COURT OF APPEALS
DECISION
DATED AND RELEASED

August 24, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1097

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE INTEREST OF RACHE M.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

RACHE M.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed*.

Before Dykman, Sundby, and Vergeront, JJ.

DYKMAN, J. Rache M., a juvenile, appeals from an order in which he was adjudicated delinquent after entering a plea that he knowingly possessed a controlled substance, cocaine, with intent to deliver, contrary to

§ 161.41(1m)(cm)1, STATS.[1] Rache entered the plea after the trial court denied his suppression motion. Rache's appeal presents the following issues: (1) whether the trial court erred when it determined that the police officers had reasonable suspicion to justify their investigative stop of Rache;[2] and (2) whether the trial court erred when it concluded that probable cause and exigent circumstances existed justifying the subsequent warrantless search of Rache. We conclude that the police officers had reasonable suspicion to believe that criminal activity had taken place and thus the investigative stop was proper. We also conclude that Rache consented to a search and that probable cause and exigent circumstances existed to justify the warrantless search. We therefore affirm.

BACKGROUND

[1] This appeal has been expedited. RULE 809.17, STATS.

[2] At the suppression hearing, Officer Tony J. Peterson testified that the fact that one of the persons he observed was a white male walking quickly through a predominantly black neighborhood added to his suspicion. At oral argument, however, the State conceded that for the purposes of this appeal, the officer should not have relied upon the race of an individual for determining whether there was reasonable suspicion to stop. As a result of this concession, we will not consider this factor. Instead, we will look at the remaining testimony to determine whether there was reasonable suspicion to stop Rache. We will also not address Rache's arguments and supporting case law related to the race issue.

The dissent focuses on race and fails to follow the proper standard of review. In determining probable cause, we do not consider the arresting officer's subjective views. Rather, we review the testimony of the officer to determine whether "police officers of reasonable caution could have believed the defendant probably committed a crime." ***State v. Drogsvold,*** 104 Wis.2d 247, 255, 311 N.W.2d 243, 247 (Ct. App. 1981). "It is sufficient that a reasonable police officer would conclude, based upon the information in the officer's possession, that the defendant probably committed the offense." ***State v. Babbitt,*** 188 Wis.2d 349, 357, 525 N.W.2d 102, 104 (Ct. App. 1994).

Once we have the historical facts before us, probable cause for an arrest is a question of law which we review *de novo.* ***Drogsvold,*** 104 Wis.2d at 262, 311 N.W.2d at 250. We have examined all of the facts known to the police officers except for the fact of race. Without regard to race, and using the facts set out in the body of this opinion, we conclude that a reasonable police officer would have reasonable suspicion to stop Rache, and then probable cause to arrest him. The facts having to do with race are therefore irrelevant.

During the evening of September 14, 1994, Madison Police Officers Tony J. Peterson and Trevor Knight were investigating a neighborhood known to them to be a high drug and crime area. Officer Peterson testified that he was assigned to a special division within the police department known as the Neighborhood Intervention Task Force or Blue Blanket which deals with gangs, guns and drugs in problem neighborhoods. He stated that he had been involved in over 500 arrests for the transfer of cocaine in the past six months. Officer Knight testified that he had been assigned to the Neighborhood Intervention Task Force for the past ten months and had been involved in numerous drug-related arrests and investigations in the neighborhood they were observing.

At about 8:00 p.m., Officer Knight saw three individuals, including Rache, meet a male on a street corner. Officer Knight testified that he recognized the male as a person who had been arrested for attempting to buy drugs earlier that year. Officer Knight observed Rache reach into his pocket, pull something out and thrust it forward. Officer Knight could not see what was in Rache's hand or to whom he extended his hand because his view was partially obstructed. Officer Knight then testified that he saw the male walk away in the direction from which he came.

Officer Peterson testified that he observed the male walking quickly down the street. He also testified that Officer Knight told him that he saw suspicious activity thought by Officer Knight to be a drug transaction. Officer Peterson stated that he could not observe the exchange because his view was partially blocked.

