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A Failure of the Fourth Amendment & Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies

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A FAILURE OF THE FOURTH AMENDMENT & EQUAL PROTECTION'S PROMISE: HOW THE EQUAL PROTECTION CLAUSE CAN CHANGE DISCRIMINATORY STOP AND FRISK POLICIES

*Brando Simeo Starkey**

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This article is part of a manuscript that I am currently writing entitled *The Intent Doctrine*. My other previous works, Brando Simeo Starkey, *Criminal Procedure, Jury Discrimination & the Pre-Davis Intent Doctrine: The Seeds of a Weak Equal Protection Clause*, 38 AM. J. CRIM. L. 1 (2010) (arguing that the Intent Doctrine started with *Smith v. Mississippi*, not *Washington v. Davis*) [hereinafter Starkey, *Criminal Procedure*] and Brando Simeo Starkey, *Inconsistent Originalism and the Need for Equal Protection Re-Invigoration*, 4 GEO. J.L. & MOD. CRIT. RACE PERSP. 1 [hereinafter Starkey, *Inconsistent Originalism*] (arguing that the future of the Equal Protection Clause must not hinge on the ratifying generation's original understanding of equal protection), will also be included in this forthcoming manuscript.

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In August of 2006, Nicholas K. Peart, a young, Black New Yorker, was sitting on a Manhattan bench with his cousin and a friend, celebrating his eighteenth birthday.¹ As they were conversing and enjoying their evening, squad cars suddenly encircled them.² “Get on the ground,” hollered an officer from a window of a marked police vehicle.³ With multiple guns pointed at their heads, one officer reached into Peart’s pockets and pulled out his photo identification.⁴ “Happy birthday,” the cop sarcastically remarked.⁵ After asking Peart and his companions a few questions, the cops bid their adieus and left the young men lying on the sidewalk.⁶

Not even two years later, in the spring of 2008, Peart was stopped and frisked again, this time after leaving his grandmother’s Flatbush, Brooklyn, residence.⁷ As he strolled down the street to a nearby bus stop, an unmarked police car passed him and then backed up.⁸ Three cops quickly jumped out and ordered him to put his hands against a garage door.⁹ They snatched his wallet out of his pocket and looked at his identification; Peart was then let go.¹⁰

1. See Nicholas L. Peart, *Why Is the N.Y.P.D. After Me?*, N.Y. TIMES, Dec. 18, 2011, at 6.

2. See *id.*

3. *Id.*

4. See *id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

In September 2010, it happened again.¹¹ He was stopped, frisked, searched, identified, and then left alone.¹²

In May 2011, Peart was leaving his apartment building on his way to a local store when two officers hopped out of an unmarked car and directed him to stop and put his hands against a wall.¹³ Peart, now unfortunately accustomed to following the dictates of those wearing the shield, did as he was commanded.¹⁴ One officer grabbed Peart's cell phone from his hand and another reached into his pockets and removed his wallet and keys.¹⁵ The officer rummaged through his wallet and handcuffed him.¹⁶ One cop then asked which one of the keys opened his apartment door.¹⁷ Next, the cop entered his building and tried to enter his apartment.¹⁸ A different police officer, meanwhile, put the handcuffed Peart in the back of a police car.¹⁹ That officer asked Peart whether he had any marijuana.²⁰ Peart responded, "No."²¹ The officer then removed and searched his shoes and patted down his socks.²² Peart drew the officers' attention because they said he supposedly fit the description of someone who had been ringing a neighbor's doorbell.²³ When the officer who had taken Peart's keys returned, the handcuffs were removed; the officers told Peart to get out of the police car and drove off.²⁴

Given all of the police attention he has drawn, one might presume that Peart is a dangerous, hardened criminal with a long rap sheet. He isn't. Peart is just a twenty-three year old college student, who, due to the color of his skin, looks like a criminal.²⁵

11. See *id.*

12. *Id.*

13. See *id.*

14. See *id.*

15. *Id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. See *id.*

24. *Id.*

25. See *id.* See generally Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 250–53 (1991) (providing additional stories of racial profiling).

INTRODUCTION

Terry v. Ohio changed everything.²⁶ Before *Terry*, Fourth Amendment law was settled.²⁷ The Fourth Amendment had long required that police officers have probable cause in order to conduct Fourth Amendment invasions;²⁸ to administer a “reasonable” search and seizure, the state needed probable cause.²⁹ But in 1968, the Warren Court, despite its liberal reputation,³⁰ lowered the standard police officers had to meet to conduct a certain type of search: the so-called “‘stop’ and ‘frisk.’”³¹ A “stop and frisk”

26. 392 U.S. 1 (1968).

27. Scott E. Sundby writes: “Prior to *Camara*, Fourth Amendment analysis had a relatively high amount of predictability: the Court presumed that a warrant based on probable cause was required before the police could perform a search or arrest.” Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 386 (1988) (citing *Agnello v. U.S.*, 289 U.S. 20 (1925)). Sundby argues that the Supreme Court intimated that a warrantless search was a Fourth Amendment violation by definition. *Id.*

To portray the police tactics featured in *Terry* as unusual for the time would be historically inaccurate. Police departments had used stop and frisk techniques against suspects before *Terry* ever reached the Supreme Court in 1968. Some states even had their legislatures codify stop and frisk policies. See Wayne R. LaFare, “*Street Encounters*” and the Constitution, *Terry*, *Sibron*, *Peters and Beyond*, 67 MICH. L. REV. 39, 40 n.4, 42 (1968) (noting that stop and frisk was not a new police tactic in the late 1960s); see also Jerome H. Skolnick, *Racial Profiling—Then and Now*, 6 CRIMINOLOGY & PUB. POL’Y 65, 65 (2007) (pointing out that police in the South had long functioned as a tool to enforce Jim Crow).

28. See David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975, 975 (1998).

29. Perhaps the best example of the argument that the *Terry* Court reversed precedent is Justice Douglas’s dissent in *Terry*. Douglas writes that “[t]he infringement on personal liberty of any ‘seizure’ of a person can be ‘reasonable’ under the Fourth Amendment if we require the police to possess ‘probable cause’ before they seize him.” *Terry*, 392 U.S. at 38 (Douglas, J., dissenting). Not all agree, however, that the Court erred in holding that some searches did not require probable cause. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761 (1994) (arguing that the words of the Fourth Amendment “do not require probable cause for all searches and seizures without warrants.”); see also Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 1097 ST. JOHN’S L. REV. 1097, 1097 (1998) (arguing that “the good *Terry*” allowed for some searches without probable cause).

30. See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 3 (1998) (arguing that the Warren Court extended freedoms and rights to persons long denied them). The Warren Court is historically remembered as a liberal era of constitutional interpretation. *Brown v. Board of Education* 347 U.S. 483 (1954), was undoubtedly its most historically memorable decision, but the Warren Court’s reputation as a liberal Court is owed to other cases such as *Miranda v. Arizona*, 384 U.S. 436 (1966). However, as Tracey Maclin writes, it is ironic “that the police power to ‘frisk’ suspicious persons is the product of a Supreme Court that did more to promote the legal rights of [B]lack Americans than any other court.” Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1275 (1998).

31. *Terry*, 392 U.S. at 16.

occurs when a police officer, believing a suspect is armed and crime is afoot, stops the suspect, conducts an interrogation, and pats him down for weapons.³² In *Terry*, the Supreme Court detached reasonableness from probable cause for such “limited” searches and seizures; if a police officer’s suspicions, based on articulable facts, lead her to believe that crime is afoot and that a perpetrator is armed, then under the Fourth Amendment, a search for weapons is constitutionally permissible.³³ Despite reversing precedent,³⁴ *Terry* and its Supreme Court progeny allowed police officers to rely upon their reasonable suspicions to conduct searches only under narrow conditions. Lower courts, however, have enlarged *Terry* beyond recognition.³⁵ Indeed, police officers now have wide latitude to stop and frisk suspects.

As the trajectory of American race relations predicts, minorities, particularly males in lower-income communities, have complained of police harassment in the wake of *Terry*.³⁶ Indeed, Blacks and Hispanics contend that police officers stop and frisk them even when no “reasonable” basis for doing so exists. It seems that “reasonableness” highly correlates to melanin.³⁷

The practice is particularly troubling in the nation’s most populous city. In 2011 alone, New York police officers made over 680,000 stops.³⁸ 87 percent of those stopped were Black and Hispanic, despite constituting only slightly more than half of the city’s population.³⁹ The practice is not even particularly effective. For instance, in eight-square blocks of a low-income Brooklyn neighborhood, from January 2006 to March 2010, NYPD officers made nearly 52,000 stops.⁴⁰ Yet, less than 1 percent of those stops resulted in an arrest, and the police recovered a paltry twenty-five guns.⁴¹ Such aggressive policing tactics targeted largely at Black men have correlated with their extraordinarily high incarceration rates,⁴²

32. Stephen M. Raphael, “*Stop and Frisk*” in a Nutshell: Some Last Editorial Thrusts and Parries Before It All Becomes History, 20 ALA. L. REV. 294, 294 (1968).

33. *Terry*, 392 U.S. at 30–31.

34. *Id.* at 36 (Douglas, J., dissenting).

35. See discussion *infra* Part A.

36. See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 680–81 (1994).

37. See Peart, *supra* note 1, at 6.

38. See John Doyle & Rocco Parascandola, ‘Stop-&-Frisks’ Soar to Record, N.Y. DAILY NEWS, Feb. 15, 2012, at 10.

39. See *id.*; see also Editorial, *The Truth Behind Stop-and-Frisk*, N.Y. TIMES, Sep. 3, 2011, at A20.

40. See Ray Rivera, Al Baker & Janet Roberts, *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, Jul. 12, 2010, at A1.

41. See *id.* at A17.

42. In 2008, 3,161 of every 100,000 Blacks were imprisoned. WILLIAM J. SABOL, HEATHER C. WEST & MATTHEW COOPER, BUREAU OF JUSTICE STATISTICS, BUREAU OF JUSTICE

leading many to conclude that the criminal justice system is the new Jim Crow.⁴³

From the New York stop and frisk numbers flows the class-action *Floyd v. City of New York*.⁴⁴ In *Floyd*, minority plaintiffs contend that the city's stop and frisk practices unconstitutionally infringe upon personal liberty.⁴⁵ The Fourth Amendment as currently interpreted, however, permits cities like New York to promulgate stop and frisk practices that result in racial harassment.⁴⁶ What constitutional tool, then, can compel local governments and police departments to revamp their discriminatory stop and frisk techniques?

The answer must be the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment, however, has been shredded. With the maintenance of the Intent Doctrine, which requires a claimant to trace a purported equal protection deprivation back to a discriminatory motive, the Supreme Court has nearly nullified a clause that reads as a guarantee of legal equality.⁴⁷ The work of the 39th Congress has been annulled. Only tattered remains survive.⁴⁸ The Equal Protection Clause, however, can be pieced back together, as this Article demonstrates. Those words, "no state shall . . . deny to any person within its jurisdiction the

STATISTICS BULLETIN: PRISONERS IN 2008 at 2 tbl.2 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

43. The most notable example of this thesis is Michelle Alexander's oft-extolled book. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). Not all agree with the Jim Crow analogy. See James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22–23 (2012) (arguing that the Jim Crow analogy is unhelpful).

44. 813 F.Supp. 2d 457, 458 (S.D.N.Y. 2011).

45. See *id.*

46. See *Whren v. United States*, 517 U.S. 806, 813 (1996). Justice Scalia writes: "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.*

47. *The Slaughter-House Cases*, 83 U.S. 36 (1873), likewise nullified the Fourteenth Amendment's Privilege and Immunities Clause.

48. It is tattered for racial minorities, that is. The Equal Protection Clause works very well at protecting Whites from supposed claims of reverse discrimination. Derrick Bell, who concurs, writes:

We in modern America for some years now have been witnessing the shift of the Court's racial shield from minorities to [W]hites. In other words, the presumption—despite staggering evidence—seems now to be that nondiscrimination is the norm and that, in the absence of strong proof of fairly blatant discriminatory intent, the equal protection shield now protects both [W]hites in general and individual [W]hites who allege disadvantage by the operation of racial remediation plans.

DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* 185 (6th ed. 2008).

equal protection of the laws,”⁴⁹ adopted in 1868, though now functionally dead for people of color, can be resuscitated if the highest Court is so inclined.⁵⁰

Some in the legal community—practitioners, judges, and law professors—are eager to supplant the Intent Doctrine.⁵¹ Criticizing, however, is easy. Devising a solution, on the other hand, is drastically more difficult. Realizing that the Court’s equal protection decisions have made it nearly pointless for racial minorities⁵² to take their grievances to court, the legal sphere has responded by proffering various replacements for the Intent Doctrine. But has anyone proffered the right solution?

This Article argues “no” and presents a moderate fix for equal protection jurisprudence: Plaintiff-Burdened Deliberate Indifference (PBDI). Under PBDI, the plaintiff carries the burden of proving that (1) the plaintiff alerted the state to the existence of a law, policy, or manner of conducting business that constrains races unequally; (2) the plaintiff provided the governmental body with an alternative law, policy, or manner of conducting business that is likely to greatly diminish or solve the complained of racial disparities; and (3) the government failed to act. After these three prongs are proven, (4) the government carries the burden of proving that its failure to act furthered a compelling governmental interest. If the government fails to produce a compelling governmental interest, equal protection has been denied.

This Article does not, to be clear, call for a complete dismantling of the Intent Doctrine. Intent can stay. Its death grip, rather, needs to be loosened, and the Intent Doctrine must be buttressed by another means of proving an equal protection violation. There should be, in other words, two different ways of establishing *any* equal protection deprivation: intent and Plaintiff-Burdened Deliberate Indifference.

To show how PBDI will produce transformational change for racial minorities generally, this Article examines how it would operate in one important context: discriminatory *Terry* stops. Under PBDI, racial minorities can enter a courtroom armed with an equal protection argument and leave with the stereotypically rogue police department having to change its stop and frisk tactics. In full, this Article argues that the Equal Protection Clause should force police departments to ensure that their stop and frisk policies, in operation, do not discriminate on the basis of race *and*

49. U.S. CONST. amend. XIV, § 1.

50. I concede that the presently constructed Roberts Court is not so inclined. Perhaps future Courts will be of a different mind.

51. See, e.g., *Intent Doctrine*, EQUAL JUSTICE SOCIETY, <http://www.equaljusticesociety.org/law/intentdoctrine/> (last visited Oct. 4, 2012) (bringing together lawyers, academics, researchers, and other legal minds in an effort to overturn *Washington v. Davis*, 426 U.S. 229 (1976), and promote racial justice).

52. The Intent Doctrine also harms women. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).

the best way to get there is to embrace Plaintiff-Burdened Deliberate Indifference instead of other existing equal protection fixes.

This Article proceeds as follows: Part I argues that Fourth Amendment jurisprudence has failed to restrain racially discriminatory *Terry* stops. After pinpointing that constitutional vacuum, Part II makes the case that the Equal Protection Clause should fill the void and force police departments to ensure that their policies and officers' conduct are not racially discriminatory in operation. Part III surveys the landscape and analyzes a few proffered solutions to the Intent Doctrine. These solutions are critically examined and found to be fatally flawed. Most fail to provide the result this Article seeks to achieve: requiring police departments to take necessary steps to ensure that their officers are not conducting *Terry* stops in a discriminatory manner. Another is unacceptable because it is tantamount to a disparate impact test which the Court has already rebuffed. Part IV fleshes out Plaintiff-Burdened Deliberate Indifference and features a defense of it. PBDI survives rigorous inspection. Part V features an application of PBDI to the *Floyd* class action. If the Supreme Court declared that claimants could prove an equal protection violation through PBDI, police departments and local governments would be forced to change their policies.

Before proceeding, it's necessary to define this Article's parameters. Its central goal is to explore the possibilities of using the Equal Protection Clause to force local governments and police departments to change the way they police their streets.⁵³ There is the obvious issue of, say, a Latino, believing that he has been targeted for racial reasons, who seeks to pursue an individual remedy whether it may be exclusion of evidence in a criminal prosecution or a § 1983 lawsuit. While these are important inquiries, such individual remedies are not the concern of this article. As Professor George C. Thomas III argues, individual remedies are not the best way to stop racial profiling.⁵⁴ People of color, instead, need to focus on police departments.⁵⁵ This Article's focus, therefore, is on how minority communities might use equal protection jurisprudence as a tool to stop discriminatory stop and frisk tactics. How can Blacks and Hispanics, as a class, employ the Equal Protection Clause to halt the abuses in New York

53. Driving while Black is a related concept, but my article only concerns walking while Black and Brown. See *New Jersey v. Soto*, 734 A.2d 350, 356 (1996) (using statistics to support a charge of discriminatory law enforcement in driving while Black cases).

