RACE AND THE JUSTICE SYSTEM: 4TH AND 5TH AMENDMENT CASES

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NACDL's 2nd Annual Seminar
"Race Matters II: The Impact of Race on Criminal Justice"
January 10-11, 2019, Millennium Biltmore Hotel, Los Angeles, CA

Race Matters Presentation Outline:

When it comes to Pretrial Litigation, Race DOES Matter.

I. Introduction:

a. **4th and 5th Amendment:**

i. **4th Amendment:** "The right of people to be secure in their persons, houses, papers, and effects, against ***unreasonable searches and seizures,*** shall not be violated, and no warrants shall issue, but **upon probable cause,** supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

ii. **5th Amendment**: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. 3 Tiers of Encounters Between Citizens and the Police (4th Amendment):

a. Consensual Encounters:

i. Consensual police – citizen encounters do not implicate the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429 (1991) (holding that police officers may, without violating the fourth amendment, approach a citizen and ask to see personal identification or ask for permission to search luggage so long as the question would not make a reasonable person think the requests are mandatory.

ii. Considering the "totality of the circumstances" to determine whether a reasonable person in the defendant's shoes would have felt free to ignore a police officer's request or terminate the interaction. *Brendlin v. California,* 551 U.S. 249 (2008)

iii. When an offier through force or a showing of authority restraints a citizen's liberty, the encounter is no longer consensual. *Brendlin* at 254.

iv. *United States v. Mendenhall,* 446 U.S. 544 (1980)(**Seizure):** Constitutional safeguards are only implemented when a citizen is restrained by means of physical force or show of authority. Id. at 553. The "purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." Id. at 553.

v. ***Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)(Consent to Search Must be Voluntary)**

1. During the course of a consent to search a car that had been stopped by officers for traffic violations, evidence was discovered that was used to convict him of unlawfully possessing a stolen check, found wadded up under left rear seat in the vehicle. Bustamonte sitting in front seat with the driver. Alcala consented to search after he produced driver's license and told officers it was his brother's car.
2. **Analysis:** The question is what must the prosecution prove to demonstrate that consent was *"voluntarily"* given: When the validity of the search rests on consent, the State has the burden of proving that necessary consent was obtained and that it was freely and voluntarily given. It is not enough to satisfy the burden by showing a mere submission to claim lawful authority.
3. *Voluntariness* = question of fact determined by the totality of circumstances
   a. Whether the defendant's will was overborne?

b. When the subject is not in custody, and the state attempts to justify a search on the basis of his consent; the state must demonstrate that the consent was voluntarily given;
    i. Knowledge of his right to refuse is a factor, but not required to demonstrate such knowledge as a prerequisite to establish voluntary consent

4. Consensual Search: Balancing Test:
    a. (1) The need for consensual searches
    b. (2) Absence of coercion in acquiring consent to search
        i. Policemen do not need to inform citizens they have the right to refuse the consent to search
        ii. Prosecutor must prove that consent was voluntary and not given under duress and coercion
        iii. Voluntariness is a question of fact, and the prosecution does not need to show that the defendant had knowledge that he could refuse to consent; but will be used as a factor to be taken into consideration.

b. Terry Stops ("Brief" Investigative Detentions)

i. *Terry v. Ohio*, 392 U.S. 1 (1968)

ii. One of the most important opinions in Modern Police Practice:

1. Facts:
    a. They see 2-3 men looking into store, walking back and talking, pacing the store; officers approached the men and asked them their names;

iii. Reasonable Suspicion Standard with Respect to a Search:

1. (1) What justifies the police conduct at its inception?
2. (2) The scope of the police conduct must be tied to the initial justification

iv. Reasonable Suspicion Standard:

1. More than a haunch; must articulate objective facts
2. Looking at the facts and what the officer knew, would a person of reasonable caution think what they did is reasonable?

v. **You don't need to be arrested in order to be seized**.

vi. What Happened After Terry? Post-Terry Effects

1. ***Terry =***
    a. allows "stops" based on "reasonable suspicion"
    b. allows "frisk" based on reasonable suspicion; NOT a full body search
    c. The ONLY time an officer can do a Terry pat down = if they are justified in believing the suspect is armed and dangerous = this is NOT an automatic right

c. Arrests:

i. In order for the arrest to be constitutional, an arrest must be based on probable cause to believe that an offense has been committed and that the person arrested committed the offense.

ii. Probable cause is a question of fact, that is determined by a case-by-case basis. Only those facts and circumstances known to police at the time of the arrest may be used to support a finding of probable cause.

III. Post-Terry Effects:

The Academy for Justice reported found that In 2013, a New York officer in the 40th precinct recorded his commanding officer directing him to stop "the right people, at the right time, at the right location," described as "male blacks, 14 to 20, 21." **Luna, E. (Ed). (2017). Reforming Criminal Justice: Policing (Vol. 2). Phoneix, AZ: Arizona State University, at 68. (Citing Graham Rayman, *New NYPD Tapes Introduced in Stop and Frisk Trial. Village Voice* (Mar. 22, 2013)** http://www.villagevoice.com/news/new-nypd-tapes-introduced-in-stop-and- frisk-trial-6721026.. The Center for the Constitutional Rights interviewed 54 people who had been subjected to this Stop, Question and Frisk program. Id.at 68.

The Center for Constitutional Rights (CCR) interviewed 54 people who had been subjected to these" Stop, Question, Frisk" (SQF) procedures, and concluded, "These interviews provide evidence of how deeply this practice impacts individuals and they document widespread civil and human rights abuses. The effects of these abuses can be devastating and often leave behind lasting emotional, psychological, social, and economic harm. Residents of some New York City neighborhoods describe a police presence so pervasive and hostile that they feel like they are living in a stage of siege." Id. at 69. The Academy for Justice stated "the overt racially charged statements by the city and police leaders, along with clear racial disproportionality in the administration of the SQF program, illustrates the persistent undercurrent of racial injustice in New York City policing." Id. Unfortunately, New York is not the only U.S city creating these problems. Id. SQF class-action civil litigation or media investigations have arisen in Philadelphia, Chicago, and Miami Gardens. Id.

IV. Race and New Policing

New Policing "emphasizes advanced statistical metrics, new forms of organizational accountability, and aggressive tactical enforcement of public-order crimes or violations." **Luna, E. (Ed). (2017). Reforming Criminal Justice: Policing (Vol. 2). Phoneix, AZ: Arizona State University at 84.** The New Policing tactics have emerged in mainly in poorer, predominately minority, and higher-crime areas in various cities. Id. at 85.

The Academy for Justice analyzed a study of New York from 2004 to 2014. Id. at 89. During that time, the NYPD recorded 4,811,769 stops. Id. "Stops were concentrated in police precincts and census tracts with high proportions of White Hispanic, Black Hispanic, and Black, after controlling for local crime ". In other words, there were more officers per crime and more stops per crime in areas with higher concentrations of Latino and Black populations" Id. Looking at the unequal distribution of policing, stops rarely resulted in arrests or seizures of contraband. The few stops that did result in arrests rarely involved serious crimes, and few resulted in convictions or punishment. Id. The results were statistically significant. Relative to white suspects who have been stopped, all three non-white groups were more likely to be frisked. "Blacks were frisked 4.7% more than White. White Hispanics 6.7% more than White. And Black Hispanics 7.2% more than whites. Id.

Moreover, two additional sets of comparisons show differences by race in the use of force during a stop and also for the "unnecessary" use of force. Id.The use of force during a stop was higher in non-whites than whites. Id. Unnecessary force rates were consistently higher for non-white suspects compared to white suspectsId.

The discrimination did not stop there. Once arraigned, non-white suspects are 37.7% to 38.6% more likely to be convicted, but for less serious crimes. Id. at 93. If convicted, non-white suspects are 45.3% to 87.8% more likely to be convicted of a less serious charge with a lower sentencing tariff. Id. But, even with lower conviction charges, Black defendants relative to Whites were more likely (31.2%) to serve time in jail or be sentenced to prison. Id.

