of whether there is invidious intent.

If a victim identifies a perpetrator as African American, police are considerably more likely to stop an African American suspect who significantly differs from the description in other ways (say being several inches too short or too tall) than to stop a white person who otherwise matches the description.\footnote{Banks (2001) at p. 1010.} A description of a perpetrator as, for example, “a young African American male of medium height” could justify exactly the sort of racial sweeps that occurred in Oneonta and are alleged to be taking place in New York City without any need to resort to racial profiles.
Therefore a fundamental goal of equal protection jurisprudence should be to ensure that police use of race is narrowly tailored, even when the police are using a suspect description. The courts should insist that while race can rule out suspects, it cannot be the any part of the basis for stopping any person. If the police are stopping and questioning persons based on little more than race, gender and age—such as the sweep of young African American men in Oneonta, this should be a considered a violation of the Equal Protection Clause.

There are numerous other examples of police collecting DNA samples and taking other measures based on vague racial descriptions. The law should be clear that while the racial part of a description can be used as a reason not to question a certain person, it cannot affirmatively justify a decision to stop any person unless the description would justify reasonable suspicion of that person regardless of their race.

VI. Summary and Conclusion.

There is a major gap in equal protection jurisprudence when it comes to the use of race by law enforcement. The use of race by police has been exempted from strict scrutiny even though it has a major impact upon minority individuals and communities. This gap should be closed. The courts should clarify and any use of race by law enforcement officials should be subject to strict scrutiny. Conceding that apprehending criminals is a compelling governmental interest, the courts should insist that use of race be narrowly tailored toward that end and should take into account the burden on minorities caused by use of race, just as the Supreme Court took into account the burden

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114 See Walker at n. 61.
on laid off white teachers in the *Wygant* case and the burden on rejected white applicants in the *Gratz* case. Specifically:

1) “Racial incongruity” should be clearly disallowed as *any* part of a reason to stop or question any person;

2) Stopping any person based, even in part, upon generalization as to how frequently persons of different races commit certain crimes should be disallowed regardless of the good faith of the officer making such stops and regardless of the perceived accuracy of such generalizations;

3) Even when a profile is based upon a specific tip, such as gangs using “sharply dressed black women” or “roughly dressed” African American men, race may not be used as a basis for stopping or questioning a person unless it includes a suspect description sufficiently specific as to justify reasonable suspicion regardless of race; and finally

4) Even when there is a specific suspect description, there must be sufficient specificity that reasonable suspicion exists *entirely apart* from the suspect’s race.

No doubt, such rules might allow some criminals to evade detection that might have otherwise been caught, but just as freedom has its price, so does genuine equality under the law. As Randall Kennedy has written, commitment to a non-racist society requires a willingness to bear some costs. The costs to minority individuals and communities under the current system are intolerable and should not survive strict scrutiny.