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“DWB (DRIVING WHILE BLACK)”* AND EQUAL PROTECTION: THE REALITIES OF AN UNCONSTITUTIONAL POLICE PRACTICE

*Jennifer A. Larrabee***

INTRODUCTION

On May 8, 1992, Robert L. Wilkins, an African-American graduate of Harvard Law School and a public defender in Washington, D.C., was traveling through western Maryland in a rented red Cadillac.¹ Wilkins and his family were returning home from a funeral which they had attended in Chicago.² Just before dawn, their car was stopped for speeding by Maryland State Trooper Bryan W. Hughes, who alleged that the car was traveling 60 miles per hour in a 40 miles per hour zone.³ After Trooper Hughes issued Wilkins' cousin, the driver of the car, a \$105 speeding ticket, he asked the family to consent to a search of the

* Michael A. Fletcher, *Driven to Extremes; Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1 (discussing the measures and precautions African-American men must take in order to avoid being stopped by the police; the term “DWB” is used by Salim Muwakkil, an African-American academic and journalist, to refer to the police practice of targeting African-American males for traffic violations).

** Brooklyn Law School Class of 1998; A.B. Columbia University, 1993. The author would like to thank Professor Susan Herman for her invaluable guidance and suggestions in the development of this Note. In addition, the author thanks Jennifer Gaffney for her understanding and patience.

¹ Paul W. Valentine, *Maryland Settles Lawsuit Over Racial Profiles; Police Allegedly Targeted Minorities for Searches*, WASH. POST, Jan. 5, 1995, at B1.

² *Id.*

³ *Id.*

car.⁴ Wilkins responded that it was unconstitutional to search a car without probable cause.⁵ Trooper Hughes ignored Wilkins' claim and continued to pressure the family to consent to the search, insisting that it was a regular practice of the Maryland State Police to search motor vehicles.⁶ When the family refused, Trooper Hughes ordered them out of the car and forced them to stand in the rain while he summoned drug-sniffing dogs from a nearby Sheriff's Deputy.⁷ Wilkins and his family waited in the rain for over a half an hour until the car was finally searched by the dogs; ultimately no drugs or illegal substances were found.⁸

Subsequently, Wilkins and his family members filed a lawsuit against the Maryland State Police Department.⁹ The Police Department chose to settle the case, and agreed to pay Wilkins and his family members \$50,000 for damages they suffered as a result of the incident.¹⁰ In addition to the payment of money damages, the settlement also included a promise by the Maryland State Police Department to cease using race as a factor in detaining motorists, and a promise to revise its training programs to incorporate this new policy.¹¹ Despite this settlement, the Maryland State Police Department still continues to use race as a factor in detaining and searching motorists.¹² A recent study by the Associated Press revealed that African-American drivers are four times as likely to

⁴ *Id.*; *Maryland State Police Settle Lawsuit Over Racial Profiles*, JET, Jan. 23, 1995, at 6 [hereinafter *Maryland State Police*].

⁵ *Maryland State Police*, *supra* note 4, at 6.

⁶ *Maryland State Police*, *supra* note 4, at 6.

⁷ Tanya Jones, *Race-Based Searches Prohibited*, BALTIMORE SUN, Jan. 5, 1995, at 1B.

⁸ *Id.*

⁹ *See Maryland State Police*, *supra* note 4, at 6.

¹⁰ *See Maryland State Police*, *supra* note 4, at 6.

¹¹ *See Maryland State Police*, *supra* note 4, at 6.

¹² *See* Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425, 441 (1997) (writing that despite the settlement of the case and the promise by the Maryland State Police Department to stop using race as a factor in detaining motorists, there is still a "continued pattern and practice of stopping African-Americans" in Maryland).

be stopped by police along sections of Interstate 95 in Maryland than other drivers.¹³

The problem outlined above is not unique to the state of Maryland. All over the country, African-American and other minority motorists are stopped for traffic violations solely because of their race.¹⁴ Statistics and studies comparing the percentage of minority motorists stopped and searched in comparison to the percentage white motorists show that police are using traffic violations as a pretext for stopping and searching motor vehicles driven by minorities.¹⁵ Reacting to this police practice, many African-Americans take precautionary measures such as driving inconspicuous cars, driving at exactly the speed limit, being

¹³ Michael Schneider, *State Police I-95 Drug Unit Found to Search Black Motorists Four Times More Often Than White: Analysis Raises Questions About Trooper Procedures*, BALTIMORE SUN, May 23, 1996, at 2B. Of 145 motorists stopped during a nine month period, 110 were black, 24 were white, 6 were Hispanic and 5 were "other minorities." *Id.*

¹⁴ See, e.g., Hart Seely, *Black Males Say It's Normal for Police to Find an Excuse to Stop Their Cars and Hunt for Drugs*, SYRACUSE HERALD AM., Oct. 22, 1995, at A12 (quoting Susan Horn, the Executive Director of the Hiscock Legal Aid Society, as saying, "the police use vehicle and traffic violations all the time as the pretext for stopping people, particularly black people, and particularly in certain neighborhoods").

¹⁵ See *Patrol To Review Drug Stops*, NEWS & OBSERVER (Raleigh, NC), Aug. 4, 1996, at B2 (comparing the stops of motorists on Interstates 85 and 95 by the State Police Special Emphasis Team, which targets drug offenses, to stops made by the regular highway patrol; 45% of the charges rendered by the Special Emphasis Team were against African-Americans, whereas other troopers working on the same highways issued only 24% of their charges against African-Americans); Linn Washington, Jr., *Racism is Driving the War on Drugs in New Jersey*, STAR-LEDGER (Newark, NJ), June 19, 1996, at 99 (stating that "Blacks and Latinos made up nearly 75% of those subjected to 'investigative stops by troopers on the section of the Turnpike running through Gloucester County although these motorists made up only 13.5% of the Turnpike's annual total drivers'"); Patrick O'Driscoll, *Drug Profile Lawsuit Settled; Minority Motorists Stopped*, DENVER POST, Nov. 10, 1995, at A1 (revealing that the police use the following factors in deciding whom to stop on the highway: race or ethnicity of the driver; temporary license plates; vehicles from known drug-source states; tinted or curtained windows; radar detectors; "visible" air fresheners; and fast-food wrappers on the floor).

conscious of their posture and avoiding flashy clothes or sunglasses to avoid being targeted by police.¹⁶

The Supreme Court recently examined the constitutionality of pretextual stops and searches where race may be involved in *Whren v. United States*.¹⁷ The *Whren* Court held that so long as the police have probable cause to stop a motorist (including police officers witnessing what they believe is a traffic violation), the stop is justified under the Fourth Amendment¹⁸ even if the officer considers the race of the driver in deciding whether to stop the vehicle.¹⁹ While the Supreme Court in *Whren* analyzed whether pretextual stops were improper under the Fourth Amendment,²⁰ the Court has never addressed the practice of stopping motorists on

¹⁶ See Fletcher, *supra* note *, at A1.

¹⁷ 116 S. Ct. 1769 (1996).

¹⁸ The Fourth Amendment protects citizens' privacy by forbidding the government to partake in arbitrary searches and seizures. U.S. CONST. amend. IV ("The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."). See *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 (1967) (asserting that "[t]he basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials").

¹⁹ *Whren*, 116 S. Ct. at 1774.

²⁰ *Id.* Relying on *Whren*, the Supreme Court recently held that the Fourth Amendment does not require that a lawfully seized defendant be advised that he or she is "free to go" before a defendant's consent to a search will be recognized as voluntary. See *Ohio v. Robinette*, 117 S. Ct. 417 (1996). *Robinette* involved a case in which the defendant was stopped for traveling 69 miles per hour in a 45 miles per hour zone. *Id.* Upon being stopped, a police officer conducted a computer check of the defendant which indicated no prior violations. *Id.* The officer then asked the defendant if he had any drugs or illegal substances in the car. The defendant said that he did not. *Id.* The officer then asked the defendant if he could search the car. *Id.* The defendant said yes and the search turned up a small amount of marijuana and a pill of methylenedioxymethamphetamine (MDMA), commonly known as ecstasy. *Id.* Robinette was subsequently arrested and charged with "knowing possession of a controlled substance." *Id.* The Supreme Court held that the consent to the search was voluntary despite the lack of a warning by the police to the defendant that he was not required to consent to the search. *Id.* at 419-21. Further, the Supreme Court held that the stop was authorized under *Whren*. *Id.*

the basis of race under the Equal Protection Clause of the Fourteenth Amendment.²¹

This Note argues that the Equal Protection Clause should prevent the police from considering the race of a motorist when deciding whom to detain for a traffic violation. However, in reality, the Equal Protection Clause offers little protection against such police activity since the Supreme Court requires claimants meet an onerous test for establishing an equal protection violation.²² For example, under the Court's traditional test, a claimant has the burden of proving that the police intended to discriminate. Since a claimant is unlikely to find proof which would satisfy this burden, the claimant's equal protection argument is likely to fail.²³ In order to solve this problem, courts should abandon the traditional equal protection test with respect to pretextual traffic stops and should institute a less burdensome analysis.²⁴

Part I of this Note discusses in detail how the police use race as a factor in deciding whom to pull over for traffic violations and the effect this practice has on minorities. Part II comments on why the Equal Protection Clause will not protect against the consideration of race by police in making their decisions. First, this section sets out the requirements necessary to demonstrate a violation of equal protection. The remainder of the section discusses the difficulties of establishing an equal protection violation under the traditional test, particularly with regard to proving discriminatory intent by the police officer making the stop. Part III argues that courts should adopt a new equal protection test for analyzing

²¹ The Fourteenth Amendment guarantees that "[n]o 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.

