

Profiling, Pretext, and Equal Protection: Protecting Citizens from Pretextual Stops Through the Fourteenth Amendment

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I. INTRODUCTION

No matter how many degrees we receive . . .

While returning to Washington, D.C. from a funeral in Chicago, two African-Americans, Robert Wilkins, a Harvard Law graduate, and his cousin were stopped by a Maryland State Police officer.¹ The officer cited the cousin for speeding on the interstate.² The officer then asked the men for consent to search the vehicle, which was refused.³ The officer stated that they were experiencing problems with rental cars transporting drugs, but Wilkins and his cousin still denied the search.⁴ The two had to wait in the rain while the officer radioed for a narcotics dog.⁵ When the dog arrived, its search revealed no drugs.⁶ Wilkins, being an attorney, informed the officer that he could not detain them unless there was a reasonable and articulable suspicion that there were drugs in the car; however, the officer kept the men in the rain.⁷ On top of all this turmoil, the cousin was still issued a \$105 ticket.⁸

No matter how many wars we fight . . .

In August 1998, on a typically hot summer afternoon in Oklahoma, Rossano Gerald, an African-American U.S. Army Sergeant First Class, and his son Gregory were stopped by Oklahoma law enforcement officers twice while passing through the state.⁹ The first stop ended without incident.¹⁰ However, during the second stop, the

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1. AMERICAN CIVIL LIBERTIES UNION, "DRIVING WHILE BLACK" IS NOT A CRIME. . . SO WHY ARE INCIDENTS LIKE THESE OCCURRING ACROSS THE COUNTRY?, www.aclu.org/profiling/tales/index.html (last visited Apr. 12, 2003) [hereinafter DRIVING WHILE BLACK].

2. *Id.*

3. Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 439 (1997).

4. *Id.*

5. *Id.* at 439-40.

6. *Id.* at 440.

7. *Id.* at 439-40.

8. *Id.* at 440.

9. DAVID A. HARRIS, AMERICAN CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS, (1999), <http://archive.aclu.org/profiling/report/index.html>.

10. *See id.*

troopers called in a canine to search the vehicle, which terrorized twelve-year-old Gregory.¹¹ The troopers threw SFC Gerald and his son into a hot car without air conditioning before they began searching.¹² During the search, the troopers destroyed the automobile's headliner, floorboards, and carpets causing more than \$1000 in damages.¹³ However, the terror did not end there. Without provocation, the officers threatened to attack SFC Gerald and his son with the canine, if they tried to escape.¹⁴ SFC Gerald, a career soldier and a veteran of Desert Storm and Operation United Shield in Somalia, sat helplessly as his son cried uncontrollably.¹⁵ The police officers defiled his property and dignity for over two-and-one-half hours.¹⁶ Ironically, midway during the encounter, the officers turned off the video, possibly fearing the damning picture that the tape would provide.¹⁷

No matter how old we get . . .

In 1997, Maryland State Police Troopers stopped an elderly African-American couple, Charles and Etta Carter, who were celebrating their fortieth wedding anniversary.¹⁸ Instead of enjoying a peaceful evening reminiscing over the past forty years, the Carters lived an unforgettable nightmare. After the couple was stopped, troopers searched the car and called in a canine for no apparent reason.¹⁹ The troopers, without any articulable suspicion, threw the couples' clothes and personal items in the highway and allowed the dog to urinate on them.²⁰ The troopers also threw their daughter's white wedding dress onto a patrol car.²¹ The dress was subsequently blown onto the ground by passing trucks.²² The troopers' search did not yield any drugs nor was the couple issued a citation.²³ All they were left with was a blemish on a special day, which the couple will remember each time that they celebrate their anniversary.

We can be stopped and searched while driving our vehicle merely for the color of our skin.

Traditionally, racial profiling has been a law enforcement tool used for hundreds of years to target African-Americans for investiga-

11. *Id.*

12. *Id.*

13. David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 297 (2001).

14. See HARRIS, *supra* note 9.

15. *See id.*

16. *Id.*

17. *Id.*

18. DRIVING WHILE BLACK, *supra* note 1.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

tions, searches, and seizures.²⁴ As early as 1693, Philadelphia, Pennsylvania, officials issued orders to allow Slave Patrols to “take up” all African-Americans “gadding abroad” without a pass from their master.²⁵ However, for the order to have any effect, the officers had to stop and search free African-Americans, as well as those enslaved, solely because of the color of their skin.²⁶ Other states such as South Carolina and Virginia also condoned such intrusions on free and enslaved African-Americans.²⁷

Today, targeting citizens because of their race alone remains prevalent in two arenas: when a written law or policy targets a racial minority, and when officers engage in discriminatory traffic stops, which are commonly referred to as pretextual traffic stops. Generally, a written law or policy profiles potential suspects by identifying certain characteristics of the suspects that are derived from research and experience, which aid law enforcement officers to target suspects who are likely guilty of some crime.²⁸ Common characteristics include purchasing airline tickets with cash,²⁹ trucks with raised beds,³⁰ as well as nervousness and shiftiness of passengers and drivers.³¹ These characteristics are legitimate and not unconstitutional. However, when these written laws and policies consider race as a relevant characteristic, the law or policy becomes unconstitutional and racial profiling occurs.³²

An additional form of racial profiling occurs when there is no written policy or law, but instead occurs when an officer identifies a person driving a vehicle as a possible suspect based on his race and follows the individual until a minor traffic offense is committed.³³ This form of racial profiling is known as a pretextual stop.³⁴ In a pretextual stop, the officer uses the minor traffic offense he observes as an excuse to stop the minority driver to explore suspicions that

24. See Adero S. Jernigan, Student Article, *Driving While Black: Racial Profiling in America*, 24 L. & PSYCHOL. REV. 127, 128 (2000).

25. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 334 (1998).

26. See *id.*

27. See *id.*

28. See Jernigan, *supra* note 24, at 129.

29. See *United States v. Jennings*, No. 91-5942, 1993 WL 5927, at *1 (6th Cir. Jan. 13, 1993) (discussing factors that cause suspicion in airports).

30. Interview with Renee LaMarge, Haysville City Police Officer, in Haysville, Kan. (June 2, 2002).

31. *Id.*

32. See Rudovsky, *supra* note 13, at 322; see also Carl J. Schifferle, Note, *After Whren v. United States: Applying the Equal Protection Clause to Racially Discriminatory Enforcement of the Law*, 2 MICH. L. & POL'Y REV. 159, 168 (1997).

33. See Schifferle, *supra* note 32, at 164.

34. See *id.* This is not limited to just drivers of a vehicle. Minorities walking down the street or riding a bike can also be victims of a pretextual stop. In those cases, officers would merely wait for the pedestrian to jaywalk, walk down the wrong side of the street, or violate a bicycle ordinance. See generally *United States v. Bell*, 86 F.3d 820 (8th Cir. 1996) (showing a pretextual stop resulting from riding a bicycle without a headlight).

arose merely because the driver is a minority; the minor offense is one where the officer would not normally stop a Caucasian.³⁵ In these stops, the officer often asks the individual for consent to search the vehicle or his person to explore his suspicions, and the search may lead to an arrest based on the fruits of that search.³⁶

This Note focuses on pretextual stops and the method to challenge them under the Fourteenth Amendment. Minority defendants must be allowed to challenge discriminatory stops. By allowing defendants to challenge the discriminatory stops that lead to their arrest, police officers would be deterred from stopping people based solely on the color of their skin. Deterring officers from making these discriminatory stops will eventually protect all minority motorists, not just those engaged in illegal activities. Contesting any racial policy so embedded into the fabric of this country is challenging to say the least. However, it is time to end this invidious practice and to afford Americans full protection of the Equal Protection Clause of the Fourteenth Amendment.

Before challenging these discriminatory stops under the Fourteenth Amendment, one must be apprised as to exactly how troublesome these stops are. Statistics prove definitively that minorities are stopped for no apparent reason other than the color of their skin.³⁷ For example, an investigation and ensuing litigation in New Jersey revealed alarming patterns.³⁸ A New Jersey court found that only fifteen percent of all drivers that traveled the New Jersey Turnpike were minorities.³⁹ Additionally, the court stated that *all* drivers violated at least one traffic law and African-Americans and Caucasians violated the traffic laws at almost the exact same rate.⁴⁰ The court also stated that "radar stops were relatively consistent with the percentage of minority [drivers]"⁴¹. However, the statistics tell a different story for stops involving the exercise of officer discretion.⁴² Of these discretionary stops, eighty-eight percent involved minorities, and sixty-three percent of those same stops were black males thirty years old or younger.⁴³ The Attorney General of New Jersey also stated that just over seventy-seven percent of all consent searches were of minority drivers and passengers.⁴⁴

35. See Schifferle, *supra* note 32, at 164.

36. *Id.*

37. See Rudovsky, *supra* note 13, at 299-300.

38. *See id.* at 300.

