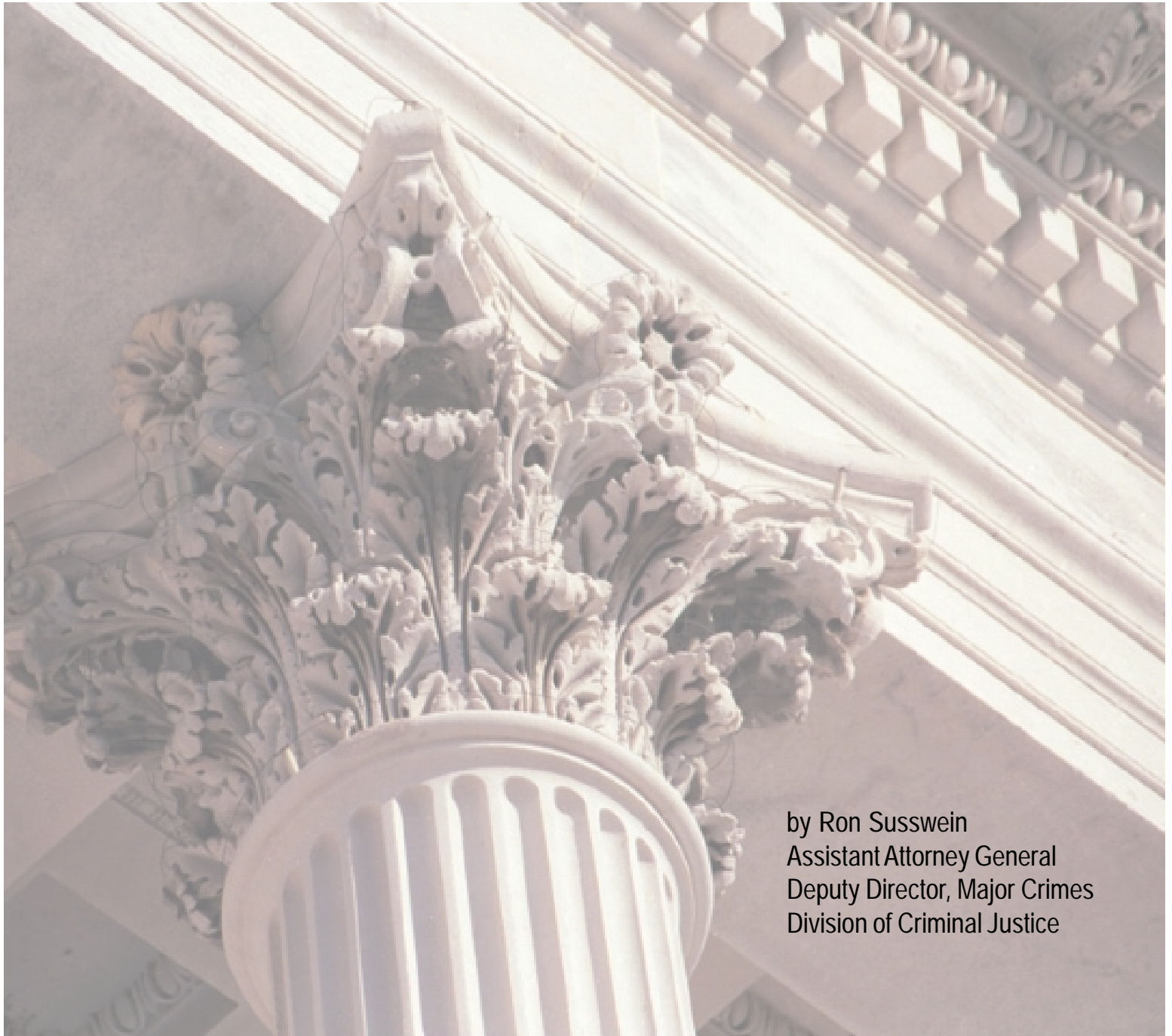


COMPANION GUIDE



by Ron Susswein
Assistant Attorney General
Deputy Director, Major Crimes
Division of Criminal Justice

TABLE OF CONTENTS

PART I UNDERSTANDING THE NATURE AND SCOPE OF THE RACIAL PROFILING PROBLEM

UNIT 1: SCOPE AND PURPOSE	1
UNIT 2: VIDEO SCENARIO.	2-5
UNIT 3: THE OBVIOUS AND HIDDEN COSTS OF RACIAL PROFILING	6-11
3.1 The Widespread Alienation of Law-Abiding Citizens	6-7
3.2 The Invocation of the Exclusionary Rule	7
3.3 The Prospect of Civil Liability	7-8
3.4 The Adverse Impact on Search and Seizure Law	8-9
3.5 The Loss of Public Support and Sources of Intelligence Information	9-10
3.6 The Advent of “Defensive Policing” and “De-Policing”	10
3.7 The Unnecessary Risks Posed to Officer Safety	10-11
UNIT 4: EXERCISING DISCRETION	12-14
UNIT 5: SETTING LIMITS ON THE EXERCISE OF POLICE DISCRETION: IMPOSING BOUNDARIES AND ERECTING BARRIERS TO PREVENT ABUSES OF DISCRETION	15-19
5.1 Distinct Rights are Defined in Distinct Provisions of the Federal and State Constitutions	16-19
UNIT 6: <u>WHAT IS RACIAL PROFILING?</u>	20-33
6.1 Distinguishing “ <i>Racial</i> Profiling” From Legitimate “Profiling”	20-22
6.2 Inadequate and Misleading Definitions of Racial Profiling	22-23
6.3 Embracing a More Precise and Comprehensive Term: “Racially-Influenced Policing”	23-24
6.4 Recognizing That Different Definitions and Rules of Police Conduct are Sometimes Used in Other Jurisdictions	24-26

6.5	The Legal and Policy Basis for the New Jersey Rule That Generally Prohibits <i>Any</i> Consideration of Race or Ethnicity	27-29
6.6	The “Strict Scrutiny” Test When Race or Ethnicity is Considered by Police	30-31
6.7	Official Deprivation of Civil Rights	31-33
UNIT 7: REPUDIATING THE MYTH THAT ONLY RACISTS ENGAGE IN RACIAL PROFILING		34-37
PART II	<u>APPLYING THE RULE PROHIBITING “RACIALLY-INFLUENCED POLICING”</u>	
UNIT 8: THE BASIC NON-DISCRIMINATION RULE IN A NUTSHELL		38-44
8.1	When Clothing or Manner of Dress May be Considered to be a Form of Conduct	39-41
8.2	The Basic Non-Discrimination Rule Applies to <u>All</u> Police Decisions	41-42
8.3	Police are Prohibited from Targeting Persons for Enhanced Scrutiny Based on Race or Ethnicity, Not From Targeting Places for Enhanced Scrutiny Based on Crime Patterns	42-44
UNIT 9: THE “B.O.L.O. EXCEPTION:” USING RACE OR ETHNICITY WHEN LOOKING FOR SPECIFIC INDIVIDUALS		45-59
9.1	Using Race or Ethnicity to Describe and Identify Specific Persons Being Sought by Law Enforcement	45-53
9.2	The Legitimate Use of Race or Ethnicity to Pursue Specific Suspects or “Leads” During the Course Of a Particular Criminal Investigation	54-59
UNIT 10: THE GANG PROBLEM		60-64
UNIT 11: SOME SPECIFIC EXAMPLES OF RACIALLY-INFLUENCED POLICING		65-70
11.1	Persons Who Appear to be “Out of Place”	65-69
11.2	Interracial Groups.	69
11.3	Persons Who Do Not Appear to “Fit” their Vehicles	69-70

**PART III UNDERSTANDING THE NATURE AND PECULIARITIES OF
SELECTIVE ENFORCEMENT LITIGATION**

**UNIT 12: HOW COURTS AND PROSECUTORS ADDRESS RACIAL
PROFILING 71-79**

- 12.1 The Role of Prosecutors in Screening Cases and Anticipating
Litigation Problems 71-73
- 12.2 The Role of “Reviewing” Courts 73
- 12.3 The “Motion Picture” Analogy 73-75
- 12.4 Making Comparisons to Infer Purposeful Discrimination
or a “*De Facto*” Agency Policy to Discriminate 75-78
- 12.5 The “Burden Shifting Template” 78-79

**UNIT 13: MEETING THE BURDEN OF PRODUCTION: THE IMPORTANCE
OF DOCUMENTATION AND REPORT-WRITING 80-109**

- 13.1 Deviations from Routine or Normal Practice 82-83
- 13.2 Judicial Skepticism About High Discretion Encounters. 83-87
- 13.3 Judicial Skepticism About “Digging” for Evidence of
Criminality 87-93
- 13.4 Judicial Skepticism About the Consent-to-Search Doctrine 93-94
- 13.5 Judicial Skepticism About Posing Probing or “Accusatorial”
Questions and Eliciting “Inconsistent Statements” 94-104
- 13.6 Judicial Concerns About Misuse of the Frisk Doctrine 104-106
- 13.7 Judicial Skepticism About Overreliance on “Nervousness”
and “Furtive Movements” as Suspicion Factors 106-109

**UNIT 14: INCONSISTENT OR INACCURATE POLICE REPORTS AND
TESTIMONY AS A TRIGGER FOR JUDICIAL SCRUTINY 110-117**

- 14.1 The Need for Precision, Accuracy and Thoroughness 110-111
- 14.2 Inconsistencies in Multiple Reports 111-112
- 14.3 Case Study: State v. Segars 112-116

14.4	Synopsis: Quality Police Reports as a Counterweight to Discrimination Claims	116-117
UNIT 15: PROBING AN OFFICER’S MENTAL PROCESSES		118-130
15.1	The Rules Concerning “Pretext” Stops	119-130
UNIT 16: THE USE AND MISUSE OF STATISTICS		131-137
16.1	The Use of Statistics to try to <i>Justify</i> Racially-Influenced Policing	131-135
16.2	The Use of Statistics to <i>Prove</i> Racially-Influenced Policing	135-137
UNIT 17: THE ROLE OF POLICE EXECUTIVES AND SUPERVISORS		138-142
17.1	Police Chiefs and Executives: Setting Good Policy and Setting a Good Example	138-140
17.2	Supervisors: The First Line of Defense Against Discriminatory Policing	140-142
UNIT 18: RACIALLY-INFLUENCED POLICING AFTER 9/11		143-151
18.1	The Basic Rule	143-144
18.2	Behavioral (Race/Ethnicity-Neutral) Profiles or “Screening Systems” of Possible Terrorists	144-148
18.3	The B.O.L.O. Exception	148-151
PART IV SUMMING UP		
UNIT 19: REVISITING THE VIDEO SCENARIO		152-159

APPENDIX

Attorney General Law Enforcement Directive No. 2005-1 Establishing An Official Statewide Policy Defining and Prohibiting the Practice of “Racially-Influenced Policing”

PART I UNDERSTANDING THE NATURE AND SCOPE OF THE RACIAL PROFILING PROBLEM

UNIT 1: SCOPE AND PURPOSE

In this course, we will discuss the law and policy that explains when and under what circumstances a police officer is prohibited from considering an individual's race or ethnicity in deciding how to exercise police discretion. This is not a course about cultural diversity, or about how to communicate effectively with citizens of different colors, from different cultures, or whose primary language is other than English. Those are all critically important subjects, but our topic is more narrowly focused: the law and legal principles about "racial profiling." There are many different terms and phrases that have been used in court proceedings to describe the police practice that is the focus of our attention. These include, "Racial Targeting," "Selective Enforcement," "Disparate Treatment," "Discriminatory Policing," and "Purposeful Discrimination."

This course was designed for use by every police department and every police officer throughout the State of New Jersey. Even if your department has to date managed to avoid a racial profiling claim or lawsuit, you will benefit by understanding the rules and how they will be applied by the courts in New Jersey. In other words, this course can help to inoculate departments and officers against future claims of discrimination.

What will make this course particularly challenging is that we will be using a nontraditional approach to legal training. It is not enough for law enforcement officers to be able to recite by rote a list of specific rules that were announced in a string of published cases. For this reason, we will be delving more deeply into the subject by examining a number of scenarios and by exploring why the published court cases were decided as they were. Sometimes these reasons are disturbing to us, but as law enforcement professionals, you must understand the reasons underlying court decisions, even if you do not agree with all of those decisions. By understanding the specific concerns that have been expressed by courts, law enforcement officers will be better able to anticipate and comply with constitutional requirements as the law of racially-influenced policing continues to evolve, as it surely will.

UNIT 2: VIDEO SCENARIO

The DVD presentation of this course begins with an examination of a two-minute vignette that was produced a number of years ago by the Anti-Defamation League. This short video was played at a Law Enforcement Summit that was held in New Jersey in 1998.

The scenario unfolds as follows:

Two Caucasian police officers are in a marked police vehicle patrolling a quiet residential street. It is obviously an extremely affluent suburban neighborhood, as evidenced by the large, well-maintained homes. There is no other traffic on the street. One of the officers notices a red car parked at the curb. It is the only parked vehicle in sight. There are two African-American males (as it turns out, father and adolescent son), sitting in the vehicle. The following conversation between the officers ensues:

Officer #1: "Quiet day, huh?"

Officer #2: "Hey, did you notice that?"

Officer #1: "What?"

Officer #2: "Those two black guys in the Toyota?"

Officer #1: "That's unusual isn't it?"

Officer #2: "Sure is around here. I just want to check on the car just to be safe."

Officer #1: "You call it in and I'll check it out."

The police vehicle makes a U-turn and pulls up behind the parked Toyota. The officers do not activate the police vehicle's overhead or "wig-wag" lights. Officer #1 steps out of the police vehicle and approaches the male sitting in the driver's seat of the parked Toyota. Officer #2 remains in the police vehicle. Officer #1 engages the person in the driver's seat (the father) in the following conversation:

Officer #1: "Anything I can do for you guys?"

Father: "No. That's okay."

Officer #1: "Do you live around here?"

Father: "No we don't."

Officer #1: "Would you please get out of the car?"

Father: "Why?"

Officer #1: "Please, get out of the car. Do you have some identification? Why are you parked here?"

The father gets out of the vehicle and produces an operator's license from his sports jacket inside pocket. He provides the license to Officer #1.

Father: "Look officer, my son and I are just waiting for someone. What's the problem?"

Officer #1: "No problem."

Officer #1 examines the license and looks at the driver, apparently to confirm that he matches the information on the license. Officer #2 has now approached the Toyota after having communicated with the police dispatcher.

Officer #2: "The car is fine."

Officer #1: "Okay. Just a routine check."

Father: "Yeah, *routine*."

Officer #2: "What's he getting upset about?"

Officer #1: "I don't know. No harm done."

The two officers return to the police vehicle. The son turns to his father in exasperation and says:

Son: "We should report them."

Father: "For what?"

Son: "I don't know."

Father: "Hey, forget it. It does make you mad though, doesn't it. I guess they just wanted to know why we were here."

Son: "I didn't know we needed a reason."

The father appears to be mortified by the implications of his son's last comment.

* * *

We start our examination of New Jersey law and policy with what would seem to be a very straightforward question. Does this scenario present an example of “racial profiling”? Which of the following statements most closely matches your own impression of the police conduct that occurred during this brief encounter:

- (1) This was good police work. The officers would have been derelict in their duty had they not investigated the situation as they did.
- (2) We need more information before we can decide whether or not this was good police work as opposed to inappropriate police work.
- (3) The officers in this scenario had their hearts in the right place, but used questionable judgment. The situation could have been handled better.
- (4) This was an example of racial profiling. It appears that the officers in this scenario discriminated against the two minority citizens.

In Unit 19, we will revisit this scenario and examine it more closely to understand exactly why you reached whatever conclusion you did.

UNIT 3: THE OBVIOUS AND HIDDEN COSTS OF RACIAL PROFILING

Before we delve into the intricacies of New Jersey's laws and policies against police discrimination, it is important to understand why it is so important for police officers to know, understand and follow the rules set by the courts that limit our authority. To fully appreciate the importance and complexity of our topic, we first need to consider some of the unfortunate byproducts of the racial profiling controversy. We must examine, in other words, some of the hidden as well as obvious costs that are exacted when police rely on race or ethnicity when exercising their discretion.

3.1 The Widespread Alienation of Law-Abiding Citizens

There is at least one point on which everyone agrees: the racial profiling controversy has left countless citizens – and countless police officers – angry and frustrated.

There are numerous accounts of young men and women of color who have been stopped time and again by police officers for the most minor motor vehicle violations. In fact, this particular circumstance has led some to refer to the practice of racial profiling as “Driving While Black.” Many minority youth today expect to be stopped repeatedly by police officers, and NOBLE, the National Organization of Black Law Enforcement Executives, has actually published training materials for young men and women of color, teaching them what to do during their repeated encounters with police officers.

This phenomenon is not limited to minority adolescents and young adults. There are countless stories of more mature minority citizens, including minority ministers and police officers, who have been stopped repeatedly by police, especially when operating expensive vehicles or driving through non-minority neighborhoods.

In many instances, these minority citizens were not issued a ticket. Some law enforcement officers might therefore question what these motorists are complaining about, since they did not receive a summons. It is all too easy to sit back and invoke what is essentially a “no harm, no foul” rule.

What we can too easily fail to appreciate, however, is that there is a harm suffered in these police-citizen encounters. The very fact that an officer elected not to issue a ticket might not be viewed as a “courtesy” or benefit extended to the motorist, but rather as proof that there had been no valid reason for initiating the motor vehicle stop in the first place, and that this had been a so-called “pretext” stop. (We will discuss pretext stops in more detail in Unit 15.1.)

That perception is compounded when an officer does not bother to explain to the motorist the true reason for the stop. (Taking the time to explain the reasons for the exercise of police discretion is one of the best ways to defuse a potentially confrontational or volatile situation. This simple precaution can help to avoid misunderstandings that might lead an angry citizen to lodge a complaint against a police officer, and this simple courtesy also serves to minimize the risk that the citizen might act out in frustration in a manner that puts both the citizen and the officer at greater risk of physical harm.)

3.2 The Invocation of the Exclusionary Rule

A claim of racial profiling can result in the suppression of relevant physical evidence or incriminating statements. When this happens, factually-guilty defendants may escape conviction and punishment. Moreover, the overwhelming majority of criminal cases are disposed of by means of a plea bargain, rather than a jury trial. In fact, in New Jersey, roughly 97% of all of our convictions for indictable crimes come by way of a plea agreement as opposed to a trial. As part of the plea-bargaining process, a prosecutor may undervalue or even dismiss outright a provable criminal case because the prosecutor anticipates that critical evidence may be suppressed as a result of a racial profiling claim. (We will discuss this case screening process in more detail in Unit 12.1.)

3.3 The Prospect of Civil Liability

Racial profiling claims can be raised in two distinct types of court actions: criminal prosecutions and civil law suits. In criminal cases, defendants seek to suppress evidence of their guilt – usually illicit drugs or weapons that were found during a motor vehicle search. In civil cases, sometimes referred to as “1983” or “civil rights” actions, plaintiffs may ask for injunctive relief – a court order prohibiting the police from repeating the illegal conduct – or may seek monetary awards. See 42 U.S.C. § 1983. Police officers and their departments, in other words, can be sued based on a claim of racial profiling. Countless taxpayer dollars are spent defending or settling these lawsuits -- money that could be better spent to benefit the law enforcement community by providing much-needed equipment and other resources.

3.4 The Adverse Impact on Search and Seizure Law

The racial profiling controversy has prompted courts to develop strict new rules that limit the authority of law enforcement officers to conduct investigations. Although most of

these new rules are technically grounded in the Fourth Amendment of the United States Constitution, or in its state constitutional counterpart, Article 1, paragraph 7, in many instances, the ghostly specter of racial profiling is lurking just beneath the surface of the court's reasoning. Even in cases where the issue of racial profiling was not expressly litigated, courts have imposed new restrictions on the exercise of police discretion in an effort to address the racial profiling problem. See, e.g., State v. Carty, 170 N.J. 632 (2002) (New Jersey Supreme Court held that under the State Constitution, unless there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, any further detention to effectuate a consent search is unconstitutional).

In addition to imposing new rules of law and procedure, some courts have also become more skeptical and probing of police officers, sometimes openly doubting their credibility as witnesses. (In Unit 13, we will discuss certain types of recurring situations when reviewing courts are likely to be more skeptical of police.)

There are a number of things that police departments and officers can do to address this problem. By way of example, when an agency equips its vehicles with Mobile Video Recorders (MVRs), an objective and virtually unassailable record is made of the police-citizen encounter. This technology serves not only to deter police misconduct, but as importantly serves to protect law enforcement officers by verifying their accounts and by repudiating false claims of misconduct that are sometimes made against police officers by disgruntled defendants who are willing to lie to try to gain an unfair advantage in the plea bargaining process.

While MVRs can accurately document what exactly happened during an encounter, they might not necessarily always establish why police officers made the decisions they made. (Of course, when the audio portion of an MVR tape captures an officer "talking through" his or her reasoning process, then we have an excellent record of the officer's "present sense impressions," which can be used not only to explain the officer's reasoning process, but also to repudiate any allegation that the officer "made up" facts when later filling out a report to justify the decisions the officer had made before finding any contraband that is now the subject of a motion to suppress evidence.)

As we will see in Unit 13, one of the keys to responding to (and preventing) allegations of so-called "testilying" by law enforcement officers is to ensure the quality, accuracy and thoroughness of police reports. For our present purposes, the key point to understand is that judicial skepticism about police credibility and veracity has been fueled by the perception of some judges that some police officers are basing their decisions on impermissible factors. This has prompted judges to be more exacting in requiring officers to explain in detail the actual, legitimate reasons for their on-the-scene decisions.

3.5 The Loss of Public Support and Valuable Sources of Intelligence Information

We have already discussed circumstances where some citizens have become mistrustful of the law enforcement community. These citizens and their family members and friends are less likely to support law enforcement efforts. It is both ironic and regrettable that in our zeal to attack the nation's drug problem by trying to interdict drugs, we may inadvertently have alienated large segments of our society who might otherwise have provided valuable information to law enforcement authorities. In other words, in our efforts to choke off the supply of drugs, we may have unwittingly choked off our supply of the kind of information or "tips" that we need in order to target our resources and apprehend the most dangerous and predatory drug traffickers.

Aside from losing out on potential sources of information, the erosion of community trust that results from racially-influenced policing can undermine our law enforcement and prosecution efforts in other ways. For example, some jurors are mistrustful of law enforcement officers, and are less willing today to accept the credibility of police witnesses. Law enforcement officers must always be mindful that every citizen they encounter is a potential juror, and that if an officer does anything during an encounter to make that citizen (or the citizen's close friends and relatives) mistrustful of police, this may effect that citizen's judgment at some future time when he or she is called upon to serve as a member of a jury and must judge the credibility of police witnesses in a criminal prosecution.

3.6 The Advent of "Defensive Policing" and "De-Policing"

As a result of the racial profiling controversy, many police officers today are chilled from vigilantly enforcing our criminal laws because they are not certain about where the legal lines are drawn. Some officers have also lost confidence in their superiors, prosecutors and judges. These officers have come to believe that it is in their best personal and professional interest simply to look the other way, ignoring legitimate and constitutionally permissible indications of criminal activity because they are afraid of being accused of engaging in racial profiling. This form of timidity is sometimes referred to as "de-policing." When this happens, dangerous criminals may escape identification and apprehension.

3.7 The Unnecessary Risks Posed to Officer Safety

Finally, and perhaps most importantly, the racial profiling controversy poses a direct and immediate threat to the safety of every police officer out on the street. Police officers and their superiors, and prosecutors as well, must never forget that "Rule #1" of policing is that at the end of an officer's tour of duty, he or she is to go home safe and sound. Officers are not to wind up in a hospital, or a morgue. The problem for our present purposes, however, is that when a citizen is fearful or mistrustful of police, that citizen during an inherently stressful and emotional encounter with a police officer is more likely

to be inclined to “fight” or to “flee.” These are the two types of citizen conduct that pose the greatest risk of physical injury or death to a police officer.

Always remember that when officers take steps during an encounter to defuse or cool down a potentially volatile situation -- such as by patiently explaining the legitimate reasons for their decisions – they are reducing the risk that a citizen might misperceive the situation and over-react. By the same token, when our law enforcement community as a whole embraces policies that are designed to restore trust and confidence among all segments of our society, we enhance officer safety and thus actively promote Rule #1 of police work.

The remainder of this course will be dedicated to showing you how you can take steps that will increase the odds that at the end of each and every duty shift, you will go home safe and sound. The goal is to protect you from all sorts of harm: physical harm (injury or death) as well as legal harm (racial discrimination complaints, internal investigations, lawsuits, and lost or devalued criminal prosecutions.)

UNIT 4: EXERCISING DISCRETION

Effective policing is all about exercising sound and judicious discretion. Each day, a law enforcement officer is required to make a seemingly endless series of split-second decisions. Some of these decisions are routine or even mundane, such as which street to patrol next, who to pull over, and whether to issue a ticket or just a warning. Other situations may involve the most urgent, life-threatening decisions, such as whether to initiate a high speed pursuit, or whether to use deadly force.

Because law enforcement officers have to make so many decisions each day, more often than not, they are not consciously aware that they are making decisions at all, and when that happens, it is easy to lose sight of the fact that those decisions could have profound practical as well as legal consequences. *The greatest danger in policing occurs when law enforcement officers in the field are not thinking consciously about what they are doing.*

In Unit 5, we will discuss how (and why) the courts have imposed limits on the exercise of police discretion, and how courts go about reviewing the decisions that are made “in the field” by law enforcement officers. But first, we need to step back and review our own conduct, asking ourselves how and why we make the decisions that we make.

Consider the following situation. You are on patrol in a marked police car. You are in between calls for service, and part of your duty assignment is to enforce motor vehicle laws. You see three cars, all traveling at the same speed well in excess of the posted speed limit. You know from your Fourth Amendment training that you are authorized to stop any of these vehicles for speeding, but as a practical matter, you can only pull over one of the cars, allowing the other two violators to go on.

Which vehicle do you select to pull over? A vehicle in the “fast” lane, or one in the “slow” lane? The closest one? The first driver to see you and apply his brakes? The vehicle with any other Title 39 violations, such as an equipment violation? The oldest vehicle? The newest one? The one with the most occupants? The one with the fewest occupants? The sports car? The sedan or the minivan or the SUV?

As a practical matter, police officers rarely act “randomly” in making this kind of selection. (An example of truly random selection would be if you were to roll dice and allow the result of the dice roll to dictate which vehicle would be pulled over.) Rather, in the real world, there had to be some reason or reasons that led you to select a particular vehicle from among the universe of vehicles that were violating the law and that were thus subject to a lawful stop under the Fourth Amendment.

Let us consider another example involving yet another step in the unfolding sequence of events that occur during a typical motor vehicle stop. Suppose that you pick one of the vehicles to pull over, you maneuver behind that vehicle and activate your

overhead and “takedown” lights. The motorist dutifully responds by pulling off to the side of the road. You pull behind the stopped vehicle, approach the driver and ask him to produce his driving credentials. At this point in the encounter, are you allowed to order the driver to exit the vehicle?

The answer is yes. Under both state and federal law, you are allowed to order the driver of a lawfully stopped vehicle to step out, so long as this can be done safely. See State v. Smith, 134 N.J. 599 (1994). (In New Jersey, the rule is different with respect to passengers, but let us confine our present discussion to the driver.) This particular decision (ordering a driver to exit the vehicle) does not amount to a new, separate intrusion upon Fourth Amendment liberty or privacy rights, and thus does not have legal significance under the Fourth Amendment or its state constitutional analog. For this reason, you are not required to meet any particular standard of proof (such as “articulable facts warranting heightened caution,” “reasonable articulable suspicion” or “probable cause”) before you may order the driver to step out (assuming, of course, that the initial stop was lawful).

But just because you are authorized to order the driver out does not mean that you will actually do that in every case. In the real world, police officers exercise discretion in deciding whether to take advantage of their legal authority to order all drivers to step out.

What factors or criteria will you use in exercising this form of discretion? As we will see in Unit 5, although the decision to order a driver out of a vehicle has no legal significance under the Fourth Amendment, this exercise of police discretion does have legal significance under another constitutional provision: the Equal Protection Clause of the Fourteenth Amendment. Indeed, as we will see, the Fourteenth Amendment right to the equal protection of the laws applies to every police decision.

When asked to explain why they made the choices that they made, officers will often answer that their decision was “based on training and experience.” But saying that one was relying on “training and experience” does not answer the question with any degree of precision. The logical follow-up question, of course, will be what exactly in your training and experience led you to draw the inference you drew, or to make the choice that you made? When an officer is unable to be precise in answering those questions, reviewing courts are more likely to be skeptical, and are more likely to wonder whether the exercise of discretion was based on a hunch or gut feeling that, in turn, may have been based on or at least influenced by an impermissible factor.

The bottom line is that police officers should not have to be thinking twice about the split-second decisions they have to make “on the fly” during an encounter with a private citizen. But officers *do* need you to be thinking *once* about what they are doing, and why they are doing it.

UNIT 5: **SETTING LIMITS ON THE EXERCISE OF POLICE DISCRETION: IMPOSING BOUNDARIES AND ERECTING BARRIERS TO PREVENT ABUSES OF DISCRETION**

Having established that policing is all about exercising discretion, we must next recognize that it is the role and responsibility of courts to *review* the exercise of police discretion. When doing so, courts will be looking for abuses of discretion, that is, they will try to hone in on decisions made by police officers that were based on inadequate reasons, or that seem to be based upon impermissible reasons.

As we undertake our careful examination of the law of racial profiling and its relationship to the law of arrest, search and seizure, we begin with a candid recognition that as a matter of human nature, no one likes to be second-guessed by others, just as no one likes to have their discretion curtailed, in part because this implies that we have exercised poor judgment in the past and that we cannot be completely trusted to do our job and make good judgments in the future.

Of course, police officers are by no means the only actors in the criminal justice system who routinely have their decisions reviewed (and sometimes criticized) by others. Appellate courts, after all, exist precisely to review the decisions made by trial court judges, and a lower court ruling may be overturned (sometimes in a published opinion) when an appellate court finds that the trial court made a mistake or abused the exercise of judicial discretion.

It is important for law enforcement officers to understand that the Federal and State Constitutions are designed to prevent abuses of power by imposing limits on the authority of the government, including law enforcement. These Constitutions achieve the goal of protecting citizens' civil rights by setting boundaries and by erecting barriers, limiting police discretion.

For example, the Fourth Amendment safeguards the right of *liberty* (the right of freedom of movement and to be left alone by government agents) and the right of *privacy* (the right to keep the government from “peeking, poking or prying” into your personal life, your physical body, your property, homestead and personal effects). It does so by erecting obstacles that can only be overcome when the government is able to meet a certain legal standard or “level of proof.” These levels of proof include: “articulable facts warranting heightened caution;” “reasonable articulable suspicion to believe that criminal activity is afoot;” “reasonable articulable suspicion to believe that a person is armed and dangerous;” “probable cause;” “preponderance of the evidence;” “clear and convincing evidence;” and “proof beyond a reasonable doubt.” The greater the degree of intrusion on a protected right, the higher the evidential standard the government must meet in order to justify that intrusion.

By way of example, you are not allowed to “seize” or “detain” a motorist or pedestrian (i.e., order him or her to “stop”) unless you are aware of facts constituting a “reasonable articulable suspicion” to believe that unlawful activity is occurring. (An observed motor vehicle violation generally satisfies this standard, so that when you observe a motor vehicle violation, you are able to lawfully initiate the stop and briefly detain the vehicle and driver.)

After the stop is initiated, there are many other decisions or steps in the course of the unfolding police-citizen encounter, and some of these decisions involve additional or incrementally greater intrusions on the detained citizen’s constitutional rights, requiring you to satisfy other legal tests. During the course of the stop or so-called “investigative detention,” for example, you would not be allowed to conduct a protective patdown or “frisk” of the citizen for weapons unless you are aware of facts that satisfy the legal standard for justifying a frisk, that is, reasonable articulable suspicion to believe that this individual may be carrying a weapon.

The key to successfully complying with the Fourth Amendment lies in (1) knowing which level of proof applies to various police decisions, and (2) being able to determine on a case-by-case basis whether you have established an adequate factual basis to satisfy the applicable legal standard.

5.1 Distinct Rights are Defined in Distinct Provisions of the Federal and State Constitutions

The United States Constitution provides only the minimum “floor” of constitutional protections that are afforded to everyone in America. See State v. Hempele, 120 N.J. 182, 197 (1990). The New Jersey Supreme Court is free to interpret our State Constitution to provide people in New Jersey with greater protections, and so the New Jersey Supreme Court is authorized to impose stricter rules for New Jersey law enforcement officers to follow than would apply to federal law enforcement officers, or to police officers in other jurisdictions.

In fact, the New Jersey Supreme Court in recent years has “diverged” from United States Supreme Court precedent on a number of occasions. See State v. Pierce, 136 N.J. 184, 209 (1994) (referring to the “steadily evolving commitment” by our state courts to provide citizens enhanced protections under the New Jersey Constitution). The critical point, of course, is that New Jersey law enforcement officers must know and comply with the stricter rules that have been issued by the New Jersey Supreme Court.

It is also important to understand that private citizens enjoy a number of different and distinct constitutional rights that are codified in different provisions in the text of the United States and New Jersey Constitutions. For example, the Fourth Amendment (and its counterpart, Article 1, paragraph 7 of the New Jersey Constitution of 1947) protects citizens from unreasonable searches and seizures.

The Fifth Amendment guarantees that citizens may not be compelled to incriminate themselves. The Sixth Amendment of the United States Constitution, meanwhile, guarantees, among other things, the right of citizens to the assistance of legal counsel at all important criminal justice proceedings. The combination and interplay of these Fifth and Sixth Amendment rights defines the law of police interrogations, and is the basis for the Miranda rule, which requires police officers to advise citizens of certain constitutional rights before police may lawfully initiate a “custodial interrogation.”

The Fourteenth Amendment of the United States Constitution, meanwhile, guarantees, among other things, the right of all persons to the “equal protection of the laws.” This particular constitutional right, which is the centerpiece of this training course, ensures that people are not treated differently by the government and its agents on the basis of impermissible or so-called “suspect” criteria, such as race or ethnicity.

Here we can begin to see how the inherent differences between these substantive rights have led courts to develop distinct rules limiting the exercise of police discretion, and distinct ways in which the courts will go about determining whether a given constitutional right was violated. As we have already seen, a court trying to determine whether police respected a person’s Fourth Amendment rights will examine the weight to be given a fact or suite of facts needed to justify the police conduct, asking whether those facts add up to satisfy the required “level of proof.” (This “adding up” process is literally referred to as the “totality of the circumstances.”).