V. Predictive Policing in the American Police Department

a. Predictive Policing is based on two core ideas: (1) mathematical forecasting methods used to anticipate future crime risk in narrowly proscribed geographic areas; and (2) the delivery of police resources to those prediction locations disrupts the opportunity for crime. P. Jeffrey Brantingham, Matthew Valasik & George O. Mohler (2018) *Does Predictive Policing Lead to Biased Arrests? Results From a Randomized Controlled Trial, Statistics and Public Policy*, 5:1, 1-6, DOI: 10.1080/2330443X.2018.1438940.

b. The idea is that the presence of police officers in any given place removes opportunities for crime without any direct contact with potential offenders. Id. The deterrence lingers after the police have left the area, and studies have shown the police presence diffuses nearby areas as well. Id. In practice, these so called "hot-spots" focus on the crimes reported by the police to the public. The goal of this program is then to send in police resources where crimes have been reported by victims, in order to prevent future crimes in those areas. Id.
c. However, tantamount evidence suggests explicit and implicit bias can have a major impact on "who" gets stopped, searched and detained. Id. The concern that arises becomes whether predictive policing exacerbates biases and reinforces the tendency for police officers to target minority communities and individuals. Id. If predictive policing indirectly exacerbates bias, any benefit for controlling the crime must be weighed against the discriminatory costs of carrying out such practices. Id.
d. The Racial Bias of predictive algorithms has been highly criticized by the ACLU. The ACLU emphasized this way of policing is "profoundly flawed." https://www.aclu.org/other/statement-concern-about-predictive-policing-aclu-and-16-civil-rights-privacy-racial-justice. The ACLU deemed this program as "systematically biased against communities of color and allows unconscionable abuses of police power." Id. While these systems seem objective or neutral, instead, they "intensify the unwarranted discrepancies in enforcement" in communities of color that already encounter disproportionate law enforcement scrutiny. Id.
    i. **Example:** A randomized controlled trial was conducted in three divisions of the Los Angeles Police Department (LAPD) between November 2011 and January 2013. Each day, police patrol officers were handed maps with 20 targeted areas (500 x 500 boxes). The officers were informed these target areas were locations where the risk of crime was the highest during their shift. Id.
        1. The officers were then encouraged to patrol the target areas. However, the officers did not know the maps were distributed to them by use of an algorithmic forecasting method or by an analyst using the technological assets available to them. Id.
        2. The maps each officer received every day were randomized, creating the algorithmic forecast.
        3. The control condition was the analyst forecast.
        4. The types of crimes targeted included burglary theft from vehicle (BTFV), burglary and car theft.
        5. These crimes account for roughly 60% of the crimes in LA
        6. The study also collected the amount of time each police officer spent in the prediction areas

b. **The Results**:
    i. The use of algorithmic predictions produced an average 7.4% drop in crime. The decrease in crime associated with the algorithmic predictions was statistically significant.
c. Results of bias induced by predictive policing:
    i. This analyses could not provide any guidance on whether arrests are themselves systematically biased. The current study determined that the arrest rates for black and latino individuals were not impacted, positively or negatively, by using predictive policing.
    ii. Under the 500 x 500 boxes that changed every day for patrolling, this test can conclude that predictive policing did not result in biased arrests in this study.
    iii. Continued empirical scrutiny along with careful policy development will be needed to ensure bias does not arise in predictive policing. Id.

VI. Ferguson and Predictive Policing:

a. Before the Ferguson Investigation, the FPD practiced its own version of "New Policing" Luna, E. (Ed). (2017). Reforming Criminal Justice: Policing (Vol. 2). Phoneix, AZ: Arizona State University, at 68. (Citing Graham Rayman, *New NYPD Tapes Introduced in Stop and Frisk Trial.*

Village Voice (Mar. 22, 2013)(citing the Department of Justice; *Investigation of the Ferguson Police Department*)

b. Background:

1. "Ferguson was actually viewed to be a model base for the saturation of misdemeanor enforcement, traffic, and other vehicular codes, and enforcement of civil codes. The reliance on code enforcement, traffic enforcement, and misdemeanor arrests suggests a thread connecting the order-maintenance prong of New Policing in cities with New Policing in less urban locales such as Ferguson." Id. at 94.

c. The Ferguson Report:

i. Documented racial disparities in both traffic enforcements but also in enforcement of civil codes. Id. at 94. The police behavior showed the role of race in traffic enforcement through stops, tickets, arrest, and seizures. Id.
   1. "The racial differences in the police decisions during these stops were conditioned on two stages:"
      a. (1) whether contraband is seized depends on whether the driver or vehicle is searched, and.
      b. (2) whether a warrant arrest is the reason for the arrest compared to other reasons Id.

ii. **Results:**
   1. Black drivers were 35% more likely than Whites to be ticketed pursuant to a stop. Id. at 95.
   2. Blacks are 93% more likely, or nearly twice as likely, to be arrested
   3. Blacks are 67% more likely than Whites to have their vehicle searched once stopped, again, a statistically significant effect

d. What was happening?

i. In Ferguson, a municipal court issued 32,975 warrants in 2013 alone. This was more than one per resident and most likely, more than one for every motorist passing through Ferguson, and nearly all for nonviolent offenses.
ii. The median per capita income in 2013 in Ferguson was roughly $40,000, and almost 1 in 4 residents lived below the poverty line.
iii. The processes of making stops, citations, and searches that lead to the issuance of warrants was contaminated with race-based preferential discrimination. When the police were stopping Blacks, there was a good chance of getting them on an outstanding warrant.

e. Continuing Effect past the initial stop:

i. Once the cases get to court, the pattern of racially disparate policing continues.
ii. Although Blacks are 67% of the Ferguson population, they are 74% of Municipal Court defendants → Within the Court population, they are 81% of the population receiving summonses, 91% of those with warrants issued for their arrest, and 95% of the persons arrested.
iii. Black Defendants in the Municipal Court averaged 3.5 citations per appearance, about 50% more than the rate of 2.3 summonses per White defendants

f. Michael Brown:

i. August 9th, 2014 Officer Wilson shot and killed 18yr- old Michael Brown. Id. at 70.
ii. Officer Wilson saw Brown and his friend, Dorian Johnson, walking in the middle of the street. Officer Wilson approached them with his vehicle and a struggle ensued between Officer Wilson and Brown, while Officer Wilson was still in his patrol car. Physical evidence supported Officer Wilson's assertion that there was a struggle over Wilson's gun, and a shot was fired while Officer Wilson was still in the vehicle. Id. at 70. Brown took off, and Officer

Wilson proceeded to get out of his vehicle, and fire several more shots, ultimately killing Michael Brown. Officer Wilson claimed that Brown had turned and was charging at him, but other testimony indicated that Brown had his hands up and was posing no threat to Wilson.

g. Department of Justice Investigation:

i. In response, the DOJ conducted an investigation into the policing practices of the Ferguson Police Department in Missouri. Id.

1. DOJ concluded:

a. Ferguson Police Department had engaged in misconduct against the citizenry of Ferguson by discriminating against African Americans and applying racial stereotypes in a "pattern or practice of unlawful conduct.

ii. The Concern here looked at the number of residents who had outstanding warrants, living in certain communities. When a significant number of residents have warrants in a certain area, it creates an incentive for the police to randomly stop people.

iii. **Justice Sotomayor:** Will have a state where police are incentivized in certain neighborhoods

VII. Racial Profiling Post-Terry:

The Academy of Justice focused on A Vera Institute of Justice Study examined the experiences of more than 500 people who had been stopped by the New York Police Department. **Luna, E. (Ed). (2017). Reforming Criminal Justice: Policing (Vol. 2). Phoneix, AZ: Arizona State University at 84.**

In that study, the Vera Institute found 44% of young people surveyed indicated they had been stopped repeatedly – nine times of more, 45% reported encountering an officer who threatened them, and 46% said they had experienced physical force at the hands of the officer , and 51% indicated that they were treated worse than others because of their race and/or ethnicity. Id. at 67.

The publicized death of Freddie Gray and Michael Brown in Ferguson, Missouri, initially stemmed from a *Terry* Stop. Id. at 69. On April 12th, 2015, Baltimore police officers attempted to stop and question Freddie Gray but Gray ran Id. The officer chased him, he was quickly taken into custody and arrested for possessing an illegal switchblade. Id. During his transport in a police van, Gray slipped into a coma and died several days later on April 19th. The autopsy findings indicate that Gray died from injuries to his spinal cord. Id. at 71 The Baltimore Police Commissioner acknowledged that Freddie Gray was not properly secured during the van transport. Id.

Since Michael Brown and Freddie Gray, allegations of racial profiling have emerged in the wake of stop-and-frisk program. Moreover, The Academy for Justice stated "the perceived discriminatory treatment of racial and ethnic minorities during Stop-and-Frisk programs adversely affects citizen trust and faith in police." Id.

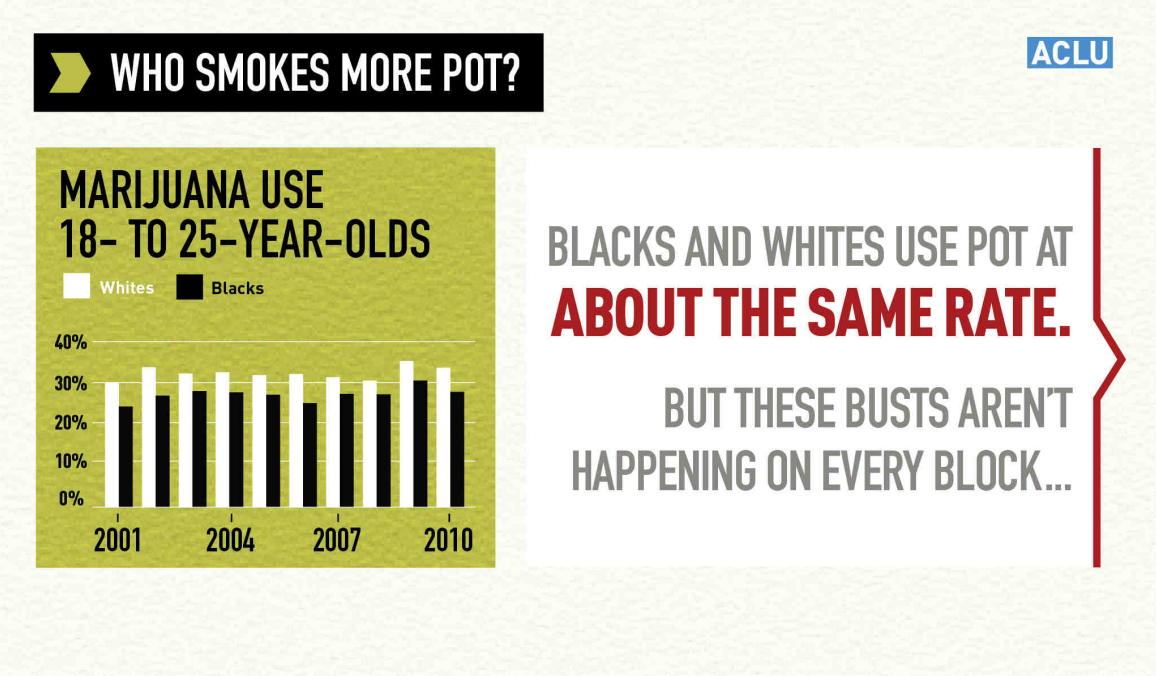
VIII. DUI Stops/Marijuana

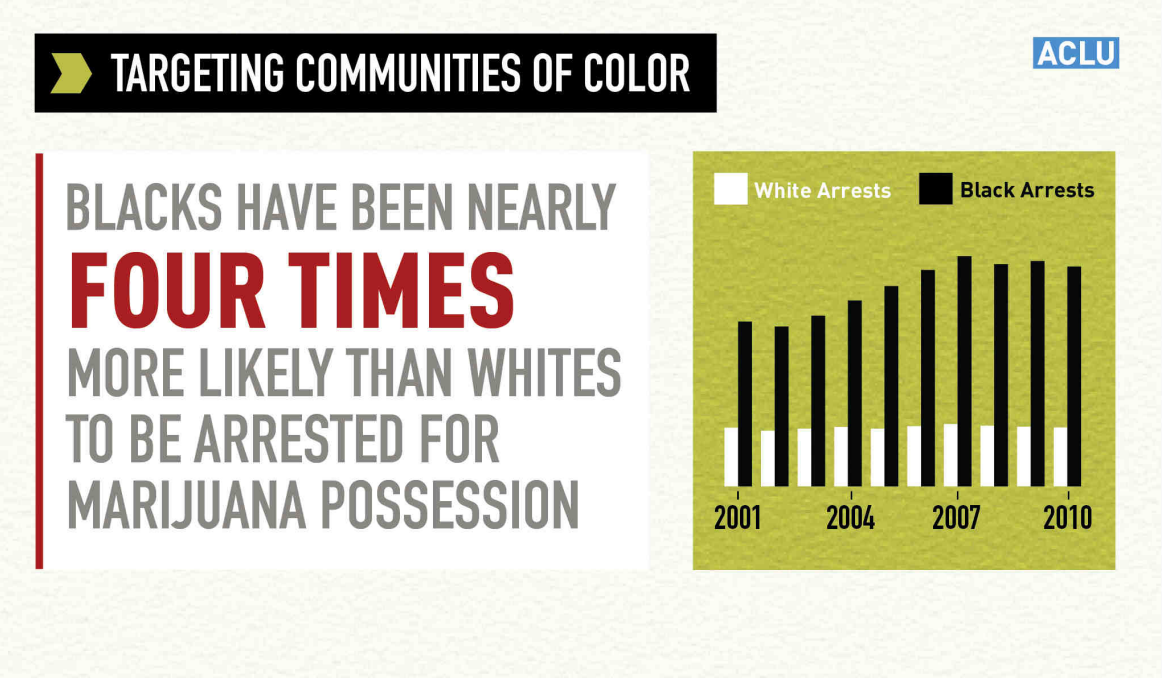
Generally, the smell or marijuana coming from a vehicle gives law enforcement officers probable cause to search the vehicle without a warrant. Andrea Levinson, Ben Yosef, *Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana – Federal Cases*, 188 A.L.R. Fed. 487, § 7 (2003). (See *U.S. v. Staula*, 80 F.3d 596 (1st Cir. 1996), where the police stopped a truck for a license plate violation, and upon approaching, smelled burnt marijuana. The court found the smell of marijuana from the passenger compartment gave the officer probable cause to search the entire passenger compartment of the car; See also, *U.S v. Nicholson*, 17 F.3d 1294 (10th Cir. 1994), the police stopped a vehicle for erratic driving, police smelled burnt marijuana and then searched the vehicle after the driver gave his consent. The officers found a small amount of marijuana in a jacket within the interior of the vehicle, and also a hidden compartment in the car that contained cocaine. The court ultimately held that the smell of marijuana alone gave rise to probable cause to search the entire vehicle and any bag therein that could contain contraband.

Smell of Burnt Marijuana vs. Smell of Raw Marijuana: The Tenth Circuit differentiated the smell of raw marijuana and burnt marijuana. *In U.S. v. Downs*, 151 F. 3d 1301 (10th Cir. 1998). In Downs, the police pulled over a car for a traffic violation and smelled "raw" marijuana. The police searched the vehicle, including the trunk, and found 200 pounds of marijuana. The court pointed out that the smell of burnt marijuana indicated personal use and therefore probable cause to search the passenger compartment of the vehicle. Here, the overpowering nature of the raw marijuana smell therefore gave rise to probable cause to allow the officers to search the trunk as well since there was a good probability the car was being used to transport the drugs.

U.S. v. Bradford, 423 F.3d 1149 (10th Cir. 2005)(held that the odor of burnt marijuana in the passenger compartment, standing alone, did not establish probable cause to search the vehicle's trunk. The court held there needed to be some odor, along with corroborating evidence of contraband that would establish probable cause to search the trunk.

According to the ACLU, arrests for marijuana account for over half of all the drug arrests in the United States. (American Civil Liberties Union, *Marijuana Arrests by the numbers,* https://www.aclu.org/gallery/marijuana-arrests-numbers, (Last visited January 3rd, 2019)). Out of 8.2 million arrests for marijuana between 2001 and 2010, 88% of those arrest were simply for having marijuana. Id. The arrest data revealed one prominent trend throughout; significant racial differences in how marijuana laws are being enforced across the nation. A 2013 ACLU study found that Blacks and Whites use pot at about the same rate , yet African Americans were 3.73x more likely than whites to be arrested for marijuana. In Illinois, D.C., Minnesota and Iowa, Blacks were 7.5x to 8.5x more likely than whites to be arrested for having weed.





IX. Implicit Bias:

a. **Implicit Bias: "**Is a growing field of study that has gained recognition for its application in various fields, including law." Yvonne Elosiebo, Implicit Bias and Equal Protection: A Paradigm Shift, 42 N.Y.U Rev. L. & Soc. Change 451 (2018)."The basic premise of implicit bias is that though people outwardly profess to hold anti-discriminatory notions, they simultaneously and often unconsciously treat people with whom they least identify, or to whom they attribute negative characteristics, less favorably than people who carry preferable attitudes." Id. at 475.

b. **Understanding how the human brain works and human intuition work: Id. at 475.**

   i. Humans receive environmental stimuli, process them, and then encode them into short and long-term memories. Id. "Humans by necessity use schemas, or "cognitive structures that represent knowledge about a concept or type of stimulus, including its attributes and the relationships among those attributes." Id. Schema-based thinking happens "nearly instantaneously" and operates on both inanimate objects and on human beings." "We classify new acquaintances into a number of social categories, including gender, age, race, disability, and role. This is the first way in which our automatic information processing affects out interactions with people and the world. Id.

   ii. A well-known researcher, Jeffrey Kang, who studies implicit bias identified three components of racial schemas that influence our interactions with others. Id. at 476

   iii. **(1)** We categorize individuals into racial categories according to society's racial mapping rules. While every society may have a different set of mapping rules, once a person is mapped, implicit and explicit racial meanings are triggered, which then influence our interactions: Racial meanings include cognitive and affective components:

iv. **(2) Cognitive Component**: includes thoughts or beliefs about the category, such as generalizations about their intelligence or criminality. Id. at 476.
    1. stereotypes are cognitive beliefs about groups
v. **(3) Affective Component:** includes emotions, feelings, and evaluations that range from positive to negative, or good to bad. Id.
    a. Prejudice is positive or negative feelings about those groups
vi. These Racial schemas operate automatically, without conscious intention and outside of our awareness. Id.
    1. . Visual information, is more powerful than subliminal or subconscious stimuli
vii. Implicit measures provide more accurate metrics for our unconscious behavior than explicit measures
    1. The studies on implicit bias reveal that implicit mental processes may draw on racial meanings that, upon conscious consideration, we would expressly disavow.

c. Implicit Attitude vs. Implicit Stereotype:

i. Jerry Kang distinguishes between implicit attitude and implicit stereotype. **Jerry Kang, Kristin Lane, *Seeing through Colorblndness: Implicit Bias and the Law, 58 UCLA L. Rev. 465 (2010).***

ii. *Implicit Attitude* = liking or disliking a social category
    1. Question: Whether one likes or dislikes men versus women (attitude)

iii. *Implicit Stereotype* = social category linked to some attribute
    1. Question: Whether men are more associated with attributes such as tall, career, mathematics, whereas women more associated with short, family, arts

d. Implicit Attitudes:

i. "Color Blind" = not to even see race.

ii. They are not claiming perceptual colorblindness, but cognitively colorblind = no different attitudes or stereotypes between any two racial categories. Id. at 469.

iii. "Implicit Social Cognition"

iv. The mental processes that affect social judgments but operate without conscious awareness or conscious control. Id. at 467.

v. "Implicit" emphasizes our unawareness of having a particular thought or feeling

e. The Crash Test:

i. Social cognitionists John Bargh and Mark Chen developed a computer crash experiment to demonstrate that the image of a mere black face can activate a black racial schema.
    1. **Methodology**: in the test, research subjects are asked to count whether an even or odd number of circles appears on the computer screen.
    2. The computer screen was designed to crash after the 130th iteration, and the subjects were then instructed to start over.
        a. Hidden cameras caught the participants' frustration and hostility
        b. Unbeknownst to them, half of them were subliminally flashed a young black male face prior to each iteration and the other half were shown a young white male face.
    3. **Results**: those who were shown the black man's face reacted with greater hostility to the computer crash.
        a. → Reveals we do not have to "see" or consciously register the black male face for it to influence our behavior.

f. "Implicit Association Test (IAT) (Speed Test)

i. The IAT → initially developed by Samuel Gaertner and John McLaughlin, uses sequential priming procedures to measure the automaticity of the racial meanings in racial schemas. Otherwise known as the Speed Test

ii. **Background:** Reaction times vary for simple mental tasks that take a relatively short time to complete, whereas mentally difficult tasks take a relatively long time to complete, by measuring the speeds of activations, we can infer the strength of the association. Id. at 471.
iii. ** Reaction-time instruments have produced the most reliable measures for implicit social cognitions

iv. **Test Methodology:** Requires participants to rapidly classify individual stimuli into one of four distinct categories using two responses;
    1. Two social categories: European American and Asian American
    2. Two Attitudinal Categories: Good and Bad
    3. Example: European American and Asian American might be represented by black and white photographs of the faces of White and Asian people. Good and Bad could be represented by words that are easily identifiable as being linked to positive or negative effect, such as Joy or Agony
v. **Results:** a person with a negative implicit attitude toward Asian Americans would be expected to go more quickly when Asian and Bad share one key, and European American and Good share the other. When the pairings of good and bad are switched, the time difference, which is the IAT D Score, is interpreted as reflecting an implicit attitude.

g. Expected Ingroup Favortisim Can Implicate Results in IAT Measures:
i. Ingroup Favortisim = our tendency to favor the groups we belong to
    1. ***On one hand:*** Those who belong to social groups deemed to be "good," show a strong preference for their own groups
    2. ***On the other hand:*** those who come from groups that the culture assigns as "bad" do not show strong Ingroup preference

h. Examining the Results
i. The millisecond time differentials measured in the IAT are connected with actual brain processes.
ii. **Functional Magnetic Resonance Imaging (fMRI)** = measure the neutral activity that is activated in the amygdala, a subcortical structure in the human brain that is associated with "emotional learning as measured by fear conditioning," memory and evaluation, and the expression of learned emotional responses that have been acquired without direct aversive experience.
    1. The amygdalae of white participants active to a much greater extent when they are subliminally primed with images of black people than white faces.
    2. The Amygdala activity is "significantly correlated with participants IAT scores"
    3. This demonstrates the "observable behavior maps" to some netural activity.
    4. The IAT is measuring something real and significantly connected to emotion-laden racial mechanics. Id. at 481.

i. Implicit Stereotypes:
i. **Implicit Stereotype** = social category linked to some attribute
    1. Question: Whether men are more associated with attributes such as tall, career, mathematics, whereas women more associated with short, family, arts
    2. Most participants associated Male with Science and Female with Humanities

j. Behavioral Colorblindness:
i. In one study, participants watched a video of computer-generated faces that morphed slowly from a frown to a smile and were instructed to hit a key when they thought the expression change. **Kurt Hugenberg & Galen v. Bodenhausen, Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat, 14 PSYCHOL. SCI. 640, 641-42 (2003);**

1. In general, people saw hostility "linger" on the "Black face" for a longer period of time than the "White face."
2. The extent of that hostility was perceived as lingering was predicted by implicit bias (as measured by the IAT)
3. A neutral facial expression as seen more-angry on Black Face, a wallet could be mistaken for a gun more often

k. In 2004, Behavioral Economists Marianna Bertrand and Sendhil Mullainathan conducted a study by sending out resumes to various employers. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg more Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94 AM. ECON. Rev. 991 (2004).*
   i. **Methodology:** sent out resumes to numerous employers in Boston and Chicago, used names such as "Emily or Greg" to signal "Whiteness" and "Lakisha or Jamal" to signal Blackness. Exact same resumes, just different names.
   ii. **Metric Findings:** Found trivial manipulation of named produced a 50% difference in callback rates. Id. at 484.

l. **Moreover, Dan-Olof Rooth extended this experiment. See, Dan-Olof Rooth, *Implicit Discrimination in Hiring. Real World Evidence 5* (Inst. For the Study of Labor, Discussion Paper No. 2764, 2007). His 2007 study e**xtended his experiment by connecting the callback discrimination to implicit bias. Rooth Created resumes similar in background, experience, and qualifications, but varied the applicant's name to denote ethnicity.
   i. Applications from an Arab-Muslim job candidate (whose education, experience, and short biography made it clear that he was born and educated in Sweden), and a Swedish job candidate were each sent to 1552 job listings in Sweden.
   ii. **Metric Findings:**
      1. A clear preference emerged with the Swedish-sounding name (217 invites), over the Arab-Muslim sounding name (66 invites)
      2. the identically qualified candidate was 3.3x more likely to be called back simply because he enjoyed a Swedish name

X. How does Bias Shape Police-Citizen Encounters?

a. Behavioral Study: (*Cite: Seeing Through Colorblindness: Implicit Bias and the Law; Jerry Kang, Kristin Lane, 58 UCLA L. Rev. 485 (2010)*
   i. The same facial expression can be interpreted differently as a function of implicit bias. 58 UCLA L.Rev. Id. at 481.
      1. *Example:* participants watched a video of computer-generated faces that morphed slowly from a frown to a smile and were instructed to hit a key when they thought the expression changed.
      2. *Results:* In general, people saw hostility "linger" on the "Black face" for a longer period of time than on the "White face." Moreover, the extent that hostility was perceived as lingering was predicted by implicit bias (as measured by the IAT scores)
   ii. If a neutral face is seen to be angrier on a Black face, a wallet could be mistaken more often as a gun.
      1. "*Shooter Bias*" Paradigm
         a. *Example:* Individuals (targets) holding an object appear in front of ordinary background scenes, such as bust stations and parks. These places are viewed on a computer screen and the participant is to make a response if the person viewed is holding a weapon, and make a different response if the person is holding a harmless object, such as a cell phone or wallet

b. *Results:* Participants were quicker to "shoot" an armed Black target than an armed White Target, BUT slower "not to shoot" an unarmed Black Target than an unarmed White Target
    i. When time pressured, unarmed Black targets were mistakenly shot more often than unarmed White targets.