Officers Peterson and Knight approached Rache and Officer Peterson put his hands on Rache's left arm so that Rache could not escape and asked him if he could search him. Rache agreed and Officer Peterson began to search Rache's pockets for drugs. Officer Peterson then asked Rache if he could look into Rache's mouth because he knew that persons who use and deal in controlled substances often hide them in their mouths. Rache opened his mouth and Officer Peterson asked Rache to lift up his tongue because, in his experience, persons commonly hide drugs underneath their tongues. Officer Peterson testified that Rache

closed his mouth and then he dropped his chin, which is indicative to me from my experience in this situation of persons starting to try and swallow the cocaine base. At that point I placed a jaw thrust hold on [Rache's] lower jaw in an attempt to keep his mouth closed so he could not swallow what I believe was [a] controlled substance in his mouth.

The police officers pulled Rache to the ground and Rache eventually spit out three cocaine base rocks. Officer Knight testified that he believed it was necessary to get the drugs out of his mouth because, if swallowed, Rache could either destroy the evidence or overdose.

Before trial, Rache moved to suppress the cocaine rocks from evidence on the grounds that the search and seizure were unreasonable. After a hearing on the matter, the trial court denied the motion concluding that reasonable suspicion existed to support the investigative stop and probable cause and exigent circumstances existed to support the search. Rache then entered a plea of guilty. The trial court adjudged Rache to be delinquent and placed him in a juvenile detention facility for a period of one year. Rache appeals.

STANDARD OF REVIEW

> In reviewing an order suppressing evidence, this court will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence.[3] However, whether a seizure or search has occurred, and if so, whether it passes statutory and constitutional muster are questions of law subject to *de novo* review.

State v. Kiper, 193 Wis.2d 69, 79-80, 532 N.W.2d 698, 703 (1995) (quoted source omitted; footnote added).

[3] This standard is essentially the same as the clearly erroneous standard. ***Noll v. Dimiceli's Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

THE INVESTIGATIVE STOP

Rache argues that the police officer's investigative stop violated the Fourth Amendment to the United States Constitution because the police officers did not have reasonable suspicion to believe that criminal activity had taken or was taking place. Consequently, he argues that the trial court should have suppressed cocaine recovered in an ensuing search. We disagree.

A brief investigatory stop is a seizure and is therefore subject to the requirement of the Fourth Amendment to the United States Constitution that all searches and seizures be reasonable. ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968). However, because an investigative stop is less restrictive than an arrest, it is permitted upon a showing of reasonable suspicion rather than probable cause. ***United States v. Sokolow***, 490 U.S. 1, 7 (1989). Reasonable suspicion "requires `some minimal level of objective justification'" beyond the officer's "inchoate and unparticularized suspicion or `hunch.'" ***Id.*** (quoted source omitted). To satisfy the Fourth Amendment, a law enforcement officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry***, 392 U.S. at 21. *See also* § 968.24, STATS.[4]

Thus, ***Terry*** and its progeny require that a law enforcement officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). The reasons for the stop must be judged by an objective standard in which we ask whether "the facts available to the officer at the moment of the seizure or the search `warrant a man of reasonable caution in the belief' that the action taken was appropriate[.]" ***Henes v. Morrissey***, ___ Wis.2d ___, ___, 533 N.W.2d 802, 806 (quoting ***Terry***, 392 U.S. at 21-22).

In the instant case, the police officers were specially trained in gangs, guns and drug investigations, were observing a high drug and crime

[4] Section 968.24, STATS., provides in pertinent part, "a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime ...."

area, saw a person one police officer knew to have been involved with drugs approach three other individuals, including Rache, for a short period of time, and observed hand gestures which could be construed as the transfer of drugs. Based upon these facts taken together and the reasonable inferences that can be drawn from them, we conclude that the police officers had reasonable suspicion to believe that Rache was involved with a drug deal. Contrary to Rache's assertions, the facts presented in the instant case are not like the facts of ***Brown v. Texas***, 443 U.S. 47 (1979), where the Supreme Court concluded that a police officer's observation of two men—one of whom was not known to the arresting officers—walking away from one another in an alley located in a high drug traffic area, did not rise to the level of reasonable suspicion. Here, the police officers observed the duration of the meeting and Rache's furtive gestures. Those factors, combined with the facts that one of the men was known to have been previously arrested for drug use and that the meeting occurred in a high crime and drug area, were sufficient for the police officers to have had reasonable suspicion to believe that a crime had been committed. Accordingly, the investigative stop did not violate the Fourth Amendment to the United States Constitution.