54. George C. Thomas III, *Blinded by the Light: How to Deter Racial Profiling—Thinking About Remedies*, 3 *RUTGERS RACE & L. REV.* 39, 39 (2001).

55. *Id.* Some do not believe that minority communities should focus intently on claims of racial profiling. Stanford Law Professor R. Richard Banks, for instance, “conclude[s] that policymakers should abandon efforts to ferret out and eliminate racial profiling in drug interdiction.” R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 *STAN. L. REV.* 571, 572 (2003).

City, for instance, that Mr. Peart and others experience all too often? That is the question this Article seeks to answer.

This Article contributes to both equal protection and criminal procedure literatures. Undoubtedly its biggest contribution to equal protection scholarship is the argument that claimants should be permitted to prove an equal protection violation through Plaintiff-Burdened Deliberate Indifference. If PBDI is adopted, the Equal Protection Clause suddenly becomes relevant again for racial minorities. As this Article will detail, existing solutions are imperfect, and thus, a promising equal protection fix is sorely needed. Also important is that equal protection scholars studying other groups, particularly women and members of the LGBT community, might consider PBDI and find that it helps those communities in securing equality as well. But beyond proffering a new standard, this Article takes up Professor Samuel R. Bagenstos on his call for scholars to forge a new normative understanding of antidiscrimination law, one that responds to our deeper scientific understanding of discrimination in the twenty-first century.⁵⁶

From a criminal procedure perspective, this Article directly confronts Justice Scalia's unanimous opinion in *Whren v. United States*.⁵⁷ Justice Scalia wrote that racially discriminatory criminal law enforcement violates the Equal Protection Clause though he knows, or should know, that the odds of such a claim being proved under the Intent Doctrine are minuscule.⁵⁸ This Article offers a standard⁵⁹ that might enable some to prove, as was charged in *United States v. Armstrong*, that criminal law officials are carrying out their duties in a discriminatory fashion.⁶⁰

I. A FAILURE OF THE FOURTH AMENDMENT

The Fourth Amendment, as it stands now, fails to prevent racial minorities from being disproportionately stopped and frisked on American streets, whether reasonable suspicion exists or not. In short, Fourth

56. Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 490–93 (2007).

57. 517 U.S. 806 (1996).

58. *Id.* at 813. Akhil Amar believes that the *Terry* Court should have taken note of the equality principle which would have defined reasonableness differently thereby extending the guarantee of being free from discrimination. Amar, *supra* note 29, at 805–10.

59. Some contend that the Fourth Amendment should handle claims of racial profiling. Tracey Maclin, along those lines, argues that the Supreme Court must not separate race from its Fourth Amendment jurisprudence. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 331, 375 (1998).

60. See 517 U.S. 456 (1996) (concerning a criminal defendant alleging that he was being prosecuted along racial lines).

Amendment rights are being denied on the basis of race.⁶¹ This is a failure of the Fourth Amendment. This Part unpacks exactly what that failure entails.

A. Stop and Frisk, the Nine Black Robes, and the Lower Courts

At 2:30 p.m. on October 31, 1963, Detective Martin McFadden, in plain clothes, was patrolling a street in downtown Cleveland when he saw two Black men—Richard Chilton and John Terry—standing on a street corner.⁶² The latter would have his last name become synonymous with a controversial police tactic.⁶³ A policeman for nearly four decades, McFadden was unable to articulate what specifically drew his attention to the gentlemen.⁶⁴ But to the officer, “they didn’t look right to [him] at the time.”⁶⁵ With the two men having secured his interest, McFadden stood a few hundred feet away and watched.⁶⁶ He peered as Terry walked down the street, looked into a store window, and walked back to Chilton to confer.⁶⁷ Each man alternately repeated this action five or six times.⁶⁸ A third gentleman, Carl Katz, who was White, approached the two.⁶⁹ A brief conversation took place between the three with Katz walking away short-

61. There has been a wealth of literature that detailing the intersection of the Fourth Amendment and Race. See, e.g., I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423 (2004); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383 (2001); Adina Schwartz, “Just Take Away Their Guns”: *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317 (1996); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Jack B. Weinstein & Mae C. Quinn, *Terry, Race, and Judicial Integrity: The Court and Suppression during the War on Drugs*, 72 ST. JOHN’S L. REV. 1323 (1998).

62. See *Terry v. Ohio*, 392 U.S. 1, 5 (1968). Terry’s lawyer actually wrote a law review article about his representation of John Terry. See Honorable Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN’S L. REV. 727 (1998).

63. See Reuben M. Payne, *The Prosecutor’s Perspective on Terry: Detective McFadden Had a Right to Protect Himself*, 72 ST. JOHN’S L. REV. 733 (1998) (writing from the prosecutor’s perspective about the officer’s actions in *Terry*).

64. *Terry*, 392 U.S. at 5.

65. *Id.*

66. *Id.* at 5–6.

67. *Id.* at 6.

68. *Id.*

69. *Id.*

ly thereafter.⁷⁰ A few minutes later, Chilton and Terry also departed, following the path that Katz had previously taken.⁷¹

Officer McFadden, after having watched the three, was suspicious.⁷² Believing that he had witnessed the planning of a robbery, he felt that as a police officer, he had a duty to investigate.⁷³ And so he did. McFadden approached the three men, identified himself as a police officer, and asked for their names.⁷⁴ After they “mumbled something” in response, he patted down each suspect.⁷⁵ Upon feeling what he thought to be weapons as he patted the outside of their clothing, McFadden removed guns from the persons of both Terry and Chilton.⁷⁶

During his trial for carrying a concealed weapon, Terry sought to have the gun excluded; he argued that it had been seized in violation of the Fourth Amendment.⁷⁷ The trial judge, however, admitted the firearm.⁷⁸ The Ohio appeals court affirmed;⁷⁹ the Ohio Supreme Court, next, dismissed Terry’s appeal;⁸⁰ and the Supreme Court granted certiorari.⁸¹

The Court determined that Terry was “searched” and “seized” under the Fourth Amendment.⁸² The Court noted, though, that these types of searches and seizures were limited and brief and balanced those facts with the need for law enforcement officials to combat crime and protect their own safety and that of the public.⁸³ Even though the Fourth Amendment was implicated, a stop and frisk was constitutionally permissible when a police officer had reasonable suspicion that a suspect was armed and that crime was afoot.⁸⁴ Though needing less evidence than probable cause, police officers needed more than an “unparticularized suspicion or ‘hunch’” to conduct a valid *Terry* stop.⁸⁵ Officers had to have, based on observation and experience, an articulable rationale to stop and frisk a suspect.⁸⁶ Such searches would be governed by this question: “[W]ould the facts available to the officer at the moment of the seizure or the search ‘warrant a man

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 6–7.

75. *Id.* at 7.

76. *Id.* Katz was unarmed.

77. *Id.*

78. *Id.* at 7–8.

79. *State v. Terry*, 214 N.E.2d 114, 122 (Oh. Ct. App. 1966).

80. *Terry v. Ohio*, 392 U.S. at 8.

81. *Terry v. Ohio*, 387 U.S. 929 (1967) (granting certiorari).

82. *Terry*, 392 U.S. at 19.

83. *Id.* at 27.

84. *Id.*

85. *Id.*

86. *Id.*

of reasonable caution in the belief' that the action taken was appropriate?"⁸⁷

The Court viewed stop and frisk as featuring two separate legal issues.⁸⁸ First, regarding the stop, the Court asserted that it must be reasonable at its inception.⁸⁹ But, lamentably, the Justices failed to provide the necessary guidance to lower courts and law enforcement officials on what exactly constituted a reasonable stop. Second, once a valid stop has occurred, the focus then turns to whether the police officer may conduct a search.⁹⁰ The Court, on this point, was decidedly more enlightening. A police officer may conduct a frisk when the officer, based on observation and experience, believes that criminal behavior is afoot by an armed suspect.⁹¹ Police are only permitted to frisk for weapons, not evidence of a crime.⁹² Thus, frisks are limited to a pat down of outer clothing.⁹³ As for *McFadden*, the Court concluded that his stop and frisk of *Terry* fit perfectly within these bounds.⁹⁴ Without admitting its new paradigmatic shift, the Warren Court fundamentally altered Fourth Amendment law.⁹⁵ A criminal search and seizure, for the first time, was constitutional when law enforcement lacked probable cause.⁹⁶ Reasonableness became king.

The same day that the Court handed down *Terry*, the Supreme Court also decided its companion case, *Sibron v. New York*.⁹⁷ In *Sibron*, Officer Anthony Martin watched Nelson Sibron associate with known drug users in Brooklyn.⁹⁸ Suspecting him of selling drugs, Martin confronted Sibron in a restaurant and directed him outside.⁹⁹ Once the two were outside, Martin declared, "You know what I am after."¹⁰⁰ Sibron mumbled something and then reached into his pocket.¹⁰¹ Martin simulta-

87. *Id.* at 21–22.

88. *Id.* at 19–20.

89. *Id.* at 20–21.

90. *Id.*

91. *See id.* at 30.

92. *See id.* at 29.

93. *See id.* at 30.

94. *See id.* at 30–31.

95. *See generally* John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749 (1998) (providing a look into the Warren Court's deliberations during *Terry*).

96. *See id.* at 823–39. To be sure, police officers conducted searches on the street without probable cause before *Terry*, but when the Supreme Court announced the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), police officers realized that the fruits of their "dirty" searches could not be used against the criminal defendant in court.

97. 392 U.S. 40 (1968).

98. *Id.* at 47.

99. *Id.* at 45.

100. *Id.*

101. *Id.*

neously reached into the pocket and pulled out packets of heroin.¹⁰² The Court declared the search unconstitutional.¹⁰³ Officer Martin, the Court determined, lacked reasonable articulable suspicion based on observational evidence that Sibron was armed.¹⁰⁴ *Sibron* declared that stops and frisks are only permissible when a police officer has reasonable suspicions that a crime is afoot that inherently requires a weapon or when reasonable suspicions exist that a suspect is armed.¹⁰⁵

Adams v. Williams was decided four years after *Terry* and *Sibron*.¹⁰⁶ Robert Williams was convicted of illegal possession of a firearm found during a stop and frisk.¹⁰⁷ At 2:30 a.m., in a supposedly high-crime area of Bridgeport, Connecticut, Williams was sitting in the passenger side of a parked car.¹⁰⁸ At the same time, not too far away, a conversation was taking place where a confidential informant told Sergeant John Connolly that Williams was seated in a nearby car with a gun and drugs in his possession.¹⁰⁹ Connolly then approached the car and instructed Williams to get out of the vehicle.¹¹⁰ Williams, instead, rolled down the car windows.¹¹¹ As the windows were rolling down, Connolly blindly reached into the car and pulled out a gun from Williams's waistband.¹¹² The Supreme Court by a vote of six to three held that the search and seizure, based on the informant's information, were reasonable under the Fourth Amendment and *Terry*.¹¹³

Ybarra v. Illinois further defined the contours of reasonableness when executing these warrantless but limited searches and seizures.¹¹⁴ Police in *Ybarra* entered a tavern with a warrant authorizing them to search the bartender and the premises for evidence of drug-trafficking.¹¹⁵ The police

102. *Id.*

103. *Id.* at 68.

104. *Id.* at 62–63.

105. *Id.* at 43–44.

106. 407 U.S. 143 (1972).

107. *Id.* at 144–45. Williams was also convicted of heroin possession following a search incident to his weapons arrest. *Id.*

108. *Id.* at 144–45.

109. *Id.*

110. *Id.* at 145.

111. *Id.*

112. *Id.*

113. Brennan's dissent was much more convincing than the majority opinion. See *id.* at 151–52 (Brennan, J., dissenting). For one, the confidential informant had never provided information that was subsequently substantiated. *Id.* at 156–57. The informant's information, moreover, concerned neither guns nor drugs. See *id.* at 156. More importantly, based on the confidential informant's information, Sgt. Connolly did not have any information to lead to a reasonable conclusion that crime was taking place which was crucial to *Terry*'s holding. See *id.* at 152.

114. See generally 444 U.S. 85 (1979).

115. *Id.* at 87–88.

went into the tavern and declared their intentions of searching everyone inside.¹¹⁶ As an officer patted down the defendant, he felt a cigarette pack containing objects.¹¹⁷ The officer removed the pack which contained heroin.¹¹⁸ As an initial matter, the Supreme Court rejected the argument that the warrant permitted the police to search every patron in the establishment.¹¹⁹ More important, though, the Court insisted that *Terry* permitted frisks only when a police officer has reasonable suspicion that a suspect is armed.¹²⁰ *Terry* does not permit officers to conduct a “generalized ‘ cursory search for weapons.’ ”¹²¹ In *Ybarra*, “[t]he initial frisk of Ybarra was simply not supported by a reasonable belief that *he* was armed and presently dangerous,” as *Terry* demanded.¹²²

The Supreme Court molded what a reasonable stop and frisk looked like through these cases. The problem, however, is that lower federal courts and state courts have marred *Terry*’s appearance. *Terry*, as it is applied now, is unrecognizable from the standard originally articulated by the Supreme Court. The *Terry* Court insisted that judges must analyze the individual facts of each particular case to determine whether a stop and frisk was reasonable.¹²³ Lower federal courts and state courts, however, have ignored the Court’s guidance.¹²⁴ Indeed, “lower courts have begun to rely on a categorical jurisprudence—that is, an ascertainment of whether the suspect fits into one or more overly broad categories, instead of an examination of facts that would tell both the officer on the street and a court deciding a suppression motion whether or not there was a reasonable suspicion to believe that a particular person was involved in a crime and armed.”¹²⁵ Though the Supreme Court’s standard was that the officer would have had to have reasonable suspicion that an armed suspect was committing or about to commit a crime, lower courts have created situations where the police officer’s search will *always* be held reasonable regardless of the facts of a particular case.¹²⁶ “Thus, anyone who falls into these categories may be frisked automatically, regardless of whether the circumstances actually indicate a weapon may be present.”¹²⁷

116. *Id.* at 88.

117. *Id.*

118. *Id.* at 89.

119. *Id.*

120. *Id.* at 93.

121. *Id.* at 93–94.

122. *Id.* at 92–93 (emphasis added).

123. Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 536–37 (1994).

124. Harris, *supra* note 28, at 987.

125. *Id.* at 987.

126. *See id.* at 987–88.

127. *Id.* at 988.

Terry and its progeny ruled that officers are always permitted to frisk a suspect when the crime suspected to be afoot is inherently violent.¹²⁸ Lower state and federal courts, however, have wrongly considered crimes that do not require weapons to be inherently violent.¹²⁹ Take drug trafficking for instance. Starting first with high traffic drug distributors, lower courts have declared that even the lowest level drug sellers are likely to be armed, and thus, capable of being frisked.¹³⁰ Lower courts have even found that persons on the premise of illegal gambling establishments can be automatically frisked.¹³¹ This jurisprudence has led to increased stop and frisks of racial minorities. As David A. Harris writes, “[t]he unfortunate fact is that *Terry* and its progeny have resulted in stops and frisks of residents of inner cities—primarily poor persons, African Americans, and Hispanic Americans—far out of proportion to their numbers, and often without justification.”¹³² This jurisprudence, has engendered unfortunate realities for racial minorities—an America where it is all too common that their Fourth Amendment rights are unconstitutionally invaded.¹³³

B. *Floyd and Stop and Frisk in New York City*

The Executive Director of the New York Civil Liberties Union has commented on the shockingly high number of stop and frisks in New York City: “‘Entire neighborhoods in NYC,’ remarked Donna Lieberman in 2011, ‘are turning into Constitution-free zones.’”¹³⁴ In 2011 alone, New York officers made over 680,000 stops.¹³⁵ Lieberman’s statement came three years after the Center for Constitutional Rights filed an initial complaint in *Floyd v. City of New York*.¹³⁶ In *Floyd*, class-action minority plaintiffs were suing both the New York Police Department (NYPD) and

128. David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 23 (1994).

129. See *id.*

130. *Id.* at 24–27.

131. *Id.* at 28; see also *Illinois v. Wardlow*, 528 U.S. 119, 136 (2000) (offering some support to the per se rule in some lower courts that flight plus a high crime area equals reasonable suspicion).

132. Harris, *supra* note 36, at 677.

133. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 496 (2000) (examining practices in New York City and arguing that stop and frisk strategies are more about “policing poor people in poor places”).

134. Rocco Parascandola, John Doyle, Barbara Ross, Kerry Wills & Joe Kemp, *NYPD Stopping and Frisking Record Number: NYCLU*, N.Y. DAILY NEWS, Nov. 30, 2011, at 16.

135. Doyle & Parascandola, *supra* note 38.

136. *Floyd v. City of New York*, No. 08 Civ. 1034, 2008 U.S. Dist. LEXIS 68798, at *1 (S.D.N.Y. Sept. 9, 2008). Initial Complaint, *Floyd*, 2008 U.S. Dist. LEXIS 68798 (No. 08 Civ. 1034), available at http://ccrjustice.org/files/Floyd_Complaint_08.01.31.pdf.

the city.¹³⁷ In addition to a Fourth Amendment claim, the complaint states that “NYPD officers, in violation of the Equal Protection Clause of the Fourteenth Amendment, often have used, and continue to use, race and/or national origin—not reasonable suspicion—as the determinative factors in deciding to stop and frisk individuals.”¹³⁸

NYPD Police Commissioner Raymond W. Kelly, unsurprisingly, has consistently denied that his officers racially profile.¹³⁹ When presented with evidence establishing that minorities are disproportionately stopped, his automatic retort is that those communities’ higher crime rates explain such disparities.¹⁴⁰ His response, however, has been invalidated by multiple studies. In 1999, for example, New York State investigated stop and frisk practices in New York City, using data compiled from January of 1998 to March of 1999.¹⁴¹ The devastating report states that “[w]hile higher crime rates may explain some increase in minority ‘stops’ above their overall percentage of the population, crime rates do not explain the *full* extent to which ‘stop’ rates for minorities were elevated.”¹⁴² “[E]ven when population rates and crime rates are controlled for,” the report further notes, “minorities were ‘stopped’ at a higher rate in New York City than [W]hites. Crime rates do not account for the disparity.”¹⁴³ The study, in other words, disproved New York City’s “no discrimination here” talking point.

More inconvenient for the NYPD is Columbia Law Professor Jeffrey Fagan’s study.¹⁴⁴ Professor Fagan’s statistical findings also support the claim that racial bias is at play.¹⁴⁵ As an initial matter, the study concluded that city’s stop and frisk tactics are less likely to lead to an arrest than random checkpoints.¹⁴⁶ Less than 6 percent of all stops lead to an arrest, making one wonder just how low of a bar reasonable suspicion is in the

137. Floyd v. City of New York, 813 F.Supp. 2d 457, 458 (S.D.N.Y. 2011).

138. Initial Complaint, *supra* note 136 at ¶ 3.

139. Al Baker, *Police Get Added Order: Stop, Frisk and ‘Explain,’* N.Y. TIMES, May 1, 2009, at A20.

140. See Al Baker, *Judge Declines to Dismiss Case Alleging Racial Profiling by City Police Street Stops*, N.Y. TIMES, Sep. 1, 2011, at A22.

141. OFFICE OF THE ATT’Y GEN., THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES, v (1999), available at http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf.

142. *Id.* at 122.

143. *Id.* at 135.

144. Report of Jeffrey Fagan at 2, Floyd v. City of New York, No. 08 Civ. 1034, 2008 U.S. Dist. LEXIS 68798 (S.D.N.Y. Sept. 9, 2008) (No. 08 Civ. 1034), available at http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf.

145. See *id.* at 3–5.

146. CENTER FOR CONSTITUTIONAL RIGHTS, STOP-AND-FRISK: FAGAN REPORT SUMMARY 1 (2010), available at <http://ccrjustice.org/files/Fagan%20Report%20Summary%20Final.pdf>.

minds of NYPD officers.¹⁴⁷ On the issue of racial profiling, Professor Fagan's research, like that of New York State, found "that racial composition predicts stop patterns over and above any predictions made by crime or other factors."¹⁴⁸ The report also establishes, as this Article argues, "that the NYPD has engaged in patterns of unconstitutional stops of City residents that are more likely to affect Black and Latino citizens."¹⁴⁹ Blacks and Hispanics, in other words, are being denied their Fourth Amendment rights on the basis of race. Brown and Black suspects, moreover, are "treated more harshly in instances in which police officers make the determination that a crime has occurred."¹⁵⁰ Indeed, "Black and Latino suspects are more likely to be arrested rather than issued a summons when compared to White suspects who are accused of the same crimes."¹⁵¹ That is, when behavior is kept constant and race is the variable, brown or black skin is a liability. For the NYPD and the city, Professor Fagan's report is simply damning.

The NYPD, however, furnishes its own counter-narrative. The NYPD hinges its non-discriminatory claims on a RAND Corporation study that it commissioned.¹⁵² The RAND report maintained that the stop and frisk data does not support charges of racial profiling.¹⁵³ Professor Fagan, however, found glaring methodological errors throughout the RAND study.¹⁵⁴ The report's findings, he wrote, "are unscientific and clearly without merit."¹⁵⁵

New York City's stop and frisk tactics are what columnist Bob Herbert harshly labeled "Jim Crow Policing."¹⁵⁶ On the pages of the *New York Times*, Herbert recounted the story of Lalit Carson, a teaching assistant at a Bronx charter school, who was stopped during a lunch break.¹⁵⁷ More troubling was the tale of a *New York Post* freelance reporter, Leonardo Blair, who was stopped and frisked and arrested for no apparent reason

147. *Id.*

148. Report of Jeffrey Fagan, *supra* note 144, at 39.

149. *Id.* at 2.

150. CENTER FOR CONSTITUTIONAL RIGHTS, *supra* note 146, at 2.

151. *Id.*

152. See generally GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES (2007), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR534.pdf.

153. See GREG RIDGEWAY, SUMMARY OF THE RAND REPORT ON NYPD'S STOP, QUESTION, AND FRISK 3-4 (2009), available at http://www.rand.org/pubs/testimonies/2009/RAND_CT329.pdf.

154. Al Baker & Ray Rivera, *Thousands of Street Stops by New York Police Were Legally Unjustified, a Study Finds*, N.Y. TIMES, Oct. 27, 2010, at A22.

155. CENTER FOR CONSTITUTIONAL RIGHTS, *supra* note 146, at 2.

156. Bob Herbert, *Jim Crow Policing*, N.Y. TIMES, Feb. 2, 2010, at A27.

157. *Id.*

other than being Black at night.¹⁵⁸ While Blair was in a holding cell, he overheard one officer inspecting his identification exclaim, “He’s not even from the projects,” suggesting that some NYPD officers either feel it is permissible to target low-income minorities or unconsciously assume that all minorities are criminals from the projects.¹⁵⁹

Much worse is the case of Michael Daragjati, the disgraced police officer who was charged with violating the civil rights of an unnamed Black man.¹⁶⁰ Daragjati was driving an unmarked car, saw a Black man in a Staten Island neighborhood, and chose to stop and frisk him.¹⁶¹ The search produced neither weapons nor contraband.¹⁶² The man complained to Daragjati about his mistreatment and asked the officer for his badge number.¹⁶³ Despite not having probable cause to arrest him, Daragjati falsely accused the Black man of resisting arrest.¹⁶⁴ This case would have been one among the many unfortunate yet untold police profiling tales, but Daragjati’s phones were being tapped in connection with a separate investigation.¹⁶⁵ Federal governmental officials intercepted phone calls and text messages proving that Daragjati had lied about the man resisting arrest.¹⁶⁶ During a phone conversation between him and a woman, he disclosed that he had “fried another nigger.”¹⁶⁷ The woman laughed in response.¹⁶⁸

This Article makes no claim about whether unconscious bias or conscious discrimination should be blamed here. This Article does not argue, that is, that police officers are overtly racist or that their actions are the inevitable outgrowth of anti-Black and anti-Brown implicit biases.¹⁶⁹ Professor L. Song Richardson convincingly argues that Fourth Amendment scholars have mistakenly ignored how implicit bias needs to be

158. See Christine Hauser, *Post Reporter Files Lawsuit Over Frisking by Police*, N.Y. TIMES, May 8, 2008, at B5.

159. *Id.*; see Leonardo Blair, *My Crime? Just Fitting the Profile*, N.Y. POST, Dec. 2, 2007, at 20 (providing Blair’s firsthand account).

160. See Mosi Secret, *Officer Held in Civil Rights Case after Frisking*, N.Y. TIMES, Oct. 17, 2011, at A21.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Blacks and Hispanics can hold negative biases about their own racial group as well. Thus, this should not be viewed solely as a White cop/Black-or-Brown citizen problem. For instance, one study found that one in ten Black cops racially profile and support it as a necessary tool for law enforcement. See David E. Barlow & Melissa Hickman Barlow, *Racial Profiling: A Survey of African American Police Officers*, 5 POLICE Q. 334, 350–51 (2002).

included more in the overall racial profiling conversation.¹⁷⁰ After all, “as a result of implicit biases,” Richardson writes, “an officer might evaluate behaviors engaged in by individuals who appear [B]lack as suspicious even as identical behavior by those who appear [W]hite would go unnoticed.”¹⁷¹ From a constitutional standpoint, however, the conscious/unconscious distinction should be irrelevant. It is, in the words of Justice Powell, “a legalism rooted in history rather than present reality.”¹⁷² What matters, rather, is that race is the reason why Fourth Amendment rights are being denied, and there is no effective remedy under current Fourth and Fourteenth Amendment jurisprudence.

II. MAKING THE CASE(S)

Part I showed that a Fourth Amendment failure exists. Part II argues that the Equal Protection Clause *should* provide a remedy. The clause’s interpretation, however, needs to be revised to meet the unique challenge of combating discrimination in the twenty-first century. In order to make the claim that changes are necessary, the defects of current equal protection jurisprudence need to be catalogued. Corrective measures are imperative. And the proper adjustments will provide minorities a constitutional tool to confront *Floyd*-like predicaments.

But it is not enough to just outline that discriminatory intent is hard to prove, that unconscious bias exists, and that structural racism abounds. One must argue affirmatively as to why equal protection jurisprudence should be responsive to these facts. Scholars, that is, need to make the case for a new normative understanding of what it means to deny a person equal protection.¹⁷³

170. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2035–37 (2011).

171. *Id.* at 2039.

172. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 218–19 (Powell, J., concurring and dissenting) (referring to the de jure/de facto distinction regarding segregation); see Donald Lively, *The Desegregation Legacy: Uncertain Achievement and Doctrinal Distress*, 47 HOW. L.J. 679, 688–89 (2004).

173. It might be necessary to explain how *Floyd v. City of New York*, 813 F. Supp. 2d 457, 458 (S.D.N.Y. 2011) presents an equal protection dilemma for those who either may be confused or balk at the very idea that this is an equal protection issue. Let’s say New York City passes a criminal statute that defines reasonable suspicion for Blacks as requiring lesser articulable facts than it does for Whites. Blacks’ equal protection rights, in such a hypothetical, unquestionably would have been denied. By that same token, if, as I am alleging, NYPD officers search and frisk Blacks for behaviors for which Whites are not being searched, that too is an Equal Protection Clause violation. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court held in 1886 that discriminatory application of a racially neutral law still violates equal protection.

Simply because an equal protection issue exists here, does not necessarily mean that reconstituting equal protection doctrine is the proper way to address a problem of the

A. *The Intent Doctrine: How Bad Is It?*

The Intent Doctrine presents three separate legal issues for claimants, though this Article focuses on only two.¹⁷⁴ First, there are nearly insurmountable evidentiary burdens associated with proving intentional discrimination. How does one prove that another intended to discriminate on the basis of race?¹⁷⁵ Second, unequal discriminatory results are often tied to implicit bias.¹⁷⁶ Americans hold negative biases about racial minorities that negatively impact the lives of people of color in various ways. Courts, however, have not embraced unconscious bias theory.¹⁷⁷ The law, simply put, is behind social science.

1. Proving That Which Cannot Be Proved

The Supreme Court now requires “near-impossible proof of discriminatory intent . . . deal[ing] a severe blow to minority groups seeking to challenge discriminatory state action on equal protection grounds.”¹⁷⁸ The standard, requiring plaintiffs to prove intent to discriminate, is exceptionally onerous for minority plaintiffs for various reasons.

One threshold issue concerns whose intentions matter? In *Personnel Administrator of Massachusetts v. Feeney*, the Supreme Court in was tasked with determining whether a veteran preference in civil service hiring violated the Equal Protection Clause because veteran status is highly correlated with gender.¹⁷⁹ The preference for veterans, indeed, “operate[d]

Fourth Amendment. This is an argument that some are likely to level—that it is an error to fix the Fourth Amendment through the Equal Protection Clause. But that would be an unfair critique. This Article endeavors to give meaning again to the words “equal protection of the laws” in all contexts. In doing so, those being denied their Fourth Amendment rights on the basis of race will naturally benefit.

174. The third issue is a racially neutral law that burdens racial groups unequally though no one sincerely believes the law was instituted for racially motivated reasons. Related to this is the idea of structural and institutional racism. See John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 794 (2008) (describing how structural racism impedes the cause of racial equality); see also Luke W. Cole & Caroline Farrell, *Structural Racism, Structural Pollution and the Need for a New Paradigm*, 20 WASH. U. J.L. & POL’Y 265, 277 (2006) (illustrating how structural racism leads to environmental racism); Mona Lynch, *Crack Pipes and Policing: A Case Study of Institutional Racism and Remedial Action in Cleveland*, 33 L. & POL’Y 179, 179 (2011) (arguing that institutional racism was present in policing in Cleveland, Ohio).

175. See CHARLES WALLACE COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* 75–76 (1912).

176. See generally R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169 (2006).

177. See Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 940 (2008).

178. BELL, *supra* note 48, at 184.

179. See 442 U.S. 256, 259–60 (1979).

overwhelmingly to the advantage of males.”¹⁸⁰ Only 1.8 percent of the veterans in Massachusetts were female.¹⁸¹ The *Feeney* Court held that absent a discriminatory purpose, a facially neutral law does not violate equal protection violation.¹⁸² Although the Court concluded that Massachusetts legislature had no anti-female bias, it was clear that American military policy had historically discriminated against women.¹⁸³ This partially explained why less than 2 percent of the veteran population was female. Thus, one could argue that the Equal Protection Clause was violated because the Massachusetts legislature incorporated or passed on the discrimination into its veteran preference employment policy. But the Court disagreed, writing that “the history of discrimination against women in the military is not on trial in this case.”¹⁸⁴ The military’s discrimination, that is, was inconsequential.

City of Memphis v. Greene further establishes that the Court delimits the discriminatory intentions that constitutionally matter.¹⁸⁵ In *Greene*, Black plaintiffs sued the Memphis mayor and City Council, arguing that their decision to close a street and erect a barrier between a White and a Black area of the city was motivated by race.¹⁸⁶ White property owners’ desire to protect the safety and tranquility of their neighborhood from “undesirable traffic” propelled the city council into action by building a barrier at the point where Black and White communities met.¹⁸⁷ The decision to close a street on traffic control grounds was the only instance of the city ever closing a street for such considerations.¹⁸⁸ There was evidence, furthermore, that detailed how racial animus motivated some of the White property owners desires to close the street.¹⁸⁹ But, the Court found that only the motives of the city mattered, not its residents.¹⁹⁰

As represented by these cases, limiting the illicit motives that will receive judicial scrutiny creates a pronounced equal protection defect. A more salient problem, however, is that illicit motives can be hidden. A governmental actor can always deny that racial animus played any role in decision making. Indeed, “many laws with both a discriminatory purpose and effect might be upheld simply because of evidentiary problems inherent in requiring proof of such a purpose.”¹⁹¹

180. *Id.* at 256.

181. *Id.* at 270.

182. *Id.* at 276–79.

183. *See id.* at 278, 281.

184. *Id.* at 278.

185. *See generally* 451 U.S. 100 (1981).

186. *Id.* at 102.

187. *Id.* at 136 (Marshall, J., dissenting).

188. *Id.* at 100 n.10.

189. *See id.* at 141–42 (Marshall, J., dissenting).

190. *Id.* at 114 n.23.

191. ERWIN CHEMERINKSY, CONSTITUTIONAL LAW 788–89 (2d ed. 2005).

An examination of the jury selection discrimination cases prior to *Norris v. Alabama*,¹⁹² decided in 1935, provides the best evidence that discriminatory motives are very nearly borderline impossible to prove. *Charley Smith v. Mississippi* formally instituted the Intent Doctrine into equal protection law.¹⁹³ Charley Smith was convicted of the 1894 murder of Wiley Nesbit by an all-White jury.¹⁹⁴ Because he could not prove that Mississippi intentionally excluded Black jurors, the Supreme Court refused to allow his equal protection argument to overturn his conviction.¹⁹⁵ Thereafter, scores of Blacks were sentenced to death by juries that were intentionally kept all-White.¹⁹⁶ In the years following *Charley Smith*, a plethora of cases established that the Intent Doctrine hindered racial justice.¹⁹⁷ Black criminal defendants struggled mightily to prove that the state generally, and jury commissioners specifically, purposefully excluded Blacks.¹⁹⁸ Black criminal defendants failed to provide evidence that the state schemed against them.¹⁹⁹ Jury commissioners, moreover, were unlikely to admit to their unconstitutional activities.²⁰⁰ There is, however, evidence of purposeful exclusion of Black jurors. In Texas, in fact, jury commissioners in at least four cases in the early 1900s conceded that they purposefully refused to let Blacks serve on juries, and the state's courts found equal protection violations in each instance.²⁰¹ Attentive onlookers, in response, learned the obvious lesson: as long as one denies any wrongdoing, the Court cannot possibly find it.

The Supreme Court's jurisprudence in jury discrimination cases changed with *Norris v. Alabama*.²⁰² *Norris* involved the Scottsboro boys, nine Black youths convicted of raping two White women in Alabama.²⁰³ Only one, twelve-year-old Roy Wright, averted a death sentence.²⁰⁴ After the Supreme Court overturned his initial conviction and the convictions

192. 294 U.S. 587, 599 (1935).

193. 162 U.S. 592 (1896). *See also* Starkey, *Criminal Procedure*, *supra* note *, at 21–22 (explaining court's consideration of intent doctrine and equal protection in *Smith* case).

194. *Charley Smith*, 162 U.S. 597–98.

195. *Id.* at 601.

196. Starkey, *Criminal Procedure*, *supra* note *, at 22–29.

197. *Id.* at 22–30.

198. *Id.*

199. *Id.* at 19–30.

200. *Id.*

201. *Id.* at 29; *see* *Whitney v. Texas*, 59 S.W. 895 (Tex. Crim. App. 1900); *see also* *Smith v. Texas*, 69 S.W. 151 (Tex. Crim. App. 1902); *Kipper v. Texas*, 62 S.W. 420 (Tex. Crim. App. 1901); *Leach v. Texas*, 62 S.W. 422 (Tex. Crim. App. 1901).

202. *See* 294 U.S. 587, 597–98 (1935).

203. JAMES A. MILLER, REMEMBERING SCOTTSBORO: THE LEGACY OF AN INFAMOUS TRIAL 7–11 (2009).

204. JAMES R. ACKER, SCOTTSBORO AND ITS LEGACY: THE CASES THAT CHALLENGED AMERICAN LEGAL AND SOCIAL JUSTICE 34 (2008).

of his co-defendants due to inadequate counsel,²⁰⁵ Norris was reconvicted and sentenced to death.²⁰⁶ In *Norris*, the Supreme Court arrived at a conclusion different than its previous intent-based standard.²⁰⁷ Black criminal defendants no longer had to prove intent to keep juries all White.²⁰⁸ The Court held, rather, that when a criminal defendant produces evidence that his race has historically been non-represented on juries, then a *prima facie* case of equal protection deprivation has been made.²⁰⁹

The Supreme Court pored over the Alabama jury roll with magnifying glasses, noticing that every Black name on the roll appeared after the names of White individuals and in different ink.²¹⁰ It was obvious that the state doctored the jury roll to deceive the Court into believing that Black names were in fact there all along but that Negroes simply had not been called to serve as jurors. Norris's lawyers contended that "these 'forgeries' constituted an 'admission' " of purposeful exclusion.²¹¹

But the Court opted not to hang their claim of equal protection deprivation on the doctored jury roll, illustrating the problem with the Intent Doctrine on at least two grounds. First, the Court might have concluded that the doctored jury roll did not prove intentional discrimination. If true, that underscores how difficult it is to establish intentional discrimination. If the doctored jury roll was not adequate, what exactly was? Second, the Court might have consciously chosen to craft a holding broad enough to be applicable in a wide array of cases. A doctored jury roll, one must assume, would be a highly unique piece of evidence. If the Court would have tied intent to that evidence, *Norris* would have been unhelpful in the overwhelming majority of jury discrimination cases. One cannot be certain what the Justices were thinking in the early 1930s, but an analysis of *Norris* establishes that the Intent Doctrine acts as a barrier to racial progress.

Some might contend that these jury discrimination cases are irrelevant today. Perhaps this is why scholars generally refuse to dust them off when analyzing equal protection jurisprudence and insist, wrongly, that we owe the Intent Doctrine to *Washington v. Davis*.²¹² But these aged

205. Powell v. Alabama, 287 U.S. 45, 69–73 (1932).

206. F. Raymond Daniell, *Scottsboro Negro Is Convicted Again*, N.Y. TIMES, Dec. 7, 1933, at 16.

207. See *Norris*, 294 U.S. at 591–92.

208. See *id.* at 591.

209. *Id.*

210. See DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 319 (1979); *Hits Alabama Jury Book*, N.Y. TIMES, Feb. 16, 1935, at 2.

211. *Hits Alabama Jury Book*, *supra* note 210.

212. See *Washington v. Davis*, 426 U.S. 229 (1976). These are but a few of the articles that ignore the jury discrimination cases when discussing equal protection and intent: Gayle Binion, *Intent and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397 (1983); Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious*

decisions are terribly important even now. The Court's current conception of intent—that a claimant must prove that a specific actor was motivated by discriminatory considerations—is the toughest standard of intent to prove, and it was the same exact standard of intent that was employed in these early jury discrimination cases.²¹³ The current Court, that is, employs the same strict definition of intent that the Court constructed in the late 1800s; this is problematic since that standard is derived from a Court that had grown tired of dealing with Negroes and their cries for equality and “special” rights.²¹⁴ The Intent Doctrine has long functioned as a barrier to equality for people of color.²¹⁵ It did in 1896 when the Court decided *Charley Smith*.²¹⁶ It did in 1935 when the Court created an exception to intent in *Norris*.²¹⁷ And it does now.

When searching for less exacting standards of intent, investigating tort law proves very helpful. An actor is liable for an intentional tort when he intended to perform the act that violates a legally protected interest. Tort law, moreover, frequently presumes that tortfeasors intended the foreseeable consequences of their actions.²¹⁸ A person who hits someone after swinging a golf club in a crowded room, for instance, has committed an intentional tort irrespective of whether the person consciously desired to deliver the blow.²¹⁹ But the Equal Protection Clause requires the strictest definition of intent, specific purpose: “Why should tort plaintiffs,” one Constitutional law case book inquirers, “receive more protection than African-Americans or women?”²²⁰

2. Unconscious Bias and Equal Protection

Professor Charles Lawrence's seminal piece *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* is the starting place when discussing unconscious bias and equal protection.²²¹ In his article, Professor Lawrence claimed that the Court wrongly conceived of facially neutral laws as “either intentionally and unconstitutionally or unintentionally and

Racism, 39 STAN. L. REV. 317 (1987); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

213. See Starkey, *Criminal Procedure*, *supra* note * at 49.

214. See *The Civil Rights Cases*, 105 U.S. 3, 25 (1883); see also DONALD E. LIVELY, *THE CONSTITUTION AND RACE* 81 (1992) (arguing that the Supreme Court in *The Civil Rights Cases* thought that “the time for special attention had passed.”).

215. See generally Starkey, *supra* note *.

216. See *Charley Smith v. Mississippi*, 162 U.S. 592 (1896).

217. See *Norris v. Alabama*, 294 U.S. 587, 599 (1935).

218. RESTATEMENT (SECOND) OF TORTS § 8A cmt. B (1965)

219. See *id.*

220. PAUL BREST ET. AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 1032 (5th ed. 2006).

221. See generally Lawrence, *supra* note 212.

constitutionally discriminatory.”²²² This was, in Professor Lawrence’s estimation, a “false dichotomy” because many acts that burden racial minorities are not intentional in the sense that they were purposefully done, but not unintentional in the sense that they were “random, fortuitous, and uninfluenced by the decisionmaker’s beliefs, desires, and wishes.”²²³

Professor Lawrence was contending that many decisions reflect an American culture where anti-minority beliefs pervade, beliefs which lead to negative outcomes for people of color. An actor might not consciously intend to cause an anti-minority outcome, but it results anyway because of the varying unconscious biases that all Americans hold by virtue of living in this society. For this, Professor Lawrence offered two explanations. The first was Freudian theory which dictates that the mind will hide thoughts which are uncomfortable to the psyche as a defense mechanism.²²⁴ American culture instructs that racism and discrimination are unacceptable. Therefore, when the mind deals with a “conflict between racist ideas and the societal ethic that condemns those ideas,” “the mind excludes his racism from his consciousness.”²²⁵ Second, Professor Lawrence relied upon cognitive psychology. This literature contends that culture disseminates particular lessons that shape how we define the world, but these lessons are not explicitly learned.²²⁶ “Instead, they seem part of the individual’s rational ordering of her perceptions of the world.”²²⁷ The observer who believes that Blacks are lazy is unaware that the belief is the product of years of anti-Black cultural lessons.²²⁸ This led Professor Lawrence to conclude that “requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works.”²²⁹ To Professor Lawrence, the Intent Doctrine is at odds with reality.

With Professor Lawrence’s article serving as a launching pad, implicit bias scholars put Professor Lawrence’s claims to the test, and proved his basic premise: that unconscious bias exists and explains behavior.²³⁰ As

222. *Id.* at 322.

223. *Id.*

224. *Id.*

225. *Id.* at 323.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. See, e.g., Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007). It is important to note that Professor Linda Hamilton Krieger wrote two articles relying on early psychological research. See Linda Hamilton Krieger, *Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*,

Kristin A. Lane, Jerry Kang and Mahzarin R. Banaji write, “we have incontrovertible evidence that thoughts, feelings, and actions are shaped by factors residing largely outside conscious awareness, control, and intention.”²³¹ People are not, contrary to common perception, “savage rationalists [with] . . . consciousness [as] the default mental state.”²³² Human behavior, rather, is constantly the manifestation of subconscious thoughts.²³³

A breakthrough for implicit bias researchers was the Implicit Association Test (IAT), which measures unconscious attitudes.²³⁴ The IAT has demonstrated that the overwhelming majority of White Americans have a persistent and automatic positive assessment of Whites but negative assessment of Blacks.²³⁵ Though racism has declined in society over the years, “research using indirect measures suggests that subtle and implicit forms of prejudice and discrimination remain pervasive.”²³⁶

Professor Jerry Kang details how race impacts “interpersonal interactions,” dubbing the process “racial mechanics.”²³⁷ In Professor Kang’s own words:

Through law and culture, society provides us (the perceivers) with a set of racial *categories* into which we map an individual human being (the target) according to prevailing rules of racial *mapping*. Once a person is assigned to a racial category, implicit and explicit racial *meanings* associated with that category are

47 STAN. L. REV. 1161 (1995); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CALIF. L. REV. 1251 (1998).

231. Lane et. al., *supra* note 230, at 428.

232. *Id.*

233. *Id.* at 429.

234. See Reshma M. Saujani, “The Implicit Association Test”: A Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395, 406 (2003). Greenwald, Banaji, and Nosek offer a good general description of what the IAT does. They write that the IAT “provides a measure of strengths of automatic associations. This measure is computed from performance speeds at two classification tasks in which association strengths influence performance.” Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197, 197 (2003).

235. See Andrew Karpinski & Ross B. Steinman, *The Single Category Implicit Association Test as a Measure of Implicit Social Cognition*, 91 J. PERSONALITY & SOC. PSYCHOL. 16, 23 (2006).

236. Nilanjana Dasgupta, Debbie E. McGhee, Anthony G. Greenwald & Mahzarin R. Banaji, *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 317 (2000). This can be explained by system justification theory, which holds that members of a society seek to preserve the status quo and legitimate it as being “good, fair, natural, desirable and even inevitable.” John T. Jost, Mahzarin R. Banaji & Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 887 (2004).

237. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497 (2005).

triggered. These activated racial meanings then influence our interpersonal interaction.²³⁸

Thus, when interacting with a Black male, to whom society has given certain negative attributes, the Black male will be categorized as Black and those attributes are activated, negatively affecting the way in which we deal with him.

Implicit attitudes and implicit stereotypes are crucial to understanding the science behind implicit social cognition. "Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects."²³⁹ For instance, a person is likely to favor a familiar object because of past experience despite being unaware that the previous familiarity explains the preference.²⁴⁰ "Implicit stereotypes," similarly, "are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category."²⁴¹ An example of an implicit stereotype "would be the (mistaken) identification that Dave Sebastian is famous, but Diane Sebastian is not, based on the belief (a correct belief, in this case) that men are more likely to be famous than women."²⁴²

Implicit bias experiments demonstrate how thoroughly unconscious bias affects the lives of racial minorities. Particularly relevant here are the simulated environments that replicate the experience of being an armed cop who has to detect whether deadly force is necessary. Such experiments have been the focus of several laboratory studies²⁴³ and have found conclusive racial bias.²⁴⁴ A person's explicit racial feelings failed to predict "shooter bias," racial bias affecting the decision to pull the trigger.²⁴⁵ Implicit biases, however, did.²⁴⁶ Indeed, those who were more likely to

238. *Id.* at 1499.

239. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *PSYCHOL. REV.* 4, 8 (1995).

240. Lane et al., *supra* note 230, at 429.

241. Greenwald et al., *supra* note 239, at 15.

242. Lane et al., *supra* note 230, at 429.

243. See Anthony G. Greenwald, Mark A. Oakes & Hunter Hoffman, *Targets of Discrimination: Effects of race on responses to weapon holders*, 39 *J. EXPERIMENTAL SOC. PSYCHOL.* 399, 400 (2003); see also B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Process in Misperceiving a Weapon*, 81 *J. PERSONALITY & SOC. PSYCHOL.* 181, 181 (2001). See generally Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 *J. PERSONALITY & SOC. PSYCHOL.* 1006 (2007); E. Ashby Plant & B. Michelle Percuche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 *PSYCHOL. SCI.* 180 (2005).

244. Lane et al., *supra* note 230, at 430.

245. *Id.*

246. *Id.*

believe the stereotype of Blacks as violent were more likely to mistakenly shoot unarmed Black suspects but not shoot armed White ones.²⁴⁷

Implicit bias, though, is not a static phenomenon.²⁴⁸ Truly, it can be reduced over time.²⁴⁹ For instance, research shows that “exposure to counterstereotypical outgroup members often reduces implicit bias.”²⁵⁰ And when Blacks as a racial group are represented by a revered Black person, say Oprah Winfrey, studies show implicit attitudes about Blacks become more positive.²⁵¹

Thus far, the judiciary has guarded implicit bias from impacting equal protection jurisprudence. Judge Charles Breyer, however, in *Chin v. Runnels*, strongly suggested his comrades are in error.²⁵² Mark Sew Fei Chin was convicted of second-degree murder and sentenced to nineteen years to life in prison.²⁵³ Chin argued in state court, unsuccessfully, that Chinese Americans, Filipino Americans and Hispanic Americans were excluded from serving as forepersons on the grand jury, in violation of his equal protection rights.²⁵⁴ Chin produced evidence establishing that from 1960 to 1996 there had never been a foreperson from those Asian ethnicities.²⁵⁵ Because the standard of review for federal habeas cases is highly deferential to the state, Judge Breyer could not overturn the previous ruling.²⁵⁶ Yet, wrote Judge Breyer, if “this matter [were] presented to this Court for de novo review, the Court would feel compelled to scrutinize the state court’s finding more closely” because “the compelling pattern of exclusion suggests there may be more to the selection process than meets the eye.”²⁵⁷

247. *Id.* For implicit bias in medical care, see Alexander R. Green et al., *Implicit Bias among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007) (showing in a separate scientific experiment that physicians with unconscious anti-Black attitudes were less likely to give Blacks a particular medical treatment than Whites with identical medical profiles).

248. Lane et. al., *supra* note 230, at 438.

249. *Id.*

250. *Id.*

251. *Id.*

252. 343 F.Supp. 2d 891 (N.D. Cal. 2004).

253. *Id.* at 892.

254. *Id.*

255. *Id.* at 895. There was some indication that the statistical evidence from 1960 to 1969 was in dispute. However, from the years 1975–96, the evidence was decidedly more solid, and therefore “the Court [fou]nd[] that the lower court findings of a *prima facie* case of discrimination” were reasonably sound. *Id.* at 895 n.4.

256. See *id.* at 905. A federal court can only grant a writ if “the court . . . find[s] that the state court’s decision was ‘objectively unreasonable.’” *Id.* at 901 (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

257. *Id.* at 905–06.

The foreperson was chosen by the presiding judge in consultation with the jury commissioner and the district attorney.²⁵⁸ The jury commissioner testified that he advised judges to select forepersons with “leadership capability” and other asserted qualities.²⁵⁹ The state denied that race was a factor, but Judge Breyer argued that the evidence raised “the question whether unconscious stereotyping or biases may have contributed to the exclusion of these groups notwithstanding the best intentions of those involved.”²⁶⁰ Judge Breyer recognized that many facially neutral criteria are not neutral but “echo the negative stereotypes that have long plagued Asian-Americans and others” and noted that “Asian-Americans have been particularly vulnerable to stereotyping and exclusion when subjective selection criteria enter on ‘leadership’ and ‘people skills.’”²⁶¹ Judge Breyer, in other words, observed a subconscious model minority myth, which depicts Asians as “unassertive and passive” at work and thus in the jury foreperson setting.²⁶²

Perhaps no other Supreme Court case perfectly encapsulates the problem of equal protection jurisprudence not embracing implicit bias more so than *McCleskey v. Kemp*.²⁶³ Warren McCleskey, a Black man, was convicted of armed robbery and the felony-murder of a White police officer.²⁶⁴ McCleskey argued on appeal that Georgia’s capital punishment statute violated the Equal Protection Clause in two ways.²⁶⁵ First, defendants who murdered Whites were more likely to be sentenced to death than those who murdered Blacks.²⁶⁶ Second, Black murderers were more likely to be sentenced to death than White murderers.²⁶⁷ The Court maintained that McCleskey carried the virtually impossible burden of proving the “existence of purposeful discrimination.”²⁶⁸ McCleskey, therefore, had to establish that “decisionmakers in *his* case acted with discriminatory purpose.”²⁶⁹

McCleskey relied on the so-called Baldus study, named after David C. Baldus. The late University of Iowa law professor, with the help of

258. See *id.* at 893–94.

259. *Id.* at 896.

260. *Id.* at 906.

261. *Id.* at 907.

262. Darren Seiji Teshima, *A “Hardy Handshake Sort of Guy”: The Model Minority and Implicit Bias About Asian Americans in Chin v. Runnels*, 11 *ASIAN PAC. AM. L.J.* 122, 123 (2006) (contending that unconscious bias was afoot and that Asian American stereotypes were the reason why the ethnic group was never chosen as forepersons).

263. See 481 U.S. 279 (1987).

264. *Id.* at 283.

265. *Id.* at 291.

266. *Id.*

267. *Id.*

268. *Id.* at 292 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)).

269. *Id.* (emphasis in original).

social scientists, authored a report detailing the stark racial disparities in sentencing in the Georgia penal system.²⁷⁰ The evidence showed that, during a ten year period, Georgia's prosecutors "sought the death penalty in 70% of the cases involving [B]lack defendants and [W]hite victims; 32% of the cases involving [W]hite defendants and [W]hite victims; 15% of the cases involving [B]lack defendants and [B]lack victims; and 19% of the cases involving [W]hite defendants and [B]lack victims."²⁷¹ Georgia courts, additionally, assessed the death penalty "in 22% of the cases involving [B]lack defendants and [W]hite victims; 8% of the cases involving [W]hite defendants and [W]hite victims; 1% of the cases involving [B]lack defendants and [B]lack victims; and 3% of the cases involving [W]hite defendants and [B]lack victims."²⁷² The Court, though, held that McCleskey's statistical evidence proved neither that his specific jury nor Georgia acted with any discriminatory purpose.²⁷³ It was, the Court estimated, "a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system."²⁷⁴ McCleskey's death sentence, accordingly, was upheld.²⁷⁵ McCleskey never could have proved that a jury intentionally sentenced him to death because of his race. That the Court rejected the salient though not individualized evidence of pervasive bias, whether conscious or unconscious, was disastrous for racial minorities.

B. *The Case for Change*

Beyond cataloguing the problems with the Intent Doctrine, it is also crucial to formulate a normative understanding as to why the Equal Protection Clause should be responsive to these particular concerns. "To save antidiscrimination law," writes Professor Samuel R. Bagenstos, "requires articulating and defending the normative principles that justify and guide the application of that law to newly understood forms of bias, whatever they are, and however they are discovered."²⁷⁶ This is the ambition for this section.

Before proceeding further, though, it is necessary to carefully respond to an inevitable response to this Article's endeavor of creating a new way of interpreting the Equal Protection Clause—the Originalist

270. *Id.* at 286. See generally DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* (1990).

271. *McCleskey*, 481 U.S. at 287.

272. *Id.* at 286.

273. *Id.* at 297–98.

274. *Id.* at 312.

275. *Id.* at 319.

276. Bagenstos, *supra* note 56, at 493.

challenge.²⁷⁷ The argument is that the ratifying generation's original understanding of the Equal Protection Clause did not embrace notions of unconscious bias or structural racism. Such considerations, therefore, must lie outside the zone in which the Equal Protection Clause operates.

As an initial matter, I reject categorically that the ratifying generation's conception of equal protection should affect contemporary jurisprudence. And, interestingly enough, self-described Originalists on the Supreme Court agree with me here. Indeed, the equal protection opinions penned by Justices Thomas and Scalia should confound anyone with even a cursory knowledge of the congressional debates of 1865 and 1866. Both Justice Thomas and Scalia contend that the Constitution is colorblind.²⁷⁸ That, however, is a risible claim for an Originalist.²⁷⁹ Justices Scalia and Thomas, moreover, argue that affirmative action in education is unconstitutional despite the fact that the same congressmen who drafted the Fourteenth Amendment supervised segregated education in Washington D.C., establishing that using race to make education policy was never understood to be unconstitutional. Thus, if, say, Michigan can exclude Blacks from White schools in the 1870s, Michigan can also use race to include them over a century later. The Congressmen also passed legislation specifically geared to help "colored persons."²⁸⁰ Justice Scalia even intimated that disparate impact provisions are unconstitutional. Nothing from the Congressional Globe, however, supports this position.²⁸¹ My basic point is that even those professing fidelity to original understanding cheat on their philosophy in equal protection contexts.²⁸²

Equally important is that the Intent Doctrine is not required by a textual reading of the Equal Protection Clause. The Equal Protection Clause reads that "no state shall . . . deny to any person within its jurisdiction the

277. See generally Starkey, *Inconsistent Originalism*, *supra* note * (making this argument in a forthcoming publication).

278. See James L. McAlister, *A Pigment of the Imagination: Looking at Affirmative Action through Justice Scalia's Color-Blind Rule*, 77 MARQ. L. REV. 327 (1994); see also Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 1005 (2005).

279. See Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 791 (1996) ("An examination of the historical evidence suggests that the original intentions of the radical Republicans in 1865 are flamboyantly inconsistent with the color-blind jurisprudence of the conservatives Justices in 1995."). Even if one might argue that the Constitution is colorblind, the best argument would be that it is a narrow conception of colorblindness impacting an exclusive packet of rights only. See generally Earl M. Maltz, *A Minimalist Approach to the Fourteenth Amendment*, 19 HARV. J. L. & PUB. POL'Y 451 (1996).

280. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431 (1997).

281. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682–83 (2009) (Scalia, J., concurring). In fact, I implore Justice Scalia or anyone agreeing with his position to find the phrase "disparate impact," "disproportionate impact," or anything analogous in any contemporaneous writing of the period.

282. Starkey, *Inconsistent Originalism*, *supra* note * at 29.

equal protection of the laws.” Nothing therein requires that the judiciary confine its search to specific intent. As this Article argued before, the Intent Doctrine was originally adopted in the 1890s by a Court seeking to maintain the racial status quo of inequality and discrimination. Even in the 1950s, those wanting to limit the effectiveness and reach of employment discrimination law sought to define the core concern as one of intentional invidious discrimination only.²⁸³ The Intent Doctrine, in other words, has long been understood to entrench, rather than palliate, racial subordination. Racism in contemporary society is an amalgamation of various factors: structural, unconscious, covert, and overt discrimination. But, the Intent Doctrine only responds to the last form of discrimination—that reminiscent of Jim Crow—and only when the discriminator admits to it or lazily leaves a paper trail.

In a way, the Intent Doctrine functions similarly to the political-civil-social rights distinctions of the late nineteenth century. Both, more specifically, prevented rather than facilitated the cause of racial equality. Civil rights “covered the right to contract, sue, give evidence in court, and inherit, hold, and dispose of real and personal property.”²⁸⁴ Political rights were synonymous with suffrage rights.²⁸⁵ And, for instance, the right for Black school children to attend integrated schools was included in the so-called “social rights.”²⁸⁶ As Professor Reva Siegel writes, “the civil-political-social rights distinction . . . offered a framework within which [W]hite Americans could disestablish slavery, guarantee the emancipated slaves equality at law, and yet continue to justify policies and practices that perpetuated the racial stratification of American society.”²⁸⁷ The same holds true with the Intent Doctrine. As the political-civil-social distinction kept Jim Crow upright until *Brown*, the Intent Doctrine “stands as a gateway to challenges concerning residential zoning, education, and the operation of the criminal justice system.”²⁸⁸

As was true with the political-civil-social rights distinctions, the Intent Doctrine promotes a racial pecking order that relegates people of color to a subordinate position. This Article will investigate a few hypotheticals to illustrate why this is true.

One issue is that discriminatory motives are hard to prove. A significant sticking point in debating the propriety of the Intent Doctrine is that debate participants widely disagree on the salience of racism in contem-

283. See Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 284 (2011).

284. Alexander M. Bickel, *Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56 (1955).

285. See Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendment*, 25 LOY. L.A. L. REV. 1207, 1207 (1992).

286. See *id.* at 1207 n.2.

287. Siegel, *supra* note 212, at 1129.

288. *Id.* at 1140.

porary society.²⁸⁹ Imagine, therefore, a reality where a police department—the Garden City Police Department (GCPD)—unequivocally administers stop and frisk tactics in a racially discriminatory fashion. The existence of discrimination is not, therefore, an issue here. Blacks and Hispanics largely control the GCPD, and Whites are being denied their Fourth Amendment rights on the basis of race. How, then, does Andre, a White resident of Garden City, prove that Garden City and its police department are denying Whites equal protection? Now remember, the hypothetical concedes that Whites are being deprived of equal protection. The only issue here is whether, under the Intent Doctrine, Andre can prove a violation. Obviously Andre will need some evidence of direct proof. He has statistics. But those numbers, like in *McCleskey*, will not suffice to prove an equal protection violation.²⁹⁰ Police officers, moreover, would never admit that they had discriminatory intent. How, then, do Andre and other White residents of Garden City establish their equal protection claims? They simply cannot. Here, I have painted a world where we know unconstitutional discrimination is occurring but the Constitution provides no remedy. It would, in fact, be a waste of time and money for Garden City's White residents to pursue a lawsuit.

This hypothetical establishes just how inappropriate an intent standard is in remedying discrimination. It reveals how our judiciary is pretending it functions in an alternate universe where the inherent difficulty of proving intent is beyond comprehension. Supporters of the Intent Doctrine, in the real world, must seriously grapple with this undeniable fact: the standard renders it nearly impossible to prove equal protection deprivations. An intentional discriminator, in fact, would be hard pressed to locate a more favorable standard on which to be judged.

Indeed, who exactly does the Intent Doctrine protect? Based on the hypothetical, Andre and other White citizens of Garden City certainly are not protected. The Intent Doctrine, rather, provided ample safety to the perpetrators of discrimination, the GCPD. This hypothetical does not feature an anomalous fact pattern either. In nearly every scenario imaginable, the Intent Doctrine is more beneficial to the discriminatory actor than the target of unconstitutional racial discrimination. How then can we claim to offer citizens equal protection if our manner of assessing claims of racial discrimination is far more lenient to the discriminator than his target?

I want to revisit the jury discrimination cases to further establish the problem with the Intent Doctrine. In *Norris*, recall that the Court held that the long absence of Blacks serving on juries established a *prima facie*

289. This feeling is closely related to the idea that America is post-racial. See generally Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010); Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

290. See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987).

case of intentional discrimination in violation of the Equal Protection Clause. The next jury discrimination case the Supreme Court heard after *Norris* was *Hollins v. Oklahoma*.²⁹¹ Jess Hollins was accused of raping a White woman and given a sham trial.²⁹² The Court relied upon *Norris* to overturn his conviction.²⁹³ But those championing the Intent Doctrine would have to disagree with both the holding in *Norris* and its application in *Hollins* if they were to remain true to the doctrine. In *Norris*, one might claim that the doctored jury rolls established intent. But why not make Hollins prove that Oklahoma intentionally kept the jury all-White? If intent is the right standard, why must we resort to proxies of discrimination, like long absence from juries, to prove an equal protection violation? Racism in Oklahoma during the 1930s was expressed much more openly than racism is expressed today. Yet, no reasonable thinker today would have required Hollins to prove that the jury which sentenced him to death was intentionally kept all-White. A Black person living in a stiflingly racist state during the Jim Crow Era had little chance of getting the same racial majority doing the discrimination to make a finding that they were intentionally discriminating. How, then, can we expect a person to prove intent today, a time where racism is decidedly less open?

A possible explanation for this intellectual inconsistency is that it is less palatable to permit states to exclude Blacks from juries in order to railroad Black criminal defendants, and thus, a narrow exception to the intent standard is allowed. But other circumstances, say racial profiling, may not elicit the same sort of visceral reaction; thus, the impossibly high burden in such contexts is maintained.

An earlier portion of Part II pointed to the wealth of social science literature that details the salience of unconscious bias and how such biases hinder the lives of racial minorities. But just showing that unconscious bias is real is not the objective. The objective, rather, is to illustrate why equal protection jurisprudence must respond to this literature. It is essential, then, to delineate how our conception of equal protection is faulty unless we take stock of unconscious bias. This Article claims that America cannot truly claim to offer its citizens equal protection while leaving a person who has been the victim of implicit bias without a constitutional remedy. To illustrate this position, re-investigating a reconfigured Garden City will prove beneficial.

In this updated Garden City, Whites generally hold the power. No Whites harbor any conscious negative feelings toward people of color. Yet, all Whites have such strong implicit biases that governance in the city

291. See 295 U.S. 394, 395 (1935).

292. *Id.* See *Oklahoman Snatched From Electric Chair as New Trial is Finally Granted*, THE PITTSBURGH COURIER, Sept. 24, 1932, at A1.

293. *Hollins*, 295 U.S. at 395.

routinely produces debilitating anti-minority outcomes. In this case, should the Equal Protection Clause operate?

If the Equal Protection Clause should offer relief in the hypothetical, must not it also offer relief in the real world? America is not rife with such debilitating implicit bias as seen in the hypothetical. But the implicit bias research is settled on the existence of extant biases that reinforces racial subordination. One might argue that if implicit bias were so widespread that racial minorities were unable to, say, get a fair shake as a criminal defendant then the Equal Protection Clause should offer some relief. In the real world, unconscious discrimination harms racial minorities. Are people of color, then, only provided relief when unconscious bias is incapacitating? One who would answer "yes" would seemingly insist that unconscious bias plays no role in equal protection jurisprudence unless bias is crippling. The idea, though, is troubling. Indeed, such an argument seems hard to defend.