²² See *infra* Part II.B for a detailed discussion of the elements courts require to establish an equal protection violation.

²³ See *infra* Part II.C for a detailed discussion of why it is so difficult to prove discriminatory intent in pretextual traffic stops. First, there usually is no admission by a police officer that he or she detained a motorist because of his or her race. See *infra* Part II.C.1. Second, statistics have not proven to be effective measures to establish discriminatory intent. See *infra* Part II.C.2.

²⁴ See *infra* Part III for an examination of the ways in which equal protection analysis could be adapted so as to reflect upon modern forms of racism.

consideration of race by police in detaining motorists for traffic violations. One possible solution is for courts to adopt the test laid out in *Batson v. Kentucky*,²⁵ where the Supreme Court lessened the burden of establishing an equal protection violation with respect to the use of race as a factor in making peremptory challenges during jury selection. Another solution is to re-evaluate the discriminatory intent requirement in the equal protection test as suggested by Charles Lawrence in his article entitled *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*.²⁶

I. POLICE USE OF RACE AS A FACTOR IN DETAINING MOTORISTS FOR TRAFFIC VIOLATIONS

It has become apparent that all across the country police have instituted a new policy to fight the war on crime. This policy involves stopping motorists for traffic violations on the basis of the motorists' race.²⁷ Studies reveal that the percentage of minority drivers being stopped by police for traffic violations far exceeds the percentage of white drivers being stopped.²⁸ In New Jersey, 75% of drivers stopped for investigation on portions of the New Jersey Turnpike are African-Americans and Latinos, yet this group only

²⁵ 476 U.S. 79 (1986).

²⁶ 39 STAN. L. REV. 317 (1987).

²⁷ See David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 249-50 (1994) (writing that defendants' claims that they are stopped by police because of their race are not treated fairly in the criminal context). See also *A CCLU Idea That Goes Too Far*, HARTFORD COURANT, Dec. 30, 1994, at A10 (writing that police officers in Avon, CT, a primarily white community, were supposedly ordered by supervisors to stop black and Latino drivers); *Activists Laud Ruling on Cops' Race-Targeting*, THE RECORD (Northern NJ), Mar. 10, 1996, at A17 (citing a court ruling that criticized New Jersey state troopers for targeting minority motorists for traffic stops because of their appearance); Kris Antonelli, *State Police Deny Bias*, BALTIMORE SUN, Jan. 11, 1997, at 1B (citing Deborah Jeon, a lawyer with the ACLU, as having knowledge that internal memos from high-ranking officials within the Maryland State Police Department admit that there is a problem within the police department of stopping and searching a disproportionate number of black motorists).

²⁸ See *supra* note 15 (listing statistics for various racial groups).

makes up 13.5% of the annual drivers on the Turnpike.²⁹ Minority drivers traveling through the suburbs of Texas' major cities are twice as likely to receive tickets for traffic violations than are white drivers.³⁰ On portions of Interstate 95 in Maryland, 71% of the motorists stopped and searched in the first nine months of 1995 were African-Americans.³¹ In one Florida county, 62% of the drivers stopped were minorities, and on an interstate in Colorado, 190 of 200 stops "targeted minorities."³² These statistics clearly indicate that minorities are disproportionately being stopped by police. The inference to be drawn from this is that police are using race as a factor in deciding whom to stop for traffic violations.³³

The stop of the motor vehicle by police is often the first in a series of events which adversely affects the motorist.³⁴ In fact, what occurs after the stop is often more objectionable than the stop itself. In most cases the motorist is not even issued a ticket for a

²⁹ Washington, *supra* note 15, at 99.

³⁰ Dianna Hunt, *Ticket to Trouble/Wheels of Injustice/Certain Areas are Ticket Traps for Minorities*, HOUS. CHRON., May 14, 1995, at 1.

³¹ Fletcher, *supra* note *, at A1.

³² CBS Evening News: *Police Appear to Target Minorities in Effort to Catch Criminals* (CBS television broadcast, May 22, 1996).

³³ Greg Williams, *Selective Targeting in Law Enforcement*, 10 NAT'L B. ASS'N MAG. 18, 20 (Mar.-Apr. 1996) (discussing specifically the police practices in Gloucester County, N.J. and Volusia County, Fla. and asserting that "[e]xamination of the disproportionate statistics relating to African American motorists stopped versus others stopped by the two highway law enforcement units, shows convincing evidence that African Americans were the prime target of the police agencies involved").

It should be noted that the other inference to be drawn from these statistics is that minorities commit more traffic violations than non-minority drivers. However, additional statistics prove such an inference incorrect. For example, one study revealed that 75% of the cars on the New Jersey Turnpike exceeded the speed limit and only 2% of those speeding cars were driven by African-Americans. See Washington, *supra* note 15, at 99.

³⁴ For example, after the motorist is stopped by police, the police may then search the car and have the discretion to decide whether or not to arrest the motorist depending on the severity of the traffic infraction. See, e.g., *Whren v. United States*, 116 S. Ct. 1769 (1996) (after a motorist was stopped for a traffic violation and his car was searched, all occupants were subsequently arrested for possession of illegal substances).

traffic violation,³⁵ but instead police use the stop as an opportunity to search the vehicle for contraband and illegal substances.³⁶ Police target minorities for these stops because they feel they have a greater chance of discovering illegal activity.³⁷ Drug courier profiles commonly include a racial component and police often believe that minorities are more likely to be drug couriers than are whites.³⁸ Further, many police officers believe that minorities have a greater propensity to commit crimes. Evidence reveals that officers rely on this belief when deciding whom to detain.³⁹ Thus, the primary motivation behind the initial stop is the hope that a

³⁵ See Rudovsky, *supra* note 27, at 250-51 (revealing that in Volusia County, Florida on Interstate 95, 70% of the cars stopped by police were driven by African-Americans or Latinos; 80% of those vehicles searched were driven by African-Americans or Latinos; and only 1% of those drivers stopped received a ticket for a traffic violation).

³⁶ See Rudovsky, *supra* note 27, at 249 (asserting that stops for traffic violations are a way for police to search a driver's car either through consent, probable cause, plain view or other justifications for search and seizure).

³⁷ Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 30 (1994) (writing that "[t]he 'war on drugs' has almost become synonymous with policing the African-American community and black males").

³⁸ Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 233-36 (1983) (writing that race is a clearly identified component of the drug courier profile); Williams, *supra* note 33, at 21 (revealing that Sheriff Vogel of Volusia County, Florida instructed his Selective Enforcement team to look for cars in which "African American and Hispanic motorists [were] traveling" in the Team's quest for drug busts).

³⁹ See *United States v. Mallides*, 473 F.2d 859, 862 (9th Cir. 1973). In *Mallides*, a case involving an appeal of a conviction for aiding and abetting illegal entry of aliens, the arresting officer admitted that he stopped all cars with Mexican-appearing people in them. *Id.* See also Johnson, *supra* note 38, at 236 (discussing the racial component of the drug courier profile used by law enforcement officials); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 210-11 (1994) ("Black men are often labeled and treated as criminals by police, even where no criminal activity is suspected. . . . Police perceive blacks as more prone to criminal activity. They find blacks more dangerous and, in other ways, easier prey for police excesses.").

subsequent search will lead to an arrest, prosecution and conviction for a crime other than a traffic violation.⁴⁰

Beyond criminal convictions, traffic stops may also lead to other positive results for the police. For example, police have an incentive to stop motorists in order to seize large amounts of money and property through civil forfeitures.⁴¹ In Florida, the Sheriff's Department in Volusia County has confiscated approximately \$8 million in cash over the past few years, all of which is believed to be narcotics money.⁴² The Sheriff's Department has expressly stated that its objective is to seize cash.⁴³ In order to meet this objective, the police generally stop a greater amount of cars traveling southbound on Interstate 95 because those cars are sometimes stocked with cash to purchase illegal substances.⁴⁴ The

⁴⁰ These stops can also lead to more harmful results, including death. For example, on October 24, 1996, in St. Petersburg, Florida, police stopped an 18 year old African-American male for speeding. See Mike Clary, *Florida City Officials Urge Calm*, L.A. TIMES, Oct. 26, 1996, at A9. While the facts after the stop were disputed, the end result was that the motorist was shot three times by the police and killed. Peter E. Howard, *St. Pete Shooting Sparks Violence*, TAMPA TRIB., Oct. 25, 1996, at 1. The police claimed that the motorist refused to obey their verbal commands and that his car lurched forward. *Florida State of Emergency/Shaky Calm Restored After Killing of Motorist*, N.Y. NEWSDAY, Oct. 26, 1996, at A13. Witnesses, on the other hand, claimed that the motorist had his hands up, with his foot on the brake and the car in gear. *Id.* The police ordered him out of the car and as he responded the car moved forward and the police proceeded to shoot him three times. *Id.*

⁴¹ See LEONARD W. LEVY, *A LICENSE TO STEAL 1* (1996).

A forfeiture is the uncompensated government confiscation of property illegally acquired or used The law allows the government to seize and confiscate the property of people suspected of some crime, though they may never be tried or, if tried, may be acquitted. The promise of forfeiture lures officers to seize what they can, because they are able to keep for law enforcement purposes most of what they seize, or they can use the assets for whatever they need — weapons, helicopters, cellular phones, salary increases, bulletproof vests, or new police cars with which to conduct the war against crime.

