POLICE USE OF RACE IN SUSPECT DESCRIPTIONS: CONSTITUTIONAL CONSIDERATIONS

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INTRODUCTION

With the country's heightened concerns over national security in the wake of the September 11, 2001 terrorist attacks, the relationship between police powers and individual liberties has become increasingly complex. Recent national security measures have given the police expanded and diverse discretionary powers. Many individuals, especially male immigrants from predominantly Muslim countries, have seen their constitutional protections eroded.

A greater use of race by the police, in particular, has received growing acceptance. For example, while racial profiling[1] was widely perceived as illegitimate prior to September 11, many Americans now view the practice as justified in maintaining security at airport checkpoints.[2] Some scholars propose that increased government scrutiny of Middle Eastern men is now justified to a lim-

1. Racial profiling can been defined as law enforcement use of race as a proxy for criminality: "'Racial profiling' at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures." CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FED. LAW ENFORCEMENT AGENCIES 1 (2003) [hereinafter GUIDANCE REGARDING THE USE OF RACE]. It is based on the "erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity." *Id.*

2. *See, e.g.*, David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 UTAH L. REV. 913, 913–14 (2004) (noting Fall 1999 Gallup poll in which 81% of all races polled disapproved of racial profiling, and contrasting September 2001 poll in which 58% of all races told pollsters they supported "requiring Arabs, including those who are U.S. citizens, to undergo special, more intensive security checks before boarding airplanes in the U.S.") (quoting Jeffrey M. Jones, *Americans Felt Uneasy Toward Arabs Even Before September 11*, Gallup Poll, Sept. 28, 2001); Darren K. Carlson, *Racial Profiling Seen as Pervasive, Unjust*, Gallup Poll, July 20, 2004 (while only 31% of Americans view racial profiling as justified in stopping motorists, 45% feel the practice is justified at airport security checkpoints).

ited extent,[3] while others maintain that racial profiling is simply not effective policing and cannot make America safer.[4]

An issue that raises many of the same concerns as racial profiling is police use of race in descriptions of criminal suspects.[5] As discussed in this article, a suspect description is a set of factors the police use to describe an alleged suspect in a crime and that can be applied to apprehend that suspect. When the police develop and implement a suspect description in which race is the sole or primary factor, it can yield results that either are or appear to be racially discriminatory.

This article focuses on police use of suspect descriptions that rely solely or primarily on race. As evidenced by police activity in cases such as *Brown v. City of Oneonta*,[6] which is discussed as a case study throughout this article, suspect descriptions based on race can provide the police vast discretion in determining whom to approach and question. In Oneonta, the police questioned over 200 non-white persons, including one woman, on the basis of a sparse suspect description of a young Black[7] man who might have had a cut on his hand.[8] No suspect was ultimately apprehended, however.[9] The individuals who were questioned did not have many options for legal relief. Most were not seized pursuant to the Fourth Amendment and thus could not trigger its protections against unsubstantiated police seizures.[10] The individuals affected brought claims separately on equal protection and related federal and state grounds, arguing that they were victims of racially discriminatory policing.[11]

Unfortunately, the race-based police dragnet that occurred in Oneonta may not have been an aberration. Commentators have drawn analogies between the police conduct in Oneonta and the federal government's investigations of the September 11 attacks, which have focused on immigrants with Arab or Muslim

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3. *See* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1437 (2002).

4. *See* Harris, *supra* note 2, at 915–17, 924–37.

5. *See* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1080 (2001) [hereinafter Banks, *Race-Based Suspect Selection*] ("Law enforcement officers' use of suspect descriptions is not fundamentally dissimilar from racial profiling. Both constitute intentional uses of race in a manner that disparately burdens innocent members of certain racial minority groups."). Professor Banks has written several other pieces about racial profiling, as well as its overlap with police use of race in suspect descriptions, including *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003); *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV 1201 (2004); and *The Story of* Brown v. City of Oneonta*: The Uncertain Meaning of Racially Discriminatory Policing Under the Equal Protection Clause* [hereinafter Banks, *The Story of* Brown], *in* CONSTITUTIONAL LAW STORIES 223 (Michael C. Dorf ed., 2004). This article draws upon these works, and I am indebted to Professor Banks for his scholarship.

6. 221 F.3d 329, 334 (2d Cir. 2000).

7. Throughout this article, I use the terms "Black" and "African American" interchangeably. In quotations, I retain the term used in the source.

8. *Brown*, 221 F.3d at 334, 337.

9. *Id.* at 334.

10. *Id.* at 340–41.

11. *Id.* at 333–34.

backgrounds.[12] These investigations resulted in wide-scale arrests and detentions of immigrants, yet reportedly did not generate any direct connections to the terrorist attacks.[13]

This article suggests that courts should closely examine police use of suspect descriptions that rely solely or primarily on race, using both Fourth Amendment and Fourteenth Amendment analyses. Equal protection principles are especially useful if, as in the case brought by those questioned in Oneonta, police use of race-based suspect descriptions do not rise to the level of constitutional seizures and hence the Fourth Amendment does not apply. Practitioners may turn instead to state constitutions, which often yield enhanced safeguards.

In Part I, I provide introductory background on police use of race in suspect descriptions and discuss the changing debate about police powers in the post-September 11 era. I set forth the factual scenario in *Brown* as a case study of the types of issues that may arise from police use of race in suspect descriptions.

In Part II, I review social science research about the nature of police use of suspect descriptions, and the role of race in such descriptions. In addition, I examine policy considerations that factor in to the appropriate use of race by the police in suspect descriptions.

Finally, in Part III I discuss legal challenges to police use of racialized suspect descriptions, focusing on the federal search and seizure and equal protection doctrines. I also address possible challenges based on state constitutional grounds.

I.
POLICE USE OF RACE IN SUSPECT DESCRIPTIONS: BACKGROUND

Several problems arise from the use of race as the sole or primary factor in suspect descriptions. Courts have found suspect descriptions providing no or few identifying elements other than race insufficient to justify law enforcement action. In some cases, the police have also disregarded nonracial elements of suspect descriptions so that race has become a sole or primary factor. As many courts have recognized, overly general suspect descriptions have resulted in large-scale dragnets ensnaring innocent individuals.

Though the government and the public have increasingly accepted the use of race by the police in the post-September 11 era, problems still arise with the determinative use of race or ethnicity in suspect descriptions, even in the national security context. An extended analysis of post-September 11 police practices and race is beyond the scope of this article, but the expanding tolerance of police use of race creates a renewed urgency for examining its legal limits.

12. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 331–36 (2002).

13. *Id.* at 331.

Finally, the factual scenario in Oneonta presents a useful case study of the issues that can arise from police use of race in suspect descriptions. The facts of the case will set the stage for further discussion about social science research and legal doctrines in this article.

A. Common Problems

Courts have invalidated police actions based on suspect descriptions relying on race because they have found the descriptions to be insufficient to yield valid and reliable identifications. This legal issue arose in *Washington v. Lambert*,[14] for instance, after Los Angeles police arrested two men allegedly resembling armed robbery suspects.[15] They were simply described as two African American men of approximate heights and weights, and ages 20–30 years.[16] The two men successfully sued for relief on the Fourth Amendment ground that they had been arrested without probable cause.[17] The Ninth Circuit noted that the "exceedingly vague and general" descriptions could have been applied to a multitude of innocent people and thus were unreliable.[18] It also observed that such general descriptions could lead to demeaning treatment of African Americans.[19] In *Brown v. United States*,[20] the District of Columbia Circuit Court held that an anonymous tip regarding a narcotics seller who was a "black male, approximately 5'6" in height, wearing a white shirt with dark writing on the front and blue jeans" was inadequate as a suspect description, absent any other indicia of distinctiveness.[21] The court noted that "[d]escriptions applicable to large numbers of people will not support a finding of probable cause"[22] and observed that the greater the number of identifying factors, the more justified a police officer may be to arrest a suspect matching those factors.[23] Similarly, in *People v. Robinson*,[24] a New York state court overturned a conviction in a case where the police had stopped, searched, and arrested suspects on the basis of descriptions of young African American men with medium builds and slightly

14. 98 F.3d 1181, 1183–84 (9th Cir. 1996).

15. *Lambert*, 98 F.3d at 1183.

16. *Id.* at 1183–84 (describing one man as about six feet and weighing 150 to 170 pounds and the other as five feet five inches and weighing 170 to 190 pounds).

17. *Id.* at 1192, 1194.

18. *Id.* at 1190–91 ("If the general descriptions relied on here can be stretched to cover [the plaintiffs], then a significant percentage of African American males walking, eating, going to work or to a movie, ball game or concert, with a friend or relative, might well find themselves subjected to similar treatment, at least if they are in a predominantly white neighborhood.").

19. *Id.*

20. 590 A.2d 1008 (D.C. 1991).

21. *Id.* at 1010, 1017–18.

22. *Id.* at 1017 (citing Commonwealth v. Jackson, 331 A.2d 189, 191 (Pa. 1975).

23. *Id.* (quoting 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 3.4(c), at 741 (2d ed. 1987)).

24. 507 N.Y.S.2d 268 (App. Div. 1986).

varying heights.[25] It, too, noted the insufficiency of such general descriptions, which could have matched many people in the neighborhood.[26]

When working from descriptions based solely or primarily on race, the police have at times abandoned the few nonracial characteristics in the description.[27] The fewer the identifying factors, the more logical it may seem to an officer to discard some factors while retaining other more seemingly important or immutable ones.[28] Courts have been critical of such police liberties with suspect descriptions. In *Lambert*, the Ninth Circuit observed that the police not only had too general a suspect description to substantiate a stop but that they had also misapplied the description.[29] The suspects in that case were described as two young African American men of certain heights and weights.[30] The apprehended individuals, while African American men, did not fit even these descriptions.[31] The District of Columbia Circuit Court's analysis in *Brown v. United States* of a general suspect description also focused on the mismatch between the description and the person arrested.[32] Though some discrepancies between the suspect descriptions and the arrestees could be explained, the court noted that the remaining conflicts were of "greater significance" because "no meaningful similarities ha[d] been positively established except that Brown . . . is a black male."[33]

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25. *Robinson*, 507 N.Y.S.2d at 269–70.

26. *Id.* at 270. *See also* United States v. Jones, 242 F.3d 215, 216, 218–19 (4th Cir. 2001) (holding that an anonymous tip that several Black males were drinking and causing a disturbance at specific intersection "was so barren of detail about the alleged culprits' physical descriptions" that, coupled with a lack of corroboration, it could not establish reasonable suspicion for stop); Commonwealth v. Creek, 597 N.E.2d 1029, 1031 (Mass. 1992) (holding physical description of "black male with a black [three-quarter] length goose" jacket insufficient where defendant was arrested in predominantly African American neighborhood on a cold fall night); Faulk v. State, 574 S.W.2d 764, 765–66 (Tex. Crim. App. 1978) (holding that description of armed robber as "young black male wearing a multicolored shirt" was too general to yield probable cause and noting that police officer who stopped appellant "had only one fact to connect the appellant to the armed robbery—that he was a young black male"); Brown v. State, 481 S.W.2d 106, 110–12 (Tex. Crim. App. 1972) (holding that description in armed robbery including race and approximate height and weight, coupled with absence of any inculpatory conduct or circumstances surrounding appellants, failed to yield probable cause for arrest).

27. *See* Brown v. City of Oneonta, 235 F.3d 769, 781–87 (2d. Cir. 2000) (Calabresi, J., dissenting) (recognizing problems created by police misapplication of race in suspect descriptions).

28. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 140–41 & n.14 (1997). Perhaps focusing on the possibility that facial hair can be altered, for example, the police detained and searched Earl Graves, Jr., a clean-shaven, six-feet-four-inch Black man, though he only fit the race characteristic in a suspect description of mustachioed, five-feet-ten-inch Black man carrying a gun. *Id.*

29. 98 F.3d at 1190.

30. *Id.* at 1183–84.

31. *Id.* at 1184.

32. 590 A.2d at 1017–19.

33. *Id.* Though sparse descriptions may be more prone to discriminatory misapplications, such problems may persist even when marginally more descriptive factors are present. In *Choi v. Gaston*, 220 F.3d 1010 (9th Cir. 2000), for instance, police arrested the Korean plaintiff even though he matched no element of the description of an eighteen-year-old Vietnamese male suspect

As courts have warned, suspect descriptions in which race is the sole or primary factor have resulted in racial dragnet investigations implicating many innocent people. For example, in the 1969 case *Davis v. Mississippi*,[34] a woman who was raped described her assailant to the police as a male "Negro youth."[35] The police subsequently questioned or fingerprinted between sixty-five and seventy-five young African American males at the police station, in school, and on the streets.[36] While trying to capture a serial rapist in a primarily white area of Ann Arbor, Michigan, the police identified over 700 African American men as suspects, on the basis of a description of a "six-foot black man."[37] They took DNA samples from 160 African American men.[38] The attorney who represented donors seeking the return of their DNA samples commented that the "[police] attempted to [test] every African American man in the city who vaguely met the description."[39] In Philadelphia, eight women who were raped described their assailant as a "slender black male."[40] The Philadelphia Police Department used this sparse description to stop and question many African American males ranging in age from twenty to forty, weighing 120 to 160 pounds, and from five feet four inches to five feet ten inches.[41] A woman who was raped at a bus stop in Baltimore, Maryland reported to the police that the perpetrator was an African American man, in his early thirties, about five feet ten inches, and weighing 180 pounds.[42] The police district commander issued a memorandum to officers that

named Phu Nguyen (who had black hair and brown eyes, was five feet ten inches, and wore a white shirt and black pants). *Id.* at 1013–14 (Noonan, J., concurring) Instead, Choi's "Asian" appearance and similar (but not identical) clothing caused the police to arrest him. *Id.* at 1014–15. Reversing a grant of summary judgment for the police, the court noted that the circumstances of Choi's arrest raised a question for the jury as to whether the police had acted solely on the basis of racial profiling. *Id.* at 1011 (per curiam).

34. 394 U.S. 721 (1969).

35. *Id.* at 722.

36. *Id.* at 722–23.

37. Sam Walker, *In Michigan, A Community Clashes Over DNA Testing*, CHRISTIAN SCI. MONITOR, Jan. 26, 1995, at 1. *See also* David M. Halbfinger, *Police Dragnets For DNA Tests Draw Criticism*, N.Y. TIMES, Jan. 4, 2003, at A1.

38. Halbfinger, *supra* note 37. The perpetrator was ultimately located through other means—he was reported to the police because he was seen with blood on his clothes. *Id.*

39. Richard Willing, *Privacy Issue Is the Catch For Police DNA "Dragnets,"* USA TODAY, Sept. 16, 1998, at 1A. For additional examples of DNA dragnets, see POLICE PROFESSIONALISM INITIATIVE, UNIV. OF NEB. AT OMAHA, POLICE DNA "SWEEPS" EXTREMELY UNPRODUCTIVE: A NATIONAL SURVEY OF POLICE DNA "SWEEPS" 4 (2004). The report recommended that "law enforcement agencies not conduct DNA sweeps based on general descriptions or profiles of suspects." *Id.* at 5.

40. Jeanette Covington, *Round Up the Usual Suspects: Racial Profiling and the War on Drugs*, *in* PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM 27, 27 (Dragan Milovanovic & Katheryn K. Russell eds., 2001) [hereinafter PETIT APARTHEID].

41. *Id.* at 27–28.