Under the Fourteenth Amendment, the court’s analysis will be different. The court will be concerned with whether the officer was allowed to consider a given fact at all. (The fact at issue is the person’s race or apparent ethnicity.) Consideration of an impermissible fact, in other words, can taint or “poison” the decision-making process.

Here again we see how courts will address two distinct questions in deciding whether police officers abused their discretion: did the officers rely upon inadequate reasons to justify their decision? (a Fourth Amendment question), and did the officers rely upon an impermissible reason? (a Fourteenth Amendment question).

Note that both Fourth and Fourteenth Amendment legal inquiries may arise in the same court proceeding examining a single encounter between a police officer and a private citizen. Judges are expected to keep the different analytical strands of constitutional law separate, and so are police officers. We will throughout this course examine in detail exactly how reviewing courts will apply the various specific legal standards and rules of police conduct that arise under the various provisions and features of the United States and New Jersey Constitutions. For our present purpose, the key point to understand is that it is possible to violate one of these various constitutional rights, while not necessarily violating all of them at once.

Note, of course, that any constitutional violation could lead to the suppression of

evidence. It is no defense in a suppression hearing that while the officer violated the Fourth Amendment, he or she did not also violate the Fourteenth Amendment Equal Protection Clause. The Fourth Amendment violation by itself is enough to result in the suppression of any evidence that was a “fruit” of the violation. The same is true, of course, when the officer complies with the Fourth Amendment but violates the Fourteenth Amendment.

It is hardly a new idea that law enforcement officers must comply with a suite of separate rules of conduct derived from different parts of the Constitution. It was always understood, for example, that if a police officer makes an unlawful arrest (for example, an arrest that is not based upon probable cause), and the officer proceeds to read the Miranda warnings, any incriminating statement given by the arrestee will be subject to the exclusionary rule, not because the Miranda rule was violated, but rather because the confession will likely be deemed to be a “fruit” of the illegal arrest. In other words, the fact that the officer dutifully complied with the Fifth/Sixth Amendment rules is not enough. Rather, for the statement to be admissible, the State would have to also establish that the underlying arrest that immediately preceded the interrogation and confession was not unlawful under the Fourth Amendment.

The same basic principle applies with respect to the Fourteenth Amendment guarantee of Equal Protection. Consider a case where an officer approaches a citizen under circumstances where the citizen reasonably believes that he or she is free to walk away. This encounter is said to be a mere “field inquiry.” See, e.g., State v. Neshina, 175 N.J. 502 (2003). Under the Fourth Amendment, there is no legal standard that the officer must meet before engaging a citizen in this type of consensual encounter. In other words, it is simply not possible for a police officer to violate the Fourth Amendment when he or she initiates a consensual field inquiry. However, if the officer’s decision to approach this particular citizen was based on an impermissible reason in violation of the Fourteenth Amendment Equal Protection Clause, the consensual encounter would be deemed by the courts to be illegal, and any results of that encounter (such as any physical evidence discovered or incriminating statement made during the course of the encounter) would be subject to the exclusionary rule. See, e.g., State v. Maryland, 167 N.J. 471 (2001).

In sum, police officers must at all times respect all constitutional rights, whatever their specific source in the text of the United States or New Jersey Constitutions. Each of these constitutional provisions serves a distinct purpose and provides to citizens its own distinct protections.

UNIT 6: WHAT IS RACIAL PROFILING?

Although we have casually bandied about the term “racial profiling” in the preceding Units, we still have not defined it. It is now time to tackle the most fundamental question: what *is* racial profiling? What conduct is prohibited (and permitted) under the Equal Protection Clause of the Fourteenth Amendment and our statewide nondiscrimination policy set forth in Attorney General Law Enforcement Directive 2005-1? When and under what circumstances are police officers permitted to consider a person’s race or ethnicity in making decisions and exercising police discretion?

These are not simple or straightforward questions. In fact, they are the source of much confusion and misunderstandings within and outside the law enforcement community and the entire legal profession.

6.1 Distinguishing “Racial Profiling” From Legitimate “Profiling”

We begin answering those questions by distinguishing the term “*racial* profiling” -- which is impermissible police conduct -- from “profiling,” which is a legitimate and well-accepted law enforcement practice. While “racial profiling” is inappropriate and cannot and will not be tolerated, other forms of “profiling” are perfectly legitimate and must remain an important part of modern police work.

The law is well-settled in New Jersey and throughout the nation that in appropriate factual circumstances, police “may piece together a series of acts, which by themselves seem innocent, but to a trained officer would reasonably indicate that criminal activity is afoot.” State v. Patterson, 270 N.J. Super. 550, 558 (Law Div. 1993). As the court in State v. Patterson noted, “it is appropriate and legitimate police work to develop a so-called ‘profile’ based upon observations made in investigating the distribution or transportation of illicit drugs.” Id. Using these and other means, “the police can develop a pattern of criminal wrongdoing that justifies their suspicions when they observe features that are in accord with the principle aspects of that pattern.” Id.

In State v. Demeter, 124 N.J. 374 (1991), the New Jersey Supreme Court recognized that “in some situations a police officer may have particular training or experience that would enable him to infer criminal activity in circumstances where an ordinary observer would not.” 124 N.J. at 382. This police experience reflects the careful collection of historical and intelligence information, thoughtful crime trend analysis, and an in-depth examination of the specific methods of operation, the so-called “*modus operandi*” of drug traffickers or others engaged in various types of criminal activity. Legitimate law enforcement “profiles” focus on the conduct and methods of operation of criminals, rather than on personal characteristics that individuals cannot change, such as their racial or ethnic heritage.

If there was any doubt about the validity of using “profiles” under New Jersey law,

the New Jersey Supreme Court in State v. Stovall, 170 N.J. 346 (2002), definitively ruled that the characteristics contained in a “drug courier profile” are permissible factors to be considered by police officers as part of the “totality of the circumstances.” 170 N.J. at 358.

According to the New Jersey Supreme Court in Stovall:

A “drug courier profile” is merely a shorthand way of referring to a group of characteristics that may indicate that a person is a drug courier. . . . A “profile” characteristic is a relevant, objective characteristic when exhibited by a particular defendant. There is no reason why the police should not be able to consider that characteristic in formulating reasonable suspicion. There is also no reason why “profile” characteristics that are exhibited by a defendant cannot provide the basis for an investigative detention in the appropriate case. [170 N.J. at 360 (emphasis added)].

That does not mean that a profile will necessarily provide reasonable articulable suspicion much less probable cause to justify a Fourth Amendment liberty or privacy intrusion. Legitimate profiles tend to be rather general in nature and persons who match a *modus operandi* profile may have perfectly innocent explanations for their conduct. As a result, a profile may describe a very large category of presumably innocent persons. While race-neutral profile characteristics are relevant and may be considered as part of the “totality of the circumstances” (along with the rest of an officer’s “training and experience”), these profile characteristics are rarely if ever sufficient by themselves to justify a “seizure” of the person, that is, a non-consensual encounter such as an investigative detention (a “stop”). See Reid v. Georgia, 100 S.Ct. 2752 (1984) (*per curiam*). See also State v. Stovall, 170 N.J. 346, 360 (2002) (“[t]he mere fact that a suspect displays profile characteristics does not justify a stop.”); State ex. rel. J.G., 320 N.J. Super. 21 (App. Div. 1999) (finding street detention unjustified where the officer’s hunch was based on profile factors and not specific overt conduct by defendants); State v. Kuhn, 213 N.J. Super. 275, 281 n.1 (App. Div. 1986) (noting that a vehicle stop and search based solely on the fact that defendant matches a “drug courier profile” would be unconstitutional).

6.2 Inadequate and Misleading Definitions of Racial Profiling

People have very different opinions about the existence, nature and scope of the racial profiling problem in part because we do not all agree what we mean when we use the term “racial profiling.” One of the most commonly used definitions of “racial profiling” – the one that is often found in newspaper accounts – is both imprecise and incomplete. Specifically, racial profiling is sometimes described as the practice of “stopping motorists based solely on their race.”

That definition steers us off in the wrong analytical direction by limiting the legal inquiry in two important respects. First, this narrow definition suggests that the only police conduct at issue is the initial decision by an officer to “stop” a motor vehicle. The disparate treatment of minorities, however, may extend to a host of discretionary decisions made by police officers before and during the course of routine traffic stops and every other kind of police encounter with a citizen. In other words, our concern is not limited to an officer’s initial decision to initiate an investigative detention. In fact, reviewing courts have expressed even more concern with respect to certain discretionary steps that occur after a stop has been made, including, especially, the decision to request a detained motorist to authorize a “consent search.” (Note that by this point in an encounter, an officer will usually not be able to argue that he or she was not aware of the outward physical appearance of vehicle occupants.)

Second, the common lay definition presupposes that the officer’s decision to stop the motor vehicle must have been based entirely on the motorist’s race or ethnicity. The use of the term “solely” suggests that it is somehow permissible for a police officer to take race or ethnicity into account provided that the officer is also considering other race-neutral facts or circumstances.

That approach has been rejected in New Jersey. We have instead adopted a rule that police officers are generally not permitted to consider a person’s race or ethnicity *to any extent* in making law enforcement decisions. Under this approach, which we will discuss in more detail in Unit 6.5, racial profiling occurs if a citizen’s race or ethnicity was taken into account and contributed to the officer’s decision to act or to refrain from acting. Race or ethnicity need not be the “sole” basis for the officer’s exercise of discretion. Rather, under the approach that we take in New Jersey, a person’s race or ethnicity is deemed to be irrelevant and may not be considered at all as an indicia of criminality or suspiciousness (except when deciding whether the person matches the physical description set out in a suspect-specific “Be-on-the-Lookout” or “B.O.L.O.” situation – an exception that we will discuss in detail in Unit 9).

6.3 Embracing a More Precise and Comprehensive Term: “Racially-Influenced Policing”

Harvard Law School Professor Randall Kennedy, one of the foremost experts on the racial profiling controversy, has described the concept of racial profiling as using race as a factor in deciding whom to place under suspicion and/or surveillance. In other words, racial profiling means using race or ethnicity as an indicator or predictor of criminality. Randall Kennedy, Race, Crime and the Law (1998).

Some courts and commentators have also used the phrase “racial targeting” to refer to the illegal practice that is the subject of our concern today. See, e.g., State v. Segars, 172 N.J. 481 (2002) (*per curiam*). That phrase is more accurate and descriptive than the term “racial profiling” in that it does not suggest that law enforcement officers must be

relying on any formal “profile” or catalog and compilation of predictive factors. Rather, the phrase “racial targeting” would also embrace using visceral, ad hoc stereotypes to focus police attention on any particular individual or group of citizens based on racial or ethnic characteristics.

Several years ago, experts at the Police Executive Research Forum coined the phrase “racially biased policing.” Police Executive Research Forum, Racially Biased Policing: A Principled Response (2001). This is a vast improvement over the ambiguous term “racial profiling.” Even so, the phrase “racially biased policing” might be seen as implying that only biased or bigoted police officers engage in this prohibited practice. One of the critical principles that we will discuss in Unit 7 is that an officer need not be a racist or bigot to be influenced by racial stereotypes. An officer who is not a racist might still unwittingly or even subconsciously rely upon racial classifications and stereotypes that could influence the officer’s exercise of discretion.

For all of these reasons, the phrase “racially-influenced policing” may represent the most accurate and complete description of the problem. Racially-influenced policing simply means allowing a person’s race or ethnicity to influence an officer’s exercise of discretion – in other words, using race as a factor in making police decisions. In virtually all circumstances (with a notable exception involving “B.O.L.O.” (Be on the Lookout) situations), this is inappropriate as a matter of law and sound law enforcement policy.

We must recognize, of course, that all of these phrases are too limited if we were to narrowly define the component term “race” to refer only to formal racial classifications. According to the United States Census Bureau, “Hispanic” heritage is not a racial classification. So too, saying that a person is a “Columbian,” for example, does not describe the person’s race. Accordingly, throughout this course, when we use the term “racially-influenced policing,” we include any situation where a person’s ethnic background or national origin is used as a factor in drawing inferences or in exercising police discretion.

6.4 Recognizing That Different Definitions and Rules of Police Conduct are Sometimes Used in Other Jurisdictions

Although the basic rules and definitions that we will use in New Jersey are clear and straightforward, we must acknowledge that there is widespread disagreement within the nation’s legal community as to exactly what kind of police conduct is prohibited under the Equal Protection Clause.

One need not be a constitutional scholar to understand that a person’s race and ethnicity cannot be the sole basis for initiating a motor vehicle stop. On that point, everyone seems to agree. However, the law in some other jurisdictions is far less clear with respect to whether there are any circumstances (besides a so-called “B.O.L.O.” situation that we will discuss in Unit 9) when police may legitimately consider race or ethnicity when drawing inferences about criminal activity.

Some courts have suggested that in at least certain circumstances, race or ethnicity may be considered as one among an array of factors that police may use to infer that an individual is generally more likely than others to be engaged in criminal activity. See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (Federal agents could take suspect's apparent Mexican ancestry into account when searching for illegal aliens near the United States-Mexico border); United State v. Weaver, 966 F.2d 391 (8th Cir. 1992), cert. den. 507 U.S. 1040 (1992) (Drug Enforcement Administration agent was allowed to use race as part of an "airport profile" when looking for gang members from Los Angeles who were "flooding the Kansas City areas with cocaine"). Sometimes this is referred to as "soft" racial profiling, in contrast to "hard" racial profiling where race is the sole reason relied upon by police officers for exercising discretion.

This is an unsettled and evolving area of federal Equal Protection law, and federal courts are struggling to figure out just what the rule is for police. Recently, a Federal Appeals Court in the case of Farm Labor Organizing Committee v. Ohio State Highway Patrol, 308 F.3d 523 (6 Cir. 2002), rejected the reasoning that had been used by some other federal courts which had said that police could consider race in drawing inferences of suspicion so long as race was not the sole factor. 308 F.3d at 538. The Court in Ohio State Highway Patrol warned that "constitutional liability is not limited to instances in which an impermissible purpose was the sole motive for an adverse action." Id. at 539. The court ultimately concluded that if the police would have treated a person differently if the person had been of a different race or ethnicity, then race or ethnicity was a causal factor in the exercise of police discretion, in violation of the Fourteenth Amendment Equal Protection clause. Id.

On June 17, 2003, the President and the United States Attorney General issued racial profiling guidelines to all federal law enforcement officers. The federal policy, like the approach we use in New Jersey, generally prohibits any consideration of race or ethnicity. While the United States Attorney General was careful to note that the federal racial profiling policy goes beyond the requirements of federal constitutional law, it is nonetheless conceivable that these guidelines will influence federal courts in deciding ultimately what law enforcement conduct is acceptable, and may well provide a national benchmark against which state and local police agencies will be measured.

The federal policy guidelines specifically provide in pertinent part that:

In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, federal law enforcement officers may *not* use race or ethnicity to any degree, except that officers may rely on race and ethnicity if a specific suspect description exists. This prohibition applies even where the use of race or ethnicity might otherwise be lawful Federal law enforcement agencies and officers sometimes engage in law enforcement activities, such as traffic

and foot patrols, that generally do not involve either the ongoing investigation of specific criminal activities or the prevention of catastrophic events or harm to the national security. Rather, their activities are typified by spontaneous action in response to the activities of individuals whom they happen to encounter in the course of their patrols and about whom they have no information other than their observations. These general enforcement responsibilities should be carried out without *any* consideration of race or ethnicity. (emphasis in original).

6.5 The Legal and Policy Basis for the New Jersey Rule That Generally Prohibits Any Consideration of Race or Ethnicity

While it is not certain how the legal debate will eventually play out in federal courts, it is a good bet that New Jersey courts would never tolerate “soft” racial profiling. In State v. Kuhn, 213 N.J. Super. 275 (App. Div. 1986), the New Jersey Appellate Division concluded that police are not permitted to draw any inferences from a suspect’s race. The court in State v. Patterson, 270 N.J. Super. 550 (Law Div. 1993), was even more forceful on this point, observing that, “certainly the police could not conclude that all young, male African-Americans are suspected of involvement in the illicit drug trade. Therefore, an individual’s race cannot be considered at all when conclusions are reached or assumed as to a ‘profile’ suggesting criminal activity.” 270 N.J. Super. at 559 (emphasis added).

The general rule that we have adopted in New Jersey – prohibiting law enforcement officers from using race or ethnicity as a factor in determining the likelihood that a person is engaged in criminal activity -- makes sense from a practical perspective because it is unambiguous and thus will help police officers to avoid many of the legal pitfalls and landmines that would arise were they to try to build race or ethnicity into the equation of suspiciousness.

To understand this, let us re-examine the earlier scenario where an officer on patrol observed three motor vehicles that were all traveling at the same speed in excess of the speed limit. As we saw, under the Fourth Amendment, the officer would be justified in stopping any one of these vehicles based on an observed motor vehicle violation. But what if the officer, forced to pick only one, were to choose one of them because that vehicle was being driven by a minority citizen. In those circumstances, the officer could honestly say that race was not the “sole” reason for the stop. Indeed, the principle “reason” for the stop was the observed motor vehicle violation.

Were we to have a rule that permitted race to be considered as long as it was not the sole basis for the exercise of police discretion, then that particular situation would be ambiguous; the rule, in other words, would not be clear in this case, and police officers would be forced to guess at their peril whether reviewing courts might deem this conduct

to be unlawful.

Let us consider another scenario to further explain why the New Jersey policy prohibiting racially-influenced policing is not limited to cases where race or ethnicity was the “sole” factor relied upon by police in drawing inferences of criminality or in exercising discretion. Suppose that a local police department is trying to address the problems that are being caused by an “open air” drug market, which is attracting would-be purchasers from surrounding neighborhoods and communities. The open air drug market is displacing legitimate businesses and eroding the quality of life for law abiding residents in the area.

The police are frustrated because the traditional strategy of targeting the drug dealers is not working; these street-level dealers are replaced as soon as they are arrested, and many of those who are arrested make bail and return almost immediately to the open air market or else return after serving only a short stint in jail or prison. The police therefore want to try a different approach; they hope to deter the prospective drug purchasers from coming to this neighborhood, thereby cutting off the source of revenue that sustains the local drug market.

In furtherance of that policy, the police department carefully analyzes crime data, arrest reports and intelligence information and determines that a significant proportion of the persons who have been arrested in this area for purchasing drugs were college-aged Caucasian students who attend a nearby college. Arrest reports show that many of these offenders traveled in pairs in passenger cars from the college campus to the open air drug market on Friday and Saturday nights between 9 to 12 p.m. Based upon this historical information, patrol officers are instructed to watch out for persons heading in the direction of the open air market who match these characteristics. (Note that although patrol officers are instructed to “look out” for persons matching these general characteristics, this instruction does not satisfy the “B.O.L.O.” (Be on the Lookout) situation that we will consider in Unit 9 because in this instance, the alert is very general and does not relate to *specific* individuals who are being sought.)

In essence, the police department has devised a “profile,” that is, a compilation of characteristics believed to be typical of persons who are about to purchase illicit drugs. While all of these characteristics are innocent, when considered in combination they are also consistent with criminal activity. The distinct components of this “drug purchaser profile” can be broken down and enumerated as follows: (1) college-aged; (2) Caucasian; (3) students enrolled in the nearby college; (4) who are traveling in pairs; (5) in passenger cars; (6) traveling from the direction of the college; (7) to a particular location; (8) on Friday and/or Saturday nights; (9) between the hours of 9 to 12 p.m.

Any such “profile” would not establish reasonable articulable suspicion to justify an investigative detention under the Fourth Amendment. This profile, after all, describes a large category of presumably innocent motorists. See Reid v. Georgia, 100 S.Ct. 2752

(1984) (*per curiam*). As we discussed in Unit 6.1, under the Fourth Amendment, police may nonetheless devise and use a compilation of characteristics which may be considered as part of the so-called “totality of the circumstances.”

In this instance, however, the “profile” expressly includes a consideration of race (enumerated Factor #2). If a police officer were to consider race in deciding whether a motorist “matches the profile,” and were in any way to treat this motorist differently than one who does not match this particular profile characteristic, then such police conduct (whether undertaken as a matter of official departmental policy or as an ad hoc decision made by an individual officer) would constitute racially-influenced policing in violation of the statewide policy prohibiting discrimination set forth in Attorney General Law Enforcement Directive 2005-1.

The key point for our present purposes is that this would be true even though race was by no means the “sole” fact relied upon to draw an inference of suspiciousness. Indeed, in this scenario, race was only one of at least nine distinctly enumerated characteristics that comprised the drug purchaser profile. Were we to have a rule that permitted race to be considered as long as it was not the sole basis for the exercise of police discretion, then police departments and officers would be allowed to construct just such a race-conscious profile, which is simply not the law. See State v. Patterson, 270 N.J. Super. 550, 559 (Law Div. 1993) (“[r]ace cannot be considered at all when conclusions are reached or assumed as to a ‘profile’ suggesting criminal activity.”).

6.6 The “Strict Scrutiny” Test When Race or Ethnicity is Considered by Police

Attorney General Law Enforcement Directive 2005-1, which generally prohibits police from considering a person’s race or ethnicity as a factor in drawing inferences of criminality or in exercising police discretion, is consistent with the general rule that when a government agency or agent explicitly relies on a so-called “suspect classification” (such as race or ethnicity) in deciding to treat persons differently, that governmental decision is subject to what is called “strict scrutiny” under the Fourteenth Amendment Equal Protection Clause. See Phylter v. Doe, 457 U.S. 202, 216-17 (1982). See also Farm Labor Organizing Committee v. Ohio State Highway Patrol, 308 F.3d 523, 534 n.4 (6 Cir. 2002) (when a State adopts explicit racial criteria, strict scrutiny will automatically be applied to the challenged government action under equal protection analysis, even in the absence of a discriminatory purpose).

The strict scrutiny test is the most intense level of judicial review found in our entire system of justice. According to Harvard Law School Professor Randall Kennedy:

Under strict scrutiny, a racially-discriminatory governmental action should be upheld only if it can be supported by reference to a *compelling* justification and only if the government’s racial distinction is narrowly tailored to advance the project at hand. When a court administers strict scrutiny, it shines an intense spotlight on the governmental decisionmaking at issue in order to uncover any covert or unconscious racial biases at work. Strict scrutiny embodies a recognition, born of long and terrible experience, that the presence of a racial factor in decisionmaking should raise anxiety and signal that the government is likely to be doing something wrong. (emphasis in original) [Randall Kennedy, Race, Crime and the Law (1998) at 147.]

Note that under the strict scrutiny test, it is not enough that the government seeks to advance a compelling State interest. Rather, the government agency seeking to rely on race or ethnicity to differentiate between how people are to be treated also bears a heavy burden of establishing that the method chosen to accomplish the compelling objective is “narrowly tailored.” This means that the government agency will be expected to consider whether there are any better, less intrusive and less offensive means to achieve the compelling objective other than by taking race or ethnicity into account.

For all practical purposes, once the strict scrutiny standard of review is invoked, the government can rarely overcome this legal hurdle. This is especially likely to be true when the government is really relying on generalized or “broad brushed” stereotypes about who is more likely to be involved in common criminal activity such as drug distribution, burglary or auto theft. Indeed, as a general proposition, the inherent breadth and generality of racial

or ethnic stereotypes is fundamentally inconsistent with the “narrowly tailored” prong of the two-part strict scrutiny test.

6.7 Official Deprivation of Civil Rights

The New Jersey Legislature recently created a new crime entitled “official deprivation of civil rights.” This new statute, found at N.J.S.A. 2C:30-6, supplements pre-existing offenses such as “Official Misconduct,” N.J.S.A. 2C:30-2, and “Bias Intimidation,” N.J.S.A. 2C:16-1.

Some law enforcement officers had at first expressed concern that some of the language in the legislative declaration of policy and findings might be interpreted to prohibit law enforcement officers from initiating investigative stops based upon information contained in a B.O.L.O. (“Be on the Lookout”) description that includes the race or ethnicity of a specific suspect or wanted person. The Attorney General, as the State’s chief law enforcement officer and prosecutor, issued an official statement – one that is binding on the Division of Criminal Justice and all county prosecutors – making clear that the new law in no way prohibits police officers from relying on a “B.O.L.O.” description that includes a racial or ethnic “identifier” of the person or persons who are being sought. (In Unit 9, we will consider in detail the so-called “B.O.L.O. exception” to the general rule in this State that police may not use race or ethnicity in drawing inferences of criminality or in exercising police discretion.)

Once the Attorney General’s official interpretation was issued, the legislation creating the new offense of official deprivation of civil rights gained the support of police chiefs and police unions, reflecting the unified commitment of the New Jersey law enforcement community to condemn discriminatory policing practices.

The new offense of official deprivation of civil rights is committed when:

A public servant acting or purporting to act in an official capacity commits the crime of official deprivation of civil rights if, knowing that his conduct is unlawful, and acting with the purpose to intimidate or discriminate against an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity, the public servant: (1) subjects another to unlawful arrest or detention, including, but not limited to, motor vehicle investigative stops, search, seizure, dispossession, assessment, lien or other infringements of personal or property rights; or (2) denies or impedes another in the lawful exercise of enjoyment of any right, privilege, power or immunity.

Note that this new crime requires proof that the government official acted with the

purpose to intimidate or discriminate against an individual based on any of the listed personal characteristics. Furthermore, this crime is committed only when the public servant knows that his or her conduct is unlawful. Under most criminal statutes, “ignorance of the law” is generally no defense. In the context of this particular offense, however, the crime is not committed unless the officer actually knows that his or her conduct is unlawful.

The new statute makes clear, however, that preparing a false report, or failing to prepare a report that was required to be prepared, gives rise to an inference that the officer knew that his or her action was unlawful. See N.J.S.A. 2C:30-6d. Lying about what happened, in other words, or failing to prepare a required report, can be enough to establish that the officer knew that his or her conduct was unlawful, and then lied about it or otherwise tried to conceal the wrongdoing.

This new crime is designed to address one of the most serious forms of discriminatory policing, involving what is essentially deliberate misconduct. In other words, this new offense requires a much higher degree of culpability than merely miscalculating the facts necessary to establish reasonable articulable suspicion or probable cause, or misapplying one of the elements of a recognized exception to the warrant requirement. While the New Jersey Supreme Court has ruled that under the State Constitution, there is no “good faith exception” to the exclusionary rule, see State v. Novembrino, 105 N.J. 95 (1987), for purposes of this new criminal statute, a police officer could not be convicted merely for making a good faith mistake. In other words, the fact that a reviewing court in a motion to suppress evidence determines that an officer’s conduct was unlawful (thus warranting invocation of the exclusionary rule), does not necessarily mean that the officer has committed this new crime.

It is also critically important to understand that the statewide policy banning racially-influenced policing is broader in scope than this new criminal statute. This legislation reflects the sound policy that the criminal prosecution of a government official should be reserved for the most serious forms of intentional discrimination and the knowing disregard of the rule of law by those who are sworn to uphold the law. The statewide non-discrimination policy set forth in Attorney General Law Enforcement Directive 2005-1 goes further and, as we will discuss more fully in Unit 7, prohibits certain police conduct without regard to whether officers are acting in good faith or in bad faith.

The point is simply that while all violations of this new crime would obviously constitute a violation of both Attorney General Law Enforcement Directive 2005-1 and the Equal Protection Clause of the Fourteenth Amendment, not all violations of the policy prohibiting racially-influenced policing would constitute “official deprivation of civil rights” within the meaning of the new criminal statute. In other words, for the reasons we will discuss more fully in Unit 7, it is certainly possible to violate the Equal Protection Clause of the Fourteenth Amendment (and the statewide policy prohibiting racially-influenced policing) without also committing this new offense.

UNIT 7: REPUDIATING THE MYTH THAT ONLY RACISTS ENGAGE IN

RACIAL PROFILING

In Unit 6.2, we noted that one of the most common (and inadequate) definitions of racial profiling requires that a motorist be stopped based solely on his or her apparent race or ethnicity. The misguided notion that racial profiling occurs only when race is the “sole” basis for police action has helped to perpetuate one of the greatest myths and misunderstandings about the racial profiling problem, namely, the idea that racial profiling is practiced only by “racist” law enforcement officers or agencies.

Needless to say, if any officer were to pull over a vehicle solely because of the race of the driver – in other words, in a case where the vehicle was not observed to have committed any violations – then we would all agree that this would seem to constitute nothing short of racist harassment. This mode of analysis has misled some into believing that racial profiling is only practiced by bigoted law enforcement officers.

To understand the nature and root cause of the confusion, we must begin by understanding what it really means to say that the Fourteenth Amendment Equal Protection Clause bans “purposeful discrimination.”

In common parlance, the word “discriminate” implies active bigotry. The verb “discriminate,” however, need not necessarily be synonymous with the verbs “intimidate” or “harass.” Rather, when used in the context of a Fourteenth Amendment Equal Protection claim in a civil action or a motion to suppress evidence, the word “discriminate” essentially means to “differentiate,” that is, to explicitly distinguish between two or more persons or things based on some distinguishing characteristic. In our present context, that means to differentiate people based on the distinguishing characteristic of their race or apparent ethnicity. (As we will see, the bedrock principle underlying the Equal Protection Clause is that the government may not treat people differently on account of their race or ethnicity.)

Accordingly, when the courts say that the Fourteenth Amendment Equal Protection Clause prohibits “purposeful discrimination,” they really mean that government actors may not intentionally rely on an impermissible or so-called “suspect” or “invidious” distinguishing characteristic such as race or ethnicity. They do not necessarily mean that the government official must have acted with malice, intended to cause harm, or deliberately violated the Constitution. Compare Farm Labor Organizing Committee v. Ohio State Highway Patrol, 308 F.3d 523, 534 n.4 (6 Cir. 2002) (when police explicitly rely on racial criteria, strict scrutiny analysis will apply even in the absence of a discriminatory purpose). (Note that the nondiscrimination policy established in Attorney General Law Enforcement Directive 2005-1 is designed to eradicate even inadvertent or subconscious discrimination, going beyond the minimum requirements of Equal Protection law.)

It is instructive to note in this regard that in State v. Patterson, 270 N.J. Super. 550 (Law Div. 1993), the court ultimately concluded that the officer had devised and relied upon an unconstitutional racial profile. The trial court went out of its way to point out that it “clearly and convincingly appeared that [the officer] is not a racist.” Id. at 553, 559. In that case, the court found that the officer has “testified in a most credible fashion” and was

clearly not a racist, even as the court concluded that the officer had engaged in impermissible racial profiling warranting invocation of the exclusionary rule.

In sum, a law enforcement actor need not have any ill will or malice toward a person or group of persons before it can be said that the officer has violated the statewide policy prohibiting discriminatory policing set forth in Attorney General Law Enforcement Directive 2005-1. Indeed, an officer can certainly violate the Directive and the Equal Protection Clause of the Fourteenth Amendment without being guilty of a “bias crime,” which requires that the actor have a “purpose to intimidate” another on the basis of the victims’ race, ethnicity or certain other distinguishing characteristics. See now N.J.S.A. 2C:16-1 (defining the offense of “bias intimidation”). While all “bias crimes” are, of course, a form of purposeful discrimination, not all forms of purposeful discrimination constitute a bias crime. In other words, it is possible to violate the Fourteenth Amendment Equal Protection Clause and the statewide policy prohibiting racially-influenced policing without committing the crime of “bias intimidation.” By the same token, as we discussed in Unit 6.7, a person can violate the Fourteenth Amendment Equal Protection Clause without committing the new crime of “official deprivation of civil rights,” which requires proof that the actor actually knows that his or her conduct is illegal.

The widespread misconception that only racists would engage in “racial profiling” helps to explain why so many departments and officers adamantly deny that they have ever engaged in or tolerated the practice. If your definition of “racial profiling” includes a requirement that the officer be a bald-faced racist, then you probably believe that the practice of racial profiling is despicable, but rare. Indeed, some officers probably believed that there is no reason for them to participate in this statewide training program since they could not possibly be guilty of racial profiling simply because they are not racists.

But the problem that we must candidly and aggressively confront goes well beyond racist harassment. Indeed, if that were the only problem that we needed to address, our task in this course of instruction would be much easier.

This is not at all to say that racism is not a problem within the law enforcement community, or to suggest that there are no law enforcement officers in New Jersey who are bigoted. Our profession is certainly not immune from the societal problem of prejudice, any more than we are immune from any other problem that exists in our society, including alcoholism and substance abuse, depression, and domestic violence. Indeed, no group or profession, however noble their calling, is immune from these problems.

The point, however, is that the problem of prejudice that we need to understand and address as a professional community is too complex to be solved simply by blaming a group of renegade officers or so-called “bad apples.” Indeed, the steps that we need to take to address the problem go far beyond identifying or weeding out those applicants, recruits, or sworn officers who harbor racist ideas and who would willingly if not eagerly allow their ingrained racism to influence the exercise of their discretion.

We should step back at this point to consider one of the unfortunate byproducts of the myth that only racists engage in racial profiling, namely, the wedge that has been driven between cops and prosecutors, and between line officers and their superiors. If the problem of selective enforcement was limited to racist police officers, then a finding by a court (or by a prosecutor or a police executive) that an officer had engaged in selective enforcement would be tantamount to a finding that the officer in question was a racist. The officer's friends and colleagues, believing this to be untrue, would be frustrated and angry because they would conclude that their colleague had been falsely accused and unfairly branded. Those officers would soon lose confidence in their supervisors, in prosecutors, and in the entire criminal justice system all because they would be operating under the misconception that racial profiling is tantamount to racism, and that a claim of racial profiling is essentially a claim that an officer is a racist.

In reality, the problem of racially-influenced profiling is exceedingly complex, and even subtle. It is true that racial profiling is a form of "prejudice" in the literal since that it involves "pre judging" a person based on skin color. But one need not be a racist to rely on racial stereotypes that lie at the very heart of the racial profiling problem. A minority law enforcement officer may be just as likely as his non-minority colleague to rely on a popular stereotype, especially one that is repeatedly broadcast in the news and entertainment media.

The real problem that we need to address – and the reason that this training course is so complicated and challenging – is that most examples of racial profiling actually do not involve overt racism or bigotry, but rather involve subtle or even subconscious reliance on race as a factor in drawing inferences and exercising police discretion. This is most likely to occur when police officers rely on a "gut feeling" or an "inarticulable hunch" in deciding what to do next. Indeed, reliance upon racial stereotypes is much more likely to occur when officers are not carefully thinking about why exactly they are doing what they are doing.

In Unit 13, we will discuss this particular aspect of the problem in the context of the need for officers to clearly articulate and document the reasons for the exercise of police discretion. For now, it is enough to note that officers cannot simply assert that they do not engage in racial profiling because they are not bigots or racists. Subtle discrimination is still discrimination, and has the same negative effects on the relationship between police and minority communities. The New Jersey law enforcement community must be committed to enforcing a policy to eradicate all forms of discrimination, whether subtle or obvious or intentional or inadvertent.

