

**RACE AND THE
FOURTH AMENDMENT**

Criminal Justice Act Panel Training Program
Baltimore, MD
May 12, 2017

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FOURTH AMENDMENT

“The rights of the people to be secure in their persons houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

SEIZURE

- Seizure occurs when an officer by means of physical force or show of authority has in some way restrained the liberty of a citizen (CA v. Hodari D.)
- **Objective Standard:** Whether the police behavior would have communicated to a “reasonable person” that he was not at liberty to walk away (Michigan v. Chesternut)



Terry v. Ohio, 392 US 1 (1968)

Fourth Amendment is not violated when a police officer stops a suspect on the street and frisks him without probable cause to arrest as long as the officer had reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has reasonable belief that the person "may be armed and presently dangerous"

LEVELS OF SEIZURES & STANDARDS OF JUSTIFICATION

LEVELS OF SEIZURE	STANDARDS OF SEIZURE
<ul style="list-style-type: none">▪ ENCOUNTER▪ STOP	<ul style="list-style-type: none">▪ NONE▪ REASONABLE ARTICULABLE SUSPICION (RAS)
<ul style="list-style-type: none">▪ FRISK	<ul style="list-style-type: none">▪ RAS TO BELIEVE ARMED & DANGEROUS
<ul style="list-style-type: none">▪ ARREST▪ SEARCH	<ul style="list-style-type: none">▪ PROBABLE CAUSE▪ PROBABLE CAUSE OR CONSENT

Reasonable Articulate Suspicion and Probable Cause

- RAS: officer must articulate specific facts that led him/her to suspect the person (*Terry v. Ohio*)
- PC: based on totality of circumstances, there is a "reasonable ground for belief of guilt...and that the belief of guilt must be with respect to the person searched or seized (*MD v. Pringle*) (emphasis added)
- RAS to Believe Armed and Dangerous: must be able to articulate relevant facts

What factors do police rely on to justify *Terry* stop?

- High crime neighborhood/ area
- Failure to respond to police
- Flight
- Furtive gestures
- Tips from informants
- Casing
- Description match
- Exchanges between individuals
- Nervousness
- Departure upon seeing police
- Temporal/spatial proximity to crime

What factors do police rely on to justify *Terry* Frisk?

- Nature/description of crime suggesting weapon is involved
- Observation of a weapon
- Body language consistent with weapon-possession (holding waistband)
- Gun shots
- Bulge in clothing
- Furtive gestures as if searching/concealing weapon

SEARCHES

- Warrant
OR:
Exceptions to Warrant Requirement
- SIVA
 - Valid Consent
 - Plain View
 - Exigent Circumstances
 - Automobile Exception
 - Inventory searches
 - Border Checkpoints



WHY DOES RACE MATTER?



Social and Political Context: Race in Terry v. Ohio

Political/Social Climate

- Terry arrested in 1963; case decided in 1968
- Heart of civil rights movement
- Cleveland specifically:
 - School integration
 - White flight

Location (Cleveland)



Social and Political Context: Race in Terry v. Ohio

Race of Parties Involved

- Terry and co-defendant Chilton African-American
- Third person observed by police (Katz) was white
- Police suspicious because Terry/Chilton conversing with a white man
- Det. McFadden was white

Community-Police Relations



How was race was relevant in Terry?

- **Racial makeup** of area likely contributed to police presence in the first place
- **Officer bias** likely led to his perception that Terry's engagement with white man was suspicious
- **Community relations** with police likely contributed to police officer's willingness to ignore the laws that would have disallowed stop and frisk without a warrant or probable cause
- But race is barely mentioned in the hearing or the Supreme Court decision. Dismissed in a footnote

SHORTCOMINGS OF THE FOURTH AMENDMENT FRAMEWORK

- 4th Amend allows pretext stops (Whren): Even if motivated by race, stop okay so long as another reason exists
- Reasonable Person in 4th Am. context fails to account for race
- RAS and PC Factors are often proxies for race

RACIAL BIAS & WHREN

Whren v. United States

- Police can use a traffic or other criminal law violation as a pretext for an intentionally discriminatory search.
- "[T]he 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."