42. M. Dion Thompson, *Memo, Outrage Swiftly Ousted City Police Major*, BALT. SUN, Mar. 7, 2002, at 1B; Gregory Kane, *District Commander Was a Good Police Officer—But a Bad Memo Writer*, BALT. SUN, Mar. 10, 2002, at 3B; Del Quentin Wilber, *Police Opt for Racial Profiling Seminar*, BALT. SUN, Mar. 13, 2002, at 1B.

simply instructed: "Every black male around this Bus Stop is to be stopped until the subject is apprehended."[43] Several individuals who had been stopped considered filing claims against the city on the basis of violations of their Fourth Amendment rights.[44]

B. *Police Powers After September 11, 2001*

Governmental law enforcement powers regarding matters of national security increased greatly after the September 11, 2001 terrorist attacks.[45] On the federal level, the USA PATRIOT Act[46]—passed just days after September 11—greatly enlarges federal law enforcement's ability to conduct surveillance and gather intelligence.[47] Law enforcement is also coordinated more comprehensively on local, state, and federal levels; and officers engage in diverse tasks ranging from protection of national security to enforcement of immigration matters.[48]

The climate of a national emergency and increased police powers has significantly shifted the debate around the role of race in police investigation.[49] Polls indicated that while eight-one percent of all Americans disapproved of racial profiling in 1999, fifty-eight percent supported singling out individuals who appeared to be of Middle Eastern descent at airport security checkpoints in late September 2001.[50] Even people of color—historically the subjects of racial profiling practices by the police—indicated that they would support racial pro-

43. Thompson, *supra* note 42. After the memorandum became public and community members expressed their outrage over the police's distorted use of race, the commander promptly retired. *Id.*

44. *Id.* For additional analysis of race-based dragnets, *see* Bela August Walker, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662, 671–74 (2003).

45. *See Panel Discussion: The USA-PATRIOT Act and the American Response to Terror: Can We Protect Civil Liberties After September 11?*, 39 AM. CRIM. L. REV. 1501, 1507 (2002) [hereinafter *Panel Discussion*] (discussion by Professor David Cole about the expansion of law enforcement powers under the USA PATRIOT Act).

46. Pub. L. No. 107-56, 115 Stat. 272 (2001); *see also* CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE REPORT RL31377: THE USA PATRIOT ACT: A LEGAL ANALYSIS 2 (2002), *available at* http://www.fas.org/irp/crs/RL31377.pdf. In 2006, certain expiring provisions of the USA PATRIOT Act were reauthorized, and some civil liberties safeguards were added. Pub. L. No. 109-177, 120 Stat. 192 (2006); Pub. L. No. 109-178, 120 Stat. 278 (2006). *See* Brian T. Yeh & Charles Doyle, Congressional Research Service Report RL 33332: USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis, 1 (2006), *available at* http://www.fas.org/sgp/crs/intel/RL33332.pdf.

47. *See* DOYLE, *supra* note 46, at 5–8, 27–37.

48. *See, e.g.*, Alan D. Cohn, *Mutual Aid: Intergovernmental Agreements for Emergency Preparedness and Response*, 37 URB. LAW. 1, 6–8 (2005); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 91–93 (2005).

49. *See, e.g.*, Harris, *supra* note 2, at 913–14.

50. *Id.*

filing of individuals of Middle Eastern descent.[51] A 2004 poll found that while only thirty-one percent of Americans believed racial profiling was justified when stopping motorists, forty-five percent continued to feel the practice was justified at airport security checkpoints.[52]

Apparently tracking popular sentiment, the Department of Justice (DOJ) has stated that it ostensibly bans racial profiling in federal law enforcement, yet accepts a greater role for the use of race in national security investigations. In a policy guidance issued in June 2003,[53] the DOJ condemned the use of race in routine domestic law enforcement as a profile or "stereotype."[54] It even asserted that its racial profiling guidance was more stringent than required by law.[55] This guidance did not recognize, however, that police use of race in suspect descriptions also has the potential to result in profiling and stereotyping. Instead, the DOJ stated that the incorporation of race in a suspect description for a specific individual is acceptable: "[U]se of race or ethnicity is permitted only when the officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an *identified* criminal activity."[56] The DOJ even outlined the scenario presented in *Brown v. City of Oneonta* as a proper instance of the use of race by the police in a description supplied by a victim[57]—a principle investigated in detail below.

The DOJ articulated a more lenient standard in its racial profiling guidelines, however, for the use of race in addressing national security concerns. The DOJ indicated that more general descriptions of suspects, in which race is a primary factor, are permissible in this realm.[58] According to the DOJ's reading of the law, if U.S. intelligence sources reported that terrorists from a particular ethnic group planned to hijack commercial airplanes for use as weapons at an airport in California in the next week, law enforcement could legitimately subject all men of that ethnic group to heightened scrutiny before permitting them to board commercial airplanes in California airports during the following week.[59] It is important that law enforcement are able to react quickly to threats of terrorism, but such general suspect descriptions could result in increased racial

51. *See id. See also* Milton Heumann & Lance Cassak, *Afterward: September 11th and Racial Profiling*, 54 RUTGERS L. REV. 283, 286 (2001).

52. Darren K. Carlson, *Racial Profiling Seen as Pervasive, Unjust*, Gallup Poll, July 20, 2004.

53. *See* GUIDANCE REGARDING THE USE OF RACE, *supra* note 2.

54. *Id.* at 5.

55. *Id.* at 1–2.

56. *Id.* at 5. Such a lead must be trustworthy, relevant to the locality or time frame of the crime, and tied to a specific criminal incident, scheme, or organization. *Id.*

57. *Id.* at 9.

58. For instance, though it still must comport with the Constitution, law enforcement handling matters of national security can dispense with specificity regarding a locale or a criminal scheme. *Id.*

59. GUIDANCE REGARDING THE USE OF RACE, *supra* note 2, at 10.

dragnets.[60] Such measures would impact many innocent passengers, who would be targeted solely because of their apparent race. Because increased use of dragnets could overtax police resources, general descriptions could also be impractical or even counterproductive to implement and could hinder the speed and effectiveness of police investigations.

Post-September 11 initiatives raise many constitutional concerns.[61] Indeed, litigators have challenged post-September 11 measures in federal court on a variety of legal theories.[62] As discussed previously, investigations, arrests, and searches based on very general, ill-defined characteristics may violate the Fourth Amendment's protections against unreasonable searches and seizures.[63] In addition, provisions that classify or allow classifications of individuals on the basis of race may be challenged under the Equal Protection Clause of the Fourteenth Amendment. Preventing terrorism and protecting national security may be legitimate and compelling government purposes for many law enforcement measures, but as commentators have pointed out, race-based measures may fail the narrow tailoring prong of the Clause's strict scrutiny test.[64] Because many state constitutions provide enhanced protections of individual liberties,[65] these measures may also be vulnerable to challenges in state courts.

C. *Case Study:* Brown v. City of Oneonta

Police activity surrounding the investigation of a burglary in Oneonta, New York in 1992 exemplifies the types of problems that can occur when the police use suspect descriptions based solely or primarily on race. In this case, a very general suspect description—of a young Black man who might have had a cut on his hand—resulted in a police dragnet that impacted over 200 non-white individuals.[66] The police also misapplied the suspect description on at least one

60. *See supra* Part I.A.

61. *See Panel Discussion*, *supra* note 45, at 1529 (statements of Congressman Barney Frank discussing the constitutional rights of immigrants); *see also* Liam Braber, Korematsu*'s Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 472–89 (2002) (discussing some of the Fourth and Fourteenth Amendment implications of post-September 11 national security measures).

62. For example, the Center for Constitutional Rights and other human rights groups challenged a section of the USA PATRIOT Act that prohibits providing "expert advice and assistance" to groups allegedly linked to terrorism as unconstitutionally vague. *Groups File Challenge to Patriot Act*, ASSOCIATED PRESS, Aug. 28, 2003. The Honorable Audrey B. Collins, in the U.S. District Court for the Central District of California, agreed with this argument, *see* Humanitarian Law Project v. John Ashcroft, 309 F. Supp. 2d 1185 (C.D. Cal. Jan. 22, 2004), *amended and superseded by* 309 F.Supp.2d 1185 (C.D. Cal. Mar 17, 2004), and became the first federal judge to strike down a portion of the Act. Eric Lichtblau, *Citing Free Speech, Judge Voids Part of Antiterror Act*, N.Y. TIMES, Jan. 27, 2004, at A16.

63. *See supra* Part I.A.

64. *See* Braber, *supra* note 61, at 483–89.

65. *See infra* pp. 44, 63.

66. Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000), *petition for rehearing denied* 235 F.3d 769 (2d. Cir. 2000), *cert. denied* 534 U.S. 816 (2001).

documented occasion, to an African American woman. *Brown v. City of Oneonta* therefore presents a useful case study for examining suspect descriptions and the issues that they raise.

The following facts are primarily culled from the case's court record. Sometime after midnight on September 4, 1992, a seventy-seven-year-old white woman was allegedly attacked in an unlit room during a burglary of the house of a friend that she had been visiting in Oneonta.[67] The woman informed the police that while she had not been able to see the assailant's face, she did see his lower forearm and concluded that he was a Black man.[68] She also said that she believed that the assailant was young because she had heard him run quickly across the room.[69] In addition, she stated that the assailant had carried a knife and had cut himself on his hand during the struggle with her.[70] The complaining witness reportedly was not able to provide any other identifying information about the alleged assailant.[71] A canine unit tracked the assailant's scent for several hundred yards, which the police said trailed off towards the campus of the State University of New York, College at Oneonta.[72]

The police issued a description of a young, Black male who possibly had a cut on his hand[73]—a prototypical example of a description in which race is the primary factor. The record did not include any discussion of why the complaining witness had only been able to provide these sparse details. Several factors may have contributed to the victim's inability to observe and remember the incident thoroughly, however, such as the lateness of the hour, the lack of lighting, and the brief and traumatic nature of the incident.[74]

Based on this general suspect description, the police proceeded to conduct a broad sweep of non-white individuals in Oneonta. First, state and city police officers obtained a list of the Black male students at the local college and tried to question each person.[75] When no suspect was located, the police stopped or questioned over 200 non-white people on the streets of Oneonta over the span of several days.[76] The official in charge of the investigation, State Police Investi-

67. Brief in Support of Petition for Writ of Certiorari to the United States Supreme Court at 4, Brown v. City of Oneonta, 235 F.3d 769 (2d Cir. 2000) (No. 98-9375) [hereinafter *Brown* Brief].

68. *Id.*

69. *Id.*

70. Brown v. City of Oneonta, 221 F.3d 329, 334 (2d Cir. 2000).

71. *See* Lynne Duke, *When Race is Equated With Crime*, WASH. POST, Oct. 21, 1992, at A3.

72. *Brown*, 221 F.3d at 334.

73. *See id.* at 337.

74. *See infra* Part II.A.1 for a discussion of factors that can contribute to a victim's inability to perceive and to remember a crime.

75. *Brown*, 221 F.3d at 334. Of the 7,500 students who attended the state university in Oneonta at the time of the incident, only 150 were Black. *Id.* A panel of the Second Circuit found that the state college officials, who were originally named as defendants, were entitled to qualified immunity from all challenges related to the release of the list. Brown v. City of Oneonta, 106 F.3d 1125, 1128 (2d Cir. 1997).

76. Brown v. City of Oneonta, 221 F.3d 329, 334 (2d Cir. 2000).

gator H. Karl Chandler, was quoted in the local paper during the investigation as acknowledging that "[w]e've tried to examine the hands of all black people in the community,"[77] who numbered only 300 in the 10,000-person city.[78] In a documented example of at least one police misapplication of a suspect description, the police approached a Black woman who only matched the race element of the suspect description.[79] Despite these actions, no suspect was ever found.[80]

The police activity in Oneonta created a national controversy.[81] Individuals who felt that their rights had been violated filed a federal class action suit against the State of New York and the City of Oneonta under federal and state laws, alleging multiple causes of action including unconstitutional searches and seizures, and equal protection violations.[82] The Second Circuit ultimately held that the Equal Protection Clause did not apply and that Fourth Amendment principles had been violated in only a handful of individuals' cases.[83] The litigants also filed a suit in state court, which so far has found violations of a Black female claimant's rights under both the equal protection and search and seizure provisions of the State Constitution,[84] and one Black male claimant's rights under the state search and seizure provision.[85]

II.
SUSPECT DESCRIPTIONS AND THE ROLE OF RACE

The incidents in Oneonta are representative of the practical issues that may arise in the creation and implementation of suspect descriptions in which race is a sole or primary factor. The complaining witness in Oneonta was only able to provide a brief report of the alleged crime and a general description of the alleged perpetrator, which was likely due in part to the circumstances of the incident. Despite the generality of the complainant's description of the suspect, the

77. Jim Mulvaney, *College Dragnet for Black Blasted*, N.Y. NEWSDAY, Sept. 12, 1992, at 5.

78. *Brown*, 221 F.3d at 334.

79. *See Brown*, 221 F.3d at 338–39 (noting that although insufficient to substantiate an equal protection claim, allegation that one woman was stopped "is significant because it may indicate that [police] considered race more strongly than other parts of the victim's description"). As the federal district court noted, it was also undisputed that law enforcement officials questioned and stopped some Black males who did not have cuts on their hands. Brown v. City of Oneonta, 911 F. Supp. 580, 590 n.4. (N.D.N.Y. 1996), *vacated in part by* 221 F.3d 329 (2d Cir. 2000).

80. *Brown*, 221 F.3d at 334.

81. *See, e.g.*, Duke, *supra* note 71; Diana Jean Schemo, *Singling Out Blacks Where Few Are to Be Found*, N.Y. TIMES, Oct. 20, 1992, at B1; 60 Minutes II: *The Black List* (CBS television broadcast Feb. 13, 2002), *available at* http://www.cbsnews.com/stories/2002/02/13/60II/main329278.shtml (last visited Oct. 7, 2006).

82. *See Brown*, 221 F.3d at 334–35. This suit was ultimately settled.

83. *See Brown*, 221 F.3d at 334.

84. Brown v. State, 814 N.Y.S.2d 492, 506 (Ct. Cl. 2006).

85. *Id.* at 503, 507. A decision regarding damages is pending before the Court of Claims, after which the litigants may file an appeal.

police used it to conduct a broad canvass of the non-white community in Oneonta. As a precursor to discussing the legal problems police actions like those in Oneonta raise, this section will examine the creation and application of suspect descriptions from a social science perspective. What considerations should properly inform police activity in circumstances like those in Oneonta?

Few authors have examined the nature of suspect descriptions and the appropriate role of race in their creation and implementation by the police. A brief review of the existing social science perspectives on witness perception and memory of crime, police interviewing techniques of witnesses, and the role of race, however, sheds light on some of the pragmatic issues, policy concerns, and consequent legal challenges that may arise.[86] At least two themes emerge in this review. First, a wide range of factors influences an eyewitness's or victim's description of a suspect and the development and implementation of that description by the police. Second, a suspect description is created through the partnership of private and public parties. The underlying attitudes towards race held by both parties can and do influence the resulting suspect description.