PART II APPLYING THE RULE PROHIBITING "RACIALLY-INFLUENCED POLICING"

UNIT 8: THE BASIC NON-DISCRIMINATION RULE IN A NUTSHELL

The policy in New Jersey prohibiting racially-influenced policing may be simply stated. Except when you are responding to some type of a suspect-specific or investigation-specific B.O.L.O. (“Be On The Lookout”) situation, you are prohibited from considering a person’s race or ethnicity to any degree in drawing inferences that this person may be involved in criminal activity, or in exercising any form of police discretion with respect to how you will deal with that person.

Obviously, police officers are human beings, not computers. We cannot be programmed to simply ignore a bit of information from our “active memory.” When officers are dealing with citizens at close quarters, they cannot help but see the race or readily apparent ethnicity of those citizens. The real issue, therefore, is how you choose to use that piece of information in drawing inferences and deciding what actions to take based upon all of the information known to you.

Accordingly, the rule is not that you must disregard a citizen’s race or apparent ethnicity, pretending as if the person’s outward appearance was invisible to you. Rather, the rule is that you may not use that information as an indicia of suspiciousness except when you are trying to decide whether this individual may be a particular person who is described in a wanted or “B.O.L.O.” bulletin or situation.

Here is a simple way to test whether your exercise of discretion was impermissibly influenced by race or ethnicity in violation of Attorney General Law Enforcement Directive 2005-1: ask yourself, if the race or ethnicity of the citizen had been different, would you have made the same decision, drawn the same inference, harbored the same suspicion or undertaken the same course of action? If the answer to all of these questions is yes, then race or ethnicity played no contributing role in the exercise of police discretion, and our rule prohibiting police discrimination would not have been violated. If, however, the answer to any of these questions is no, meaning that you would have treated this person differently had he or she been of a different racial or ethnic background, then racial or ethnic characteristics contributed to and influenced your decision-making process, in violation of the statewide policy prohibiting racially-influenced policing.

We can now reduce the cardinal principle of this course of instruction to a very simple and practical rule of thumb: rather than considering people’s racial or ethnic heritage -- features persons are born with and cannot change -- you should instead be focusing on their conduct, that is, what they are doing, or saying.

8.1 When Clothing or Manner of Dress May be Considered to be a Form of Conduct

In some circumstances, a person’s manner of dress may also be relevant and can be considered to be a form of expressive “conduct.” By way of example, if, based on your training and experience, you recognize that an individual is wearing clothing, jewelry, or

bearing tatoos consistent with membership in a particular criminal organization (in other words, “flying the colors” of a particular street gang), you may certainly take that information into account in determining how you will exercise your discretion in investigating whether that individual is actually involved in criminal activity. In Unit 10, we will consider the gang problem in more detail. For the moment, the critical point is that you may not consider physical characteristics that individuals are born with and cannot change, such as their racial or ethnic heritage, in deciding whether they are more likely than others to be engaged in criminal activity.

Police officers must always be cautious and circumspect in drawing any inferences of suspiciousness from a person’s physical appearance. As a general rule, an officer should not consider physical characteristics such as manner of dress, length or style of hair, etc. (other than when determining whether a person matches a description in a “B.O.L.O.”) unless the officer can identify and describe the manner in which those personal characteristics are directly and specifically related to particular criminal activity.

When, for example, an officer is aware that a particular local gang or other criminal organization expects its members to display a particular kind of attire, and the officer sees a person wearing just such attire, then the officer may properly consider those observed personal characteristics in inferring whether the person is, in fact, associated with this particular gang. In that event, the officer would be able to identify and describe the manner in which the observed personal characteristics (clothing) are directly and specifically related to a particular form of criminal activity, and would do so by recounting the specific training or experience that taught the officer that the particular manner of attire that was observed is consistent with the customs and practices of this particular gang.

It is important to restate, however, that it is another question entirely whether an officer’s observation of a person’s physical appearance satisfactorily establishes a basis under the Fourth Amendment to believe that the individual is in fact associated with a particular gang, or is presently engaged in criminal activity. By way of example, and at the risk of stating the obvious, the overwhelming majority of persons who wear an article of red clothing are not “Bloods,” and the overwhelming majority of persons who wear an article of blue clothing are not “Crips.” Our discussion at this point focuses only on *whether you are allowed* to consider outward appearance characteristics of this nature, and not on *how much weight* should be given to these race-neutral physical characteristics in determining on a case-by-case basis whether there is a reasonable and articulable suspicion to believe that a person is engaged in criminal activity.

In contrast to the gang “colors” scenario we just considered, it would be inappropriate for a police officer to deduce from a person’s old, tattered or shabby clothing that the citizen is more likely to be a criminal. Any such inference would be based on nothing more than a broad-brushed stereotype, namely, that the observed manner of dress suggests that the person is poor, and by, virtue of economic status, is more likely than others to be engaged in general criminal activity. That is exactly the kind of offensive,

stereotype-driven reasoning that courts in New Jersey will not tolerate under either Fourth or Fourteenth Amendment analysis.

Finally, as we will consider in more detail in Unit 18, except when responding to a suspect-specific “B.O.L.O.” situation, police officers in this State may not draw any inferences of suspiciousness from the fact that a person is wearing attire that is commonly associated with the expression of religious beliefs or religious affiliation. Thus, for example, you are not permitted to infer from a person’s religious garb that he or she may be an Islamic terrorist.

8.2 The Basic Non-Discrimination Rule Applies to **All** Police Decisions

It is critically important to understand that our basic nondiscrimination rule applies to every police decision and to every conceivable step during the course of a law enforcement officer’s interaction with an individual or group of individuals, and not just those decisions that trigger a Fourth Amendment legal standard (such as an investigative detention, a frisk, an arrest or a search).

Obviously, an officer may not consider to any degree the person’s race or ethnicity in deciding whether to initiate a motor vehicle stop, or to initiate a true “Terry” stop. But this rule also applies to the exercise of police discretion even before an officer makes a decision to initiate an investigative detention. For example, it is improper for a police officer to consider an individual’s race or ethnicity in deciding whether to conduct a motor vehicle lookup (i.e., “run the plates”) of a vehicle that the individual is in, even though this type of police scrutiny does not intrude upon any of the recognized Fourth Amendment rights and so may be performed by police officers without first having to meet any of the traditional Fourth Amendment standards of proof, such as reasonable articulable suspicion or probable cause. See State v. Segars, 172 N.J. 481 (2002)(*per curiam*).

Furthermore, the basic rule prohibiting racially-influenced policing applies to every police decision that might occur after an officer makes the decision to initiate an investigative detention or any other kind of encounter with a private citizen.

In sum, the general prohibition against using race or ethnicity to any degree in deciding how a law enforcement officer should act with respect to a particular individual applies to every conceivable decision that the officer can make, including but not limited to:

- the decision to “run the plates” of a vehicle;
- the decision to approach an individual and to initiate a consensual “field inquiry,”
- the decision to initiate an investigative detention;

- the decision to order a driver or passenger to exit from a lawfully detained vehicle;
- the decision to conduct a protective frisk for weapons;
- the decision to pose probing or “accusatorial questions” during the course of a consensual “field inquiry” or a routine motor vehicle stop;
- the decision to run an outstanding warrant check or to conduct a criminal history lookup;
- the decision to ask an individual for permission to conduct a consent search;
- the decision to summon a drug detection canine to the scene;
- the decision to issue a ticket rather than to issue a written or oral warning; and
- the decision to make a custodial arrest rather than to issue a summons on the scene.

8.3 Police are Prohibited from Targeting Persons For Enhanced Scrutiny Based on Race or Ethnicity, Not From Targeting Places For Enhanced Scrutiny Based on Crime Patterns

When police detain or arrest a large proportion of minority citizens, some people may argue that this statistic automatically constitutes “disparate treatment” and proof of impermissible discrimination. This is not always a fair conclusion. Sometimes, what might appear at first glance to be a “discriminatory effect” (the high proportion of arrestees who are minority citizens) is actually the result of perfectly legitimate, *race-neutral* law enforcement decisions, such as when police respond to reported crimes in urban neighborhoods that happen to be comprised predominantly of minority residents. In Unit 16, we will discuss more fully the complex role that statistics play in the racial profiling controversy, and we will consider, for example, the importance of identifying appropriate statistical “benchmarks” to measure the impartiality of police decisions. For present purposes, the critical point is that police are permitted to rely upon race-neutral criteria in exercising discretion or deploying personnel, even when this happens to result in the arrest or detention of a comparatively large number of minority citizens.

The basic rule under Attorney General Law Enforcement Directive 2005-1 is that police may not consider race or ethnicity as a factor in targeting individuals for enhanced police scrutiny or in drawing an adverse inference of suspiciousness about those

individuals. That rule in no way restricts the authority of officers or agencies to target crime-plagued neighborhoods for enhanced law enforcement attention and enforcement actions (e.g., “saturation” patrol), even though such enhanced enforcement activity is likely to result in the detention and arrest of a comparatively high proportion of minority citizens, reflecting the racial composition of the high-crime neighborhood that is the subject of special attention. As a matter of common sense, police are permitted to respond to a rash of crimes reported at particular locations, just as they are allowed to pursue leads in a particular investigation. See Unit 9.2.

As will be noted in Unit 17.1, when law enforcement officers are deployed in an area that happens to have a comparatively large minority population, it is reasonable to expect that the officers patrolling in that neighborhood will interact with a correspondingly high percentage of minority citizens. So too, it could be expected that a large proportion of the persons arrested in that particular neighborhood will be minority offenders or fugitives, reflecting those persons who are present in the area. (Note that those minority offenders will tend to prey upon a correspondingly large proportion of minority *victims*, again reflecting the racial and ethnic composition of the resident population of that particular area. Those law abiding minority citizens, in turn, are the beneficiaries of the enhanced and targeted enforcement efforts.)

When police respond in this way to reported crimes, they simply are not relying on anyone’s race or ethnicity to draw adverse inferences or to make policing decisions. Using empirical data to focus law enforcement efforts at particular locations must not be confused with the *inappropriate* use of empirical data that we will consider in Unit 16.1, where we will examine why police in this State are flatly prohibited from using aggregate arrest or conviction statistics to infer that a particular individual or group of individuals of a given race or ethnicity is more likely to be engaged in criminal activity because other persons of that race or ethnicity happen to have been arrested or convicted.

In sum, it is perfectly appropriate for police to use arrest reports and other historical and intelligence information to identify specific locations where the crime problem is particularly acute. This form of empirically-based resource allocation is a critical part of modern policing strategies, and is one of the key features of COMSTAT – a proven crime analysis and management tool designed to reduce crime and violence and enhance the quality of life for the law abiding residents of the targeted districts.

UNIT 9: THE “B.O.L.O. EXCEPTION:” USING RACE OR ETHNICITY WHEN LOOKING FOR SPECIFIC INDIVIDUALS

9.1 Using Race or Ethnicity to Describe and Identify Specific Persons Who Are Being Sought by Law Enforcement

It is important to discuss at some length the notable exception to the general rule that prohibits a police officer in New Jersey from considering an individual’s race or ethnicity in exercising police discretion. No one disputes that police are permitted to take a person’s race or ethnicity into account when trying to determine whether that person is an individual who was specifically described in a “wanted” or “be on the lookout” bulletin. In this instance, race or ethnicity is being used only as a means of identifying a known suspect. As Harvard Law School Professor Randall Kennedy has noted:

In such a case, the person’s skin color is being used no differently than information about the pants or jacket or shoes that the suspect was said to be wearing. When used as part of a detailed description to identify a given individual, the person’s race is not so much a category that embraces a large number of people as a distinguishing fact about the identity of a designated person. [Randall Kennedy, Race, Crime and the Law (1998) at 137-38 (unnumbered footnote).]

Accord, State v. Stovall, 170 N.J. 346 (2002), where the New Jersey Supreme Court concluded that the identification of the suspects in that case as Hispanic was only that -- an identification.

Recall that in Unit 6.6, we discussed the so-called “strict scrutiny” test that is used by reviewing courts when the government intentionally relies on a “suspect classification,” such as race or ethnicity. Under the “strict scrutiny” standard of review, the government must establish that it is pursuing a *compelling* governmental objective, and must further show that the means chosen to do so are *narrowly tailored* to accomplish that compelling objective.

The so-called “B.O.L.O. exception” clearly satisfies both prongs of this test. Needless to say, the State has a compelling interest in identifying and apprehending wanted persons (whether they are wanted on suspicion of criminal activity or wanted as witnesses in a bona fide criminal investigation or community caretaking or intelligence-gathering function). Furthermore, the use of race or ethnicity to identify a particular individual is “narrowly tailored” precisely because it is limited to *specific* individuals and because there is no other practicable way to identify and apprehend a specific wanted person without giving as detailed a description of that person’s outward appearance as is possible based on all known facts about that individual. Obviously, leaving out important descriptive details about the person’s outward appearance would greatly reduce the likelihood of achieving the legitimate governmental objective of finding the person who is

being sought.

In fact, the Fourth Amendment in some circumstances may actually require law enforcement agencies to include and rely upon every known identifying characteristic in a bulletin or alert that instructs officers to identify, apprehend and detain a wanted person or known suspect. Under the Fourth Amendment, law enforcement officers in New Jersey are generally expected to use what is called the “least intrusive means” to accomplish their legitimate investigative objectives. See, e.g., State v. Davis, 104 N.J. 490 (an officer during a stop should use the least intrusive technique reasonably available to verify or dispel suspicion in the shortest period of time). When police put out any kind of alert calling for the apprehension of a suspect, they are expected to use all reasonable means to limit the number of persons who might be scrutinized or detained based upon the B.O.L.O. bulletin. In other words, as criminal investigators, police are generally expected to separate the wheat from the chaff and to winnow down the number of potential suspects to the greatest extent possible.

Consider the following scenario. A convenience store was just robbed by a man who is described by witnesses as being Caucasian, 25 years old, about six feet tall, and wearing a dark jacket and blue jeans. If any resulting B.O.L.O. bulletin were to exclude the fact that the suspect being sought is Caucasian, then young non-Caucasian males would potentially be included in the class of persons that police would scrutinize, even though there is absolutely no basis to justify such scrutiny of persons who could not possibly be the suspected robber. Such a practice of leaving out important descriptive identifiers would not only dilute and distract law enforcement attention (making it less likely that the actual suspect would be apprehended), but might result in persons being detained when, viewed objectively, based on the “totality of the circumstances,” there would be absolutely no basis to justify any such detention, thus constituting a violation of the Fourth Amendment.

In sum, law enforcement officers are by no means required to “redact” a racial or ethnic description of a person from a wanted or B.O.L.O. bulletin. Indeed, were it otherwise, police might also be precluded from posting a wanted flier that includes a picture or artist’s drawing of the suspect, since the photograph or artist’s rendering would communicate the suspect’s race or ethnicity. Obviously, that is not the law.

The so-called “B.O.L.O. exception” to the general rule prohibiting law enforcement officers from taking an individual’s race or ethnicity into account provides an opportunity for us to consider the complex interplay between the Fourth and Fourteenth Amendments, and gives us an opportunity to start to explore how courts will analyze or dissect police conduct under these two distinct constitutional provisions. (In Unit 13, we will discuss in more detail the differences between Fourth and Fourteenth Amendment litigation.)

Let us suppose that a robbery has just been committed at a convenience store in an urban area. The manager of the convenience store, who was the victim and principal witness to the crime, did not have an opportunity to get a good look at his assailant and so

the victim is only able to provide the police with a fairly general description: “light-skinned male, twenty to thirty years old; dark clothing, average height and build.”

That description is broadcast over the police radio system, reflecting the only information currently available to police to use in identifying the robber. You are patrolling the area near the crime scene and you observe a large number of people of various racial and ethnic types going about their affairs. One of these individuals who comes into your view is Caucasian possibly of Hispanic ethnicity, is wearing a dark jacket, is of average height and build and appears to be in his twenties. The person does not appear to be acting in any particularly unusual or suspicious manner. He is not, for example, running from the crime scene. Nor does he turn away from you, attempt to flee, or otherwise try to avoid you or conceal his physical features.

Based on the information that had been provided to you over the radio, could you initiate an investigative detention or so-called “Terry” stop?

While in these circumstances you would certainly be permitted to approach the individual and attempt to engage him in conversation as part of a consensual “field inquiry,” given the very general description of the wanted suspect, you probably would not be allowed on these facts to initiate a stop. The B.O.L.O. description in this case was not sufficiently specific or “particularized” to justify even a brief “seizure” of the person.

In this instance, the limitation on your authority to initiate an investigative detention would derive from the Fourth Amendment, not the Fourteenth Amendment Equal Protection Clause. Your use of the individual’s race in this case in trying to determine whether or not this was the person who had committed the recent robbery would be perfectly legitimate.

It should be noted that a “B.O.L.O.” may, of course, refer to more than one person. See Drake v. County of Essex, 275 N.J. Super. 585 (App. Div. 1994) (reasonable suspicion may be established by evidence which points to the guilt of at least one of a discrete group of individuals), citing to United States v. Fisher, 702 F.2d 372 (2d Cir. 1983) (reasonable suspicion to stop four African-American males to investigate a robbery committed by three persons matching their general physical characteristics). The key for our purposes is that each and every person mentioned or described in the B.O.L.O. is believed to be associated with specific criminal activity, that is, a particular event, episode, transaction, scheme, or conspiracy that is the subject of a pre-existing law enforcement investigation.

This is what distinguishes a B.O.L.O. from a “profile.” A B.O.L.O. relates to one or more specific individuals who are being sought by law enforcement authorities. A “profile,” in contrast, is more general and describes the characteristics and behavior of a large and undetermined number of persons who may be involved in various types of criminal activity, but who are not specifically believed to be engaged in such criminal activity based on pre-existing information that law enforcement authorities already know about them as

individuals. Compare Drake v. County of Essex, *supra* at 591 (an individualized suspicion is one that refers to evidence of wrongdoing at a particular time and place, as distinguished from suspicion based on general group characteristics; detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity).

Applying these basic principles, a profile is merely a tool to aid police in inferring whether a person may be engaged in criminal activity. A B.O.L.O., in contrast, is a tool for locating one or more specific individuals who are already the subject of law enforcement attention and interest.

It is important to note that the so-called “B.O.L.O. exception” to the general rule prohibiting law enforcement officers from considering race or ethnicity applies whenever a law enforcement officer is looking for one or more particular persons, whether as a result of a broadcast alert or as a result of information learned during the course of a particular investigation of a reported or suspected specific crime. (In Unit 9.2, we will discuss in more detail a variant of the “B.O.L.O. Exception” when police are “pursuing leads” in the course of an ongoing investigation.) The exception to the general rule, in other words, is not limited to circumstances where the “B.O.L.O.” information is “broadcast” over the police radio or flashed as part of an “All Points Bulletin” or an Amber Alert. Rather, the B.O.L.O. exception applies to any information describing a particular suspect or suspects without regard to the exact means by which this identifying and descriptive information is communicated to, by and among law enforcement officers. By way of example, the B.O.L.O. exception applies to descriptive information about a wanted person or specific criminal suspect or suspects that is communicated to police at roll call, by means of teletypes, a radio dispatch, a wanted flier, or that is provided to law enforcement officers by a private citizen.

Consider the following situation. You are on patrol in a marked vehicle when you are flagged down by a pedestrian. She tells you that she just observed an individual selling drugs out in the open. This observation, according to the citizen-tipster, was made just a few minutes ago on an adjoining street. The citizen gives you a description of the person, including a description of the suspect’s race. Based on this information, you go immediately to the adjoining street where you see several persons of different races milling about.

In this scenario, you are of course, absolutely permitted to consider a person's race in determining which if any of the persons presently in view may be the same person who had been described by the tipster as selling drugs. This situation clearly falls within our "Be on the Lookout" exception because that is exactly what is happening – you are "looking out" for a particular suspect.

Note that under the Fourth Amendment, you may or may not have enough information to justify a "Terry" stop. That will depend on a number of factors, including the detail and specificity of the description of the suspect, the credibility of the citizen who had provided the information to you, and especially her basis for suspecting that the suspect had been selling drugs. (It is generally not enough that an informant knows the location or comings and goings of a suspect; rather, the informant must have a basis for believing that the suspect is involved in criminal activity, such as in this case, the informant's personal observation of open-air drug distribution.) Reviewing courts will ask, for example, whether this tipster was "anonymous," or whether you would be able to later find the tipster to hold her accountable if it were to turn out that she had been lying. (The United States Supreme Court in Florida v. J.L., 120 S.Ct. 1375 (2002), ruled that an anonymous tip, by itself, is rarely sufficient to justify a "Terry" stop or frisk, even when the tipster reports that the suspect is carrying a concealed weapon. However, courts interpreting the J.L. decision have recognized that a tip that is delivered face-to-face, even from an unidentified person, is inherently more reliable than an anonymous tip delivered via telephone. See, e.g., United States v. Heard, 367 F.3d 1275, 1278-81 (11 Cir. 2001)).

The critical point for our present purposes is that these fact-sensitive questions arise under traditional Fourth Amendment law governing searches and seizures. In this scenario, there is no violation of the Fourteenth Amendment Equal Protection Clause as a result of the officer having used and relied upon a racial description in trying to identify the person who had been described by the tipster.

This does not mean that Fourteenth Amendment Equal Protection issues cannot arise when a law enforcement officer responds to information that has been provided by a private citizen. There may be circumstances where it is so readily apparent that the citizen tipster is himself or herself relying entirely on racial stereotypes that it would be inappropriate for police to give credence to the citizen's report unless that report provides objective facts that the officer could use to draw his or her own race-neutral conclusions.

As a general proposition, the Fourteenth Amendment Equal Protection Clause applies only to government conduct; it does not apply to decisions and actions undertaken by private citizens who are not acting "under color of state law." Even so, police officers must always use common sense in using and relying upon information provided by citizens. This is certainly a familiar principle to us, at least in the context of the Fourth Amendment. We all know, for example, that a "tip" provided by an informant is by no means automatically deemed to be reliable. To the contrary, for purposes of deciding whether the

tipster's information establishes reasonable articulable suspicion or probable cause, we have long known that police must always examine the tipster's basis for knowledge. In some instances, police also must consider the informant's veracity, that is the informant's penchant for lying or for telling the truth, at least in the case of a confidential informant who is said to be involved in the so-called "criminal milieu." (Ordinary citizens, that is those who are not believed to be personally involved in criminal activity, are generally assumed to be trustworthy. See State v. Stovall, 170 N.J. 346, 363 (2002), and State v. Johnson, 171 N.J. 192 (2002). However, police must still question how a citizen came to know the information that he or she claims to know, and why the informant has reason to believe that the suspect is involved in *criminal* activity.) This analytical process is sometimes described in Fourth Amendment law as the "two-pronged" test of informant reliability. Cf. Illinois v. Gates, 462 U.S. 213 (1983) (rejecting a rigid application of the "two pronged" test for confidential informants).

To explain how this review or scrutiny of citizen information would apply in the context of the Fourteenth Amendment, let us consider the following scenario. You are in uniform and on routine patrol when a citizen flags you down and advises you to be-on-the-lookout for a group of "suspicious" adolescents that the citizen recently observed in the neighborhood. Since you would always want to gather as much information as possible, you inquire of the citizen as to what the adolescents were doing that led the citizen to believe that they were acting in a suspicious manner. The citizen replies, "Well, they're black kids. They really have no business being around here." The citizen cannot point to anything that the youths were doing (besides merely being present in the neighborhood) that reasonably suggests unlawful activity.

In Unit 11.1, we will discuss in greater detail when and under what circumstances an officer may consider that a person seems to be "out of place" in a particular neighborhood. For our present purposes, it is enough to note that in the specific scenario that we have just described, it should be readily apparent to the police officer that the tipster's suspicion is based principally if not entirely on a racial stereotype, and not on an observation of unlawful or even suspicious conduct. Accordingly, under the general rule prohibiting police discrimination, in these particular circumstances, you could not use the tipster's information as a basis for the exercise of police discretion.

In contrast, had the tipster provided a description of observed facts that are objectively suspicious, you would of course be permitted to rely on those facts in drawing your own inferences and reaching your own race-neutral conclusions. (Some examples of such facts might be that the group of adolescents were creating a loud disturbance, or were obstructing traffic, or were observed trespassing, throwing bottles or damaging property.) If you are provided with such objective, race-neutral facts, you would not have to rely at all on the tipster's inferences and conclusions. In that event, it would not matter whether or not the citizen tipster was biased or had relied in part on a racial stereotype.

Let us now change the scenario to further demonstrate that as a general rule, the

Fourteenth Amendment Equal Protection Clause and our State's nondiscrimination policy would not require you to ignore or disregard information provided by private citizens, even though that information does not meet the Fourth Amendment standard for initiating an investigative detention or for making an arrest. Let us suppose that instead of flagging you down on the street, the citizen tipster had called the police station to report that a number of youths at a certain location were "hanging out" and acting "suspiciously." The tipster does not reveal to the dispatcher the exact reasons why she had concluded that the adolescents were behaving in a suspicious manner, and the dispatcher simply relays the raw information to you to check out as part of your routine patrol function. In this case, it is by no means readily apparent that the information was based on an inappropriate racial stereotype and in these circumstances, the responding officer would, of course, be allowed, indeed expected to proceed to the scene to determine for himself/herself whether anyone was engaging in objectively suspicious conduct. In other words, a police officer dispatched to investigate a situation is not required to assume that a tip or citizen's report of information is based on a racial stereotype.

To this point in our discussion of the "B.O.L.O. exception" to the general rule prohibiting police from considering a person's race or ethnicity, all of the persons described in a B.O.L.O. alert or "All Points Bulletin" were criminal suspects. It is important to note, however, that the B.O.L.O. exception need not be limited to specific persons who are "suspects," that is, individuals who are suspected of being personally involved in criminal activity. Rather, a B.O.L.O. alert can certainly include innocent persons, including witnesses and victims. An Amber Alert, for example, may focus as much on the description of the victim as on the description of a suspected offender. Indeed, for practical reasons, the description of the victim in such an alert may well be far more detailed and useful than the description of a suspected kidnapper.

Furthermore, the pre-existing law enforcement investigation need not have established probable cause to believe that a crime has actually been committed. For example, police may issue a B.O.L.O. for a "missing person" (and any other individuals believed to be associated with that missing person) without having to have established that the missing person was kidnapped or murdered.

In sum, the "B.O.L.O. exception" applies whenever police officers are alerted by any means to "look out for" a specified individual (or group of specific individuals), even though these persons may not themselves be criminal suspects, but rather may merely be persons that some law enforcement agency wants to locate in furtherance of a law enforcement investigation.

9.2 The Legitimate Use of Race or Ethnicity to Pursue Specific Suspects or “Leads” During the Course of a Particular Criminal Investigation

As we have seen, the so-called “B.O.L.O. Exception” applies whenever a law enforcement officer uses race or ethnicity for the purpose of describing and identifying one or more particular, specific suspects or persons of interest during the course of a pre-existing investigation into specific criminal activity (*i.e.*, a specific event, episode, transaction scheme, or conspiracy). What distinguishes a legitimate example of the B.O.L.O. Exception from an illegitimate use of a racial or ethnic stereotype is that the B.O.L.O. Exception focuses police attention on persons who are the subjects, targets or witnesses in a specific ongoing investigation, whereas an impermissible stereotype is, by its nature, very generalized. (If we were to use Fourteenth Amendment Equal Protection Clause terminology to describe this difference, we might say that the use of racial or ethnic characteristics in a B.O.L.O. situation is “narrowly tailored,” while the reliance on racial or ethnic characteristics as part of a stereotype is not.)

Another way to think about the distinction is that the B.O.L.O. Exception applies to an ongoing investigation of a specific crime or ongoing criminal scheme that has already been reported, or that at least is already suspected based on particularized facts that are already known. The impermissible use of race or ethnicity, in contrast, is much more likely to arise when an officer is first trying to determine whether a crime is occurring at all, such as when an officer assigned to patrol duties happens by chance to encounter a citizen and the officer spontaneously seeks to convert this as yet routine, unplanned encounter (such as a traffic stop) into a criminal investigation. This police patrol practice is sometimes referred to as “digging” and is now frowned upon by many courts for reasons that we will discuss in much more detail in Unit 13.3.

It should be noted that throughout this course of instruction, the legitimate law enforcement practice of pursuing specific leads and winnowing down the list of potential suspects while investigating a specific criminal event, episode, transaction, scheme or conspiracy is essentially considered to be a type of “Be on the Lookout” situation for the purposes of determining whether it is permissible to take into account a person’s race or ethnicity. This analytical approach makes sense since a law enforcement officer investigating a specific case is pursuing or “looking out for” one or more specific individuals (the perpetrators of or witnesses to this particular crime), even though the officer at this stage of the investigation may not yet know the identity of any suspects or witnesses and may not yet be able to describe them with any specificity.

Alternatively, the notion of pursuing leads during the course of a specific investigation might be thought of as a separate and distinct “exception” to the general rule that law enforcement officers may not consider a person’s race or ethnicity in drawing inferences of criminal involvement and may not treat people differently based on their race or ethnicity. That analytical approach and nomenclature is perfectly acceptable under Attorney General Law Enforcement Directive 2005-1, so long as it is clearly understood that

the Fourteenth Amendment Equal Protection Clause and our statewide nondiscrimination policy applies at all times to all law enforcement officers, and not just to uniformed police officers assigned to patrol duty. See Unit 8.2 (the basic non-discrimination rule applies to *all* police decisions). Detectives, in other words, can certainly violate the rule prohibiting racially influenced policing.

Consider, by way of example, a case where a specific crime has been reported, such as an automobile theft, but there is no eyewitness to provide any description of the thief. Under our nondiscrimination policy, a detective assigned to investigate this offense could not, of course, focus his or her attention on minority citizens based on the derisive stereotype that such citizens are generally more likely than non-minority citizens to commit this type of crime. Any such investigation would clearly constitute racially influenced policing in violation of Attorney General Law Enforcement Directive 2005-1.

The critical distinguishing characteristic between the permissible and impermissible consideration of race depends on the *specificity* of the suspicion and the information upon which that suspicion is based. Law enforcement officers must ask themselves whether they are focusing on specific suspects or witnesses (pursuing one or more specific “leads”) or rather are relying on a generalized inference about racial or ethnic groups (a stereotype). Recall from our discussion in Unit 6.6 that the “strict scrutiny” test under the Fourteenth Amendment requires that any governmental reliance upon race or ethnicity must be “narrowly tailored” to achieve the compelling governmental objective.

The key point is that while police are, of course, permitted to pursue specific leads during the course of a specific ongoing investigation, they are not permitted to rely upon broad-brushed, race or ethnicity-based stereotypes about who is generally more likely to be involved in criminal activity. When police are following a specific lead, they may, for example, consider any relevant fact or circumstance (including a person’s race or apparent ethnicity) that may help to winnow out any individual who is clearly not a subject, target, witness or person of interest in this particular investigation, just as police may quickly discount or ignore any person who clearly does not match the description in a traditional B.O.L.O. bulletin. In other words, our statewide nondiscrimination policy by no means requires police to interview or otherwise interact with persons who could not possibly be aware of information relevant to a specific ongoing investigation, and in certain circumstances, a person’s race or ethnicity could be used to exclude him or her from further consideration. (For a specific example of such a situation, see Factual Scenario #6 in the Skills Assessment portion of this course of instruction.)

Relatedly, it is important to understand that the “B.O.L.O. Exception” to the general rule prohibiting any consideration of race or ethnicity is certainly not limited to situations where an “All Points Bulletin” was actually “broadcast” to police. As noted above, this exception to the general rule applies when a law enforcement officer during the course of an ongoing investigation of a specific incident or scheme develops a reason for locating (in other words, a reason to “look out for”) one or more persons believed to have information

relevant to this particular criminal investigation. This would be true even though the officer may not yet know the exact identities of these potential witnesses, and cannot provide a specific description of these individuals that might be broadcast to or otherwise shared with other officers via a traditional B.O.L.O. bulletin. (Indeed, the objective of the criminal investigation at this stage may simply be to identify and locate potential witnesses and suspects.)

In certain circumstances, a “Be on the Lookout” situation may exist for purposes of our statewide nondiscrimination policy even when no information has been communicated from one law enforcement officer to another. A single officer, for example, may learn something during the course of an encounter or investigation that prompts him or her to seek out some other person or persons for additional information. The officer may proceed to look out for this new witness, suspect or information source without advising any other officers or bothering to enlist their assistance in locating this specific individual or individuals who the investigating officer wants to find. This commonsense practice is essentially nothing more than pursuing or following up on investigative “leads.”

The point is simply that detectives assigned to a specific case (and uniformed officers who are pursuing a specific investigation as well) are permitted, indeed are expected to pursue leads during the course of the ongoing investigation. In doing so, law enforcement officers may focus their attention on any and all individuals who may have information concerning the particular incident, particular scheme or particular organization that is the subject of the ongoing investigation. Similarly, officers investigating a specific crime may focus their attention on specific places or premises where potential suspects or witnesses to that particular criminal episode are most likely to congregate.

To underscore this point, let us consider a situation that at first glance might look as if you were relying inappropriately on race or ethnicity, when in reality you would actually be relying on appropriate, race-neutral criteria. You are a detective conducting a criminal investigation of a reported crime, in this instance, a murder. In the course of investigating the homicide, you will want to speak to friends, co-workers, and neighbors of the victim and of any potential suspect that you may already have in mind. Suppose that, as it turns out, the victim tended to associate with persons who shared the victim’s own racial or ethnic background. In that event, the persons who you would be seeking out to interview (the friends, co-workers, and neighbors of the victim), would tend to be persons of a particular race or ethnicity.

In a closely related vein, you might want to canvas the neighborhood, local bars, stores, etc. seeking information about the victim and any potential suspect. Naturally, you would “target” those places where the victim was known to have frequented. If the neighborhood that you would be canvassing is predominantly comprised of citizens of a particular race, then your investigative efforts would tend to focus on persons of that race.

Let us suppose that the homicide victim was believed to be a member of a particular gang. In that event, you would be permitted and would be expected to try to identify other members of that specific gang or “set” who might have information about the circumstances of this particular crime. So too, if intelligence information reveals that there is a rival gang in the area, you would, of course, be expected to investigate the possibility that the rival gang may have been involved in this murder, and you could focus your attention on persons who are believed to be members of that specific rival gang, as well as on persons who might otherwise have information concerning the activities of that specific rival gang. (In Unit 10, we will be considering the gang problem in more detail.) In pursuing any such specific investigation involving a particular group or gang, an officer could, of course, exclude from consideration those persons who could not possibly be affiliated with this specific gang by reason of the gang’s own membership criteria.