THE SEARCH

Rache also argues that the ensuing search which yielded three cocaine rocks was unconstitutional. According to Rache, while he consented to a limited search, once he closed his mouth in response to Office Peterson's request for him to lift up his tongue, he withdrew his consent. He also argues that the police officers lacked probable cause and exigent circumstances to grab Rache's jaw and force him to spit out the cocaine. We disagree.

Section 968.25, STATS., provides that a law enforcement officer may search a person for weapons if the officer reasonably suspects that the officer or another is in danger of physical injury. However, to extend the scope of the search, a police officer must have either consent from the suspect or probable cause to believe that a crime has been committed and exigent circumstances exist such that obtaining a warrant is rendered fruitless. ***City of Milwaukee v. Cohen***, 57 Wis.2d 38, 46, 203 N.W.2d 633, 638 (1973).

Probable cause to arrest exists if the facts and circumstances known to the police officer would warrant a reasonable police officer to believe that a person has committed or is committing a crime. ***State v. Drogsvold***, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981). This is an objective test and does not depend upon the officer's subjective beliefs. ***Id.*** at 255, 311 N.W.2d at 247. We look at the totality of the circumstances to determine whether probable cause exists. ***Illinois v. Gates***, 462 U.S. 213, 230-31 (1983).

A warrantless search of a person may be conducted when a police officer has probable cause to believe a crime has been or is being committed and exigent circumstances exist such that there is an urgent need for immediate action coupled with insufficient time to secure a warrant. *See* ***State v. Smith***, 131 Wis.2d 220, 228, 388 N.W.2d 601, 605 (1986).

> The basic test to determine whether exigent circumstances exist is an objective one: "Whether a police officer under the circumstances known to the officer at the time reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." ***State v. Smith***, 131 Wis.2d 220, 230, 388 N.W.2d 601[, 606] (1986). As a result, this court has identified four factors which constitute the exigent circumstances required for a warrantless entry: (1) an arrest made in "hot pursuit," (2) a threat to safety of a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee.

Kiper, 193 Wis.2d at 89-90, 532 N.W.2d at 707-08. Thus, we must determine whether exigent circumstances exist independently, without reference to the subjective beliefs of the arresting officers. ***Id.***

After the police officers stopped Rache, they asked him if he would consent to a search. Rache agreed to a search of his pockets as well as a search of his mouth for drugs. When Officer Peterson asked Rache to lift up his tongue, Rache refused, shut his mouth and appeared to be attempting to swallow something. At that point, the police officers had probable cause to

believe that Rache possessed drugs. Exigent circumstances also existed because it appeared that Rache was attempting to dispose of the drugs by swallowing them. To prevent the destruction of evidence and to prevent a possible overdose, the police officers were justified in grabbing Rache's jaw to prevent him from swallowing the drugs, and forcing him to expel the drugs from his mouth. *See* ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966) (factors to be considered in determining whether an intrusive search of a person's body is permitted is that the officer must have a clear indication that incriminating evidence will be found and, if no warrant is obtained, exigent circumstances exist, such as the imminent destruction of evidence, and the officer uses a reasonable method to search the suspect). Accordingly, the trial court did not err when it denied Rache's suppression motion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 95-1097(D)

SUNDBY, J. (*dissenting*). Some forty years ago, police officers stopped Malcolm X because he was a black man in a white neighborhood. Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 214 (1983) (citing M. LITTLE, THE AUTOBIOGRAPHY OF MALCOLM X 145-46 (1964)). As recently as 1980, law enforcement officers have admitted that "race is an independently significant, if not determinative, factor in deciding who to follow, detain, search, or arrest." Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 555 (1995).[5] At oral argument, the State conceded that the officers improperly considered that one of the participants in the alleged drug transaction was white.[6] The other alleged participants were black. Because such racial discrimination offends the principles of the Equal Protection Clause and one's fundamental liberties to travel and to associate, I dissent.