A. Background: Suspect Descriptions

Researchers have found that a suspect description is essential to solving any crime:

> The single most important determinant of whether or not a case will be solved is the information the victim supplies to the immediately responding patrol officer. If information that uniquely identifies the perpetrator is not presented at the time the crime is reported[,] the perpetrator, by and large[,] will not be subsequently identified.[87]

Detectives will likely not proceed with an investigation unless they are fairly certain that the perpetrator can be identified.[88]

Typically, at the beginning of an investigation, a witness who was a victim or bystander during a crime will recount to the police her observations of the perpetrator.[89] The witness may relate this description on several occasions, most

86. This section is intended to discuss social science literature that is relevant and helpful to the topic of police use of suspect descriptions that include race, and should not be read as an exhaustive review of the field.

87. Wesley G. Skogan & George E. Antunes, *Information, Apprehension, and Deterrence: Exploring the Limits of Police Productivity*, *in* WHAT WORKS IN POLICING 108, 114–15 (David H. Bayley ed., 1998) (quoting P.W. GREENWOOD, ET AL., OBSERVATIONS AND ANALYSIS ix (1975)).

88. *See* David H. Bayley, *Police for the Future*, *in* CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS 19, 23 (Christopher Slobogin ed., 2002) (noting possible exception if external public pressure to proceed exists).

89. *See* Brian R. Clifford & Graham Davies, *Procedures for Obtaining Identification Evidence* [hereinafter Clifford & Davies, *Obtaining Identification Evidence*], *in* PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE 47, 48 (David C. Raskin ed., 1989) [hereinafter PSYCHOLOGICAL METHODS].

likely to an officer who first responds to an emergency call, and then possibly later and in greater detail to a follow-up investigator.[90] The police, in turn, decide if the description is complete, accurate, and reliable enough to pursue.[91] Applying the suspect profile, the police then attempt to locate the suspect or groups of suspects for further identification procedures and possible arrest.[92]

A useful suspect description is one that is complete, accurate, and reliable.[93] Several factors can impede the creation of a useful suspect description, including the circumstances of the crime, the specific characteristics and capabilities of the witness, and the efficacy of the police interviewer.

1. The crime and the witness

Many factors during a crime can prevent a witness from properly observing and remembering the experience. There may be poor or nonexistent lighting,[94] the event may have occurred very quickly,[95] or violence may have rendered the incident difficult to perceive and to remember.[96] Other factors relevant to a witness's ability to perceive and to remember include her stress level,[97] age,[98] and bias.[99] A witness also may not be able to fully perceive a perpetrator if a weapon is present or if she is the victim of the crime.[100] She may not recognize or predict her own inability to perceive or to remember.[101] Finally, a witness

90. *See* NAT'L INST. OF JUSTICE, U.S. DEP'T. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 13–16, 21–25 (1999) [hereinafter EYEWITNESS EVIDENCE GUIDE].

91. *See* Ronald P. Fisher, R. Edward Geiselman & David S. Raymond, *Critical Analysis of Police Interview Techniques*, 15 J. POLICE SCI. & ADMIN. 177, 177 (1987). *See also* Telephone Interview with James J. Fyfe, Deputy Comm'r for Training, N.Y.C. Police Dep't (Feb. 21, 2003) [hereinafter Fyfe Interview].

92. *See generally* Clifford & Davies, *Obtaining Identification Evidence*, *supra* note 89, at 61–87; EYEWITNESS EVIDENCE GUIDE, *supra* note 90, at 27–38.

93. *See* Fisher, Geiselman & Raymond, *supra* note 91, at 177.

94. Elizabeth F. Loftus, Edith L. Greene & James M. Doyle, *The Psychology of Eyewitness Testimony*, *in* PSYCHOLOGICAL METHODS, *supra* note 89, at 3, 6–7.

95. *Id.* at 8–9.

96. *Id.* at 11–13.

97. *Id.* at 13–16, 17–18.

98. *Id.* at 19–21.

99. *Id.* at 18–19.

100. *See* Loftus, Greene & Doyle, *supra* note 94, at 16–17. An additional factor that may obfuscate witnesses' perception or memory is their inability to accurately identify individuals of races different from them. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 937–43 (1984). Problems with cross-racial identification might result in a witness correctly perceiving the race of a perpetrator but incorrectly determining the actual suspect. *See* Banks, *Race-Based Suspect Selection*, *supra* note 5, at 1103 n.110.

101. In one study, people were shown images of an assault and implied rape in varying light conditions—daylight, start of twilight, end of twilight, and nighttime. The nighttime viewers exhibited the highest discrepancy between their actual and self-assessed accuracy and completeness of recall. While they were able to recall merely 0.06%of the assailant's traits, they estimated that they were 74% accurate and 65% complete in their witnessing ability. Loftus, Greene & Doyle, *supra* note 94, at 7 (citing A.D. Yarmey, *Verbal, Visual, and Voice Identification*

may not be able to convey effectively to an interviewer her perceptions due to fear, anxiety, or limitations on verbal skills.[102]

2. The police

Police interview methods are crucial to the creation of suspect descriptions. Though many individual police departments have generated policies governing the procedures to be followed in gathering information from witnesses, a national best practices and procedures recommendation that integrated modern social science research was not issued until 1999.[103] In one 1987 study of witness interviews at a county police department, researchers found that there was very little uniformity in the interview structure.[104] The researchers speculated that this disparity exists in part because of a lack of formal training about witness interviewing techniques and about problems with memory that impact witnesses' abilities to provide information.[105] Later studies found that, in fact, no more than 2 percent of law enforcement had received formal training on how to interact with civilians, even though this often constituted a primary expenditure of their time (up to eighty-five percent).[106] In particular, the researchers in the 1987 study found that interviewers were likely to interrupt witnesses too often, use frequent and close-ended questions, and sequence their questions in ways that hindered witnesses' recollections.[107]

The researchers offered suggestions for modifications of police interviewing methods, based primarily on what they termed "cognitive interviewing."[108] The cognitive interview is based on social science principles regarding the memory and cognition of witnesses.[109] Applying the right interviewing techniques, the researchers posited, is crucial in assisting witnesses to fully retrieve information from their memories.[110] They suggested interviewing techniques to incorporate questions responsive to witnesses' mental representations of crimes and perpe-

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of a Rape Suspect Under Different Levels of Illumination, 71 J. APPLIED PSYCH. 363, 363–70 (1986)).

102. Fisher, Geiselman & Raymond, *supra* note 91, at 183.

103. *See* EYEWITNESS EVIDENCE GUIDE, *supra* note 90, at 1.

104. *See* Fisher, Geiselman & Raymond, *supra* note 91, at 178.

105. *Id.*

106. *See* R. Edward Geiselman & Ronald P. Fisher, *Ten Years of Cognitive Interviewing*, *in* INTERSECTIONS IN BASIC AND APPLIED MEMORY RESEARCH 291, 291 (David G. Payne & Frederick G. Conrad eds., 1997).

107. *See* Fisher, Geiselman & Raymond, *supra* note 91, at 180–82. For example, they found that many of the interviewers asked questions in the same order for each witness. *Id.* at 181. Some interviewers could not explain why they did this, while others stated that they were taught the sequence at the police academy so that they could elicit information compatible to a police report. *Id.* Other common issues included the use of leading questions, suggestive words, and jargon, as well as interviewers' judgments of the witnesses and underutilization of leads provided by the witnesses. *Id.* at 182–83.

108. *Id.* at 177.

109. *Id.*

110. *See id.* at 179.

trators, encourage narrative answers, follow up on interpretative comments, and individualize communications to particular witnesses.[111] In sum, the researchers recommended that formal training on interviewing witnesses that reflected advances in science on memory and cognition should be institutionalized for both police officers and experienced investigators.[112]

a. Department of Justice guidelines for witness interviews

Responding in part to the problem of lack of uniformity of interviewing procedures, as well as increasing revelations of mistaken eyewitness identifications resulting in erroneous convictions, in 1999 the Department of Justice (DOJ) issued a guide for recommended uniform practices for the collection and preservation of witness evidence.[113] This guide, which includes cognitive interviewing techniques, provides recommendations for all phases of police investigation.[114] When interviewing witnesses, the guide recommends that the interviewer use open-ended questions ("what can you tell me about the car?") followed by close-ended questions ("what color was the car?"), but avoid leading questions ("was the car red?").[115] It also recommends that interviewers ask clarifying questions and document the information in a written report.[116] In addition to cautioning the witness not to guess, encouraging nonverbal communication, and avoiding interruptions, the guide suggests asking witnesses to "mentally recreate the circumstances of the event," including any emotions they were feeling at the time, in order to elicit as many details as possible.[117]

The guide explicitly recommends that interviewers carefully assess the accuracy of each element of a witness's statement.[118] Doing so will avoid the fallacy that the accuracy of an individual component of the description predicts the accuracy of any other component.[119] The guide recommends that interviewers search for inconsistencies within the witness's statement, as well as among the evidence as a whole.[120]

The guide has received positive reviews, though commentators have recognized that it is perhaps only a first step toward implementing uniform procedures.[121] Additional strategies to increase the effectiveness of interviewing

111. *Id.* at 184.

112. *Id.* at 185.

113. *See* EYEWITNESS EVIDENCE GUIDE, *supra* note 90, at iii, 1.

114. *Id.* at 11–38. The guide discusses procedures for the initial reports of crimes to 911 operators, preliminary interviews by investigators, use of mug books and composite images, follow-up interviews, field identifications, and lineup procedures. *Id.*

115. *Id.* at 15.

116. *Id.*

117. *Id.* at 23.

118. *Id.* at 24–25.

119. EYEWITNESS EVIDENCE GUIDE, *supra* note 90, at 25.

120. *Id.*

121. *See, e.g.*, Donald P. Judges, *Two Cheers for the Department of Justice's* Eyewitness

techniques could also include structural reforms such as implementing formalized training for interviewing skills, and perhaps more recruitment and assignment of interviewers.[122]

b. Applying suspect descriptions

Once a police officer has a complete, accurate, and reliable suspect description, she can apply it in the field. The more detailed the description, the easier it becomes for the officer to implement the search. If a description is a more general one, the officer must evaluate other factors before deciding to apply the description.[123] For instance, one training officer believed that proximity of time and place—if the crime happened just minutes ago and the officer happened to be in the vicinity of the reported incident—might weigh in favor of applying a more general description.[124]

The police officer can broadcast the description and begin a search.[125] Once the officer locates someone who possibly fits the description, she can perform a prompt show-up with the witness.[126] If a suspect is not immediately apprehended, the officer can ask witnesses to examine past arrest photos for possible matches.[127] Composite images of a suspect can also be developed.[128] If these techniques produce a match, the police can utilize lineup procedures.[129] The police may also corroborate a suspect description through additional investigation and discussions with supplementary witnesses.[130]

B. The Role of Race in Suspect Descriptions

Race can play a primary role in suspect descriptions and can affect their creation and implementation in important ways.[131] Witnesses' underlying atti-

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Evidence: A Guide for Law Enforcement, 53 ARK. L. REV. 231, 236–39 (2000).

122. *Id.* (noting the reasons for giving the guide "two cheers" instead of "three cheers").

123. Fyfe Interview, *supra* note 91.

124. *Id.*

125. *See* Videotape: "Description as Follows": Eyewitness Identification Procedures (N.Y.C.P.D. Legal Bureau Constitutional Law Film Series 1985) (on file with the N.Y.C.P.D. Training Dep't) [hereinafter "Description as Follows"]; EYEWITNESS EVIDENCE GUIDE, *supra* note 90, at 14–15.

126. "Description as Follows", *supra* note 125; *see also* EYEWITNESS EVIDENCE GUIDE, *supra* note 90, at 27 (cautioning that "the inherent suggestiveness of a show-up requires careful use of procedural safeguards").

127. "Description as Follows", *supra* note 125; EYEWITNESS EVIDENCE GUIDE, *supra* note 90, at 17–18.

128. EYEWITNESS EVIDENCE GUIDE, *supra* note 90, at 18–19.

129. "Description as Follows", *supra* note 125; EYEWITNESS EVIDENCE GUIDE, *supra* note 90, at 29–38.

130. *See* "Description as Follows", *supra* note 125.

131. *See, e.g.*, Banks, *Race-Based Suspect Selection*, *supra* note 5, at 1112 (observing that "race[,] rather than physical features . . . predominates in the development and use of suspect descriptions").

tudes about race can impact their perceptions of crimes and the alleged perpetrators. Their attitudes can also affect their memories and their motivations to report crimes. The police, individually or collectively, may also possess race-based attitudes that affect their approach to crimes, suspects, and victims.

1. The witnesses

a. Underlying attitudes towards race

White witnesses to alleged crimes involving suspects of color may possess a variety of underlying attitudes towards race. Generally, studies have shown a dramatic decrease in overtly racist attitudes held by white Americans.[132] Studies also demonstrate that subtle racism still exists among many white individuals, however, especially against African Americans.[133] Whether the presence of subtle racism indicates an actual decline in racial animosity, or merely the decreased social acceptance of overt racism, is unclear.[134] In particular, studies indicate that white witnesses may associate "blackness" with criminality.[135] Studies have shown that white individuals may also view African Americans as militant, violent, criminal, and hostile.[136] In tests of implicit associations made by a range of test-takers, many individuals' results demonstrate that they possess racial biases even though these beliefs may be subconscious.[137] Over two-thirds of non-Arab, non-Muslim test-takers, for example, showed biases against Arab Muslims in these tests.[138]

b. Perception, memory, and motivation

A landmark study regarding perception and memory demonstrates the strong influence of race on witnesses.[139] White subjects were instructed to look at pictures of an African American man and a white man who appeared to be

132. *See, e.g.*, Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination, in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 359 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998). From the 1950s to the 1980s, for example, white Americans willing to vote for an African American presidential candidate increased from 37% to 81%, and those rejecting laws against interracial marriage rose from 38% to 66%. *Id.*

133. *Id.* (discussing studies in which white individuals provided less help, were more aggressive in sanctioned aggression scenarios, and subtly indicated negative feelings toward African Americans).

134. *Id.*

135. *Id.* at 379. *See also* CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR vii (1993) (discussing association of criminality with different subgroups of people of color).

136. Fiske, *supra* note 132, at 379.

137. Shankar Vedantam, *See No Bias*, WASH. POST MAGAZINE, Jan. 23, 2005, at 15 (discussing Implicit Association Test developed by scientists Brian Nosek, Mahzarin Banaji, and Tony Greenwald).

138. *Id.*

139. *See* Loftus, Greene & Doyle, *supra* note 94, at 18.

arguing, in which the white man was holding a razor.[140] The subject was asked to describe the scene to a second person, who then related that description to another person, and so on.[141] Researchers discovered that in the successive descriptions, the razor often migrated from the hand of the white man to that of the African American man.[142] They concluded that this result was due to cultural biases or stereotypes of African Americans as being more prone to criminality and violence.[143]

Studies have suggested that White individuals may also characterize similar behavior differently for a White actor versus an African American actor.[144] For instance, a "belligerent attempt" to establish contact with a White woman who is a stranger might be deemed an attempted rape if the person trying to make contact is African American, whereas the action might be interpreted as less threatening if that person were not African American.[145]

In addition, victims tend to mischaracterize or to overestimate the number of incidents with African Americans in crime victimization surveys. Records in Portland, Oregon revealed only a thirty-four percent agreement rate between the racial characteristics of suspects recorded in police data and those reported to researchers in subsequent surveys about crime.[146] The victims also estimated a greater number of incidents involving African American suspects than did the police.[147] The researcher suggested that such inaccuracies in crime victimization surveys might be examples of victims "project[ing] racial bias or prejudice into their perception of who committed the crime."[148]

Witnesses or victims may also inject their racial attitudes or biases into police reports via deliberate and malicious misreporting. As Professor Katheryn Russell has reported, some individuals have falsely reported crimes implicating people of color, often employing sparse suspect descriptions.[149] The unfortunate occurrence of "racial hoaxes" further reinforces the importance of assessing the credibility of witnesses' information at all stages in a criminal investigation.[150]

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140. *Id.*

141. *Id.*

142. *Id.* at 18–19.

143. *See id.* at 19.

144. *See, e.g.*, MANN, *supra* note 135, at 33.

145. *Id.*

146. *Id.* at 33–34.

147. *Id.* at 34.

148. *Id.*

149. KATHERYN K. RUSSELL, COLOR OF CRIME 69 (1998).

150. Professor Russell notes that historically, the most common form of racial hoax was the false accusation of rape made by a white woman against an African American man. *Id.* at 79. Her study of racial hoaxes found that of sixty hoaxes, seventy percent were perpetrated by white individuals alleging a crime committed by an African American person. *Id.* at 76. In these instances, assault, rape, and murder were the most frequent fabrications. *Id.* Many of the cases Russell studied involved sparse suspect descriptions. For example, in the case of Carol Stuart, who was murdered in Boston in 1989, her white husband reported only that an African American man wearing a jogging suit had shot and killed her. When the police focused instead on the husband as

2. The police

a. Underlying attitudes towards race

Police officers, as individuals, may have the same underlying attitudes towards race as civilians. They may also possess attitudes regarding race that are unique to law enforcement.

Studies have attempted to examine the attitudes of the police towards race and criminality. The 1991 *Christopher Commission Report*[151] noted that twenty-five percent of Los Angeles Police Department officers said they believed other officers' racial bias resulted in negative interactions with community members.[152] The racial composition of a police force may be associated with racial differences of suspects who are arrested.[153] Scholars have also observed that the police may hold expectations of criminality based on race.[154]

The ample literature on the issue of alleged racial profiling practices reveals incidences in which the police appear to have used race as a proxy for criminality. In New Jersey, the State Attorney General issued a report recognizing that state troopers' illegal reliance on race in conducting traffic stops was "real, not imagined."[155] Rigorous studies in New Jersey and Maryland demonstrated that state police were disproportionately stopping African American motorists on certain roads.[156] Further, one study in Michigan found that the police conducted surveillance upon African American drivers at a greater rate than white motorists through "runs" of license plates.[157] This practice occurred most frequently in neighborhoods that were predominantly white.[158] Regardless of whether racial profiling is a widespread reality, the disproportionate impact of the criminal justice system on people of color is clear.

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a primary suspect, he committed suicide. *Id.* at 70.

151. Independent Comm'n, L.A. Police Dep't, *Racism and Bias Affecting the Use of Excessive Force*, in REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 67, 69 (1991), *available at* http://www.parc.info/reports/pdf/chistophercommision.pdf.

152. *Id.*; *see also* RUSSELL, *supra* note 149, at 37–38.

153. John J. Donohue III & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367, 371 (2001).

154. *See, e.g.*, Arthur H. Garrison, *Disproportionate Minority Arrests: A Note on What Has Been Said and How it Fits Together*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 53–54 (1997) (reviewing studies); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L. J. 214, 236–39 (1983).

155. DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 59 (2002) [hereinafter HARRIS, PROFILES IN INJUSTICE].

156. David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 277–81 (1999) [hereinafter Harris, *Stories*] (discussing application of studies' findings in *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) and in lawsuit against Maryland State Police).

157. HARRIS, PROFILES IN INJUSTICE, supra note 155, at 70.

158. *Id. See also* Sandra Bass, *Out of Place: Petit Apartheid and the Police*, in PETIT APARTHEID, *supra* note 40, at 43, 46 (discussing relationship between policing and residential racial segregation).

A 1995 study found, for instance, that almost one–in-three African American men between the ages of 20 and 29 was in prison, in jail, on probation, or on parole.[159]

b. Interviewing witnesses and applying suspect descriptions

Once a private actor has reported a crime, race may continue to play a role in the ensuing police investigation. During the initial interview with a witness about a crime, individual or police-wide attitudes may influence data gathering. In the 1987 analysis of police interview techniques, researchers noted that an officer should refrain from using suggestive or nonneutral words when interviewing a witness.[160] For example, they observed that one interviewing officer asked a witness regarding a suspect, "Was he darkly complected?"[161] The researchers cautioned that this sort of leading question could bias the witness's recollection, and suggested asking instead, "Can you describe his complexion?"[162]

The police have been shown to respond differently depending on the race of a crime victim. One study noted that "the tendency to arrest minorities more than non-minority offenders is exacerbated when the victim is white."[163] Another study determined that police are more likely to make arrests in incidents involving white complainants than in incidents involving black complainants, and described the phenomenon as an "invisible form of police discrimination."[164] The researchers suggested that the police may view complainants of color as "less deserving of legal protection," or may simply be less sympathetic towards people of color.[165]

A police department's response may be linked to public or political pressures, which in turn could be influenced by race. For example, a claim by Susan Smith, a white woman, that an African American man had kidnapped and murdered her children generated extensive media coverage, and the police conducted a full-scale, week-long manhunt for the suspect.[166] In contrast, the case of Darlie Routier, an African American woman who claimed that a white man had murdered her two children in her home, elicited very little media coverage and only moderate police response.[167]

159. MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (1995) (report summary), *available at* http://www.sentencingproject.org/pdfs/9070smy.pdf.

160. Fisher, Geiselman & Raymond, *supra* note 91, at 182.

161. *Id.*

162. *Id.*

163. MANN, *supra* note 135, at 34.

164. *Id.* at 145.

165. *Id.*

166. RUSSELL, *supra* note 149, at 69.

167. *Id.* at 82.

How the police use a suspect description during their investigation may also be affected by the racial composition of the community. If a description is of an African American man in a community where African Americans comprise the minority, as in Oneonta, the policy may—rationally or irrationally—deem a general suspect description as more likely to be effective in their investigation because there will be fewer African Americans to stop than in a community where African Americans are the vast majority.[168] The social consequences of employing such police actions can be profound, however, because the minority community would understandably feel overburdened by increased police scrutiny. Such activity may also raise legal challenges on equal protection grounds because of its disparate impact on a particular racial group.[169]

Regardless of the legitimacy of employing general suspect descriptions against people of color, it does not appear to be generally accepted police practice to misapply a suspect profile by focusing on race to the exclusion of all other descriptive elements. Some elements of a description, such as hairstyle or clothing, might be easily changed by a suspect, and may justify a limited degree of flexibility in applying a description. Gender can be concealed or initially difficult to determine, but detaining and questioning a woman when looking for a man, as occurred in Oneonta,[170] was probably beyond the range of ordinary police license with suspect descriptions.

3. Policy considerations regarding police use of race in suspect descriptions

As we have seen, there are many circumstances in which a witness may only be able to provide the most rudimentary description of a suspect. The briefness of the encounter, poor lighting, the trauma of the encounter, as well as the age, race, and perspective of the witness, can contribute to the quality and detail of the description a witness gives to the police. A witness's racial bias may also contribute to her recollection of a perpetrator. The police play an important role in eliciting, developing, and applying a suspect description. They may lack the interviewing skills to properly gather detailed evidence regarding a suspect and may apply the description differently according to race, however. Factors such as these could have contributed to the creation and implementation of the suspect description in Oneonta.

Should the police act on a suspect description in which race is a sole or primary factor, however? The police can, after all, decline to proceed with a description if it will not be fruitful or will lead to discriminatory behavior. First, a poor suspect description may be a sign of an underdeveloped or inadequate investigation. As discussed earlier, techniques do exist to attempt to elicit and

168. *See, e.g.*, Brown v. City of Oneonta, 221 F.3d 329, 338 (2d Cir. 2000).

169. *Id.* at 338–39.

170. *See id.* at 341. Sheryl Champen alleged that an officer approached her at a bus station and told her that she could not board a bus until she produced identification. *Id.*

develop the most complete, accurate, and reliable descriptions possible.[171] Supplementary questioning of other witnesses or further investigation of the physical evidence may be necessary. In addition, the social science literature reveals the critical function of the police in the process of gathering and implementing a suspect description. Deciding to exercise discretion to *decline* to apply an overly general description acknowledges the powerful role of the police, and the concomitant responsibility they bear to act effectively and fairly.

Moreover, a central consideration should be the possibility that civilians' and police's potential biases could be expressed through overly general descriptions because they provide the police an enormous degree of unguided discretion. The fewer elements there are in any description, the fewer objective factors there are to direct a police officer in his or her investigation. The officer then has enhanced powers to make arbitrary decisions about whom to stop, and opportunities to act upon or to amplify prejudices. As a result, a suspect description in which race is a sole or primary factor may permit racially discriminatory policing.

The widespread use of race-based suspect descriptions can also result in costs from the law enforcement perspective. Reliance on a general suspect description is inefficient. Approaching and questioning a broad set of individuals is a slow process that diverts police resources. It is also likely not useful; in Oneonta, for example, no perpetrator was ever apprehended. Such activity may also be found to be insufficiently based on reasonable suspicion or probable cause, creating a risk that a stop or arrest will be invalidated by the courts.[172]

In addition, the use of suspect descriptions in which race is a sole or primary factor may jeopardize relationships between police departments and communities of color. By definition, the use of general suspect descriptions will result in interactions with many innocent individuals of color. Their use can confirm the views of many people of color that the criminal justice system is racially biased.[173] Particularly if people of color are in the minority in a given community, police activity motivated by race can also create the impression that it is being used as a tool of racial oppression.[174] While police-community relations have always been an important part of crime prevention, police goodwill with all communities is vital for gathering concrete intelligence in the post-September 11 era.[175] Thus, endangering police-community relations can only make modern policing more difficult.

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171. *See supra* Part II.A.2.

172. *See* discussion *infra* Part III.A.1.

173. *See, e.g.*, HARRIS, PROFILES IN INJUSTICE, *supra* note 155, at 117.

174. *Id.* at 102 (giving as an example an African American sales executive living in an upscale "white" neighborhood who, after repeatedly encountering police hostility, eventually moved).

175. *See, e.g.*, Harris, *supra* note 2, at 928–34.

In light of the social science literature and policy concerns, the creation and application of suspect descriptions in which race is a sole or primary factor require great caution. In large part because of concerns over unconstrained police discretion like those presented by general suspect descriptions, the courts have recognized the need to develop constitutional protections against unregulated police powers. Racially discriminatory policing also implicates constitutional doctrines, though race-based suspect descriptions perhaps present novel issues for the courts.

III.
LEGAL CHALLENGES

In Oneonta, a suspect description that relied chiefly on race led to a race-based police sweep of the non-white community. As discussed in the preceding section, police use of a suspect description that relies solely or primarily on race raises many critical social science and policy concerns. From a legal standpoint, however, the over 200 people who were investigated by the police, including one woman, discovered that very few of their experiences implicated federal constitutional protections.

In Part III.A., I first address federal constitutional protections against searches and seizures. I discuss the problems raised by unconstrained police discretion, and in particular, its impact on communities of color. While the potential for racially discriminatory policing has so far not been explicit in Fourth Amendment jurisprudence, courts should consider this problem because race and police powers are linked. I recommend that plaintiffs seized by the police within the meaning of the Fourth Amendment based on a general suspect description should first challenge its sufficiency.[176] I also discuss state protections against searches and seizures, which may apply to a broader spectrum of police conduct than federal protections.

In Part III.B., I explore Fourteenth Amendment equal protection guarantees and their application to racially discriminatory policing. The Supreme Court has indicated the Equal Protection Clause is the appropriate tool to ferret out discriminatory policing, but the use of this doctrine for this purpose has so far remained underdeveloped. Especially for litigants who have not triggered Fourth Amendment protections, this jurisprudential underdevelopment results in a lack of effective legal rights. In Oneonta, the Second Circuit declined to apply equal protection because it found the litigants had not established police use of an express racial classification or evidence of discriminatory intent. This section examines that result to suggest that equal protection should apply, and observes

176. For example, the Second Circuit permitted individuals seized in Oneonta to proceed with their claims because it determined that the suspect description in the case provided insufficient justification for police action. *See* Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000). *See also infra* discussion Parts III.A.1.d, III.A.2.b.

that state courts, like those in New York, may have the ability to use equal protection principles under state law.

A. Constitutional Protections against Searches and Seizures

1. Federal protections against searches and seizures

The Fourth Amendment provides protections to individuals from unreasonable intrusions by the state.[177] Three levels of police conduct in criminal investigations have been established by Fourth Amendment jurisprudence on searches and seizures: arrests, stops, and encounters. The text of the Fourth Amendment indicates that the police must possess probable cause in order to perform an arrest.[178] Generally speaking, an arrest occurs if "a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest."[179] The reasonable person standard is an objective one.[180] Similarly, the subjective intent of a police officer is not considered in assessing whether a seizure occurred.[181] "Probable cause" has been defined broadly. For example, the United States Supreme Court has stated that "probable cause . . . exists where the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[182] The Court has also created a lesser level of police seizure, or a "stop." A stop occurs when, due to police actions, and taking into consideration all circumstances surrounding the incident, a reasonable person would have believed that she was not free to leave.[183] As the Court recognized in *Terry v. Ohio*,[184] stops may be justified when the police possess mere reasonable suspicion, not probable cause, that "criminal activity may be afoot."[185]

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177. "The right 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." U.S. CONST. amend. IV.

178. U.S. CONST. amend. IV.

179. United States v. Corral-Franco, 848 F.2d 536, 540 (5th Cir. 1988) (internal quotation marks omitted). The court specifically applied this definition to situations in which a suspect is not formally arrested. *Id.*

180. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(a) at 5–6 (4th ed. 2004) [hereinafter LAFAVE].

181. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).

182. *See, e.g.*, Ker v. California, 374 U.S. 23, 35 (1963) (alterations in original) (internal quotation marks and citations omitted).

183. *See Mendenhall*, 446 U.S. at 553–54.

184. 392 U.S. 1 (1968).

185. *Id.* at 30.

Police conduct that does not rise to the level of a stop or arrest, however, 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 actions such as requests for identification and questioning.[186]

In the event a stop does occur, the following part discusses federal protections against searches and seizures available to litigants. If there is no stop, plaintiffs may also consider claims under state laws that protect against searches and seizures.

a. Police discretion and federal protections against searches and seizures

A "paramount purpose" of the Fourth Amendment is to prohibit arbitrary and unjustified searches and seizures by the police.[187] In cases like *Delaware v. Prouse*,[188] the Supreme Court has acknowledged the dangers of unconstrained police discretion. In *Prouse*, a police officer stopped a motorist, not because of any traffic violation or suspicious activity, but simply to spot-check the driver's license and registration.[189] The officer did not conduct this random spot check pursuant to any police department or state standards, guidelines, or procedures.[190] Finding that the motor vehicle stop constituted a seizure,[191] the Court proceeded to balance the interests of the State of Delaware against the intrusions on the motorist's Fourth Amendment protections.[192] The State asserted that a practice of discretionary spot checks promoted its interest in ensuring the safety of its roads.[193] The Court found that the suspicionless spot checks only marginally contributed to roadway safety.[194] In contrast, every driver's travel and privacy could be interrupted by a seizure "at the unbridled discretion" of police officers, which would invite arbitrary intrusions based at most on "inarticulate hunches."[195] In administering these spot checks, nothing would legitimately guide an officer in choosing to stop one motorist over any other on the road.[196] The Court declared that "[t]his kind of standardless and unconstrained discretion is the evil" that it had previously identified in regulating

186. *See, e.g.*, INS v. Delgado, 466 U.S. 210, 216–17 (1984).