These are all examples of legitimate law enforcement work. In these situations, you would not be using anyone’s race or ethnicity to draw a *generalized* inference of his or her propensity to commit crime. While the overwhelming majority of persons that you would select to approach and interview might happen to be persons of a particular racial or ethnic background, you would not be considering their skin color as the basis for a generalized or stereotype-influenced inference of criminality.

Another way to think about this distinction is that in this crime investigation scenario, the detective during the course of the ongoing investigation of specific criminal activity (the reported homicide) is only reacting to facts and circumstances over which he or she has no control. In this case, the officer is permitted, indeed expected, to “follow leads” wherever they may happen to go, and without regard to the racial or ethnic characteristics of any persons that the detective may encounter during the investigation.

This is very different from a spontaneous and “proactive” police-citizen encounter, such as where an officer on patrol is trying to first see whether a crime is being committed at all. In such a scenario, as may occur during a routine traffic stop, the officer is not following leads, so much as pursuing hunches in the hope of fortuitously uncovering as yet unreported and unrevealed criminal activity. As we will discuss more fully in Unit 13.3, courts in New Jersey are critical of this kind of proactive “digging,” especially when a police officer seeks to escalate a routine motor vehicle stop or pedestrian field inquiry into a full-blown criminal investigation.

Finally, it should be noted that law enforcement officers may obviously consider race or ethnicity in the course of an ongoing investigation when those physical characteristics are at issue in the case or are relevant to the elements of the specific offense that is the subject of the investigation. If, for example, police are investigating an alleged or suspected violation of the crime of bias intimidation defined at N.J.S.A. 2C:16-1, they may, of course, consider all circumstances that would tend to prove or disprove that the perpetrator acted “with a purpose to intimidate an individual or group of individuals because of race, color . . . or ethnicity.” N.J.S.A. 2C:16-1a(1).

In other words, law enforcement officers investigating the offense of bias intimidation, or any crime where race or ethnicity was related to the motive for committing the offense, may consider the race or ethnicity of the suspected perpetrator(s) and victim(s). This is simply another type of situation where police would be “following leads” in the course of an ongoing investigation of specific criminal activity (i.e., a specific event, episode, transaction, scheme or conspiracy).

UNIT 10: THE GANG PROBLEM

One of the most difficult challenges in complying with the basic rule that race and ethnicity may not be considered to any degree in deducing whether an individual is engaged in criminal activity arises in the context of how a law enforcement officer goes about determining whether an individual is a member of a gang or other criminal organization that happens to be comprised largely of persons of a given race or ethnicity. Regrettably, the gang problem in New Jersey has worsened in recent years, and law enforcement agencies will be expected to adopt strong measures to aggressively disrupt these criminal organizations. There are nonetheless many legal pitfalls and landmines that police officers must take careful steps to avoid. It is therefore important that we consider this issue in some detail.

We start our analysis by recognizing a simple and undeniable fact: some criminal organizations are comprised of persons of like racial or ethnic characteristics. Some of these groups or gangs are thus said to be exclusionary, meaning that they exercise their First Amendment right to associate with whomever they please, even if this means practicing a form of racism and bigotry.

The general rule for police under the Fourth Amendment is that a Terry stop or ensuing frisk may not be based solely on the fact that a person is a member of a particular group, even if other members of that group are often associated with criminal offenses. See, e.g., Drake v. County of Essex, 275 N.J. Super. 585 (App. Div. 1994). Were it otherwise, police would be permitted to repeatedly detain a known gang member any and every time he or she is recognized without regard to whether the officer is aware of any facts that suggest that the gang member is presently engaged in criminal activity.

Courts recognize, however, that a person's known membership in a specific criminal organization such as a particular street or motorcycle gang is highly relevant and may of course be considered by a police officer as part of the so-called "totality of the circumstances." For obvious and compelling reasons, moreover, gang membership may be especially relevant in the context of an officer's reasonable suspicion that an individual may be armed and dangerous, at least where members of the particular group that the person is believed to be associated with are known to typically carry firearms or other weapons.

The legal and practical problem for police officers is that we must reconcile this principle of Fourth Amendment relevance (gang membership is a legitimate factor for police to consider) with the fundamental Fourteenth Amendment principle that police are not permitted to draw any inferences of criminal activity from a person's race or ethnicity.

The answer to this dilemma is that while membership in a criminal organization is a legitimate factor that an officer may use in determining whether a person is presently engaged in criminal activity, or is armed and dangerous, an officer in this State is not

permitted to use the person's race or ethnicity in first assessing the likelihood that the person is, in fact, a member of any such criminal organization. To do otherwise would be to practice a form of legal bootstrapping, placing the cart before the horse by drawing an inference (the person is presently engaged in criminal activity) from a predicate fact (gang membership) that has not yet been established.

The key to complying with the Fourteenth Amendment in this situation lies in your ability to carefully "line up the ducks" of your reasonable suspicions. The notion that the Constitution requires police to pay careful attention to timing (the proper sequencing of police decisions) is hardly a new or radical idea. After all, we have always known that under the Fourth Amendment, officers must be prepared to articulate the specific reasons that justify their suspicions before acting upon those suspicions by engaging in conduct that intrudes upon Fourth Amendment interests, such as initiating an investigative detention or conducting a frisk. For example, police officers may not initiate a routine motor vehicle stop until after they have observed a motor vehicle violation. If an officer were to make the stop without first seeing a violation, the fact that the officer subsequently observed an equipment violation while walking up to the stopped vehicle would not, of course, justify the stop. Any such belated discovery of an equipment violation would be deemed to be a "fruit" of an illegal detention.

In sum, police officers in this State are prohibited from relying to any degree on generalized stereotypes about who is more likely to be a gang member. Rather, a law enforcement officer must have some objective and specific basis to believe that an individual might actually be a member of a particular criminal gang or group before the officer may draw an inference of criminality from any such group association. If, for example, an officer were to recognize that a motorist or pedestrian was wearing a jacket bearing the distinctive insignia of a specific motorcycle gang, the officer at that point would have an objective and articulable factual basis to suspect that the person is associated with that particular gang, and at that point, the officer could proceed to draw reasonable inferences from such specific gang affiliation. (In Unit 8.1, we found that the way in which a person dresses may in certain circumstances be considered to be an expressive form of conduct, which is something that police officers are allowed to consider in drawing reasonable inferences based on their training and experience.)

The critical point is that police officers should not simply guess at gang membership, or rely upon inarticulable hunches (which, as we have seen, may be influenced by all-too-common stereotypes). Rather, a law enforcement officer must be prepared to articulate why he or she had an objectively reasonable basis for believing that a particular person was in fact a member of a specific gang or group, based upon objective, articulable and specific indicators that have been provided through training or that were learned through personal experiences. It is also important to remember that the general rule is that police should focus on a person's conduct in deciding whether that person is engaged in criminal activity.

In the gang recognition context, this careful “line up your ducks” approach makes sense from a practical as well as legal perspective for the simple reason that the percentage of persons of any particular racial or ethnic background who are actually members of a criminal group is exceedingly small. It is, of course, true that a person could not be a member of a particular exclusionary group or gang unless the person shares the racial or ethnic characteristics of that group. Skinhead white supremacy groups that commit bias crimes, for example, are, by definition, comprised of Caucasians. It does not logically follow, however, that a significant percentage of persons of like characteristics (Caucasians, or Caucasians with shaved heads) are members of any such criminal organization. In fact, the percentage of persons who are actually members of any such organization is so small that an officer could make no rational (much less legally sufficient) conclusion about a person’s gang membership based on the person’s race or ethnicity.

To further explain this point, let us draw an example from the New Jersey law enforcement community’s tireless efforts to deal with so-called “traditional” organized crime groups that are sometimes referred to collectively as “*La Cosa Nostra*” or “the *Mafia*.” The *La Cosa Nostra* families that operate in the New York, New Jersey, and Philadelphia areas are comprised almost entirely of persons of Italian ancestry. Let us suppose that an officer were to pull over a motorist and deduce from the motorist’s surname that he is of Italian heritage. It almost goes without saying that it would be ludicrous (and offensive) for the officer to treat that citizen as if he were a suspected soldier, associate, lieutenant or *capo-regime* of a *La Cosa Nostra* family. It is true that this person could conceivably be a *Mafioso*; he is not precluded from that possibility according to the ethnicity-based membership criteria and recruiting practices of this particular gang. But all but the most unenlightened bigot understands that the percentage of Italian-Americans who are actually associated with organized crime is negligible. Indeed, no law enforcement officer in this State would even think for a moment to treat an Italian-American motorist under suspicion of being a *Mafioso* on the basis of the person’s apparent ethnic heritage.

The key point to understand is that this basic principle applies to all colors and ethnicities. This does not mean that there are not organizations comprised of persons of certain racial backgrounds or from certain foreign nations that, for example, traffic in illicit drugs or engage in other types of organized criminal activity. Regrettably, New Jersey is home to many African-American, Hispanic, Asian, former Soviet-bloc, and white supremacist criminal organizations. But the percentage of citizens from each and every racial and ethnic group who are actually members of such organized street gangs or drug trafficking networks is so small that no officer could entertain an objectively reasonable suspicion that a motorist or pedestrian is a member of such a gang or criminal enterprise on the basis of race or ethnicity.

For all of these reasons, it is not enough to provide gang “awareness” information to law enforcement officers in which we broadly describe the general nature of the worsening gang problem. Rather, we must provide detailed and specific gang recognition training that provides officers with the objective specific facts that they can use to recognize

ongoing gang activity and to reasonably determine whether a particular individual is likely to be associated with a particular gang. Such training must focus on the specific and distinctive hand signals, tattoos, insignia, jewelry, code words, rituals, and “colors” that are “flown” by specific gangs that are believed to be operating, organizing or recruiting within the trainee’s patrol jurisdiction.

Gang recognition trainers must be very careful to minimize the chances that the information that they provide will be taken out of context or misinterpreted and misapplied. A trainer before supplying a piece of information to an audience should always consider and anticipate how that bit of information is likely to be used by law enforcement audience members out on the street. In other words, instructors (and those who develop and disseminate intelligence bulletins and reports) should carefully consider the intended purpose for including a bit of information, especially when that information relates to a racial or ethnic classification.

By way of example, broadly announcing that “African American gangs are forming and expanding in this town,” without more specific information or explanation, could foreseeably cause local police officers to view all black youth in town under suspicion of being potential gang members. Any such generalized warning is inadequate and unacceptable because it is likely to be misinterpreted and foster broad-brushed stereotyping. For recognition training to be meaningful, the instructor must instead explain in precise detail how an officer can reliably determine whether a given citizen is (or is not) a member of a specific, particular gang.

Remember that a little knowledge can be a dangerous thing. In some respects, incomplete or imprecise gang “awareness” training is like taking a half-day course in Tae Kwan Do. You are likely to learn just enough to get into serious trouble.

UNIT 11: SOME SPECIFIC EXAMPLES OF RACIALLY-INFLUENCED POLICING

The problem of racially-influenced policing is by no means limited to the purposeful or even subconscious use of racial stereotypes in an effort to interdict illicit drugs on interstate highways. There are a number of other enforcement situations where race or ethnicity can inappropriately influence the exercise of police discretion. In this unit, we will talk about three such examples that can arise in any police department: (1) when an officer draws an inference of suspicion because a person does not appear to “fit” the neighborhood he or she is in; (2) when an officer draws an inference of suspicion because two or more persons of different races or ethnicities are congregating; and (3) when an officer draws an inference of suspicion because an individual does not appear to “fit” the vehicle that he or she is driving.

11.1 Persons Who Appear to be “Out of Place”

Police officers on patrol are expected to look out for suspicious behavior, that is, conduct that, while innocent on its face, might be consistent with ongoing criminal activity. By way of example, one of the modus operandi or “methods of operation” associated with street level drug activity is that persons from out of town will sometimes drive into an urban area that is known to be an “open air” drug market. These visitors are there to purchase drugs by means of what is sometimes referred to as a “stranger to stranger” transaction. (This is often done out in the open because these visiting purchasers are afraid to park their vehicles and venture into inner-city dwellings to complete transactions behind closed doors; the purchasers instead prefer the perceived safety and convenience of making transactions in or very near their vehicles.)

The question logically arises, when and under what circumstances can a police officer react to information that suggests that a person who is observed in such a high-crime area is not a resident of that area, leading to the inference that he or she may be there to conduct illicit business? Needless to say, some neighborhoods have a definite racial or ethnic composition, that is, the residents of that neighborhood or community may be predominantly of one race or ethnicity or another. The real issue, therefore, is whether and to what extent an officer may consider a person’s race or ethnicity in determining whether this individual is in fact a visitor who is here to engage in an illicit drug transaction.

Applying the general rule that we have restated repeatedly throughout this course, it is inappropriate for an officer to draw an inference that a person is a non-resident who is “up to no good” in a predominantly minority neighborhood by considering the fact that the person is white, since, in essence, the officer would be inferring possible criminal activity from the person’s racial or ethnic characteristics.

The same legal principle would, of course, apply in a case involving a minority citizen who was walking or driving in a neighborhood comprised predominantly of non-minority citizens. Indeed, this latter situation may seem to be a more obvious example of

impermissible race-influenced policing. Few would question that it would be inappropriate for an officer to infer that a minority citizen is “suspicious” simply because he or she is walking or driving in a non-minority neighborhood.

The critical point, however, is that the Equal Protection Clause requires equal treatment, and protects persons of all races and colors from being treated with suspicion based upon their race or ethnicity. In State v. Kuhn, 213 N.J. Super. 275 (App. Div. 1986), a Caucasian defendant had been observed in a vehicle conversing with two Hispanic males in a high-crime area. The appellate court expressly held that, “if defendant as a white person in a predominantly black neighborhood could be stopped and searched, so could any black person seen in a predominantly white neighborhood. That simply is not the law.” 213 N.J. Super. at 281.

The key to complying with this rule is to recall that police officers when drawing inferences of suspiciousness and criminality are required in New Jersey to focus not on a person’s racial or ethnic characteristics, but rather on the person’s conduct. If an officer were to observe an individual (without regard to his or her race or ethnicity) engaging in objectively suspicious conduct, then the officer could certainly act upon that observation. Thus, for example, police could take into account whether a person is driving slowly around the block or “cruising” in a high crime area or open air drug marketplace. An officer could also take into account whether the person stopped and called a known or suspected drug dealer over to his car, or made some kind of hand to hand transfer of an object.

These are objective facts that, although quite possibly innocent, nonetheless are consistent with criminal activity based on the modus operandi or methods of operation of persons who are engaged in, or who are about to engage in, illicit drug deals. So too, a person cruising slowly through a neighborhood could be “casing” a house or business in preparation for a future burglary or other criminal act. In all of these instances, the unusual movements and actions of the vehicle or its occupants would constitute objective facts that an officer could take into account in determining whether criminal activity might be afoot. The fact that such activity might also be consistent with innocent behavior (for example, the person may merely be looking at house numbers to find a particular address), does not preclude the officer from considering these facts in determining whether there is a basis to initiate a consensual encounter or an investigative detention. See State v. Arthur, 149 N.J. 1 (1997) (“It must be rare indeed that an officer observed behavior consistent only with guilt and incapable of innocent interpretation.”).

By the same token, the rule that we just discussed does not mean that a police officer is prohibited from considering whether a person is not a resident of a particular area, or may be a resident of or recently traveled to or from another specific jurisdiction, such as a known “source” city of illicit drugs. Rather, the point is that an officer may not rely to any degree on an individual’s skin color in determining whether the person’s presence is suspicious or warrants further investigation. While being from “out of town” is clearly not a sufficient reason to initiate an investigative detention, that fact might nonetheless be a relevant and a legitimate factor for a police officer to consider where, for example, the

officer knows that out of town citizens frequently come to a particular area to engage in criminal activity.

Thus, for example, if a police officer who routinely patrols a public housing project sees an individual that the officer does not recognize as a tenant, the officer may approach the individual to inquire whether he or she is a guest of a tenant, or is instead trespassing on housing authority property or is otherwise violating visitor security rules and protocols. So too, if a community policing officer while patrolling a public street knows everyone in the area and sees a person who he does not recognize, the officer may reasonably (and lawfully) infer that this person is not a resident of that area, and the officer at this point may take that race-neutral predicate fact into account in determining whether the person's presence warrants closer scrutiny. A police officer might also deduce that a motorist is likely to be a resident of another jurisdiction based upon information learned from a motor vehicle lookup. (Note that while police may "run the plates" of a vehicle without first observing a violation -- a so-called "random" lookup -- under New Jersey law, police may not access "personal information," such as the address of the registered owner, unless they have observed a motor vehicle violation or unless the initial "random" lookup information discloses a basis for further police action (e.g., the vehicle is reported stolen or the registered owner is on the revoked list). See State v. Donis, 157 N.J. 44 (1998). Of course, whether a motor vehicle violation is observed or not, the motorist's race or apparent ethnicity may play *no part* in an officer's decision to conduct (or not to conduct) a computer inquiry, whether the officer's purpose is to try to determine if the motorist is from another jurisdiction, or the inquiry is done for some other investigative purpose. See State v. Segars, 172 N.J. 481 (2002) (*per curiam*)).

Furthermore, the rule that we have just discussed does not mean that a police officer may not focus on and react to a person who is in a place where there is a race-neutral reason to believe that the person is trespassing or otherwise does not belong there. For example, police could certainly respond if they learn that someone is walking or driving in a restricted area, or in the parking lot of a closed store, or they learn that an adult is "hanging around" a schoolyard. An officer in these circumstances could certainly react to these situations by conducting a discreet surveillance to further scrutinize the person's conduct, or could go ahead and initiate a consensual field inquiry, or could even initiate an investigative detention or so-called "Terry" stop, provided, of course, that the facts taken together establish a reasonable articulable suspicion to believe that criminal activity is afoot. In State v. Nishina, 175 N.J. 502 (2003), for example, the New Jersey Supreme Court unanimously held that, based on the totality of the circumstances, the officer in this case had reasonable suspicion to stop and ask the defendant for credentials where the defendant was observed on school grounds late at night when the school was closed and offered no legitimate explanation for being on school grounds.

Once again, the point is that officers are allowed to scrutinize and investigate persons who appear to be out of place, such as persons who, based on their movements, seem to be lost. Police officers in this State are not, however, allowed to use race or

ethnicity as a factor in determining that the person's presence is suspicious.

11.2 Interracial Groups

Another example of impermissible racially-influenced policing occurs when a law enforcement officer draws an inference of suspiciousness from the fact that persons of different races or ethnicities are seen together or are traveling in the same vehicle. Any such inference would be based on the generalized racial stereotype that people tend to congregate only with persons of their own racial or ethnic backgrounds, and so when persons of different races interact, they are more likely to be engaged in some kind of illicit transaction. This broad-brushed stereotype is racially-based and thus can play no part in an officer's reasoning process, as was made clear by the court in State v. Kuhn, 213 N.J. Super. 275 (App. Div. 1986) – the case where the defendant was a Caucasian male who was seen in a vehicle conversing with two Hispanic males in a high crime area.

11.3 Persons Who Do Not Appear to "Fit" Their Vehicles

Yet another not so subtle kind of racially-influenced policing can occur when a police officer's decision to "run the plates" of a vehicle or to initiate a stop is in any way influenced by the notion that the driver does not appear to "fit" the vehicle that he or she is operating. The supposition that a person does not appear to "match" the vehicle based on the person's race or ethnicity is essentially nothing more than an inarticulate hunch predicated upon a stereotype, such as, for example, the broad brushed notion that minority citizens are less likely to be able to afford a high-priced vehicle, leading to an inference that either the vehicle is stolen, or else that the minority citizen must have some illegitimate source of income (such as drug trafficking) to be able to afford this automobile.

This is an especially important and problematic example of racially-influenced policing that we need to address and eradicate. Law enforcement agencies in New Jersey and throughout the country have received numerous complaints from men and women of color who have been repeatedly stopped by police for the most minor motor vehicle violations and who were essentially treated as criminal suspects when they happened to be operating expensive sports or luxury vehicles. Before you ever draw and act upon an inference that a person seems not to fit the vehicle he or she is driving, you must stop and ask yourself why exactly you suspect this to be so, and you must be absolutely certain that the driver's race or ethnicity played no part in your reasoning process. Remember, you cannot "run the plates" of a vehicle to check out a racially-influenced hunch, because that police act is subject to the requirements of the Fourteenth Amendment Equal Protection Clause even though the suspected motorist is unaware of and may never learn about your computer look-up. See State v. Segars, 172 N.J. 481 (2002) (*per curiam*).

PART III UNDERSTANDING THE NATURE AND PECULIARITIES OF SELECTIVE ENFORCEMENT LITIGATION

UNIT 12: HOW COURTS AND PROSECUTORS ADDRESS RACIAL PROFILING

12.1 The Role of Prosecutors in Screening Cases and Anticipating Litigation Problems

Police officers, as professionals, are entitled to know how courts go about reviewing and critiquing the exercise of police discretion. Police officers cannot fully appreciate how racial profiling cases will be litigated without first understanding the role of prosecutors, and how prosecutors go about addressing and *anticipating* the legal issues that might arise in a motion to suppress physical evidence based upon an alleged violation of a defendant's Fourth or Fourteenth Amendment rights.

It is a prosecutor's responsibility at the very outset of a criminal case to gauge the likelihood of ultimately prevailing in court. This review process is sometimes called "case screening." When a prosecutor determines that there is a significant possibility that key evidence may be suppressed, the prosecutor will tend to devalue the case as part of the plea bargaining process. (Almost 97% of all convictions for indictable crimes in New Jersey are the result of a plea agreement, rather than a trial.) In other words, the plea offer that a prosecutor tenders to a defendant will account for any perceived weaknesses in the case, including the *possibility* that crucial State's evidence may be suppressed.

In addition to considering the probability of ultimate success, the prosecutor will also consider the amount of time and effort that must be expended throughout the course of any anticipated litigation. When a prosecutor anticipates that a particular motion to suppress will be difficult or especially burdensome to handle, the prosecutor will take the anticipated expenditure of prosecutorial and judicial resources into account in deciding whether a case should be resolved through a negotiated guilty plea rather than a trial. (In State v. Soto, 324 N.J. Super. 66 (Law Div. 1996), the motion to suppress hearing involved a remarkable 75 days of testimony. Racial profiling cases also tend to involve extensive pretrial "discovery," where thousands of pages of police reports and other internal police department documents may have to be identified, copied and made available for inspection. See, e.g., State v. Ballard, 331 N.J. Super. 529 (App. Div. 2000).)

Finally, prosecutors must always consider whether litigating a case will produce adverse legal precedent, providing trial or appellate courts with an opportunity to make new law that will further limit the discretion and authority of police officers. (This concern applies to cases arising under both the Fourth Amendment and the Fourteenth Amendment.) It is often said in this regard that "tough cases make bad law."

One of the biggest problems we face, and one that we are beginning to tackle in this training course, is the need to improve the lines of communication between prosecutors and police. We know that there already is a natural tension between prosecutors and

police officers. After all, cops and troopers risk their lives to make criminal cases, whereas prosecutors are seen as trying to dispose of those cases as quickly and easily as possible. (It is interesting to note that the final resolution of a criminal case is called a “disposition.”) Too often, moreover, prosecutors do not do a good enough job explaining to police officers why cases were handled in the way that they were. This breakdown in the lines of communication has been a source of considerable frustration, leading some law enforcement officers to believe that prosecutors are just “dumping” racial profiling cases.

It is therefore important for police officers to understand the legal procedures and challenges that prosecutors will face in the courthouse when litigating a selective enforcement case. As it turns out, a prosecutor’s decision to dismiss a case, or to devalue it in the plea-bargaining process, does not necessarily mean that the prosecutor believes that the officer has engaged in discriminatory practices. (And as we have already seen, by no means does the decision to dismiss or downgrade a case constitute a finding by the prosecutor that the officer is a racist. See Unit 7.) Rather, the decision to dismiss or downgrade a case may mean only that the prosecutor has determined that there is not enough legal or factual ammunition available to successfully contest the case in light of the so-called “burden-shifting template” that has been adopted by the New Jersey Supreme Court. (We will discuss this “burden shifting” analytical model in Unit 12.5.) That is why it is

so important for police officers today to understand some of the litigation realities involved in selective enforcement litigation.

12.2 The Role of “Reviewing” Courts

Courts have the opportunity if not the obligation to “second-guess” the split-second decisions made by police officers out in the field. Indeed, a judge hearing a motion to suppress is often called a “reviewing court.” It may seem unfair to police officers that judges – who usually have no practical law enforcement experience – get to review an officer’s split-second decisions with the benefit of 20/20 hindsight and from the comfort and safety of courtrooms, offices and law libraries.

The problem is exacerbated because, in most cases, police officers do not get to see what happens inside the courthouse and rarely if ever get to observe an entire case from start to finish. As law enforcement professionals, however, police officers are entitled to understand the inner workings of the process by which judges analyze or, literally, “break down” a police officer’s roadside decisions. It is also important for police officers to understand some of the significant differences in the way in which courts analyze traditional Fourth Amendment cases, as compared to “selective enforcement” cases under the Fourteenth Amendment.

12.3 The “Motion Picture” Analogy

Police officers in New Jersey are far more familiar with the manner in which traditional Fourth Amendment claims are analyzed. We will therefore start here as a way of showing some of the critical differences between selective enforcement cases and cases involving “regular” search and seizure issues.

Fourth Amendment litigation focuses entirely on the conduct of a police officer during a particular encounter with a particular defendant. The analytical approach used by reviewing courts can be likened to watching a motion picture. The reviewing court is a “critic,” who will closely observe the officer’s conduct from start to finish, frame-by-frame as the story unfolds. (The court usually learns about what happened out on the street by listening to testimony, but sometimes, the court may have an opportunity to watch an actual motion picture if the on-the-scene encounter was recorded by an MVR (Mobile Video Recorder) in a police vehicle.)

The reviewing court always has the option of rewinding and replaying the imaginary motion picture, and the court also has the option to use what could be likened to the “slow motion,” “freeze frame” and “zoom in” features of a remote control on a DVD player, allowing the court to hone in and pay especially close attention to a particular “frame” of film that shows a particular step taken by the officer that may have especially important legal significance.

In some ways, this review process can be likened to the way in which an NFL

referee responds to a “coach’s challenge” following a controversial play. The referee will review the key aspects of the play in dispute from various angles, zooming in on some critical point and making full use of slow motion and freeze frame controls while the opposing teams wait anxiously to see if the referee will reverse the ruling made out on the field. (Under NFL rules, the ruling on the field will not be reversed in the absence of “indisputable visual evidence.” In essence, the NFL has established a “burden of proof” on the team challenging the play by creating a “presumption” that the ruling on the field is correct. As we will see in Unit 12.5, this same basic approach is used in both Fourth and Fourteenth Amendment litigation and is an extremely important concept that we will discuss in great detail.)

The key point for our present purposes is that under traditional Fourth Amendment analysis, while the reviewing court will look closely at this particular incident (the officer’s encounter with the defendant), the court will not look beyond that particular and specific episode. To go back to our NFL “coaches challenge” analogy, consider that the referee may look at a close play several times from different angles, but in deciding whether, for example, the receiver had caught the ball in bounds, the referee will not consider other plays involving that receiver. The referee, in other words, is not supposed to consider, for example, whether the receiver had been “robbed” by a bad call on an earlier play, or whether that receiver is known to be very athletic and thus very capable of having kept his feet in bounds while stretching to catch and exercise control of the football. The sole issue is whether the receiver stayed in bounds on this play. His reputation and past history is irrelevant.

So too, under traditional Fourth Amendment analysis, a reviewing court does not examine earlier or later encounters involving different citizens. The issue is not whether this particular officer generally complies with or violates Fourth Amendment rules (although an officer who has been found to be less than credible as a witness will face a tough road in all future court hearings). Rather, the only issue before the court is whether the officer had violated the Fourth Amendment *on this particular occasion*.

Going frame by frame through the encounter, a reviewing court will carefully examine each step or police decision that has legal significance, that is, steps where the officer was required to satisfy one of the “levels of proof” established under the Fourth Amendment. The court will decide whether the officer at that precise moment was aware of facts that satisfied the legal standard applicable to that particular intrusion upon protected Fourth Amendment interests.

If the reviewing court were to observe a frame of film in the imaginary motion picture that depicts a Fourth Amendment violation, then for all practical purposes, the film breaks at that exact point. As a general proposition, any information learned or evidence seized after the violation will likely be deemed to be a “fruit” of the violation and will thus be subject to the exclusionary rule.

12.4 Making Comparisons to Infer Purposeful Discrimination or a “De Facto” Agency Policy to Discriminate

A defendant may make a Fourth Amendment claim and a Fourteenth Amendment claim as part of a single motion to suppress evidence. The way in which the Fourteenth Amendment Equal Protection issue is litigated may be quite different from the manner in which the Fourth Amendment issue is handled. There are essentially two distinct ways that a defendant can pursue the alleged violation of the Fourteenth Amendment Equal Protection Clause. One way is by trying to show that the arresting officer impermissibly relied upon the defendant’s race or ethnicity in exercising police discretion on this specific occasion. In that event, the court will review the allegation in much the same way that it would examine a claimed Fourth Amendment violation, that is, by focusing on the actions of a specific officer during the course of a specific encounter, except that instead of having to determine whether the facts known to the officer were enough to satisfy a particular Fourth Amendment “level of proof” (e.g., “reasonable articulable suspicion,” or “probable cause”), the court will decide whether any of the facts relied upon by the officer were race-based and thus impermissible.

The other method for pursuing a Fourteenth Amendment Equal Protection claim is very different. Under this distinct theory, the defendant will try to demonstrate that the agency itself either had an actual policy to discriminate, or else had a so-called “de facto” policy to discriminate. A de facto policy essentially means the agency made it a practice to tolerate or to “look the other way” in the face of discriminatory policing.

When you consider the implications of this distinct method for pursuing Fourteenth Amendment litigation, it should be immediately clear why it is so important for police departments to establish and enforce a policy that prohibits, rather than tolerates, any form of discriminatory policing. As importantly, it is vital that every member of the department, from the chief all the way down to the newest recruit, fully embrace and help to enforce the agency's official policy to condemn all forms of discrimination. Always remember that it is possible for you to lose a motion to suppress evidence on Equal Protection grounds based not on your own conduct, but rather on the conduct of your brother and sister officers. To prevent that result, every officer must contribute to the overall effort to deter and condemn discriminatory policing, using peer pressure to establish a department-wide culture that will not tolerate racially-influenced policing.

As a practical matter, a defendant claiming a Fourteenth Amendment violation in a motion to suppress may resort to either or both of these two distinct theories in an effort to suppress the evidence. Whenever the defendant claims that the agency had either an official or a de facto policy to discriminate, then, unlike the mode of analysis used to resolve a Fourth Amendment claim, the reviewing court need not limit its review to a specific encounter between the arresting officer and the defendant. Courts instead may look for *patterns* of behavior. This means that a reviewing court may examine other episodes occurring at different times involving this same officer, a whole squad of officers, or even the entire department, and to do this, the court may consider "aggregate statistics." In Unit 16, we will consider the relevance and importance of aggregate statistics in more detail.

In addition to considering statistical evidence, a reviewing court hearing a Fourteenth Amendment claim may look at a department's regulations and standing operating procedures, the department's training programs, and how the department has responded to past racial profiling complaints in an effort to determine whether the department has an actual or de facto policy to permit officers to engage in impermissible discrimination.

As you can see, as compared to traditional Fourth Amendment litigation, litigation arising under the Fourteenth Amendment can become quite cumbersome and unwieldy in terms of the breadth and scope of the court's review of law enforcement conduct and policy. See Farm Labor Organizing Committee v. Ohio State Highway Patrol, 308 F.3d 523, 534 (6 Cir. 2002) (determining whether official action was motivated by intentional discrimination for purposes of an equal protection claim demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available). Whereas the typical discovery package in a Fourth Amendment case is a scant few pages consisting of one or two police reports and perhaps a radio log of a particular dispatch, in a Fourteenth Amendment case, where a defendant makes a colorable claim of discrimination, the prosecution may be required to turn over tens of thousands of pages of internal police department records. See, e.g., State v. Kennedy, 247 N.J. Super. 21 (App. Div. 1991); State v. Ballard, 331 N.J. Super. 529 (App. Div. 2000); State v. Clark, 345 N.J. Super. 349 (App. Div. 2001).

To understand why this is so, keep in mind that when a claim is made by a

defendant under the Equal Protection Clause of the Fourteenth Amendment, the defendant is essentially alleging that he or she had been subjected to “unequal” or “disparate” treatment. In other words, the gist of a selective enforcement claim under the Fourteenth Amendment is that this defendant was treated differently from other similarly-situated persons on the basis of an impermissible classification, such as race or ethnicity.

As a practical matter, it would be difficult if not impossible in most cases to establish one way or the other whether any particular individual had been treated differently from others by looking only at the way in which the police officer treated this individual suspect (unless of course the officer had displayed blatant and overt racial bias, as might be evidenced, for example, by the use of racial epithets or other outrageous conduct that by itself would demonstrate an officer’s racial animus). Rather, a selective enforcement claim generally requires the reviewing court to draw a comparison between the way in which this particular defendant was treated and the way in which other similarly-situated persons of other races or ethnicities have been treated. It is no surprise then that selective enforcement litigation can be quite protracted and wide-ranging in scope, going well beyond a painstaking review of the police officer’s conduct and decision-making processes in this particular encounter with this particular citizen.

12.5 The “Burden Shifting Template”

In State v. Segars, 172 N.J. 481 (2002) (*per curiam*), the New Jersey Supreme Court for the first time provided judges and lawyers with an analytical model to explain how selective enforcement claims are to be litigated. The Court embraced what it called a “burden shifting template” in racial targeting cases. Under this analytical model, a defendant who is making an Equal Protection selective enforcement claim bears the ultimate burden of proving by a preponderance of the evidence that the police acted with a discriminatory purpose, that is, that the police selected the defendant because of his or her race. In addition to that ultimate burden, the defendant claiming discrimination bears the preliminary obligation of establishing what is called a “prima facie” case of discrimination, that is, one in which the evidence, including any favorable inferences to be drawn therefrom, could sustain a judgment in the defendant’s favor. Once a defendant through relevant evidence and inferences establishes a prima facie case of racial targeting, a so-called “burden of production” shifts to the State to articulate a race-neutral basis for its actions.

One of the practical problems for police officers is that the “shifting of burdens” can be triggered by events that occur beyond an individual officer’s control or even awareness. For example, a claimant’s prima facie case may arise months or years after the fact through an analysis of aggregate statistics involving multiple police officers and encounters. This means that as a practical matter, you cannot always know when you might need to offer a race-neutral explanation for your conduct.