On September 14, 1994, two Madison police officers were patrolling a neighborhood known to be a high crime and drug area. The officers detained the defendant, Rache M., under ***Terry v. Ohio***, 392 U.S. 1 (1968). In justifying the "stop," one of the officers, Officer Peterson, testified that he became suspicious of Rache for two reasons: (1) the white male, Kirby Doiron, walked quickly into the area, and (2) Doiron was a white male in a predominately black neighborhood. Describing this second factor, Officer Peterson stated that many of the persons who purchase drugs in this predominately black neighborhood are white.[7] Officer Peterson's justification

---

[5] *See also* Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 337 (1994) ("Sheriff Henry Lee of Jefferson Parish, Louisiana, explicitly admitted discriminatory use of racial incongruity in 1983: `If there are some young blacks driving a car late at night in a predominantly white area, *they will be stopped*.'") (emphasis added).

[6] The majority relegates this issue to a footnote, determining that because the State conceded that the officers' reliance on race was improper, the court need not consider the racial discrimination.

[7] Additionally, I find it curious, if not suspicious, that the police officers failed to stop Doiron--the one Caucasian involved in the transaction; especially in light of the fact that Officer Knight "recognized [Doiron] as a person who had been arrested for attempting to buy drugs earlier that year." Maj. Op. at 3. Rather than stop Doiron--a known drug buyer--the officers decided to stop and search a black fourteen-year-old boy. Had they stopped Doiron and searched him, they could have confirmed whether a drug transaction occurred. If not discriminatory, the police procedures were inept.

assumes that whites generally enter black neighborhoods to buy drugs and blacks living in such neighborhoods generally sell drugs.

The State claims that the ***Terry*** stop of Rache was justified because the police officers had "reasonable suspicion" to believe that a crime was being committed--namely, a drug transaction. According to the Supreme Court's decision in ***Terry***, law enforcement officers may conduct investigatory stops as long as the stops are consistent with the reasonableness requirement of the Fourth Amendment. ***Terry***, 392 U.S. at 20-22. In particular, the Fourth Amendment requires that officers have "reasonable suspicion" to make such stops, ***United States v. Sokolow***, 490 U.S. 1, 7 (1989); that is, the Fourth Amendment requires that officers have "some minimum level of objective justification," ***id.*** (quoting ***INS v. Delgado***, 466 U.S. 210, 217 (1984)). The ***Terry*** Court specifically stated that law enforcement officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." 392 U.S. at 21.

Although the "reasonable suspicion" standard is fairly easy to satisfy, it may not be satisfied by pointing to one's race. Simply put, race is not a factor which officers may consider when determining who to follow, detain, search, or arrest. Unfortunately,

> [t]he indeterminate nature of the standard makes it easy for police officers who stop someone for discriminatory reasons ... to later justify the stop by articulating other benign reasons. Because courts are routinely deferential to law enforcement officers, an officer can point to many aspects of the suspect's conduct and claim that in the totality of [the] circumstances, he or she was justifiably suspicious.

Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 332 (1994).[8] Judge Edwards of the Federal Court of Appeals

[8] *See also* Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 556 (1995) (noting that "[t]his practice has been approved at least indirectly by the courts, allowing police officers to make racially-based stops and justify them post hoc.").

for the District of Columbia recently stated: "It is well known, by now, that the police will cite virtually any circumstance noted prior to arrest or a ***Terry***-stop in order to justify the defendant's detention." ***United States v. Prandy-Binett***, 995 F.2d 1069, 1077 n.3 (D.C. Cir. 1993) (Edwards, J., dissenting), *quoted in* 31 AM. CRIM. L. REV. at 332-33.

In theory, the reasonable suspicion standard *should* protect individuals from discriminatory seizures. 31 AM. CRIM. L. REV. at 334. Indeed, Justice Marshall wrote:

> By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to "overbearing or harassing" police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race.