iii. **Laquan McDonald (Chicago)**

XI. State-Sponsored Racial Profiling:

a. ***Whren v. United***, 517 U.S. 806 (1996):
   i. In Whren, officers in plainclothes observed two men sitting in a vehicle at a stop sign. Both of the men inside the vehicle were young Black men. The men had been sitting at the stop sign for more than twenty seconds, when Officers suddenly turned their vehicle around, and began to pursue the vehicle because the vehicle had started to drive off at an "unreasonable" speed.
   ii. When the officers pulled up next to the vehicle, they saw two bags that contained a white powder. The driver and the passenger were then arrested.
   iii. During pre-trial litigation, the Defendants challenged the legality of this stop and seizure of the contraband. They argued the initial traffic stop was pretextual and that the officers lacked probable cause, and even reasonable suspicion to initiate the search for contraband.
   iv. The Court ultimately deemed the stop constitutional. The officer's subjective motivations for conducting the traffic stop, even if pretextual, did not invalidate a stop and search, even if a "reasonable officer" in the same circumstance, would not have stopped the motorist.

b. 8 Years later, The Supreme Court further extends *Whren, in* ***Devenpeck v. Alford,*** 543 U.S. 146, 148 (2004):
   i. In *Devenpeck,* the defendant saw a car pulled over on the side of the road and went to assist the other driver. Shortly thereafter, a police officer arrived on the scene to assist the motorist. At that time, the defendant then proceeded back to his own car and drove away. However, the driver on the side of the road indicated to the police officer he was under the impression the defendant was actually a police officer. Upon belief that the defendant was impersonating the police officer, the officer pulled him over.
   ii. At this time, the defendant recorded his interaction with the police, and was subsequently arrested for recording a law enforcement officer.
   iii. The Court, using *Whren,* ultimately concluded that an officer's subjective intent is immaterial, on the grounds that the offense that initially establishes probable cause does not need to be "closely related" to justification for the actual arrest.

c. The acceptance of racial profiling continued ***in Herring v United States*****,** 555 U.S. 135, 136-37 (2009):
   i. In ***Herring***, a man went to get items from his vehicle that was impounded. When the police officers learned Herring was going to do this, they investigated into his background to determine whether he had any active warrants. Herring an outstanding warrant, but unbeknownst to the officers, the warrant had been recalled nearly 6 months ago. Upon Herring's arrival at his vehicle, police officers arrested him and found him with a firearm and meth.
   ii. During pre-trial litigation, *Herring* challenged the legality of the stop and search and sought to apply the exclusionary rule for the evidence unlawfully seized. .
   iii. The Court acknowledged the clerical error made, however, nonetheless did not apply the exclusionary rule because the error was not deliberate. Moreover, a violation of a

constitutional right or false information for probable cause, does not automatically give rise to the Exclusionary Rule remedy.

d. Since its inception, *Whren* has actually broadened and expanded over the past two decades, and has yet to come to a halt. We see the most recent demonstration in *Utah v. Strieff*, 136 S. Ct. 2056 (2006).
   i. In *Strieff,* a detective received an anonymous tip about "narcotics activity." Over the course of a week, narcotics detectives observed the house and its visitors. Some visitors stayed only a few minutes after arriving, that raised the suspicion the occupants of the house were dealing drugs. One of the visitors was Strieff. When the surveillance detective saw Strieff leave the residence, he watched him walk into a nearby store parking lot. In the parking lot, the detective approached Strieff, identified himself and asked him to produce identification. When Strieff's information was ran through the system, the detective learned of an active arrest warrant for a minor traffic violation. Strieff was then searched, found to be in possession of meth and drug paraphernalia and arrested.
   ii. Strieff moved to suppress the evidence, arguing the evidence was inadmissible because it was derived from an unlawful investigatory stop. The prosecutor even conceded the detective lacked reasonable suspicion for the stop.
   iii. However, the Court did not find this convincing. While the Court acknowledged the officer may have acted negligently and did not have probable cause to stop Strieff, yet, the evidence was allowed in because there was nothing illegal about the detective approaching Strieff in the first place. Moreover, the evidence discovered pursuant to an unlawful stop was admissible because the officer discovered an active warrant after the illegal stop.

e. Putting it Together:
   i. Post *Whren* has allowed racially motivated stops without a violation of the Fourth Amendment, allowed subjective, racially discriminatory motivations by officers, and allowed pretextual, racially motivated stops. Mary N. Beall, *Gutting the Fourth Amendment: Judicial Complicity in Racial Profiling and the Real-Life implications,* 36 Law & Ineq. 156 (2018)
   ii. Post Devenpeck: allowed an officer's subjective reason for initiating a stop, as long as there is probable cause, but the probable cause does not need to be "closely related" to the reason why the officer initially stopped the suspect.
   iii. Post *Herring*: Allowed evidence, even though obtained after an unconstitutional stop is admissible when the officer comes to find out the suspect has an active warrant.
   iv. In 2014, there were more than 7,800,000 active warrants. And Post *Whren, Devenpeck* and *Strieff,* allow a racially motivated stop without probable cause, but have an active warrant, even if warrant is no longer valid, are subjected to the risk of being stopped. Id. at 160. "Particularly, racial minorities are at risk of being stopped for pretextual reasons and search incident to the existence of a warrant, even if the warrant is for a low-level offense or has been withdrawn." Id. at 161,

XII. Racial Profiling:

a. "Racial profiling affects a wide array of communities of color. More than 240 years of slavery and 90 years of legalized racial segregation have led to systemic profiling of blacks in traffic and pedestrian stops. Since September 11, 2001, members of the South Asian, Muslim and Arab communities have been profiled by local law enforcement and airline personnel."(American Civil Liberties Union, *Racial Profiling,* https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling (Last Visited January 3rd, 2019)).

a. The Patriot Act:

Under this, TSA's power expanded to investigate individuals and entities suspected of being a threat to the national security interests Yvgenia S. Kleinder, *Racial Profiling in the Name of Natonal Security, Protecting Minority Travelers' Civil Liberties in the Age of Terrorism*, 30 B..C. Third World L.J. 103 (2010)

i. "TSA is an agency of the Department of Homeland Security, and is responsible for screening all airline passengers." Id. at 107. All of the screening employees in the airports are federal employees. Id. Post 9/11, introduced a fear of terrorism and created a suspicion of immigrants of Muslim and Middle Eastern descent. Id. at 108.

ii. **The Department of Justice Civil Rights Division has defined Racial Profiling as:**

1. "The invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity." Id. at 111.

iii. Empirical evidence indicates that race is often "the decisive factor in law enforcement decisions regarding who should be searched and questioned." Id. at 111.

b. However, racial profiling is often improperly executed, and it often "mis-targets" indivudals. Id. at 114. One example is the American Sikhs. This is one group that has experienced unfair prejudice as a result of their skin color, accents and style of dress because they have been confused with Muslim Arabs;

i. This mistake highlights the ignorance that "All Arabs are not Muslim, and All Muslims are not Arab.

c. **Example of Mis-Targeting.**

i. The Irfan Family: Id. at 103.

1. **January 1st, 2009,** AirTran Airways official ordered 9 Muslim passengers off AirTran Flight 175: Washington D.C. flight to Orlando, Florida.Id. at 103.
   a. ***The Group of Passengers:*** South Asian descent, 3 young boys (age 2, 4 & 7) two adult brothers, their wives, a sister-in-law and a family friend who happened to be on the same flight. Id. at 104. All but one of them were U.S born citizens
      i. The family friend = Abdul Aziz, attorney for United States Library of Congress. Id. at 104.
   b. Irfan family on their way to vacation to Orlando, Florida. There they had planned to visit family and attend a religious retreat. Id.
   c. On the airplane, two teenage girls reported a conversation between Atif Irfan and his wife regarding the "safest seats" on the airplane.
   d. Before the plan even took off, Federal air marshals aboard the flight notified TSA about the potential safety concern, and the FBI ordered the Irfan family and Mr. Aziz off the plane. Id. at 104.

2. Police Interrogation:

   a. Irfan family and Mr.Aziz were then questioned in a quarantined area of the passenger lounge; authorities wouldn't allow the three young boys from eating the food they had in the family's carry-on, and the plane's remaining ninety-five passengers and their luggage were re-screened, as with the crew and the airplane itself. Id. at 104.

3. **The FBI concluded**: The Irfan family and Mr.Aziz posed no danger to the airline or its passengers and informed AirTran that the passengers were cleared to travel but the airline refused to rebook the flights, and would only offer to refund the cost of the original tickets. Id. at 104.
4. ***AirTran spokesman***: agreed the incident was the result of a misunderstanding, he affirmed that AirTran's "better safe than sorry" approach complied with the federal rules on responding to security threats, and downplayed the ethnic-profiling aspect of the incident.
5. ***TSA spokeswoman***: told Washington Post that this incident "just highlights that security is everybody's responsibility. Someone heard something that was

inappropriate, and then the airline decided to act on it. We support the pilot's call to do that.