These hypotheticals illustrate just how odd it is to demand that the Equal Protection Clause be defined so narrowly as to only protect racial minorities from intentionally discriminatory behavior. The Intent Doctrine, in fact, is not just a poor standard; it is often an active participant in the denial of equal protection. That is, to force racial minorities to prove their claims of unconstitutional racial discrimination through a motive-centered inquiry without any other options should be understood as a conscious choice to frustrate the cause of racial equality.

Intent proponents offer various defenses of the Intent Doctrine. Supporters generally believe that the Equal Protection Clause guarantees equal opportunity but not equality of results.²⁹⁴ If the intent standard is jettisoned, then the assumption is that the Court would have to embrace a disparate impact test for equal protection.²⁹⁵ Under a disparate impact test, a state might have "to adopt an affirmative action plan in its hiring and promotion practices" to not run afoul of the Equal Protection Clause, which gives minorities special rights rather than equality, or so the argument holds.²⁹⁶ An additional reason offered in support of the Intent Doctrine is that acts of the legislature should not be undone unless the democratic process has been marred by discriminatory actions.²⁹⁷ Along those lines, some believe that absent illicit purposes, discriminatory effects

294. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATT'Y GEN., *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* 50-55 (1988).

295. *Id.* at 55.

296. *Id.* at 54.

297. Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 968 (1993). What I am referring to here is process theory. For a defense, see generally *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991). Cf. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

must not be the concern of the judiciary. As Robert W. Bennett writes, "without concern about past and present intent, racially discriminatory effects of legislation would be quite innocent."²⁹⁸ Intent, in other words, is a necessary component of any discriminatory action.²⁹⁹

The problem, however, is that proponents of the Intent Doctrine select a standard that is inconsistent with their own principles. The Garden City hypothetical where Whites were victims of discriminatory stop and frisk tactics featured illicit purposes. However, under the Intent Doctrine the White victims could not prove that they were being denied equality under the law. Thus, even those who link a denial of equal protection to intentional discrimination should also abandon the Intent Doctrine because those who are being intentionally discriminated against cannot prove as such. The only champions of the Intent Doctrine, therefore, should be those who conclude that whatever perceived benefits of this standard outweigh the manifest discrimination it permits.

My understanding of what equal protection entails is as follows:³⁰⁰ to deny someone equal protection is to either (1) allow stringent constitutional interpretive standards to prevent the possibility of a person from having a meaningful opportunity of proving that they have been denied equality on the basis of race, or (2) to force a person to prove their equal protection complaints in a vacuum that ignores both the effects America's sordid racial past has on the present and the myriad of ways that a person can be denied equal protection on the basis of race. If this is the normative mediating principle of the Equal Protection Clause, then it becomes clear that the leaky Intent Doctrine must be set ashore.

III. THE PROFFERED SOLUTIONS

This section will examine various replacements to the Intent Doctrine and put their strengths and weaknesses to the test. The central evaluative criterion is whether these replacements will produce an equal protection violation in *Floyd*, the New York discriminatory stop and frisk lawsuit. Some scholars have championed a motive-centered inquiry in

298. Robert W. Bennett, "Mere" Rationality In Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049, 1076 (1979).

299. Barbara Flagg argues that the intent requirement is "a distinctively [W]hite way of thinking about race" because "[W]hite people tend to view intent as an essential element of racial harm" while "nonwhites do not." Flagg, *supra* note 297, at 968.

300. This principle might appear similar to Owen Fiss's antidiscrimination principle, and perhaps, it is comparable. But my response is that I argue that constitutional interpretation should be seen as a participant in discriminatory state action. See generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

equal protection cases,³⁰¹ but under such a standard, a court would have little choice but to rule for New York City in *Floyd*.

This Part also inspects the proffered solutions to assess whether they satisfy other, more general considerations. First, the solution cannot resemble a disparate impact test. In *Washington v. Davis*, the Supreme Court declared that disproportionate impact would not give rise to strict scrutiny.³⁰² It is, therefore, incumbent upon detractors of the Intent Doctrine to forge new ground and not merely repackage previously excluded options. An additional concern is that the test must be reliable. If the Equal Protection Clause, for racial minorities, has been effectively stricken through in the Constitution, then any fix should be dependable. It should not be effective in some situations but not in others. And last, the solution, by its terms, must meet the needs of racial minorities. The most promising solution, in other words, will provide relief in the contexts in which minorities are most vulnerable.

A. Professor Theodore Eisenberg and the "Causation Principle"

Professor Theodore Eisenberg champions the causation principle as a means of resolving the heavy evidentiary burdens posed by proving intent. By requiring claimants to trace an equal protection deprivation back to a discriminatory motive, Professor Eisenberg contends that the *Davis* Court misjudged "where the line ought to be drawn."³⁰³ Professor Eisenberg, though, posits that the Court wisely settled on a interpretative standard for the Equal Protection Clause that limits governmental liability for some racially disparate impacts.³⁰⁴ The problem, however, according to Professor Eisenberg, is that in too many cases the Intent Doctrine

301. See, e.g., Paul Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141 (1978). Though, to be fair to Brest, he is arguing against those contending that as long as the legislative enactment is facially valid, no equal protection issue arises. *Id.* at 1142. See also Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV. 95, 130 (1971) ("A court should entertain an action challenging an otherwise constitutional decision . . . on the ground that it was designed in part to serve an illicit or suspect objective."). Again, Brest was arguing against the holding in *Palmer v. Thompson*, 403 U.S. 217 (1971), that the Jackson, Mississippi legislative racist motivation to close city swimming pools was constitutionally irrelevant. *Cf.* John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1161 (1978). Ely claimed that a motivational analysis is only appropriate when the deprivation is not the subject of a substantive constitutional right or what he terms "constitutionally gratuitous." *Id.* But "where what is denied is something to which the complainant has a substantive constitutional right—either because it is granted by the terms of the Constitution . . . the reasons it was denied are irrelevant." *Id.* (emphasis in original).

302. 426 U.S. 229, 239 (1976).

303. Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 61 (1977).

304. *Id.*

provides no remedy.³⁰⁵ Its scope is too narrow. Professor Eisenberg's causation principle is premised on his belief that strict scrutiny should arise when unintentional disparate impact is "reasonably attributable to race."³⁰⁶ The causation principle is derived heavily from tort law and "instructs a court to subject official actions to heightened scrutiny whenever the plaintiff can show that race was both a cause in fact and a proximate cause of disproportionate impact on minorities."³⁰⁷ The basic premise of the causation principle is that no person should suffer a disadvantage from a governmental action if the disadvantage is reasonably related to race.³⁰⁸ Thus, the causation principle in the context of discrimination cases provides redress for any disparate impact that can either be traced back to previously invidious state conduct, say a Jim Crow statute, or when the state reacted to or promoted private discrimination.³⁰⁹ An example of the latter could include a city council that, reacting to a discriminatory electorate, passes an ordinance that prevents the turning of a city-owned building into a Hispanic cultural center.³¹⁰

There are two levels to the causation principle: cause-in-fact and proximate cause. Both must be satisfied in order to sustain an equal protection violation.³¹¹ Cause-in-fact is the "but for" causation requirement based in tort law.³¹² Here, the plaintiff alleging discrimination must show that the disparate impact would not have occurred but for a "prior official or private race-dependent decision."³¹³ An example of an official race-dependent decision might be a former law that statutorily denied Blacks the right to vote.³¹⁴ Such a statute, Professor Eisenberg posits, may produce diluted voting power long after its enactment.³¹⁵ An example of a private race-dependent decision that can produce a disparate impact is the instance of a state providing a liquor license to an establishment that denies Blacks service.³¹⁶ But for the private discrimination, Blacks would not obviously face disparate treatment. Because of the state's close connection with the private discrimination in such a hypothetical, Professor Eisenberg believes the state should be liable for the private discrimination.³¹⁷

305. *Id.* at 63.

306. *Id.* at 57.

307. *Id.* at 57-58.

308. *Id.* at 62.

309. *Id.* at 64-65.

310. *See id.* at 65.

311. *Id.* at 64, 66.

312. *Id.* at 58.

313. *Id.* at 64.

314. *Id.* at 65.

315. *Id.*

316. *Id.*

317. *See id.*

Proximate cause, the second level of the causation principle, reduces governmental liability by requiring a close connection between “the race-dependent decision and the uneven impact.”³¹⁸ Proximate cause also requires that no intervening forces exist.³¹⁹ For instance, criminal law statutes, Professor Eisenberg explains, create disparate impacts because Blacks are convicted of crimes at higher rates.³²⁰ “A court might conclude that this uneven impact would not have occurred but for widespread discrimination against blacks,” satisfying the cause-in-fact prong.³²¹ “But the connection between general discrimination and specific crimes is relatively indirect.”³²² The volitional aspect of crime commission, moreover, (the perpetrator has direct control over whether he violates a criminal statute) is an intervening cause that a court would have to acknowledge.³²³ The disparate impact, therefore, is “not reasonably attributable to race.”³²⁴

Professor Eisenberg also correctly notes that the Intent Doctrine works fairly well when intent can be proven, when a statute is facially discriminatory, or when disproportionate impact is so glaring from statistical disparities.³²⁵ Professor Eisenberg holds that the causation principle will make the Equal Protection Clause operable in more situations.³²⁶ And in the specific instance seen in *Davis*, the causation principle might lead to a different result, Professor Eisenberg opines.³²⁷ Past school segregation—a prior race-based discriminatory policy—very well may have led to lower test results for Black test takers.³²⁸

Critiquing it generally, the main problem with Professor Eisenberg’s causation principle as applied to equal protection is its narrowness. The causation principle is the doctor tending to a patient’s scratches while ignoring the gunshot wounds. It does nothing to ease the burden of proving intent and has no power to deal with unconscious bias, perhaps its most glaring defects. Racial minorities’ most salient critique of equal protection, furthermore, has little to do with excusing the government for behavior that is tied closely enough to private discriminatory actions to warrant minorities’ having a cause of action.³²⁹ Very infrequently, moreover, can Blacks’ inequality be traced directly back to a past facially

318. *Id.* at 66.

319. *Id.* at 66–67.

320. *Id.* at 67.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 62–63.

326. *Id.* at 63.

327. *Id.* at 74.

328. *Id.* at 74–75.

329. Though, admittedly, a standard that would invalidate a law enacted by a legislature in response to anti-minority sentiment would be useful.

discriminatory statute. Now, it must be acknowledged that Professor Eisenberg penned his Article in 1977, and every piece of writing reflects the era in which it was drafted. Perhaps the causation principle was more useful in the 1970s. However, in contemporary society where prejudice is increasingly covert, it misses the point.

More importantly, the causation principle, if applied in *Floyd*, would likely fail to produce an equal protection violation. The best argument to the contrary is that past racial discrimination might today lead to police officers viewing Black and Hispanic males as more threatening. This would satisfy the cause-in-fact requirement. That past racial discrimination, though, is highly attenuated from the present day occurrence of a White cop frisking a Black suspect with no reasonable suspicion. Most courts, that is, would find no proximate cause.³³⁰ Proximate cause requires directness. Professor Eisenberg makes a similar point regarding criminal laws and crime rates in the Black population. Professor Eisenberg writes that “the connection between general discrimination and specific crimes is relatively indirect” in that context. A comparable issue is presented here. Thus, the causation principle is unlikely to lead a court to conclude that New York City’s stop and frisk policies violate the Equal Protection Clause.³³¹ Professor Eisenberg’s replacement for the Intent Doctrine, in short, fails to produce the solution to which this Article is dedicated: finding an equal protection solution to the discriminatory stop and frisk policies challenged in *Floyd*.

B. Professor Charles Lawrence and the Cultural Meaning Test

Perhaps an overlooked aspect of his article, *The Id, the Ego and Equal Protection*, is Professor Lawrence’s substitute for the Intent Doctrine: the cultural meaning test. After arguing that American discrimination is often the product of an unconscious mind, Professor Lawrence avers that courts should, therefore, examine whether a purportedly discriminatory action conveys a negative “cultural meaning” and jettison its search for discriminatory intent.³³² “This test,” in Professor Lawrence’s own words, “would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance.”³³³ According to Professor Lawrence, under this test, judges would be akin to cultural anthropolo-

330. Eisenberg makes this point regarding the issue of criminal law and race. Eisenberg, *supra* note 303, at 67.

331. A judge who is most dedicated to the cause of racial justice very well might find an equal protection violation. But I believe the case is hard to make.

332. Lawrence, *supra* note 212, at 355–56.

333. *Id.* at 356.

gists³³⁴ who would, in light of historical developments and current social contexts, assess whether governmental conduct furthers a racial meaning.³³⁵ “If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action’s meaning had influenced the decisionmakers.”³³⁶ Once a cultural meaning is detected, strict scrutiny applies.³³⁷

Professor Lawrence illustrates how the cultural meaning test, a test which also applies to the First Amendment’s Establishment Clause, would function in equal protection situations by investigating past Supreme Court decisions.³³⁸ Professor Lawrence investigates *Brown v. Board of Education*,³³⁹ suggesting it would have been an easy case for the Court to decide.³⁴⁰ The nine Justices, argues Professor Lawrence, would have declared segregated public schools unconstitutional because society would have no choice but to conclude that Jim Crow schools conveyed the cultural meaning of Black inferiority.³⁴¹

City of Memphis v. Greene, according to Professor Lawrence, would likewise present an easy opportunity for judges to invalidate a governmental action through the use of the cultural meaning test.³⁴² Memphis, like all southern cities, had a troubling racial past and maintained *de jure* segregation until 1965.³⁴³ It would be impossible, Professor Lawrence believes, to conclude that less than a generation after the dismantling of Jim Crow that constructing a barrier between Black and White communities would not carry a cultural meaning; more to the point, the barrier signaled the racial inferiority of Blacks.³⁴⁴ “In the contextual reality of Memphis,” Lawrence asserts, “the message is as clear as if the declaration were painted on the wall itself.”³⁴⁵ A court, therefore, would find that building the barrier violated the Equal Protection Clause.

334. See *id.* at 358 (claiming that some legal scholars don’t agree with this point but have no problem with the use of economics in the judiciary).

335. *Id.* at 356.

336. *Id.*

337. See *id.*

338. See *id.* at 359.

339. 347 U.S. 483 (1954).

340. Lawrence, *supra* note 212, at 362–63.

341. See *id.* at 363.

342. *Id.* at 363–64. Remember, *Greene* concerned Blacks in Memphis claiming that the building of a barrier between all-White and all-Black sections of town was constitutionally impermissible. See generally *City of Memphis v. Greene*, 451 U.S. 100 (1981).

343. Lawrence, *supra* note 212, at 363.

344. *Id.* at 364.

345. *Id.*

Professor Lawrence also discusses more borderline Supreme Court cases, including *Washington v. Davis*.³⁴⁶ Here again, Professor Lawrence contends that the cultural meaning test would render the hiring policies unconstitutional.³⁴⁷ “Despite the race-neutral origins of civil service exams as a generic entity, one has an intuitive sense that their use in this case has racial connotations—that this case is more like the Memphis wall than it is like an increased bus fare or a regressive tax.”³⁴⁸ Test 21, the exam that Washington D.C.’s police department used to make its hiring decisions, would violate the Equal Protection Clause because it would cause Americans to interpret the results as connoting Black inferiority.³⁴⁹

To counter the assumption that the cultural meaning test is limitless, Professor Lawrence discusses the hypothetical instance of an increase in railway fare in a racially and economically diverse city.³⁵⁰ The increased fare will disproportionately affect racial minorities; people of color, after all, generally have less wealth and lower incomes.³⁵¹ America, however, has “no history of using bus or train fares as a way to designate nonwhites as inferior,” Professor Lawrence claims.³⁵² Professor Lawrence further maintains that there is no legacy of thinking of transportation fares in racial terms.³⁵³ An increase in railway fare, therefore, could not lead to an equal protection violation.³⁵⁴

While it has some merit, the cultural meaning test fails on a few levels. First, it is counter-intuitive. Professor Lawrence proffers a great argument describing how racism is often unconscious, yet his test forces the very same people who he contends have unwittingly buried their biases to then search for the cultural meaning of certain behaviors. Won’t judges just embrace an alternate explanation over finding a racial meaning? Professor Lawrence’s confidence that judges would have “an intuitive sense” that Test 21 carries a negative cultural meaning seems misguided.