This circumstance highlights the need for accurate and thorough report writing and

record keeping in all encounters, to guard against the possibility that a particular encounter may become the subject of a Fourteenth Amendment claim at some future time. (It is a supervisor's responsibility to make certain that all reports are of high quality, and not just those that are likely to result in Fourth Amendment litigation, such as when an officer seizes evidence or makes an arrest.) You must always keep in mind that citizens may file internal affairs complaints and bring civil actions against police departments in cases that did not result in an arrest or the seizure of evidence. Indeed, a person filing a discrimination lawsuit may tend to be far more sympathetic to a jury if that civil plaintiff was personally innocent of any wrongdoing.

UNIT 13: MEETING THE BURDEN OF PRODUCTION: THE IMPORTANCE OF DOCUMENTATION AND REPORT-WRITING

It is hardly a radical idea to suggest that a police officer should be able to articulate the reasons for making legally significant decisions. Indeed, law enforcement officers have been trained for decades that when they conduct a warrantless search or seizure, their conduct is deemed by the courts to be “presumptively” unlawful. See State v. Moore, 181 N.J. 40 (2004) (a warrantless search or seizure is presumed invalid and the State as the party seeking to validate a warrantless search has the burden of proving its validity). See also State v. Pineiro, 181 N.J. 13 (2004) (the State must demonstrate by a preponderance of the evidence that there was no constitutional violation from a warrantless search). This means that the State in a motion to suppress will bear the burden of proving that the officer’s conduct was lawful whenever the officer’s decision to intrude upon a protected Fourth Amendment right was made without first having received express authorization (i.e., a warrant) from a “neutral and detached” judge.

Because this familiar Fourth Amendment “burden of proof” principle applies only to police actions that have Fourth Amendment significance, however, officers are only accustomed to being required to document the reasons for those particular actions that trigger a Fourth Amendment standard of proof, such as a stop, a frisk, an arrest or search. Police officers are therefore less likely to carefully analyze much less bother to document the reasons for police decisions that do not intrude upon Fourth Amendment liberty or privacy interests. This can cause a serious litigation problem in the event that a defendant mounts a Fourteenth Amendment claim and is able to trigger the “burden shifting template.”

Let us consider a specific example to highlight this point. As we have seen, the Fourth Amendment does not require an officer to articulate the reasons for ordering the driver of a lawfully stopped vehicle to exit the vehicle. See State v. Smith, 134 N.J. 599 (1994). It is therefore more likely that an officer may be inclined to exercise this option and actually order a driver out based on a mere hunch or gut feeling. While that poses no problem under traditional Fourth Amendment analysis, this hunch or gut feeling may turn out to be based on a stereotype involving race or ethnicity (e.g., the stereotypical notion that young men of color are more likely to be carrying weapons than young non-minority men). In that event, race or ethnicity would indeed have played a part in the officer’s decision, but, precisely because the officer was not thinking carefully about the decision, the officer may not have been consciously aware that he or she was using race or ethnicity inappropriately as a factor in deciding how to deal with this individual.

It is important to understand that the courts do not prohibit law enforcement officers from having hunches. Experienced police officers can develop a “feel” or “sixth sense” for situations where something seems to be amiss or is not quite “right.” The critical points to keep in mind are (1) a hunch is never enough to justify a Fourth Amendment intrusion (such as a stop, a frisk, or an arrest), and (2) even when you are not intruding on Fourth

Amendment liberty or privacy rights, you should not rely on a hunch in taking any action unless you make certain that your suspicion is not based on a person's race or ethnicity.

The importance of this last point was underscored by the New Jersey Supreme Court in State v. Maryland, 167 N.J. 471 (2001), a decision that we will discuss in more detail in Unit 15.2. In that case, the Court observed:

We do not intend to suggest that ordinarily a proper field inquiry could not be based on a hunch. But that rationale will not do here. Because the totality of the record suggests that the hunch itself was, in our view, at least in part based on racial stereotyping, it was insufficient to rebut the inference of selective law enforcement that tainted the police conduct. The officer's field inquiry is therefore defective. [167 N.J. at 486.]

Remember that any time that you cannot explain in English why you drew the inference that you drew (in other words, for example, why you suspected an individual of being involved in criminal activity, or of being more dangerous than others), then your suspicion is said to be, literally, "inarticulable." In that event, your reasoning will be invisible to a reviewing court and so the court may be forced to guess as to your internal thought processes, which exposes you to the risk that a skeptical court might infer that

your reasoning had been based on some impermissible, unstated basis, such as race or ethnicity.

At this point, we must step back and take a reality check. Obviously, it is not humanly possible for you to document all of the reasons for every decision that you make throughout the course of any one encounter, much less every encounter that might conceivably be reviewed as part of a selective enforcement claim. You therefore need to figure out when it is most important to document your reasoning process, recognizing that your entire duty shift cannot be spent filling out novel-length, stream-of-consciousness reports to protect you in the off-chance that these reports might someday be relevant in a selective enforcement proceeding. Indeed, police today complain, with justification, that too much of their time is already spent in the stationhouse filling out paperwork, rather than out on the street protecting the public. For this reason, it is important to understand when and under what circumstances reviewing courts are most likely to be skeptical and probing, because it is in these circumstances when an officer must be especially careful, thorough and precise in documenting the legitimate reasons for the exercise of police discretion.

13.1 Deviations from Routine or Normal Practice

Any deviation from an officer's normal or routine procedure can attract the attention of a reviewing court, prompting the court to wonder what factors the officer may have actually considered in deciding to treat a particular citizen differently from the way the officer has generally treated other citizens in roughly the same circumstances. You should therefore be certain to carefully document the reasons that explain your choice of action whenever you deviate from your normal or routine practice. After all, that is exactly when there is the greatest risk of engaging in the kind of selective enforcement or "disparate treatment" that courts will be on the lookout for.

If, for instance, it is your personal practice in certain circumstances to always order the driver of a lawfully-stopped vehicle to step out, then no legal issue can arise from that decision. (By way of example, you may have a routine personal practice to order a driver out when it is nighttime, the weather is good and there is a passenger in the front seat.) In contrast, if your general practice is not to order every driver to exit a vehicle in a given set of circumstances, then you should be prepared to explain why you deviated from your normal practice in a given case where you chose to order the driver to step out of his or her vehicle.

This same principle applies to all other discretionary steps during the course of the encounter, such as posing probing or accusatorial questions. (See Unit 13.5.) In other words, if it is your general practice to pose certain questions to motorists during a traffic stop, there will be no Fourteenth Amendment issue (although there could be Fourth Amendment implications if your questions inappropriately prolong the duration of the stop). If, however, you are more likely to pose certain probing questions to minority motorists, that practice constitutes impermissible racially-influenced policing even if the questions

themselves do not violate the Fourth Amendment.

13.2 Judicial Skepticism About High Discretion Encounters

We can expect greater judicial skepticism and probing whenever an officer has an especially wide range of discretion to act or to refrain from acting, since in those circumstances, there will be a correspondingly greater potential for an abuse of that unchanneled discretion. Not surprisingly, most claims of racial profiling arise when officers are on “discretionary patrol” rather than when they are responding to a “call for service,” precisely because discretionary patrol, as the name suggests, involves proactive police decisions where officers can pretty much choose what they want to focus on, as opposed to having to react to information provided by a police dispatcher.

This does not mean, however, that an officer assigned to patrol duties always has unlimited discretion. Sometimes, an officer has no choice but to react to a serious event or observation that cries out for a police response. Consider, for example, that when an officer sees a motorist traveling in excess of 90 mph, the officer has practically no discretion in deciding whether or not to initiate a motor vehicle stop. Of course, a police officer always has discretion to refrain from engaging in a high-speed pursuit when the officer believes that such a pursuit would be too dangerous. The point, however, is that rarely if ever would a police officer simply ignore a motor vehicle violation of this degree of seriousness.

This kind of excessive speeding, in other words, would virtually always prompt some law enforcement action, and for this reason, it would be exceedingly difficult for a defendant to claim that an officer had engaged in “racial profiling” in selecting his or her vehicle to be stopped when the defendant had been observed committing so serious a motor vehicle violation. (Remember, the test ultimately is whether the office would have treated the motorist the same if the motorist had been of a different race or ethnicity. When the observed violation is especially serious, it becomes clear that the race or ethnicity of the violator would make no difference in the officer’s decision to intervene.)

Similarly, police officers have comparatively little discretion and selectivity when dealing with obvious drunk drivers – a vehicle weaving all over the road and thus posing an immediate public safety risk to other motorists. Again, it would be difficult for a defendant to establish a prima facie case of discrimination where an officer had initiated a motor vehicle stop based on such observed conduct.

Police officers also have comparatively limited discretion when they are relying upon information provided by another. Consider a case where an officer is dispatched to a scene to investigate information that had been reported by a private citizen. This may be a report of an “aggressive driver” made by another driver via a cell phone, or may be a report from a concerned resident about a “suspicious person” prowling about in their neighborhood. From the responding officer’s perspective, these are essentially “B.O.L.O.” situations and if the citizen’s report had included a description of the suspicious person’s race or ethnicity, then the responding officer may, of course, take that circumstance into account in trying to identify this individual described in the citizen’s report. (As we saw in Unit 9, however, there may be circumstances where it might be readily apparent that the citizen’s report is itself based entirely on a racial stereotype, rather than an observation of objectively suspicious conduct, so that an officer would be expected to discount the reported information on its face.)

Recall that from a Fourth Amendment perspective, the information or “tip” provided to police by a citizen may or may not constitute a reasonable and articulable suspicion necessary to justify an investigative detention. The general rule is that an “anonymous” tip (where the identity of the tipster is unknown) is rarely sufficient to satisfy the reasonable articulable suspicion level of proof needed to justify an investigative detention, even when the tip pertains to a suspicious person with a gun. See Florida v. J.L., 120 S.Ct. 1375 (2002). But even if the information provided by a citizen is insufficient by itself to justify initiating an investigative detention, an officer would usually be permitted to undertake some form of less intrusive investigation, such as conducting a discreet surveillance, or approaching the person to initiate a consensual “field inquiry.” In other words, the information provided by a citizen and conveyed via a dispatcher would generally authorize an officer to focus attention on any person matching the description in the tip. Indeed, depending on the circumstances, it might well constitute dereliction of duty for an officer to simply ignore what is essentially a call for service. Note that in this type of situation, the officer is reacting to a reported event or incident, which is very different from proactive

“digging” for evidence of criminality, which we will discuss in Unit 13.3.

We have just considered several examples of “low discretion” encounters where there is a low potential for abuse of police discretion. Let us now consider what could be described as a “high discretion” encounter where, from a reviewing court’s perspective, there would be a correspondingly high potential for an abuse of police discretion and where it would be easier for a defendant to establish a prima facie case of selective enforcement.

Suppose that an officer were to pull over a motorist who had been traveling at 67 mph in a 65 mph zone, or for having a broken taillight. A reviewing court in such a case is much more likely to probe deeply into the true reasons why this vehicle was selected to be stopped, and the court is more likely to question whether race or ethnicity might have played some part in the exercise of police discretion. The reason for this is that police officers have much more discretion to ignore, or at least not act upon, a violation of such a comparatively minor nature. In fact, it is common for police to refrain from making a stop for such a violation, leading to an inference that there must have been something about this particular violator that distinguishes him or her from other similar violators who are not stopped.

This is not to suggest that it is illegal for a police officer to initiate a motor vehicle stop based on a minor moving violation or equipment violation. The point, rather, is that in such a case, you can expect that a reviewing court will be more likely to require you to explain the criteria that you used to select this vehicle to be stopped from among the universe of other vehicles that may have been committing violations that were at least as serious. (Remember, the gist of a “selective enforcement” claim is that you relied on inappropriate criteria to “select” an individual for a certain type of treatment or enforcement action.) Officers who want to avoid such heightened scrutiny of their discretionary decisions should focus their enforcement actions on more serious violations, since such encounters are less likely to result in a claim of being a so-called “pretext” stop. (We will discuss the issue of pretext stops – when they are permitted and when they are not permitted – in more detail in Unit 15.1.)

Let us consider yet another example of a type of police decision that involves a wide latitude of discretion precisely because the police conduct does not involve an intrusion on Fourth Amendment rights (but that nonetheless could raise issues under the Equal Protection Clause). Under New Jersey law, police officers are allowed to “run the plates” of any motor vehicle that comes into their line of sight. Because there is no expectation of privacy with respect to one’s license plate, this police action simply does not intrude on the Fourth Amendment and thus need not be justified under any Fourth Amendment standard or “level of proof.” See State v. Segars, 172 N.J. 481 (2002) (*per curiam*); State v. Donis, 157 N.J. 44 (1998). If the officer were to “run plates” in a truly “random” fashion, then there would also be no Equal Protection issue, since the definition of randomness is that every vehicle would have an equal chance of being selected for this type of police scrutiny. If, for example, an officer were to check every plate that he observes (or every third or fifth

vehicle), there could be no possibility of unlawful disparate treatment or discrimination based upon race or ethnicity.

But in the real world, an officer does not have the time or opportunity to run the license plates of every vehicle that the officer sees on the road. Nor is it feasible in many situations to select vehicles according to a neutral plan of the kind used at a drunk driving checkpoint (i.e., every third, every fifth vehicle, etc.) Accordingly, there must be some other selection criteria that an officer uses in choosing which license plates to check through the MVC database. If a statistical analysis were later to produce an anomaly (i.e., e.g., if the license plates of minority drivers are disproportionately represented among the universe of plates that were checked), an inference could be drawn that race or ethnicity had played some part in the exercise of police discretion, and in that event, using the “burden-shifting template” developed by the New Jersey Supreme Court, it would fall upon the officer to explain the legitimate, race-neutral criteria that he or she used to exercise this form of discretion. If the officer cannot produce a race-neutral explanation, then the prima facie case of discrimination established by aggregate statistics could be enough to result in a finding of racial targeting.

13.3 Judicial Skepticism About “Digging” for Evidence of Criminality

New Jersey courts in recent years have repeatedly expressed their concern with the police practice sometimes known as “digging,” as in digging for hidden treasure. From the courts’ perspective, this can be most problematic when a police officer assigned to patrol duties seems to be trying to transform or escalate a routine motor vehicle stop into a full-blown criminal investigation. It is one thing to be vigilant and observant. Police officers should always be paying attention to everything going on around them, and must be especially watchful for signs of criminal behavior. It is another thing, however, for officers to be launching “fishing expeditions,” especially when this has the effect of treating ordinary citizens as if they were criminal suspects.

This practice raises a number of Fourth Amendment issues. As importantly, serious Fourteenth Amendment Equal Protection concerns arise whenever it appears that officers may be more likely to engage in “digging” when they are dealing with minority motorists (based on the stereotype that such motorists are more likely to be engaged in criminal activity). Consider that from a reviewing court’s perspective, the problem with allowing police to embark on a “fishing expedition” during a run-of-the-mill traffic stop is not just that we might cast too wide a net, but also that we may throw out one that is too narrow, that is, one that has the practical effect of trolling for criminals too selectively based on subtle or even subconscious stereotypes of what a “typical” criminal looks like. (Recall from our discussion in Unit 7 that reliance upon a racial or ethnic stereotype is more likely to occur when officers rely on a “gut feeling” or “hunch,” that is, when officers cannot articulate the reasons for the exercise of police discretion and are not carefully thinking about why exactly they are doing what they are doing.) The courts’ response to the police practice of “digging” or “fishing” represents a good example of how the development of Fourth

Amendment search and seizure law has been influenced by concerns about Equal Protection violations, and these *Fourteenth* Amendment concerns may be lying just beneath the surface of a court's express Fourth Amendment analysis and reasoning.

In 1979, the United States Supreme Court ruled in Delaware v. Prouse, 440 U.S. 648, that police may not order a vehicle to pull over unless the officer has a reasonable articulable suspicion that a violation has occurred. In the vast majority of cases, this legal standard is satisfied by an officer observing a motor vehicle violation – a traffic offense. The reasonable articulable suspicion standard used in Delaware v. Prouse had first been developed in the landmark case of Terry v. Ohio, 392 U.S. 1 (1968) – a case that involved suspected criminal activity. (In Terry, a police officer became suspicious of two men pacing nervously on a street and repeatedly peering into a store – conduct consistent with casing a store for a robbery).

In the quarter century since Delaware v. Prouse was decided, many courts and police trainers and legal advisors have tended not to distinguish between true Terry stops (criminal suspicion encounters) and Prouse stops (traffic stops typically based upon observed motor vehicle violations). In fact, the term “Terry stop” is often casually used by police officers, lawyers and judges to describe the brief detention of a motor vehicle for a traffic offense. In other words, we have tended to lump routine traffic stops and criminal suspicion stops together under the broad rubric of “investigative detentions.” (An investigative detention, sometimes also called an “investigatory stop,” literally involves briefly detaining someone for the purpose of conducting an on-the-scene investigation of some suspected unlawful (but not necessarily criminal) behavior.)

Recently, however, courts, especially in New Jersey, seem to have begun to draw at least a tacit distinction between these two types of encounters, even though both are considered to be “investigative detentions” and both are justified by the same “level of proof,” namely, reasonable articulable suspicion. Reviewing courts generally expect police officers in these two different types of encounters to pursue a different sequence of routine steps as part of their prompt, on-the-scene investigation into the unlawful activity that justified the decision to initiate a temporary “seizure” of a person or vehicle. This means that an officer who stops a vehicle for an observed motor vehicle violation might not automatically be authorized to pursue a probing or protracted investigation into criminal activity absent some articulable basis for suspecting that the motorist is engaged in committing a criminal offense, at least where any such expanded investigation would have the practical effect of prolonging the duration of the encounter beyond that which is necessary to investigate and resolve the initial motor vehicle infraction.

Actually, this is hardly a new principle of law, although the courts are now becoming more strict in enforcing this principle. In the landmark case of Terry v. Ohio – the historic case decided in 1968 that first established the whole concept of an investigative detention – the United States Supreme Court ruled that reviewing courts must examine “whether the officer's action was justified at its inception, and whether it was reasonably related in scope

to the circumstances which justified the interference [with a citizen's right to go about his or her business] in the first place." 392 U.S. at 20 (emphasis added). Police actions that are not "reasonably related in scope" to the initial reason for the stop, in other words, can constitute a Fourth Amendment violation, especially when those actions have a tendency to prolong the duration of the encounter.

Indeed, reviewing courts are especially concerned with police conduct that unnecessarily extends the duration of a routine investigative detention. In United States v. Sharpe, 470 U.S. 675 (1985), the United States Supreme Court admonished that police must "diligently pursue" their investigation during a stop, and in Florida v. Royer, 103 S.Ct. 1319 (1983), the Court warned that the scope of an investigative detention "must be carefully tailored to its underlying justification . . . , and [may] last no longer than is necessary to effectuate the purpose of the stop." See also Illinois v. Caballes, 125 S.Ct. 834 (2005) and Muehler v. Mena, 125 S.Ct. 1465 (2005) (A lawful seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission," referring to the situation-specific "mission" to investigate and resolve the motor vehicle violation or other infraction that had justified the stop in the first place).

The New Jersey Supreme Court in State v. Davis, 104 N.J. 490 (1986), held in the same vein that an officer during a stop should use the least intrusive technique reasonably available to verify or dispel suspicion in the shortest period of time. In State v. Pegeese, 351 N.J. Super. 25 (App. Div. 2002), the court was even more pointed when it noted that in the absence of any evidence of criminal wrongdoing, once a law enforcement officer is satisfied that the operator of a vehicle stopped for a traffic violation has a valid license and the vehicle is not stolen, the officer may not detain the occupants of the vehicle for further questioning, since such detention could not be deemed to be "reasonably related in scope" to the circumstances which justify the stop in the first place. (In that particular case, the court concluded that prolonging the detention while the trooper waited for the results of a registration and license computer check to see whether the vehicle was stolen was permissible, since the registered owner was not present and neither of the occupants were able to present a driver's license or any other form of identification.)

The courts have thus relied upon the Fourth Amendment and Article 1, paragraph 7 of the New Jersey Constitution to impose limitations on the authority of police officers to use rudimentary investigative techniques, such as posing questions, that might not at first blush seem to be particularly intrusive. In Unit 13.5, we will discuss in more detail when and under what circumstances it is appropriate to engage citizens in conversation and pose probing questions or request citizens to provide identification. For present purposes, the key point is that under the "reasonably related in scope" test, courts may be skeptical when police exercise discretion by trying to elicit information from citizens when that information is not necessary to resolve the reason for the police-citizen encounter.

In Hornberger v. American Broadcasting Company, 351 N.J. Super. 577 (App. Div. 2002), for example, a New Jersey court held that it was unreasonable for an officer to

request identification from the passengers of a motor vehicle where the officer had no basis to suspect the passengers of any wrongdoing. (The Hornberger case involved a civil lawsuit brought by police officers against a news organization that broadcast a television report on “Driving While Black” based upon an incident involving three African American men who were acting as “testers” by agreeing to cruise in an expensive car to find out if police would stop them.) The Appellate Division in Hornberger recognized that there is a split in legal authority and that courts in some States permit such requests as a routine matter. In holding that the officer’s conduct was unreasonable, the court in Hornberger concluded that prohibiting routine demands for identification when there is no factual justification for such a demand is “most consistent with our [New Jersey] Supreme Court’s decision in Carty and the prophylactic purpose of discouraging the police from turning a routine traffic stop into a ‘fishing expedition for criminal activity unrelated to the stop.’” 351 N. J. Super. at 614, quoting from State v. Carty, 170 N.J. at 632. (Note that Carty is the case that holds that police during a traffic stop may not ask for permission to conduct a consent search unless the officer has reasonable articulable suspicion to believe that the search would reveal evidence of criminal activity.)

It is important to recognize that if the initial reason for a stop is an observed motor vehicle violation, as opposed to suspected criminal activity, then as a general proposition, an officer should not treat the driver or occupants as if they were *criminal* suspects, subjecting them to the kinds of probing tactics that are designed to ferret out criminal activity, unless there is some objective basis to believe that criminal activity may be occurring. The same principle would, of course, also apply to a so-called “community caretaking” encounter, where the officer has a reasonable basis to believe that a vehicle or occupant is in some kind of distress and needs assistance.

Even putting aside constitutional requirements, this approach makes sense from a policy perspective as well. Treating citizens as if they are criminal suspects when there is no legitimate basis for doing so is the antithesis of modern notions of community policing. Such an aggressive and inherently accusatorial tactic tends to leave citizens with a negative impression of police, fosters their earnest belief that they had been targeted or singled out for some unstated impermissible reason, and may ultimately prove to be an unsafe police tactic because it may lead to anger, resentment or frustration that could manifest itself in a response that puts the officer at greater risk.

Of course, the nature of a routine motor vehicle stop may change in midstream, where, for example, during a stop that was originally based upon an observed motor vehicle violation, the officer, based on objective observations and reasonable inferences drawn therefrom, begins to suspect that criminal activity may be occurring. When that happens, the purpose or reason for the stop changes, and it is as if the Delaware v. Prouse traffic stop was now “merging” with or evolving into a true Terry v. Ohio stop. The officer at that point would be authorized to begin to take a different series of actions, such as asking follow-up questions that are related to the newly-evolved suspicion.

This is sometimes referred to as a “broadening” of the investigation – a phrase that was used by the New Jersey Supreme Court in State v. Dickey, 152 N.J. 468 (1998). See also State v. Chapman, 332 N.J. Super. 623 (App. Div. 2000) (if during a traffic stop the circumstances give rise to suspicions unrelated to the traffic offense, police may broaden their inquiry beyond the circumstances of the initial stop). This practice is sometimes also referred to as “enlarging” a routine traffic stop or as a “shift in purpose.” See Illinois v. Caballes, 125 S.Ct. 834 (2005) (United States Supreme Court held that the “shift in purpose” from a traffic stop into a drug investigation was lawful because the dog sniff was not a search subject to the Fourth Amendment and because in the unusual circumstances of that case, the duration of the stop had not been extended by the dog sniff since the canine had arrived at the scene and completed its scent examination while the trooper who initiated the speeding stop was still in the process of writing a warning ticket; the dog handler had responded immediately to the initial radio call-in of the stop and the entire incident (from the moment the stop was initiated to the time when the drug detection dog alerted to the exterior of the trunk of the detained vehicle) lasted less than ten minutes.)

In sum, this is an unsettled and rapidly evolving area of search and seizure law. Several courts in oral or unpublished opinions have suggested that a police officer during a routine motor vehicle stop has no right to be “nosy” in investigating the possibility that the vehicle may be transporting drugs, or involved in other types of criminal activity. Reviewing courts will especially be on the lookout for any indication that race or ethnicity played any part in the officer’s decision to try to broaden the scope of the investigation beyond that which was minimally necessary to investigate the circumstances of the observed motor vehicle violation.

In the next few subunits, we will be talking about judicial skepticism about certain particular “digging” tactics, including police reliance upon the consent-to-search doctrine, and the posing of probing or “accusatorial” questions to detained motor vehicle violators and their passengers. For our present purposes, the key point is that when you initiate an encounter with a citizen, and especially when you initiate an investigative detention (*i.e.*, when you briefly detain someone for the purposes of conducting an on-the-scene investigation), you should (1) be able to articulate exactly what it is that you are investigating, and (2) carefully consider whether the investigative tactics or techniques you choose to use are reasonably geared to advance that particular investigation.

13.4 Judicial Skepticism About the Consent-To-Search Doctrine

Police officers must always be cognizant that some courts are especially concerned about the use of the consent-to-search doctrine because they believe that it has been used by police officers as a mean to promote “digging” for evidence of a crime, transforming routine traffic stops into protracted criminal investigations. Because some courts, in turn, believe that “digging” is itself a manifestation of the racial profiling problem, the courts in New Jersey have erected new legal restrictions under the guise of the Fourth Amendment. These new rules are designed in part to discourage officers from trying to broaden the

scope of a routine motor vehicle stop.

One of the concerns about the consent-to-search doctrine was that it allowed for a virtually unlimited degree of police discretion, precisely because there were no legal standards or limits imposed on when an officer could ask for permission to conduct a consent search. (All of the rules governing consent searches, including some especially strict rules that had been developed by the courts in New Jersey, dealt with how to obtain a knowing and voluntary waiver of Fourth Amendment rights, not when to do so. See, e.g., State v. Johnson, 68 N.J. 349 (1975) (Under the New Jersey Constitution, the State must prove that person knew that he or she had the right to refuse to consent to search).) Given the absence of a legal standard for requesting permission to conduct a consent search, police officers were free to base their decision on a mere hunch or gut feeling, leading some courts to speculate that these hunches, in turn, could be based on unstated, impermissible criteria that would be difficult to detect or monitor precisely because police were not required to articulate their reasons for wanting to conduct a consensual search.

In State v. Carty, 170 N.J. 632 (2002), the New Jersey Supreme Court dramatically changed the legal landscape, at least in the context of routine motor vehicle stops, by establishing a legal standard that police must meet before they can even ask for permission to conduct a consent search. Specifically, the Court in Carty diverged from long-standing federal and state precedent by holding that an officer during a motor vehicle stop may not prolong the duration of the encounter by asking a motorist to consent to a search unless the officer is aware of facts constituting a reasonable articulable suspicion to believe that the search would find evidence of criminal activity.

By imposing this legal standard for patrol officers to meet, the Court restricted and channeled the exercise of police discretion, reducing the potential for an abuse of that discretion. Furthermore, by effectively eliminating the potential for patrol officers to conduct roadside searches based on a whim or hunch, the New Jersey Supreme Court undoubtedly hoped to discourage officers from bothering to even begin to engage in any type of factually unsubstantiated “digging,” since such efforts would be far less likely to hit pay dirt without the ability to rely on the consent doctrine.

13.5 Judicial Skepticism About Posing “Probing or Accusatorial” Questions and Eliciting “Inconsistent Statements”

One of the most common examples of “digging” occurs when an officer decides to engage a driver and passengers in conversation in the hope of eliciting an outright and obvious lie, or at least “inconsistent statements” that might reasonably suggest that one or more of the occupants is lying, which in turn would suggest that criminal activity is afoot. Specifically, officers will sometimes pose a legitimate identification or itinerary question to the driver, and then later pose the same questions to a passenger to see whether their “stories” are inconsistent. (It should be noted that police officers will sometimes order a driver to exit a lawfully detained vehicle to preserve the option of posing the same itinerary

or identification questions to first the driver, and then to the passengers. The driver will be ordered out, in other words, so that the officer can pose questions to the driver under circumstances where the passengers cannot hear the driver's answers.)

Sometimes officers will be even more direct by asking a motorist straight out whether there are any illicit drugs in the vehicle. This is sometimes

referred to as an “accusatorial” question because the question by its very nature presupposes criminal activity.

Most police officers have been trained over the years to think that the law of police questioning or “interrogations” derives principally if not entirely from the Fifth and Sixth Amendments, which define and safeguard the right against compelled self-incrimination and the right to counsel. These Fifth and Sixth Amendment principles are distilled in the landmark case of Miranda v. Arizona. In reality, other constitutional provisions, including the Fourth and Fourteenth Amendments, may also impose limitations on the authority of police officers to pose questions to private citizens.

The Miranda rule, as it turns out, only applies when the person being questioned is in police “custody,” which in this context essentially means that the person is under arrest. Although accusatorial questions are clearly designed or at least are reasonably likely to elicit an “incriminating” response, police officers are not required to read Miranda warnings before posing such questions during a consensual field inquiry, or even during the course of an investigative detention. See State v. Hickman, 335 N.J. Super. 623 (App. Div. 2000) (following the reasoning in Berkemer v. McCarty, 104 S.Ct. 3138 (1984)).

While posing such questions during the course of a field inquiry or investigative detention is clearly permitted under the Fifth Amendment and the Miranda rule, that does not mean that there are no constitutional issues concerning the propriety and legal impact of this police tactic. Recall from our earlier discussion in Unit 5.1 that various provisions in the State and Federal Constitutions define and safeguard a number of distinct and sometimes overlapping civil rights. The key point, of course, is that police officers in their interactions with private citizens must comply with *all* of the various rules established under all of the various constitutional provisions that are designed to impose limits on the exercise of police discretion.

We will start our analysis by discussing the Fourth Amendment implications whenever an officer is using questions to “dig” for evidence of criminal activity. While the Fourth Amendment is generally not thought of as dealing directly and specifically with police questioning, we must always remember that this constitutional provision safeguards, among other things, a right of liberty, that is, the right that citizens enjoy to move about freely, to be left alone, and to go about their affairs without being interrupted or unduly delayed by government agents. Accordingly, any police conduct that unreasonably extends the duration of a nonconsensual police-citizen encounter may violate the Fourth Amendment or its state constitutional counterpart.

The United States Supreme Court has repeatedly held that mere police questioning does not constitute a seizure under the Fourth Amendment. See most recently Muehler v. Mena, 125 S.Ct. 1465 (2005). In Florida v. Bostick, 111 S.Ct. 2382 (1991), for example, the Court explained that “even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the

individual's identification; and request consent to search his or her luggage.”

In Illinois v. Caballes, 125 S.Ct. 834 (2005), the Court nonetheless warned that a lawful traffic stop “can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” Furthermore, we now know after State v. Carty, 170 N.J. 632 (2002), that under the state constitutional counterpart to the Fourth Amendment, certain questions may not be posed by law enforcement officers in New Jersey absent reasonable suspicion of criminal activity. As we considered in the preceding unit, the New Jersey Supreme Court in Carty rejected a long line of federal (and State) precedent by holding that police officers during a traffic stop may not ask a motorist whether he or she would be willing to consent to a search unless the officer is aware of facts that constitute a reasonable suspicion to believe that the search would find evidence of an offense. We therefore know that at least some of the above-quoted language in Florida v. Bostick is no longer good law in this State.

The rules under the Fourth Amendment (and especially under Article 1, paragraph 7 of the New Jersey Constitution) may be particularly strict when the police questioning is accusatorial in nature. An accusatorial question is one that presupposes criminal activity, such as “Are you carrying any illicit drugs?” (Note that asking a person to give permission to conduct a consent search is impliedly accusatorial, especially now that the New Jersey Supreme Court has ruled in State v. Carty that there must be reasonable suspicion to believe the consent search would uncover evidence of an offense.)

New Jersey courts have recently held that posing an accusatorial question can in at least certain circumstances transform a consensual field inquiry into a full-blown “Terry” stop. See State v. Rodriguez, 172 N.J. 117 (2002). In State in Interest of J.G., 320 N.J. Super. 21 (App. Div. 1999), the court went even further and suggested that posing an accusatorial question *automatically* converts a field inquiry into an investigative detention. (The New Jersey Supreme Court in Rodriguez declined to decide one way or the other whether it would embrace such a strict, automatic rule governing accusatorial questions.) Most recently, the Court in State v. Neshina, 175 N.J. 502 (2003), observed that a field inquiry occurs when an officer questions a citizen in a manner that is not “harassing, overbearing *or accusatory in nature*.” (emphasis added).

Note that any such escalation from a consensual field inquiry into an investigative detention can have profound legal consequences, since at the precise moment a police-citizen encounter becomes an investigative detention, the detaining officer must be aware of facts constituting a reasonable articulable suspicion that criminal activity is afoot. If the officer at that moment does not satisfy the reasonable articulable suspicion level of proof, the field inquiry-turned-investigative detention is deemed to be unlawful and any information learned or evidence seized after that precise point in the encounter (that “frame of film” in our motion picture analogy) will be subject to the exclusionary rule.

But let us suppose that we are not talking about a field inquiry, but rather a case

where the tactic of posing an accusatorial question is used after a person has already been temporarily “seized” for Fourth Amendment purposes, such as a traffic stop. In that event, the accusatorial question cannot convert the encounter into an investigative detention because the encounter is already in the investigative detention mode. How then will courts react to this form of “digging”? What are the limits imposed on the authority of an officer to engage detained motorists in conversation?

This aspect of search and seizure law in New Jersey is evolving and unsettled. As we have seen, courts seem to be beginning to distinguish between Delaware v. Prouse traffic stops and true Terry v. Ohio criminal suspicion stops. Police officers should remember that as a matter of sound law enforcement policy, if not as a matter of settled law, it is generally inappropriate to treat a motorist who is stopped for a mere motor vehicle violation as if he or she were a criminal suspect unless there is some objective factual basis for doing so. At a minimum, police officers must expect reviewing courts to look closely at the reasons for subjecting a person detained in a routine motor vehicle stop to probing questions that, by their nature, presuppose criminal activity.

We also need to consider the legal implications of somewhat less aggressive and accusatorial forms of police probing, such as posing a series of questions that are designed to elicit indications of deception. While this aspect of search and seizure law is also unsettled, always keep in mind that one of the key questions that reviewing courts will address is whether any such probing questions unduly extended the duration of the police-citizen encounter.