Id. at 1.

⁴² *Id.* at 3.

⁴³ *Id.*

⁴⁴ *Id.*

cars going northbound, however, are not stopped as often because if drug sales have already taken place, those cars would carry drugs, not cash.⁴⁵ Hence, the police are encouraged to use traffic stops as a way to achieve objectives other than the enforcement of traffic laws.

Moreover, the courts have given police the authority, under the Fourth Amendment, to use traffic violations as a legitimate reason to stop and search a motorist's car.⁴⁶ As a result, police have been allowed to accomplish hidden objectives through pretextual traffic stops. Police authority during traffic stops was most recently upheld in *Whren v. United States*, where the Supreme Court held that evidence of illegal drugs obtained by District of Columbia Police during a traffic stop search of petitioners' car was admissible in a trial for illegal possession of narcotics.⁴⁷ Petitioners argued that the police did not have probable cause or reasonable suspicion to believe that the petitioners were involved in illegal drug activity and thus, the search of their car violated their Fourth Amendment rights.⁴⁸ Petitioners further argued that the police used the alleged traffic violations as a pretext in order to stop and search their car and that their race was the true motivation behind the stop.⁴⁹

The Court rejected petitioners' arguments, asserting that the reasonableness of the stop does not depend upon the motivations of the individual police officer.⁵⁰ The Court also refused to adopt a

⁴⁵ *Id.*

⁴⁶ See, e.g., *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996) ("[A] traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring. It is also irrelevant . . . that the officer may have had other subjective motives for stopping the vehicle."); *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1327 (9th Cir. 1995) ("We hold that once a police officer has lawfully stopped a vehicle for a traffic violation, the officer may, consistent with the Fourth Amendment and despite the absence of probable cause or reasonable suspicion of criminal activity, order all occupants of the vehicle to step outside.").

⁴⁷ 116 S. Ct. 1769, 1776 (1996).

⁴⁸ *Id.* at 1772-73.

⁴⁹ *Id.* at 1773.

⁵⁰ *Id.* at 1774.

test that would ask whether a "reasonable officer" would have chosen to stop the vehicle in order to enforce traffic laws.⁵¹ Instead, the Court held that a motorist can be detained by police when the officer has probable cause to believe that a traffic violation has occurred.⁵² The Court ultimately upheld the admissibility of evidence seized during the stop and suggested that if petitioners wanted to attack the police officers' use of race in the stop, they would have to use the Equal Protection Clause, not the Fourth Amendment.⁵³

Whren grants the police authority, through the Fourth Amendment, to use traffic violations as a means to search vehicles for evidence of illegal activity. Therefore, as one commentator noted:

[A]s long as there was cause for the police action, it does not matter that the police were using their powers as a pretext to conduct a drug investigation that was at the time unsupported by cause or suspicion It does not matter that the ultimate purpose of the police action has nothing to do with the "legal" reason for the intrusion and everything to do with the search for drugs.⁵⁴

However, *Whren* has left open the question of whether detaining motorists for traffic violations on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment.⁵⁵

⁵¹ *Id.* at 1775-76.

⁵² *Id.* at 1772 (citing *Delaware v. Prouse*, 440 U.S. 648, 659 (1979)).

⁵³ The Court ultimately upheld the conviction of petitioners. Further, the Court did not address whether the stop of petitioners by police would have been constitutional under the Equal Protection Clause since petitioners did not raise the issue on appeal. *Id.* at 1774, 1777.

⁵⁴ See Rudovsky, *supra* note 27, at 251.

⁵⁵ *Whren*, 116 S. Ct. at 1174 (stating that "the Constitution prohibits selective enforcement of the law based on considerations such as race" and that the appropriate remedy for this problem would be the Equal Protection Clause, not the Fourth Amendment). Although not mentioned by the *Whren* Court, another option claimants have to attack the use of race by police in detaining motorists for traffic violations is to look to independent state constitutional grounds. See *Malloy v. Hogan*, 378 U.S. 1 (1964). States are required at a minimum to afford their citizens with essentially all of the guarantees offered by the Bill of Rights "according to the same standards that protect those personal

II. THE INSURMOUNTABLE EQUAL PROTECTION STANDARD

A. *The Equal Protection Clause Should Prevent the Police From Detaining Motorists on the Basis of Race*

The Equal Protection Clause states that no state shall "deny to any person within its jurisdiction the equal protection of the laws"⁵⁶ and has generally been interpreted to ensure that similarly situated people are treated alike under the law.⁵⁷ Equal protection

rights against federal encroachment." *Id.* at 10-11. However, the states do have the option of providing greater protections to their citizens through their own state constitutions, even where the text of the state constitutional provision is identical to the Federal Bill of Rights. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (stating that federal courts will not review state court decisions which are based only upon state law and state constitutional interpretation because federal courts have no jurisdiction over these claims).

Therefore, claimants wishing to assert that a police officer stopped a motorist for a traffic violation because of the motorist's race, would argue that such a stop is unreasonable under the state's search and seizure constitutional provisions. In essence, claimants in this situation would be urging states to reject the United States Supreme Court's decision in *Whren*. For example, in *People v. Brewer*, 1997 WL 453677, the defendants, who were charged with possession of a weapon in the third degree after being stopped for a traffic violation, argued that the police stop was pretextual and that New York should not follow *Whren* and thus should declare the stop unconstitutional. *Id.* at *1. The court agreed with the defendants that the stop was pretextual but held that a lower court judge does not have the authority to interpret the New York State Constitution to provide greater rights to its citizens than the *Whren* interpretation. *Id.* at *4.

However, a few states have opted to follow *Whren*, thereby foreclosing any potential arguments based on independent state constitutional grounds. See, e.g., *Russell v. United States*, 687 A.2d 213, 214 (D.C. 1997); *Petrel v. State*, 675 So.2d 1049 (Fla. 1996); *People v. Thompson*, 283 Ill. App.3d 796, 798 (Ill. 1996); *State v. Hollins*, 672 N.E.2d 427, 430 (Ind. 1996); *State v. Predka*, 555 N.W.2d 202, 205 (Iowa 1996); *State v. George*, 557 N.W.2d 575, 577 (Minn. 1997); *Gama v. State*, 920 P.2d 1010 (Nev. 1996); *State v. McCall*, 929 S.W.2d 601 (Tex. 1996).

⁵⁶ U.S. CONST. amend. XIV, § 1.

⁵⁷ See GERALD GUNTHER, CONSTITUTIONAL LAW 601 (12th ed. 1991). See also *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879) (asserting that equal protection should guarantee that the laws of the states be the same for blacks as

forbids classifications within laws, particularly those based on race, and seeks to remedy forms of discrimination.⁵⁸

As noted, the police practice of stopping motorists on the basis of race often leads to searches, seizures, arrests and other incidents within the criminal justice system.⁵⁹ Typically, these acts of

they are for whites).

⁵⁸ The Fourteenth Amendment and the Equal Protection Clause were designed to protect minorities from being victim to discriminatory acts, such as being stopped by police for traffic violations, because of their race. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325-28 (1952). On July 28, 1868 the United States Constitution was amended to include the Fourteenth Amendment. *Id.* The Fourteenth Amendment was passed after the Civil War and in response to the inadequacy of the Thirteenth Amendment and the Civil Rights Act of 1866. *Id.* The Amendment was geared to nationalize civil rights and to ensure that African-American citizens were afforded adequate and equal protection of the law. *Id.* at 1325. The Supreme Court in the *Slaughter-House Cases* explained the purpose of the Equal Protection Clause: "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." 83 U.S. (16 Wall.) 36, 81 (1873) (holding that Louisiana's grant of a monopoly to a particular company for all New Orleans-area slaughter-houses was not a violation of equal protection).

Throughout history, the Supreme Court has turned to the Equal Protection Clause to prevent racial discrimination. In *Strauder v. West Virginia*, Justice Strong, writing for the majority of the Supreme Court stated "What is [equal protection] but declaring . . . , in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" 100 U.S. 303, 306-07 (1879). In *Korematsu v. United States*, the Court held that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." 323 U.S. 214, 216 (1944). The Supreme Court in *Washington v. Davis* stated "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." 426 U.S. 229, 239 (1976). Thus, the historical development of the Equal Protection Clause demonstrates that the Clause was designed to prevent harmful race-based classifications and was intended to prevent discriminatory practices such as police choosing to detain motorists for traffic violations based upon their race.

⁵⁹ See *supra* Part I (discussing pretextual stops as a way to search the motorist's car for evidence of other illegal activity, particularly possession of drugs).

discrimination have been attacked under the guise of the Fourth Amendment.⁶⁰ Claimants argue that the stop was not justified or that the evidence seized is not admissible under the Fourth Amendment.⁶¹ This approach has not been successful, particularly in light of the Supreme Court's recent decision in *Whren*.⁶²

The Equal Protection Clause, however, offers an alternative argument for minority motorists who are detained by police because of their race. While the Fourth Amendment was designed to deal with issues surrounding "privacy and personal security,"⁶³ the Equal Protection Clause was designed to prevent discrimination by the State.⁶⁴ If a police officer selectively enforces traffic laws in order to search a minority motorist's car, he has discriminated against the minority motorist. Thus, the focus of the motorist's legal claims should be on the actual selection process used by police in deciding to stop him rather than the search of his car after the stop.⁶⁵

⁶⁰ See, e.g., *Whren*, 116 S. Ct. at 1774 (stating that despite petitioners' arguments that their Fourth Amendment rights were violated when police stopped them for a traffic violation because of their race, such police conduct should be attacked under the Equal Protection Clause).