39. *Id.*

40. *Id.*

41. *Id.*

42. *See id.*

43. *Id.*

44. *Id.*

This disparity is not exclusive to New Jersey. In New York, the Attorney General conducted a study of 175,000 police encounters with pedestrians.⁴⁵ The Attorney General found that “African-Americans were stopped six times more frequently than whites.”⁴⁶ Additionally, in predominately white precincts where the African-American population comprised ten percent or less of the population, thirty percent of stops were of African-Americans.⁴⁷

Initially, it seems that such pretextual stops violate the Fourth Amendment because officers use these stops to circumvent the reasonable suspicion requirement to search a person. In fact, Justice William Brennan once stated that he had “no doubt that [pretextual] searches violate the Fourth Amendment.”⁴⁸ Justice Brennan provided the following example:

[i]f an officer enters a house pursuant to a warrant to search for evidence of one crime when he is really interested only in seizing evidence relating to another crime, for which he does not have a warrant, his search is “pretextual” and the fruits of that search should be suppressed.⁴⁹

Pretextual searches of a home cannot be condoned because the searches are intentional attempts “to circumvent the constitutional requirement of a warrant ‘particularly describing the place to be searched, and the person or things to be seized.’”⁵⁰ This is true for pretextual stops of a vehicle based on race as well; thus, these searches should violate the Fourth Amendment. However, in *Whren v. United States*,⁵¹ the United States Supreme Court shut the door on using the Fourth Amendment to challenge racial pretextual stops.⁵² In *Whren* the Court stated that officers’ subjective intentions play no part in a Fourth Amendment analysis.⁵³

45. *Id.* at 302.

46. *Id.*

47. *Id.* Additionally, the Attorney General did find that African-Americans who were stopped committed less crimes than white motorists who were actually stopped. *Id.*

48. *Horton v. California*, 496 U.S. 128, 148 (1990) (Brennan, J., dissenting). In this case the Court decided that inadvertence was not a requirement of the plain view doctrine. *Id.* at 139. Justice Brennan went out of his way to state that this holding was limited and did not justify unconstitutional pretextual stops. *Id.* at 148 (Brennan, J., dissenting).

49. *Id.* at 147 (Brennan, J., dissenting). This situation parallels the officers’ initial stop pretextual cases.

50. *Id.* at 148 (Brennan, J., dissenting).

51. 517 U.S. 806 (1996). Plainclothes officers were patrolling in an unmarked police vehicle. *Id.* at 808. As they were patrolling through a neighborhood in southeast Washington, D.C., they drove past two black males looking into the passenger’s lap while they waited at a stop sign. *Id.* The officers testified that the defendant’s truck was parked at the stop sign for approximately twenty seconds. *Id.* However, before the officers reached the defendant’s truck, it made a right-hand turn without signaling. *Id.* The officers then approached the truck and observed two plastic bags that contained what appeared to be crack. *Id.* at 808-09. The defendants moved to have the evidence suppressed as unreasonable under the Fourth Amendment because the officers only stopped the defendant in order to investigate their unfounded suspicions. *See id.* at 809.

52. *Id.* at 813.

53. *Id.*

However, all was not lost in *Whren*. The Court stated that pretextual stops based on race can be challenged. The proper constitutional challenge must occur under the Equal Protection Clause of the Fourteenth Amendment.⁵⁴ However, the Court did not establish how a defendant would utilize the Fourteenth Amendment, nor what remedy would be available to him. This Note argues that the United States Supreme Court must adopt a framework specifically to address this widespread problem. The Court has adopted a framework to address racial discrimination in *Batson v. Kentucky*,⁵⁵ which added substance to the holding of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁵⁶ and addressed discriminatory discretion in voir dire challenges. *Arlington Heights* and *Batson* allow a defendant to rely on one single incident to prove purposeful discrimination and should be applied to pretextual stops. Additionally, the Court must use *Arlington Heights* and current state case law as examples to allow the defendant to prove that the actions of the officer were purposeful and pretextual. Furthermore, the exclusionary rule must be applied as a remedy in order to prevent the Fourteenth Amendment from being a hollow promise.⁵⁷

This Note begins by examining how current Fourteenth Amendment principles, as applied in claims under selective prosecution and selective enforcement, do not protect minorities from discriminatory stops. Section III will examine *Arlington Heights*, *Batson*, and current New York case law, specifically addressing the elements of these cases that should be used to prove a discriminatory purpose under the Fourteenth Amendment. This section will also demonstrate how the courts should combine these elements into a comprehensive approach to address discriminatory stops. Section IV will show that the exclusionary rule that has been developed under the Fourth and Fifth Amendment should be extended to Fourteenth Amendment violations and is the only remedy that serves to deter racially motivated police behavior.

II: WHY CURRENT FOURTEENTH AMENDMENT PRINCIPLES FAIL IN PRETEXTUAL STOP CASES

“[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵⁸

54. *Id.*

55. 476 U.S. 79 (1986).

56. 429 U.S. 252 (1977).

57. The exclusionary rule is a judicially created tool that excludes evidence that was illegally obtained. *See generally* *Mapp v. Ohio*, 367 U.S. 643 (1961).

58. U.S. CONST. amend. XIV, § 1.

Courts recognize two forms of discrimination under the Fourteenth Amendment: facial discrimination and as applied discrimination.⁵⁹ Facial discrimination occurs when a law expressly targets a class of citizens.⁶⁰ When a state makes a law that expressly excludes African-Americans from protected liberties or if the law expressly targets African-Americans in a profile merely because of their race, facial discrimination is accomplished.⁶¹ Additionally, facial discrimination occurs where police officers admit that race was the primary reason in initiating a traffic stop.⁶² Furthermore, any form of facial discrimination based on race under the Fourteenth Amendment is subject to strict scrutiny.⁶³ In order for a law to remain valid, a state must show a compelling state interest.⁶⁴ Although desirable, facial attacks are unlikely. Governments practically never admit to relying on race to effectuate a traffic stop, nor create laws that expressly exclude or target African-Americans. Thus, most challenges of police officers' actions would be challenged as discriminatory as applied.

Opposite of facial discrimination is discrimination as applied. This is simply unequal application of a facially neutral law⁶⁵; this is the most common framing for discrimination under the Fourteenth Amendment.⁶⁶ Under this framework, the plaintiff must generally show that he was treated differently than similarly situated individuals and that the government acted with a discriminatory purpose.⁶⁷ Currently, cases specifically addressing the Fourteenth Amendment rights of criminal defendants are analyzed under two subsets: selective enforcement and selective prosecution.⁶⁸ Each of these areas is analyzed under ordinary Fourteenth Amendment principles and can be discussed interchangeably.⁶⁹

A. *Selective Prosecution and Selective Enforcement*

Criminal defendants who believe that they were singled out because of their race have two avenues to challenge police actions: selective prosecution and selective enforcement. Generally, selective prosecution is an "independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution" and "is

59. See *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886).

60. See *id.*

61. This is an example of racial profiling.

62. See Schifferle, *supra* note 32, at 168.

63. See *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

64. See *id.*

65. See *id.* at 648.

66. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

67. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996).