Sokolow, 490 U.S. at 12 (Marshall, J., dissenting), *quoted in* 31 AM. CRIM. L. REV. at 334. However, most courts continue to permit police to seize individuals based upon their race as long as the officers can point to other circumstances when justifying the seizure in court.[9]

Such practices by law enforcement officers, as well as condonation of these practices by the courts, clearly violate the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides: "No State shall

---

[9] In an attempt to respond to these arguments, the majority merely claims: "The dissent focuses on race and fails to follow the proper standard of review." Maj. Op. at 2 n.2. The majority argues that all the court need do is "review the testimony of the officer," and "examine[] all of the facts known to the ... officer[] *except for the fact of race*." ***Id***. (emphasis added). Unfortunately, the majority has fallen into the "trap" which I have described: Because courts frequently defer to police officers, the judiciary routinely allows officers to make racially-based stops and justify them post-hoc by pointing to "pretextual" circumstances. Indeed, consider the other "circumstance" which Officer Peterson claims justified the stop: "The white male, Kirby Doiron, walked quickly into the area." For some reason, we are to believe that this constitutes suspicious behavior. Such post-hoc and pretextual reasons for justifying discriminatory stops cannot be tolerated. The facts having to do with race are *hardly* irrelevant.

... deny to any person ... the equal protection of the laws." U.S. CONST. amend. XIV, § 1. "[A] primary purpose of the Fourteenth Amendment was to free blacks from stereotypes, prompted by a history of disadvantage and slavery that ignored the qualities of the individual ...." 93 YALE L.J. at 242. Accordingly, the Equal Protection Clause prohibits state action which discriminates on the basis of race; police officers stopping citizens certainly constitutes state action. 31 AM. CRIM. L. REV. at 339. Moreover, racial classifications "are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be `necessary ... to the accomplishment' of their legitimate purpose." ***Palmore v. Sidoti***, 466 U.S. 429, 432-33 (1984), *quoted in* 31 AM. CRIM. L. REV. at 339; *see also* ***Loving v. Virginia***, 388 U.S. 1, 11 (1967) ("Over the years, this Court has consistently repudiated `[d]istinctions between citizens solely because of their ancestry' as being `odious to a free people whose institutions are founded upon the doctrine of equality.'") (quoted source omitted).

Judge Keith of the Sixth Circuit commented on the relation between the police's use of race in determining who to stop and the Equal Protection Clause: "Surely, this [racially discriminatory] practice must `be subjected to the strictest scrutiny and [can be] justified only by the weightiest of considerations.'" ***United States v. Taylor***, 956 F.2d 572, 581 (6th Cir.) (Keith, J., dissenting) (quoted source omitted), *cert. denied*, 113 S. Ct. 404 (1992), *quoted in* 31 AM. CRIM. L. REV. at 340. I do not believe the State can legitimately argue that detaining African-Americans, or other minorities, because of the color of their skin, is *necessary* to accomplish a *compelling governmental interest*. *See* ***Jones v. DEA***, 819 F. Supp. 698, 723 (M.D. Tenn. 1993) (holding that "the discriminatory investigation of citizens on the basis of race certainly violates the Equal Protection Clause of the Fourteenth Amendment.").

Over fifty years ago, the United States Supreme Court permitted such racial discrimination in ***Korematsu v. United States***, 323 U.S. 214 (1944). In ***Korematsu***, the Court upheld the relocation and internment of thousands of Japanese-Americans during World War II on the grounds that Japanese-Americans "were more likely to be subversive of the United States' war interests"; the Court determined that "the racially discriminatory policy sufficiently advanced the compelling state interest in domestic peace." *Racial Discrimination on the Beat: Extending the Racial Critique to Police Conduct*, 101 HARV. L. REV. 1494, 1497 (1988). ***Korematsu*** represents a shameful example of executive and judicial hypocrisy, equally opprobrious as ***Dredd Scott***. Today,

one cannot realistically argue that because of the color of a person's skin, that person is more likely to engage in criminal activity. To so argue, would defy both logic and reason, as well as validate ludicrous stereotypes.