6. ***The Irfan Family's Reaction***: Atif Irfan told CNN "really at the end of the day, we're not out here looking for money. I am an attorney. I know how the court system works. We're basically looking for someone to say … 'We're apologizing for treating you as second class-citizens."

d. The 2004 Amnesty International Report (AIUSA): Yvgenia S. Kleinder, *Racial Profiling in the Name of Natonal Security, Protecting Minority Travelers' Civil Liberties in the Age of Terrorism*, 30 B..C. Third World L.J. 103 (2010) (Citing Honorable Judge Timothy K. Lewis, 2004 Amnesty International (AIUSA) report, *Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States*, Honorable Judge Timothy K. Lewis "admonished" the U.S government that "focusing on race, ethnicity, national, origin, or religion as a proxy for criminal behavior has always failed as a means to protect society from criminal activity."

1. The Amnesty International report conservatively estimated that "one in three people living in the United States, or approximately 7 million individuals out of a population of approximately 281 million, are at risk of being subjected to some form of racial profiling." Id. at 113.

ii. Race based profiling jeopardizes anti-terrorist security measures because law enforcement officials are not focusing on the real target. Id. at 112.

1. While racial profiling implies the identification and singling-out of suspects of color, the reality is that anybody can be a terrorist, regardless of background, age, sex, ethnicity, education, and economic status. Id. at 113.
2. For example, the recent cases of the "American Taliban" John Walker Lindh and British "Shoe bomber" Richard Reid. Both of these men revealed Al Qaeda has the ability to recruit sympathizers of diverse backgrounds. John Walker Lindh was a U.S white citizen and Richard Reid was a British citizen. Each of these men would not necessarily have been identified under the current programs that target South Asian men and boys, and Arab Muslims. Id. at 113.

e. Airport Profiling Examples:

i. Jarrar v. Harris, et al:

1. **Facts:** JetBlue and Transportation Security Administration (TSA), "Inspector Harris" would not let Raed Jarrar board his 2006 flight to JFK airport until he agreed to cover his t-shirt.
2. Jarrar's t-shirt said "We Will Not Be Silent" in English and Arabic
3. Inspector Harris; → told Jarrar that it was impermissible to wear an Arabic shirt to an airport and equated it to a "person wearing a t-shirt at a bank stating: 'I am a robber.'"
4. In 2009, TSA Officials and JetBlue Airways paid Jarrar to settle the charges that they illegally discriminated against him based on his ethnicity and the Arabic writing on his T-shirt

ii. Hebshi v. United States: 2015

1. **Facts:** Hebshi was traveling home to Ohio on September 11th, 2015, after visiting her sister in California. She was seated next to two South Asian men, who she didn't know. Once the plane landed, armed agents boarded the plane and arrested all three of them because fellow passengers thought the amount of time each man spent in the bathroom was suspicious.

a. Hebshi was held in a cell, forced to submit to a strip-search, and detained for hours. She learned she was pulled off the plane after fellow passengers thought the amount of time each man spent in the bathroom was suspicious.

2. **Settlement:** Hebshi received a $40,000 settlement. Moreover, under the settlement, Frontier agreed to amend its employee handbook to more clearly state its zero-tolerance policy on discrimination and to provide all new employees with training on that revision.
    a. Frontier also amended its customer complaint policy to ensure allegations of discrimination are given the appropriate attention

XIII. How does Bias Shape Custodial Interrogations?

a. Are certain cultures more included to make statements to police?

b. Using Cultural/Alienage against a suspect:

i. By referring to the mythical "objectively reasonable person," courts fail to acknowledge that people of different cultures sometimes think or act differently than those in the dominant culture → By ignoring cultural factors that have shaped the suspect's perspective, the objective test imposes a false norm upon the suspect.
    1. Here in ***Panez***, the Court recognized that certain subjective factors, such as culture or alienage, may affect an individual's perception of a certain situation

ii. *U.S v. Beraun – Panez,* 812 F.2d 578 (9th Cir. 1987):

1. **Facts**: Panez was herding cattle in a remote rural area of Idaho. He was approached by Twin Falls Deputy Sheriff Webb and Bureau of Land Management Special Investigator Hughs, who were investigating a range fire.
2. The officers stopped their truck on a dirt road, about 200 yards of Panez; the officers shouted to Panez, who was on horseback, to come over to the truck. Panez rode down the hill to meet them. Investigator Hughes showed Panez his badge and asked if he would answer a few questions.
3. **Panez was interrogated:**
    a. Lasted roughly 30mins to an 1 ½ , took place at front of sheriff's pickup, Panez dismounted from horse and positioned between both deputy and investigator.
    b. Panez asked at least 3x if he started fire, demanded to know why he was laying and said they knew the truth
    c. Investigator Hughes told Panez, that if convicted, he could be deported, BUT if he cooperated, Hughes would tell the AUSA of his cooperation.
    d. At trial, Panez testified that he was told that if he continued to lie, he would be deported and separated from his family.
    e. Then kept his co-worker separate from getting to him, in a remote rural location
    f. Prior to the interrogation: Officials investigated into Panez's alien status.
    g. *Pre-trial:*
        i. D moved to suppress his statements to law enforcement officials who failed to provide him of his Miranda rights before questioning him
4. **The Court:**
    a. Even though Panez was not physically bound was subjected to psychological restraints and therefore, was in custody during interrogation.
        i. Accusing him of lying, confronting him with false witness statements, employing good guy/bad guy tactics, keeping him separated from his co-worker in a remote rural rea AND **taking advantage of Panez's insecurities about his alien status.
    b. The officer's relentlessness gave rise to a psychological coercion beyond that inherent in a typical noncustodial interrogation.

c. **The Officers' mention of the possibility that he would be deported and separated from his family was a specific factor that restricted his freedom;
    i. The officers knew Panez was an alien, had in fact taken steps to determine his status before questioning him, and may have even used the information to their own advantage.
    ii. He may have had some difficulty understanding English,
d. Panez was not told he was under arrest, but he was also not told he was free to leave. Isolated in a police-dominated atmosphere = interrogation was custodial
e. Custodial = therefore, needed to Mirandize him

c. False Confessions:

i. Because a confession is universally treated as damming and compelling evidence of guilt, it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant.
    1. A false confession an exceptionally dangerous piece of evidence to put before anyone adjudicating a case.
    2. Police-induced false confessions rank amongst the most fateful of all official errors
ii. Police-induced false confessions arise when a suspect's resistance to confession is broken down as a result of poor police practice, overzealousness, criminal misconduct, and/or misdirected training
    1. Interrogators sometimes become so committed to closing a case that they improperly use psychological interrogation techniques to coerce or persuade a suspect into giving a statement that allows the interrogator to make an arrest.

iii. Post 9/11 False Confessions:

1. **(Cite: *Punishing Foreigners: Is the Equal Treatment of Citizens and Aliens Accused of Crime Consistent with Social Contract Theory and the Constitution,* 1 Penn Undergraduate L.J. 7 (2013)(Skyler Albertson)**
2. Mohammed al-Qahtani was rumored to have been closely involved with the terrorist attacks of September 11th, 2001, possibly as the "mystery 20th hijacker who never made it on to one of the planes." Id. at 9.
3. Al-Qahtani was allowed 4 hours of sleeps a night, for 48 hours, out of 54 days
    a. Forced to strip naked, wear a leash, and perform dog tricks
    b. Deprived of his opportunity to use a toilet after having been force fed liquids intravenously,
4. While American investigators were ultimately about to prove that Al-Qahtani was associated with al-Qaeda, but was involved on such a low level that he possessed no useful information
5. When he was finally able to meet with a lawyer, he informed his lawyer that he had offered false confessions in order to avoid the prolonged abuse. Id. at 9.

d. Torture while in Custody to Confession

i. **What Happened? Who was involved? (Edward J. Egan, Robert D. Boyle: *Report of the Special State's Attorney* (http://www.aele.org/law/2006LROCT/chicagoreport.pdf)**
    1. Investigation into Lieutenant Jon Burge, several other CPD officers, State's Attorneys;
    2. Allegations of torture, perjury, obstruction of justice, and conspiracy to obstruct justice; under command of Jon Burge, at Area 2 and Area 3 headquarters in Chicago from 1973 -
ii. **Torture**
    1. Mostly African Americans
    2. One in specific, Andrew Wilson
    3. Convicted by jury of the murder of two CPD officers;
iii. **Wilson's Torture to Confession:**