68. See *Armstrong*, 517 U.S. at 468; *Bell*, 86 F.3d at 823.

69. Compare *Armstrong*, 517 U.S. at 465, with *Bell*, 86 F.3d at 823.

not a defense on the merits.”⁷⁰ Under a selective prosecution claim, the criminal defendant must show that the prosecutorial policy “had a discriminatory effect and that it was motivated by a discriminatory purpose.”⁷¹ The criminal defendant meets the burden for selective prosecution when he shows that “similarly situated individuals of a different race were not prosecuted.”⁷² There is a presumption that government actions are consistent with the Constitution, which the criminal defendant must overcome by clear evidence to the contrary.⁷³ This standard is demanding and is intended to bar insignificant claims.⁷⁴

Selective enforcement, conversely, is an independent assertion that the government chooses to unequally enforce facially neutral laws for reasons forbidden by the Constitution.⁷⁵ With this challenge, as with selective prosecution, there is a presumption that the government’s actions were consistent with the Constitution.⁷⁶ The criminal defendant must present clear evidence that his constitutional rights have been violated.⁷⁷ This standard is also demanding and is intended to bar insignificant claims.⁷⁸ The defendant must show that the unequal enforcement had “a discriminatory effect, and that the enforcement was motivated by a discriminatory purpose.”⁷⁹ The criminal defendant meets the burden for selective enforcement when he shows that “people of another race violated the law [yet] the law was not enforced against them.”⁸⁰

B. *Shared Analysis of Selective Prosecution and Selective Enforcement Challenges*

Although the wording in selective prosecution and selective enforcement challenges is different, the standard to establish a case under the Fourteenth Amendment for each is identical.⁸¹ An early example of this standard is found in *Yick Wo v. Hopkins*.⁸² In this case, the petitioners were Chinese owners of a laundry business.⁸³

70. *Armstrong*, 517 U.S. at 463.

71. *Id.* at 465 (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

72. *Id.*; see also *infra* notes 144-72 and accompanying text (discussing situations where this burden was and was not met).

73. See *Ah Sin v. Wittman*, 198 U.S. 500, 506 (1905) (stating that courts will not interfere with a government action unless it is a “clear, unmistakable infringement” of the rights of individuals).

74. See *Armstrong*, 517 U.S. at 463.

75. See *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1998).

76. See *Armstrong*, 517 U.S. at 463.

77. See, e.g., *Ah Sin*, 198 U.S. at 506.

78. See, e.g., *Armstrong*, 517 U.S. at 463.

79. *Bell*, 86 F.3d at 823.

80. *Id.*

81. Compare *Armstrong*, 517 U.S. at 465, with *Bell*, 86 F.3d at 823.

82. 118 U.S. 356 (1886).

83. See *id.* at 368.

The petitioners were fined for violations of several city and county ordinances that were designed to protect neighbors' property from fire and any injury to public health.⁸⁴ Petitioners were denied licenses despite the fact that they complied with every requisite that the ordinances required and did not pose a danger of fire or injury to public health.⁸⁵ Additionally, the petitioners refused to pay the fine and were imprisoned until they paid.⁸⁶ The petitioners then filed a writ of habeas corpus, claiming they were denied a right in violation of the Constitution, which the United States Supreme Court addressed.⁸⁷ In making its decision, the Court announced the landmark phrase:

[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.⁸⁸

The Court held that the petitioners successfully proved that they were treated differently than similarly situated laundry owners.⁸⁹ The Court reasoned that the petitioners complied with every aspect of the ordinances, and the supervisors only denied the petitioners' request because they did not want the petitioners to run a laundry business.⁹⁰ The supervisors withheld consent from two hundred Chinese citizens who petitioned while permitting eighty others who were not Chinese to operate a laundry business.⁹¹

In *Yick Wo*, evidence of selective treatment was clear. However, in *Ah Sin v. Wittman*,⁹² the evidence was not so clear, and the United States Supreme Court reached a different result on a similar issue. In *Ah Sin*, the petitioner contended that a California criminal statute barring people from housing gambling tables in rooms that were barricaded to prevent police entry was unconstitutional because it was only applied against Chinese citizens, denying a protected class equal protection of the laws.⁹³ The Court rejected the argument because the petitioner's claim failed to allege "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced."⁹⁴ Thus, the petitioners

84. *Id.* at 374.

85. *Id.*

86. *Id.* at 356, 374.

87. *Id.* at 365.

88. *Id.* at 373-74.

89. *Id.*

90. *See id.*

91. *Id.* at 374.

92. 198 U.S. 500 (1905).

93. *See id.* at 506.

94. *Id.* at 507-08.

failed to make their prima facie case because they were not able to show that other similarly situated persons of another race were treated differently.

Similarly, in *United States v. Bell*,⁹⁵ a selective enforcement case, the petitioner showed that African-Americans were the only racial group arrested during a one-month period for violating a statute regulating bicycle riders.⁹⁶ However, this was insufficient to show that the petitioner was treated differently than others because he “failed to show white bicyclists also violated the statute and police chose not to arrest them.”⁹⁷ Thus, a person who claims selective prosecution or selective enforcement must show that other persons of a different race were not prosecuted or arrested in order to show a discriminatory effect.⁹⁸

Once the defendant shows discriminatory effect, he must prove that the officer acted with a discriminatory purpose.⁹⁹ In order to show a discriminatory purpose in selective prosecution and selective enforcement cases, the defendant must show that the adverse decision made against him was partially based on race.¹⁰⁰ In *Bell*, the Eighth Circuit upheld a district court’s ruling that an officer’s decision to enforce a statute against African-Americans was not based on their race.¹⁰¹ The defendant urged the court to infer discriminatory purpose because the officer admitted that within the month surrounding the petitioner’s arrest there were five previous arrests, all of which were African-American.¹⁰² However, the officer also explained that the area targeted was highly populated with minorities and was under a zero-tolerance policy.¹⁰³ Thus, the court refused to draw an inference of a discriminatory purpose and, in fact, concluded that it was not surprising that African-Americans were the only persons arrested.¹⁰⁴

Courts likewise have rejected inferring discriminatory purpose based on the disparate impact that resulted from drug sentencing laws.¹⁰⁵ In *United States v. Brown*,¹⁰⁶ the Eighth Circuit Court of Appeals stated that discriminatory purpose “implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . .

95. 86 F.3d 820 (8th Cir. 1996).

96. *Id.* at 823.

97. *Id.*

98. *See id.*

99. *Id.*

100. *See id.*; *United States v. Brown*, 9 F.3d 1374, 1376 (8th Cir. 1993).

101. *Bell*, 86 F.3d at 823.

102. *Id.*

103. *Id.*

104. *See id.*

105. *See Brown*, 9 F.3d at 1376.

106. 9 F.3d 1374.

selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse affects upon an identifiable group.”¹⁰⁷ Thus, the petitioner must present specific facts of discriminatory conduct, and in *Brown*, he did not provide any proof that a decision was made because of his race.¹⁰⁸

Once the plaintiff proves a discriminatory effect and purpose, the government must present sufficient evidence to overcome the petitioner’s prima facie case.¹⁰⁹ The state may present evidence that the same decision would have been made regardless of the discriminatory purpose.¹¹⁰ The state may also present evidence that “‘permissible racially neutral . . . criteria and procedures have produced the monochromatic result.’”¹¹¹ However, this evidence must be more than mere generalities.

For example, in *Norris v. Alabama*,¹¹² the petitioner proved a strong prima facie case. In proving his prima facie case, the petitioner showed that the names of African-Americans would often appear on a prospective juror list.¹¹³ However, in four years, over 2500 citizens were actually called for jury duty and not even one African-American called.¹¹⁴ Additionally, the petitioner showed that there was a great number of qualified African-Americans eligible to serve on a jury.¹¹⁵ The government claimed, however, that African-Americans were not excluded because of race, but merely that they were not as qualified as their white counterparts.¹¹⁶ Additionally, the government claimed that more qualified white citizens were excluded from jury duty than the entire population of African Americans.¹¹⁷ In light of the strength of evidence supporting the petitioner’s prima facie case, the Court held that the defendant’s excuse failed to rebut the petitioner’s prima facie case.¹¹⁸ The jury commissioner’s excuse under oath was:

I do not know of any negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn’t afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and

107. *Id.* at 1376 (quoting *Wayte v. United States*, 470 U.S. 598, 610 (1985)).

108. *See id.*

109. *Turner v. Fouche*, 396 U.S. 346, 361 (1970).

110. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271 n.21 (1977).

111. *Washington v. Davis*, 426 U.S. 229, 241 (1976) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

112. 294 U.S. 587 (1935).

113. *Id.* at 596.

114. *Id.* at 597.

115. *Id.*

116. *Id.* at 598-99.

117. *See id.* at 593.

118. *See id.* at 598.

who can read English, and who has never been convicted of a crime involving moral turpitude.¹¹⁹

Assertions sufficient to rebut a prima facie claim must not be clearly contrary to the evidence or common belief.¹²⁰ The commissioner's excuse was so contrary to common belief that it was clearly false.¹²¹ After *Norris*, it is clear that the government must present specific and credible evidence in order to rebut a prima facie case of discrimination.

C. *Why Selective Enforcement and Prosecution Principles Are Inadequate in Pretextual Stop Cases*

Currently, the analytical framework that exists for selective prosecution and selective enforcement cases is inadequate to address pretextual stop cases and presents unique problems. The "similarly situated persons" requirement of selective enforcement and selective prosecution cases is the major problem. This requirement creates an insurmountable barrier to receive discovery and prove a discriminatory purpose.¹²² Under these cases, courts have created a catch-22 requirement. The criminal defendant must show on at least two separate occasions that the government failed to prosecute similarly situated persons.¹²³ To even get the discovery necessary to make this showing, the criminal defendant must make an initial proffer that the government prosecuted or enforced its law in a discriminatory manner.¹²⁴ Only then will a court allow the defendant access to necessary information in order to prove at trial that the government failed to prosecute similarly situated persons: a no-win situation for a defendant.¹²⁵

1. Unreasonable Discovery Requirement

In order to get discovery, the defendant must present a colorable basis for discriminatory purpose.¹²⁶ The United States Supreme

119. *Id.* at 598-99.

120. *See id.* at 599. The Court stated that if these "mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement." *Id.* at 598. "In the light of the testimony given by defendant's witnesses, we find it impossible to accept such a sweeping characterization of the lack of qualifications of negroes in Morgan County. It is so sweeping, and so contrary to the evidence as to the many qualified negroes, that it destroys the intended effect of the commissioner's testimony." *Id.* at 599.

121. *See id.* at 599.

122. *See generally* *United States v. Armstrong*, 517 U.S. 456 (1996) (denying a criminal defendant discovery because he could not show how similarly situated persons were treated); *United States v. Bell*, 86 F.3d 820 (8th Cir. 1996) (stating that a criminal defendant failed to show how similarly situated persons were treated).

123. *See generally* *Armstrong*, 517 U.S. 456; *Bell*, 86 F.3d 820.

124. *See Armstrong*, 517 U.S. at 469.

125. *See Bell*, 86 F.3d at 823.

126. *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974).

Court in *United States v. Armstrong*¹²⁷ specifically rejected the premise that this burden can be met by presenting evidence other than showing that the government failed to prosecute similarly situated persons.¹²⁸ In *Armstrong*, the defendant requested discovery for his selective prosecution claim.¹²⁹ To support his request, the defendant presented compelling evidence.¹³⁰ Initially, the defendant presented an affidavit from an intake coordinator of a drug facility, who swore that there was “an equal number of caucasian users and dealers to minority users and dealers.”¹³¹ A defense attorney provided a second affidavit.¹³² In his affidavit, he stated as an expert that non-African-American crack offenders were prosecuted in state court as opposed to federal court.¹³³ Additionally, the defendant provided a newspaper article that stated that federal “crack criminals . . . are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black.”¹³⁴ The defendants also provided a study that listed twenty-four defendants, their race, whether the prosecution was for crack or powder cocaine, and the case status.¹³⁵ Along with the study, the defendants included a third affidavit of a “Paralegal Specialist,” which stated that each of the twenty-four persons charged under 21 U.S.C. § 841 and § 846 in 1991 was African-American.¹³⁶

The Court systematically disregarded all of this evidence as insufficient to warrant discovery by stating that the defendants failed to identify persons who were not African-American and could have been prosecuted for the same offenses as the defendants, but were not.¹³⁷ The defendants exhausted the means available to them, making the information impossible to produce without discovery.¹³⁸ Nonetheless, the Court stated that the defendants “could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted by the federal court.”¹³⁹

Curiously, the Court required information “known to federal officers,” despite the fact that the defendant would not know who was

127. 517 U.S. 456.

128. *Id.* at 469.

129. *Id.* at 459.

130. *See id.* at 459.

131. *Id.* at 460.

132. *Id.*

133. *Id.*

134. *Id.* at 460-61 (quoting Jim Newton, *Harsher Crack Sentences Criticized As Racial Inequity*, L.A. TIMES, Nov. 23, 1992, at 1).

135. *Id.* at 459.

136. *Id.*

137. *Id.* at 470.

138. *See generally id.*

139. *Id.* at 470.

“known to federal officers” without the very discovery that he was being denied; the government did not have to provide the evidence that the plaintiff needed to move forward. Additionally, the Court dismissed the affidavits of the intake coordinator and the attorney as merely hearsay and “personal conclusions based on anecdotal evidence.”¹⁴⁰ As Justice John Paul Stevens pointed out in his dissent, the affidavit from the intake coordinator was sufficient because the defendants “do not need to prepare sophisticated statistical studies in order to receive mere discovery.”¹⁴¹ Furthermore, the affidavit from the attorney contained more relevant information besides hearsay.¹⁴² The attorney offered information based on his extensive personal experience, which made him “well qualified to compare the practices of federal and state prosecutors.”¹⁴³

Armstrong is contrary to the principles of the Fourteenth Amendment. There is no other area where a plaintiff is required to make a showing of such detail to receive discovery. The goal of all civil rights laws is to ensure equal protection. However, this goal is defeated because the courts will not even consider whether a defendant is afforded equal protection of the laws unless the defendant can show that persons of other races committed the same crime, could have been prosecuted, and were not prosecuted — the very information that the government controls. Thus, as it stands, a defendant has little or no chance to receive discovery. The fallacy in requiring such a detailed showing by a criminal defendant to obtain discovery is clear and questions the integrity of the Court.

2. The Prima Facie Case

If the defendant is somehow able to receive discovery, he must again show that other similarly situated persons could have been stopped, but were not. This has proven to be an insurmountable feat.¹⁴⁴ Plaintiffs are booted out of court because they are unable to prove a prima facie case regardless of how shocking to the conscience the facts are to the court.

This insurmountable burden is best illustrated in *United States v. Jennings*,¹⁴⁵ where the defendant entered the Cincinnati/Northern Kentucky International Airport dressed in conservative business at-

140. *Id.*

141. *Id.* at 481 (Stevens, J., dissenting).

142. *Id.* (Stevens, J., dissenting).

143. *Id.* (Stevens, J., dissenting). The attorney was a well respected and leading criminal defense lawyer in California, a fact that the majority failed to acknowledge. *Id.*

144. See *United States v. Jennings*, No. 91-5942, 1993 WL 5927, at *5 n.4 (6th Cir. Jan. 13, 1993). But see *Armstrong*, 57 U.S. at 466 (stating in its opinion that this burden is not impossible and pointing to *Ah Sin* as an example).

145. No. 91-5942, 1993 WL 5927.

tire.¹⁴⁶ Two plainclothes officers watched the defendant exit the airplane.¹⁴⁷ The defendant walked in the opposite direction of the baggage claim, stopped, reversed direction, and walked quickly towards the baggage claim.¹⁴⁸ The defendant also had a “carry-on” bag with a tag labeled “CVG,” which denotes the Cincinnati airport.¹⁴⁹ The two plainclothes officers became suspicious and followed the defendant because his actions were consistent with the agency’s drug courier profile.¹⁵⁰ The defendant continued to change directions before entering the men’s restroom.¹⁵¹ He only stayed in the restroom for approximately twenty seconds and left to call for a taxi.¹⁵² As the defendant was waiting for the taxi, the officers approached the defendant.¹⁵³ The officers eventually searched the defendant and found an envelope with dilaudid tablets.¹⁵⁴

The defendant challenged the stop, claiming that the officers violated the Fourteenth Amendment when he was stopped because of his race.¹⁵⁵ In order to make a *prima facie* case, the Sixth Circuit Court of Appeals held that the defendant had to show “that the officers who stopped him single out racial minorities for treatment [not] given to non-minorities.”¹⁵⁶ Once the defendant made a *prima facie* case, the government had to provide a “compelling governmental interest for race-based stops.”¹⁵⁷ The officer who detained the defendant admitted that half of his stops were of African-Americans and Hispanics,¹⁵⁸ despite the fact that African-Americans and Hispanics comprised significantly less than fifty percent of general airport travelers at that airport.¹⁵⁹

The court stated that the facts, in light of equal protection principles, were disturbing.¹⁶⁰ Additionally, the testimony of the officer was hollow and created doubt as to any race-neutral motivation that the officer may have possessed in stopping the defendant.¹⁶¹ Most of the reasons that the officers gave for stopping the defendant could not justify the stop.¹⁶² Many people in airports are in a hurry to get

146. *Id.* at *1.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at *2.

155. *Id.* at *3.

156. *Id.* at *4.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.*

162. *See id.* at *5.

through it and make wrong turns. Travelers also often leave old travel tags on luggage after a trip. The majority of society shares these characteristics, and reasonable suspicion cannot be based on conduct that is shared by the majority of society.¹⁶³ As a result, the court intuitively felt that the defendant was only stopped because he was African-American.¹⁶⁴

Despite the hollowness of the officer's reasons and the court's intuition that the officers stopped the defendant because he is African-American, the defendant failed to make a prima facie case under the Fourteenth Amendment.¹⁶⁵ Specifically, the defendant failed to show that "race constituted a motivating factor in the stop and questioning."¹⁶⁶ As an example, the *Jennings* court stated that the defendant was unable to show statistically that "African-Americans represent a small minority of passengers deplaning in Cincinnati."¹⁶⁷ The court reached this conclusion even while recognizing the near impossibility of ever being able to present such statistics.¹⁶⁸ The Drug Enforcement Agency does not keep records of its drug courier profile, and it is "unknown whether the Cincinnati International Airport keeps track of the racial composition of travelers" that deplane there.¹⁶⁹ Even if this information existed, the defendant may not get the information because of the near-impossible discovery requirement.¹⁷⁰

For precisely the same reason that the defendant in *Jennings* failed to make the required showing, the current framework for selective prosecution and selective enforcement cases is inadequate for pretextual stop cases. A motorist will rarely be able to receive discovery or show a prima facie case. The defendant's inability to receive discovery or show a prima facie case arises because he must present statistical data. The defendant would have to use statistics to show the race of other motorists who commit the same infraction as well as the frequency that they are actually stopped and searched. Police departments are not required to retain this type of data.¹⁷¹ Therefore, the

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *See id.* at *5 n.4 (stating that it is not surprising that the record was inadequate to establish this statistical requirement).

169. *Id.*

170. *See, e.g.,* *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (demonstrating the heightened discovery burden placed on a defendant in a selective prosecution context).

171. Departments only keep this information if forced, and, currently, the federal government does not force the states to retain this information. There are a few states who do require this, but they are in the small minority. *See* ACLU, SAN DIEGO POLICE DATA PROGRAM URGED AS LOCAL MODEL FOR OTHER AGENCIES, <http://archive.aclu.org/news/2000/w061500d.html> (June 15, 2000).

framework established for selective prosecution and selective enforcement cases fails to provide motorists with the protection afforded by the Equal Protection Clause of the Fourteenth Amendment. The courts must recognize this dilemma and look to existing case law that allows a defendant to make a prima facie case under the Fourteenth Amendment without relying on statistics that may not exist. Furthermore, the Court must create an analytical framework that will adequately address these invidious stops.

III. FRAMEWORK TO CHALLENGE PRETEXTUAL STOPS

A. Introduction

As evidenced in the previous discussion, traditional Fourteenth Amendment principles cannot adequately address pretextual stops. The goal of the Fourteenth Amendment is to prevent official conduct that discriminates on the basis of race.¹⁷² In order to realize this goal, a defendant must be allowed to challenge pretextual stops during his criminal trial under a framework unique to these stops because the discretion inherent in a law enforcement officer's position creates great opportunity for the officer to discriminate if he so chooses.

The United States Supreme Court in *Batson* has similarly recognized the need to develop a distinct framework to address the inherent discretion of government officials. The Court expressly stated that voir dire permitted anyone to discriminate.¹⁷³ *Batson* recognized that it was important for prosecutors to retain discretion, however, it also recognized that discretion unbridled led to racial exclusion.¹⁷⁴ In response, the Court developed a burden shifting approach.¹⁷⁵

Like the government officials in *Batson*, law enforcement officers are in a position to discriminate if they so choose. Statistics prove that this unbridled discretion has led to a disproportionate number of minorities being stopped.¹⁷⁶ Thus, in response to this growing social problem, the Court must develop a framework similar to that established in *Batson* to address pretextual stops, which will attempt to determine the officer's ultimate motive.

The United States Supreme Court's decisions in *Arlington Heights* and *Batson* can be combined to create an effective framework that the Court should adopt in challenging discriminatory stops. In establishing this framework, the defendant must establish a prima facie case by showing the factors announced in *Arlington Heights*, which

172. *Washington v. Davis*, 426 U.S. 229, 238 (1976).

173. *See Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

174. *See id.*

175. *See id.* at 96-97.

176. *See supra* notes 37-47 and accompanying text.

have also been specifically applied to pretextual stop cases in New York state courts. Furthermore, showing a prima facie case establishes a presumption that the actions of the government are unconstitutional. The burden then shifts to the government to justify its actions. Moreover, the factors announced in *Arlington Heights* and applied in New York cases would determine whether the justification proffered by the stopping officer is legitimate.

B. *Prima Facie Case*

In establishing a prima facie case under the Fourteenth Amendment, courts want to bar insignificant claims.¹⁷⁷ As a result, there is a difficult standard in proving a prima facie case of discrimination under the Fourteenth Amendment. However, establishing a prima facie case under the proposed framework passes this threshold. A prima facie case of a pretextual stop should be established when the defendant presents evidence that the officer acted with a discriminatory purpose when stopping the defendant. In establishing that the officer acted with a discriminatory purpose, the defendant must be able to rely on the single incident in question. The Court's decisions in *Arlington Heights* and *Batson* demonstrate that the use of a single incident to show a discriminatory purpose is sufficient under a Fourteenth Amendment analysis.¹⁷⁸ Additionally, with that single incident, evidence of the factors established in *Arlington Heights* will sufficiently allow a court to determine the stopping officer's subjective intentions and whether there was a discriminatory purpose. The presence of these factors may also show whether the excuse provided by the government was clearly "contrary to the evidence."

1. A Single Incident to Show a Discriminatory Purpose

Instead of having to prove discriminatory purpose through statistics, the defendant must be allowed to establish a prima facie case by examining the facts of the single incident in question. Furthermore, allowing a defendant to rely on one single event in order to show a prima facie case is consistent with prior United States Supreme Court decisions. For instance, in *Arlington Heights*, Metropolitan Housing (Metro) challenged the Village's denial of its request for rezoning.¹⁷⁹ Metro requested that Arlington Heights rezone its community in or-

177. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). One can argue that there is no such thing as an insignificant claim if a person feels as though his constitutional rights have been violated.

178. *See Batson*, 476 U.S. at 95; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.1.

179. *See Arlington Heights*, 429 U.S. at 258.

der to accommodate multifamily housing.¹⁸⁰ Arlington Heights denied the request, stating that its primary concern was to “protect property values and the integrity of the Village’s zoning plan.”¹⁸¹ Metro argued that the denial of its request was racially discriminatory under the Fourteenth Amendment.¹⁸² The case turned on whether there was enough evidence to prove a discriminatory purpose.¹⁸³ In order to prove discriminatory purpose, Metro only offered the fact that there was a discriminatory effect of the Village’s denial of Metro’s request for rezoning.¹⁸⁴ In probably the Court’s most important discussion of discriminatory purpose in a Fourteenth Amendment context, it stated that any inquiry into invidious discriminatory conduct must be sensitive and consider *all* available direct and circumstantial evidence.¹⁸⁵ Additionally, the Court clearly established that a person seeking Fourteenth Amendment protection does not have to show a pattern of official racial discrimination.¹⁸⁶ This essentially reverses the need to show a discriminatory effect *and* discriminatory purpose as seen in *Ah Sin*.¹⁸⁷ The Court in *Arlington Heights* stated that “[a] single invidiously discriminatory governmental act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions.”¹⁸⁸ This combination establishes that discrimination under the Fourteenth Amendment can be proven *either* through statistics *or* the single discriminatory act.¹⁸⁹ Consequently, a person can rely on a single incident is making a prima facie case under the Fourteenth Amendment.

Following *Arlington Heights*, the *Batson* Court reasoned that requiring several persons to suffer discrimination before one person was afforded full protection of the Fourteenth Amendment was “inconsistent with the promise of equal protection to all.”¹⁹⁰ The United States Supreme Court in *Batson* created a framework to challenge discriminatory practices occurring during voir dire, which is also central in creating a new approach to analyzing pretextual stop cases. In *Bat-*

180. *Id.* at 257.

181. *Id.* at 259 (quoting *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 373 F. Supp. 208, 211 (N.D. Ill. 1974)).

182. *See id.*

183. *See id.* at 266.

184. *See id.* at 268.

185. *Id.* at 266.

186. *Id.* at 266 n.14.

187. *See generally* 198 U.S. 500 (1905).

188. *Arlington Heights*, 429 U.S. at 266 n.14 (emphasis added). Metro was unable to show a discriminatory purpose by solely relying on the effect of *Arlington Heights*’ decision. When relying on an effect, the court must look to other facts to show a discriminatory purpose because an effect alone is not sufficient to establish a discriminatory purpose. *Id.* Courts have subsequently announced factors that are relevant in determining whether there was a discriminatory purpose. *See infra* notes 202-27 and accompanying text.

189. *Id.* at 266.

190. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

son, a criminal defendant challenged the use of the prosecutor's peremptory challenges on the basis that his Fourteenth Amendment rights were violated.¹⁹¹ The defendant specifically alleged that the prosecutor eliminated prospective African-American jurors simply because of their race.¹⁹² In proving the prima facie case in *Batson*, the same general principles of the Fourteenth Amendment applied to the defendant's voir dire claim as those used to establish selective prosecution and selective enforcement cases with one important distinction.¹⁹³ The distinguishing feature in *Batson* was that the Court allowed the defendant to make a prima facie case against the government by *only* showing a discriminatory purpose during a single instance that arose *at the defendant's trial*.¹⁹⁴ The necessity to create a distinct framework arose from the inherent nature of prosecutorial discretion during voir dire. The Court recognized "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" ¹⁹⁵ Thus, as a direct result of potential danger that discretion holds, *Batson* allows defendants to invoke the protection of the Fourteenth Amendment by relying on one single incident.¹⁹⁶ This analysis is specific to voir dire challenges, but it demonstrates that the Court allows proof of discrimination for Fourteenth Amendment claims that are not based on widespread patterns and practices when the danger of discretion exists. Since this danger is prevalent in pretextual stop cases, *Batson* analysis must be extended here as well.

Currently, the courts improperly reject cases when the defendant cannot show how similarly situated defendants were treated.¹⁹⁷ In pretextual stop cases, the court *must* make a sensitive inquiry into all of the relevant circumstantial evidence, which *may* include proof of how persons of another race were treated, but does not necessarily require it.¹⁹⁸ The courts must allow defendants to rely on the single incident in order to ensure that courts will review *all* the evidence relevant to the *one* incident.¹⁹⁹ Throwing out defendants' claims without properly applying weight to all of the relevant facts is completely contrary to the principles of the Fourteenth Amendment that *Arlington Heights* and *Batson* established. Thus, in accordance with Four-

191. *Id.* at 83.

192. *Id.*

193. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996); *supra* notes 128-39 and accompanying text.

194. *Batson*, 476 U.S. at 95.

195. *Id.* at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

196. See generally *id.*

197. See generally *Armstrong*, 517 U.S. 456; *Bell*, 86 F.3d 820.

198. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 256, 266 (1977); see also *Washington v. Davis*, 426 U.S. 229, 242 (1976).

199. See *Arlington Heights*, 429 U.S. at 266.

teenth Amendment principles, a defendant does not have to show a pattern of treatment against one race as opposed to another.

2. Factors That Show Discriminatory Purpose

Also in establishing a prima facie case, the courts must take into account all possible factors surrounding the traffic stop.²⁰⁰ There are many relevant factors that can be used when determining whether the police officer's stop and search were racially motivated. In addition to laying the foundation for *Batson*, the Court in *Arlington Heights* also established several factors that would tend to show a discriminatory purpose. Although the United States Supreme Court has used these factors in determining discriminatory purpose, it has not used them specifically in the context of pretextual stops. However, New York state courts have adopted the *Arlington Heights* factors and specifically applied these factors in pretextual stop cases.²⁰¹ Consequently, these factors provide objective criteria to measure the officer's subjective intentions.

Departing from a certain procedural sequence is the most compelling factor announced in *Arlington Heights* to consider when determining an officer's ulterior motive.²⁰² The New York courts specifically consider whether the driver was questioned about the traffic infraction; whether the officer requested proof of his license, registration, and insurance; whether there was a traffic summons issued; and whether the stop deviated from a normal traffic stop.²⁰³ In *People v. Smith*,²⁰⁴ the police followed a defendant who entered a cab after leaving a building that was under surveillance.²⁰⁵ The police followed the cab until it made a U-turn and then stopped the cab.²⁰⁶ The officers then approached the car and asked the defendant and the cab driver whether they owned a bag sitting on the floor.²⁰⁷ Both denied ownership, and the officer seized the bag, which contained weapons and ammunition.²⁰⁸ The court held that the stop was clearly pretextual because the officer did not ask to see the driver's license or regis-

200. See *Batson*, 476 U.S. at 95.

201. See Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 734 (2000). The courts never mention *Arlington Heights* in its decisions, which makes these factors even more powerful. The United States Supreme Court announced these factors in the context of a zoning case, and, years later, New York courts use the very same factors in pretextual stop cases. This displays the solidity of these factors in accomplishing its goal.

202. See *Arlington Heights*, 429 U.S. at 267.

203. See *People v. Smith*, 581 N.Y.S.2d 240, 241 (App. Div. 1992).

204. 581 N.Y.S.2d 240.

205. *Id.* at 241.

206. *Id.*

207. *Id.*

208. *Id.*

tration nor issue the driver a citation.²⁰⁹ Likewise, in *People v. Roundtree*,²¹⁰ the court granted a defendant's motion to suppress evidence based on a pretextual stop resulting from a failure to signal a left turn.²¹¹ During the stop, the officer did not issue a citation, nor ask the driver about the alleged infraction.²¹² The court in *People v. Rijo*²¹³ also concluded that the stopping officer's failure to check the driver's license and plate number, or issue a summons "clearly established that the traffic violation . . . was merely a pretext to investigate [the] defendant on an unrelated matter."²¹⁴

The sequence of events prior to the alleged discriminatory action is also an important factor announced in *Arlington Heights*.²¹⁵ With this inquiry, the court should particularly examine whether the officer followed the vehicle for an extended period before the traffic infraction occurred.²¹⁶ A finding that the officer followed the vehicle for an extended period of time creates a strong inference that the officer was concerned with investigating the driver because of suspicions based on the driver's race. In *People v. Smith*, the police followed a defendant who entered a cab after leaving a building that was under surveillance.²¹⁷ The police followed the cab for several blocks before stopping it.²¹⁸ The court found that officers following a vehicle for a short distance created an inference that the minor traffic infraction was merely a pretext to validate their unrelated suspicions.²¹⁹

Another factor announced in *Arlington Heights* was substantive departures from the government official's ordinary duties.²²⁰ In the context of pretextual stops, New York courts look to see if traffic stops are part of the ordinary duties of the stopping officers.²²¹ In *People v. Young*,²²² the court held that an officer's stop was pretextual when he was an investigator whose ordinary duties did not involve traffic stops.²²³ This inquiry is not only specific to the officers stopping the vehicle, but it also extends to the officers who authorize the stop. For instance, in *People v. Letts*,²²⁴ the court found pretext when

209. *Id.*

210. 651 N.Y.S.2d 615 (App. Div. 1996).

211. *Id.* at 615-16.

212. *Id.*

213. 632 N.Y.S.2d 4 (App. Div. 1995).

214. *Id.*

215. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

216. *People v. Smith*, 581 N.Y.S.2d 240, 241 (App. Div. 1992).

217. *Id.*

218. *Id.*

219. *See id.*

220. *See Arlington Heights*, 429 U.S. at 267.

221. *See People v. Young*, 660 N.Y.S.2d 165, 168 (App. Div. 1997).

222. 660 N.Y.S.2d 165.

223. *Id.* at 168.

224. 580 N.Y.S.2d 525 (App. Div. 1992).

the officer who authorized the stop was a detective investigating the defendant for a separate case.²²⁵

The combination of these factors establishes a presumption of purposeful discrimination. Additionally, these factors are not exhaustive and only provide a beginning point for a court.²²⁶ Consequently, the court must continue its inquiry into all of the relevant circumstantial facts surrounding the stop of a defendant.²²⁷

Arlington Heights and New York case law, coupled with *Batson*, provide a strong framework to analyze pretextual stops. Current Fourteenth Amendment law for selective prosecution and selective enforcement creates an insurmountable burden for defendants in these cases. Furthermore, as evidenced by media coverage and shocking statistics, these stops remain a great problem to minority drivers.²²⁸ The United States Supreme Court must apply a new framework to address these stops in order fulfill the goal of the Fourteenth Amendment. In doing so, the Court should use *Arlington Heights* and *Batson* to establish this framework. Additionally, the Court should adopt the analysis applied in New York case law that specifically addresses pretextual stops.