Some have argued that race is indeed indicative of criminal propensity, citing arrest statistics which reveal that a disproportionate percentage of minorities are involved in criminal activity. 101 HARV. L. REV. at 1507. However, these generalizations are tenuous, at best, because "arrestees for most street crimes constitute only a small fraction of the population in any given community: the national average ranges between 1% and 5% annually without taking recidivism into account." ***Id.*** at 1508. The fact that a particular minority group may be disproportionately represented in arrest statistics is not probative of whether a particular member of that group is presently engaged in criminal conduct.

In addition, empirical studies demonstrate that racial discrimination by police officers in choosing whom to arrest causes arrest statistics to exaggerate what differences might exist in crime patterns between certain minorities (e.g., African-Americans) and whites, making any reliance on arrest patterns misplaced. ***Id.*** at 1507-08. In part, "this exaggeration results from a self-fulfilling statistical prophecy: racial stereotypes influence police to arrest minorities more frequently than nonminorities, thereby generating statistically disparate arrest patterns that in turn form the basis for further selectivity." ***Id.*** at 1508; *see also* 93 YALE L.J. at 240. ("That some agents have observed the [drug] couriers to be predominantly Hispanic, while others have observed them to be almost exclusively black females, suggests a self-fulfilling prophecy. Agents who look for Hispanic drug couriers find them, and agents who lie in wait for black females do not arrest white males.").

United States v. Taylor is illustrative of this latter point. In that case, the arresting officer testified that seventy-five percent of those stopped at the Memphis airport as suspected drug couriers were African-American. In response to this "evidence," Judge Keith stated:

> The disproportionate number of African-Americans who are stopped indicates that a racial imbalance against African-Americans does exist and is implicitly sanctioned by the law enforcement agency.

> The assumption that seventy-five percent of those persons transporting drugs and other contraband through public modes of transportation are African-American is impermissible. It flies in the face of reason and legitimates a negative stereotype of African-Americans.

956 F.2d at 581 (Keith, J., dissenting), *quoted in* 31 AM. CRIM. L. REV. at 340.

Because the State cannot reasonably point to any *compelling governmental interest* to justify such racial discrimination, I conclude that these types of ***Terry*** stops violate the Equal Protection Clause of the Fourteenth Amendment.

In addition, this police misconduct violates citizens' fundamental rights to travel and to associate. *See* ***Dunn v. Blumstein***, 405 U.S. 330, 338 (1972) (recognizing fundamental right to travel); ***Illinois St. Bd. of Elections v. Socialist Workers Party***, 440 U.S. 173, 184 (1979) (acknowledging right to associate). If, for instance, African-Americans are harassed whenever they enter white neighborhoods, they will cease to enter such areas. Considering this issue, the Supreme Court of California correctly stated:

> A person's racial status is not an "unusual" circumstance and the presence of an individual of one race in an area inhabited primarily by members of another race is not a sufficient basis to suggest that crime is afoot. *Freedom to travel and to associate are fundamental rights in this state*, and the suggestion that their exercise can contribute to a lawful seizure of one's person under these circumstances is both illogical and intolerable.

People v. Bower, 597 P.2d 115, 119 (Cal. 1979) (emphasis added).

Some have argued that these type of police tactics do not violate an individual's rights to travel and to associate because the police officer's focus on race imposes symmetrical burdens on all groups. 93 YALE L.J. at 244. That is, "[t]he use of racial incongruity is purportedly justified because blacks face

increased suspicion if they venture into white neighborhoods while whites face increased suspicion if they venture into black neighborhoods." ***Id.***

There are several problems with this argument. First, the same reasoning was used to support segregation in the 1950's: "Segregation does not violate the Fourteenth Amendment because it imposes symmetrical burdens on each group." 93 YALE L.J. at 244 (citing ***Plessy v. Ferguson***, 163 U.S. 537, 551-52 (1896) (applying "separate but equal" doctrine to segregation)). Fortunately, in 1954, the Supreme Court in ***Brown v. Board of Education***, 347 U.S. 483 (1954), rejected the concept of segregated schools and the "symmetrical burden" doctrine. 93 YALE L.J. at 244.

