

# Race college essay



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The interviews excerpted here show that racially biased pretextual traffic stops have a strong and immediate impact on the individual African-American drivers involved. These stops are not the minor inconveniences they might seem to those who are not subjected to them. Rather, they are experiences that can wound the soul and cause psychological scars to form. And the statistics show that these experiences are not simply disconnected anecdotes or exaggerated versions of personal experiences, but rather established and persistent patterns of law enforcement conduct. It may be that these stops do not spring from racism on the part of individual officers, or even from the official policies of the police departments for which they work. Nevertheless, the statistics leave little doubt that, whatever the source of this conduct by police, it has a disparate and degrading impact on blacks. But racial profiling is important not only because of the damage it does, but also because of the connections between stops of minority drivers and other, larger issues of criminal justice and race. Put another way, "driving while black" reflects, illustrates, and aggravates some of the most important problems we face today when we debate issues involving race, the police, the courts, punishment, crime control, criminal justice, and constitutional law.

A. The Impact on the Innocent  
The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, and specifies some of the requirements to be met in order to procure a warrant for a search. Since 1961—and earlier in the federal court system—the Supreme Court has required the exclusion of any evidence obtained through an unconstitutional search or seizure. From its inception, the exclusionary rule has inspired spirited criticism. Cardozo himself said that "the criminal is

to go free because the constable has blundered," capturing the idea that the bad guy, caught red handed, gets a tremendous windfall when he escapes punishment because of a mistake in the police officer's behavior. We need not even go all the way back to Cardozo to hear the argument that the exclusion of evidence protects—and rewards—only the guilty.

The justification advanced for the exclusionary rule is that while the guilty may receive the most direct benefit when a court suppresses evidence because of a constitutional violation, the innocent—all the rest of us—are also better off. The right to be free from illegal searches and seizures belongs not just to the guilty, but to everyone. The guilty parties who bring motions to suppress are simply the most convenient vehicles for vindicating these rights, because they will have the incentive—escaping conviction—to litigate the issues. In so doing, the argument goes, the rights of all are vindicated, and police are deterred from violating constitutional rules on pain of failing to convict the guilty. One problem with this argument is that it takes imagination: the beneficiaries of suppressed evidence other than the guilty who escape punishment are ephemeral and amorphous. They are everybody—all of us. And if they are everybody, they quickly become nobody, because law-abiding, taxpaying citizens are unlikely to view ourselves as needing these constitutional protections. After all, we obey the law; we do not commit crimes. We can do without these protections—or so we think.

It is not my intention here to recapitulate every argument for and against the exclusionary rule. Rather, I wish to point out a major difference between the usual Fourth Amendment cases and the most common "driving while black" cases. While police catch some criminals through the use of pretext

stops, far more innocent people are likely to be affected by these practices than criminals. Indeed, the black community as a whole undoubtedly needs the protection of the police more than other segments of society because African-Americans are more likely than others to be victims of crime.

Ironically, it is members of that same community who are likely to feel the consequences of pretextual stops and be treated like criminals. It is the reverse of the usual Fourth Amendment case, in that there is nothing ghostlike or indefinite about those whose rights would be vindicated by addressing these police practices. On the contrary, the victims are easy to identify because they are the great majority of black people who are subjected to these humiliating and difficult experiences but who have done absolutely nothing to deserve this treatment—except to resemble, in a literally skin-deep way, a small group of criminals. While whites who have done nothing wrong generally have little need to fear constitutional violations by the police, this is decidedly untrue for blacks.

Blacks attract undesirable police attention whether they do anything to bring it on themselves or not. This makes “driving while black” a most unusual issue of constitutional criminal procedure: a search and seizure question that directly affects a large, identifiable group of almost entirely innocent people.

B. The Criminalization of Blackness The fact that the cost of “driving while black” is imposed almost exclusively on the innocent raises another point. Recall that by allowing the police to stop, question, and sometimes even search drivers without regard to the real motives for the search, the Supreme Court has, in effect, turned a blind eye to the use of pretextual stops on a

racial basis. That is, as long as the officer or the police department does not come straight out and say that race was the reason for a stop, the stop can always be accomplished based on some other reason—a pretext. Police are therefore free to use blackness as a surrogate indicator or proxy for criminal propensity. While it seems unfair to view all members of one racial or ethnic group as criminal suspects just because some members of that group engage in criminal activity, this is what the law permits.