Along those lines, Professor Lawrence greatly overstates how obvious cultural meaning is in certain contexts. Does Lawrence truly believe that he and Justice Scalia, for instance, will agree on the cultural meanings that governmental actions convey in varying contexts? The effectiveness of the cultural meaning test, more pointedly, depends highly upon who’s behind the bench. The test can work well if Professor Lawrence is donning the long black robe, but in the hands of others—specifically jurists

346. *Id.* at 369.

347. *Id.* at 369–76.

348. *Id.* at 370.

349. *Id.* at 373.

350. *See id.* at 364.

351. *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2008).

352. Lawrence, *supra* note 212, at 365.

353. *Id.*

354. *See id.*

who do not or choose not to see the salience of race—the cultural meaning test will produce the same results that perturb Professor Lawrence.

But, for the sake of argument, let's say that judges will be able to discern history properly and find cultural meanings where they exist. What Professor Lawrence fails to appreciate is that there could be a cultural meaning in nearly everything that occurs in American society. Professor Lawrence makes the point that there is no history of using fare to subjugate Blacks; thus, a transportation fare increase carries no cultural meaning. However, there is no doubt that there is a sad legacy of using Blacks' lack of economic vitality to subjugate them. Take peonage, for instance.³⁵⁵ The entire scheme depended on Blacks' lack of wealth. Professor Lawrence, therefore, is wrong. One certainly could find a cultural meaning in increased fares.

For the purposes of this Article, moreover, the cultural meaning test cannot be counted upon to combat discriminatory *Terry* stops. One cannot be certain, that is, that a court deciding *Floyd* using a cultural meaning test would find an equal protection violation. I remain convinced, as an initial matter, that a judge who rejects the unconscious bias narrative that Professor Lawrence recounts will most likely fail to see a conveyed negative cultural meaning in *Floyd*. In any event, if Professor Lawrence would contend that the cultural meaning test would lead a judge to invalidate New York City's stop and frisk policies, the argument would likely be that the policies carry a cultural meaning that Blacks and Hispanics are violent and criminally predisposed.³⁵⁶ Professor Lawrence might accept that argument. But would Justice Clarence Thomas? A jurist like Justice Thomas would likely insist that there is no cultural meaning conveyed by New York City's stop and frisk policies. And even if such a jurist did see a negative conveyed cultural meaning that would only mean that strict scrutiny applied. Because such judges are typically highly deferential to law enforcement, strict scrutiny, in this circumstance, would not be fatal in fact. Indeed, the chances are slim that the cultural meaning test, as applied in *Floyd*, would result in an equal protection violation in this circumstance.

From the opposite perspective, a judge who could ascertain a cultural meaning conveyed by New York's stop and frisk tactics could also discern a cultural meaning conveyed by the entire criminal justice system. The death penalty, prosecutorial discretion, sentencing, arrests, and even more, could possibly be susceptible to equal protection attacks. There are possible equal protection violations in all of these areas. But, the cultural meaning test would produce very disparate judicial decisions largely

355. See generally Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646 (1982).

356. I am not sure whether Lawrence would make this contention.

depending upon individual judge's personal predilections. It cannot, simply put, be trusted.

Professor Lawrence erred in championing the cultural meaning test. Rather, Lawrence's detailing of unconscious bias should have led him to endorse an objective test. Instead, he opted for a subjective one that ignores the important lesson his own article instructs: unconscious bias negatively impacts racial minorities' ability to enjoy the fruits of American democracy. If one believes that to be true, then it makes little sense to promote a standard that permits those same unconscious biases to continue to reign supreme.

C. Professor Derek Black and Deliberate Indifference

Professor Derek W. Black has devised a solution similar to the one presented in this Article, but it is different in important respects that I will flesh out later.³⁵⁷ Professor Black argues that the Intent Doctrine is incongruous with both the Framers' original understanding and a "fair meaning of equal protection."³⁵⁸ This compels him to embrace a deliberate indifference standard.³⁵⁹ Professor Black's deliberate indifference standard is a four-pronged objective test.³⁶⁰ First, the government has to be aware or should be aware of the racial harms or "impacts that its actions caused or the benefits/opportunities it denied."³⁶¹ Second, there have to be reasonable alternatives available.³⁶² If these first two prongs are satisfied, the court then moves to the third prong, which explores why other alternatives were not used.³⁶³ And fourth, there must be interests that justify the racial harm.³⁶⁴ Under the last two prongs, "if the defendant cannot justify the choice to perpetuate a racial harm—in spite of available alternatives—with some governmental purpose that outweighs the racial harm, then the deliberate indifference standard would find that equal protection had been denied."³⁶⁵

Professor Black champions this standard because, unlike the Intent Doctrine, deliberate indifference does not perpetuate the status quo by forcing minorities to prove that which often cannot be proved: intentional

357. See generally Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533 (2006–2007).

358. *Id.* at 575.

359. *Id.* (noting Black's standard of deliberate indifference is different from deliberate indifference used in other areas of the law).

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

discrimination.³⁶⁶ “A deliberate indifference standard,” Black maintains, “forces the status quo to justify itself.”³⁶⁷

One obvious criticism is Black’s replacement of intent when allowing claimants to also prove an equal protection violation through his new standard makes more sense. That is to say, Professor Black should permit claimants to prove an equal protection violation through proving deliberate indifference *or* intent. A hypothetical will explain the dilemma. Let’s say that Officer Smith willingly concedes that race was the reason why he stopped and frisked Michael, a Hispanic male walking in Beverly Hills. Under Professor Black’s equal protection jurisprudence, Michael must prove that Officer Smith was deliberately indifferent. It’s pretty clear, however, that Officer Smith was not deliberately indifferent; he was patently racist. Was Michael, then, denied equal protection? Perhaps a court would conclude “yes,” but not accounting for this is a flaw in Professor Black’s equal protection vision.

If Professor Black’s test were used in *Floyd*, it quite possibly could lead to an equal protection violation. That’s true because Professor Black’s test is a disparate impact test that the Supreme Court has declared inapplicable at least since *Washington v. Davis* and consistently thereafter. In essence, Professor Black’s test requires governments to monitor their policies, ensure that racially disparate impacts do not occur, and, if these uneven impacts exist, the state had better have a good excuse or equal protection has been denied. This is true for disparate impact as well. The most fatal assessment I can level is that I cannot envision a scenario where disparate impact would void a policy that Black’s deliberate indifference would permit and vice versa. As mentioned earlier, those seeking to replace the Intent Doctrine must devise new solutions and not repackage old ones.

D. United States v. City of New York³⁶⁸ and
Historical Deliberate Indifference

“I would say this is pretty big,”³⁶⁹ said New York Law School Professor Elise Boddie when responding to the surprising news that Judge Nicholas G. Garaufis found that New York City had intentionally discriminated against Black and minority firefighters.³⁷⁰ In *United States v. City of New York*, the Justice Department originally sued New York City for discriminatory employment practices under Title VII, which is governed by disparate

366. *Id.* at 577.

367. *Id.*

368. 683 F.Supp. 2d 225 (E.D.N.Y. 2010).

369. Al Baker, *Judge Finds ‘Intentional Discrimination’ Against Blacks in Fire Department Hiring*, N.Y. TIMES, Jan. 14, 2010, at A30.

370. *Id.*

impact theory.³⁷¹ The Vulcan Society, a Black firefighter's organization,³⁷² intervened and sued for intentional discrimination under the Equal Protection Clause.³⁷³ Their intervention compelled the court to determine whether the city had purposefully discriminated against aspiring minority firefighters. The disparate impact claim was far easier to decide.³⁷⁴ Whether the city had intentionally discriminated against minorities was another matter; it is a question that has proved exceedingly difficult for minorities to get the courts to decide in their favor.

Something seemingly nefarious was ensuing in New York City. Over half of the city's population was minority, yet, when the lawsuit commenced, only 3.4 percent and 6.7 percent of the city's fire fighters were Black or Hispanic, respectively.³⁷⁵ The New York Fire Department (FDNY) maintains a multi-tiered hiring process. The first tier, a written examination, was used as a pass/fail screening device.³⁷⁶ Candidates also had to pass a physical performance test.³⁷⁷ The written examination and the performance test scores were combined with bonus points and placed on a hierarchical hiring list.³⁷⁸ The Vulcan Society contended that the written test and the rank-ordering procedures violated the Equal Protection Clause.³⁷⁹

Surprisingly, lacking direct evidence, Judge Garaufis found that the city had intentionally discriminated against Black firefighters.³⁸⁰ Judge Garaufis began his discussion of intentional discrimination thusly: "The history of the City's efforts to remedy its discriminatory firefighter hiring policies can be summarized as follows: 34 years of intransigence and deliberate indifference, bookended by identical judicial declarations that the City's hiring policies are illegal."³⁸¹ Discrimination within the FDNY first received judicial attention in 1973.³⁸² That year, Judge Weinfeld held that the City's practice of implementing non-validated written tests to screen

371. The Justice Department, well aware of the difficulty of proving intentional discrimination, only brought Title VII claims. See *City of New York*, 683 F. Supp. 2d at 233.

372. The organization was first constituted in the 1940s amid discrimination in the FDNY. See GARY R. URBANOWICZ, *BADGES OF THE BRAVEST: A PICTORIAL HISTORY OF FIRE DEPARTMENTS IN NEW YORK CITY* 178–79 (2002).

373. See *City of New York*, 683 F. Supp. 2d at 234.

374. See *United States v. City of New York*, 637 F. Supp. 2d 77, 132 (E.D.N.Y. 2009) (granting the plaintiff's motion for summary judgment on their claim that the city had violated Title VII).

375. *Id.* "In other words, on a force of 8,998 firefighters, there were just 303 Black firefighters and 605 Hispanic firefighters." *Id.* at 80.

376. *City of New York*, 683 F. Supp. 2d at 233.

377. *Id.*

378. *Id.*

379. *Id.* at 234.

380. *Id.* at 264.

381. *Id.* at 262.

382. *Id.*

and sort firefighter candidates violated antidiscrimination law because it had adverse effects on Black applicants and lacked a legitimate business necessity that may have overridden such effects.³⁸³ Twenty-six years later in 2009, a federal court held that similar hiring procedures were illegal.³⁸⁴ From 1973 to 2009 the number of Black firefighters hovered near 3 percent of the total force.³⁸⁵

New York City, however, contended that its troubling history was inconsequential because the only issue was whether the interveners had proven that decisionmakers purposefully harmed minority applicants.³⁸⁶ City officials insisted that their behavior was “at worst a display of bureaucratic failure”³⁸⁷ New York, in other words, believed this case mirrored *Feeney* where the Supreme Court found that a veteran’s preference, though women were vastly less likely to be veterans, was not unconstitutional absent evidence that the policy was put in place purposefully with anti-female intentions.³⁸⁸

The court, however, distinguished this case from *Feeney*, noting that the policies in question had been criticized for thirty years and had a history of being declared illegal.³⁸⁹ In *Feeney*, the court wrote, the veterans’ preference had always been deemed a legitimate exercise.³⁹⁰ However, FDNY hiring practices had long been deemed illegal under the 1964 Civil Rights Act.³⁹¹ “The difference,” Judge Garaufis wrote, “between proceeding with knowledge that an action will produce certain consequences and proceeding with knowledge that an action is illegal is one of kind, not degree.”³⁹² “The fact that the City . . . was on notice that exam practices with unjustified adverse effects on [B]lack applicants were presumptively illegal, and nonetheless continued to enforce such policies, is, at the very least, powerful evidence supporting an inference of intentional discrimination.”³⁹³ To Judge Garaufis, city officials possessed an “attitude of deliberate indifference” because they were clearly unconcerned about the discriminatory impact of the FDNY’s hiring policies, “rais[ing] a strong inference that intentional discrimination was the City’s ‘standing operating procedure.’”³⁹⁴

383. *Vulcan Soc’y of New York City Fire Dep’t, Inc. v. Civil Serv. Comm’n*, 360 F. Supp. 1265, 1277 (S.D.N.Y. 1973).

384. *City of New York*, 683 F. Supp. 2d at 262.

385. *Id.*

386. *Id.*

387. *Id.* at 263.

388. *Id.*

389. *Id.*

390. *Id.* 263–64.

391. *Id.* at 264.

392. *Id.*

393. *Id.*

394. *Id.* at 266.

Judge Garaufis found intentional discrimination through the use of a deliberate indifference standard that differs from both Professor Black's and my variant. I will call his standard Historical Deliberate Indifference. Discriminatory intent was found by establishing that New York City officials had been on notice that their behavior was illegal for decades, yet the officials opted for the very same policies anyway. The court used a proxy to find intentional discrimination. In this way, the decision is somewhat comparable to *Norris v. Alabama*.³⁹⁵ Remember in *Norris* the Supreme Court held that prolonged absence of Blacks from juries established a *prima facie* case of intentional discrimination.³⁹⁶ In *United States v. City of New York*, the court deemed that continued use of previously declared illegal hiring practices established intentional discrimination under Title VII.³⁹⁷

While *Norris* was helpful in many other cases, *City of New York*, however, would unlikely mirror that success. The Supreme Court, relying on *Norris*, overturned many convictions that were secured through discrimination in the composition of juries³⁹⁸ Unfortunately, Historical Deliberate Indifference fails to show that sort of promise. Indeed, there are not many racial minorities who can cite to a case invalidating a law or governmental policy that is still maintained by the state. Historical Deliberate Indifference, however, shares *Norris*'s biggest defect. Many Blacks for years had to have been denied a jury from which their race could ever serve before *Norris* could ever be activated. The same problem exists for Historical Deliberate Indifference as seen in *United States v. City of New York*; the case's holding was premised on Blacks for decades being denied an opportunity to serve as firemen in New York City. Thus, as in *Norris*, the success of winning a lawsuit is built on years of misery for people of color.

More importantly, Historical Deliberate Indifference would not lead to an equal protection violation in *Floyd*. The judiciary has no history of slapping down New York's stop and frisk policies for being discriminatory. A court relying on this standard, consequently, would have nothing on which to hang an equal protection deprivation. Historical Deliberate Indifference, to be sure, is an improvement over the Intent Doctrine. But it is far from perfect. A panacea it is not.

Having determined that each of these solutions is flawed, this Article now turns to an analysis of the comparative strengths and weaknesses of PBDI.

395. See 294 U.S. 587 (1935).

396. *Id.* at 591-92.

397. *City of New York*, 683 F. Supp. 2d at 264.

398. Starkey, *Criminal Procedure*, *supra* note * at 30-46.

IV. NEW SOLUTION: PLAINTIFF-BURDENED DELIBERATE INDIFFERENCE

This section advances the Plaintiff-Burdened Deliberate Indifference standard. Analyzing all four of its prongs, this section demonstrates exactly how a claimant can prove an equal protection violation under this new test. This section concludes by exposing this test to among the strongest criticisms it must survive. It finally concludes that PBDI is sturdy enough to withstand scrutiny.

A. Unraveling Plaintiff-Burdened Deliberate Indifference

Under PBDI, the plaintiff carries the burden of proving that (1) the plaintiff alerted the state to the existence of a law, policy, or manner of conducting business that constrains races unequally; (2) the plaintiff provided the governmental body with an alternative law, policy, or manner of conducting business that is likely to greatly diminish or solve the complained of racial disparities; and (3) the government failed to act. After these three prongs are proven, (4) the government carries the burden of proving that its failure to act furthered a compelling governmental interest. If the government fails to produce a compelling governmental interest, equal protection has been denied.

As noted previously, the Intent Doctrine remains intact. Claimants have two different options to pursue an equal protection violation: intent and PBDI. One might wonder why intent still endures. The answer is that keeping intent solves the problem that Professor Derek Black has encountered. If one actually has the proof to evidence intentional discrimination, it would be unreasonable to force them to prove their case under PBDI.

The first prong is relatively straightforward. Claimants cannot argue that the state should have been aware of any racially disparate impacts that its behavior has caused. Rather, a claimant must affirmatively alert the state to any uneven impact. One might wonder how exactly does one alert the state, and which person(s) must be alerted? The best way for potential plaintiffs to meet their burden is to have an attorney deliver something similar to an official complaint to the person(s) who would be listed as the defendants in a potential lawsuit. On this prong, Professor Derek Black and I disagree. Under his test, a state can be liable even if it did not know that disparate impacts were occurring as long as the state should have known.