As a general proposition, once an investigative detention (e.g., a motor vehicle stop) has been lawfully initiated, police are authorized to pose questions to a detained motorist so long as those questions are not excessive and do not unduly prolong the encounter, and provided that the questions are reasonably related to the reason for the stop. Compare State v. Chapman, 332 N.J. Super. 452 (App. Div. 2000) (the questions in that case concerning the motorists’ travel itinerary had a “substantial nexus” to ascertaining the reasons for erratic driving; if during the stop, or as a result of reasonable inquiries initiated by officers, the circumstances give rise to suspicions unrelated to the traffic offense, then police may broaden their inquiry beyond the circumstances of the initial stop) with State v. Hickman, 335 N.J. Super. 623 (App. Div. 2000) (police during a motor vehicle stop may question occupants on a subject “unrelated to the purpose of the stop” so long as such questioning does not extend the duration of the stop). Compare also Muehler v. Mena, 125 S.Ct. 1465 (2005) (Officers’ questioning of defendant about her immigration status while she was detained during execution of a search warrant did not constitute a Fourth Amendment violation when the questioning did not extend the time she was detained).

One thing is certain. Police are *permitted*, indeed are *expected* to pose questions during the course of a traffic stop or any other kind of encounter with private citizens. It is therefore a gross exaggeration to suggest that police officers during a routine, noncriminal encounter are precluded by the Fourth Amendment (and Article 1, paragraph 7 of the New

Jersey Constitution) from investigating possible criminal activity. The key is to understand the nature and reasons for the constitutional limitations that are indeed imposed on police discretion. The practical test can be simply stated: police officers should have a legitimate basis for posing questions that are likely to have the effect of extending the duration of an encounter. This is hardly an insurmountable burden. Indeed, as it turns out, police officers continue to enjoy a wide (but not unbounded) latitude of discretion in pursuing an on-the-scene investigation during the course of routine encounters.

For example, because the overwhelming majority of motor vehicle stops involve an observed speeding violation, officers are almost always permitted to ask what are sometimes referred to as “itinerary questions,” that is, questions that ask where the motorists are heading, where they are coming from, and what is the purpose of their travel. Such point of origin and destination questions are relevant or “reasonably related” to investigating why the motorist was traveling in excess of the speed limit, and it is appropriate for the officer to consider these circumstances in deciding, for example, whether to issue a summons for speeding as opposed to merely issuing an oral or written warning.

The problem is that there is no simple or “bright line” rule governing what questions may be deemed by a reviewing court to be “excessive.” Police officers must therefore use common sense in deciding how long to pursue a line of questioning with a detained motorist or pedestrian. Obviously, in every encounter, it is appropriate for an officer to pose at least some questions to the motorist so as to determine whether the driver is coherent (in other words, to establish whether the person appears to be intoxicated), and also to determine the motorist’s state of mind. From an officer safety perspective, moreover, it is obviously important to ascertain at the earliest possible opportunity in the encounter whether a motorist appears to be extremely angry or agitated.

Police officers should also be aware that there may be legal issues concerning the manner in which they interact with passengers during the course of routine traffic stops. While an officer will always engage the driver in conversation, this is not necessarily true with respect to a passenger who is not suspected of any offense (such as a seat belt infraction). The courts in New Jersey have on occasion drawn a distinction between drivers and passengers for purposes of routine investigatory or precautionary steps that may be taken by police during a motor vehicle stop. In State v. Smith, 134 N.J. 599 (1994), for example, the New Jersey Supreme Court ruled that police may not automatically order a passenger to step out of a lawfully stopped vehicle, whereas police may automatically order the driver to exit the vehicle. The Court in Smith observed:

[w]ith respect to the passenger, the only justification for the intrusion on the passenger’s privacy is the untimely association with the driver on the day the driver is observed committing a traffic violation. Because the passenger has not engaged in culpable conduct, the passenger has a legitimate expectation

that no further inconvenience will be occasioned by any intrusion beyond the delay caused by the lawful stop. [134 N.J. at 615.]

As we saw in Unit 13.3, reviewing courts are becoming increasingly wary of any effort by an officer during a “routine” traffic stop to mount a “fishing expedition” or otherwise “dig” for evidence of criminality that is not immediately apparent. In Hornberger v. American Broadcasting Company, 351 N.J. Super. 577 (App. Div. 2002), the court found it to be unreasonable for the officer to have requested identification from passengers where there was absolutely no basis to suspect the passengers of any wrongdoing. Compare State v. Sirianni, 347 N.J. Super. 382 (App. Div. 2002), certif. den. 172 N.J. 178 (2002), where the court declined to adopt a bright line rule that a request for identification must be based upon reasonable articulable suspicion to believe that the person has committed a crime.

(As a matter of common sense, of course, not all forms of casual conversation will raise constitutional concerns. If, for example, a backup officer engages a passenger in friendly conversation while the other officer questions the driver about the circumstances for the stop, there is not likely to be cause for judicial anxiety. Not all conversations between an officer and a citizen are “probing” in nature, or are likely to prolong the duration of the stop.)

While the law concerning the questioning of passengers is unsettled and evolving, there are clearly times when it is perfectly appropriate for an officer to pose questions to a passenger during the course of a traffic stop. For example, an officer should pose questions where the driver turns out to be on the revoked list or appears to be intoxicated, since the officer needs to ascertain whether the passenger is sober and licensed to operate the vehicle. Similarly, an officer may pose questions to a passenger where the registered owner is not present and it is appropriate to verify that the driver has permission to operate this particular vehicle. In these circumstances, the questions posed to a passenger would be reasonably related to a legitimate question that has arisen during the course of the traffic stop.

It is certainly understandable why a police officer would always want to know the identity of the vehicle occupants, since an officer armed with this information would be able to run a criminal history check and because an occupant might be less likely to flee or resort to violence if he or she knew that the officer had ascertained his or her identity. The point, however, is that it is by no means clear that officers are automatically authorized to pose questions to occupants during routine traffic stops. Consider that passengers are not really “witnesses” to a mere traffic offense (prosecutors in municipal court do not call civilian witnesses to establish that the driver was speeding, for example), and therefore, depending on the circumstances, a passenger’s cooperation may not be relevant or “reasonably related” to completing the investigation of the observed traffic infraction that justified the stop in the first place. An officer should therefore be able to articulate why it is appropriate

to interact with a passenger by posing probing questions, especially when the nature of those questions might lead a citizen to believe that he or she is suspected of something or otherwise is “under investigation.”

At this point, it would be helpful to recap and synthesize the limitations imposed by law on an officer’s authority to “ask the next question” during the course of a noncriminal encounter. In doing so, we need to be as clear and precise as possible so that officers can be confident in posing questions that are perfectly legitimate and lawful. It is critically important that police officers not be chilled from asking questions whenever there is an objective basis to believe that something may be amiss. The federal and State Constitutions do *not* require officers to put on blinders or avert their eyes during an encounter, and officers should never ignore any sights, sounds or smells that may raise legitimate suspicion of possible criminality. After all, every officer’s core mission is to protect the public by detecting and deterring criminal activity.

But because police discretion is not unlimited, and because the end goal of protecting public safety by ferreting out crime does not necessarily justify all investigative means, an officer during a routine, noncriminal encounter with a private citizen should be able to articulate why he or she is pursuing a particular avenue of investigation or line of questioning, and this in turn can best be done when the questions are based on the citizen’s *conduct*, that is, what this particular citizen said or did (or didn’t say or do) that might provide cause for further inquiry or more intensive scrutiny.

As we have seen repeatedly throughout this course, some of our Fourth Amendment rules (e.g., limits on prolonging the duration of a stop) are designed in part to safeguard Fourteenth Amendment Equal Protection rights, reflecting the sneaking suspicion by some reviewing courts that a citizen’s race or ethnicity may sometimes play a role in the exercise of police discretion. That being so, our strategy for complying with the Fourth Amendment can be based on our strategy for complying with the Equal Protection Clause and Attorney General Law Enforcement Directive 2005-1:

First you should focus on the citizen’s *conduct*. Your observation of some unusual or suspicious circumstance would justify posing a question, just as an unusual or suspicious reaction or response to a police question would always warrant a follow-up question.

Second, you should be prepared to *document* the objective basis or reason(s) why you bothered to pose a particular question or decided to pursue a line of questioning. (Recall that while the Fourth Amendment is mostly concerned with *what* happened, the Fourteenth Amendment is just as concerned with *why* an officer acted as he or she did.) This two-pronged strategy will help to inoculate you from claims arising under *both* the Fourth and Fourteenth Amendments.

The bottom line is that in today’s legal climate, you should always be prepared to answer *why* you elected in the exercise of discretion to undertake every investigative step

that you took during the course of a police-citizen encounter. It therefore makes sense to think about the rationale for posing questions to passengers (and drivers) before you pose them. Remember, the cornerstone of the Fourth Amendment is “reasonableness,” which requires you to be *reasoning* (i.e., thinking about what you are doing) at all times.

In sum, when you pose a question during the course of a routine traffic stop (whether to the driver or to any other occupants) and that question has the capacity to extend the duration of the stop, you should make certain that the question is “reasonably related” to one or more of the following circumstances:

(1) the initial reason for the stop (i.e., the observed motor vehicle violation, and the sobriety of the driver (and passenger) when this is in question);

(2) ownership of the stopped vehicle and the lawful authority of the driver to be operating this vehicle (i.e., the driver’s identity, license status and relationship to this particular vehicle, and the bona fides of the vehicle registration and insurance coverage);

(3) whether an occupant is the subject of a B.O.L.O. bulletin, or

(4) some suspicious or at least unusual fact learned or observation made during the course of the encounter that justifies posing follow-up questions or “broadening” the scope of the on-the-scene investigation (such as, for example, a “furtive” movement, see Unit 13.7, a discrepancy between the driver/vehicle credentials and MVC records, an implausible or inaccurate response to a lawfully propounded question, an item in plain view that seems inconsistent with the situation or at least consistent with unlawful activity, or some piece of information provided by a dispatcher or mobile data computer before or during the encounter, etc.).

Remember that from a Fourth Amendment analytical perspective, reviewing courts are principally concerned with whether the detaining officer’s conduct unnecessarily extended the duration of the encounter. See, e.g., State v. Pegeese, 351 N.J. Super. 25 (App. Div. 2002) (once the officer is satisfied that the operator of a lawfully stopped vehicle has a valid license and the vehicle is not stolen, the officer may not detain the occupants for further questioning). For this reason, it is generally a good idea to pose any “probing” questions during what could be described as the “downtime” when the officer is waiting for information to come back from a mobile display computer or the dispatcher concerning the bona fides of the vehicle registration and the operator’s license. See State v. Chapman, 332 N.J. Super. 623 (App. Div. 2000) (court noted that most of the questions were posed while the officer was awaiting computer verification so they did not have the effect of prolonging the duration of the encounter).

Finally, and perhaps most importantly for our present purposes, you must always keep in mind that there are also Fourteenth Amendment Equal Protection issues that would arise if it could be established that an officer does not routinely use the same probing tactics when interacting with non-minority motorists. Always remember that courts tend to be skeptical and are more likely to create or more strictly enforce *Fourth* Amendment rules limiting police discretion when they believe that officers may be relying on race or ethnicity in exercising discretion. Recall also that the Equal Protection Clause applies to *all* police decisions, whether or not the decision intrudes on a Fourth Amendment liberty interest by prolonging the duration of a stop.

While police officers in this State are expected to be vigilant and watchful for objective indications of criminal activity, they must not, of course, rely to any extent on race-influenced stereotypes in their effort to ferret out criminal activity. You must therefore always ask yourself this critical question: would you have posed the same questions to the driver and/or passengers of a detained vehicle if they had been of a different race or ethnicity? If the answer is no, then the decision to pose those questions represents a form of racially-influenced policing in violation of the statewide nondiscrimination policy set forth in Attorney General Law Enforcement Directive 2005-1.

13.6 Judicial Concerns About Misuse of the Frisk Doctrine

A number of courts have expressed concern about police abuse of the “frisk” doctrine, which has resulted in a series of cases that restrict the authority of police officers to engage in this self-protective tactic. The caselaw in New Jersey makes clear that protective frisks (sometimes also referred to as “patdowns”) may not be done “routinely,” much less “automatically,” unless the initial reason for the stop was a reasonable articulable suspicion that the person was engaged in criminal activity involving violence or weapons. See, e.g., State v. Lipski, 238 N.J. Super. 100 (App. Div. 1990) (police may not routinely frisk a detained motorist for weapons). The basic rule is that a frisk is only authorized where the officer can point to facts and circumstances that constitute a reasonable articulable suspicion to believe that the specific person to be frisked is armed and dangerous. See State v. Thomas, 110 N.J. 673 (1988). It is not enough that officers earnestly but subjectively fear for their safety because they are in close proximity to a detained citizen, such as when they order occupants to exit a vehicle or are administering a field sobriety test.

In State v. Garland, 270 N.J. Super. 31 (App. Div. 1994), the court adopted a simple and straightforward rule of thumb: if the reason for the initial stop does not automatically include an objective basis to believe that the suspect is armed and dangerous (in other words, if the stop is not based, for example, on a reasonable suspicion that the person had recently committed an armed robbery or other offense that by its nature involves violence or weapons), then a frisk is not permitted unless some event occurs between the stop and the frisk that leads to the objective belief that the detained person is armed and dangerous. 270 N.J. Super. at 42.

It is critically important for police officers to recognize that at least some courts believe that some officers are more likely to engage in “routine” or even casual frisking when they are dealing with minority citizens. (Such “casual” frisking may involve a frontal or “face-to-face” frisk where the officer nonchalantly pokes around a citizen’s pockets without taking the usual precautions associated with a properly executed protective frisk, which is generally done from behind while the suspect’s hands are away from his or her body or are otherwise under control so that the officer maintains a positional and tactical advantage.) These courts believe that some officers, in other words, rely on a racial stereotype – the notion that minority citizens are more likely to be armed and dangerous than non-minority citizens – to justify the decision to initiate a frisk. Obviously, in any case where this is true,

the officer would be engaging in racially-influenced policing in clear violation of the law and policy in this State.

The bottom line is that police officers in this State are strictly prohibited from drawing any inference regarding the likelihood that a person is carrying a concealed weapon based to any degree on the person's race or ethnicity. Rather, the decision to initiate a protective frisk for weapons must be based on objective, race-neutral facts that are specific to the particular individual who the officer intends to frisk. It is absolutely imperative that those facts be thoroughly and accurately documented, whether or not the frisk actually revealed a weapon.

All police officers have a vested interest in making certain that their colleagues comply with these Fourth and Fourteenth Amendment rules. The frisk doctrine is a vital tool designed to enhance officer safety. Any abuses of the frisk doctrine will only encourage courts to impose further restrictions on the exercise of police discretion.

13.7 Judicial Skepticism About Overreliance on "Nervousness" and "Furtive Movements" as Suspicion Factors

Some courts have criticized police officers for relying too often and too heavily upon certain facts or observations in order to justify treating detained motorists as criminal suspects. Specifically, some courts have expressed concern about police reliance upon "unnatural nervousness" and "furtive movements." These judges believe that it is too easy for police to misinterpret or place too much emphasis upon nervousness and furtiveness in drawing inferences of ongoing criminal activity, using these subjective factors to justify pre-existing suspicions that are really based on hunches and perhaps influenced by racial or ethnic stereotypes.

Although "unusual nervousness" and "furtive movements" are *legitimate* factors that police may consider as part of the "totality of the circumstances," whenever you rely upon either or both of these suspicion factors, it is especially important for you to fully and specifically document the circumstances. It is not enough, for example, to write in a report that a motorist made a "furtive" movement without fully explaining exactly *what* the movement was, and why you reasonably believed that that movement was threatening or otherwise consistent with criminal (as opposed to innocent) behavior. See State v. Daniels, 264 N.J. Super. 161 (App. Div. 1993) ("Although such characterizations [the officer describing suspect's movement as "furtive"] may be helpful in understanding a police officer's subjective reactions, they are not talismanic, search justifying "sesames." The critical inquiry is the objective nature of the movement.").

Part of the problem lies in the fact that the word "furtive" is extremely nebulous and does not mean much. It is defined in the dictionary as "concealed, or hidden or stealthy." The term thus encompasses a wide range of behaviors, some of which are far more threatening or consistent with criminal behavior than others.

As the dictionary definition suggests, the one common feature in all “furtive movement” cases is that the movement, at least initially, is unexplained (precisely because it was concealed or hidden). This logically begs the question of who will have the burden of explaining the true nature and significance of the movement. As we have seen, under traditional Fourth Amendment law, whenever an officer is acting without the benefit of prior authorization from a court, the burden of proof generally rests with the State in a motion to suppress.

An officer confronted with any unexplained or ambiguous movement should therefore consider the feasibility of posing a question to the person concerning the movement, trying to elicit some explanation. The citizen’s explanation may dispel the threatening or suspicious nature of the movement, or, in contrast, may heighten the officer’s concern, providing a new factual basis for suspicion, where, for example, the person denies having made a movement that the officer actually observed. Such a denial is essentially a form of lying, which is an extremely important circumstance, one that is inherently suspicious and that logically supports or corroborates an inference that criminal activity may be afoot and that weapons may be present. See again State v. Daniels, 264 N.J. Super. 161 (App. Div. 1993) (the officer’s concern engendered by the front seat passenger’s reaching under seat was heightened by the passenger’s denial of these actions so that furtive gesture ripened into reasonable articulable suspicion).

A number of courts have also expressed concern that police rely too much on a suspect's nervousness as evidence of a "consciousness of guilt." Recently, the New Jersey Supreme Court in State v. Stovall, 170 N.J. 346 (2002), explained that nervousness is a perfectly legitimate suspicion factor, notwithstanding that it is common for people to react nervously when questioned by police. See also State v. Hickman, 335 N.J. Super. 623 (App. Div. 2000) (nervousness in responding to questions justified broadening the scope of the officer's inquiries).

Even so, it is important for police officers to understand why some trial courts remain skeptical. Law enforcement officers may tend to interpret nervousness as evidence that a person is hiding something. But there can be many reasons why a person might be nervous in the presence of a uniformed officer. Indeed, courts are likely to assume that *all* citizens (including law abiding citizens) are at least somewhat apprehensive when they are pulled over by police. See, e.g., State v. Jones, 326 N.J. Super. 234 (App. Div. 1999) (driver's nervousness was "to be expected").

This fact-sensitive issue is especially important in the context of our discussion of racially-influenced policing because some minority citizens may appear to be nervous because they are mistrustful of police or have been treated with derision or disrespect by police officers in the past. Anyone who anticipates being treated as a criminal suspect is more likely to be nervous about the encounter (*i.e.*, "act guilty") than are persons who are only worried about whether they are going to be able to talk their way out of getting a traffic ticket.

Whenever you rely on nervousness as a factor in deducing whether criminal activity is afoot, you should fully and precisely document the person's conduct that manifested nervousness (*i.e.*, trembling hands or voice, apparent unwillingness to make eye contact, unusual perspiration, etc.). (Although the resolution of the video portion of a Mobile Video Recorder may not be good enough to record such subtle behaviors, the audio portion can be used to document an officer's "present sense impressions" when, for example, the officer asks the motorist why he or she seems to be so nervous. When this can be done safely (the posing of this question could prompt a nervous criminal to react with a fight or flee response), the audio recording would help

to repudiate any claim that the officer had later fabricated the observation that the motorist appeared nervous.)

As importantly, you should be aware of and carefully document exactly when those nervous behaviors first occurred. If, for example, the person exhibited nervousness from the very outset of a motor vehicle stop, that might be explained by the citizen's general apprehensiveness regarding law enforcement officers. If, in contrast, the person's nervous behavior only began (or significantly intensified) after a specific question was posed by the officer, that would constitute stronger evidence that the nervousness suggests a consciousness of guilt.

UNIT 14: INCONSISTENT OR INACCURATE POLICE REPORTS AND TESTIMONY AS A TRIGGER FOR JUDICIAL SCRUTINY

14.1 The Need for Precision, Accuracy and Thoroughness

In today's judicial climate, and because in many if not most cases the burden of proof or production will be on the State in a motion to suppress evidence, it is not enough that police officers make sound decisions out in the field. Rather, officers must be prepared to document their actions and the reasons that explain and justify their split-second decisions.

Report-writing, as it turns out, is one of the most important skills that a law enforcement officer must master. The test for a good police report is deceptively simple: a person reading your report -- who knows nothing about the police encounter at issue -- should be able to figure out exactly what happened (the who, what, where and when), and, as importantly, should be able to figure out why you made the decisions that you made.

Always remember that defense attorneys, prosecutors and judges will carefully review police reports, focusing on what is in them, and also on what is missing. Police must therefore be dead-on accurate, precise and thorough in describing the sequence of events and in establishing the facts necessary to meet any applicable legal test or required level of proof. It is important to understand that your reports serve many functions besides helping to "refresh" your recollection at the time that you testify at trial or a pretrial motion to suppress evidence. These reports are read by prosecutors, defense lawyers and judges to decide how a case will be handled. Indeed, a poorly written report (one that is incomplete or imprecise) may result in a case being downgraded, devalued as part of the plea bargaining process, or even dismissed outright, so that you may never have a chance to supplement the report with your in-court testimony.

Let us consider how even factually accurate language in a report can create confusion in a Fourteenth Amendment Equal Protection context where the report is otherwise deficient in setting forth the legitimate factual basis for the exercise of police discretion. Suppose that an officer in his report writes that, "I observed two Hispanic males conversing with a white male in an area known to be a high drug crime area."

It is certainly conceivable that the report-writer merely intended to describe the individuals that he encountered, and did not mean to suggest that the race/ethnicity of these individuals played a role in the officer's initial suspicion that they were engaged in criminal activity. A prosecutor screening the case and reviewing this report might nonetheless take the report's prominent references to race and ethnicity into account in gauging the risk that a defendant could mount a successful or costly Equal Protection (or Fourth Amendment) challenge. Unless the report provides other details that clearly document a legitimate, race-neutral basis for police scrutiny and the ensuing police conduct, this case might easily be devalued by a prosecutor in the course of case

screening and plea bargaining. The key, of course, is that the report be sufficiently thorough to set forth all of the facts (and the reasonable inferences drawn therefrom) that had prompted the officer to focus attention on these individuals and to initiate the encounter with them.

14.2 Inconsistencies in Multiple Reports

As a practical matter, it may not take much for a court in New Jersey to conclude that a defendant has made a prima facie case of discrimination, thus shifting the burden of production to the State to articulate a race-neutral basis for an officer's action. In State v. Maryland, 167 N.J. 471 (2001), for example, the New Jersey Supreme Court invoked the exclusionary rule notwithstanding that the defendant had not offered detailed evidence or statistics to prove racial discrimination. The Court in State v. Maryland found that the officer had approached the defendant only because he was one of three black males that the officer had seen at the train station a week earlier. This circumstance raised an inference of selective law enforcement, triggering the State's burden to provide a race-neutral explanation for the officer's decision to initiate a consensual field inquiry.

In that case, the Court ultimately found that the record "persuades us that the police action of which defendant complains is not reasonably understood as anything but such a proscribed race-based inquiry." The Court was especially concerned with the way in which the police officers had articulated and documented the reasons for the exercise of their discretion. The Court observed that because,

an inference of selective enforcement was raised, and because there were three disparate and inconsistent versions of defendant's encounter with the police, the State was required to have established a non-discriminatory basis for the officers to conduct a field inquiry . . . (emphasis added). [167 N.J. at 486.]

In light of this case, we are now on clear notice that poorly written police reports can help to trigger an inference of racially-influenced policing.

14.3 Case Study: State v. Segars

At this point, it would be helpful to look very closely at another case where the New Jersey Supreme Court reversed a conviction on the grounds of impermissible racial targeting. The case of State v. Segars, 172 N.J. 481 (2002) (*per curiam*), sheds light on how New Jersey courts will go about reviewing police discretion when racial discrimination is alleged, and once again, this case highlights the importance of accurate recordkeeping, accurate report writing, and accurate in-court testimony.

The facts of this case were sharply contested and the prosecution and defense offered radically different versions of what had happened. The Court first described the defendant's version of the facts: The defendant testified that on the date in question, at approximately 1 p.m., he drove his car into the parking lot of a bank and parked next to an unoccupied police vehicle, which was the only other car in the lot at the time. The defendant entered the bank to use the automated teller machine. On the way in, he passed the police officer exiting the bank. Defendant noted that the officer, who was Caucasian, was looking at him "with sort of a question mark on his face." The defendant, who was African-American, was wearing a running outfit and a baseball cap. The defendant completed his transaction, exited the parking lot and drove next door to a convenience store. After a few minutes in the convenience store, defendant returned to his vehicle where he was approached by the police officer, who asked to see his credentials. Defendant produced the credentials and, when asked, admitted that his license had been suspended. The defendant acknowledged that the officer was polite and made no comments in respect of the defendant's race.

The police officer's testimony was quite different. The officer testified that he saw defendant's unoccupied vehicle already in the bank parking lot when the officer drove in. The officer decided to check the license plate on his MDT (Mobile Data Terminal) and may also have checked the plates of another vehicle that was parked in the lot. The motor vehicle lookup of the defendant's plates revealed that the registered owner of the vehicle had a suspended driver's license. The officer then pulled up next to the parking lot exit and called central dispatch to determine the reason for the suspension, which he discovered was for driving while impaired. While waiting for the defendant to exit the bank and return to his vehicle, the officer checked the plates on another car that pulled up in front of the

bank because the officer noticed that this other vehicle had an expired inspection sticker. He saw the driver of that vehicle use the automated teller machine. That driver, who was Caucasian, subsequently was issued a ticket.

On cross-examination, the officer restated that he did not use the automated teller machine within the span of time in question and that he never saw the defendant in the bank or anywhere else prior to the time that the officer ran the MDT check on defendant's parked vehicle. When asked why he "ran" defendant's license plates, the officer replied, "It was a bank holiday . . . very light traffic, very – not many cars parked in the lot. There were two cars parked there; I ran both plates . . . Any car that was in the lot I would have run." The officer stated that he runs plates frequently, without "rhyme or reason," and that if it is a slow day, like a holiday, he might check every car that goes by.

On the second day of the hearing, defendant presented the records of the bank regarding the use of the automated teller machine on the day in question. Those records supported the accuracy of the defendant's testimony where that testimony conflicted with that of the officer. In particular, the bank records bolstered defendant's assertion that he and the officer first encountered each other inside the bank, and that the officer only then ran the MDT check of defendant's license plates. Specifically, the records showed that the officer had personally used the automated teller machine at 1:10 p.m. and that defendant had used the ATM at 1:11 p.m. Police records turned over in discovery further revealed that the officer checked the plates of another car at 1:12 p.m., and checked the plates on defendant's car at 1:13 p.m. and on a third car at 1:16 p.m.

Defendant argued from these facts that there could be only one explanation for the officer's inaccurate testimony, namely, that the officer was "covering up" for having checked defendant's plates because of his race. The State countered that the reason for the officer's inaccurate testimony was unknown, and that defendant's theory was "only rank speculation and conjecture."

In applying the law to the facts of this case, the New Jersey Supreme Court first reaffirmed that MDT checks are not traditional "searches" subject to Fourth Amendment restrictions. Accordingly, a police officer may lawfully "run the plates" of a vehicle even though the officer has no objective basis to suspect a violation of any kind. The Court took pains to make clear, however, that under the Equal Protection Clause of the Fourteenth Amendment, the officer could not rely on an impermissible reason such as race in deciding when and how to use an MDT.

The Court went on to hold that when a defendant claims that an MDT check is based on race, the defendant bears the burden of establishing a "prima facie" case by producing relevant evidence that would support an inference of discriminatory enforcement. If the defendant does so, the burden then shifts to the State to produce evidence of a race-neutral reason for the check. (As we saw in Unit 12.5, the Court referred to this mode of analysis as the "burden shifting template.")

In this case, the officer testified that he never used the automated teller machine during the time in question, that he never saw defendant and thus did not know defendant's race before he ran the MDT check, that that MDT check was totally random, and that he checked and ticketed others, including a Caucasian motorist, during the same period. Defendant had testified to the contrary that the officer used the automated teller machine immediately before the defendant had, and so the officer would have therefore seen the defendant and known the defendant's race before the officer ran the MDT check on the defendant's vehicle.

The New Jersey Supreme Court concluded that from this evidence, a trier of fact could infer that the officer checked defendant's plates because of his race and then testified falsely about what he did because he knew that racial targeting is wrong. Put another way, the court concluded that defendant had met his burden of establishing a prima facie case of selective enforcement.

Furthermore, because the evidence that raised the inference of racial targeting also served to impeach the officer's race-neutral rationale, a critical part of the State's rebuttal should have been the production of an explanation for the officer's inaccurate testimony. The State did not provide any such explanation and the Court referred to this as "the pivotal point in the case."

The Court concluded that an inference of discriminatory targeting was established by the defendant's testimony and documentary evidence, the officer's inaccurate testimony, and the failure of the State to recall the officer for an explanation. The Court ultimately found that the State had not defeated that inference, since the only evidence advanced by the State to support the officer's explanation and to counter the inference of racial targeting was that the officer had also checked the plates of a Caucasian driver. However, on the facts of this case, that circumstance could not serve as a "counterweight" to the inference of racial targeting because the officer acknowledged that he had run the plates of the other vehicle as a result of an observed expired inspection sticker. By that testimony, the Court concluded, the officer revealed that that Caucasian motorist was not checked randomly, but rather "for cause." The Court concluded that such a for cause check is irrelevant in determining whether the officer's claimed "random" computer inquiries were racially motivated. (The race of the *third* driver whose license plate was checked was never determined, and consequently that MDT check could not support an inference for or against the racial targeting of the defendant.)

The Court ended its decision by recognizing that this was a very unusual case. Without the officer's repudiated testimony, the evidence produced by defendant that the officer saw him prior to the MDT check would have been completely inadequate to support an inference of discriminatory enforcement. But because the officer's misstatements went to the heart of defendant's claims and would have allowed a trier of fact to conclude that the officer had testified inaccurately because he practiced racial targeting and knew that it was wrong, the State needed to recall the officer to explain his testimony.

Although this is indeed an unusual case, it is an important precedent for training purposes, because it shows just how easily the burdens of proof and production can shift back and forth in the course of Equal Protection litigation. Always keep in mind that if officers are asked why they stopped a particular individual, or why they treated that individual in a particular way, and their answer for any reason lacks credibility and veracity, that alone might generate an inference of an impermissible reason, shifting the burden to come forward with a credible, race-neutral explanation.

14.4 Synopsis: Quality Police Reports as a Counterweight to Discrimination Claims

Because a police officer can never know whether a burden of production might arise at some time in the future – perhaps as a result of statistical evidence offered by a person alleging discrimination – an officer must take prudent steps to document the facts that would meet the State’s burden of production by demonstrating a race-neutral explanation for the officer’s course of action. Indeed, one of the central themes of this entire course is that the changing nature of both Fourth and Fourteenth Amendment litigation has placed an ever-greater emphasis on the importance of top quality report writing and record keeping. Always keep the following principles in mind when writing a report, or when reviewing and approving a report drafted by a subordinate:

- Police reports (and, of course, testimony) must be **completely accurate**. As we saw in both State v. Maryland and State v. Segars, inconsistent police reports or inaccurate testimony can result in invocation of the exclusionary rule. (Inaccurate sworn testimony is an especially fatal mistake and can, depending on the circumstances, result in serious disciplinary action or even criminal prosecution for false swearing or official deprivation of civil rights. Recall that preparing a false report gives rise to an inference that the officer knew that his or her conduct was unlawful. See N.J.S.A. 2C:30-6d.) Police officers should be mindful that defense attorneys will be looking carefully for internal inconsistencies and may also cross-check an officer’s account with other sources of information (such as other police reports, patrol and radio logs, 911 tapes, and other records) to try to cast doubt on a police officer’s credibility.
- Police reports and testimony must be **precise**. Law enforcement officers in their reports and testimony must be careful when using legal terminology. When a police officer uses a term or phrase that has a particular legal meaning, prosecutors and reviewing courts will assume that the officer knows the meaning of the phrase and has used it correctly.
- Police reports and testimony must be **thorough**. You must be prepared to document all facts and circumstances, and the reasonable inferences drawn

therefrom, that are necessary to justify police conduct against an expected or at least reasonably foreseeable claim of a constitutional violation. (This is true for issues arising under both the Fourth and Fourteenth Amendments.) By way of example, instead of writing that you “observed a hand-to-hand transaction,” you should explicitly describe the actors’ hand movements and why, for example, these movements were not consistent with innocent behavior such as a handshake. Similarly, if warning signals were issued (e.g., “5-0” or “88”), these should be fully documented along with all other legitimate suspicion factors.

- Police reports should not include extraneous or irrelevant information. Reviewing courts, knowing that officers do not have much time available to draft the narrative portion of their police reports, will assume that everything in the report is there for a reason, and that if a bit of information is memorialized in a report, the officer must have thought that piece of information was important and must have relied on that bit of information in making police decisions.

UNIT 15: PROBING AN OFFICER'S MENTAL PROCESSES

Fourteenth Amendment litigation is very different from traditional Fourth Amendment litigation with respect to whether and to what extent a reviewing court will probe the internal thought processes of a law enforcement officer. In resolving a *Fourth* Amendment claim, reviewing courts use what is called an “objective” test. The inquiry for determining the constitutionality of a search or seizure is limited to asking “whether the conduct of the law enforcement officer who undertook the [stop or] search was objectively reasonable, without regard to his or her underlying motives or intent.” State v. Bruzzese, 94 N.J. at 210 (1984). “The Fourth Amendment,” the New Jersey Supreme Court noted in Bruzzese, “proscribes unreasonable actions, not improper thoughts.” Under this so-called “objective” (as opposed to subjective) approach, the courts are not concerned about what the officer was actually thinking or hoping, provided that the officer was not making decisions for the purpose of engaging in racist harassment. 94 N.J. at 226.

This Fourth Amendment analytical approach is consistent with the “motion picture analogy” that we have already used in a different context to demonstrate how courts conduct a “frame by frame” analysis of an officer’s conduct. When we watch a movie, we are only concerned with the action and dialogue on the screen – what the actors are doing, or saying. We are not at all concerned with what the actors might happen to have been actually thinking when the motion picture was being filmed.

The legal approach used by courts in analyzing *Fourteenth* Amendment claims, however, is very different. When a defendant alleges an Equal Protection violation, the reviewing court must decide whether the officer (or the officer’s department) engaged in purposeful discrimination. (A department’s discriminatory purpose can be established by showing that the agency either had a policy to discriminate, or else had a de facto policy to tolerate or condone discriminatory practices by its officers in the field.) Recall from our discussion in Unit 7 that the concept of “purposeful discrimination” when used in the context of a Fourteenth Amendment claim does not necessarily require a purpose to harass or intimidate, or a purpose to violate the Constitution. Rather, in a selective enforcement case, purposeful discrimination essentially means that the officer intended to rely on a

particular distinguishing characteristic (in our context, race or ethnicity) in differentiating between persons when deciding how they are to be treated.