Stopping disproportionate numbers of black drivers because some small percentage are criminals means that skin color is being used as evidence of wrongdoing. In effect, blackness itself has been criminalized. And if “driving while black” is a powerful example, it is not the only one. For instance, in 1992, the city of Chicago enacted an ordinance that made it a criminal offense for gang members to stand on public streets or sidewalks after police ordered them to disperse. The ordinance was used to make over forty-five thousand arrests of mostly African-American and Latino youths before Illinois courts found the ordinance unconstitutionally vague. Supporters said that the law legitimately targeted gang members who made the streets of black and Latin neighborhoods unsafe for residents. Accordingly, the thousands of arrests that resulted were a net good, regardless of the enormous amount of police discretion that was exercised almost exclusively against African-Americans and Hispanics. Opponents, such as Professor David Cole, argued that the ordinance had, in effect, created a new crime: “standing while black.” In June of 1999, the U. S. Supreme Court declared the law unconstitutional, because it did not sufficiently limit the discretion of officers enforcing it. The arrests under the Chicago ordinance share something

with “driving while black”: in each instance, the salient quality that attracts police attention will often be the suspect’s race or ethnicity. An officer cannot know simply by looking whether a driver has a valid license or carries insurance, as the law requires, and cannot see whether there is a warrant for the arrest of the driver or another occupant of the car. But the officer can see whether the person is black or white. And, as the statistics presented here show, police use blackness as a way to sort those they are interested in investigating from those that they are not. As a consequence, every member of the group becomes a potential criminal in the eyes of law enforcement.

C. Rational Discrimination When one hears the most common justification offered for the disproportionate numbers of traffic stops of African-Americans, it usually takes the form of rationality, not racism. Blacks commit a disproportionate share of certain crimes, the argument goes.

Therefore, it only makes sense for police to focus their efforts on African-Americans. To paraphrase the Maryland State Police officer quoted at the beginning of this Article, this is not racism—it is good policing. It only makes sense to focus law enforcement efforts and resources where they will make the most difference. In other words, targeting blacks is the rational, sound policy choice. It is the efficient approach, as well.

As appealing as this argument may sound, it is fraught with problems because its underlying premise is dubious at best. Government statistics on drug offenses, which are the basis for the great majority of pretext traffic stops, tell us virtually nothing about the racial breakdown of those involved in drug crime. Thinking for a moment about arrest data and victimization

surveys makes the reasons for this clear. These statistics show that blacks are indeed overrepresented among those arrested for homicide, rape, robbery, aggravated assault, larceny/theft, and simple assault crimes. Note that because they directly affect their victims, these crimes are at least somewhat likely to be reported to the police and to result in arrests. By contrast, drug offenses are much less likely to be reported, since possessors, buyers, and sellers of narcotics are all willing participants in these crimes. Therefore, arrest data for drug crimes is highly suspect.

These data may measure the law enforcement activities and policy choices of the institutions and actors involved in the criminal justice system, but the number of drug arrests does not measure the extent of drug crimes themselves. Similarly, the racial composition of prisons and jail populations or the racial breakdown of sentences for these crimes only measures the actions of those institutions and individuals in charge; it tells us nothing about drug activity itself.

Other statistics on both drug use and drug crime show something surprising in light of the usual beliefs many hold: blacks may not, in fact, be more likely than whites to be involved with drugs. Lamberth's study in Maryland showed that among vehicles stopped and searched, the "hit rates"—the percentage of vehicles searched in which drugs were found—were statistically indistinguishable for blacks and whites. In a related situation, the U. S. Customs Service, which is engaged in drug interdiction efforts at the nation's airports, has used various types of invasive searches from pat downs to body cavity searches against travelers suspected of drug use. The Custom Service's own nationwide figures show that while over forty-three percent of

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those subjected to these searches were either black or Hispanic, "hit rates" for these searches were actually lower for both blacks and Hispanics than for whites. There is also a considerable amount of data on drug use that belies the standard beliefs. The percentages of drug users who are black or white are roughly the same as the presence of those groups in the population as a whole.

For example, blacks constitute approximately twelve percent of the country's population.