1. Feb 14th, 1982 at 5:15am WILSON arrested; arresting officers included Lieutenant Jon Burge.
2. Thrown onto floor during arrest; while on the floor, Burge placed one knee in the small of Wilson's back and the other knee on the back of Wilson's head
3. Wilson taken to Area 2:
    a. Beaten by several officers who kicked him, slapped him, hit him with their fists
    b. Put a plastic bag over his head and burned him on the arm with a cigarette
    c. Right eye was injured during course of beating
4. Burge states: "If it had been him, he would not have messed up the face"
5. Wilson taken out of initial room, and placed into a new room:
6. Handcuffed to a ring on the wall
7. Burge came in and told him to confess, Wilson refused

iv. Officer Yucaitis came into the room with another unnamed officer

1. Took out a black box from a grocery bag
2. The box had a crank on the outside and two wires to each of which an alligator clip was attached
    a. One of the clips was clamped to Wilson's left ear and the other one to his nostril
3. When Yucaitis cranked the box, Wilson received a shock
    a. Cranked the box again and Wilson screamed
    b. Yucaitis left the room when someone came knocking

v. When Wilson went to speak with the ASA, he told the ASA of his mistreatment, but WILSON alleged the ASA told officers "take that jagoff out of here"

vi. WILSON was then returned back to the same room;

1. Burge came into the room with another detective
2. Burge took out a device, This device also had clamps, and Burge placed clamps to his ears and began cranking the device
    a. This caused Wilson to grind his teeth, scream and rub the clamps off
3. Wilson was stretched over the radiator, so that the radiator was under his chin
4. Burge placed the clamps on his fingers and began cranking it again, causing Wilson to scream

vii. Burge then took out a device that looked like a curling iron

1. Burge rubbed the device between Wilson's legs
    a. Shock from this device was much stronger than the cranking device
2. Wilson was on his knees, in front of the radiator, with another detective kicking him in the back while Burge shocked him

viii. Then at one point, Burge put a gun in Wilson's mouth and clicked it

1. Told Wilson that he would not be mistreated again if he confessed to the murders
2. Wilson then agreed to make the statement to keep him from being shocked

ix. **SAME DAY*** at 6:00pm: Wilson made confession

x. Wilson at the lockup:

1. Wilson brought to lockup after confession, but the lockup personnel refused to accept him in his condition → taken to Mercy Hospital

xi. Hospital:

1. Numerous red scratches and marks along his chest
2. Scratches on shoulders
3. Long wound on his thigh; second degree burns
4. Bruise under Wilson's right eyelid and redness on the surface of the eye
5. Cuts on forehead, cuts on the back of his head
6. **Officers even told the Doctors Wilson had better refuse treatment if he knew was good for him

e. **Lawrence Hyman: (ASA)**

i. Took Wilson's statement/confession

ii. Noticed a cut on Wilson's right eyelid which Wilson kept dabbing with a wet paper towel
iii. Hyman NEVER asked how Wilson had his eye injured
    1. He asked a detective about it, and had been told the injury occurred during his arrest
iv. Never asked how WILSON had been treated by the police or whether their statements were voluntary

f. **Richard Brzeczek (Superintendent of CPD):**
    i. Brzeczek named defendant, among other police officers, in WILSON's civil right action in federal court
    ii. Now accepted as fact that Officers Mulvaney and Ferro abused Wilson and attempted to coerce Wilson at Mercy Hospital to refuse medical treatment, which would have included suturing an open wound
    iii. Brzeczek made aware of the lock-up personnel's rejection of Wilson some time before he received a letter from Dr. Raba, director of Cermak Hospital
        1. Letter informed Brzeczek of all the wounds, brusies, swellings and blisters (radiator burns)
    iv. Brzeczek then sent a copy of this letter to then State's Attorney Richard M. Daley and said he was "seeking direction as to how the Department should proceed in the investigation of these allegations."
    v. Brzeczek called in 12-13 African America members of his command and instructed them to contact the leaders of the African-American community to reassure them and to "lay down the law to the police officers."
        1. Did not do this with the white command personnel
        2. Called all his black command personnel, discussing the public allegations and the complaints in the African-American community of police misconduct, and told his black command personnel to assist him in dealing with the allegations.
    vi. He asked them to take a twofold approach:
        1. **(1)** to reemphasize to the police officers what their role was and what their conduct should be and
        2. **(2)** and also to deal with the community leaders where the outcries were coming from
    vii. Brzeczek aware lock-up personnel refused to accept Wilson, but took no steps to find out why
        1. Learned medical personnel at Mercy Hospital complained the police officers had coerced Wilson into refusing medical attention
        2. BUT → Made no attempt to determine the results of any investigation of the officers who had control and custody of Wilson before he got to lock up

XIV. Cross-Racial Identification/ "own-race bias"

a. Over the past 80 years, courts, social scientists, and legal scholars have come to agree that eyewitness testimony is largely unreliable due to a variety of cofounding factors. Id. at 115.
    i. One prominent factor is own-race bias: individuals are better at recognizing members of their own race and tend to be highly inaccurate in identifying persons of other races. (**Cite: *Alleviating Own-Race Bias in Cross-Racial Identifications*, 8 Wash. U. Jurisprudence Rev. 115 (2015)(Bryan Scott Ryan)**
b. Mistaking identifications have been responsible for more miscarriages of justice than any other factor – more so perhaps than all other factors combined. Id. at 120.
    i. One study found that mistaken identifications factor in more than 75% of all overturned convictions ** This is extremely discerning when the consequence of a wrongful conviction includes incarceration and or the death penalty. **
    ii. Even under the "best of circumstances, eye witness confident is only a modest predictor of eyewitness accuracy," due to confounding factors, such as own-race bias in cross-racial identification. Id. at 123.

c. **In 1927 Justice Frankfurter stated:** "the identification of strangers is proverbially untrustworthy and the hazards of such testimony are established by a formidable number of instances in the records of English and American trials.

d. Cross-Racial Identification:

i. **Cross-Racial Identification:** occurs when an individual of one race attempts to identify an individual of another race. Id. at 119.
   1. Eyewitnesses are more accurate in identifying members of their own race than they are in identifying members of other races.
   2. Cross-Racial Identifications have been shown to be particularly reliable due to "own-race bias," the unintentional tendency of individuals to less accurately identify members of other races.
      a. Courts first began examining the problems of **own-race bias** in 1972. While at that time the science behind cross-racial identifications was relatively undeveloped, own-race bias is now scientifically accepted. Id. at 124.

e. Example: Cite (*Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L.Rev. 934 (Sheri Lynn Johnson)

i. **William Jackson:** was convicted of two rapes and spent five years in the Ohio penitentiary before authorities discovered their error. Id. at 935.
   1. The true perpetrator of the crime was not an amazing look-alike.
   2. Jackson and the actual rapist were bearded blacks with trimmed afros and similar physiques, a comparison of their facial features suggests only a rough resemblance
   3. Nevertheless, two white women testified they were positive Jackson was their assailant. Despite several alibi witnesses, an all-white jury convicted him. Id. at 935.

ii. Unfortunately, the mistaken identification of Jackson was neither a unique occurrence nor random misfortune. Legal observers have long recognized that cross-racial identifications by witnesses are disproportionately responsible for wrongful convictions

iii. In the last fifteen years, psychologists have compiled empirical evidence that incontrovertibly demonstrates a substantially greater rate of error in cross-racial recognition of faces. Id. at 935.

iv. Example: Id. at 938. Patrick Wall classic study of eyewitness identification:
   1. Cross-racial misidentification in kidnapping, rape, and robbery with five victims.
      a. All of the victims spent several hours with the perpetrator, each identified a man who was subsequently proven to be several hundred miles away at the time of the offense.
      b. When the true criminal was found, it was apparent, that other than his black skin, he had no resemblance to the original suspect.
   2. Wall stated "In general, there is much greater possibility of error where the races are different than where they are the same. Where they are different, there is more likelihood of error where the subject belongs to a minority group and witness to a majority group than there is in the opposite situation."

f. The "Own-Race" Phenomenon:

i. **The Test**: Facial recognition study where subjects view photographs of a number of faces that are later randomly mixed with a new set of faces. Usually the length of the observation time is carefully controlled.
   1. The subject is then asked to select the "old faces" from the "new faces"
   2. Each of the subject's performance is measured by plotting "hits" against "false alarms" and compiling the scores statistically together.
   3. The performance of the subject is aggregated by race and then by each racial group's accuracy which is measured on same-race and other-race photos.

ii. **Findings:**

1. **White Subjects: Id. at 940.**
    a. **Recognizing African Americans:**
        i. Significant difference in the ability of white American subjects to recognize white and black faces. The impairment in the ability to recognize black faces is substantial. Two studies were conducted, the first with elderly subjects revealed the subject's recognition rate for pictures of white male faces was twice as great as the mean recognition rate for black faces (male or female).
        ii. The second study involved a field experiment with clerks at convenience food stores, and were asked to recognize the photos of two customers, one black and one white, who had been in the store earlier that day.
        iii. == modest race-own effect, white clerks misidentified blacks 54.8% of the time and whites 34.9% of the time. Id. at 940.
    b. Recognizing Asian Americans:
        i. Recognized 76.8% of white faces
        ii. Recognized only 52% of Asian American faces
2. **Black Subjects: Id. at 940.**
    a. 5 domestic studies report that black subjects are significantly less able to recognize white faces than black faces
    b. On the other hand, 4 studies showed no significant differences.
    c. Two studies found that Blacks are less able to recognize Asian faces than Black Faces. Id. at 940.
3. **Asian American Subjects: Id. at 940.**
    a. Japanese Americans are only marginally better at recognizing Japanese American faces than Chinese American faces; Chinese American subjects display a reciprocal and equally significant tendency
    b. Both Japanese and Chinese Americans are significantly better able to recognize Asian faces than black faces, as well as significantly better able to recognize black faces than white faces.