⁶¹ See, e.g., *United States v. Harvey*, 788 F. Supp. 966 (1992), *aff'd*, 16 F.3d 109 (6th Cir. 1994), *cert. denied*, 513 U.S. 900 (1994) (where defendant filed a motion to suppress contraband [under the Fourth Amendment] seized by a police officer when defendant was stopped by police for driving 68 miles per hour in a 65 mile per hour zone and for equipment violations).

⁶² *Whren*, 116 S. Ct. at 1774. Although *Whren* was decided recently, it has been followed throughout the federal and state courts. See *supra* note 55 and accompanying text discussing states which have followed *Whren*. *Whren* was recently upheld in *Ohio v. Robinette*, 117 S. Ct. 417 (1996). See *supra* note 20 for a detailed discussion of *Robinette*.

⁶³ Robert Alan Culp, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800, 805 (1986) (arguing that the Fourth Amendment is concerned with the intrusion of a citizen's physical privacy and the level of intrusion as opposed to the Equal Protection Clause which attempts to minimize the repercussions of being classified and distinguished as a member of a group).

⁶⁴ See *supra* notes 56-58 and accompanying text.

⁶⁵ *Whren*, 116 S.Ct. at 1774 (asserting that pretextual stop claims should be attacked under the Equal Protection Clause, not the Fourth Amendment).

When police use race in the selection process of whom to stop for a traffic violation, they devise two sets of traffic laws — one set more stringent and vigorous, which is applied to minorities, and one set more lenient and forbearing, which is applied to whites.⁶⁶ The Equal Protection Clause does not permit such race-based classifications. The Supreme Court in *Strauder v. West Virginia* announced that the Fourteenth Amendment and the Equal Protection Clause were “declaring that the laws in the States shall be the same for the black as for the white”⁶⁷ Based on this finding, the Equal Protection Clause should be applied so as to discontinue the police practice of having one set of traffic regulations for white drivers and another set for minority drivers.

B. The Traditional Equal Protection Test and Detaining Motorists on the Basis of Race

The Equal Protection Clause seeks to prevent the use of racial classifications in the application of laws⁶⁸ and therefore, it should prevent the police from applying traffic laws only to members of certain races. In order to establish an equal protection violation, a claimant must prove several elements. First, the Fourteenth Amendment has generally been interpreted to apply only when state action is present.⁶⁹ An act between two private individuals is not

⁶⁶ See *infra* note 128 and accompanying text (discussing Judge Keith’s dissent in *United States v. Harvey*, 16 F.3d 109 (6th Cir. 1994) in which Judge Keith argues that the court’s failure to condemn discrimination by police officers in a traffic stop has resulted in the creation of two sets of traffic laws, one for whites and one for minorities).

⁶⁷ See *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879) (holding that a West Virginia statute which made only white males of twenty-one years of age and above eligible to serve as jurors violated equal protection because it discriminated against African-Americans).

⁶⁸ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (articulating that the Equal Protection Clause is designed to curtail classifications of citizens, particularly those based on race).

⁶⁹ See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 10-11 (1883) (finding the 1875 Civil Rights Act, which required equal access to inns, public transportation, theaters and other public places be granted regardless of race, unconstitutional because it sought to regulate private action).

usually protected by the Fourteenth Amendment, but where the State is involved, the protections of the Amendment can be invoked.⁷⁰ When arguing that the Equal Protection Clause prohibits police from using race in their decisions to stop motorists for traffic violations, a claimant must show that enforcement of traffic laws by the police is state action.⁷¹ The Sixth Circuit in *United States v. Jennings* held that "[l]aw enforcement is quintessential official conduct — the police function being 'one of basic functions of government.'"⁷² Using this precedent, a claimant easily satisfies the first element of an equal protection claim, that state action be involved.

After establishing state action, a claimant must show that the act intentionally discriminates on its face or in its application.⁷³ Where the act expressly discriminates against a particular group, it is considered discriminatory on its face.⁷⁴ If the act does not call for discrimination against a certain group, but when executed, results in singling out a certain group, the act discriminates in its application.⁷⁵ If the act discriminates on its face, the Court will not require a claimant to show discriminatory impact.⁷⁶ The mere risk of discriminatory impact is sufficient because intentional discrimination is expressed in the act itself.⁷⁷ If the act discrim-

⁷⁰ See, e.g., *id.* at 11.

⁷¹ See, e.g., *id.* at 10 (requiring that state action be involved for there to be a violation of equal protection).

⁷² 985 F.2d 562 (6th Cir. 1993) (quoting *Folie v. Connelie*, 435 U.S. 291, 297 (1978)).

⁷³ See *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886) (finding that a San Francisco ordinance prohibiting hand laundries from operating in wood buildings without the consent of the Board of Supervisors violated equal protection because its application was discriminatory in that the Board granted operational permits to all non-Chinese laundries except one, and nearly all 200 Chinese laundry applications were denied); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (holding a statute that limits eligible jury members to white males age twenty-one and older discriminatory on its face).

⁷⁴ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

⁷⁵ *Yick Wo*, 118 U.S. at 368.

⁷⁶ *Strauder*, 100 U.S. at 309.

⁷⁷ *Id.* at 309-10 (claimant not required to show that blacks would have been selected to the jury if the statute disqualifying them was not enforced).

inates in its application, however, a claimant must prove intentional discrimination.⁷⁸ Since intent is not explicit in application cases, a claimant must rely on discriminatory impact as well as other factors in proving intent.⁷⁹

The practice of stopping motorists for traffic infractions, on its face, is a neutral act.⁸⁰ A constitutional problem arises, however, where the police apply the traffic laws in a discriminatory manner by considering a motorist's race in deciding whether to stop him. Generally, police end up targeting African-Americans and other minority motorists for traffic violations.⁸¹ Since this policy applies the traffic laws in a discriminatory manner, a motorist bringing an equal protection claim must show that the stop was carried out with an intent to discriminate.⁸² This requirement was established in *Washington v. Davis* where the Supreme Court decided that the District of Columbia Police Department's requirement that all job applicants pass a written test did not violate equal protection merely because African-Americans failed the test four times as frequently as whites.⁸³ The Supreme Court held that a showing of discriminatory impact was only a factor in determining intent and that it was insufficient by itself to prove discriminatory intent.⁸⁴

After *Washington*, the Supreme Court further clarified how to establish discriminatory intent. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court held that intentional discrimination can be found when race was a motivating factor in the act, and discrimination need not be

⁷⁸ See, e.g., *Washington v. Davis*, 426 U.S. 229, 241-43 (requiring claimants to prove discriminatory intent in order to establish that a policy, discriminatory in its application, violates the Equal Protection Clause).

⁷⁹ *Id.*

⁸⁰ Cf. *Strauder*, 100 U.S. at 308 (holding that the statute which disqualifies blacks from serving as jurors discriminates on its face).

⁸¹ See *Davis*, *supra* note 12, at 427-28 (asserting that the discretion granted to police in detaining motorists for traffic violations lends itself to the police practice of using race as a factor in deciding whom to detain).

⁸² *Washington*, 426 U.S. at 240-43.

⁸³ *Id.* at 245-47.

⁸⁴ *Id.* at 246.

the act's sole purpose.⁸⁵ The Court suggested that in order to discern discriminatory intent the following factors should be considered: impact of official action; historical background of decision; specific sequence of events leading up to the decision; procedural or substantive departures from the norm in connection with the decision or action; and legislative or administrative history.⁸⁶ However, the broad interpretation of *Arlington Heights* was narrowed in *Personnel Administrator of Massachusetts v. Feeney*.⁸⁷ There, the Supreme Court decided that the state actor must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group."⁸⁸ *Feeney* implies that intentional discrimination is present when the use of race is the primary motivating factor behind the action. Thus, in order to establish that the use of race in stopping a motorist for a traffic violation is intentional discrimination, the motorist must show that race was the primary motivating factor behind the stop.⁸⁹

Obviously, the best way to establish that race was the primary motivating factor is with an admission by the officer that the motorist was targeted because of his or her race. But more than likely, this type of evidence will not be readily available.⁹⁰

⁸⁵ 429 U.S. 252, 265-66 (1977) (finding that a village's denial of a developer's request to have land rezoned for residential mixed-income development did not violate equal protection because there was no intentional discrimination and the denial was not based on racial reasons; claimants had argued that the village's refusal to rezone the land was racially discriminatory because the land was to be developed into racially integrated low income housing).

⁸⁶ *Id.* at 266-68.

⁸⁷ 442 U.S. 256 (1979) (holding that a Massachusetts civil service statute which afforded a hiring preference to any veteran who passed a competitive exam did not deprive women of equal protection despite claims by petitioner that this statute discriminated against women because 98% of veterans were male).

⁸⁸ *Id.* at 279.

⁸⁹ *Washington v. Davis*, 426 U.S. 229, 246 (1976).