C. Government's Justification

Once a defendant establishes a prima facie case, the burden of persuasion shifts to the government to provide a racially neutral justification sufficient to overcome the defendant's case.²²⁹ The government's proffered justification must be more than a cover up, and it cannot be clearly contrary to the evidence or common belief.²³⁰ In most cases, however, the results will not be clearly against common sense as was the case in *Norris v. Alabama*, where the jury commissioner stated that there were no intelligent African-Americans in the entire community.²³¹ Thus, in most cases, the government's excuse

225. *Id.* at 527-28.

226. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

227. *See Batson v. Kentucky*, 476 U.S. 79, 95 (1986).

228. The media has dubbed this phenomenon as Driving While Black/Brown (DWB). *See* ACLU OF N. CAL., TOWN HALL MEETINGS, CAPITAL DEMONSTRATION: STATEWIDE PROTESTS CALL FOR A HALT TO RACIAL PROFILING, <http://acluweb.best.vwh.net/racial-justice/dwb-facts.html> (last visited Apr. 17, 2003).

229. *See Batson*, 476 U.S. at 97; *Turner v. Fouche*, 396 U.S. 346, 361 (1960). It is important to note that this differs from Title VII cases. In Title VII cases, the plaintiff always carries the burden of persuasion, and the defendant employer only has the burden of production. There is no credibility analysis at that stage. The difference between pretextual stop challenges and employment discrimination cases is that in Title VII there is a third stage where the burden falls on the plaintiff to discredit the employer's proffered justifications. In pretextual stop cases, there is no third stage, thus, the credibility analysis must take place in the second stage with the burden of proof falling on the government. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

230. *Norris v. Alabama*, 294 U.S. 587, 599 (1935); *see also Avery v. Georgia*, 345 U.S. 559, 562 (1953).

231. *Norris*, 294 U.S. at 598-99.

will be tested against the evidence and has to be more than a baseless excuse.²³² Following the principle of *Norris*, the United States Supreme Court again addressed this burden in *Turner v. Fouche*.²³³ In *Turner*, the plaintiff established a prima facie case of discrimination in a voir dire challenge.²³⁴ In making his case, the plaintiff showed that the percentage of African-Americans in Taliaferro County, Georgia, was substantially disproportionate compared to the percentages of African-Americans on the county's jury list.²³⁵ To satisfy its burden, the government merely stated that no one was excluded because of their race.²³⁶ The government, however, did not address the disparity in percentages of African-Americans on the jury lists as opposed to the percentages of the African-Americans in the county.²³⁷ The United States Supreme Court held that the government's proffered reason was contrary to the evidence.²³⁸ The plaintiff's evidence created a void that the government did not fill.²³⁹ Similarly, in pretextual stop cases, the *Arlington Heights* factors used in establishing a prima facie case will also create a void that the government must fill. Thus, the government can only fill this void by presenting sufficient and credible evidence.²⁴⁰

D. Conclusion

Courts must adopt this proposed framework allowing the defendant to rely on the single stop to prove it was pretextual. Defendants are severely handicapped by existing selective enforcement and selective prosecution cases because they must present statistical information of other motorists, evidence which is practically non-existent. When people are singled out because of race, they should only have to say "my constitutional rights were violated." According to *Arlington Heights* and *Batson*, a defendant should be able to seek protection of his constitutional rights without showing whether or not other motorists had their rights violated. This proposed framework allows courts to view all of the evidence relevant to the actions of the officer in that *one* stop. The factors announced in *Arlington Heights*, and fleshed out in New York case law, also allow the court to draw the presumption that the officer merely stopped the defendant because of the

232. *See id.* at 599.

233. 396 U.S. 346.

234. *See id.* at 359.

235. *Id.* at 360.

236. *Id.* at 361.

237. *Id.*

238. *Id.*

239. *See id.*

240. *See id.*

color of his skin. The government then bears the burden to present sufficient evidence to justify its actions.

IV. PROVIDING A REMEDY: THE EXCLUSIONARY RULE

The courts must decide on the appropriate remedy to apply once a defendant establishes a *prima facie* case, and the government is unable to meet its burden. The remedy must further the goal of the Fourteenth Amendment, which is to provide all citizens of the United States with equal protection of the laws.²⁴¹ The exclusionary rule does just that.

Applying the exclusionary rule to Fourteenth Amendment violations ensures that protection provided by the Fourteenth Amendment is realized by preserving the judicial integrity of the court and deterring officers from willfully violating the constitutional rights of minority drivers. Recently, courts have de-emphasized the judicial integrity rationale as applied to Fourth Amendment violations.²⁴² However, new life is given to this rationale when addressing Fourteenth Amendment violations. The problem, however, is that the courts have yet to extend the exclusionary rule to Fourteenth Amendment violations.²⁴³ So the question remains: should the government be allowed to use evidence obtained in violation of a guaranteed constitutional right against a defendant in a court of law? The answer is a constitutionally mandated no.

The United States Supreme Court first addressed the exclusionary rule in *Boyd v. United States*.²⁴⁴ In *Boyd*, a merchant challenged a forfeiture proceeding based on the Fourth and Fifth Amendments.²⁴⁵ The Court held that evidence obtained in violation of those amendments could not be admitted at trial because doing such would be unconstitutional.²⁴⁶

Twenty-eight years later, the Court once again addressed the exclusionary rule. In *Weeks v. United States*,²⁴⁷ the defendant was

241. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986); *Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

242. See Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1124 (2000).

243. This should not be shocking given that the only courts presented with this opportunity have been through selective prosecution and selective enforcement cases. As it has been shown, defendants have not been able to succeed in these claims, making consideration of a remedy unnecessary. See generally *United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Bell*, 86 F.3d 820 (8th Cir. 1996). In the *voir dire* cases, courts have merely remanded the cases once the defendant has proven that the prosecutor discriminated against him, giving the remedy of a new jury. See generally *Batson*, 476 U.S. 79.

244. 116 U.S. 616 (1886).

245. *Id.* at 621.

246. *Id.* at 638.

247. 232 U.S. 383 (1914).

charged with illegally using the mail to send lottery materials.²⁴⁸ U.S. Marshals searched the defendant's home without a warrant, where they obtained letters and other documents.²⁴⁹ As a result of the warrantless search, the defendant sought to exclude the documents based on Fourth and Fifth Amendment violations.²⁵⁰ In response, the Court discussed evidence unconstitutionally obtained and stated that

[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.²⁵¹

In *Mapp v. Ohio*,²⁵² the Court took the opportunity to extend the exclusionary rule to the states through the Fourteenth Amendment.²⁵³ The Court stated that the extension was necessary because it was imperative to judicial integrity to apply the exclusionary rule to the states.²⁵⁴ Further, the exclusionary rule actually ensures Fourth Amendment protection through deterrence.²⁵⁵

Analysis extending the exclusionary rule to a Fourteenth Amendment violation would employ a cost-benefit analysis.²⁵⁶ The costs primarily consist of losing evidence and allowing defendants to go free. However, applying the exclusionary rule to evidence obtained as a direct result of racial discrimination outweighs these costs. As with the Fourth and Fifth Amendments, the use of evidence obtained in violation of the Fourteenth Amendment must be held unconstitutional and suppressed in order to ensure the protection guaranteed under the Fourteenth Amendment.

A person should never be searched simply because of his race. This is a right guaranteed by the Fourteenth Amendment. The most effective means to achieve this goal is through deterrence and limiting the discretion that police officers hold. This places police officers on

248. *Id.* at 386.

249. *Id.*

250. *Id.* at 393.

251. *Id.*

252. 367 U.S. 643 (1961).

253. *Id.* at 660. The Fourteenth Amendment extended the exclusionary rule to the states as a remedy for a Fourth Amendment violation. *See id.* This is distinct from actually applying the exclusionary rule to a violation of the Fourteenth Amendment, which is what this Note proposes.

254. *Id.* at 659.