g. Own-Race Effect operates in criminal identifications:

i. Jurors tend to believe eyewitness accounts even in extremely doubtful circumstances. Moreover, at least one study found jurors generally unable to differentiate between accurate and inaccurate eyewitness testimony, even after cross-examination.

h. "Own-Race" in Court:

i. Courts have incorrectly relied on the belief that jurors understand the inaccuracy of cross-racial identifications, and thus can "sniff out" false identifications themselves during trial. **(Cite: *Alleviating Own-Race Bias in Cross-Racial Identifications*, 8 Wash. U. Jurisprudence Rev. 115 (2015)(Bryan Scott Ryan). Id. at 129.**

1. → Relying on this belief, courts have continued to reject measures to resolve own-race bias that extend beyond the traditional safeguards of justice. Id. at 129.
2. But, the average citizen does not know of or understand own-race bias. Id. at 129.

ii. The Courts that have attempted to remedy own-race bias have stated that the general population does NOT in fact recognize or even understand the subconscious biases of cross-racial identifications. Id. at 129.

1. Laypersons are not aware of the inaccuracy of eyewitness testimony and appear to be "insensitive to… the impact of cross-racial identifications on eyewitness accuracy."

i. Proposed Solutions to Cross-Racial (Id. at 131):

i. (1) Excluding Eyewitness Testimony Entirely
ii. (2) Relying on Traditional Safeguards of Justice such as cross-examination and summation
iii. (3) Utilizing expert testimony; and
iv. (4) Implementing cautionary jury instructions:

XV. The Exclusionary Rule is the Best Tool:

a. Whether the evidence is excluded or not, in essence it effects the long-game of successes in our cases by exposing weaknesses in the State's case.
   i. Providing discovery not normally provided
   ii. Leading to new witnesses
   iii. Further investigation

b. United States v. Hussain, et al, No 14-4425:

   i. Recently the Second Circuit addressed reasonable suspicion with a Jamacian-American and potentially a suburban mother and father.
   ii. In the United States v. Hussain, the Second Circuit reversed the district court's denial of a motion to suppress a loaded gun found during a protective search of the defendant's car.
      1. Damian Cunningham, a member of a Jamaican robbery gang, was stopped by police allegedly on his way to commit a robbery. However, the record actually indicated that the officers pulled Cunningham and his associate over for running a stop light.
      2. While Cunningham was pulled over, the Officer's conducted a full protective sweep search of Cunningham's automobile and located a loaded handgun, later offered against him at trial.
   iii. Cunningham moved to suppress this gun on the grounds that the police officers did not have reasonable suspicion of dangerousness to conduct a protective search of his car, and violated the 4th amendment.
   iv. The District Court:
      1. Denied Cunningham's suppression motion, and held that the facts of the circumstances gave rise to reasonable suspicion of dangerousness. The fact that the officer saw Cunningham move his arm toward the center of the console of the car, the officers then observed Cunningham's passenger seated in an "unnatural position" and that Cunningham was carrying a pocketknife when searched, were all facts taken into consideration to determine there was reasonable suspicion of dangerousness to search the car.
   v. On Appeal, Judge Lohier, held for the Second Circuit panel that the factors the District Court relied on were insufficient to establish "reasonable suspicion"
   vi. The Court focused on the idea that it was unlikely that a stop, with a similar fact pattern but with different passengers of another race, gender or ethnicity, would give rise to the police officers to conduct that same protective search.
      1. Moreover, the Court made an analogy and compared this situation to a suburban mother or father, reaching into the center console for a phone during a routine traffic stop. This type of conduct would not justify a protective sweep.
      2. Furthermore, the fact that Cunningham did not immediately comply with the officers to put his cell phone down did not suggest dangerousness.
   vii. The Second Circuit ultimately prompted a discussion into the crucial question of whether the same facts presented in the case at bar, would have prompted a suspicion of dangerousness in the context of a white, female, suburban driver.

XVI. United States v. Armstrong, 517 U.S. 456 (1996):

a. **Facts:** Defendants were indicted for selling crack and using a firearm in connection with drug tracking. Defendants filed a motion for discovery or for dismissal, alleging they were selected for prosecution because they were black. Defendants offered preliminary evidence that whites were

not being prosecuted for crack cocaine offenses and provided 24 crack cocaine defendants which listed their race, whether they were prosecuted for dealing cocaine, and the status of each case. With this, defendants looked to obtain an order requiring the United States Attorney's office to provide them information with regard to the race of each of the crack defendants it had prosecuted within the last few years.

b. In order to prevail on this claim, Justice Rehnquist held that:
   i. (1) to establish entitlement to discovery on claim of selective prosecution based on race, defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not;
   ii. (2) to establish a discriminatory effect of prosecution in a race case, defendant must show that similarly situated individuals of a different race were not prosecuted; and
   iii. (3) "study" listing 24 defendants by race, whether they were prosecuted for dealing cocaine as well as crack, and status of each case did not constitute some evidence tending to show existence of essential elements of selective-prosecution claim that blacks were singled out for prosecution for crack offenses.
c. The Court ultimately deemed the "study" to be insufficient to meet the threshold required of the defendants and the defendants were not entitled to this discovery from the government.
d. Applying United States v. Armstrong
   i. United States v. Barlow, 310 F. 3d 1007 (7th Cir. 2002) (Racial Profiling)
      1. The 7th Circuit struck down the defendant's attempt to allege he was racially profiled. In this case, Drug Enforcement Administration Transportation Task Force Agents observed Barlow and his friend in Union Station. As the two men proceeded through Union Station, they continued to look over their shoulders at the agents and then whispered to one another. Both men were carrying bags. DEA agents then approached them and identified themselves, and asked if they would consent to a search in their bags. Subsequently, the agents found firearms and narcotics in the bag.
      2. During pre-trial litigation, Barlow filed a motion of discovery on the basis that he was stopped and interviewed because of his race.
      3. Applying *Armstrong,* in order to prevail, Barlow had to show the agents actions had a discriminatory effect and that the agents had a discriminatory purpose when they initially approached him in Union Station.
      4. The Court ultimately denied Barlow's motion, focusing on the evidence Barlow presented. Barlow failed to present any evidence that DEA agents, who observed whites engaging in the same conduct, looking over shoulder at agents, whispering back and forth in a hushed manner, but DEA agents did not approach them.

XVII. *United States v. Brignoni-Ponc,* 422 U.S. 873 (1975):

a. *Brignoni* specifically addressed the issue of race as a factor that gives rise to the reasonable suspicion standard of criminal activity articulated in Terry v. Ohio.
b. **Facts:** A grand jury in Southern District of California charged driver, Felix Humberto Brignoni-Ponce with two counts of knowingly transported an alien into the United States.
   i. Brignoni moved to suppress the testimony of and about the passengers, claiming that the evidence was the fruit of a stop and seizure in violation of the 4th Amendment.
   ii. Judge Turrentine denied the motion to suppress, even after hearing Border Patrol agent testify that the people in the car appeared to be of Mexican descent and that was the reason he stopped him.
   iii. A jury found Brignoni-Ponce guilty on both counts of the indictment and sentenced Brignoni to 4 years in prison
c. U.S Court of Appeals applied Almeida-Sanchez v. United States, that held it was a violation of the 4th amendment to use patrols to conduct warrantless searches without probable cause on vehicles that were in the greater border region, but not actually in the border.

i. The Court of Appeals for the 9th Circuit applied Almeida-Sanchez to Brignoni-Ponce and held that Mexican appearance, alone, was insufficient to justify a stop and the district court should have granted the motion to Suppress.

d. The Supreme Court:

i. Rejected Brignoni's argument and the probable cause requirement for an immigration stop, and instead, used the 4th Amendment's reasonable suspicion standard under *Terry* v. Ohio.

ii. The Court held that Border Patrol officers on roving patrols may stop persons "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. "

iii. The Court found the stop violated the 4th Amendment as the Border Patrol agents exclusively relied on the "apparent Mexican ancestry."

1. While Mexican Ancestry can be a relevant factor to consider, standing alone looking at the "apparent" ancestry does not justify stopping all Mexican-Americans to ask if they are aliens.