The bottom line is that under Fourteenth Amendment analysis, the mental processes of an officer may be relevant, and so courts are free to probe an officer's internal thought processes to determine, for example, whether some impermissible factor influenced the exercise of police discretion. This fundamentally different analytical approach helps to explain why aggregate statistics are relevant in Fourteenth Amendment litigation, whereas they are irrelevant in deciding whether the Fourth Amendment was violated. These statistics may serve as evidence of an officer's underlying intent (or a department's de facto policy), and may be used in certain circumstances by a court to draw an inference that race or ethnicity played a role in the exercise of police discretion.

Of course, an inference of improper motive or intent might also be based upon the officer's conduct during a particular encounter, if, for example, the officer were to use a racial slur or epithet, suggesting that race or ethnicity was being considered at the time that the officer was making decisions or engaging in specific conduct. And as we saw in our discussion of State v. Segars in Unit 14.3, subsequent inaccurate testimony can also establish an inference of improper motive by suggesting that the officer was trying to conceal or "cover up" an improper motive. See also N.J.S.A. 2C:30-6d (creating a permissive inference that an officer knew that his or her conduct was unlawful when the officer prepares a false report or fails to prepare a report that was required to be prepared).

In sum, Fourth Amendment litigation tends to focus mostly on what happened. Fourteenth Amendment litigation, in contrast, tends to focus much more on why events transpired as they did, examining the thought processes and purpose and motivations of law enforcement officers.

15.1 The Rules Concerning Police Deception and "Pretext" Stops

In litigation arising under both the Fourteenth Amendment Equal Protection Clause and the Fourth Amendment, defendants may allege that the officer had conducted a "pretext" stop. The word "pretext" has obvious negative connotations, implying that an officer has lied, is operating under a "false pretense," or otherwise has attempted to mislead someone. (The word pretext is defined in the dictionary to mean "a false reason or motive put forth to hide the real one.")

This is not a word that should ever be used casually or inartfully by police or prosecutors. From a legal perspective, however, the word "pretext" is much like the word "profile." While both of these terms carry a negative connotation in common parlance, neither word describes police conduct that is always inappropriate, and certainly not all pretext stops are illegal. Indeed, there are times when it is perfectly acceptable for police to resort to a pretext or ruse, just as it is appropriate for police to make use of a race-neutral "profile." With respect to so-called "pretext" stops, if the underlying true reason for

the stop is lawful, then the stop is lawful. In contrast, if the underlying or ulterior reason for the stop is unlawful for any reason, then the resulting stop is automatically unlawful.

In Whren v. United States, 116 S.Ct. 1769 (1996), the United States Supreme Court rejected the defendant's Fourth Amendment claim that the police had conducted an impermissible "pretext" stop when plainclothes narcotics officers pulled defendant's vehicle over for a minor motor vehicle violation for the ulterior purpose of pursuing a narcotics investigation. Although it was highly unusual for plainclothes detectives to initiate a traffic stop, the Court refused to delve into the officers' secret or ulterior motives, declining to examine whether their conduct was based on a so-called subterfuge or pretext.

(The United States Supreme Court in Whren nonetheless issued a stern warning to officers who might decide which motorists to stop based on what the Court characterized as "decidedly impermissible factors, such as the race of the car's occupants." "We of course agree with petitioners," the Court warned, "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." 116 S.Ct. at 1774.)

Similarly, the New Jersey Supreme Court years ago in the landmark case of State v. Bruzzese, 94 N.J. 210 (1984), refused to probe an officer's mental processes under Fourth Amendment analysis, holding that the proper inquiry for determining the constitutionality of a search or seizure is done "without regard to [the officer's] underlying motives or intent." 94 N.J. at 219.

In that case, the police suspected that the defendant was involved in a burglary of a business premises from which the defendant had recently been fired. Detectives checked their records and determined that the defendant was subject to an outstanding bench warrant. The detectives, relying on the authority of the arrest warrant, went to the defendant's house, even though it was not standard procedure and in fact was highly unusual for detectives to bother to execute this kind of warrant by going to a person's home. The New Jersey Supreme Court rejected the defendant's argument that the execution of the arrest warrant was a mere "pretext" for conducting a criminal investigation. The Court ruled that it was irrelevant, for purposes of Fourth Amendment analysis, that the detectives had hoped to use this encounter at defendant's home to spot evidence of the burglary, which is exactly what happened.

(The New Jersey Supreme Court in Bruzzese nonetheless issued a clear warning that, "[i]n discarding the general use of a subjectivity analysis, we do not condone searches that are not undertaken to further valid law enforcement aims. For example, we afford no legal protection to police officers who invade the privacy of citizens as a means of racist or political harassment." 94 N.J. at 226.)

In sum, there are times when it is perfectly appropriate for a police officer to conceal

from a criminal suspect the true reason or factual basis for the officer's course of action. Indeed, it is sometimes permissible for a law enforcement officer to go further and affirmatively mislead a criminal suspect. For example, it may, depending on the circumstances, be a permissible interrogation tactic to suggest to a properly-Mirandized suspect that the strength of the case against the suspect is stronger than it really is. See, e.g., Frazier v. Cupp, 89 S.Ct. 1420 (1969) (confession was held to be voluntary and admissible where police had lied to defendant that his co-defendant had implicated him in the crime). But compare State v. Patton, 362 N.J. Super. 16 (App. Div. 2003) (police deception in the form of fabricating false tangible evidence or documents to elicit a confession violates due process and defendant's resulting confession was per se inadmissible). See also State v. Chirokovkcic, 373 N.J. Super. 125 (App. Div. 2004) (re-affirming the rule that police may not fabricate evidence to use in an interrogation and holding that Patton did not announce a new rule of law in New Jersey.) The use of deception during the course of a police interrogation is an extremely complicated area of Fifth and Sixth Amendment law. Courts will closely examine the circumstances to determine whether any such police tactics went too far and had the capacity to "overbear the suspect's will."

Furthermore, and at the risk of stating the obvious, while it is sometimes permissible for police to mislead criminal suspects, it is never permissible for a police officer to mislead a court. Whenever any kind of deception or pretense is used, prosecutors and courts must be able to review the tactic and determine whether the deception or pretense was appropriate, or went too far. Here is a simple rule of thumb: if a police officer would hesitate to fully and accurately document the true nature of any deception, pretense or ulterior motive, then that fact by itself is a clear indication that the deception or ulterior motive is inappropriate and illegal. Always remember, it is our responsibility to explain to a reviewing court exactly what happened and why it happened.

One of the most common examples of a legitimate use of a "pretext" occurs when the police make what is sometimes called a "directed" stop. Consider the following scenario. Narcotics detectives have been working on a significant case for a long time and have learned from a reliable source that a large shipment of drugs will be traveling in a particular vehicle using a particular route. The detectives want to intercept this drug shipment in transit, but do not want to reveal to the "mule" or his or her superiors that they are all the subjects of an ongoing narcotics investigation. The detectives therefore arrange for a uniformed police officer in a marked patrol car to intercept the subject vehicle and essentially simulate a routine motor vehicle stop, misleading the suspected drug courier into believing that he had simply been unlucky when he was stopped for a motor vehicle violation. This encounter, meanwhile, provides the detaining officer the opportunity to pursue the narcotics investigation, and possibly even secure the cooperation of the mule.

This is a *lawful* police tactic. Essentially, this is a type of "B.O.L.O." situation where the uniformed officer in a marked patrol car is instructed by other officers to be on the lookout for a particular vehicle suspected of being involved in criminal activity. Note that

in this instance, because the detaining officer has preexisting reasonable suspicion (or even probable cause) to justify an investigative detention (if not a full blown arrest), the officer need not wait to observe a motor vehicle violation before initiating the encounter, although for tactical reasons, the officer will probably be instructed to watch and wait for a motor vehicle violation so as not to arouse the mule's suspicions about the true reason for the stop. In this scenario, the officer would be permitted to lie to the motorist about the true reason for the stop, explaining to the motorist that the stop was based on an observed speeding violation, even if, in fact, no such violation took place.

While the use of deceptive tactics or subterfuge has its place in dealing with criminal suspects, as a general proposition, police officers should not attempt to deceive or mislead persons who are not already criminal suspects. For example, when a citizen is pulled over for a minor traffic violation, it would be inappropriate for a police officer to lie to the detained motorist as to the reason for the motor vehicle stop. If the stop was based on an observed speeding violation, the officer should explain that to the motorist, and generally should do so at an early stage of the encounter, and without prodding from the motorist, so as to reduce tensions and assuage any concerns that the motorist might have that the stop was based on some impermissible reason.

(Obviously, if the reason for the stop is that the officer had reasonable articulable suspicion to believe that the motorist was engaged in criminal activity, or was the subject of a wanted or B.O.L.O. bulletin, then, for tactical and safety reasons, the officer need not reveal that fact until it is safe to do so. In those circumstances, such as the "directed" stop we just discussed, it would be appropriate for the officer to tell the motorist that he or she was pulled over for an observed motor vehicle violation, even though that is not true. But note that in this circumstance, the motorist being deceived would already be a criminal suspect.)

As we have seen, courts have expressed concern when police try to use a routine motor vehicle stop as a launching pad to initiate an impromptu criminal investigation – a practice we have referred to as "digging." As a general proposition, it is inappropriate for a police officer to treat a motorist who is suspected of nothing more than a minor traffic violation as if he or she

were a criminal suspect, unless the officer is actually aware of objective facts that suggest that this individual is, in fact, engaged in criminal activity.

Let us consider another scenario where there are objective, race-neutral facts concerning possible criminal activity that would justify what might well be called a “pretext” motor vehicle stop. Suppose a citizen reports by cell phone that the occupant of a particular vehicle is carrying a gun. The tipster gives a detailed description of the suspect’s vehicle and license plates, but she refuses to provide her own name to police, choosing to remain anonymous. As we have seen, the United States Supreme Court in Florida v. J.L., 120 S.Ct. 1375 (2000), has ruled that an anonymous tip of a “man with a gun” generally does not, by itself, satisfy the reasonable articulable suspicion level of proof. In other words, our anonymous tip standing on its own would not justify initiating a so-called “Terry” stop.

Let us further suppose that you are on patrol and, acting on a B.O.L.O. bulletin based on the anonymous tip, you identify the subject vehicle, watch it for a few moments from a discreet distance (without activating your overhead and “takedown” lights), and fortuitously observe a very minor Title 39 violation. At this point, may you initiate a motor vehicle stop based on the Title 39 violation, even though that infraction is so minor that ordinarily, you would not bother to stop a vehicle for this violation?

The answer is yes. This would indeed be lawful and appropriate police conduct in response to the anonymous tip. It is true, of course, that this stop might be characterized as a “pretext” in that you are obviously trying to take advantage of the minor motor vehicle violation to pursue an investigation into matters that are wholly unrelated to the observed Title 39 infraction, namely, an investigation into whether the driver is carrying a firearm. However, as in the Bruzzese and Whren cases, your ulterior motives in this instance are irrelevant (because those motives are not themselves illegal), and so you would be authorized under both State and federal constitutional law to initiate an investigative detention based on the objective fact of the observed motor vehicle violation.

During the course of this investigation, you could certainly order the driver to step out of the vehicle so that you might be able to observe a bulge in his pockets, and you could also pose questions and watch for any nervous or furtive reactions that might corroborate the anonymous tip. (Indeed, in this instance you could also order any passenger to step out of the vehicle based on the report of the gun, since the anonymous tip, while not meeting the reasonable articulable suspicion level of proof, would meet the lower “articulable facts warranting heightened caution” level of proof established by the New Jersey Supreme Court in State v. Smith, 134 N.J. 599 (1994), to justify ordering passengers to alight from a lawfully-stopped vehicle.)

The key point to understand is that in this scenario, the officer’s ulterior motive (the officer’s desire to investigate the anonymous tip) was not independently unlawful, and thus did not taint or “poison” the decision to stop the subject vehicle for a very minor Title 39

infraction.

It is important to note in this regard that the United States Supreme Court in Florida v. J.L. by no means suggested that an anonymous tip is irrelevant and may not be considered as part of the totality of the circumstances. Rather, the United States Supreme Court only ruled that as a general proposition, an anonymous tip *by itself* does not establish reasonable articulable suspicion of criminal activity. In fact, the Court suggested that a responding officer could and should investigate the matter, but could not do so by initiating an investigative detention based solely on the as yet uncorroborated anonymous tip.

This is yet another example of the importance of timing (patiently controlling the sequence of events and police decisions) and of “lining up your ducks” before taking a step that intrudes on Fourth Amendment rights and that therefore triggers a legal standard or level of proof. (At the risk of making a bad pun, one might say that the officers in Florida v. J.L. had “jumped the gun” by initiating an investigative detention before they had attempted to corroborate the anonymous tip.) In our scenario, in contrast, the act of identifying and watching the subject vehicle from a discreet distance to look for a violation was an appropriate “less intrusive” investigative alternative, and, as was true in Bruzzese, the fact that the officer very much “hoped” to observe just such a violation to justify a stop is simply irrelevant for purposes of constitutional analysis.

Let us now consider yet another considerably more complex scenario that will help to explain when officers might be allowed to make what could be characterized as a “pretext” stop in a situation that raises the issue whether the Fourteenth Amendment Equal Protection Clause has been violated. In this variation of a “pretext” stop scenario, we will consider when and under what circumstances an officer may legitimately consider that an individual is “out of place” in a particular neighborhood – a sensitive and complicated subject that we have already discussed in Unit 11.

Suppose that narcotics detectives interview numerous arrestees and develop and share reliable intelligence information that indicates that students from a nearby college are buying illicit drugs at a particular urban public housing complex. (The college student body happens to be comprised mostly of non-minority students, whereas the residents of the public housing project are predominantly African-American. However, the resulting modus operandi “profile” that is communicated to rank and file officers at a roll call briefing is silent as to race.)

Two officers are on patrol near the public housing complex and observe a vehicle entering the neighborhood bearing a rear windshield parking permit sticker that indicates that the owner/operator of the vehicle attends the nearby college. The two persons in the vehicle are Caucasian.

The officers watch the vehicle to look for suspicious behavior (such as cruising repeatedly around the block, stopping to speak with known drug dealers out on the street,

hand-to-hand transactions, etc.), but before they observe any such behavior consistent with criminal activity, the officers observe a minor motor vehicle infraction. Let us suppose, for example, that they notice an equipment violation, such as a malfunctioning brake light. Although the officers would not normally bother to initiate a traffic stop for so minor a motor vehicle infraction, they decide to stop the vehicle on the basis of this Title 39 equipment violation. Their ulterior purpose, of course, is to investigate whether the occupants are here to buy drugs.

Is this a lawful stop under the Fourth Amendment? Yes, the observed motor vehicle violation provides what is called an “objectively reasonable” justification for initiating an investigative detention. Once again, for purposes of Fourth Amendment analysis, the officer’s ulterior purpose or motive is irrelevant.

Of course, that does not end our legal inquiry. The real issue that is likely to arise is whether this particular “pretext” encounter violated the Equal Protection Clause of the Fourteenth Amendment, and we could reasonably expect in this scenario that a reviewing court might be skeptical and would carefully examine whether race or ethnicity contributed in any way to the officers’ decision to target this vehicle. The answer to the legal question in a nutshell is that the police decision to stop the vehicle in these specific circumstances would not constitute a violation of either the Equal Protection Clause of the Fourteenth Amendment or the New Jersey policy strictly prohibiting racially-influenced policing. It is true that this was a “pretext” stop in the sense that the officers clearly had an ulterior purpose for taking advantage of the observed Title 39 violation, namely, their desire to create an opportunity to investigate possible involvement in more serious criminal activity. But remember that the general rule is that an officer’s ulterior purpose or motive is irrelevant so long as that ulterior purpose is not itself unlawful.

In this case, the officers do not appear to have engaged in racially-influenced policing because there is no indication that they had used race as a factor in determining that this vehicle or its occupants may have been engaged in criminal activity. The modus operandi “profile” of local drug purchasers that was developed through the analysis of intelligence information was “race neutral” – it referred to students from a particular college, not persons of a particular race or ethnicity. (Note that travel to or from a particular place (such as a known “source” of illicit drugs) is a form of *conduct* that may be considered as part of a race-neutral profile.) It may well be true, of course, that race was strongly “correlated” to attendance at this particular college, meaning in this instance that students from this particular school are more likely to be white. But the officers cannot change that fact and are not responsible for such demographic realities, any more than they can change the ethnic composition of the Mafia. See also Unit 16.2 (discussing so-called “spurious” or “intervening” variables that can explain how race-neutral suspicion factors may be statistically correlated to race or ethnicity).

The point is simply that in this scenario (in contrast to a similar scenario we considered in Unit 6.5), the officers who developed and disseminated the intelligence

reports, and the officers who relied on those intelligence reports to make decisions in the field, at no time used race or ethnicity to draw or bolster inferences that an individual or group of individuals of a certain racial type are more likely to be engaged in criminal activity. The officers who developed and disseminated the intelligence data did not incorporate race or ethnicity into their description of the methods of operation of students who are traveling to the urban apartment complex to purchase drugs. Needless to say, it would have been inappropriate (and violative of our non-discrimination policy) if the intelligence report and ensuing alert had been that “white college kids are coming into this part of town to buy drugs.” Any such broad-brushed, race-based alert would have been no better, from a policy or constitutional perspective, than a generalized alert saying something along the lines that young African Americans are coming into town to buy or sell drugs, commit burglaries or steal cars.

To sum up our mode of analysis, in this scenario, there were essentially two significant components of the intelligence-based “profile” of local drug purchasers and their modus operandi:

1.

students from a particular college

 are
2.

traveling to a particular location to buy drugs

Had the “profile” included a third component, “(1) white students (2) from a particular college are (3) traveling to a particular location to buy drugs,” then this “profile” would not be race-neutral. Such a generalized consideration of race would not fall within the “B.O.L.O. exception,” moreover, because in this instance, race would not be used to describe a particular known suspect or even a group of specific suspects, but rather would inevitably be used to draw the general inference that white youths are more likely than other college-aged persons to be in this area for the purpose of buying drugs. (Had the intelligence information and resulting bulletins referred to specific students suspected of being drug purchasers, then they could of course be described in part by reference to their race, and any such alert would fall neatly under the B.O.L.O. Exception. But in that event, one would expect that the B.O.L.O. bulletin would include some additional identifiers, besides race, about the known individual suspects.)

It is also important to note that in this case, the officers on patrol did not establish the first predicate fact (that these motorists are reasonably likely to be students who attend the particular college) by considering their race or ethnicity. The officers, in other words, did not “put the cart in front of the horse” by assuming that these motorists attended the college on the grounds that they were white and thus would have no business in this apartment complex unless they were college students who are known to come here to purchase drugs. (An example of the internal thought process of such “bootstrapping” might sound something like this: “Hmm, that’s odd. These must be a couple of those college

kids we were warned about at roll call. Why else would white kids be in this part of town?") Rather, in our scenario, the predicate fact of the motorists' attendance at the college was established by the markings on the vehicle -- an objective, race-neutral circumstance. The observation of the college parking sticker created a fair inference that one or both of the vehicle occupants attend the college, and thus matched the race-neutral "profile" of drug purchasers developed through intelligence data.

Having considered two legitimate "pretext" stops, let us consider an example of what would constitute an illegitimate pretext stop – one that would clearly violate our policy prohibiting racially-influenced policing. Let us suppose that an officer on patrol observes a vehicle driven by a minority citizen traveling in a predominantly white neighborhood. The officer believes that this citizen seems to be "out of place" and he very much wants the opportunity to stop that vehicle to "check it out," but he sees no Title 39 violation. The officer knows that he is not permitted under the Fourth Amendment to make a motor vehicle stop unless there is an observed motor vehicle violation to justify any such investigative detention. The officer therefore runs the plates on the vehicle hoping that the MVC lookup would reveal an objective basis under the Fourth Amendment to initiate an investigative detention.

Needless to say, this scenario right from the outset constitutes a violation of our policy banning racially-influenced policing. As we have seen repeatedly, an officer may not consider race or ethnicity in deciding whether or not to "run the plates" of a vehicle, even though that particular police action does not intrude upon Fourth Amendment interests, and even though the motorist may never learn that the officer had checked his or her license plates. If, by chance, any such motor vehicle lookup had revealed the basis for initiating an investigative detention (such as, for example, information indicating that the vehicle was falsely plated or was reported stolen, or that the operator of the vehicle was driving on the suspended list), that information would be tainted, that is, would be considered to be the "fruit" of the unlawful use of race or ethnicity in exercising police discretion.

In this case, any resultant "pretext" stop would be illegal, not because officers are not allowed to run plates in the hope of providing a pretextual basis for initiating a stop, but because in this case, the ulterior motive was itself racially-influenced and thus unlawful. The violation of our statewide nondiscrimination policy in this scenario occurred the instant that the officer "ran the plates" of the vehicle. It therefore would not matter whether or not the computer inquiry produced some kind of "hit." The "hit," in other words, would not salvage the officer's race-influenced decision to "run the plate."

Let us now change the scenario and suppose instead that the officer when scrutinizing the "out of place" vehicle happened to notice a minor motor vehicle violation. May the officer in that event initiate a motor vehicle stop relying upon the observed Title 39 violation? The answer, of course, is no. In this situation, the true reason for selecting this vehicle to be stopped was the officer's hunch that something is amiss based on the officer's belief that it is unusual or suspicious for a minority citizen to be traveling in a predominantly

white neighborhood. In this case, the race-based inference would clearly have influenced the officer's exercise of discretion, and would thus taint or poison any ensuing police decision or action.

Note that in this version of the scenario, a stop based on the observed motor vehicle violation would not violate the Fourth Amendment, but would instead violate the Fourteenth Amendment Equal Protection Clause and our statewide nondiscrimination policy set forth in Attorney General Law Enforcement Directive 2005-1. The practical result, of course, is the same; the police conduct is illegal and any evidence that might thereafter be found would be subject to the exclusionary rule. See Unit 5.1 (a police officer must at all times respect all constitutional rights, and a violation of any provision of the Constitution could lead to the suppression of evidence even though the officer's conduct complied with other provisions of the Constitution).

UNIT 16: THE USE AND MISUSE OF STATISTICS

Statistical data have played an interesting role in the unfolding racial profiling controversy. We all know that statistics are easily manipulated and misused, whether inadvertently or on purpose. We must therefore always be careful in how we use statistical information.

In the context of the racial profiling controversy, statistics have been used in a number of different ways to serve many different purposes. Sometimes, statistics have been used by law enforcement professionals to try to justify various forms of racially-influenced policing – a dangerous and discredited practice that raises serious legal and policy questions. On the other side of the scales, statistics have also been used against law enforcement agencies, and can be relied upon by persons who are trying to establish that they were the victims of police discrimination. Statistics are also sometimes used by police agencies to monitor their own performance and to serve as a kind of “early warning system” to alert supervisors and managers of potential problems. (We will consider this latter use of statistics in our discussion of the roles of police executives and supervisors in Unit 17.)

16.1 The Use of Statistics to Try to *Justify* Racially-Influenced Policing

We will first consider how statistics have sometimes been used by some law enforcement agencies around the country in an effort to justify certain enforcement tactics. We begin our discussion by noting that one of the specific assumptions that lies near the heart of the racial profiling controversy is the belief that a disproportionate percentage of drug dealers and couriers are Black or Hispanic. If that were true, the argument goes, then race and ethnicity might then serve as a reliable indicator or predictor of drug trafficking activity. In other words, some have argued that by focusing police attention on minority citizens, the law enforcement community could enhance the odds of detecting drug offenders and of seizing large drug shipments. Essentially, the advocates of using racial characteristics to focus police scrutiny on minorities have determined that the ends (marginally enhancing the efficiency of drug interdiction efforts) justifies the means (using race to predict criminal activity).

The proponents of this viewpoint often cite to “empirical” evidence, usually in the form of arrest and conviction statistics that would appear at first glance to demonstrate that minorities are indeed disproportionately represented among the universe of convicted drug offenders. On closer inspection, however, it turns out that these statistics may have been used unwittingly to grease the wheels of a vicious cycle – a self-fulfilling prophecy whereby law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources in targeting their drug enforcement efforts.

It is important to understand that drug enforcement is said to be “proactive,” meaning that we will often go out looking for offenses and offenders, rather than wait to investigate a completed crime that was reported by a witness or victim, such as a burglary or robbery. That is why drug arrests are not considered to be “index” offenses and are not used to calculate crime rates. The number of drug arrests is more a reflection of law enforcement efforts and priorities than it is a reflection of the actual extent of drug distribution activity. We can, in other words, make as many drug arrests as we want to, although as a practical matter, we can only make arrests for a tiny fraction of the innumerable drug offenses that are actually committed. When drug enforcement is made a priority, drug arrests go up, and conversely when our attention and resources are diverted to other enforcement priorities, drug arrests may go down, whether or not the drug problem has actually worsened, improved, or stayed pretty much the same.

Furthermore, when an officer during a particular encounter with a citizen is not expecting to find drugs, the officer is less likely to actively look for drugs, and, logically, is less likely ultimately to find them. For this reason, our arrest and conviction statistics involving minority citizens could well be the result of the fact that these citizens were more likely to be suspected of being drug offenders in the first place, and thus were more likely to be subjected to probing investigative tactics (such as posing accusatorial questions or asking for permission to conduct a consent search) -- “digging” tactics that are designed to confirm pre-existing suspicions of criminal activity.

Simply stated, the practice of relying upon minority arrest and conviction statistics to justify investigation and arrest practices is like allowing the tail to wag the dog. Some police officers may be subjecting minority citizens to heightened scrutiny and more probing investigative tactics, which leads to more arrests, which are then used tautologically to justify those same enhanced investigative tactics.

Yet another problem in relying on arrest and conviction statistics is that these numbers, by definition, count only those persons who were found to be involved in criminal activity. These statistics do not show the number of persons who were detained or investigated who, as it turns out, were not found to be carrying drugs. Consistent with our human nature, we in law enforcement tend to remember and focus on our “hits,” but tend to pay much less attention to our far more frequent misses, that is, those instances where, for example, a consent search failed to discover contraband, or where the posing of probing or accusatorial questions failed to reveal inconsistencies or apparent falsehoods that could

be used to build a reasonable articulable suspicion of criminal activity.

Consider that if you act on a “hunch” and your ensuing investigation happens not to find evidence of criminality, you are not likely to pay too much attention to this episode; nor are you likely to lose confidence in your gut instincts. If, on the other hand, your hunch happens to pan out, leading to the discovery of evidence of criminal activity, you will always remember this incident and view it as validating your “sixth sense.” This same principle of selective memory can apply to profiles. “Misses,” while common, are just chalked up to experience, while fortuitous “hits,” which are far less common and thus inherently more noteworthy, are credited to the profile, rather than to chance. (“Selective enforcement,” as it turns out, can sometimes be attributed to selective recall.)

Statistics that show that a disproportionate percentage of minority citizens are arrested and convicted for drug offenses can also be misleading because it is so much easier for police to observe and apprehend drug offenders who operate out in the open. It is far easier to make arrests in or around “open air” drug marketplaces in urban areas than it is to apprehend suburban drug offenders, who tend to commit offenses more discreetly from behind closed doors. As to these suburban and rural offenders, we generally cannot make an arrest except as a result of a comparatively sophisticated investigation that is conducted by undercover officers and that depends upon the issuance of a search warrant. Because urban offenders tend to operate out on the street rather than from behind closed doors, they are far more vulnerable, and can easily be arrested without a warrant by uniformed patrol officers, who comprise the vast majority of our law enforcement resources.

The easy-to-catch urban offenders reflect the racial and ethnic demographics of the urban neighborhoods in which they operate. The same is true for the harder-to-catch suburban and rural offenders. That being so, the net result is that minority drugs dealers tend to be more easily apprehended, and so are arrested in greater numbers. When one “controls for” the racial and ethnic demographics of the neighborhoods in which drug offenders operate, it turns out that race and ethnicity are not useful in predicting who is more likely than others to be engaged in criminal activity.

Indeed, law enforcement experts who have carefully examined the empirical evidence have reached this conclusion. According to the Police Executive Research Forum, for example, “many studies have demonstrated that race is not a useful predictor of criminality, either as a sole factor or in combination with other factors . . .” Police Executive Research Forum, Racially Biased Policing: A Principled Response, p. 93 (2001). In other words, as it turns out, using profiles that rely on racial or ethnic stereotypes is no better, and in many respects is far worse, than targeting citizens at random.

It is also important to note that the United States Department of Justice – an agency that includes the Drug Enforcement Administration and the Federal Bureau of Investigation – recently announced strict policy guidelines that flatly dismiss the notion that crime

statistics can be used to justify racially-influenced policing. Specifically, the United States Attorney General has declared that:

Stereotyping certain races as having a greater propensity to commit crimes is absolutely prohibited. Some have argued that overall discrepancies in crime rates among racial groups could justify using race as a factor in general traffic enforcement activities and would produce a greater number of arrests for non-traffic offenses (e.g., narcotics trafficking). We emphatically reject this view.

In sum, and for all of the foregoing reasons, under our statewide policy prohibiting discriminatory policing, aggregate or group statistics (such as arrest and conviction data) may not be used to justify using race or ethnicity as a factor in predicting or inferring that a particular individual or group of individuals is more likely than others to be involved in drug trafficking or any other type of criminal activity. It is inappropriate, in other words, to rely on “aggregate” or group statistics to support an inference that a particular individual of a given race or ethnicity (the person with whom an officer is interacting) is engaged in criminal activity.

16.2 The Use of Statistics to Prove Racially-Influenced Policing

Fourteenth Amendment litigation is very different from Fourth Amendment jurisprudence in its use and reliance upon aggregate statistics. In an Equal Protection case, the person claiming to be the victim of unconstitutional behavior is permitted, or in some cases may even be required, to present evidence concerning “patterns” of similar police conduct involving other possible victims. Such statistical evidence may be used to show a “disparate impact,” a “discriminatory intent,” or both. (In the real world, these two legal concepts tend to overlap. Evidence that shows that minorities are treated differently (an “effect”) may also establish an agency’s actual or de facto intent to treat minority citizens differently.)

In State v. Soto, 324 N.J. Super. 66 (Law Div. 1996), the defendants based their claim of racial targeting on statistics. While statistical evidence is deemed to be relevant, it is usually not sufficient by itself to support an Equal Protection claim. (In most cases, defendants are not likely to rely entirely on statistical evidence. In State v. Soto, for example, the defense produced other witnesses, including an expert to testify on whether the State Police had allowed, condoned, cultivated or tolerated discriminatory practices.) Sometimes, however, these statistics may reveal anomalies that could conceivably satisfy the claimant’s “prima facie case,” thus triggering the “burden shifting template” established by the courts, requiring the State at that point to offer a race-neutral explanation for the statistical anomaly. Relatedly, statistics may be used by a defendant to establish a “colorable basis” to believe that selective enforcement may be occurring, thus entitling the defendant to demand access to internal police reports and other documents as part of the

process of pretrial “discovery.” See *State v. Kennedy*, 247 N.J. Super. 21 (App. Div. 1991); *State v. Ballard*, 331 N.J. Super. 529 (App. Div. 2000).

The use of statistics to try to determine whether racially-influenced policing is occurring can lead to a protracted “battle of experts.” Statisticians may argue, for example, over whether data were correctly obtained and whether the data are accurate and reliable. We can also expect expert witnesses to argue over how many “standard deviations” from an expected result constitutes evidence of discrimination, and is not just random variation that signifies nothing.

One of the key issues that arises in any such battle of experts is how to determine what “benchmark” should be used to decide whether the recorded statistics actually demonstrate a potential Equal Protection problem. Remember that the gist of an Equal Protection claim is that a particular individual or group of individuals is being treated unequally, that is, treated differently from other persons who were otherwise similarly situated but who have different racial or ethnic characteristics. This type of litigation necessarily requires a *comparison*, which forces judges, lawyers and statisticians to figure out whether they are comparing the right information, rather than comparing apples and oranges.

It is important to note that a statistical discrepancy (e.g., the apparent overrepresentation of minorities in a given stop, arrest or conviction statistic) does not necessarily mean that police have engaged in discrimination in violation of the Fourteenth Amendment Equal Protection Clause or Attorney General Law Enforcement Directive 2005-1. Often, what might appear at first glance to be evidence of “disparate treatment” might actually have been caused by one or more perfectly legitimate, race-neutral factors -- criteria that police are absolutely permitted to rely upon under our statewide nondiscrimination policy. This is so because there are many instances when legitimate law enforcement criteria or suspicion factors turn out to be “correlated” to race or ethnicity for reasons that have nothing to do with law enforcement decisions and that are simply beyond the power of law enforcement to change.

By way of example, a law enforcement agency whose core mission is to investigate the criminal activities of *La Cosa Nostra* families could be expected to arrest and prosecute a large proportion of suspected *Mafioso* who happen to be persons of Italian ethnicity. Such arrest and prosecution statistics would simply reflect the membership criteria of that particular criminal organization, and so in this instance, the arrest and conviction statistics would by no means demonstrate that this law enforcement agency has in any way engaged in purposeful discrimination or otherwise violated the basic principles set forth in Attorney General Law Enforcement Directive 2005-1. So too, as we saw in Unit 6.7, when a police agency focuses its patrol and enforcement efforts to respond to reported offenses in a so-called high crime neighborhood that happens to have a large minority population, it is reasonable to expect that police officers assigned to patrol that neighborhood would stop and arrest a correspondingly large proportion of minority offenders (who, in turn, would

have been preying upon the law-abiding minority residents of this neighborhood).

One of the most important and challenging tasks for those involved in selective enforcement litigation is to identify what statisticians refer to as “spurious” or “intervening” variables that might cause or help to explain any statistical discrepancies or deviations. By identifying and statistically “controlling for” these variables, it may be possible to demonstrate that the law enforcement agency had, in fact, relied upon appropriate, race-neutral criteria in exercising discretion, thus satisfying the burden of production that might fall upon the State under the so-called “burden-shifting template” devised by the New Jersey Supreme Court in State v. Segars, 172 N.J. 481 (2002) (*per curiam*). See Unit 12.5.