255. *Id.* at 656.

256. *See generally* *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (applying the balancing approach to a civil deportation hearing); *United States v. Haven*, 446 U.S. 620 (1980) (applying the balancing approach to impeachment of a defendant on cross examination); *Stone v. Powell*, 428 U.S. 465 (1976) (applying the balancing approach to a habeas corpus proceeding).

notice that evidence obtained as a result of a discriminatory stop will not be used in a court of law. Police officers possess great discretion when deciding whom to stop and investigate in a street-level encounter.²⁵⁷ Now that the officer's subjective intent is not an issue under the Fourth Amendment after *Whren*, that discretion is even greater and creates an inherent danger because officers are now in a position to discriminate if they so choose.²⁵⁸ That danger arises due to an officer's ability to make subjective choices. For example, the officer has the discretion to stop certain drivers and not others. On the street level, police are afforded great investigative latitude. However, their investigative powers must not trample the basic rights afforded by the Constitution, and officers must be accountable for their actions, which should limit their propensity to act on racial motives. This must be viewed in the light that all people hold prejudices and biases that affect a person's subjective choice. When a police officer holds such biases, however, the impact is magnified because of the power the officer wields. The law does recognize that prosecutors can create an inherent danger to citizens. Accordingly, the law provides a mechanism to deter this danger.²⁵⁹

Law enforcement officers, like prosecutors, must be deterred from acting on prejudices when exercising their discretion. Deterrence is the only effective means to prevent the abuse of discretion by police officers. Allowing convictions to stand based on unconstitutionally obtained evidence and subjecting officers to civil suit does not further the goal of the Fourteenth Amendment, which is to prevent unequal application of the law. The exclusionary rule accomplishes this goal because it "is calculated to prevent and not repair."²⁶⁰ The purpose of the exclusionary rule "is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."²⁶¹ Thus, due to the nature of police discretion and the lack of a suitable alternative, the deterrence purpose of the exclusionary rule is as strong with the Fourteenth Amendment as with the Fourth and Fifth Amendments and should be extended to Fourteenth Amendment violations. In fact, "no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted in either case."²⁶²

257. See Holland, *supra* note 242, at 1107.

258. See *Batson v. Kentucky*, 476 U.S. 79, 96 (1986); *Avery v. Georgia* 345 U.S. 559, 562 (1953).

259. See *Batson*, 476 U.S. 79, 96.

260. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

261. *Id.*

262. *Id.* at 215.

In addition to the constitutional right to be free from a racially based search, race is irrelevant when determining whether or not a person committed a crime. The harm in allowing evidence from stops based on a person's race "touch[es] the entire community."²⁶³ It also undermines any confidence the public has in the fairness of our justice system.²⁶⁴ Additionally, allowing the use of evidence found as a result of a discriminatory stop denies all minorities the equal protection guaranteed under the Fourteenth Amendment. No other right, including a privacy right, has demanded such protection as the Thirteenth, Fourteenth and Fifteenth Amendments afford racial minorities.²⁶⁵

Furthermore, race plays no factor in the true administration of justice. It is the courts who oversee this administration. In order for the officers to actually be deterred, the courts must not allow evidence obtained as a result of using race as a tool in traffic stops in a court of law. Not allowing the evidence preserves the judicial integrity of the courts. When one thinks of a judge, the words wisdom, integrity, and honor come to the forefront. The court has the duty to ensure that all citizens are afforded the protection guaranteed by the Fourteenth Amendment. Courts must use that wisdom, integrity, and honor in fulfilling its duty to watch the "constitutional rights of the citizen, and against any stealthy encroachments thereon."²⁶⁶ A court only protects an individual's rights that the Constitution guarantees. A court should also provide "to the police officer no less than that to which honest law enforcement is entitled."²⁶⁷ "[J]udicial integrity [is] so necessary in the true administration of justice"²⁶⁸ because "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."²⁶⁹ Thus, a court must not subordinate the use of evidence obtained in violation of the Fourteenth Amendment, and a court fails its duty if it does. As a result, a court must protect the rights of minorities, and maintain the judicial integrity of the court. Due to the sensitized nature of race, judicial integrity is a stronger rationale in Fourteenth Amendment violations than previously applied.

263. *Batson*, 476 U.S. at 87.

264. *Id.*

265. *See generally* U.S. CONST. amends. XIII, XIV, XV.

266. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

267. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

268. *Id.*

269. *Id.* at 659.

V. CONCLUSION

Critics may argue that this proposed framework is only another protection for criminals. However, the goal of the Fourteenth Amendment is to ensure equality, and that applies to all citizens, including criminals. While it could protect criminal defendants by eliminating evidence of their guilt, a stronger enforcement of the Fourteenth Amendment helps all minorities by changing law enforcement's attitudes over time. Consider the following hypothetical of Officer Bob.

Officer Bob was raised in an average, suburban neighborhood. The only experience that Officer Bob had with African-Americans was through mass media. As a result, Officer Bob held an inherent suspicion of African-American males.

One evening, during Officer Bob's shift, he observed two brothers, Marcus and Aaron, driving through a white suburban neighborhood in their cousin's new Honda Accord. As Officer Bob watched the brothers, he thought to himself "uh oh, two black boys . . . new car . . . they have to be up to something." Officer Bob followed the brothers for over three miles. The brothers stopped at a stop sign and turned right without signaling. Officer Bob immediately turned on his lights and pulled over the teens. Officer Bob ordered the teens out of the car and to the ground. While the teens were on the ground, Officer Bob asked them if he could search their car. Feeling they had no other choice, they consented. During the search, he found crack-cocaine in the glove box. Marcus and Aaron told Officer Bob that the car was their cousin's and anything in there was his. At that point, he took the teens to jail without issuing a citation for the stop or even asking for identification. Marcus and Aaron were charged with possession of narcotics.

At trial, Marcus and Aaron sought to suppress the evidence because Officer Bob's search violated the Fourth Amendment. Specifically, they argued that Officer Bob did not have reasonable suspicion to pull them over, and the real reason they were stopped was because of their race. However, Officer Bob stated that the reason that he pulled the teens over was because they failed to signal when turning. The court relied on the United States Supreme Court's decision in *Whren* and stated that the search did not violate the Fourth Amendment because an officer's subjective intent plays no part in a Fourth Amendment analysis.

Marcus and Aaron also challenged the stop as pretextual under the Fourteenth Amendment. Following the proposed framework, they had to show that Officer Bob acted with a discriminatory purpose. They argued that the actions of the officer clearly showed that

he acted with a discriminatory purpose. They pointed to the fact that he followed the vehicle for three miles; the teenagers were never questioned about the violation or even cited for a violation; the fact that Officer Bob immediately ordered the teenagers to the ground and asked for consent to search; and the fact that Officer Bob never asked for identification or insurance. The court held that, following the principle set forth in *Arlington Heights* and *Batson*, the defendant did not have to show how other drivers were treated or identify their race. The facts of this case established a discriminatory purpose.

In response, Officer Bob maintained his original reason for stopping the teens. The court held, however, that because of the factors shown by the defendants, Officer's Bob justification was clearly contrary to the evidence presented in this case. Thus, the evidence was suppressed.

Over the next year, three of Officer Bob's cases were dismissed as violations of the Fourteenth Amendment. Although, this was directly beneficial to the alleged criminals in these cases, over time, the primary benefit was realized. Officer Bob observed an elderly African-American couple, who, unbeknownst to him, was celebrating their fortieth anniversary. As Officer Bob began to follow the couple, he remembered that two weeks prior he had a case dismissed because he acted on his subjective prejudice, and so he stopped following the couple without incident. That couple was able to enjoy their anniversary and deliver their daughter's wedding gown in peace.

As shown in the hypothetical, this analysis under the Fourteenth Amendment is the only way to ensure that the subjective intentions of officers do not lead to pretextual stops. The United States Supreme Court must ensure that the Fourteenth Amendment is not a hollow promise. The Court must take this opportunity to revive the judicial integrity of the Court after the *Whren* decision. Discrimination continues to be a blemish on the face of the United States of America. The perpetuation of this discrimination by law enforcement officers remains a serious social issue. The framework introduced serves to check the prejudicial intentions inherent in a police officer's discretion. By applying existing United States Supreme Court decisions, the basic framework already exists to protect the rights guaranteed by the Fourteenth Amendment to all citizens, while allowing officers to exercise their constitutional discretion.