Second, even if the symmetrical burden doctrine were permitted, the police's use of race in making investigative and arrest decisions creates inequitable, not symmetrical, burdens; minorities are disadvantaged to a much greater extent. ***Id.*** at 245. This phenomenon has been explained as follows:

> Because there are far more predominantly white than predominantly black neighborhoods, a black person has many fewer areas in which he may travel without prompting suspicion and possible detention. Furthermore, because many black neighborhoods are poor, have limited public recreation facilities, and have higher crime rates than white neighborhoods, it would be unusual for a white person to want to enter many of these neighborhoods except to visit a particular person. It would be much more likely that a black person would want to enter a white area, many of which are aesthetically pleasant, contain the most desirable public recreation facilities, and benefit from better public safety services. Thus, blacks would be detained because their race was "out of place" more often than would whites, and blacks would be inhibited in their choices of where to travel more often than would whites.

Id.

This emphasis on race also fosters racial separation and negative stereotypes. For example, consider the theory behind using racial incongruity to support "reasonable suspicion": "[A] black person in a white neighborhood is there to rob a home or steal a car; a white person in a black neighborhood either needs to be protected or is there to buy drugs." 101 HARV. L. REV. at 1517. Accordingly, even if the symmetrical burden doctrine could be considered, it is inapplicable here; a law enforcement officer's reliance on race to establish reasonable suspicion creates disparate burdens on whites and minorities, and clearly perpetuates negative racial stereotypes.

In addition to violating the Equal Protection Clause and the fundamental liberties to travel and associate, these police practices offend the public policies underlying the Civil Rights Movement. Such practices "engender[] distrust of law enforcement officials, and perpetuate[] the perception among minority citizens that they are second-class citizens, and are likely to be suspected of wrongdoing solely because of their race or ancestry." ***Jones***, 819 F. Supp. at 723. The affect of these negative stereotypes has been explained as follows:

> [R]acial discrimination is injurious not simply because it attaches generalizations on the basis of "immutable" physical features, but more importantly because it disrespects the very culture and heritage that define a given racial or ethnic group.... [D]iscriminatory police misconduct injures racial minorities by denigrating them as a group and by contributing to those groups' historically subordinate position.
>
> Government's ability to denigrate groups is especially powerful when the law being applied discriminatorily is the criminal law, the very purpose of which is to stigmatize as unworthy of freedom those found to have violated its precepts.... [W]hen the state treats a given racial group as if it were criminally predisposed--as when police systematically impute criminal intent to black citizens--the state identifies the culture that defines the group as having a propensity to be morally depraved, thus endorsing a view of those who share

> in that culture as unworthy of equal respect.... Indeed, racial discrimination reinforces a set of deeply held negative attitudes about those who by virtue of their racial identity tend disproportionately to occupy the lowest ends of the socioeconomic scales--attitudes that often exert imperceptible influence on societal behavior. These very attitudes help perpetuate the underclass status of racial minorities which, in turn, influences society in general and police in particular to deny minorities equal access to society's benefits.

101 HARV. L. REV. at 1514-15.

Because reasonable suspicion based on race violates the Equal Protection Clause, the fundamental liberties to travel and associate, and important public policy concerns, I would hold that ***Terry*** stops based on such suspicions are impermissible, and all evidence obtained as a result should be excluded. Violations of the Fourth Amendment invoke the Exclusionary Rule; violations of the Fourteenth Amendment, therefore, should also mandate exclusion. *See* 101 HARV. L. REV. at 1519-20. Indeed, courts have consistently applied the Exclusionary Rule where they have "deemed it necessary to deter police misconduct and preserve the dignity of the judiciary." ***State v. Barber***, 823 P.2d 1068, 1077 (Wash. 1992) (Dolliver, J., dissenting).

The United States Supreme Court has explicitly stated: "Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race *or the race of his companions, or in any way act to compel or encourage racial segregation*." ***Adickes v. S.H. Kress & Co.***, 398 U.S. 144, 150-52 (1970), *quoted in* 93 YALE L.J. at 245-46. Because our decision perpetuates "a dual racially based system in which minority defendants receive less Fourth Amendment protection than their white counterparts," 31 AM. CRIM. L. REV. at 349, I dissent.