DISTINGUISHING WHREN

- Race-based facts are relevant to officer credibility on the facts relied upon for stop/search
- Implicit bias undermines objective basis claimed by officer, by
 - improperly skewing officer's "observation" of "facts" on scene and
 - how officer recalls those facts at the suppression hearing

AND EVEN IF YOU LOSE SUPPRESSION: credibility issues can affect the trial judge's assessment of the officer's testimony at trial

Reasonable Person

One who possesses the intelligence, educational background, level of prudence, and temperament of an average adult.

Hope? Reasonable Child?

- Reasonable child in the Fifth Amendment (JDB v. North Carolina, 131 S. Ct. 2394 (2011))
 - "Because the differences between children and adults are 'self-evidence to anyone who was a child once himself...[w]e think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.'" at 2043
- *Youth is an unambiguous fact that "generates commonsense conclusions about behavior and perception" at 2043*

REASONABLE BLACK PERSON?

- Common sense conclusions...
 - Are there objective and common sense conclusions that flow naturally from their status as African American in contemporary society? *Wardlow* dissent
 - Perceptions
 - Behaviors (responses to police presence)..
 - Does/should race have an objectively discernible relationship to determinations of reasonableness in criminal law?

How Does Race Affect the Seizure Analysis?

- Does race affect a "how a reasonable person" in the suspect's position "would perceive his/her freedom to leave"?

How Does Race Affect Consensual Encounter and Consent to Search?

- Police must show that consent was freely given, and not the result of express or implied duress and coercion. *Schneekloth v. Bustamonte*, 412 US 218, 219 (1973)
 - "The psychological atmosphere in which the consent is obtained is a critical factor in the determination of voluntariness."
 - Consent analysis not only involves some objective evaluation of the facts and circumstances, but it is also a subjective inquiry that takes into account personal experiences that drive fears and motivate people to act. *Schneekloth*, 412 U.S. at 234.
 - Must also consider the "possibly vulnerable subjective state of the person who consents." *Id.* at 229

Bringing Race into the Suppression Hearing

- Implicit Bias Affects Police Perception of Innocuous Behavior
- Implicit Bias Affects Police Interpretation of Whatever Behavior they Observe
- Current Commonsense Interpretations of Various Behaviors Fail to Account for Race



HOW DOES RACE IMPACT OFFICER'S OBSERVATIONS, PERCEPTIONS AND INTERPRETATIONS OF BEHAVIOR

- Nervousness
- Furtive gestures
- High crime area
- Proximity to suspect crime scene
- Association with known criminals
- Descriptions

HOSTILITY, NERVOUSNESS, FURTIVE GESTURES Implicit Racial Bias

- Several studies have found that individuals are more likely to interpret ambiguous behavior by blacks as
 - more aggressive and
 - consistent with violent intentions
- while interpreting the same behavior by whites as harmless.

IRB RESEARCH:
HOSTILITY, NERVOUSNESS, FURTIVE GESTURE

- Study: Participants viewed brief movie clip in which a target's facial expression morphed from unambiguous hostility to unambiguous happiness and vice versa in a second clip.
- Participants with higher levels of implicit bias took longer to perceive black faces change from hostile to friendly, but not white faces.
- In the second clip, participants perceived the onset of hostility much earlier for black faces than white faces.

▪ Kurt Hugenberg & Galen V. Bodenhausen, *Prejudice and the Perception of Facial Threat*, 14 (2003). Sci 640-643

IRB RESEARCH:
HOSTILITY, NERVOUSNESS, FURTIVE GESTURE

- Study: Participants viewed series of black or white faces and then determined whether the faint outline of an ambiguous object that slowly emerged on the screen was crime-related or neutral.
- Participants were quicker to see a crime-related object when associating the object with a black face than with a white face.

▪ Jennifer L. Eberhardt, et al., *Processing*, 87 PERSONALITY OC PSYCHOL 876, 881(2004)

IRB RESEARCH: Misremembering Facts in Racially Biased ways

- IRB causes people to misremember and recall facts in racially biased ways.
- Study: When asked to recall facts from a fictional story, mock jurors were significantly more likely to recall the fictional defendant as being aggressive when he was black than when he was white or Hawaiian.

Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering* (2007).

COMMON SENSE JUDGEMENTS
ABOUT THE MEANING OF BEHAVIOR

- *Illinois v Wardlow, 528 US 119, 125 (2000)* that “the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior,”
- *J.D.B. v. North Carolina*, as discussed above that a child’s age: “generates commonsense conclusions about behavior and perception.”

FLIGHT

- Several federal & state courts acknowledge that innocent people sometimes flee from the scene of a crime for example out of fear of being apprehended for a crime they did not commit. *Wardlow, J. Stevens* concurrence, 528 U.S. at 132:

Among some citizens, particularly minorities...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. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices... The probative force of the inferences to be drawn from flight is a function of the varied circumstances in which it occurs.

FLIGHT

Commonwealth v. Warren,
475 Mass. 530 (Mass. 2016).

- Held: Defendant Jimmy Warren (approached by police due to a concurrent report of a break-in) did not behave in an inherently suspicious manner by attempting to evade that interaction.
 - Cited Boston Police Department data &
 - 2014 ACLU of Massachusetts report on racially discriminatory department practices that disproportionately targeted Black and Latino communities.

PROXIMITY OR PRESENCE IN HIGH CRIME AREA

Brown v. Texas, 443 U.S. 47, 52 (1979) (noting that an individual's presence in an area with high levels of narcotics trafficking is insufficient to allow stop or frisk).

- "presence in a high crime neighborhood [alone] is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry."
- *US v. Montero-Camargo*, 208 F.3d 1122, 1138 (2000) "the citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity."

ASSOCIATION WITH KNOWN CRIMINALS

- "[m]ere association with a known criminal cannot on its own be a basis for 'reasonable suspicion.'" *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342, 62 L. Ed. 2d 238 (1979)
- *Sibron v. New York*, 392 US 40 (1968), officer observed defendant associating with 6-8 known drug addicts over course of 8 hours and talking to 3 more known addicts later on at a restaurant. The officer eventually thrust his hand into the defendant's pocket and found heroine. The Court noted that "reasonable suspicion required more than mere association with known criminals or addicts."

DESCRIPTIONS

- Race becomes irrelevant when it describes the majority of a population in the area, and a seizure will be unconstitutional when it is based on a description that is too broad and would apply to a large number of youth at a given time.
 - *In re T.L.L.*, 729 A.2d 334, 340-41 (D.C. 1999) (finding description insufficient to justify seizure when lookout of two black teenagers wearing dark clothing could have fit many, if not most, black young men in the area at the time)
 - *Matter of A.S.*, 614 A.2d 534, 538 (D.C. 1992) (finding description applied to a "potentially staggering number of youths in the quadrant of the city where the arrest took place.")

DESCRIPTIONS: When Police Acknowledge Race as a Factor

- When race is explicitly stated by a police officer as a reason for the stop, race alone will not meet the reasonable articulable suspicion standard. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-87 (1975); *United States v. Beck*, 602 F.2d. 726 (5th Cir. 1979).
- RAS will not be met if the officer's suspicion "is based solely on racial incongruity—when a person is seen in a particular geographic area that is predominantly populated with people of a different race." *United States v. Hawthorne*, 982 F.2d 1186, 1190 (8th Cir. 1992).

IRB and the Record

- In moving or reply papers, attach scientific studies regarding implicit bias.
- If time and money permit, *call* experts as witnesses.
 - Psychologists, sociologists, legal theorists, cultural experts
- Using IRB in cross-examination of police officer:
 - IRB affects how we later remember facts
- Using IRB in oral argument
 - Trial courts should consider IRB when determining officer's credibility and memory of what justified the stop, frisk or search
 - Argue that officer is filling in details when defendant is black

PUTTING RACE ON THE RECORD

- Race of your client
- Race of the police officer
- Heavily policed neighborhood.
- Percentage of population black
- Percentage of population incarcerated
- Percentage of population below poverty line
- Pattern of policing by this particular police officer or unit (i.e., gang unit)
- Recent event (i.e., Mario Woods, Oscar Grant)