187. 1 LAFAVE, *supra* note 180, § 1.4(e), at 130 & n.63 (citing Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417 (1974)).

188. 440 U.S. 648 (1979).

189. *Id.* at 650.

190. *Id.*

191. *Id.* at 653.

192. *Id.* at 654.

193. *Prouse*, 440 U.S. at 655.

194. *Id.* at 659–61 (identifying existence of alternate means, ineffectiveness, and lack of deterrence of spot checks, among other factors).

195. *Id.* at 661, 663 (internal quotation marks omitted).

196. *Id.* at 661.

police powers in the field.[197] Cautioning against the specter of the "grave danger of abuse of discretion,"[198] the Court held that the discretionary spot checks violated the drivers' Fourth Amendment rights.[199]

Highlighting the limits of acceptable police discretion, the Court has contrasted the problematic discretionary spot checks in *Prouse* with the more neutral, though suspicionless, checkpoints in cases like *Michigan Department of State Police v. Sitz*.[200] In *Sitz*, motorists challenged sobriety checkpoints in which the police stopped all drivers, without individualized reasonable suspicion or probable cause, and briefly examined them for signs of driving under the influence of alcohol.[201] A checkpoint advisory committee had created guidelines regarding the selection and administration of the checkpoints.[202] Unlike in *Prouse*, the officers who staffed the checkpoints in *Sitz* did not choose whom to stop.[203] Instead, the checkpoints were selected according to predetermined guidelines, and the officers stopped every approaching automobile.[204] Thus, there existed little opportunity for standardless and unconstrained exercise of discretion by law enforcement. Applying a balancing test, the Court ultimately upheld the state's use of the checkpoints because the state's interest in preventing drunk driving, and the extent to which the checkpoints could reasonably be said to advance that interest, outweighed the intrusions on the motorists.[205]

b. Race and federal protections against searches and seizures

Commentators have argued that race should be part of Fourth Amendment doctrine because it was historically a consideration in the development of criminal procedure law. Though there are not explicit references to race in the limited legislative materials surrounding the enactment of the Fourth Amendment, or of the Fifth and Sixth Amendments, scholars have observed that the development of criminal procedure law as a whole may be considered a form of civil rights law. According to Professor William Stuntz, "[t]he post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones."[206] Commentators further recognize the long shadow cast by the

197. *See id.*

198. Delaware v. Prouse, 440 U.S. 648, 662 (1979) (internal quotation marks omitted).

199. *Id.* at 663.

200. 496 U.S. 444 (1990). *See also, e.g.*, Illinois v. Lidster, 540 U.S. 419 (2004) (upholding highway checkpoint to seek information on fatal hit-and-run accident committed one week before).

201. *See Sitz*, 496 U.S. at 447.

202. *Id.*

203. *See id.* at 454.

204. *Id.* at 453.

205. *Id.* at 455.

206. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997). Professor Charles Ogletree has been cited for the proposition that much of the Warren Court's "criminal procedure reform more properly should be understood

historical intersection of criminal law and racism in America on any considerations of law enforcement authority.[207] This historical backdrop lends further support to the principle that race *should* be a part of Fourth Amendment jurisprudence.

While the Supreme Court has recognized race as one legitimate factor, among others, contributing to police actions,[208] it has also acknowledged the impact of unconstrained police discretion on communities of color.[209] The Court in *Terry v. Ohio*,[210] for example, observed in its discussion of stops based on reasonable suspicion and the exclusionary rule that there existed "[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly [African Americans], frequently complain[.]"[211] The *Terry* Court also discussed the finding of the President's Commission on Law Enforcement and Administration of Justice that "'[i]n many communities, field interrogations are a major source of friction between the police and minority groups.'"[212] The Court further recognized that there might be situations in which the police stop and frisk youth or people of color in order to maintain an image of power, which would further exacerbate police-community tensions.[213] Professor Anthony Thompson notes that this short discussion of race in *Terry* was likely influenced by a brief filed by NAACP Legal Defense

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as constituting a branch of race law." Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2245 (1993) (citing Charles Ogletree, Lecture at the American Association of Law Schools Annual Meeting (Jan. 1990)).

207. *See, e.g.*, MANN, *supra* note 135, at 115–33 (discussing use of police power to enforce slavery, the Black Codes, and Jim Crow-era segregation and disenfranchisement); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 56–66 (2004) (same); Carol S. Steiker, *Response: Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 838–41 (1994) (comparing policing in urban minority communities to "an army of occupation").

208. For example, the Court has permitted the use of Mexican ancestry as one factor in stops of motorists near the U.S.-Mexico border to search for undocumented immigrants. *See, e.g.*, United States v. Brignoni-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 . . . ."); United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) ("[E]ven if it be assumed that . . . referrals [to a secondary checkpoint] are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.").

209. For further discussion on the impact of unconstrained police discretion on communities of color, *see, e.g.*, Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344–54 (1998) (arguing that the Court should consider race in its Fourth Amendment jurisprudence); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983–91 (1999) [hereinafter Thompson, *Usual Suspects*] (arguing that the Supreme Court has not adequately considered the concerns of communities of color in its Fourth Amendment cases).

210. 392 U.S. 1 (1968).

211. *Id.* at 14.

212. *Id.* at 14 n.11 (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967)) (alterations in original).

213. *Id.* (citing L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 47–48 (1967)).

and Educational Fund as *amicus curiae*[214] which sharply cautioned that increased police discretion would lead to widespread harms:

> The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged. This is no historical accident or passing circumstance. The essence of stop and frisk doctrine is the sanctioning of judicially uncontrolled and uncontrollable discretion by law enforcement officers. History, and not in this century alone, has taught that such discretion comes inevitably to be used as an instrument of oppression of the unpopular.[215]

In later cases, Justices of the Court have also acknowledged the negative impact of unregulated police discretion on communities of color. In his dissent in *United States v. Martinez-Fuerte*,[216] Justice Brennan predicted that the majority's decision, which permitted the use of Mexican ancestry as a primary factor in checkpoint stops to investigate undocumented immigration, would frustrate the Mexican American community, and warned "[t]hat deep resentment will be stirred by a sense of unfair discrimination is not difficult to foresee."[217] Later, in *Florida v. Bostick*,[218] Justice Marshall's dissent invoked the concern that the police used race as a factor in deciding which individuals to target in conducting ostensibly "random" bus sweeps.[219] Justices in *Illinois v. Wardlow*[220] and *Atwater v. City of Lago Vista*[221] also discussed the impact of increased police powers on people of color, who might have legitimate reasons to fear and flee from the police,[222] or who might experience police harassment as a result of enforcement of a minor traffic law.[223]

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214. Thompson, *Usual Suspects*, *supra* note 209, at 965.

215. Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae at 3–4, Sibron v. New York, 392 U.S. 40 (1968) (No. 63) and Terry v. Ohio, 392 U.S. 1 (1968) (No. 67), reprinted in 66 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 577, 580–81 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *Terry* Amicus Brief].

216. 428 U.S. 543 (1976).

217. *Id.* at 573 (Brennan, J., dissenting).

218. 501 U.S. 429 (1991).

219. *Id.* at 441 n.1 (Marshall, J., dissenting) (discussing testimony of officers who admitted focusing on race when conducting stops on buses, and commenting that "the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*").

220. 528 U.S. 119 (2000).

221. 532 U.S. 318 (2001).

222. *Wardlow*, 528 U.S. at 132 (Stevens, J., concurring in part, dissenting in part) (acknowledging that people of color, among others, might flee from the police not due to guilt but because of fears that police contact itself could be hazardous).

223. *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting) (commenting that police power to effect arrests over minor offenses constituted "unbounded discretion" that "carries with it grave potential for abuse").

Despite these comments, the impact of unchecked police discretion on communities of color has so far not been an explicit element of the Court's Fourth Amendment analysis. Although the *Terry* Court identified dangers to communities of color from increased police discretion, it noted that such dangers "are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations."[224] While it stated that courts could employ existing means for judicial review and remedy to address problems that may arise, it did not engage in further substantive discussion about racially discriminatory policing.[225] As Professor Thompson has pointed out, the Court's limited discussion about race is notable because the trial court record indicated that race was "the most obvious explanation" for the police officer's suspicion in that case.[226] In *Delaware v. Prouse*,[227] the Respondent's brief highlighted the link between standardless police discretion and expression of racial bias.[228] It included a social science analysis that elaborated on the individual and structural racial biases of police and police departments.[229] This analysis noted that in "ambiguous situations" requiring the exercise of individual discretion, police officers ultimately make decisions subjectively.[230] Inevitably, "police officers' behavior will reflect their biases when the officers are given free rein."[231] The *Prouse* Court did not analyze the impact of unconstrained police discretion on communities of color in its opinion, however. In *Whren v. United States*,[232] the petitioners argued that officers permitted to stop motorists on the basis of probable cause without any analysis of pretextual motivation might decide to stop motorists based on race.[233] In response, the Court simply stated that it views the Equal Protection Clause, and not the Fourth Amendment, as the source for a challenge of selective enforcement of the law based on race: "[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

224. Terry v. Ohio, 392 U.S. 1, 17 n.14 (1968).

225. *Id.* at 14–15.

226. Thompson, *Usual Suspects*, *supra* note 209, at 967–73. *See id.* at 967 (observing that the trial record showed that two suspects were African American and the third was white, and that the police officer had taken special note of the interracial group before deciding to make the stop).

227. 440 U.S. 648 (1979).

228. Brief for Respondent app. A at 8a, Delaware v. Prouse, No. 77-1571 (440 U.S. 648 (1979).

229. *Id.* at 1a–9a.

230. *Id.* at 8a.

231. *Id.* at 9a. *See supra* notes 155–59 and accompanying text (discussing additional social science studies regarding the police and racial bias).

232. 517 U.S. 806 (1996).

233. *Id.* at 811.

analysis."[234] Commentators have criticized the *Whren* decision for not effectively guarding against race-based seizures.[235]

c. Challenges to the sufficiency of suspect descriptions

As discussed in Part I,[236] courts have often found suspect descriptions in which race was one of only a few factors to be insufficient to justify any police action under the Fourth Amendment. An important ground upon which to challenge a general suspect description, therefore, is its sufficiency.[237] A claim on this ground can draw upon the themes raised in this article. For example, courts have acknowledged that a wide variety of factors may influence a witness's description of a suspect[238] and a police officer's subsequent application of that description.[239] They have recognized the roles played by both private and public parties in creating and implementing a suspect description.[240] Courts have also observed that suspect descriptions that rely mainly on race provide the police with unfettered discretion[241] that may allow racially discriminatory police behavior.[242]

Courts additionally have acknowledged that race by itself is rarely sufficient to justify a stop or an arrest. In *United States v. Brignoni-Ponce*,[243] the Court invalidated a stop on the ground that it was apparently conducted solely on the basis of race.[244] Circuit courts have widely advocated this view. For example,

234. *Id.* at 813.

235. *See, e.g.*, Maclin, *supra* note 209, at 375–79; Thompson, *supra* note 214, at 981.

236. *See supra* pp. 134–142.

237. *See* 2 LAFAVE, *supra* note 180, § 3.4(c), at 248–69.

238. *See, e.g.*, United States v. Downing, 753 F.2d 1224 (3rd Cir. 1985) (conditionally vacating conviction based solely on eyewitness identification because trial court did not permit expert testimony regarding reliability of eyewitness accounts, and discussing several factors influencing eyewitness identifications).

239. *See, e.g.*, State v. Hetland, 366 So. 2d 831, 839 (Fla. Dist. Ct. App. 1979) (pointing out that police should attempt to record informants' identities and suspect descriptions verbatim, unless need for immediate action dictates otherwise, to forestall challenges by defendants regarding police application of suspect description).

240. *See, e.g.*, United States v. Brooks, 350 F. Supp. 1152, 1155 (E.D. Wis. 1972) (finding arrest not based on probable cause because warrant merely included citizen informant's statement against defendant, without any further mention of police investigation of citizen informant's reliability); *In re* A.S., 614 A.2d 534 (D.C. App. 1992) (invalidating stop where undercover officer failed to adequately develop suspect description based on his observations despite opportunity to do so).

241. *See, e.g.*, Brown v. City of Oneonta, 235 F.3d 769, 787 (2d Cir. 2000) (Calabresi, J., dissenting) (noting that judicial acceptance of police application of predominantly racial suspect descriptions broadly legitimates police's actions and provides them a "blank check").

242. *See, e.g.*, Washington v. Lambert, 98 F.3d 1181, 1191 (9th Cir. 1996) ("[O]ther equally general descriptions [as in present case] could serve as the basis for similar demeaning treatment of many other African Americans [by police.]").

243. 422 U.S. 873 (1975).

244. *Id.* at 887 ("[S]tanding alone[, Mexican ancestry] does not justify stopping all Mexican-Americans to ask if they are aliens.").

in its denial for rehearing and rehearing *en banc* of *Brown v. City of Oneonta*,[245] the Second Circuit noted that "stops based on racial considerations alone, absent compelling exigent circumstances, would almost never" justify a police stop under the Fourth Amendment standards set forth in *Terry*. The court cited several circuit court decisions[246] invalidating seizures based primarily on race or ethnicity and in which the police asserted few or no additional factors to justify a seizure.

In addition, a key concern expressed by courts is that a general suspect description can be applied to too broad a group and thus cannot provide an adequate quantum of suspicion to justify a seizure of any one individual.[247] For example, in *Commonwealth v. Jackson*,[248] descriptions of two assailants as "5 [feet 6 inches] to 5 [feet] 8 [inches] in height, with medium builds, medium to dark complexions and semi-bush haircuts" led to arrests of fifteen to twenty individuals who matched the description, including the defendant.[249] The court found the defendant's arrest illegal because its precedents "held that descriptions equally applicable to large numbers of people will not support a finding of probable cause," and further condemned the "dragnet" arrests.[250]

Professor Wayne LaFave further observes that while a more general suspect description might permit police action in certain circumstances, like proximity of time and place to a crime, these attendant circumstances must still require the police to be very selective.[251] He identifies the following interrelated factors to be considered in determining whether there was sufficient suspicion to justify police action:

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245. 235 F.3d 769, 776 (2d Cir. 2000).

246. *See, e.g.*, Buffkins v. City of Omaha, 922 F.2d 465, 467, 470 (8th Cir. 1990) (holding that a tip that a black person or persons arriving on a flight from Denver would be importing cocaine to the Omaha, Nebraska, area before 5:00 p.m. on March 17, 1987, was not sufficient to justify *Terry* stop of Black woman carrying toy animal); United States v. Grant, 920 F.2d 376, 388 (6th Cir. 1990) (finding no reasonable suspicion where Border Patrol agents in Detroit, Michigan airport stopped defendant because he was man of color with dreadlocked hair and his flight originated in Los Angeles, California, an alleged "drug source" city); Orhorhaghe v. INS, 38 F.3d 488, 497 (9th Cir. 1994) (sole basis for suspicion was racial background or national origin, assumed from defendant's "foreign-sounding" surname, which did not satisfy reasonable suspicion for seizure); United States v. Tapia, 912 F.2d 1367, 1368, 1371 (11th Cir. 1990) (Mexican ancestry, possessing few pieces of luggage, being visibly nervous, and traveling with out-of-state license plates not enough to yield reasonable suspicion for additional detention after initial traffic stop).

247. *See, e.g.*, Brown v. United States, 590 A.2d 1008, 1017–18 (D.C. 1991) (citing Commonwealth v. Jackson, 331 A.2d 189, 191 (Pa. 1975), and quoting 1 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.4(c), at 741 (2d ed. 1987)); People v. Robinson, 507 N.Y.S.2d 268, 270 (App. Div. 1986) ("The information known to the officers at that time—a very general description that could have fit many people in the neighborhood and the presence of ambiguous bulges—fell far short of the probable cause required for a search or seizure.").

248. 331 A.2d 189 (Pa. 1975).

249. *Id.* at 190–91.

250. *Id.* & n.4

251. *See* 2 LAFAVE, *supra* note 180, § 3.4(c), at 248–54.

> (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in the area; (4) the known or probable direction of the offender's flight; (5) observed activity by or condition of the particular person arrested; and (6) knowledge [or suspicion] that the person arrested or his vehicle have been involved in other criminality of the type for which the instant arrest was made.[252]

Professor LaFave also suggests courts examine a witness's veracity and basis of knowledge, factors usually applied to assessments of police informants.[253] Examining veracity, for instance, can involve assessing if a witness has a motive to testify falsely. He points out, though, that courts will usually presume the veracity of an eyewitness.[254] Discussing the basis of knowledge provides an opportunity to highlight any eyewitness perception or memory concerns.[255]

d. Federal protections against searches and seizures in Brown

The district court in *Brown v. City of Oneonta* found that most of the plaintiffs had not successfully alleged that they had been subject to police seizures, and thus could not trigger Fourth Amendment protections. For example, the court found that plaintiffs Darnell Lemons's and Felix Francis's assertions did not demonstrate they had been seized by the police.[256] Police officers stopped Lemons as he was walking away from them, asked him questions, and he answered.[257] An officer asked Francis "to show his bare arms boarding a bus."[258] Francis "complied with this request and was allowed to board the bus."[259] Though Francis's circumstances imply that he might not have been allowed to board the bus had he not complied, the court found that his

252. *Id.* at 254; *id.* at 254–69 (discussing probable cause); 4 LAFAVE, *supra* note 180, § 9.5(g), at 550–51; *id.* at 547–70 (discussing reasonable suspicion).

253. 2 LAFAVE, *supra* note 180, § 3.4(c), at 248–49 (applying *Illinois v. Gates,* 462 U.S. 213 (1983)).

254. *Id.* § 3.4(a) at 218–19.

255. *See, e.g.*, People v. Donnelly, 691 P.2d 747 (Colo. 1984) (court recognized that "[i]t is essential . . . that the citizen be an eyewitness to, or have some other first-hand knowledge of, the incident he reports to police officers"); State v. Ribera, 597 P.2d 1164 (Mont. 1979) (high school official's description of person selling drugs at school found insufficient because basis of knowledge not revealed). This strategy can be effective, as evidenced by the court's finding an arrest illegal in *People v. Anonymous*, 312 A.2d 1 (Conn. C.P. 1973), where the trial record "revealed that the complainant did not see who assaulted him." *See also supra* Part II.B.1.b.

256. Brown v. City of Oneonta, 911 F. Supp. 580, 586–87 (N.D.N.Y. 1996), *vacated in part by* 221 F.3d 329 (2d Cir. 2000).

257. *Id.* at 586.

258. *Id.* at 587.

259. *Id.*

police encounter was a consensual one not rising to the level of a seizure.[260] The court therefore dismissed or granted summary judgment against many of the plaintiffs on their Fourth Amendment claims.

On appeal, the circuit court affirmed the district court regarding most of the plaintiffs' claims.[261] The court found that at least four of the plaintiffs had been seized by the police, however.[262] Noting *United States v. Mendenhall*'s free to leave test,[263] it found that police statements to Jamel Champen that consisted of "What, are you stupid? Come here. I want to talk to you," in conjunction with being told to show his hands, would have been considered compulsory by a reasonable person and therefore constituted a seizure.[264] Similarly, three police officers' encircling of Ricky Brown on the street, telling him he was free to leave, but then telling him to return to show his hands, was a seizure.[265] A police officer's directive to Sheryl Champen at a bus station that if she wanted to board a bus, she would have to show him identification, was clearly a detention for Fourth Amendment purposes.[266] Finally, under *Whren*'s determination that a "temporary detention" of an individual during an automobile stop is a seizure, the court found that when police pulled Jean Cantave over using a siren and flashing lights, ordered him out of his car, and instructed him to place his hands on top of the car, their behavior constituted a seizure.[267]

Because the police defendants had disputed that any seizures had occurred, they had argued that they had not needed any quantum of suspicion to justify their encounters with city residents.[268] Referring to the suspect description of a young, Black male, possibly with a cut on his hand, the Second Circuit observed that the "description consisted primarily of the suspect's race and gender" and that "a description of race and gender alone will rarely provide reasonable suspicion justifying a police search or seizure."[269] It further acknowledged that the "[d]efendants would have difficulty demonstrating reasonable suspicion in this case, and indeed, they do not attempt to do so."[270] It therefore concluded that the seizures that did occur were grounded upon insufficient reasonable suspicion, and thus vacated the lower court's grant of summary judgment against these plaintiffs.

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260. *Id.* The district court also declined to dismiss three plaintiffs' cases, on the grounds that they had alleged seizures or raised material questions of fact on the issue. *Id.* at 586–87. These three cases were discontinued at a later date. Brown v. Oneonta, 221 F.3d 329, 340 n.10.

261. *See* 221 F.3d 329, 340 (2d Cir. 2000).

262. *Id.* at 340–41.

263. 446 U.S. 544, 553–54 (1980).

264. *Id.* at 340.

265. *Id.* at 341.

266. *Id.*

267. *Mendenhall*, 446 U.S. at 340–41 (quoting Whren v. United States, 517 U.S. 806, 809 (1996)).

268. *Id.* at 340.

269. *Id.* at 333–34.

270. *Id.* at 340.

2. *State protections against searches and seizures*

a. *New York State protections against searches and seizures*

Though the Fourth Amendment of the Federal Constitution may not regulate police encounters that do not constitute stops or arrests, state constitutions can offer different and increased protections.[271] The Constitution of the State of New York, for example, includes a search and seizure provision that replicates the Fourth Amendment in the Federal Constitution.[272] Based on this provision, New York state courts have interpreted New York's search and seizure protections to restrict police discretion to a greater degree than required by the Supreme Court's Fourth Amendment jurisprudence.[273]

In contrast to the two levels of police conduct specifically regulated by federal law (i.e., stops and arrests), the New York Court of Appeals created a four-level analysis of police conduct in *People v. De Bour*.[274] The most minimal police intrusion regulated by the court is a request for information,[275] which can involve "basic, nonthreatening questions regarding, for instance, identity, address or destination."[276] To justify this conduct, the police must possess "some objective credible reason for [the] interference not necessarily indicative of criminality."[277] The next level of police intrusion is a common-law right to inquire.[278] The Court of Appeals has determined that police contact ceases

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271. *See, e.g.*, Hon. Dennis J. Braithwaite, *An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1, 2 (2001) (New Jersey); Melissa Harrison and Peter Mickelson, *The Evolution of Montana's Privacy-Enhanced Search and Seizure Analysis: A Return to First Principles*, 64 MONT. L. REV. 245, 254 (2003) (Montana); Rebecca N. Turner, *Search and Seizure Law:* State v. Cardenas-Alvarez*: The Jurisdictional Reach of State Constitutions—Applying State Search and Seizure Standards to Federal Agents*, 32 N.M. L. REV. 531, 531 (2002) (New Mexico). *See also infra* Part III.A.2.a (New York).

272. N.Y. CONST. art. I, § 12. The provision provides that:

> The right 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.

273. *See* People v. Hollman, 590 N.E.2d 204, 211–12 (N.Y. 1992). The court pointed out that New York's search and seizure scheme is more protective than the one available under the Fourth Amendment, and that though it may not be compelled by the text of the state or federal provisions, "encounters that fall short of Fourth Amendment seizures still implicate the privacy interests of all citizens and that the spirit underlying those words" mandate the creation of a sub-constitutional scheme to protect individuals from arbitrary or intimidating police conduct). *Id.*

274. 352 N.E.2d 562, 571–72 (N.Y. 1976).

275. *Id.*

276. *Hollman*, 590 N.E.2d at 206.

277. *De Bour*, 352 N.E.2d at 572.

278. *Id.*; *see also* People v. Cantor, 324 N.E.2d 872, 878 (N.Y. 1975) ("The common-law power to inquire does not include the right to unlawfully seize . . . . Our court has consistently limited [the power for a lawful detaining stop] when it has been exercised solely on the basis of vague suspicion or as a means of harassment.") (citations omitted).

being a request for information and transforms into a common-law inquiry once an officer asks "more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation."[279] In order to conduct the common-law right to inquire, the police must have a "founded suspicion that criminal activity is afoot."[280] The New York state courts also regulate stops and arrests.[281]

The contrary results of *United States v. Drayton*[282] and *People v. McIntosh*,[283] despite their similar fact patterns, illustrate the differences between the federal and New York search and seizure protections. Both cases involve police interdiction efforts on commercial passenger buses that led to searches uncovering drugs. In *Drayton*, the federal case, three police officers dressed in plain clothes but with visible badges boarded a Greyhound bus during a stop in Florida to conduct a drug and weapons interdiction.[284] One officer sat in the driver's seat, facing the passengers, while another officer positioned himself at the back of the bus.[285] The third officer spoke to passengers individually as he moved forward from the back of the bus, asking them about their travel plans and matching them with their carry-on luggage.[286] Though the passengers could have refused to answer questions, the officer conducting the inquiries did not tell them they had the right to refuse to cooperate.[287] When reaching the respondent Christopher Drayton and his travel partner, the questioning officer obtained consent to conduct a search of their persons and discovered drugs.[288] The Supreme Court found that the police officers' conduct had not risen to the level of even a *Terry* stop, and that the respondents' consent had been valid.[289] The Court's decision was based in part on the reasoning that the Fourth Amendment's protections against unreasonable searches and seizures were not triggered during a bus encounter by mere police questioning.[290] The police did not need any particularized suspicion to conduct this questioning; a seizure only occurred if a reasonable person believed that "he or she was barred from leaving the bus or otherwise terminating the encounter."[291]

In *McIntosh*, the New York Court of Appeals found that because a request for information requires objective, credible justification under New York state

279. People v. Hollman, 590 N.E.2d 204, 206 (N.Y. 1992).
280. *Id.* (citing *Cantor*, 324 N.E.2d at 878).
281. *See* People v. Bora, 634 N.E.2d 168, 170 (N.Y. 1994) (citation omitted).
282. 536 U.S. 194 (2002).
283. 755 N.E.2d 329 (N.Y. 2001).
284. *Drayton*, 536 U.S. at 197.
285. *Id.* at 197–98.
286. *Id.* at 198.
287. *Id.*
288. *United States v. Drayton*, 536 U.S. 194, 199 (2002).
289. *Id.* at 200, 203–04, 206–07.
290. *Id.* at 203–06.
291. *See id.* at 204.

law, police contact similar to that permitted in *Drayton* was invalid in New York.[292] Three officers dressed in plain clothes also boarded a bus during a stopover in Albany, New York and announced that they would perform a drug interdiction.[293] The officers asked everyone on the bus to show her ticket and identification and one officer then began to check each person's documents.[294] The questioning officer saw two people in the rear of the bus push a black object between them; the officer approached them, asked for their documents, and obtained consent to search the defendant's bag.[295] In searching a black jacket on their seat, he discovered drugs.[296] The Court of Appeals found that the police officers' actions in boarding the bus and questioning individuals about destinations and identification implicated the first of the four levels of regulated police conduct articulated in *People v. De Bour*: a request for information.[297] The police asserted that they conducted this interdiction because the bus was "traveling from New York City, a known source city for narcotic drugs."[298] The court found this justification too general for a request for information, and that the police had not identified any conduct or other basis that would yield a particularized reason for their request.[299] Thus, no objective, credible reason existed for the police action.[300] It ruled that the searches were invalid, granted the defendant's motion to suppress, and dismissed the indictment.[301]

Based on almost identical police conduct to that in *Drayton*, New York's enhanced search and seizure protections resulted in outright dismissal of charges. The Court of Appeals required a minimum quantum of justification for the police intrusion, even if the actions only involved questioning about travel and identity. In contrast, the Court in *Drayton* would require no justification for any police conduct, so long as the conduct did not result in a full-blown seizure. Though the police have "fairly broad authority" to request information, New York's scheme provides genuine protections to individuals against capricious police action.[302]

b. Application of New York State protections against searches and seizures to Brown

Application of New York's four-level analysis of police conduct under *De*

292. People v. McIntosh, 755 N.E.2d 329, 333 (N.Y. 2001).

293. *Id.* at 330. At least one officer had a visible police badge. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 331 (citation omitted).

298. *See* People v. McIntosh, 755 N.E.2d 329, 331 (N.Y. 2001) (quoting People v. McIntosh, 711 N.Y.S.2d 547, 548 (App. Div. 2000)).

299. *Id.* at 331–32.

300. *Id.* at 333.

301. *Id.*

302. *Id.* at 331 (quoting People v. Hollman, 590 N.E.2d 204, 209 (N.Y. 1992)).

Bour could invalidate all of the police encounters alleged in the *Brown* cases. Both the federal appellate and district courts dismissed plaintiffs' cases that they found did not involve police seizures. Under New York law, the state court could view almost all of the scenarios that were dismissed as implicating the first or second levels of the *De Bour* analysis. For example, the state court could characterize police officers' actions in stopping Darnell Lemons as he was walking away from them and asking him questions as at least a request for information.[303] The court's opinion does not detail the nature of the questions; thus, if the police were asking about more than his identity, destination, or his reason for being in the area, a further common-law inquiry may have occurred.[304] When police officers approached Raishawn Morris in his lobby and asked him to show them his hands,[305] they were most likely engaging in a common-law inquiry. By asking him to show his hands, the officers would be indicating to the reasonable person that he was a target of suspicion and thus a focus of investigation.[306] Similarly, when a police officer asked Felix Francis to show him his bare arms boarding a bus, a common-law inquiry likely took place.[307] If Francis had been prevented from boarding unless he showed his hands, a reasonable person would likely have felt that his freedom was significantly limited. Though the district court felt Francis's allegation did not reach the level of a stop under the federal standard, it might be a stop under New York's standard.

Individuals who were approached by the police filed suit in the New York State Court of Claims.[308] The claimants alleged that "[t]he sole reason that each and every claimant was approached for questioning, seizure and/or search by the law enforcement officials was the color of claimants' skin," and such police actions occurred "without the requisite articulable suspicion, reasonable suspicion, or probable cause."[309] The State of New York denied these allegations and asserted an affirmative defense that investigative queries were constitutional as the exercise of the common-law right to inquire.[310] The Court concluded that because a request for information and the common-law right to inquire are common-law concepts, they could not provide relief for the claimants' suit for damages under a theory of constitutional tort.[311] It did determine, however, that any level three or four seizure that did take place was not

303. Brown v. City of Oneonta, 911 F. Supp. 580, 586 (N.D.N.Y. 1996), *vacated in part by* 221 F.3d 329 (2d Cir. 2000).

304. *Hollman*, 590 N.E.2d at 206, 209–10.

305. Brown v. City of Oneonta, 221 F.3d 329, 341 (2d Cir. 2000).

306. *See Hollman*, 590 N.E.2d at 206, 210.

307. *Brown*, 911 F. Supp. at 587.

308. Brown v. State, 814 N.Y.S.2d 492 (Ct. Cl. 2006)

309. Verified Claim for Damages ¶ ¶ 63, 78, Brown v. State, 814 N.Y.S.2d 492 (Ct. Cl. 2006) (No. 86979).

310. Amended Verified Answer ¶ ¶ 63, 78, 111, Brown v. State, 814 N.Y.S.2d 492 (Ct. Cl. 2006) (No. 86979).

311. *Brown*, 814 N.Y.S.2d at 499.

justified by the evidence that "a black male had broken into a residence and possibly suffered cuts to his hands or arms."[312] It thus found that two of the claimants had been unconstitutionally seized: Ricky Brown, who had been circled by the police and told to return to them to show his hands; and Sheryl Champen, who had been asked for identification before boarding a bus.[313]

B. Equal Protection Guarantees

1. Federal equal protection guarantees

Historically, the Equal Protection Clause of the Fourteenth Amendment[314] has served as the primary constitutional source for protections against illegitimate government action on the basis of race.[315] From its inception as an amendment to ratify the citizenship privileges of former slaves,[316] the Fourteenth Amendment and its Equal Protection Clause have provided guarantees of equality to a wide range of individuals.

The Supreme Court has formulated varying standards of judicial review to assess the governmental use of classifications implicating certain categories of individuals. The Court views government classifications that incorporate race as suspect and analyzes such classifications with strict scrutiny, its most rigorous standard of review.[317] Under strict scrutiny review, any racial classification must serve a compelling governmental interest and be narrowly tailored to further that interest.[318] While the Court has tried to dispel the notion that strict scrutiny review is "strict in theory, but fatal in fact,"[319] few government classifications involving race have survived this standard.[320]

In its early Equal Protection Clause jurisprudence, the Supreme Court applied equal protection guarantees in the criminal justice context to such matters as police brutality and jury discrimination.[321] For several decades in the

312. *See id.*

313. *Id.* at 501–506. There may be further appellate consideration of the case, and thus these outcomes may change.

314. "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

315. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213–31, 35–37 (1995) (reviewing, in part, equal protection jurisprudence addressing state action involving racial classifications).

316. *See* DERRICK A. BELL, JR., CONSTITUTIONAL CONFLICTS PART 1, at 187 (1997).

317. *See Adarand,* 515 U.S. at 227, 236–37.

318. *Id.* at 227.

319. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

320. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); United States v. Paradise, 480 U.S. 149 (1987).

321. Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2001 n.5 (1998) (referring to *Screws v. United States*, 325 U.S. 91 (1945), *Ex parte Virginia*, 100 U.S. 339 (1880), and *Strauder v. West Virginia*, 100 U.S. 303 (1880), among others).

twentieth century, however, the Court built upon rights articulated by the Fourth, Fifth, and Sixth Amendments, but not equal protection, for criminal justice cases.[322] As Professor Pamela S. Karlan has observed, the Court began to reapply the Equal Protection Clause to criminal proceedings in the late 1980s.[323] In *Batson v. Kentucky*,[324] the Court applied the Equal Protection Clause to the use of peremptory challenges of jurors on the basis of race. The Court also applied equal protection principles in *McCleskey v. Kemp*,[325] to find no violation according to race in the administration of Georgia's death penalty.

Nearly a decade later, the Supreme Court stated in *Whren v. United States*[326] that the appropriate challenge to the intentionally racially discriminatory application of laws lies in equal protection principles, not the Fourth Amendment.[327] In the contemporaneous decision of *United States v. Armstrong*,[328] the Court observed that any claim regarding selective prosecution based on race has to accord with "ordinary equal protection standards."

The Supreme Court has therefore expressly separated Fourth Amendment protections from those of the Equal Protection Clause. As Professor R. Richard Banks has noted, there are important distinctions between the two doctrines, as well as some key similarities.[329] Fourth Amendment doctrine is concerned with minimizing unreasonable intrusions on individuals by the government, while equal protection doctrine involves ferreting out illegitimate classifications. To advance its purposes, the Fourth Amendment doctrine balances intrusions on liberty and privacy against governmental interests.[330] Equal protection doctrine, on the other hand, involves no balancing analysis but instead incorporates a formal two-step process of identifying the presence of a suspect classification and then applying the requisite level of scrutiny.[331] Equal protection doctrine also applies in two important circumstances outside of the scope of considerations of the Fourth Amendment.[332] While the Fourth Amendment's protections are only triggered by a seizure, the Equal Protection Clause can apply to all police encounters.[333] In addition, while the Fourth Amendment doctrine is not concerned with officers' subjective motivations, the Equal Protection Clause can reach police conduct motivated by racial animus.[334] In both

322. *See* Karlan, *supra* note 321, at 2002.
323. *Id.*
324. 476 U.S. 79, 82, 89 (1986).
325. 481 U.S. 279, 282–83, 291–99 (1987).
326. 517 U.S. 806 (1996).
327. *Id.* at 813. *See also supra* pp. 160, 164 (discussing *Whren*).
328. 517 U.S. 456, 465 (1996).
329. *See* Banks, *Race-Based Suspect Selection*, *supra* note 5, at 1088–90.
330. *Id.* at 1088–89.
331. *See id.* at 1089.
332. *See id.*
333. *See id.*
334. *See id.* at 1089–90.

the Fourth Amendment and the equal protection contexts, however, courts do treat state actors' sole reliance on race cautiously by either finding that reasonable suspicion is not supported or by requiring strict scrutiny.[335] Both doctrines also recognize that race is only a nominally reliable proxy for criminality.[336]

Because the Equal Protection Clause can apply to police conduct that does not rise to the level of a seizure, it can provide important protections against racially discriminatory policing and offer an avenue for challenging police practices motivated by racial animus. In *United States v. Avery*,[337] for example, the Sixth Circuit applied *Whren*'s principles and extended equal protection guarantees to analyses of police conduct independently of Fourth Amendment principles to find that "[a] person cannot become the target of a police investigation solely on the basis of skin color."[338] It acknowledged that "[i]n this circuit[,]. . . the Fourteenth Amendment protects citizens from police action . . . based solely on impermissible racial considerations,"[339] regardless of whether the action is an arrest, a stop, or an encounter.

Claims of discriminatory policing under the Equal Protection Clause have generally been difficult to bring in the courts, however.[340] An express racial classification is rare. Without such a classification, litigants must prove discriminatory intent. A central challenge is presenting adequate proof. Police departments are unlikely to openly identify their actions as racially motivated, or make publicly available internal documents that would show discriminatory intent.[341] Litigants can also attempt to demonstrate intent through statistical evidence of disparate impact, but courts have appeared to be reluctant to accept this form of proof in the context of policing claims.[342] For these and other reasons, equal protection doctrine in this area has not been well-developed.[343]

335. Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., New York Civil Liberties Union, and Center for Constitutional Rights in Support of Plaintiff-Appellants at 29–30, Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000) (No. 98-9375) [hereinafter *Brown* Amicus Brief] (on file with author).

336. *See id.* at 32–36.

337. 137 F.3d 343 (6th Cir. 1997).

338. *Id.* at 354.

339. *Id.* at 353.

340. *See, e.g.*, 1 LAFAVE, *supra* note 180, § 1.4(f), at 147–48 & nn.121–22 (quoting David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 326); Jennifer A. Larrabee, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291, 295 (1997).

341. *See* 1 LAFAVE, *supra* note 180, § 1.4(f) at 147–48; Larrabee, *supra* note 340, at 305–09.

342. *See, e.g.*, 1 LAFAVE, *supra* note 180, § 1.4(f), at 148; Larrabee, *supra* note 340, at 309–11; Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 741–44 (2002).

343. *See* Gross & Barnes, *supra* note 342, at 741.

a. Discussion of federal equal protection guarantees in Brown

The Second Circuit's opinion in *Brown v. City of Oneonta* illustrates some of the difficulties litigants face when asserting a claim of discriminatory policing under equal protection principles.[344] The plaintiffs alleged that police officers used an express racial classification in stopping and questioning them solely on the basis of their race.[345] They asserted that this conduct should therefore trigger strict scrutiny review under equal protection principles.[346]

The Second Circuit ultimately declined to apply the Equal Protection Clause to the police conduct in question. It found that the plaintiffs had not identified a law or policy containing an express racial classification.[347] Instead, it determined that the police's "policy was race-neutral on its face."[348] It based this finding on a characterization of the police action as "question[ing] on the altogether legitimate basis of a physical description given by the victim of a crime," and not solely on the basis of race.[349] The court noted that, in fact, the suspect description had incorporated race as one of several elements, including age, gender, and the possibility of a cut on the hand.[350]

The Second Circuit denied the claim on the alternate theory that there had been a facially neutral policy that resulted in disparate impact to a minority group and was animated by a discriminatory purpose.[351] It recognized that the defendants' actions in "attempting to question every person fitting a general description" could have a disparate impact on small minority groups in towns like Oneonta.[352] The plaintiffs pointed out that at least one Black woman had been stopped, which the court acknowledged could indicate that the "defendants considered race more strongly than other parts of the victim's description."[353] The court found this incident insufficient to allege discriminatory intent, however.[354]

In rejecting this alternative theory, the court asserted that police activity based on race might be more effective on racial groups that comprise a minority

344. *See* 221 F.3d 329, 336–39 (2d Cir. 2000).

345. *Id.* at 337.

346. *Id.* The NAACP Legal Defense and Educational Fund and other civil rights organizations submitted an *amicus curiae* brief to the Second Circuit in support of the plaintiffs that also urged a finding that the police's use of race in determining whom to question or stop should be considered a facial classification meriting strict scrutiny review. *See Brown* Amicus Brief, *supra* note 335, at 8–9.

347. *See Brown*, 221 F.3d at 337.

348. *Id.*

349. *Id.*

350. Brown v. City of Oneonta, 221 F.3d 329, 337–38 (2d Cir. 2000).

351. *See id.* at 338–39.

352. *Id.*

353. The court also declined to describe the police actions in this case as profiling based on a racial stereotype, which it presumably would consider evidence of discriminatory intent. *See id.* at 338–39.

354. *Id.*

in a community, because there would be fewer individuals fitting the description.[355] Though this might be true, there must be limits on such police behavior so as not to disregard traditional equal protection principles regarding the protection of minority groups.[356] The court also hypothesized that such a disparate impact could fall equally on a minority white community if the police were to implement a suspect description of a "young white male."[357] Though it is possible that such a burden could fall upon a minority white community, similar race-based dragnets of white individuals appear to be rare.[358] In addition, any parity of burden would not erase the inherently suspect nature of the race-based action.[359]

In reaching its decision, the Second Circuit in a footnote distinguished *United States v. Avery*, the Sixth Circuit case that had applied *Whren* to provide equal protection guarantees to claims of race-based police actions.[360] In *Avery*, the Sixth Circuit was faced with a similar scenario in which a claimant challenged, on equal protection grounds, police conduct that did not rise to the level of a seizure for Fourth Amendment purposes.[361] Unlike the Second Circuit in *Brown*, the Sixth Circuit in *Avery* stated:

> [W]e find that citizens are entitled to equal protection of the laws at all times. If law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred.[362]

The Sixth Circuit discussed some scenarios that might raise equal protection questions. It noted, for example, the use of race in a suspect description based on a "tip" by a private source, like an airport gate agent, would generally not yield an equal protection violation because officers would have no control over the race of the suspect.[363] It observed, though, that there could exist equal protection problems with the creation and application of a general suspect description: "Nonetheless, if the tipster provides only the person's race as a descriptive characteristic and the officers pursue investigations of everyone of that

355. *Id.* at 338.

356. *See, e.g.*, BELL, JR., *supra* note 316, at 202–05 (discussing Justice Stone's statement in United States v. Carolene Products, 304 U.S. 144, 153 (1938), that there might be a need for "more exacting judicial scrutiny" with legislation that affects political processes or exposes "discrete and insular minorities" to prejudice).

357. Brown v. City of Oneonta, 221 F.3d, 329,338 (2d Cir. 2000).

358. *See Brown* Amicus Brief, *supra* note 335, at 23–24.

359. *Id. See also* Banks, *The Story of* Brown, *supra* note 5, at 236–37.

360. *Brown*, 221 F.3d at 338 & n.8 (discussing United States v. Avery, 137 F.3d 343, 354–55 & n.5 (6th Cir. 1997)).

361. *Avery*, 137 F.3d at 352.

362. *Id.* at 355.

363. *Id.* at 354 n.5.

race, their action may be found constitutionally impermissible."[364] Though the Sixth Circuit did not detail its reasoning, it was likely identifying the latter scenario as a problem because it could lead to widespread police actions motivated solely by race.[365] Also implicit in the scenario is the principle that the police cannot implement, without limits, a race-based suspect description simply because it originated from a private source.

Though the *Avery* court's second hypothetical scenario sounds very similar to the facts in Oneonta, the Second Circuit in *Brown* noted that it did not know whether this scenario was similar to a suspect description provided by a crime victim.[366] It also said that the two "tip" scenarios were "somewhat contradictory" because officers cannot control the race of a suspect based on a private tip.[367] It ultimately sidestepped the *Avery* court's language by concluding that it was, "[i]n any event, . . . non-binding dicta from a non-binding circuit court."[368] In deflecting *Avery*, the Second Circuit failed to squarely address the Sixth Circuit's implication that the police cannot blindly act upon a suspect description from a private source. In deeming the use of race in *Brown* legitimate, the Second Circuit stated "defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a legitimate classification . . . ."[369] The court appeared to be indicating that a racial category created by a private party, but implemented by a state actor, would somehow be less subject to equal protection scrutiny. Especially because potential exists for private parties to inject suspect descriptions with their racial biases,[370] incentives must exist to fortify the police's responsibility to screen information gathered from witnesses. The court's perspective also fails to acknowledge the affirmative role the police play in eliciting information from witnesses, compiling effective suspect descriptions, and choosing which suspect descriptions to act on.[371] In addition, the legal relevance of the fact that a description came from a private source is unclear when assessing if state action is discriminatory.

In denying any equal protection claim in *Brown*, the Second Circuit noted that "[w]e are not blind to the sense of frustration that was doubtlessly felt by those questioned by the police during this investigation. The actions of the police were understandably upsetting to the innocent plaintiffs who were stopped . . . ."[372] The *Brown* court commented that it was *not* holding that "under no circumstances may the police, when acting on a description of a

364. *Id.*
365. *See id.* at 353–54.
366. Brown v. City of Oneonta, 221 F.3d 329, 338 n.8 (2d Cir. 2000).
367. *Id.*
368. *Id.*
369. *Id.* at 337–38.
370. *See supra* pp. 22–24.
371. *See supra* pp. 18–21.
372. Brown v. City of Oneonta, 221 F.3d 329, 339 (2d Cir. 2000).

suspect, violate the equal protection rights of nonsuspects."[373] The court observed the impact of police actions in this case on community relations in Oneonta, but stopped short of characterizing their conduct as improper: "our role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause."[374]

The Second Circuit denied the petition for rehearing, and rehearing *en banc*, though the judges expressed sharply divergent opinions.[375] Judge Walker, who was the author of the original opinion and concurred in the denial of its rehearing, commented that inserting equal protection analysis into police investigations that use racial descriptions would disrupt the Fourth Amendment framework that "strikes an appropriate balance between individual rights and the necessities of effective law enforcement."[376] He also stated that "any benefits from extending equal protection guarantees" to encounters that are not seizures "are outweighed by the additional costs to effective law enforcement."[377] The police would have to justify their intuitive considerations, after all, if they were accused of being motivated solely by race in any encounter.[378] Judge Walker's observations stand in contrast to the Sixth Circuit's approach in *Avery*. The *Avery* court also recognized that restricting police conduct that did not rise to the level of a seizure might be administratively inconvenient.[379] It did not view these administrative concerns as outweighing the need for rigorous equal protection guarantees in all levels of police-citizen contacts, however.[380] In addition, Judge Walker's comments appear to contradict the spirit of *Whren*, which would apply the Equal Protection Clause independently of Fourth Amendment considerations.

Judge Calabresi, in dissent, stated that "police investigations in which race is a factor . . . implicate[] some of the deepest and most searing questions in our society."[381] He framed the controversy as whether the police create an express racial classification that must survive strict scrutiny if officers "ignore essentially everything but the racial part of a victim's description, and, acting solely on that racial element, stop and question all members of that race they can get hold of, even those who grossly fail to fit the victim's description."[382] His answer to this

373. *Id.*

374. *Id.*

375. Brown v. City of Oneonta, 235 F.3d 769 (2d Cir. 2000). Judge Walker, who had written the original Second Circuit opinion, and Judges Jacobs, Sack, and Katzmann concurred in the denial of the rehearing *en banc*, while Judges Kearse, Calabresi, Parker, Straub, and Sotomayor dissented. *Id.* at 770.

376. *Id.* at 775.

377. *Id.* at 776–77.

378. *Id.* at 777.

379. United States v. Avery, 137 F.3d 343, 355 (6th Cir. 1997).

380. *Id.*

381. Brown v. City of Oneonta, 235 F.3d 769, 779 (2d Cir. 2000).

382. *Id.* at 781.

question was "a resounding yes."[383] In response in part to Judge Walker, he pointed out:

> the Fourth Amendment seems to me manifestly inadequate to deal with the underlying problem. There are, for example, in a society with deep racial divisions, any number of police intrusions on citizens that do not amount to *Terry* stops or other forms of searches and seizures cognizable under the Fourth Amendment, but that are, nonetheless immensely hurtful. . . . [B]ecause no searches or seizures are involved, the Fourth Amendment cannot preclude them. As a result, excluding even a minimal consideration of equal protection when reviewing police behavior in such cases, far from protecting society from dire consequences, treats every conceivable interest of law and order, however insignificant, as if it were necessarily more important than any interest in not being categorized on the basis of race. And that seems to me clearly untenable.[384]

Professor R. Richard Banks, in analyzing the various opinions in the *Brown* cases, has commented that the use of race-based suspect descriptions by the police may warrant strict scrutiny review.[385] Since the police used race as a predominant factor in determining whom to question, he states that their investigation should likely have been addressed as a racial classification, subject to strict scrutiny.[386] Professor Banks notes, however, that declining to apply equal protection guarantees to suspect descriptions maintains the appearance of commitment to the current doctrine of colorblindness.[387] The police are characterized as merely acting on race because of appearance, for example, not prejudice. He observes that deeming a suspect description to be a racial classification would either render the strict scrutiny standard too loose, or "highlight the impossibility of actually eliminating . . . discrimination."[388] As a result, he concludes that the existing equal protection jurisprudence does not possess a well-fitting means to address the issues raised by race-based suspect descriptions, or alternatively, that the "centrality of race in suspect descriptions represents a form of racial discrimination so ingrained . . . as to be immune to legal remediation and beyond moral recognition, . . . signal[ling] the bluntness not only of our doctrinal tools, but of our moral assessments as well."[389]

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383. *Id.*

384. *Id.* at 787 n.13.

385. Banks, *Race-Based Suspect Selection*, *supra* note 5, at 1115. *See also* Banks, *The Story of* Brown, *supra* note 5, at 234–40 (evaluating the arguments for suspect classification in *Brown v. City of Oneonta*).

386. Banks, *Race-Based Suspect Selection*, *supra* note 5, at 1115.

387. *See id.* at 1121.

388. Banks, *The Story of* Brown, *supra* note 5, at 242.

389. *Id.* at 247.

b. Application of federal equal protection guarantees generally

In the foregoing analyses of police conduct in *Brown*, there appears to be little consensus about whether equal protection guarantees should apply to police use of suspect descriptions in which race is a sole or primary factor. Those who believe that the Equal Protection Clause should apply would employ strict scrutiny on the premise that such action creates a racial classification. Because strict scrutiny almost always invalidates a racial classification, most applications of the test to suspect descriptions relying on race could likely result in a violation of equal protection.[390]

If a sparse suspect description were to be characterized as a racial classification and strict scrutiny applied, it is unlikely that routine crime investigation would satisfy the "compelling interest" prong of the test. As Professor Banks has noted, the Supreme Court has never characterized ordinary police activity as compelling, and has declined to do so on at least one occasion.[391] During times of war or other threats to national security, of course, there are concerns in addition to "routine" police investigation. For police investigations expressly linked to deterring terrorist or other war-related activity, the compelling interest prong may easily be satisfied.[392]

Even if there is a compelling interest, the police would have to surmount the strict scrutiny test's narrow tailoring requirement. The NAACP Legal Defense and Educational Fund's *amicus curiae* brief in *Brown* pointed out that the narrow tailoring analysis could include factors already articulated in other arenas of affirmative action law: availability and consideration of race-neutral alternatives, the duration of race-conscious measures, and the impact of the state conduct on innocent individuals.[393] The police could be required to consider multiple descriptive factors; limit their investigation to a specified location and to a defined, brief duration of time; and act upon race only if a crime is an extra-ordinary one.[394] They could also be required to limit their investigation to a discrete number of individuals.[395]

What would be the costs and the benefits of applying strict scrutiny to suspect descriptions in which race is the sole or dominant element? As Judge Walker pointed out, the costs could include restraining policing during investigations, in which individual, subjective decisions are critical or in which

390. Banks, *Race-Based Suspect Selection*, *supra* note 5, at 1117.

391. *Id.* at 1119 & n.178 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–57 (1976)).

392. The Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944), for example, did uphold a racial classification in a case that arose from a criminal prosecution of a Japanese American defendant during World War II. *See Brown* Amicus Brief, *supra* note 335, at 31.

393. *See id.* at 30–32 n.27; United States v. Paradise, 480 U.S. 149 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

394. *See* Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1215–17 (2003).

395. *See* Banks, *Race-Based Suspect Selection*, *supra* note 5, at 1119.

time is an issue.[396] The use of strict scrutiny would increase judicial involvement in the review of police actions. There could be increased litigation by individuals who have been stopped or arrested. Professor Banks has noted that the resulting frequency of application of the strict scrutiny test could lead to its dilution, especially if courts were to uphold suspect descriptions on the basis of routine policing as a compelling interest.[397]

The benefits of applying strict scrutiny to such suspect descriptions would hopefully minimize police reliance on suspect descriptions in which race is a sole or primary factor, misapplications of suspect descriptions where race becomes the only implemented criterion, and the use of wide-scale dragnets that ensnare innocent people. Though courts have invalidated seizures motivated by insufficient suspect descriptions based on race, applying strict scrutiny would provide a means to address police conduct that does not rise to the level of a seizure but yet can be discriminatory. Strict scrutiny could limit the impact of police activity on innocent individuals in general. Because a suspect was never apprehended in *Brown*, the police stopped or questioned hundreds of innocent people. The benefits of applying strict scrutiny might also minimize the impact of racially discriminatory policing on individuals and groups, especially those who comprise a minority in the community, like the individuals targeted in *Brown*. The benefits could also include improving relationships between communities of color and the police, especially in small towns. Such an improved relationship could lead to greater cooperation between all community members and the police, which is especially critical during the current era of national security concerns. In addition, communities of color may gain greater faith not only in policing, but in government institutions and the law as well.

From the police perspective, extending equal protection guarantees would increase accountability among law enforcement, especially by reinforcing police responsibility to interview witnesses appropriately; to consider witnesses' potential issues with perception, memory, and bias; and to act carefully and judiciously with the information they do gather. Such accountability could enhance overall police effectiveness, because general suspect descriptions and dragnets like the one in *Brown* are not necessarily fruitful. It could also decrease costs, provide a restraint to individual police discretion,[398] and minimize state partnership in private racism. Finally, the application of strict scrutiny is likely to result in an increased perception of fairness. As the New York State Attorney General Eliot Spitzer said at the time about the police actions in Oneonta: "You know what? We won the case, but it makes your skin crawl."[399] In sum, the

396. Brown v. City of Oneonta, 235 F.3d 769, 776–77 (2d Cir. 2000).

397. *See* Banks, *Race-Based Suspect Selection*, *supra* note 5, at 1119.

398. *See* HARRIS, PROFILES IN INJUSTICE, *supra* note 155, at 155–61 (discussing limiting discretion as a means of implementing accountability-based policing).

399. Bob Herbert, *Breathing While Black*, N.Y. TIMES (Nov. 4, 1999), at A29.

costs of applying the Equal Protection Clause may be outweighed by its many benefits.

2. State equal protection guarantees

a. New York State equal protection guarantees

State constitutions may provide equal protection guarantees different and greater from those of the Federal Constitution. The Constitution of the State of New York, for instance, includes an Equal Protection Clause similar to the Fourteenth Amendment's Equal Protection Clause in the Federal Constitution. It states that "no person shall be denied the equal protection of the laws of this state or any subdivision thereof."[400] As the New York Court of Appeals noted in *Brown v. State of New York*, this clause was intended to provide protections "as broad as" those afforded by its federal counterpart.[401] The state courts can interpret New York's equal protection guarantees more broadly than those provided by the Federal Constitution, however, as has happened in the search and seizure context.[402] As under the federal framework, race is a suspect class that triggers strict scrutiny review.[403] This test requires that the use of race be necessary to support a compelling government interest.[404] Actions of state or local officials that do not survive strict scrutiny review are invalid.

b. Application of New York State equal protection guarantees to Brown

The Second Circuit did not apply the Equal Protection Clause because it characterized the police conduct as "race-neutral on its face" in relying upon a suspect description that included race, gender, and age,[405] and found no evidence of discriminatory intent.[406] The Third Department has confirmed that despite the consistency between federal and state law on equal protection grounds, the federal decision does not preclude litigation in New York state courts on state equal protection grounds.[407] It has also noted the federal decision does not bind

400. N.Y. CONST. art. I, § 11.

401. 674 N.E.2d 1129, 1140 (N.Y. 1996) (citations omitted).

402. *See, e.g.*, Stewart F. Hancock, Jr., Annelle McCullough & Alycia A. Farley, *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute—Two Questions*, 59 ALB. L. REV. 1545, 1548–50 (1996) (quoting People v. Barber, 289 N.Y. 378, 384 (N.Y. 1942) ("[I]n determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States").

403. *See In re* Joseph LL, 470 N.Y.S.2d 784, 786 (App. Div. 1983), *aff'd*, 473 N.E.2d 736 (N.Y. 1984).

404. *Id.*

405. Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 2000).

406. *Id.* at 338–39.

407. Brown v. State, 776 N.Y.S.2d 643, 645–47 (App. Div. 2004) (noting that the parties had

the state court, though the decision may be "useful and persuasive authority."[408] A state court may thus employ a standard of proof that diverges from the one used by the Second Circuit, and could apply strict scrutiny.

In the state suit filed by individuals who were approached by the police in Oneonta, the New York State Court of Claims concluded that the overall police investigation did not focus exclusively or predominantly on race, and thus did not violate the state equal protection provision. The police did behave solely on the basis of race, however, when stopping Sheryl Champen—a Black woman who was asked to show identification despite the fact that the police were searching for a Black male. The Court determined that this action constituted an express racial classification, triggering strict scrutiny. The State did not attempt to offer any explanation for this police conduct, and thus the Court found that Champen's state constitutional equal protection rights were violated.[409]

CONCLUSION

Social science literature suggests that suspect descriptions that rely solely or primarily on race should be treated with caution. The police must judiciously choose whether to apply descriptions that contain sparse details to avoid ineffective or discriminatory conduct, especially in light of their important role in eliciting and shaping a description. Courts should take this literature and the policy concerns it raises into consideration when reviewing police conduct that relies on vague and general descriptions. In addition, concerns about discriminatory policing should be reflected in Fourth Amendment jurisprudence. Especially in cases that do not implicate the Fourth Amendment, equal protection guarantees should apply to such police activity. Practitioners should also look to state constitutions to provide relief where federal protections do not appear to be effective.

Non-legal means could be especially useful in addressing police use of suspect descriptions that rely solely or primarily on race. Most importantly, police departments must educate officers about issues surrounding eyewitness identifications, and train them to use interviewing techniques designed to elicit reliable information. Departments should also train officers to create and implement suspect descriptions that will be reliable and will minimize reliance on race as a primary factor. Police officers should additionally be educated about the federal and state constitutional requirements that govern their conduct.[410]

"entered stipulations agreeing, among other things, to the dismissal of *all* state law claims without prejudice" and that a federal court's rulings on equal protection grounds under the U.S. Constitution "does not preclude litigation for the first time of a state equal protection claim in state courts").

408. *Id.* at 646 n.3 (citation omitted).

409. Brown v. State, 814 N.Y.S.2d 492, 506 (Ct. Cl. 2006). Again, there may be further and different appellate consideration of the case.

410. *See* Brown v. City of Oneonta, 911 F. Supp. 580, 592 (N.D.N.Y. 1996), *vacated in part by* 221 F.3d 329 (2d Cir. 2000) ("The Court cannot say as a matter of law that training or super-

Police departments and city governments can work with their communities to improve police-community relations, as well. In response to concerns about racial profiling by the police in Detroit, Michigan, for example, community leaders and local police chiefs created the Advocates and Leaders for Police and Community Trust in 1998.[411] The group held official meetings and a conference to open a dialogue about profiling and to create relationships of trust between historically conflicting entities.[412] This alliance proved especially helpful after the September 11 attacks, issuing a public statement condemning hate crimes against Arab and Muslim community members.[413] It also worked with the Federal Bureau of Investigations and the DOJ to assist in their terrorism investigations, and to allay fears among Arab and Muslim communities about possible discriminatory policing.[414] The Detroit group's efforts have served as a model for collaborations in other parts of the country.[415]

Both communities of color and police departments will ultimately benefit from taking steps to address police use of race as a primary factor in suspect descriptions. Especially in an era of increased concern with security, cooperation between all community members and the police is crucial for maintaining safety. This safety must be coupled with respect for racial equality and individual liberties, however, in order to truly maintain a secure, fair, and just society.

vision as to the difficult Fourth Amendment situations raised by the investigation following this odious crime would not have prevented the conduct complained of herein.").

411. DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING 29–36 (2005).

412. *Id.* at 29–31.

413. *Id.* at 32.

414. *Id.* at 33–36.

415. *Id.* at 36.