⁹⁰ See Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 341 (1994) (asserting that "[t]he problem with trying to prove that police officers treat racial minorities differently is that it is almost impossible to find concrete evidence of the discrimination" and that police officers and judges rarely admit when race is used as a factor in the

Officers will instead suggest that the motorist was chosen based on other factors such as the type of car being driven, the age of the car, temporary license plates, cars traveling or having license plates from known drug-source states, tinted windows, or radar detectors.⁹¹

Other than an admission by the police officer, the strongest evidence of discriminatory intent in these cases is statistics which demonstrate that minorities are disproportionately stopped by police for traffic violations. Using statistics as circumstantial evidence will allow a strong inference that police are using race as the primary motivating factor in deciding whom to stop for a traffic violation.⁹² Yet, there is some question as to whether claimants will either have the cooperation of police departments in obtaining statistical information or will have the resources to gather such evidence.⁹³ Further, there is no clear indication that courts will simply accept statistical information as a valid indication of discriminatory intent.⁹⁴

Controversy has arisen as to whether or not courts will accept statistical data as an indication of discriminatory intent.⁹⁵

decision-making process).

⁹¹ See O'Driscoll, *supra* note 15, at A1 (citing these factors as elements that police consider in deciding whom to stop for a traffic violation).

⁹² See Henry Pierson Curtis, *Statistics Show Pattern of Discrimination*, ORLANDO SENTINEL, Aug. 23, 1992, at A11 (writing that statistics show that a disproportionate number of blacks and Latinos are targeted for traffic stops and thus is evidence of discriminatory and racist policies by the Volusia County Sheriff's Department); *State to Challenge Ruling Troopers Targeted Drivers*, THE RECORD, (Northern NJ), May 2, 1996, at A3 (reporting that a state court judge relied on statistics in his decision that state troopers targeted minority motorists for traffic stops on the New Jersey Turnpike).

⁹³ See Fletcher, *supra* note *, at A1 (stating that there are no national statistics comparing the number of minorities stopped for traffic violations in comparison to white drivers). See also Hunt, *supra* note 30, at 1 (discussing the difficulty in obtaining statistics from the Texas Department of Public Safety concerning minorities and traffic violations).

⁹⁴ See *United States v. Bullock*, 94 F.3d 896 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 966 (1997) (refusing to consider the arresting officer's past history of stopping motorists on the basis of race).

⁹⁵ In other circumstances, courts have rejected the use of statistics to prove discriminatory intent. The most famous example is the Baldus study used by the

Although use of statistical evidence has become commonplace in modern equal protection cases, there is some question as to the weight the courts will give this type of evidence.⁹⁶ In *Batson v. Kentucky*, the Supreme Court allowed statistical proof to show discriminatory intent on the part of Kentucky prosecutors in their use of peremptory strikes to remove African-American jurors from cases where the defendants were African-Americans.⁹⁷ Statistical

petitioner in *McCleskey v. Kemp* in his attempt to prove that Georgia's use of the death penalty violated the Equal Protection Clause. 481 U.S. 279 (1987). A summary of the report states:

Death was imposed in 34% of the white-victim cases but only in 14% of similarly aggravated black-victim cases. The odds of receiving a death sentence in a white-victim case was 4.3 times greater than the odds of receiving a death sentence in a comparable black-victim case. Nearly six of every 10 defendants who were sentenced to death for killing white victims would not have been sentenced to death had their victims been black. Nearly 90% of those executed since 1977 were convicted of murdering whites, while in the same period, almost half of the homicide victims were black. In the same period of time, all seven of the persons executed in Georgia were convicted of killing whites. Six of the seven executed were black.

Georgia and the Nation, RACE AND THE DEATH PENALTY (ACLU/Capital Punishment, New York, N.Y.), Fall 1987, at 1-2. The Court found this study unconvincing and held that the study was insufficient to support an inference that any of the decisionmakers in the Georgia State Legislature acted with a discriminatory purpose. *McCleskey*, 481 U.S. at 297. The Supreme Court was unable to find any evidence that the Georgia State Legislature adopted the death penalty because it intended to discriminate against blacks or that the Legislature maintained the death penalty because of its discriminatory impact. *Id.* at 298.

Another Supreme Court decision that refused to grant statistics significant weight was *United States v. Armstrong*. 116 S. Ct. 1480 (1996). There, in a selective-prosecution claim, the defendant offered a study which showed that of the 24 cases involving similar drug charges that the federal public defender's office had closed in the past year, the defendant was black in every case. *Id.* at 1483. The Supreme Court dismissed such statistics for a lack of sufficiency. *Id.* at 1488.

⁹⁶ See generally Julia Lamber, Barbara Reskin & Terry Morehead Dworkin, *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 HASTINGS L.J. 553, 554-55 (1983). See *infra* note 128 for a discussion of intentional discrimination and the use of statistics in Title VII cases.

⁹⁷ 476 U.S. 79, 83-84 (1986).

evidence was also accepted in *Rogers v. Lodge* in order to show discriminatory purpose in a voting rights case.⁹⁸ There, an at-large voting scheme was found to be unconstitutional since under that system no African-American had ever been elected to office.⁹⁹ The Supreme Court held that a discriminatory intent can be surmised from circumstantial evidence and from a "totality of circumstances."¹⁰⁰ While the court accepted statistics as an indicator of discriminatory intent in those cases, in the more typical case, courts may not find statistics as persuasive.¹⁰¹ However, in evaluating statistics courts should bare in mind that statistics may be the only way to prove "the concealed nature of most discriminatory acts."¹⁰²

Just as there are instances where the court has found that statistics indicate discriminatory intent, there are examples where courts have discerned discriminatory intent where a law or policy promotes stereotypes.¹⁰³ Justice O'Connor, writing for the majority in *City of Richmond v. J.A. Croson Company*, stated "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."¹⁰⁴ The Supreme Court also held in *Edmonson v.*

⁹⁸ 458 U.S. 613, 624-27 (1982).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *supra* notes 83-84 and accompanying text (discussing the Supreme Court's ruling in *Washington v. Davis* that statistics and discriminatory intent alone is not enough to prove intentional discrimination). See also *supra* note 95 and accompanying text (referring to instances where the Supreme Court has not been persuaded by statistics); *infra* Part II.C.2 (discussing specifically how courts have found statistics insufficient to prove intentional discrimination).

¹⁰² See *Lamber, supra* note 96, at 554 (discussing how litigants have come to rely on using indirect and circumstantial evidence, including statistics, to prove discrimination).

¹⁰³ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 404-05 (1978) (Blackmun, J., separate opinion concurring in the judgment in part and dissenting in part) ("[R]acial and ethnic distinctions where they are stereotypes are inherently suspect and call for judicial scrutiny . . .").

¹⁰⁴ 488 U.S. 469, 493 (1989) (holding that minority set asides in government contracts violated equal protection).

Leesville Concrete Company that “[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.”¹⁰⁵ Thus, the Court is unlikely to uphold state action which perpetuates negative stereotypes.¹⁰⁶

The Supreme Court should take note that when police use race to decide whom to detain for a traffic violation, stereotypes are perpetuated. By singling out selected groups for traffic stops, the police are not only basing their decisions on stereotypes, but they are also promoting stereotypes.¹⁰⁷ As discussed previously, police stop minorities because of drug courier profiles and because they believe that minorities have a greater propensity to commit crimes.¹⁰⁸ This practice perpetuates stereotypes since the public may become convinced that minorities violate traffic laws more often than whites and have a greater propensity to commit crimes.¹⁰⁹ The perpetuation of these stereotypes should be one of the factors courts consider in determining whether police acted with an intent to discriminate when they stopped minority drivers for traffic violations.

¹⁰⁵ 500 U.S. 614, 630-31 (1991).

¹⁰⁶ See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (“[T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.”); *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (Marshall, J., concurring) (stating that “the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes”).

¹⁰⁷ See *Development in the Law — Race and the Criminal Process, Racial Discrimination on the Beat: Extending the Racial Critique to Police Conduct*, 101 HARV. L. REV. 1494, 1508 (1988) [hereinafter *Development in the Law*] (asserting that the use of race by police in detaining suspects sets up a self-fulfilling prophecy: “racial stereotypes influence police to arrest minorities more frequently than nonminorities, thereby generating statistically disparate arrest patterns that in turn form the basis for further selectivity”).

¹⁰⁸ See *supra* notes 38-39 and accompanying text (discussing the racial component of the drug courier profile and the stereotype that minorities commit more crimes).

¹⁰⁹ See *Development in the Law, supra* note 107, at 1509 (stating that arrest statistics which show that minorities are arrested for more crimes “reinforce stereotypes that are deeply embedded in our culture, but . . . tend to be of minimal probative value”).

If a claimant establishes discriminatory intent by the state, the court must then decide what level of review it will apply to the state action. When the action involves a "suspect classification," such as a classification based on race, then the action will be subjected to "strict scrutiny."¹¹⁰ In order to survive strict scrutiny, the state must show that the particular action meets a compelling state interest and is narrowly tailored to solve the pending problem.¹¹¹ The state is required to prove that not only is the law or policy necessary for the good of society, but that there is no other legitimate means of achieving the purpose.¹¹² If the state is able to justify its action as serving a compelling state interest and as being narrowly tailored, then the law or policy will be found constitutional.¹¹³ However, if the court finds that the state action cannot be justified by a compelling state interest or is not narrowly tailored to meet such an interest, then it will be deemed to have violated the Equal Protection Clause.¹¹⁴

A traffic stop will be subjected to strict scrutiny if a claimant can show that the police stopped the car because of the claimant's race. As discussed above, the police would have to prove that the

¹¹⁰ See, e.g., *Personnel Adm'r of Mass. v. Feeney*, 422 U.S. 256, 272 (1979) (holding that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification").