Under the second prong, after alerting the state to the complained of disparate impact, a claimant carries the burden of proffering an alternate policy that is likely to mitigate or solve the complained of disparate impact. As with the first prong, a wise plaintiff will have his attorney deliver the alternate plan to persons who would be named in the potential lawsuit. Again, Professor Black and I differ here; his test requires that the

alternatives merely be available while I require the plaintiff to have offered up a replacement that is likely to fix the problem.

It is worth examining how onerous of a burden the plaintiff will carry here. On one end of the spectrum, one might presume that this prong requires that the plaintiff have a substitute policy that has been proven to work because it has been instituted successfully elsewhere. On the other end of the spectrum, one might conclude that the hurdle for the plaintiff is low since he only has to present the state with any idea that may or may not work. The answer is somewhere in the middle. This prong requires a fully-formed substitute, but it does not have to be a proven one in the sense that the policy or law has been put in place elsewhere and has a documented history establishing its success. Instead, there must be enough supportive corroboration that makes the policy a likely success in terms of meeting the state's overall objectives and reducing the complained of racial disparities.

As for the third prong, the plaintiff still carries the burden. This time, however, the burden is light. The plaintiff merely has to prove that the state did nothing after it was presented with the substitute policy. The state would not be required to adopt the suggested alternative policy, but it must move to correct the disparate impacts. An issue here is how much time the state would have to correct its disparate impacts. It would be unwise to have a hard set time requirement because situations vary, and it should be left to the courts to determine whether the state has had enough time in which to implement a new plan.

After the first three prongs have been met, the burden shifts to the state. Here the state will lose an equal protection dispute unless it can produce a compelling reason for not moving to cure the disparate impact. If no compelling reason exists, then equal protection has been denied. This last prong permits the state to offer affirmatively what other considerations at play may rightly lead it to continue to pursue its course of action. Though the burden here is high, I do not envision that if the plaintiff satisfies the first three prongs the court's duties are all but over.

Plaintiff-Burdened Deliberate Indifference was devised specifically to counteract hard-to-prove discriminatory motives, unconscious bias and structural racism. In offering a solution to the Intent Doctrine, one must take disparate impact off the table because the Court has held consistently that the standard is inapplicable. A disparate impact standard that makes strict scrutiny apply whenever races are burdened unevenly would respond to these three issues, but the Supreme Court has rejected it. Thus, those seeking to forge new ground for the Equal Protection Clause should devise a new solution as this Article does.

The key in combating those three issues is that directly confronting them is futile. Indeed, a test that relies on proving unconscious bias, for instance, will be inherently messy. One must, then, devise a creative way of addressing these problems. I believe that Plaintiff-Burdened Deliberate

Indifference is that creative solution. If a state has been told that its behavior produces racially uneven impacts, and has been provided an alternate policy that promises to be just as effective but without the uneven impacts (or reduced disparate impacts), and the state continues as is, then, that should be considered a form of discrimination.

Plaintiff-Burdened Deliberate Indifference is premised on this central question: After being alerted that its policy is causing racial harms, and given a promising policy that reduces or solves those racial harms, why would a government choose to ignore the new policy and continue with one that discriminates? What's worse? A state that consciously discriminates or a state that, when told it is discriminating, is offered a way to not discriminate, but chooses the discriminatory path anyway? The objective of PBDI is simple: to provide states an option to not discriminate. States can always deny that intentional discrimination is afoot and unconscious bias is hard to prove. But PBDI brings the debate to a conscious level. Indeed, a state that fails PBDI has consciously chosen to discriminate when a nondiscriminatory option was available.³⁹⁹ There is no legally relevant difference between choosing a discriminatory policy over a nondiscriminatory one and intent to discriminate.

B. Possible Criticisms

Perhaps the most compelling criticism that PBDI might encounter is that it places too heavy of a burden on plaintiffs, particularly since the cost of funding an equal protection challenge is expensive. But more than merely being expensive, this criticism holds that plaintiffs should not have to alert the state to the existence of a discriminatory impact, and more importantly, plaintiffs must not be forced to provide a substitute policy. Those who level this critique might contend that plaintiffs are ill-suited to devise policy solutions. This argument, in sum, is that the Intent Doctrine is an impossible burden and PBDI is an impossibly onerous one.

As an initial matter, even if plaintiffs were forced to carry a heavy burden, at least this standard allows them an opportunity to directly confront equal protection denials. But, those who support this critique need to consider this more deeply. If the Supreme Court were to embrace this test, what would be the consequence of the Equal Protection Clause suddenly becoming relevant again for racial minorities? The likely answer is that racial justice and civil rights organizations around the country, in response, would devise solutions to the various problems that plague racial minorities most. Minorities, in reality, will not be forced to develop policy solutions. After alerting the state to the existence of racially disparate

399. For instance, in Title VIII cases, if other nondiscriminatory options are available, courts will view that as supporting a claim that illegal behavior had occurred. *See, e.g.,* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (1988).

impacts, the burden for plaintiffs might be as light as going to a website and downloading a well-conceived plan.

Some might contend that the non-profit organizations that bring these sorts of lawsuits will not have the money to devise the required policy solutions. But such criticism misses the mark. These organizations regularly bring these lawsuits and, more importantly, the policy solutions that they are likely to rely on are the sorts of projects that public policy professionals do in the course of their work. Plaintiff's shoulders, simply put, are unlikely to collapse under the burden as critics may insist.

A deeper examination of PBDI might reveal that its implementation might result in the courts being inundated with equal protection lawsuits, overwhelming the judiciary. This criticism, though, may not have much merit because fewer lawsuits might be brought than some may expect. If governments realize that they cannot choose a discriminatory path if it has been offered a nondiscriminatory route, then governments will quickly appreciate that and may work cooperatively with citizens to ensure that discrimination does not pervade in society. If not, they theoretically expose themselves to potentially expensive § 1983 lawsuits.

But some governments may be undaunted by a potential lawsuit and choose to harbor disparate impacts for which there are remedies, leading to an influx of lawsuits. That should not, however, be seen as a problem with PBDI. Instead, that merely hints that society harbored discrimination for which there was no remedy. There can be too much discrimination; there cannot be too many lawsuits that are brought in response to actual discrimination. We should never "fear too much justice" in the words of Justice Brennan in his *McCleskey* dissent.⁴⁰⁰

The last criticism is the argument that there should never be a compelling reason to continue an existing policy if the state has been given a nondiscriminatory option. Many are likely sympathetic to this argument. It is difficult to envision many compelling reasons to choose a discriminatory path when the state has been given a nondiscriminatory option. But it is imperative that the state be extended the opportunity to have its voice heard. The state, perhaps, has considerations of which courts should take stock.

V. APPLICATION

This final Part argues that PBDI would lead to an equal protection violation in *Floyd v. City of New York*. By forcing police departments to ensure that minorities are not being denied their Fourth Amendment rights because of race, PBDI gives the Equal Protection Clause back its bite. This section will trace how PBDI would produce an equal protection

400. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

victory by detailing, step-by-step, the manner by which the class action plaintiffs in *Floyd* would have to prove their case.

A. Alerting the State

The first prong for PBDI is to alert the state and as mentioned this is a light burden to carry. The class action plaintiffs in *Floyd* merely need to notify city officials that there are racial disparities when it comes to NYPD's stop-and-frisk practices. Providing the city with its own statistical data establishing that Black and Brown New Yorkers are disproportionately stopped and frisked would satisfy this prong.

B. Presenting New York City with an Alternate Policy

The hardest part for the class-action plaintiffs in *Floyd* would be offering a substitute policy that is likely to reduce or cure the racial disparities yet still permit the NYPD to effectively police the streets. At the outset, it is important to note that New York's stop and frisk tactics are less successful than random checkpoints. The bar, therefore, is set very low. Here are some possible solutions.⁴⁰¹

1. Officer Tracking

University of South Carolina Criminology Professor Geoffrey P. Alpert believes that racial profiling "is not an efficient, an effective, or a responsible police strategy."⁴⁰² Professor Alpert, therefore, presses for police departments to track officers' behavior and compare findings to similarly situated fellow officers.⁴⁰³ Such a police strategy to combat officers using race as a proxy for reasonable suspicion would "use peer comparisons to determine appropriate behavioral patterns."⁴⁰⁴ To understand what this policy entails, Professor Alpert's words are worth quoting at length.

401. There are two solutions I did not include because they appear to be too general. See John D. Cohen, Janet Lennon & Robert Wasserman, *Eliminating Racial Profiling*, available at <http://www.dlc.org/print.cfm?contentid=610>; POLICE EXECUTIVE RESEARCH FORUM, *RACIALLY BIASED POLICING: A PRINCIPLED RESPONSE* 49–63 (2001); see also Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001) (discussing various options to remedy racial profiling). Another idea that I do not discuss at length is a controversial plan that advocates randomization in police investigations. See generally BERNARD E. HARCOURT, *AGAINST PREDICTION: PUNISHING AND POLICING IN AN ACTUARIAL AGE* (2007).

402. Geoffrey P. Alpert, *Eliminate Race as the Only Reason for Police-Citizen Encounters*, 6 CRIMINOLOGY & PUB. POL'Y 671, 676 (2007).

403. *Id.* at 672.

404. *Id.* at 675.

Specifically, police departments should institute a policy that maintains and evaluates statistics on each police officer's actions, including vehicular and pedestrian stops, and post-stop activities. The agencies should incorporate internal benchmarking to compare the behavior and activities of similarly situated officers in the same department (officers who are assigned during the same time and same location). This method can be used to compare stops, citations, searches, arrests, and other activities, and it can be included as part of a more comprehensive management procedure such as an "early intervention" or early warning system.⁴⁰⁵

Though "internal benchmarking" lacks the capacity to assess whether the overall behavior of a police force meets normative conceptions of reasonable suspicion, what it can do is locate officers whose conduct differs from the mean.⁴⁰⁶ From there, police departments can implement intervention techniques.⁴⁰⁷

Police departments who adopt this policy must have an accountability system that has three components.⁴⁰⁸ First, police departments will have to define who is an outlier officer (i.e., which officers will be targeted for intervention).⁴⁰⁹ "Second, the [department] must determine how to undertake the intervention and decide whether informal or formal counseling or training is warranted."⁴¹⁰ And third, there must be "post-intervention monitoring" to assess whether the officer's behavior is improving.⁴¹¹

2. Center for Constitutional Rights' Recommendations

The Center for Constitutional Rights (CCR) has offered a few recommendations to negate racial disparities in *Terry* stops.⁴¹² One recommendation in CCR's 2008 preliminary report is that the NYPD must release additional policing and crime data.⁴¹³ The report contends that "[g]reater transparency about NYPD policies and procedures is essential in combating the racial profiling of hundreds of New Yorkers."⁴¹⁴ The

405. *Id.*

406. *See id.*

407. *Id.* at 675–76.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *See generally* CENTER FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITIES IN NYPD STOPS-AND-FRISKS (2009) available at <http://ccrjustice.org/files/Report-CCR-NYPD-Stop-and-Frisk.pdf>.

413. *Id.* at 16.

414. *Id.*

NYPD, furthermore, has inconsistently reported the numbers of stops and frisks, to the chagrin of many.⁴¹⁵ CCR, therefore, wants to oblige the city to adhere to reporting regulations that require that the NYPD “to report to the City Council quarterly on the number of stop-and-frisks in every precinct by race and gender.”⁴¹⁶ The last CCR recommendation is to expand the Civilian Complaint Review Board’s power.⁴¹⁷ Ideally, CCR wants an “increased authority to impose more effective disciplinary sanctions based on the findings of their investigation, independent of any input or influence by the NYPD.”⁴¹⁸ This last recommendation is particularly persuasive.

A necessary component of any alternate policy must include improved training of officers on reasonable suspicion and instruction on unconscious bias. The police department alleged that it teaches its officers during a training program the proper way to conduct stop and frisks and warns against racial profiling.⁴¹⁹ But Judge Scheindlin, the presiding judge in *Floyd*, criticized those efforts, “noting that numerous officers did not recall ever receiving such training.”⁴²⁰ The NYPD must effectively train police officers to conduct valid *Terry* stops and about the perils of unconscious bias.

3. Anti-Racial Profiling Laws

Another facet of an alternate policy might include the enacting of anti-racial profiling laws. In 2001, Cincinnati, for example, passed such an ordinance. Such laws are an excellent way of deterring police misbehavior by making such improprieties criminal. “When an officer’s intention is to violate the constitutional rights of citizens, criminal penalties are justified.”⁴²¹

4. Quota System

One last possible solution is placing a quota on the number of people New York officers can stop and frisk during a given year. As mentioned, the NYPD stopped and frisked over 680,000 persons in 2011 though only 6 percent were ultimately arrested. Those low arrest statistics unveil that New York officers have an untenable standard for reasonable

415. See *id.*

416. *Id.*

417. *Id.* at 16–17.

418. *Id.* at 17.

419. Editorial, *supra* note 39, at A20.

420. *Id.*

421. Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 739 (2004).

suspicion. If New York could only stop and frisk a third of that amount, police officers might feel forced to actually stop only those for whom there is a reasonable suspicion that crime is afoot.⁴²²

C. *Failure to Act*

Here, the plaintiffs have to prove that NYC failed to act. For the purposes of this Article, I will assume that the city ignored any calls for it to amend its stop and frisk policies. The burden here, therefore, is light.

D. *Compelling Reasons Not to Act*

Because the minority class-action plaintiffs carried their burden, the burden then shifts to New York City to proffer a compelling reason for not attempting to remedy their discrimination. Here, the city's best argument would undoubtedly be that the stop and frisks rates reflect the crime statistics in the city. Blacks and Hispanics, in other words, commit a disproportionate amount of crime and thus are stopped at higher rates. This would be a compelling reason not to act *if* there were not studies proving that the higher crime rates of Blacks and Hispanics do not entirely explain those groups being stopped and frisked at alarmingly high rates.

New York also might contend that "stop and frisk" is crucial to ensuring safe streets. But this argument rings hollow, particularly since random checkpoints are more likely to lead to an arrest than *Terry* stops. If random police work is more fortuitous than cops actually observing behavior, then it's fair to conclude that New York City would avert descending back to 1980s-level of violence if its policies were modified to ensure that Black and Brown New Yorkers do not have their constitutional rights violated.

In conclusion, I fail to locate any compelling reason that would excuse New York City for failing to move to correct its discriminatory stop and frisk techniques. Thus, under PBDI, the *Floyd* plaintiffs would prevail

422. Randall Kennedy espouses what may seem to be an opposite version of this idea. Kennedy writes:

[I]nstead of placing a racial tax on [B]lack, Mexican-American, and other colored people, governments should, if necessary, increase taxes across the board. More specifically, rather than authorizing police to count Mexican ancestry or apparent [B]lackness as negative proxies, states and the federal government should be forced either to hire more officers or to inconvenience everyone at checkpoints by subjecting all motorists and passengers to questioning (or to the same chance of random questioning).

RANDALL KENNEDY, RACE, CRIME, AND THE LAW 159–61 (1997). By taxes, Kennedy is referring to a racial tax, in other words, a price that racial minorities have to pay for being a racial minority. *Id.*

in an equal protection lawsuit, illustrating how potentially transformational this new standard is to antidiscrimination law. Another revolutionary aspect of PBDI is that if New York City officials realize that they have no compelling reason to continue a discriminatory policy, they might move to repair the city's policing techniques on their own.

In the Introduction, this Article argues that the Supreme Court had effectively stricken through the Equal Protection Clause in the Constitution for racial minorities. The Equal Protection Clause, however, can be resurrected. Indeed, Plaintiff-Burdened Deliberate Indifference can give the Equal Protection Clause the life that the Supreme Court has practically extinguished. That the Equal Protection Clause could force police departments to cease racial profiling would be a revolutionary change for people of color, and potentially women and members of the LGBT community as well in other contexts. That change is sorely needed.

CONCLUSION

Racial minorities endeavoring to prove an asserted denial of equal protection must establish that a state actor intended to cause a discriminatory result. Intent is an exceedingly onerous burden. Claimants, moreover, cannot argue that unconscious bias is the reason for an asserted equal protection deprivation. Does America, then, truly offer its citizens equal protection under the law? If our understanding of equal protection does not respond to the difficulties of proving intent and the salience of implicit bias can we truly claim to offer our citizens equal protection of the laws? This Article insists we cannot. Plaintiff-Burdened Deliberate Indifference is the solution to the problem. By requiring that the state opts for the nondiscriminatory path when presented with one, PBDI, unlike the Intent Doctrine, gives true power to the words "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁴²³