In 1997, the most recent year for which statistics are available, thirteen percent of all drug users were black. In fact, among black youths, a demographic group often portrayed as most likely to be involved with drugs, use of all illicit substances has actually been consistently lower than among white youths for twenty years running.

Nevertheless, many believe that African-Americans and members of other minority groups are responsible for most drug use and drug trafficking. Carl Williams, the head of the New Jersey State Police dismissed by the Governor in March of 1999, stated that "mostly minorities" trafficked in marijuana and cocaine, and pointed out that when senior American officials went overseas to discuss the drug problem, they went to Mexico, not Ireland. Even if he is wrong, if the many troopers who worked for Williams share his opinions, they will act accordingly. And they will do so by looking for drug criminals among black drivers. Blackness will become an indicator of suspicion of drug crime involvement. This, in turn, means that the belief that blacks are disproportionately involved in drug crimes will become a self-fulfilling



prophecy. Because police will look for drug crime among black drivers, they will find it disproportionately among black drivers. More blacks will be arrested, prosecuted, convicted, and jailed, thereby reinforcing the idea that blacks constitute the majority of drug offenders. This will provide a continuing motive and justification for stopping more black drivers as a rational way of using resources to catch the most criminals. At the same time, because police will focus on black drivers, white drivers will receive less attention, and the drug dealers and possessors among them will be apprehended in proportionately smaller numbers than their presence in the population would predict.

The upshot of this thinking is visible in the stark and stunning numbers that show what our criminal justice system is doing when it uses law enforcement practices like racially-biased traffic stops to enforce drug laws. African-Americans are just 12% of the population and 13% of the drug users, but they are about 38% of all those arrested for drug offenses, 59% of all those convicted of drug offenses, and 63% of all those convicted for drug trafficking. While only 33% of whites who are convicted are sent to prison, 50% of convicted blacks are jailed, and blacks who are sent to prison receive higher sentences than whites for the same crimes. For state drug defendants, the average maximum sentence length is fifty-one months for whites and sixty months for blacks.

D. The Distortion of the Legal System Among the most serious effects of “driving while black” on the larger issues of criminal justice and race are those it has on the legal system itself. The use of pretextual traffic stops distorts the whole system, as well as our perceptions of it. This undermines

the system's legitimacy, which affects not only African-Americans but every citizen, since the health of our country depends on a set of legal institutions that have the public's trust. Deep Cynicism Racially targeted traffic stops cause deep cynicism among blacks about the fairness and legitimacy of law enforcement and courts. Many of those African-Americans interviewed for this Article said this, some in strong terms. Karen Brank said she thought that her law-abiding life, her responsible job, her education, and even her gender protected her from arbitrary treatment by the police. She thought that these stops happened only to young black men playing loud music in their cars. Now, she feels she was "naive," and has considerably less respect for police and all legal institutions. For James, who looks at himself as someone who has toed the line and lived an upright life, constant stops are a reminder that whatever he does, no matter how well he conducts himself, he will still attract unwarranted police attention. Michael describes constant police scrutiny as something blacks have to "play through," like athletes with injuries who must perform despite significant pain.

Thus, it is no wonder that blacks view the criminal justice system in totally different terms than whites do. They have completely different experiences within the system than whites have, so they do not hold the same beliefs about it. Traffic stops of whites usually concern the actual traffic offense allegedly committed; traffic stops of blacks are often arbitrary, grounded not in any traffic offense but in who they are. Since traffic stops are among the most common encounters regular citizens have with police, it is hardly surprising that pretextual traffic stops might lead blacks to view the whole of the system differently. One need only think of the split-screen

television images that followed the acquittal in the O. J. Simpson case—stunned, disbelieving whites, juxtaposed with jubilant blacks literally jumping for joy—to understand how deep these divisions are. Polling data have long shown that blacks believe that the justice system is biased against them. For example, in a Justice Department survey released in 1999, blacks were more than twice as likely as whites to say they are dissatisfied with the police. But this cynicism is no longer limited to blacks; it is now beginning to creep into the general population's perception of the system. Recent data show that a majority of whites believe that police racism toward blacks is common. The damage done to the legitimacy of the system has spread across racial groups, and is no longer confined to those who are most immediately affected. Perhaps the most direct result of this cynicism is that there is considerably more skepticism about the testimony of police officers than there used to be. This is especially true in minority communities. Both the officer and the driver recognize that each pretextual traffic stop involves an untruth. When a black driver asks a police officer why he or she has been stopped, the officer will most likely explain that the driver committed a traffic violation. This may be literally true, since virtually no driver can avoid committing a traffic offense. But odds are that the violation is not the real reason that the officer stopped the driver. This becomes more than obvious when the officer asks the driver whether he or she is carrying drugs or guns, and for consent to search the car. If the stop was really about enforcement of the traffic laws, there would be no need for any search. Thus, for an officer to tell a driver that he or she has been stopped for a traffic offense when the officer's real interest is drug interdiction is a lie—a legally sanctioned one, to be sure, but a lie nonetheless. It should surprise no one, then, that the same