¹¹¹ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 7-8, 11-12 (1967) (finding a Virginia statute that prevents marriage between persons of different races unconstitutional because it violates equal protection). The State of Virginia argued that it had a right to regulate marriage and that it sought to preserve racial integrity through the statute. *Id.* The State also alleged that the statute was narrowly tailored since no one group was singled out and both whites and blacks were equally punished under the law. *Id.* The Court found that Virginia's interests were not compelling and did not justify racial classifications. *Id.*

¹¹² *Id.*

¹¹³ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (upholding military order barring people of Japanese ancestry from access to certain parts of the West Coast because of the compelling state interest of national security during World War II with Japan).

¹¹⁴ See, e.g., *Bush v. Vera*, 116 S. Ct. 1941, 1949 (1996) (finding Texas Congressional Districts 18, 29 and 30, which were minority-majority districts, unconstitutional because they were created primarily with race in mind and could not be justified by the state's interest in complying with the Voting Rights Act).

practice of stopping motorists on the basis of race serves a compelling interest and is narrowly tailored to that interest.¹¹⁵ While protecting the public from the potential harms of traffic violations is a compelling state interest,¹¹⁶ the practice of stopping only minority motorists for the purpose of finding evidence of criminal activity is not a compelling state interest. Moreover, even if traffic safety is accepted as the State's compelling interest, the practice of stopping only minority motorists is not narrowly tailored to meet this interest. Stopping minority motorists is both underinclusive and overinclusive and thus, does not reasonably achieve traffic safety.¹¹⁷ In other words, many minorities who do not commit traffic violations will be stopped while many non-minorities who do commit traffic violations will not be stopped.¹¹⁸ Police

¹¹⁵ See *Loving*, 388 U.S. at 11 (finding a Virginia statute barring interracial marriages unconstitutional because the state could not identify a compelling interest to justify the statute).

¹¹⁶ See, e.g., *Craig v. Boren*, 429 U.S. 190, 199 (1976) (holding that traffic safety is an important government objective).

¹¹⁷ See generally Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, CAL. L. R. 341 (1949). Courts, in deciding whether the classifications in a statute are reasonable, will look to whether the statute is underinclusive or overinclusive. *Id.* "Underinclusive" refers to a statute which seeks to prevent some harm and thus includes some people in a class suspected of contributing to the harm, but leaves many citizens out of the class who actually contributed to the harm. *Id.* For example, the police practice of using race to detain motorists will result in the detention of those minorities who commit traffic violations, but non-minorities who commit traffic violations will not be stopped.

A statute is "overinclusive" where the class created by the statute includes individuals who do not contribute to the harm sought to be alleviated by the statute. *Id.* Again, where the police stop motorists on the basis of race, minority drivers who did not commit a traffic infraction may nonetheless be stopped.

¹¹⁸ See *Carey v. Brown*, 447 U.S. 455, 465 (1980) (holding that an Illinois statute which prohibited picketing at residences, but not at workplaces, was unconstitutional because it was both underinclusive and overinclusive in that "the statute discriminate[d] among pickets based on the subject matter of their expression . . ."); *Wynn v. Carey*, 599 F.2d 193, 196 (7th Cir. 1979) (holding that a forty-eight hour waiting period and parental consent requirements of the Illinois Abortion Act of 1977 were unconstitutional in that they were underinclusive because they excluded married minors and overinclusive because they included married, emancipated minors); *Zablocki v. Redhail*, 434 U.S. 374, 390

Police practices of stopping and searching motorists must be narrowly tailored to serve the state's interest of ensuring traffic safety; the practice of stopping motorists because of race is not so tailored, and thus violates the Equal Protection Clause.

C. Discriminatory Intent: The Insurmountable Requirement of Equal Protection

Part B laid out the necessary elements of a traditional equal protection argument and then demonstrated how a claimant could establish an equal protection violation when the police use race to decide whom to stop for traffic violations. While the claimant is able to set forth arguments for each element of an equal protection claim,¹¹⁹ there will be one major weakness in the claimant's case, that is, a lack of proof that the police were acting with discriminatory intent.¹²⁰ This weakness results from limitations on claimant's use of direct evidence or circumstantial statistical evidence to prove that the police officer chose to detain the claimant because of the claimant's race.

1. Admissions by Police Officers

The best evidence of intentional discrimination by the police in stopping motorists is the admission by an officer that he or she did

(1978) (holding a Wisconsin statute unconstitutional that prevented any state resident from marrying where the resident had a child not in his custody and was obligated to provide support to that child by court order because such a law was both underinclusive and overinclusive in that the statute did not limit the applicant's new financial commitments and does not protect children born out of wedlock).

¹¹⁹ Claimant is able to argue that when a police officer stops the claimant because of his or her race, state action is involved. *See United States v. Jennings*, 985 F.2d 562 (6th Cir. 1993) (stating that law enforcement is one of the most basic functions of government). Claimant can also argue that while the state may have a compelling interest (traffic safety), the practice is not narrowly tailored to justify such an action because it is overinclusive and underinclusive. *See supra* note 117 (describing the concepts of underinclusive and overinclusive).

¹²⁰ *See supra* note 90 and accompanying text (discussing the difficulty in proving discriminatory intent).

in fact detain the motorist because of the motorist's race.¹²¹ However, there is some suggestion that courts may not even give this evidence weight.¹²² For example, in *United States v. Harvey*, an African-American male was arrested for possession with intent to distribute cocaine and possession of a firearm during the commission of a felony after being stopped for driving "several miles per hour" over the speed limit, and for equipment violations.¹²³ The defendant claimed that he had been stopped because of his race and that "no reasonable police officer would have stopped the car for those violations absent some other motive."¹²⁴ When Officer Collardey, the arresting officer, was asked what prompted him to stop the car, he responded, "[t]he age of the vehicle and the appearance of the occupants."¹²⁵ Although it is unclear what Officer Collardey meant by "the appearance of the occupants," an inference can be made that he actually suspected the defendant because of his race. The majority found that the stop of the defendant's vehicle was proper and that his conviction should be upheld.¹²⁶ The majority addressed the testimony of the officer in a footnote commenting that "nowhere in that testimony is there any suggestion that Collardey's use of race was a 'but for' cause of the stop."¹²⁷ The dissent, written by Judge Keith, vehemently disagreed. He wrote:

In my twenty-six years as a federal judge, although I have suspected discrimination by police officers, I have never heard an officer admit he stopped an individual based on the color of his skin The majority's willful disregard

¹²¹ See generally Brendan Mangan, *Comparable Worth Claims Under Title VII: Does Evidence Support An Inference of Discriminatory Intent?*, AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1991), 61 WASH. L. REV. 781, 797-98 (1986) (writing that in Title VII cases involving discriminatory pay practices, the best evidence of intentional discrimination is an admission by the defendant).

¹²² See Magee, *supra* note 39, at 179 (discussing the Supreme Court's recent policy of affording police officers great deference in their judgments).

¹²³ 16 F.3d 109, 110 (6th Cir. 1994).

¹²⁴ *Id.* at 111.

¹²⁵ *Id.* at 113 (Keith, J., dissenting).

¹²⁶ *Id.* at 112.

¹²⁷ *Id.* at 112, n.3.

of the flagrant discriminatory treatment in this case endorses a system where one set of traffic regulations exists for African-Americans like myself, and a more lenient set exists for white Americans.¹²⁸

Thus, *Harvey* suggests that courts may not even find discriminatory intent where an officer admits that he stopped a car because of the race of the occupants.¹²⁹ The question remains, if the Supreme Court is unwilling to accept this type of evidence, what evidence will it require to fulfill the discriminatory intent requirement?¹³⁰ If the claimant does not have available direct evidence that the officer selected the claimant due to his or her race or if the court does not accept such evidence, then the claimant must rely on other evidence.

2. *Statistics as Sufficient Proof of Discriminatory Intent*

There is some doubt as to whether courts will discern discriminatory intent on the basis of statistics alone.¹³¹ The cases seem to

¹²⁸ *Id.* at 114.

¹²⁹ In *Harvey*, the court was addressing whether the traffic stop violated the Fourth Amendment, not the Equal Protection Clause. *Id.* at 109-10.

¹³⁰ For example, Title VII cases often do not require the claimant to prove intentional discrimination on the part of an employer. The Supreme Court recognized the difficulty in providing direct evidence to show an employer's intent to discriminate and thus laid out the requirements of a *prima facie* case which do not require a showing of discriminatory intent. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Further, the Supreme Court approved of the use of statistics to show a pattern and practice of discriminatory intent. *Id.* In addition, in a Title VII action of a former employee against her employer for racial discrimination, the Court reaffirmed "[t]he principle that some facially neutral employment practices may violate Title VII even in the absence of discriminatory intent." *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 988 (1988). Further, the Supreme Court has found that a requirement by the employer that all applicants and employees pass an intelligence test was discriminatory and that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

¹³¹ For example, in *United States v. Armstrong*, 116 S. Ct. 1480 (1996), the defendant alleged a selective-prosecution claim and offered a study which

suggest that the courts usually find defects in the statistics offered by defendants, thus rendering this evidence ineffective.¹³² For example, in *United States v. Bell*, the defendant was charged with possession of cocaine base with intent to distribute after a stop by local police officers for operating a bicycle without a headlight.¹³³ The defendant contended that his arrest was invalid because it violated the Equal Protection Clause.¹³⁴ He offered statistics showing that "the only people arrested for violating the statute [of operating a bicycle without a headlight] during a certain month were black"¹³⁵ In addition, he had a bicycle shop owner testify that 98% of bicycles operated in the area (which is populated predominantly by whites) did not have headlights.¹³⁶ In rejecting this claim, the court explained that the statistics relied upon by the defendant were incomplete. The court stated that the defendant needed to show that white bicyclists also violated the statute and that the police chose not to arrest them.¹³⁷ The court further stated that the defendant needed to show the number of white bicyclists who ride their bicycles between sunset and sunrise.¹³⁸ *Bell* is an example of how the courts usually do not find statistics adequate to prove discriminatory intent.

showed that during the prior year, in all 24 cases handled by the federal public defender's office involving similar drug charges, the defendant was black. The Supreme Court found this evidence insufficient and instead stated that defendant should have additionally offered proof of individuals who were not black and could have been prosecuted for the same offenses but were not charged. *Id.* at 1489.

¹³² See *United States v. Jennings*, No. 91-5942, 1993 WL 5297, at *4-*5 (6th Cir. Jan. 13, 1993) (holding that discriminatory intent by the arresting officer, who admitted that half of the people he stops for searches are African-Americans and Hispanics, cannot be inferred because the defendant failed to provide statistical data showing that African-Americans represent a small minority of passengers). See also *United States v. Bell*, 86 F.3d 820 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 372 (1996).

¹³³ *Bell*, 86 F.3d at 821-22.

¹³⁴ *Id.* at 822.

¹³⁵ *Id.* at 823.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

In addition to courts not giving weight to the use of statistics, a claimant trying to prove discriminatory intent with statistics faces the problem of gaining access to these statistics.¹³⁹ First, there are no national statistics, that is statistics kept by police departments across the entire nation, available on the percentage of minority motorists stopped and searched in comparison to white drivers.¹⁴⁰ Second, even if local police do keep such statistics, they may not be willing to turn over such information to claimants bringing equal protection claims against them.¹⁴¹ For example, the *Houston Chronicle* wrote several articles about minority drivers being stopped and ticketed more often than whites.¹⁴² One such article discussed the difficulty in obtaining information regarding traffic violations stating that: "[t]hough driving records are routinely released to the public by the [Texas Department of Public Safety] one at a time, the agency refused to release them to the *Chronicle* for less than \$60 million."¹⁴³ This suggests that even if access to statistics is available, the statistics may not be affordable. Courts have not been eager to compel states to supply such information to claimants or to grant them access to such records.¹⁴⁴ For example, the court in *United States v. Bullock* refused to compel the arresting officer to produce evidence regarding his past history on stopping motorists on the basis of race.¹⁴⁵

A claimant attempting to prove that equal protection is violated when police stop a motorist on the basis of race has a very difficult task. The most serious hurdle is establishing that the police acted

¹³⁹ See Davis, *supra* note 12, at 438 (discussing the difficulty in obtaining statistics regarding the race of those motorists stopped by police for traffic violations).

¹⁴⁰ See Fletcher, *supra* note *, at A1 (revealing that national statistics concerning number of stops by police of minorities are not available).

¹⁴¹ See Fletcher, *supra* note *, at A1. ("Police departments have varying policies on compiling and releasing such information.").

¹⁴² See Hunt, *supra* note 30, at 1.

¹⁴³ See Hunt, *supra* note 30, at 1.

¹⁴⁴ See *United States v. Armstrong*, 116 S. Ct. 1480, 1485 (1996) (asserting that under Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure the defendant is not entitled to examine government documents that are material to the preparation of selective-prosecution claims).

¹⁴⁵ 94 F.3d 896 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 966 (1997).

with an intent to discriminate. Direct evidence in discrimination cases is usually unavailable¹⁴⁶ and the courts are reluctant to rely on a claimant's use of statistics to prove intentional discrimination.¹⁴⁷ Therefore, the traditional equal protection test may not be sufficient to protect minority drivers from the discriminatory practices of police. One possible solution is refining the requirements for establishing a prima facie equal protection violation.

III. THE NEED FOR A NEW EQUAL PROTECTION TEST

A. *The Test Under Batson v. Kentucky and its Application to Stops of Minority Motorists*

One area where the Supreme Court has re-evaluated the stringent equal protection test is jury selection and the use of peremptory challenges.¹⁴⁸ The Supreme Court announced this equal protection test in *Batson v. Kentucky*,¹⁴⁹ thereby overruling previous decisions which had required proof of specific instances of discriminatory practices by prosecutors in making their peremptory challenges.¹⁵⁰ Courts should adopt the equal protection test set out in *Batson* when analyzing the use of race by police in their decisions to stop motorists for a traffic violation.

1. *The Court's Findings in Batson v. Kentucky*

The issue before the Supreme Court in *Batson* was whether a defendant could prove that the State denied him equal protection when the State used its peremptory challenges to strike members of

¹⁴⁶ See Lamber, *supra* note 96, at 554.

¹⁴⁷ See, e.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976).

¹⁴⁸ See Lawrence Elmen, Jr., Note, *Peremptory Challenges After Batson v. Kentucky: Equal Protection Under the Law or an Unequal Application of the Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 481, 492-93 (1994) (detailing the history of jury selection cases and equal protection).

¹⁴⁹ 476 U.S. 79 (1986).

¹⁵⁰ See Elmen, *supra* note 148, at 494 (discussing how the *Batson* decision changed the prior requirement of purposeful discrimination test under equal protection).

the jury who were of the same race as the defendant.¹⁵¹ The same issue had arisen previously in *Swain v. Alabama* where the Supreme Court held that in order for a defendant to establish an equal protection violation, he or she would have to look beyond his or her own case and establish an extensive pattern by prosecutors of discriminatory exclusion of a certain race from juries.¹⁵² The Supreme Court in *Batson*, however, found fault with this approach and criticized the effect of *Swain* stating that: "[s]ince this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny."¹⁵³ The Supreme Court in *Batson* chose to overrule *Swain* and set out new rules for establishing an equal protection violation in jury selection cases.¹⁵⁴

The *Batson* Court laid out three elements which must be met in order to establish a prima facie case of purposeful discrimination.¹⁵⁵ First, the defendant "must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."¹⁵⁶ Second, the defendant is allowed to make the presumption that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"¹⁵⁷ Finally, the defendant is required to "show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."¹⁵⁸ To establish this inference, the court will consider all relevant circumstances which might include a pattern of strikes against certain members of a particular race or questions the prosecutor asked during voir dire.¹⁵⁹

¹⁵¹ 476 U.S. 79, 82-83 (1986).

¹⁵² 380 U.S. 202, 222 (1965).

¹⁵³ *Batson*, 476 U.S. at 92-93.

¹⁵⁴ *Id.* at 100, n.25.

¹⁵⁵ *Id.* at 96-98.

¹⁵⁶ *Id.* at 96.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 96-97.

After the defendant has established these three elements, the burden of proof then shifts to the State.¹⁶⁰ The State is required to provide some neutral explanation for the exclusion of certain members of a particular race.¹⁶¹ The Court specifically stated that it will not be acceptable for the State to explain its actions by saying that it believed the potential jury members would be more sympathetic to the defendant.¹⁶² As one commentator articulated, the Supreme Court has now shifted its focus away from the "ends" a prosecutor hopes to achieve and instead looks more closely at the "means" as to how those ends are achieved.¹⁶³

2. *Why Batson Should be Applied to Cases Where Motorists are Detained by Police Because of Their Race*

The prima facie case for discriminatory intent established in *Batson* should be applied to cases where motorists allege that they have been stopped by police due to their race because the two situations are analogous. A prosecutor's use of race in determining who should sit on a jury is comparable to a police officer's use of race in deciding whom to detain for a traffic violation. In each of these scenarios, the selection process at issue involves the discretionary power of either a prosecutor or a police officer.¹⁶⁴ The attention on members of a particular race usually stems from stereotypes such as a black juror will be sympathetic to a black defendant or a black driver is more likely to have an illegal substance in the car than a white driver.¹⁶⁵ Both situations involve

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Elmen, *supra* note 148, at 493-94.

¹⁶⁴ See Williams, *supra* note 33, at 18 ("State Troopers' abuse of discretion is routine, and it plagues racial minorities on one of the nation's busiest highways.").

¹⁶⁵ See *Batson v. Kentucky*, 476 U.S. 79, 97-98 (requiring a prosecutor to rebut a defendant's claim of discrimination with more evidence than the prosecutor's intuitive judgment that the juror will be sympathetic to the defendant because they share the same race). See also Johnson, *supra* note 38, at 236 (discussing police officers' assumptions that minorities have a greater propensity to commit crimes).

a subjective decision by a state actor that often cannot be clearly quantified. In both situations, a prosecutor's or a police officer's race-based decision can be hidden by a pretext.¹⁶⁶ Both situations involve a major infringement upon the civil rights of members of a particular race, particularly since they both involve criminal proceedings.¹⁶⁷ The two situations are comparable and thus should be treated similarly under the law.

3. *The Effect of Invoking the Batson Prima Facie Case in Cases Involving Motorists Being Stopped by Police Because of Race*

The Supreme Court in *Batson* was able to recognize that, despite the State's pretextual explanations for its choice in jury members and peremptory strikes, race played a significant role in the State's decisions.¹⁶⁸ The Supreme Court decided that the best way to solve this problem is to have the party responsible for the selection process explain its actions.¹⁶⁹ As a result of *Batson*, a state now has to provide a neutral justification for its challenge of a potential juror, thereby freeing the claimant from having to prove the nebulous, subjective intent of the state actor.¹⁷⁰ The Supreme Court finally recognized that unless the heavy burden placed upon the claimant by *Swain* was lifted from him, the Equal Protection Clause would be an empty promise.¹⁷¹

¹⁶⁶ See *Batson*, 476 U.S. at 98 (requiring that prosecutors articulate a neutral explanation of why juror was excused). See also Seely, *supra* note 14, at A12 ("The police use vehicle and traffic violations all the time as the pretext for stopping people, particularly black people, and particularly in certain neighborhoods.").

¹⁶⁷ See Williams, *supra* note 33, at 20 (arguing that targeting minorities for traffic violations "abus[es] the civil rights of hundreds of thousands of motorists to make a handful of arrests for possession of drugs").

¹⁶⁸ See *Batson*, 476 U.S. at 89.

¹⁶⁹ *Id.* at 97.

¹⁷⁰ *Id.*

¹⁷¹ See generally Catherine Beckley, *Batson v. Kentucky: Challenging the Use of the Peremptory Strikes*, 15 AM. J. CRIM. L. 263, 263-64 (1988) (discussing how *Batson* recognized and corrected the shortcomings of *Swain*).

Just as in the jury selection cases, it is evident that police are motivated by race to stop certain motorists for traffic violations. If the *Batson* rationale was implemented in cases involving race and traffic stops, the claimant would have to set forth a prima facie case and then the burden would shift to the police to have to explain their decision to stop the motorist.¹⁷² With this type of equal protection test in effect, the burden of proving intentional discrimination would be removed from the claimant. Instead, the State would have to explain why the particular motorist was suspected, other than his or her race, for a violation of the traffic law. Under this procedural requirement, the Equal Protection Clause would finally become viable again and would be able to achieve its original purpose: to protect minorities from harmful classifications and discrimination on the part of the state.

B. Equal Protection and "Unconscious Racism"

1. Charles Lawrence: "Unconscious Racism" and The Cultural Meaning Test

Charles Lawrence in his profound article, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, argues that racism and the Equal Protection Clause should be approached from a different angle that better reflects the realities of racism in our culture.¹⁷³ Lawrence begins by asserting that our cultural and historical heritage has been imbedded with notions of racism which has resulted in all of us being racist to some degree.¹⁷⁴ Most of us are unable to recognize the extent to which our culture has affected our ideas about race and thus we are unaware that race plays a role in our decisions and actions.¹⁷⁵ Lawrence asserts that, "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."¹⁷⁶ Notions of

¹⁷² *Batson*, 476 U.S. at 89.

¹⁷³ 39 STAN. L. REV. 317, 321 (1987).

¹⁷⁴ *Id.* at 322.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

racism are even further suppressed given that recent "American cultural morality" views racism as wrong.¹⁷⁷

Lawrence argues that the concept of "unconscious racism" should be incorporated into the equal protection analysis.¹⁷⁸ Given that racism may take a less than obvious form, requiring a showing of intentional discrimination is not adequate to address the problem.¹⁷⁹ Lawrence writes: "decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional — in the sense that certain outcomes are self-consciously sought — nor unintentional — in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision-maker's beliefs, desires, and wishes."¹⁸⁰ Equal protection analysis needs to be revisited so that it can better reflect this understanding of unconscious racism.

Lawrence, in developing the concept of "unconscious racism," goes on to articulate a new test that courts should implement in cases involving racism and equal protection that he calls the "cultural meaning test."¹⁸¹ The first step in the test is for the court to "evaluate [the] governmental conduct [in question] to see if it conveys a symbolic message to which the culture attaches racial significance."¹⁸² The court, in attempting to make such a decision, would have to consider the historical and cultural context in which the suspect conduct occurred. If the court concludes that a "significant portion of the population thinks of the governmental action in racial terms," then the decision would be deemed to have been influenced by "socially shared, unconscious racial attitudes."¹⁸³ The suspect conduct, thus, would be subjected to strict scrutiny analysis by the court.¹⁸⁴

¹⁷⁷ *Id.* at 344.

¹⁷⁸ *Id.* at 323.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 322.

¹⁸¹ *Id.* at 324.

¹⁸² *Id.* at 356.

¹⁸³ *Id.*

¹⁸⁴ *Id.* For a discussion of strict scrutiny, see *supra* note 110 and accompanying text.

2. *The Cultural Meaning Test Applied to Cases Where Police Stop a Motorist Because of Race*

In applying Lawrence's cultural meaning test to a situation in which a police officer detains a minority motorist, several factors have to be considered. Primarily, the court should focus on the historical and social context in which the traffic stop occurred. The court should begin by looking at general historical and cultural stereotypes regarding African-Americans. Throughout history and continuing to today, African-Americans have stereotypically been thought of as overly aggressive, violent, involved in drugs, dishonest, shiftless and lazy, desirous of white women and lacking in work ethics.¹⁸⁵ Whites, on the other hand, have been seen as industrious, intelligent and responsible.¹⁸⁶

In addition to these cultural stereotypes, our country has historically associated crime with race, and still does today.¹⁸⁷ African-Americans are often viewed as being out of control and as possibly dangerous.¹⁸⁸ There is a commonly held belief that they tend to commit more crime and thus police are justified in targeting African-Americans as opposed to other groups.¹⁸⁹ Many feel that the focus of the police should be aimed at preventing black crime against white victims because of the dangerous nature of African-Americans.¹⁹⁰

Based on this historical and cultural conduct, an officer who decides to stop a minority motorist for a traffic violation, clearly sends a symbolic message latent with racial significance. Given the extensive coverage by the media and press regarding the prevalence of minorities being stopped by police for traffic violations,¹⁹¹ it

¹⁸⁵ See Weatherspoon, *supra* note 37, at 28.

¹⁸⁶ See Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945, 1948 (1993).

¹⁸⁷ See Jason A. Gillmer, Note, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 527-40 (1995).

¹⁸⁸ See Roberts, *supra* note 186, at 1947.

¹⁸⁹ See Roberts, *supra* note 186, at 1949.

¹⁹⁰ See Roberts, *supra* note 186, at 1946.

¹⁹¹ See *supra* notes 1-15 (discussing media attention to pretextual car stops

would not be difficult for the court to find that a significant portion of the population attributes such police action to racial factors. After making this judgment, the court would apply the strict scrutiny standard to the police practice of choosing to detain a motorist for a traffic violation because of the motorist's race.¹⁹²

CONCLUSION

The Supreme Court held in *Whren* that under the Fourth Amendment, a police officer has probable cause to stop a motorist for a potential traffic violation even if the police officer considers the race of the driver in his or her decision to stop the motorist.¹⁹³ The *Whren* decision essentially prevents any claimant from arguing that the Fourth Amendment is violated when a police officer stops a motorist for a traffic violation because of the driver's race.¹⁹⁴ Instead, the *Whren* Court asserted that the appropriate remedy for such a problem lies with the Equal Protection Clause.¹⁹⁵

It is apparent, however, that the current equal protection test may be inadequate to remedy the problem of drivers being detained by police officers for traffic violations because of their race. Under the traditional equal protection test, it will be extremely difficult for claimants to establish that a police officer acted with an intent to discriminate against the minority driver when that driver was stopped for a traffic violation.¹⁹⁶ The officer is unlikely to admit

based on race).

¹⁹² Once the court applies the strict scrutiny standard, the state would be obligated to show that stopping motorists on the basis of race for traffic violations meets a compelling state interest and is narrowly tailored to that interest. See *supra* notes 110-117 and accompanying text for a discussion of strict scrutiny and its requirements.

¹⁹³ *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* See *supra* Part II.C (discussing the *Whren* Court's view that the police practice of using race in deciding whom to detain for a traffic violation should be addressed through the Equal Protection Clause, not the Fourth Amendment).

¹⁹⁶ See *supra* Part II.C (discussing the difficulty of proving discriminatory intent in cases where a police officer has stopped a motorist for a traffic violation because of the motorist's race).

that he or she stopped the driver because of his or her race which leaves the claimant with only circumstantial evidence to prove his or her case.¹⁹⁷ Claimants may look to statistics as a form of proof, but it may be impossible for claimants to get access to such studies and the courts may not accept such evidence.¹⁹⁸ To remedy the pervasive problem of stops of minority motorists based on race, courts should re-evaluate the traditional equal protection test to better reflect the requirement in *Batson* or to take into account unconscious racism as defined by Charles Lawrence.¹⁹⁹ Whether courts will actually re-evaluate the current equal protection standard is something yet to be determined. However, we must encourage the courts to do so in order to fight "DWB."²⁰⁰

¹⁹⁷ See *supra* Part II.C.1 (discussing the lack of admissions by police officers that they detained a motorist because of the motorist's race and courts failure to give weight to "couched" admissions).

¹⁹⁸ See *supra* Part II.C.2 (discussing the lack of weight courts have given to statistics and the difficulty claimants traditionally have in obtaining them).

¹⁹⁹ See *supra* Part III (discussing the more lenient equal protection test adopted by the Supreme Court in cases where race was considered in peremptory challenges in jury selection and other ways in which the equal protection test could be changed, for example by adopting the cultural meaning test as suggested by Charles Lawrence).

²⁰⁰ See Fletcher, *supra* note *, at A1 (defining the term "DWB"). See also David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283, 1312 (1995) (advocating that the Supreme Court adopt a new equal protection test regarding cocaine sentencing guidelines and writing, "while the history of equal protection jurisprudence provides ample grounds for pessimism, neither history nor morality permits us to give up equal protection law for dead").