UNIT 17: THE ROLE OF POLICE EXECUTIVES AND SUPERVISORS

17.1 Police Chiefs and Executives: Setting Good Policy and Setting a Good Example

Professional policing starts at the top of a law enforcement agency. It is the Chief's responsibility, ultimately, to establish and enforce unambiguous policies and procedures that make clear that discriminatory policing will not be tolerated. In doing so, police executives must be certain that their rank and file officers receive the training and day-to-day supervision they will need to achieve the highest standards of professionalism. In implementing New Jersey's statewide nondiscrimination policy, police executives must embrace the need to support their officers, giving them the tools to succeed – and the tools to avoid unnecessary law suits and citizen complaints.

In implementing and enforcing our State's nondiscrimination policy, police executives should not rely, of course, only on the threat of discipline. Rather, police executives should create a professional and supportive work environment by using, as appropriate, non-punitive means such as counseling and in-service training to prevent as well as to identify and remediate problems before they might become a basis for legal or disciplinary action.

In recent years, many police departments throughout New Jersey and the rest of the nation have begun to collect more detailed statistics about how their officers interact with persons of different races and ethnicities. Police executives can then use this data to monitor their department's performance and to identify potential problems. For this system to work, police departments must be certain to record enough information to be able to "control" for certain so-called "spurious" or "intervening" variables, that is, environmental factors that might cause, or at least explain, differences in the way people of various racial or ethnic backgrounds are being treated.

For example, an officer or group of officers who are assigned to patrol a particular neighborhood are obviously most likely to encounter persons who reside or work in that area. Accordingly, the stop, frisk, search and arrest statistics for these officers are likely to reflect the racial, ethnic and socio-economic characteristics of that particular area constituting their primary patrol zone. If the demographic features of that zone are different from the demographic characteristics of the remainder of the police department's jurisdiction (e.g., if a particular zone is comprised predominantly of minority citizens whereas the town as a whole is not), then one would expect officers who spend most of their time and enforcement efforts in that zone would make stops, frisks, arrests and searches of a greater percentage of minority citizens than would be true for officers in the same Department who are assigned to patrol other areas in the town that have a different racial or ethnic composition. In other words, the proper "benchmark" for reviewing the statistics generated by officers operating in a particular patrol zone is the racial or ethnic composition of that specific area.

As we considered in Unit 16, it is not always easy to figure exactly what is the appropriate “benchmark” to use when comparing data about *observed* police conduct with *expected* police conduct. Experts do not always agree on how to measure the demographic characteristics of those citizens who police officers on various types of duty assignments are most likely to encounter, that is, those citizens who, by virtue of their own conduct or other circumstances beyond an officer’s control, are at greatest risk of attracting the attention of and interacting with police officers who are lawfully performing their assigned duties.

The key point for our present discussion is that any agency that decides to collect these kinds of statistics must be certain to employ sensitive enough measures to be able to account for (or “statistically control for”) such factors as type of duty assignment, day of week and time of day (the demographic composition of persons who police are likely to encounter on the street may vary by time of day), and specific locations where the encounters took place.

We must also recognize that keeping statistics is only one step in addressing the racial profiling controversy. A department that keeps accurate statistics of critical events such as stops, frisks, arrests and consent searches must make certain that it also takes steps to ensure the consistent high quality of its report writing practices. This is critically important because, as we have seen, it may be necessary to review police reports to glean legitimate, race-neutral explanations in the event that a statistical anomaly arises. Police supervisors and managers should never rely solely on statistics, and they will need to conduct a further investigation on a case-by-case or report-by-report basis to determine whether, in fact, any statistical deviation was the result of impermissible discrimination. There may well be innocent, non-discriminatory explanations for a statistical deviation, but once any such statistical discrepancy arises, the State must be prepared to meet the burden of production under the “burden shifting template” by producing credible evidence of a race-neutral explanation.

In a closely related vein, police executives and supervisors must recognize that collecting and reviewing statistics should not be used to reach final judgments about particular officers or incidents. A statistically significant deviation from an expected result or “benchmark” is only the beginning of the inquiry, not the end of the inquiry. Any such deviation should be thought of only as a kind of “trigger” for closer scrutiny, and as part of that scrutiny, executives and supervisors should always look to other sources of information (including explanations provided by the officers involved), to corroborate or dispel any inference of racially-influenced policing that might arise as a result of statistical analysis.

Finally, and perhaps most importantly, police departments and officers must avoid relying on these kinds of statistics to the point that they start to exercise discretion “by the numbers.” Always remember that the Equal Protection Clause requires equal treatment of persons of all races and colors. Just as it is illegal for an officer to consider race or ethnicity in deciding who to stop, question, frisk or search, so too it is illegal to consider

race or ethnicity in deciding who not to stop, question, frisk or search. Officers who consciously select non-minority citizens for a particular course of treatment in an effort to “improve” their numbers (i.e., artificially achieve a representative cross-section of the community so as to avoid supervisory scrutiny or Equal Protection claims) are just as guilty of racially-influenced policing as if they had instead targeted minority citizens. Indeed, any such deceptive and manipulative tactic would strike at the very heart of police integrity and impartiality, and cannot and will not be tolerated.

17.2 Supervisors: The First Line of Defense Against Discriminatory Policing

Front line supervisors must play an especially important role in recognizing and guarding against racially-influenced policing by their subordinates. Supervisors throughout the chain of command must be held accountable for holding their supervisees accountable for complying with our nondiscrimination policy and all constitutionally-based rules of police conduct. One of the most significant contributions that supervisors can make is to carefully review and critique police reports prepared by their supervisees, making certain that these reports are thorough. Supervisors should take steps to ensure that any errors, gaps or ambiguities are resolved before a draft report is approved and formally submitted.

Supervisors should place themselves in the shoes of a reviewing court, posing the same kind of probing analytical questions that a prosecutor or reviewing court would ask based on the information provided in the police report. Supervisors should anticipate when a reviewing court is more likely to be skeptical or probing, and should then make certain that the report adequately addresses the questions that a court would likely ask were this case to result in Fourth or Fourteenth Amendment litigation.

If a supervisor cannot tell exactly what happened during the police-citizen encounter by reading the report, then the supervisor must assume that a reviewing court would also be in the dark, and would be forced to speculate as to the events that took place – a situation that might not bode well for the State in litigation.

Supervisors should not assume that an officer at some future point will be able to explain any gaps, deficiencies, discrepancies or ambiguities by means of oral testimony, since, as we have seen, an inadequate report might lead to an unfavorable review by a prosecutor, resulting in the downgrading, devaluation, or even outright dismissal of the case so that the officer who wrote the report may never actually get an opportunity to provide additional information by testifying in a court hearing.

The police report, in other words, is not just used to “refresh” an officer’s recollection when the officer prepares to testify in court. Even more importantly, the report is used by other actors in the criminal justice system to figure out what happened out on the street and to gauge the strengths and weaknesses of the State’s case. The bottom line is that a police report must speak for itself, and while it is the line officer’s responsibility in the first place to draft a thorough and accurate report, it is the supervisor’s responsibility to make

certain that that is done in every case.

When reviewing reports to look for the possibility of racially-influenced policing, supervisors must always remember the critical principle that one need not be a racist to engage in racial profiling. The fact that the supervisor knows his or her subordinate well, and knows this officer to be a man or woman of integrity – one who would never intentionally violate a citizen’s civil rights – does not end the supervisor’s inquiry. Supervisors must be on the lookout for subtle or even unthinking examples of racially-influenced policing.

Just as a good report spells out the facts constituting reasonable articulable suspicion or probable cause necessary to justify a Fourth Amendment intrusion, that report must likewise set forth the facts establishing a race-neutral explanation for the officer’s exercise of discretion, especially in the kinds of circumstances we discussed in Unit 13 where reviewing courts are more likely to be skeptical of the way in which police exercise discretion. Supervisors must always consider what would happen if an inference of selective enforcement were to arise, thus triggering the “burden shifting template” adopted by the New Jersey Supreme Court. If that is a realistic possibility, then the supervisor must make certain that information documented in the report would satisfy the State’s “burden of production.”

UNIT 18: RACIALLY-INFLUENCED POLICING AFTER 9/11

No discussion of the racial profiling controversy would be complete without candidly addressing the impact of the terrorist attack against our country on September 11, 2001, the ongoing global war against terrorism and the military conflict in Iraq. Police officers in New Jersey must continue to play a vital role in protecting our homeland. We nonetheless need to carefully define the specific contributions that each law enforcement officer and agency can make to our overriding goal of protecting our safety and security.

The most difficult question for the purposes of this course is whether and under what circumstances a law enforcement officer in New Jersey may consider a person's apparent Middle Eastern ethnicity (or attire indicating the person's Islamic religious beliefs) in drawing inferences that that person might possibly be engaged in terrorist activities. In answering this question, we must never lose sight of the critical fact that the percentage of persons who reside in or travel through New Jersey who are of Middle Eastern ethnicity or who practice the Islamic faith and who are actually affiliated with al-Qaida or any other terrorist network is negligible.

18.1 The Basic Rule

Under our State nondiscrimination policy, a police officer may not consider a person's apparent Middle Eastern ethnicity, or attire suggesting a person's Islamic faith, to any degree in drawing an inference that the person may be engaged in terrorist or other criminal activity or in deciding, for example, whether to initiate a consensual field inquiry or investigative detention. In this limited setting, our rule may be stricter than the one announced in June 2003 by the United States Attorney General for use by federal law enforcement agencies.

Consistent with the general rule that we have discussed throughout this course, law enforcement officers in this State must focus not on the person's skin color, but instead must focus on the person's conduct and whether, for example, the person's conduct is consistent with the methods of operation of terrorists, or is otherwise suspicious.

Furthermore, while manner of dress can in appropriate circumstances be considered to be a form of conduct (*i.e.*, when persons are “flying the colors” of a gang), in this context, when manner of dress and personal appearance relates to an expression of a person’s religious beliefs, the person’s attire may not be considered to any degree in drawing any inferences of criminal activity (other than in the context of a “Be on the Lookout” situation discussed in Unit 18.3). In other words, it is inappropriate and unlawful for a law enforcement officer operating under the authority of the laws of this State to infer from a person’s garb that he or she is a Muslim, and then to infer from that conclusion that the person may be a fanatical terrorist poised to strike.

18.2 Behavioral (Race/Ethnicity-Neutral) Profiles or “Screening Systems” of Possible Terrorists

While Attorney General Law Enforcement Directive 2005-1 prohibits police from considering a person’s ethnicity or religious attire in drawing an inference that this person is more likely than others to be engaged in terrorist activity, or is otherwise “suspicious,” it is important to recall that it is perfectly legal and appropriate for law enforcement agencies to develop behavioral “profiles” of persons engaged in various types of criminal activity, including suicide bombings and other forms of terrorism, so long as those profiles do not rely on racial or ethnic characteristics (or on religious attire or other symbols of religious faith or expression). See Unit 6.1 (distinguishing “*racial* profiling” from legitimate, race-neutral “profiling”). Legitimate counter-terrorism profiles and screening systems are designed to identify persons who are at a heightened or elevated risk of being associated with potential terrorist activity by focusing on conduct and race-neutral behavioral characteristics that have been gleaned from a careful analysis of intelligence information.

As we considered in Unit 8.3 and in Unit 16.2 in our discussion of the use of statistics, sometimes, a perfectly legitimate, race-neutral suspicion factor may happen to be “correlated” to race or ethnicity for reasons (such as demographics) that are simply beyond the control of law enforcement. To explain this point in the context of homeland security, let us briefly consider two legitimate counter-terrorism-related factors or characteristics that may coincidentally be correlated to ethnicity, but that are actually “race-neutral” and so may be taken into account by police officers in making threat assessments without violating our nondiscrimination policy. Specifically, we will consider: (1) a person’s recent travels to and from other nations, and (2) a person’s country of citizenship. (Note that the following discussion is by no means intended to suggest that travel abroad and foreign citizenship are especially important factors in gauging the risk that a person may be involved in terrorist activity. These two examples are discussed only to show how ethnicity might be correlated to characteristics that are actually “race neutral” and that may therefore be taken into account by police without running afoul of our statewide nondiscrimination policy.)

Recall from our earlier discussion of legitimate, race-neutral “profiles” that travel to and from a particular place is a form of conduct that may be considered in inferring whether criminal activity is afoot. (For example, a legitimate drug courier profile may include a

consideration of whether a person is traveling to or from a place where illicit drugs are known to be produced or shipped -- a so-called "source" city.) Applying this same principle to counter-terrorism efforts, if during the course of a lawfully initiated encounter an officer were to learn that a person had recently traveled to or otherwise had contact with a nation that is believed to sponsor terrorism, the officer may legitimately consider that race-neutral fact in determining the likelihood that this individual may be engaged in terrorist activities.

Of course, like all generalized "profile" characteristics, travel abroad, considered in isolation, would by no means establish reasonable articulable suspicion, much less probable cause to believe that this person is in fact engaged in criminal activity. Note also that this particular behavioral characteristic (recent travel to a specified foreign nation) could coincidentally be correlated to the person's ethnic background. It is conceivable, for example, that individuals who have recently traveled to or from a particular Middle Eastern nation might tend to reflect the ethnic composition of that nation's indigenous population. In this instance, however, the police officer would be focusing solely on the person's *conduct* (travel abroad), and not on the person's ethnicity.

By the same token, neither the Fourteenth Amendment Equal Protection Clause nor Attorney General Law Enforcement Directive 2005-1 prohibit a police officer from considering a person's foreign citizenship. This is true even though foreign citizenship may coincidentally be correlated to race or ethnicity, since foreign nationals may tend to reflect the racial or ethnic composition of their nation of citizenship. (While the United States is a true "melting pot" comprised of innumerable cultures, races and ethnicities, some other nations are far less diverse. Some nations, in other words, are far more homogeneous than America with respect to the racial or ethnic composition of their indigenous population.)

For the purposes of our statewide nondiscrimination policy, a person's alien citizenship is legally and analytically distinct from the person's ethnicity or "national origin" (*i.e.*, where the person's ancestors were born). Being a citizen of another nation, unlike race or ethnicity, is a legally cognizable *status* (such as whether the person is an adult, or is licensed to operate a motor vehicle) that police in appropriate circumstances may consider as part of their enforcement duties. See Farm Labor Organizing Committee v. Ohio State Highway Patrol, 991 F. Supp. 895 (N.D. Ohio 1997) (any police officer whose duty is to enforce criminal laws may enforce the criminal prohibitions of the federal Immigration and Nationality Act and in some circumstances may therefore question motorists about their alienage and immigration status). See also Muehler v. Mena, 125 S.Ct. 1465 (2005) (Officers' questioning of defendant about her immigration status did not constitute a Fourth Amendment violation; in this case, the questioning did not extend the time she was detained during the execution of a search warrant of the premises she happened to be in).

This by no means suggests that alien citizens do not have constitutional rights. Indeed, the Fourth Amendment applies to all "persons" and draws no distinction at all between United States citizens and citizens of other nations. Rather, it means that in certain contexts, the government may treat its own citizens differently from noncitizens, requiring,

for example, alien visitors and residents to comply with immigration laws and regulations that simply have no applicability to United States citizens.

The bottom line for our purposes is that neither the Fourteenth Amendment Equal Protection Clause nor Attorney General Law Enforcement Directive 2005-1 require police officers to ignore a person's citizenship or immigration status. In fact, in some instances, police are *expected* to determine a person's foreign citizenship. When foreign nationals are arrested, for example, police officers in this country are required by international law and treaty obligation to advise the arrestees of their right to have their consular office notified. See Vienna Convention on Consular Relations (Approved 1963).

Of course, the fact that a person happens to be a citizen of a nation thought to sponsor or harbor terrorists hardly establishes reasonable articulable suspicion of criminal activity for purposes of the Fourth Amendment. The point, rather, is that government agents are not prohibited by the Equal Protection Clause or our statewide nondiscrimination policy from taking foreign citizenship into account as part of the "totality of the circumstances."

In applying these general principles of relevance, police officers in this State must always use caution and common sense, making certain that a person's race or ethnicity plays no part in the exercise of police discretion. Police officers, in other words, should always take the time to carefully "line up the ducks" of their suspicions. (Recall from our discussion of the gang problem in Unit 10 that timing and the sequencing of events and inferences is often critical to the resolution of constitutional issues under both Fourth and Fourteenth Amendment analysis.) By way of example, a law enforcement officer operating under the laws of this State must not use an individual's skin color or apparent ethnicity as an indicia of suspiciousness and as the factual basis for first inquiring as to the person's citizenship or recent travels abroad. See Farm Labor Organizing Committee v. Ohio State Highway Patrol, 95 F.Supp. 2d 723 (N.D. Ohio (2000), affirmed and remanded 308 F.3d 523 (6 Cir. 2002) (court found a *prima facie* case of racial discrimination based on evidence that showed that Ohio troopers questioned Hispanic motorists, but not white motorists, about their immigration status when they were pulled over for traffic violations).

It would be an inappropriate form of "bootstrapping" -- putting the cart in front of the horse -- if an officer during a routine encounter such as a traffic stop were to consider a person's physical appearance (as opposed to the person's conduct) as the basis for launching what is, in effect, an *ad hoc* criminal investigation of possible terrorist activity. That would be roughly akin to using an individual's race or ethnicity to infer that he or she is "out of place" in a particular neighborhood, leading to enhanced scrutiny and probing, such as accusatorial questions that would not be posed if the individual were of a different race or ethnicity. See Unit 11.1. (In essence, an officer in these circumstances would be impermissibly using a person's ethnicity as the predicate for inferring that the person may be "up to no good," and as the basis for investigating, not what the person is doing in this particular neighborhood, but rather what the person is doing in this country.) See also Unit 15.1, where we considered why it would be inappropriate for the officers in one scenario to

use the motorists' race to infer that they were students at a particular college and thus "fit the profile" of a drug purchaser.

Always remember that the ultimate test under Attorney General Law Enforcement Directive 2005-1 is whether you would have taken the same investigatory or enforcement actions if the person had been of a different ethnic background. If the answer to that question is no, then the person's ethnicity would have contributed to your decision-making process in violation of our statewide nondiscrimination policy.

18.3 The B.O.L.O. Exception

As we have noted in Unit 9 and throughout this course, an officer during a lawful encounter may take steps to determine whether a person is the subject of an outstanding "Be on the Lookout" bulletin. Law enforcement officers should be aware that the F.B.I. has compiled a list of persons who are thought to have information about terrorist activities. The F.B.I. has asked to be notified whenever local police come across a person on this B.O.L.O. list.

While the B.O.L.O.s issued by the F.B.I. refer to specific, named people, these alert bulletins generally do not provide a sufficiently detailed physical description to allow an officer on patrol to make a Fourth Amendment liberty intrusion, such as initiating or unduly prolonging an investigative detention. However, a law enforcement officer in this State during a lawfully initiated encounter may consider a person's apparent Middle Eastern ethnicity in determining whether or not the person may be one of the individuals listed in the F.B.I. B.O.L.O. bulletins or in similar alerts issued by State or local authorities. Accordingly, an officer during a lawfully initiated stop traffic may ask a passenger to identify himself or herself so that the person's name could be checked against the F.B.I. B.O.L.O. list, provided that this process can be completed without unduly prolonging the duration of a routine motor vehicle stop. See Unit 13.5.

It should be noted that under New Jersey law, a person other than one who is operating a motor vehicle is generally under no legal obligation to provide proof of identification to a law enforcement officer, or even to provide his or her name upon request or otherwise cooperate with an on-the-scene law enforcement investigation.

On June 21, 2004, a sharply divided United States Supreme Court ruled in a 5-4 decision in Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S.Ct. 2451 (2004), that the officer's request for identification during the course of a lawful "Terry" stop was reasonably related to the circumstances justifying the stop, and thus the suspect's arrest for failure to comply with Nevada's "stop and identify" law did not violate either the Fourth Amendment or the Fifth Amendment right against self-incrimination. The Nevada statute expressly requires persons who are lawfully detained as part of a "Terry" stop to disclose their names. The United States Supreme Court ruling would seem to have little impact in New Jersey, however, because we do not presently have a statute that creates what is essentially a legal duty for a person who is the subject of an investigative detention (other than the operator of a motor vehicle) to disclose his or her name upon request. Compare State v. Stampono, 341 N.J. Super. 247 (App. Div. 2001) (when an officer does not have reasonable articulable suspicion of criminal conduct before approaching and questioning a person sitting in a car, the person has the right to refuse and remains free to leave without showing identification.) See also State v. Pineiro, 181 N.J. 13 (2004) (field inquiries are permissible so long as they are not harassing, overbearing or accusatory in nature. This means that the person approached in a field inquiry need not answer any question put to him, and the person may decline to listen to the question at all and may go on his way).

It is important to remember that the so-called "B.O.L.O. exception" to the general rule prohibiting any consideration of race or ethnicity is by no means limited to formal bulletins or teletypes issued by the F.B.I. or any other federal, state, county or local law enforcement agency. As we saw in Unit 9, the B.O.L.O. exception also applies with respect to information provided to an officer, *by any means*, about a particular person who is suspected of criminal activity. Thus, for example, if a private citizen were to report a "suspicious person" to authorities, police officers are generally permitted, indeed depending on the circumstances may well be required, to investigate that report and may rely upon a racial or ethnic description of the person thought by the private citizen to be "suspicious" in determining whether an individual in the responding officer's view is the same person who had been reported by the citizen-informant. Remember, however, that if it is readily apparent that the citizen's report is based entirely on the suspect's ethnicity, and not at all on the person's suspicious conduct, then you may not give credence to the use of any such ethnic stereotype.

Also remember that under the Fourth Amendment, the information provided by the citizen may or may not justify a "seizure" (i.e., a "Terry" stop). That will depend upon a number of fact-sensitive factors, including the specificity of the description, the citizen-informant's basis for believing that this person may be involved in unlawful activity, and the veracity or credibility of the informant-tipster. The key point to keep in mind is that the

Fourteenth Amendment focuses on whether you are allowed to consider a fact (a person's race or ethnicity) at all. The Fourth Amendment is concerned with whether all of the known facts (the "totality of the circumstances") add up to satisfy the level of proof necessary to justify a seizure or other police action that intrudes upon a Fourth Amendment liberty or privacy interest.

It is also important to recall that the "B.O.L.O. exception" to the general rule prohibiting police in this State from considering a person's race or ethnicity is not limited to specified persons who are criminal "suspects," that is, persons who are believed to be personally engaged in criminal activity. As we saw in Unit 9.1, police are allowed to follow investigative "leads" and may therefore seek out and interview specified persons who may have valuable information but who are not themselves suspected of any criminal activity. It is interesting to note in this regard that many of the federal B.O.L.O. bulletins issued after September 11, 2001, refer to persons who are thought to have information that might be helpful to counter-terrorism authorities. These are individuals who the F.B.I. wants to interview, but not necessarily detain or arrest. In fact, many if not most of these federal B.O.L.O.s do not involve outstanding arrest warrants, and the federal bulletins caution police not to make arrests based on such bulletins.

Finally, it is important to recognize that the "B.O.L.O. exception" need not be limited to recognizing wanted persons in chance encounters out on the street. Law enforcement authorities are, of course, allowed to pursue a B.O.L.O. bulletin by going to specific places where the subject of the B.O.L.O. (whether a criminal suspect, possible witness, or victim) is likely to be. For example, if federal law enforcement authorities want to go to the homes or businesses of specified persons to interview them about any knowledge that they may have about terrorist organizations or terrorist activities, police in New Jersey may accompany federal authorities and may actively participate in any such investigative activities without in any way violating our non-discrimination policy, even though these specified persons to be interviewed may tend to be of a particular ethnicity. In these circumstances, law enforcement officers are merely following "leads" that identify specific individuals who are believed to have potentially useful information. See Unit 9.2.

PART IV SUMMING UP

UNIT 19: REVISITING THE VIDEO SCENARIO

We have covered a lot of ground in this course. It is now time to put the pieces of the complex and intricate racial profiling puzzle together and apply some of the ideas and legal concepts that we have discussed to a specific scenario – one that we have already considered. Let us take a moment to revisit the script of a dramatized police encounter that was produced by the Anti Defamation League.

* * *

Two Caucasian police officers are in a marked police vehicle patrolling a quiet residential street. It is obviously an extremely affluent suburban neighborhood, as evidenced by the large, well-maintained homes. There is no other traffic on the street. One of the officers notices a red car parked at the curb. It is the only parked vehicle in sight. There are two African-American males (as it turns out, father and adolescent son), sitting in the vehicle. The following conversation between the officers ensues:

Officer #1: “Quiet day, huh?”

Officer #2: “Hey, did you notice that?”

Officer #1: “What?”

Officer #2: “Those two black guys in the Toyota?”

Officer #1: “That’s unusual isn’t it?”

Officer #2: “Sure is around here. I just want to check on the car just to be safe.”

Officer #1: “You call it in and I’ll check it out.”

The police vehicle makes a U-turn and pulls up behind the parked Toyota. The officers do not activate the police vehicle’s overhead or “wig-wag” lights. Officer #1 steps out of the police vehicle and approaches the male sitting in the driver’s seat of the parked Toyota. Officer #2 remains in the police vehicle. Officer #1 engages the person in the driver’s seat (the father) in the following conversation:

Officer #1: “Anything I can do for you guys?”

Father: “No. That’s okay.”

Officer #1: “Do you live around here?”

Father: "No we don't."

Officer #1: "Would you please get out of the car?"

Father: "Why?"

Officer #1: "Please, get out of the car. Do you have some identification? Why are you parked here?"

The father gets out of the vehicle and produces an operator's license from his sports jacket inside pocket. He provides the license to Officer #1.

Father: "Look officer, my son and I are just waiting for someone. What's the problem?"

Officer #1: "No problem."

Officer #1 examines the license and looks at the driver, apparently to confirm that he matches the information on the license. Officer #2 has now approached the Toyota after having communicated with the police dispatcher.

Officer #2: "The car is fine."

Officer #1: "Okay. Just a routine check."

Father: "Yeah, *routine*."

Officer #2: "What's he getting upset about?"

Officer #1: "I don't know. No harm done."

The two officers return to the police vehicle. The son turns to his father in exasperation and says:

Son: "We should report them."

Father: "For what?"

Son: "I don't know."

Father: "Hey, forget it. It does make you mad though, doesn't it. I guess they just wanted to know why we were here."

Son: "I didn't know we needed a reason."

The father appears to be mortified by the implications of his son's last comment.

* * *

At the beginning of this course, when we first considered this scenario, you were asked to consider whether this was an example of good police work, or an example of police officers relying on racial stereotypes. Your personal opinion may or may not have changed as a result of anything that we have discussed in this course. That is not important, because there is not necessarily a right or wrong answer to the question whether this scenario represents appropriate law enforcement conduct. The key is that you be able to analyze or "break down" the scenario so that your opinion is a reasoned one.

In terms of legal analysis of this scenario, we need to consider first when under the Fourth Amendment a "stop" was initiated. Pulling behind a vehicle that is already stopped generally constitutes a mere "field inquiry," rather than a "Terry" or "Prouse" stop. (Police will sometimes describe this type of field inquiry as a "motorist aid" situation, or one that is justified under the so-called "community caretaking function." See, e.g., State v. Martinez, 260 N.J. Super. 75 (App. Div. 1992) (driving at a "snail's pace" at 2:00 a.m. was "abnormal" behavior that raised sufficient concerns to justify a stop)). Note that the officers did not activate the police vehicle's overhead or "wig-wag" lights. See also State v. Stampone, 341 N.J. Super. 247 (App. Div. 2001) (when police do not have reasonable articulable suspicion of illegal conduct sufficient to initiate a "Terry" stop before approaching and questioning a person sitting in a car, the person has the right to refuse to answer questions and remains free to leave without showing identification.)

However, once the officer directed the person in the driver's seat to step out of the vehicle, it is conceivable if not likely that a reviewing court would say that the encounter had escalated into an investigative detention. Arguably, many citizens in these circumstances would believe that they would not be free to disregard the officer's second "request" to step out of the vehicle, and few citizens at this point would believe that they could simply drive off leaving the officer behind. This would be especially true once the driver had turned over his license to the officer pursuant to the officer's command. See State v. Maryland, 167 N.J. 471 (2001) (courts in deciding whether an encounter is an investigative detention will consider whether the officer has made any demands or issued orders). See also State v. Stovall, 170 N.J. 346, 358 (2002) (although police officer framed his statement as a request rather than a command, the Court found that defendant was not free to leave).

We need to ask, therefore, what was the legal basis for briefly detaining these citizens? Was it unlawful for this vehicle to be parked in this location (which would constitute an observed violation that by itself would justify an investigative detention) or, was there a reasonable articulable suspicion to believe that these individuals were "casing" a house for the purpose of committing a burglary, or were otherwise engaged in criminal activity? (We simply do not know from the limited information presented in this scenario whether there had been recent burglaries reported in the neighborhood? Nor do we know whether this vehicle

been seen before at the time of a reported burglary, or whether the vehicle or occupants matched the description of a B.O.L.O. bulletin.) In other words, was the situation so abnormal as to raise legitimate concerns that would justify a brief detention?

Even putting aside these important Fourth Amendment questions, recall that the Equal Protection Clause of the Fourteenth Amendment applies to all police decisions, and not just those that constitute a “seizure” under the Fourth Amendment. Thus, even if we were to assume for purposes of discussion that the Fourth Amendment was never triggered in this scenario, under a Fourteenth Amendment analysis, the reviewing court would still ask whether the officer’s initial decision to turn the patrol car around and pull behind the parked vehicle was based to any degree on race or ethnicity. (Remember, the Fourteenth Amendment rules apply to *all* police-citizen encounters, including consensual “field inquiries” and the decision to run a computer query)

As we considered in Unit 15, under the Fourth Amendment, the courts use a so-called “objective” test, meaning that they are generally not concerned with the police officer’s purposes or motivations. Under the Fourteenth Amendment, however, the officer’s purpose and mental processes are relevant and may be carefully scrutinized by a reviewing court to make certain that race or ethnicity played no part in the officer’s decision-making processes. The problem in reviewing this case (or any other case for that matter) is that we cannot be absolutely certain from the text of this scenario what exactly the officers were thinking. Rather, we have to try to deduce their reasoning process by looking at what they did and said.

This scenario shows us quite clearly that even when the objective facts are known – in other words, even when we know exactly what happened – the constitutional inquiry is not over. When a Fourteenth Amendment claim is brought, a reviewing court may go beyond an objective and detached “motion picture” review of the officer’s conduct (the action and dialogue on the screen), and may probe the thought processes of the officers to determine whether the officer’s judgment was influenced by some impermissible consideration.

The key to resolving the Fourteenth Amendment question in this case will ultimately depend upon the ability of these officers to articulate the reasons for their actions. In other words, the officers should be prepared to answer probing questions about the reasons for their decisions. In this scenario, the officers must be prepared to explain exactly what it was that they observed that was suspicious or “unusual” so as warrant turning around, pulling behind the parked vehicle, “running the plates” and engaging the occupants in conversation. (By way of example, perhaps, given the nature of the street, it was unusual for anyone to be sitting in a car parked along the curb at this time of day. In that event, it may have been the citizen’s conduct (parking on this street) rather than their race that prompted the officers to describe the situation as being “unusual.”)

Of course, the most important question that these officers must be prepared to answer is whether they would have done the same thing if the two persons observed in the parked vehicle had not been minority citizens. When one of the officers said to his partner, “did you notice the two black guys in the Toyota,” was he merely describing the two people in the vehicle, or was it their skin color that had really attracted attention and was the basis

for suspicion? In other words, would the situation have been suspicious or, to use officer's own characterization, "unusual . . . around here," had two *white* males been sitting in a parked car at this exact location on this particular street at this time of day? Remember that the cardinal principle undergirding all Fourteenth Amendment analysis is that persons may not be treated differently by police on account of their race or ethnicity.

Always remember, moreover, that if a reviewing court were to review this scenario and were to draw an inference that race had played a part in the way this encounter unfolded, then the "burden of production" would shift to the officers to establish a race-neutral explanation for their decision to turn around, to pull behind the parked vehicle, to "run the plates" of the vehicle, to order the person in the driver's seat to step out of the vehicle and to order that person to produce proof of identification. As was made clear by our Supreme Court in State v. Segars, once an inference of racially-influenced policing can be drawn, reviewing courts will not speculate as to the legitimate reasons for police conduct; rather, it will be our responsibility to come forward with those legitimate reasons.

Finally, however one interprets the propriety of the police conduct described in this scenario, and however one gauges the likelihood that a reviewing court might condemn this encounter as an example of racial targeting, you must recognize the importance of perceptions and the fact that different people reviewing the same events can come to different conclusions as to the officers' actual motivations for initiating this encounter. Police officers in New Jersey must understand that minority citizens experiencing this situation might become frustrated, angry, and mistrustful of law enforcement. In this vignette, the African-American father and his son obviously believed that they had been singled out for police scrutiny on the basis of their race and because the officers assumed that they had no legitimate business being in this affluent neighborhood. The father was no doubt humiliated by the fact that this demeaning encounter took place in the presence of his adolescent son.

The officers during the encounter, meanwhile, did nothing to dispel any such perception and treated the whole affair as a rather trivial or "routine" incident, unaware that the way they conducted this encounter would likely leave a lasting impression on these two citizens. The officers certainly did not explain to the citizens why they had been approached and why the older man had been ordered out of the car. Always remember that courtesy and demeanor are the hallmarks of a law enforcement professionalism. Perhaps the officers in this particular dramatization were trained that they do not have to have, or give, a reason for this exercise of police authority, and they may earnestly have believed that these citizens were simply not entitled to an explanation. But by not perceiving and defusing the perception of selective enforcement, these officers may have needlessly exposed themselves to the possibility that these citizens might file a complaint against them.

As you perform your duties as a peace officer, you must always remember that no one likes to be falsely accused of wrongdoing, or to be treated like a "suspect" when there is no objective reason to justify such derisive treatment. This is especially true when a person believes that he or she was singled out for suspicion based on broad-brushed group

characteristics. The feelings of resentment and hostility that arise in this kind of situation are certainly not ameliorated merely because the person winds up not being formally charged with an offense or violation. (Being charged would only add injury to insult.)

If you doubt how human beings react to being implicitly accused of wrongdoing, consider the following scenario. You are off duty and you are proudly wearing a tee shirt that bears the name and logo of your agency. You are with your family in a shopping mall. Someone comes up to you, looks at your shirt and asks you, "Hey, are you one of those racial profilers?"

You would have every reason to be disturbed by the accusatorial nature of the citizen's question, since it implies that you and your department have engaged in police misconduct. While you would no doubt respond to this situation in a professional manner, you would not come away from that encounter with a favorable impression of that citizen, who had essentially challenged your integrity and ethics and embarrassed you in the presence of your family.

As it turns out, cops don't like to be "profiled" (to use the vernacular) any more than private citizens do. The bottom line is that law abiding people are rightfully upset and resentful when they are treated under suspicion for wrongdoing on the basis of the color of their skin, or the color of their uniforms.