people who are subjected to this treatment regard the testimony and statements of police with suspicion, making it increasingly difficult for prosecutors to obtain convictions in any case that depends upon police testimony, as so many cases do. The result may be more cases that end in acquittals or hung juries, even factually and legally strong ones.

2. The Effect on the Guilty As discussed above, one of the most important reasons that the “driving while black” problem represents an important connection to many larger issues of criminal justice and race is that, unlike many other Fourth Amendment issues, the innocent pay a clear and direct price. Citizens who are not criminals are seen as only indirect beneficiaries of Fourth Amendment litigation in other contexts because the guilty party’s vindication of his or her own rights serves to vindicate everyone’s rights. Law-abiding blacks, however, have a direct and immediate stake in redressing the “driving while black” problem. While pretextual traffic stops do indeed net some number of law breakers, innocent blacks are imposed upon through frightening and even humiliating stops and searches far more often than the guilty. But the opposite argument is important, too: “driving while black” has a devastating impact upon the guilty. Those who are arrested, prosecuted, and often jailed because of these stops, are suffering great hardships as a result.

The response to this argument is usually that if these folks are indeed guilty, so what? In other words, it is a good thing that the guilty are caught, arrested, and prosecuted, no matter if they are black or white. This is especially true, the argument goes, in the black community, because African-Americans are disproportionately the victims of crime.

But this argument overlooks at least two powerful points. First, prosecution for crimes, especially drug crimes, has had an absolutely devastating impact on black communities nationwide. In 1995, about one in three black men between the ages of 20 and 29 were under the control of the criminal justice system—either in prison or jail, on probation, or on parole. In Washington, D. C., the figure is 50% for all black men between the age of eighteen and thirty-five. Even assuming that all of those caught, prosecuted, convicted and sentenced are guilty, it simply cannot be a good thing that such a large proportion of young men from one community are adjudicated criminals. They often lose their right to vote, sometimes permanently. To say that they suffer difficulties in family life and in gaining employment merely restates the obvious. The effect of such a huge proportion of people living under these disabilities permanently changes the circumstances not just of those incarcerated, but of everyone around them.

This damage is no accident. It is the direct consequence of “rational law enforcement” policies that target blacks. Put simply, there is a connection between where police look for contraband and where they find it. If police policy, whether express or implied, dictates targeting supposedly “drug involved” groups like African-Americans, and if officers follow through on this policy, they will find disproportionate numbers of African-Americans carrying and selling drugs. By the same token, they will not find drugs with the appropriate frequency on whites, because the targeting policy steers police attention away from them. This policy not only discriminates by targeting large numbers of innocent, law abiding African-Americans; it also

discriminates between racial groups among the guilty, with blacks having to bear a far greater share of the burden of drug prohibition.

3. The Expansion of Police Discretion As the discussion of the law involving traffic stops and the police actions that often follow showed, police have nearly complete discretion to decide who to stop. According to all of the evidence available, police frequently exercise this discretion in a racially-biased way, stopping blacks in numbers far out of proportion to their presence on the highway. Law enforcement generally sees this as something positive because the more discretion officers have to fight crime, the better able they will be to do the job.

Police discretion cannot be eliminated; frankly, even if it could be, this would not necessarily be a desirable goal. Officers need discretion to meet individual situations with judgment and intelligence, and to choose their responses so that the ultimate result will make sense. Yet few would contend that police discretion should be limitless. But this is exactly what the pretextual stop doctrine allows. Since everyone violates the traffic code at some point, it is not a matter of whether police can stop a driver, but which

Bibliography: