Predicting Future Supreme Court Decisions on Race and the Fourth Amendment

By: Walter M. Norkin*

Introduction

Oliver Wendell Holmes's theory of legal realism, which contends that written law is patently incomplete and compels wide judicial discretion in interpretation and application,[1] has been called the "What the Judge Ate for Breakfast" theory of judicial decision-making.[2] By emphasizing the large amount of discretion necessarily afforded to judges, Holmes's theory suggests that cases are decided based on judges' fancy. Indeed, when President Franklin Delano Roosevelt tried to pack the Supreme Court (of which Holmes was a member) in "[t]he defensible intent to end the Court's frustration of the people's will,"[3] the President implicitly acknowledged the great power of individual justices to influence federal policy at personal whim.[4]

Nowhere is the importance of an individual judge's personal, non-legal opinion more evident than in Fourth Amendment reasonable suspicion jurisprudence.[5] The Fourth Amendment guarantees the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[6] Temporary detention of individuals by the police, even if only for a brief period and for a limited purpose, constitutes a seizure within the meaning of the Fourth Amendment.[7] An officer may conduct a temporary stop consistent with the Fourth Amendment when the officer has a reasonable, articulable suspicion, based on the totality of the circumstances, that criminal activity is afoot.[8] While the officer must be able to articulate more than

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1. *See generally* OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation*, *in* COLLECTED LEGAL PAPERS 203, 206-08 (1920).

2. *See generally* Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decisionmaking*, 26 LOY. L.A. L. REV. 993 (1993).

3. HAROLD EVANS, THE AMERICAN CENTURY 274 (1998).

4. For a discussion of the importance of even a single justice, *see* Stuart Taylor, Jr., *The Supremes In the Dock, The High Court's Balance of Power May Turn Into a Hot Issue*, NEWSWEEK, Apr. 10, 2000, at 48.

5. *Cf.* Ornelas v. United States, 517 U.S. 690, 698, 704 (1996) (noting that past reasonable suspicion cases are seldom useful precedent).

6. U.S. CONST. amend. IV.

7. *See* Whren v. United States, 517 U.S. 806, 809-10 (1996).

8. *See* Illinois v. Wardlow, 528 U.S. 119, 122 (2000).

an inchoate suspicion or hunch of criminal activity,[9] the term "reasonable suspicion" is itself undefined.[10] "The concept of reasonable suspicion...is not 'readily, or even usefully, reduced to a neat set of legal rules.'"[11] Thus, when the Supreme Court overrules a lower court's decision concerning reasonable suspicion, the Court is essentially saying, "you applied the right legal standard; we just disagree with you on what is reasonable."[12]

One of the most salient and oft-debated topics within reasonable suspicion jurisprudence is law enforcement's reliance on race, or racial profiles, as a factor in determining whether to detain a person.[13] Although the Court has issued opinions pertaining to the use of race in establishing reasonable suspicion, it has never squarely addressed the topic in terms of an individual officer's personal beliefs when finding reasonable suspicion, or in terms of race as an element of a larger criminal profile.[14]

This article explores the territory bounded by race and reasonable suspicion by drawing a specific distinction between "personal" and "professional" experience or knowledge. The adjectival term "professional," as used in this article, describes information or beliefs attained through an occupation or during work, whether from personal observation, training, or hearsay. On the other hand, "personal" is used to describe knowledge gained outside of work or in a manner not related to the subject's occupation. Admittedly, sharp contrasts may not always exist in this demarcation. For example, a police officer may learn information about forensics while reading a gun aficionado magazine off duty. However, despite the possible drawbacks of such gray areas, this division serves to highlight the difference between an officer who relies on law enforcement statistics to find reasonable suspicion versus one who finds reasonable suspicion after applying a stereotype formed from personal beliefs. While stereotypes might not necessarily be illicit or hateful, these types of personal beliefs are plainly unsupported by professional experience. Intuitively, this lack of support should cause a court to give the factor less weight in evaluating reasonableness.

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9. United States v. Sokolow, 490 U.S. 1, 8 (1989).

10. *Id.* at 7-8.

11. *Id.* at 8 (citation omitted).

12. *See, e.g., id.* at 7, 9 ("Our decision, then, turns on whether the agents had a reasonable suspicion that respondent was engaged in wrongdoing when they encountered him on the sidewalk .... Any one of these factors is not by itself proof of any illegal conduct.... But we think taken together they amount to reasonable suspicion.").

13. *See, e.g.*, Irene Dey, *Drug Courier Profiles: An Infringement on Fourth Amendment Rights*, 28 U. BALT. L.F. 3 (1998); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Lisa Walter, Comment, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255 (2000).

14. *See infra* Part I.A.

This article attempts to move beyond bare intuition to predict how the Court would decide a case that deals directly with racial profiling and an officer's own stereotypical perceptions.[15] Part I discusses the legal precedent that guides the Court in this area of legal jurisprudence. Next, a hypothetical fact pattern, based on an actual district court case, is presented. Part II analyzes this fact pattern in light of recent Court rulings and considers possible criticism of the analysis. The article concludes that, under the Fourth Amendment, the Court would condone reliance on personal knowledge but would not condone race as a factor within a broader criminal profile.

I. Setting the Stage

A. Background and Legal Precedent

In the early 1970s, the Drug Enforcement Agency (DEA) developed "drug courier profiles."[16] Based on patterns detected by DEA agents tracking the flow of drugs into the United States, the profiles described characteristics generally associated with narcotics traffickers.[17] While the traits might have been meaningless when considered individually by an inexperienced observer, to law enforcement officers with special training, taken together, the characteristics signified a suspect's probable involvement in drug trafficking.[18]

Due to the effectiveness of DEA profiles in pinpointing drug smugglers, state and local law enforcement agencies instituted widespread use of similar profiles.[19] Furthermore, the success of drug courier profiles prompted the creation of other criminal profiles: airline hijacker, battering parent, gang member, auto thief, and alien smuggler.[20] The race of a suspect was among the elements identified by the profiles as indicative of possible criminal activity.[21]

To date, the Court has issued three decisions—*United States v. Mendenhall*,[22] *Reid v. Georgia*,[23] and *United States v. Sokolow*[24]—

15. The use of race and racial profiling by law enforcement has received significant criticism. *See* sources cited *supra* note 13. This article neither takes a policy stance nor advocates how the judiciary should decide the matter. Rather, the article merely endeavors to determine the Supreme Court's unstated position through objective evaluation of prior opinions.

16. *See* Dey, *supra* note 13, at 3.

17. *See id.* at 3-4.

18. *See id.*

19. *See id.*

20. *See id.* at 3-4, 6-7.

21. *See id.* at 4, 8.

22. 446 U.S. 544 (1980)

23. 448 U.S. 438 (1980).

24. 490 U.S. 1 (1989).

discussing the validity of profiles in ascertaining reasonable suspicion.[25] Initially, the concurring opinion of three justices, crucial in crafting the *Mendenhall* judgment, established that the law enforcement training and experience applied in assessing the totality of the circumstances could rightly include knowledge accumulated from criminal profiles.[26] The opinion explained, "courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience."[27] However, the justices clarified that fitting a profile would not necessarily demonstrate reasonable suspicion; each case must be judged based on the underlying facts.[28]

Indeed, several months later, the Court held that the particular circumstances observed by the agent in *Reid* could not form the basis for reasonable suspicion of criminal activity, even though the observations matched some of the traits contained in the drug courier profile.[29] The Court reasoned that the evidence on which the agent relied could "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that [such meager evidence] . . . could justify a seizure."[30]

While *Reid* stands for the proposition that evidence does not become more substantial simply because it appears to match a profile, the Court later explained that the value of evidence is not diminished because it seems to conform to a profile.[31] In *Sokolow*, Justices Marshall and Brennan mounted a scathing attack on DEA profiles in their dissenting opinion, reasoning that profiles reduce an officer's ability to make fact-specific inferences because profiles mandate the "mechanistic application of a formula" of traits.[32] Moreover, the justices noted how inconsistencies between the characteristics allow profiles to adapt to any

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25. Law enforcement's reliance on profiles has been mentioned in other Court cases, but the issue of the profile's validity in establishing reasonable suspicion has not formed part of the majorities' holdings in any of these other cases. For example, in *Florida v. Royer*, 460 U.S. 491 (1983), Justice Rehnquist's dissent, joined by Justice O'Connor, noted that the appellate court's decision discussed profiles. *See* Royer, 460 U.S. at 525 n.6. While the dissent acknowledged that the plurality opinion did not broach the subject of criminal profiles, the dissent was concerned that, by affirming the lower court's ruling on other grounds, the plurality was also affirming the lower court's stance on profiles. *See id.* Hence, the dissent contained a lengthy footnote countering the appellate court's reasoning regarding profiles. *See id.*

26. *See Mendenhall*, 446 U.S. at 563-66. *Accord Royer*, 460 U.S. at 525 n.6.

27. *Mendenhall*, 446 U.S. at 566.

28. *See id.* at 565 n.6.

29. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980). Justice Stevens was among the justices who made up the *Reid* per curiam opinion. *See* THE AMERICAN BENCH 89 (Ruth A. Kennedy et al. Eds., 1999) (noting Justice Stevens' appointment to Supreme Court in 1975). Justice Rehnquist dissented in *Reid*, reasoning that the suspect was never seized and that analysis of reasonable suspicion was thus superfluous. *See Reid*, 448 U.S. at 442.

30. *Id.* at 441.

31. *See* Florida v. Royer, 460 U.S. 491, 525 n.6 (1989) ("We have held that conformity with certain aspects of the 'profile' does not automatically create a particularized suspicion which will justify an investigatory stop.").

32. *See* United States v. Sokolow, 490 U.S. 1, 13 (1989).

particular set of observations in a "chameleon-like way."[33] Hence, the dissent concluded that the evidentiary value of profiles, and the traits contained therein, is too low to sustain reasonable suspicion.[34] Responding to the dissent, the *Sokolow* majority, which included Justices Stevens,[35] O'Connor, Scalia, Kennedy, and Chief Justice Rehnquist, ruled: "A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."[36]

Unfortunately, none of the opinions in *Mendenhall*, *Reid*, or *Sokolow* addressed the legitimacy of using race as a factor within the profiles. However, around the same time that the DEA was developing and promulgating the drug courier profiles, the Supreme Court rendered two rulings involving race as a factor in an officer's assessment of reasonable suspicion: *United States v. Brignoni-Ponce*[37] and *United States v. Martinez-Fuerte*.[38] The decisions did not encompass profiles, but rather focused on an individual officer's professional experience in law enforcement.

In *Brignoni-Ponce*, two Border Patrol officers in a squad car parked on the side of a highway observed a northbound car with three occupants.[39] The officers decided to pursue and stop the northbound vehicle solely because its "occupants appeared to be of Mexican descent."[40] The Court held that the officers' reliance on that single factor was insufficient to furnish reasonable grounds to believe that the suspects were aliens.[41] The Court explained:

> [T]he nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators.
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> The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a

33. *See id.* at 13-14 (citations omitted). For example, profiles note that a suspect may be the first or last to deplane; may buy a one-way or round trip ticket; may travel alone or with a companion; or may act nervously or too calmly. *See id.*

34. *See id.* at 14-18.

35. Justice Stevens' presence in this majority is curious given his position in *Reid*, *see supra* notes 29-30 and accompanying text; *see also Mendenhall*, 466 U.S. at 573 n.11.

36. *Sokolow*, 490 U.S. at 10.

37. 422 U.S. 873 (1975).

38. 428 U.S. 543 (1976).

39. *See Brignoni-Ponce*, 422 U.S. at 874-75.

40. *See id.* at 875.

41. *See id.* at 885-86.

> relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.[42]

Although this holding seems to confront head-on the role of race as a factor in arousing reasonable suspicion, Justice Rehnquist, in his concurring opinion, noted the narrowness of the ruling: "[The] opinion . . . is both by its terms and by its reasoning concerned only with the type of stop involved in this case."[43] This insight proved to be prescient just one year later when the Court, addressing the detention of suspects at permanent Border Patrol checkpoints in *Martinez-Fuerte*, outlined the issue in *Brignoni-Ponce* as "under what circumstances a *roving patrol* could stop motorists."[44]

Notwithstanding this distinction, the Court further condoned the use of race in *Martinez-Fuerte*. The Court concluded that even if stops "are made *largely* on the basis of apparent Mexican ancestry," the intrusion at permanent checkpoints is too minimal to trigger constitutional protection.[45] *Brignoni-Ponce* and *Martinez-Fuerte* together suggest that race may be the principal basis for a stop, but not the only basis.[46]

In crafting this legal rule, the Court relied heavily on statistical data regarding the correlation of apparent Mexican ancestry and illegal alien status collected by the U.S. Department of Commerce, the Census Bureau, and the Immigration and Naturalization Service.[47] These statistics led the Court to conclude that race was a relevant factor and, therefore, could be used by police officers as part of the reasonable suspicion equation.[48] However, such statistics are pertinent only if they already comprise part of an officer's professional experience or training; an officer cannot claim reliance on such statistics when forming an opinion about reasonable suspicion if the officer was not aware of those statistics before detaining the suspect. Thus, *Brignoni-Ponce* and *Martinez-Fuerte* do not indicate whether an officer may utilize race in his calculus of reasonable suspicion if the knowledge informing the

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42. *Id.* at 883, 886-87. The opinion provides a laundry list of factors that could be taken into account in deciding whether reasonable suspicion exists, including: characteristics of the area, proximity to the border, patterns of traffic, previous professional experience, driver behavior, attempts to evade, aspects of the vehicle, number of passengers, mode of dress, and haircut. *See id.* at 884-85.

43. *Id.* at 887.

44. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) (emphasis added).

45. *See id.* at 563-64 (emphasis added).

46. *See id.* at 564 n.17 ("[R]eliance [on race] clearly is relevant . . . . [However, race] by itself could not *create* the reasonable suspicion required . . . .") (emphasis added).

47. *See id.* at 551-52, 554, 563-64 & nn.16-17; *Brignoni-Ponce*, 422 U.S. at 878-79, 882, 885-87 & nn.4-5, 12.

48. *See Martinez-Fuerte*, 428 U.S. at 564 n.17; *Brignoni-Ponce*, 422 U.S. at 886-87.

officer's decision is derived from personal, non-professional experience.[49]

Some commentators argue that the Court's recent opinion in *Whren v. United States*,[50] bolstered by *Arkansas v. Sullivan*,[51] eliminated the possibility of any future examination of an officer's personal experience or motivation under Fourth Amendment reasonable suspicion analysis.[52] Admittedly, parts of the *Whren* opinion support this assertion:

> [T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. . . . [W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers. . . . [T]he Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, whatever the subjective intent.[53]

Yet, given that *Whren* was ultimately about probable cause, not reasonable suspicion,[54] it is premature to consider the issue of personal experience or motivation a settled matter within Fourth Amendment jurisprudence. Moreover, an individual officer's intent is not akin to reliance on personal experience, which may be devoid of any noticeable personal motivation. Hence, "certain circumstances" could well include personal knowledge as a factor supporting reasonable suspicion.

In addition, despite the *Whren* ruling, some justices have since taken individual officers' motivation into account while performing Fourth Amendment analysis.[55] Discussing the reasonableness mandate of the Fourth Amendment, the dissent in *Atwater v. City of Lago Vista* noted the ongoing debate surrounding racial profiling and that a "relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."[56] Thus, it is incorrect to conclude that *Whren* has removed any possible challenge of an officer's personal experience or motivation under Fourth Amendment reasonable suspicion analysis.[57]

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49. For a discussion of the difference between personal and professional experience, see *infra* Introduction.

50. 517 U.S. 806 (1996).

51. 532 U.S. 769, 771 (2001).

52. *See* Thompson, *supra* note 13, at 980-83.

53. *Whren*, 517 U.S. at 813-14.

54. *See id.* at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). *See also* City of Indianapolis v. Edmonds, 531 U.S. 32, 45-46 (2000)

55. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., joined by Justices Stevens, Ginsburg, and Breyer dissenting).

56. *Id.*

57. *See City of Indianapolis*, 531 U.S. at 46 ("[N]othing . . . suggests that we would extend the principle of *Whren* to all situations where individualized suspicion was lacking.").

B. Places, Everyone: The Hypothetical[58]

On September 12, 1999, Detective Susan Gaines of the Santa Fe Police Department received an anonymous phone call informing her that a drug courier was traveling on a train scheduled to arrive in Santa Fe that evening. The tipster stated that the courier was a young, Hispanic male seated in the first class section of the train from Pasadena. Although the detective was uncertain of the reliability of the information, she decided to investigate.

Detective Gaines drove to the Santa Fe train station and waited for the train from Pasadena to arrive. When the train pulled into the station, the detective quickly staked out the two first class cars. The detective watched passengers get off the train and noticed a young male who appeared to be Hispanic among the travelers.

Detective Gaines, while not observing anything unusual in the suspect's actions or demeanor, decided to follow the young man to the station parking lot. Once in the lot, the detective stopped the young man, explained that she was a member of the Santa Fe police, and asked him for identification. The suspect produced a driver's license that identified him as Carlos Estevez.

Detective Gaines then told Mr. Estevez that she had reason to believe that Mr. Estevez's luggage contained drugs. The detective asked Mr. Estevez if he would consent to a search of his bags. Mr. Estevez unequivocally refused; however, the detective persisted and told Mr. Estevez that she would detain him until a drug-sniffing dog could be brought in unless he consented to the search. Thereupon, Mr. Estevez reluctantly consented to a search of his luggage. Detective Gaines opened Mr. Estevez's bags in the parking lot. The search revealed a container filled with one kilogram of cocaine. The detective subsequently arrested Mr. Estevez.

Prior to trial, Mr. Estevez moved to have evidence of the cocaine suppressed. Mr. Estevez's motion claimed that the evidence was fruit of an illegal search and seizure in violation of the Fourth Amendment. Specifically, Mr. Estevez contended that Detective Gaines lacked reasonable suspicion to detain him and pointed to testimony of the detective to support his contention.

At a hearing before the district court, Detective Gaines testified that she did not rely on the tip alone to form reasonable suspicion. The detective explained that the suspect's apparent race played an important role in justifying her decision to stop Mr. Estevez. First, the DEA drug

58. The following hypothetical fact pattern is loosely based on *United States v. Armijo*, 781 F. Supp. 1551 (D.N.M. 1991). The facts presented have been altered to place certain issues squarely before the Court.

courier profile for the southwestern United States noted that many drug couriers are Hispanic.[59] Second, having lived in Santa Fe for ten years and having traveled regularly by train, the detective believed that it was unusual for a young Hispanic to travel first class. These two points, coupled with the tip, led Detective Gaines to conclude that reasonable suspicion existed to detain Mr. Estevez.

The trial judge denied Mr. Estevez's motion. After his conviction, Mr. Estevez made the same argument in his appellate brief. Like the district court, the panel of circuit court judges declined to rule that the detective lacked reasonable suspicion to detain Mr. Estevez. On December 2, 2000, the Supreme Court granted certiorari to Mr. Estevez.

The overarching question for the Court is whether, under the totality of the circumstances, these facts could amount to reasonable suspicion. However, several smaller issues exist within the larger question. First, is it reasonable to rely on profiles that include race as a factor? Second, could personal beliefs or knowledge form the basis of reasonable suspicion? Third, could personal beliefs lend credibility to an otherwise unsubstantiated tip?

II. Raising the Curtain

A. Opening Night at the Supreme Court

In order to predict the Court's decision, two premises must be maintained. First, the nine justices often cluster into three groups when ruling.[60] Specifically, Chief Justice Rehnquist usually votes in concert with Justices Scalia and Thomas to form a conservative bloc.[61] This conservative group is often joined by Justices O'Connor and Kennedy, who are considered centrist conservatives.[62] Meanwhile, Justices Stevens, Ginsburg, Souter, and Breyer comprise the liberal vote.[63]

The second premise is that the liberal justices tend to support legal positions that are more favorable to racial minorities than are the positions supported by the conservatives.[64] For example, the liberal justices have defended expanding the federal government's power to make states draw election districts that benefit black or Hispanic candidates.[65] This same group of justices has endorsed the use of statistical sampling in the census survey, which might have corrected the

59. "[T]here is no single 'national' profile . . . ." Dey, *supra* note 13, at 3.

60. *See* Taylor, *supra* note 4, at 48.

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.* (stating that liberal justices would support affirmative action and redistricting along racial lines).

65. *See id.*

historically systematic undercounting of minorities.[66] Additionally, liberal justices have placed great importance on redressing past discrimination by advocating upholding affirmative action programs[67] and certain other programs utilizing race-based voting that benefit minorities.[68] As a final example, noting that minorities often have strained relationships with police, liberal justices have cautioned against interpreting an individual's "unprovoked flight" from a police officer as indicative of criminal activity.[69]

1. *Reliance on Race and Profiles*

At first glance, it might appear that the Court would permit reliance on profiles that include race as a factor. The Court already allowed race to be a factor in establishing reasonable suspicion, and it upheld the use of criminal profiles.[70] Thus, combining the two precedents seems to establish support for including race as an element of criminal profiles. However, a closer examination of the cases shows that such a conclusion is not so straightforward.

Turning first to criminal profiles, *Reid* and *Sokolow*, written by justices from all three voting groups, together hold that circumstances are neither to be given greater nor lesser weight merely because of their congruence to a profile.[71] These cases, read together, indicate that the Court *condoned* criminal profiles, but did not *endorse* their use, thereby directing courts to examine the naked facts irrespective of the possible existence of a profile.

These directions, which reflect the gap between condonation and endorsement, create an inherent tension for the Court: allowing officers to rely on profiles, which essentially train the officers to place additional weight onto circumstances that the untrained would find innocent, yet also refusing to accord extra weight to those same circumstances when retrospectively evaluating the officer's assessment in light of reasonableness.[72] This tension exposes a large crack in the foundation of

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66. *See* Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 349-65 (1999) (dissenting opinions of Stevens, Ginsburg, Breyer, and Souter, J.J.).

67. *See generally* Taylor, *supra* note 4, at 48. *See, e.g.*, City of Dallas v. Dallas Fire Fighters Ass'n, 526 U.S. 1046, 1046 (1999) (Breyer and Ginsburg, J.J.,) (dissenting from denial of certiorari where appellate court found "insufficient evidence of past discrimination . . . to justify" an affirmative action program and calling lower court's reasoning "questionable").

68. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 527-47 (2000) (dissenting opinions of Stevens and Ginsburg, J.J.).

69. *See* Illinois v. Wardlow, 528 U.S. 119, 128, 129 n. 3, 132-33 nn. 7-10 (2000) (Stevens, J., joined by Justices Souter, Ginsburg, and Breyer dissenting).

70. *See supra* Part I.A.

71. *See supra* notes 29-36 and accompanying text.

72. *Compare* Reid v. Georgia, 448 U.S. 438, 441 (1980) (finding absence of reasonable suspicion even though four characteristics matched profile) *with* Florida v. Royer, 460 U.S. 491, 525 n.6 (1983) (dissent) ("While each case will turn on its own facts, sheer logic dictates that where

the Court's reasoning in upholding reliance on criminal profiles by disregarding the "considerable expertise" that officers have acquired through training and experience.[73]

In addition, the inclusion of race as a profile element is difficult because the reasoning in the cases that approved the use of race in forming reasonable suspicion does not apply well to cases involving general criminal profiles. Both *Brignoni-Ponce* and *Martinez-Fuerte* were Mexican alien smuggling cases.[74] Thus, as the Court recognized, there is a nexus between race and the specific crime in that an illegal Mexican alien will necessarily be of Mexican descent.[75] However, this nexus between race and the prevention of a specific crime does not exist outside the illegal alien context; it cannot be said that a drug smuggler, for example, will necessarily be of a particular descent.[76]

The recent case of *City of Indianapolis v. Edmond*[77] sheds light on the present Court's stance on the gravamen of *Martinez-Fuerte* and the concept of nexus. *City of Indianapolis* "consider[ed] the constitutionality of a highway checkpoint program whose primary purpose [was] the discovery and interdiction of illegal narcotics."[78] Under the program, the city set up a series of roadblocks.[79] At the roadblocks, police officers would pull over a predetermined number of cars and subject all the cars to visual inspections and canine narcotics sniffs.[80] Officers had no discretion to stop any vehicles out of sequence.[81] Absent reasonable suspicion from the inspection and sniff, the detention time was no more than five minutes.[82] The city argued that the checkpoints were similar to those in *Martinez-Fuerte*, and therefore constitutional; the Court disagreed.[83]

The majority, consisting of Justices O'Connor, Kennedy, Stevens, Souter, Ginsburg, and Breyer,[84] engaged in a thorough review of the *Martinez-Fuerte* ruling. The Court distinguished *Martinez-Fuerte* by noting "the *particular context* in which the constitutional question arose" and the "considerations *specifically related* to the need to police the

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certain characteristics repeatedly are found among drug smugglers, the existence of those characteristics in a particular case is to be considered accordingly . . . .").

73. *See supra* Part I.A. (discussing *Mendenhall*).

74. *See supra* Part I.A.

75. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor . . . .").

76. Admittedly, this is an assumption, albeit an intuitively safe assumption. The analysis would change if empirical data were available showing some very strong correlation (such as statistical probability at a 5% confidence level) between race and some specific crime.

77. 531 U.S. 32 (2000).

78. *Id.* at 34.

79. *Id.*

80. *Id.* at 35.

81. *Id.*

82. 531 U.S. at 35.

83. *Id.* at 42-43.

84. *See id.* at 33.

border . . . ."[85] The Court explained that only those random checkpoint programs that were "designed primarily to serve purposes *closely related* to" preventing a specific crime—never programs designed to detect general criminal wrongdoing—have been approved under the Fourth Amendment.[86] The Court reasoned that this nexus between the program and detection of a specific crime was important because otherwise "there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose."[87]

The dissent, written by Chief Justice Rehnquist and joined by Justices Scalia and Thomas,[88] did not place the same weight on nexus. In voting to uphold the roadblock program, the dissent reasoned that the primary purpose should not be the controlling fact in deciding constitutionality.[89]

Notwithstanding the conservatives' dissent, the majority's logic applies equally to the nexus between race and the prevention of a specific crime. Indeed, the Court's reasoning has the same resonance if "racial statistics" are substituted for "roadblocks." There would be little check on the ability of the authorities to construct racial statistics for almost any conceivable law enforcement purpose.[90] The end result is that it would probably not be reasonable to rely on profiles that include race as a factor if there is no nexus between race and the specific crime profiled.

Although it might be hard to fathom intuitively how the Court could allow criminal profiling and reliance on race separately but not together, an analogy to mathematics helps illustrate this concept. The Court has effectively allowed both in assessing reasonable suspicion but has not one hundred percent endorsed either. In other words, the Court has given each one individually support of greater than fifty percent—enough to pass constitutional muster, but less than a full one hundred percent. Let us imagine that the Court's support of either practice can be quantified at sixty percent. Multiplying the two fractions of support in order to apply race and criminal profiling together (.6 times .6), the total (.36) is smaller than either fraction individually and amounts to less than fifty percent support, thereby falling short of the constitutional bar.

Thus, Detective Gaines would not be able to shield her assessment of the circumstances behind a profile, especially if only one

85. *Id.* at 38 (emphasis added).

86. *Id.* at 41-42 (emphasis added).

87. *Id.* at 42. *See also id.* at 42-43 ("[W]e must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue.").

88. 531 U.S. at 33.

89. *See id.* at 50.

90. Noticeably absent from both the majority and dissent's discussions of *Martinez-Fuerte* is any mention of race. This may suggest that the current Justices are attempting to shy away from the implications of *Martinez-Fuerte* to allow race to be considered when formulating reasonable suspicion. *Cf. City of Indianapolis*, 531 U.S. at 56 (Thomas, J., dissenting) ("I am not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided.").

characteristic fit within that profile and if that one characteristic was race.[91]

2. *Personal Knowledge and Reasonable Suspicion*

The matter of whether officers can insulate their assessment with personal knowledge or experience is the next hurdle of the hypothetical scenario. Both liberal and conservative justices have endorsed law enforcement's application of professional training and common sense in determining reasonable suspicion.[92] In *United States v. Cortez*,[93] a unanimous Court which included Justice Stevens and Justice Rehnquist wrote: "The analysis proceeds with various objective observations, information from police reports, . . . and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions . . . ."[94] The *Cortez* opinion emphasized objectiveness[95] and was subsequently embraced and reinforced by every justice on the current Supreme Court.[96]

Cortez, nevertheless, limited the "trained" law enforcement officer to "permissible" deductions from the facts.[97] Indeed, the liberal justices in *Wardlow* pointed out that an inquiry into reasonableness involves calculating the degree of suspicion in each circumstance and determining exactly "what 'commonsense' conclusions can be drawn . . . ."[98]

It is precisely at this point where liberal and conservative justices seem to differ. The distinction between personal and professional knowledge is currently undefined.[99] Justices on both sides of the ideological spectrum are impressed by data that resembles statistics

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91. Moreover, some justices might find reliance on the lone factor of race to be particularly repugnant. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 572 n.1 (1976) (Brennan, J. and Marshall, J. dissenting) (stating "[t]hat law in this country should tolerate use of one's ancestry as probative of possible criminal conduct is repugnant under any circumstances"). *See also, e.g., supra* note 90.

92. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119 at 125, 133-35 (2000) (both majority and dissent); Ornelas v. United States, 517 U.S. 690, 699-700 (1996) (Rehnquist, J., joined by Justices Stevens, O'Connor, Thomas, Ginsburg, Souter, Breyer, and Kennedy).

93. 449 U.S. 411 (1981).

94. *Id.* at 418.

95. *See id.* at 418-20 ("The analysis proceeds with various *objective* observations . . . . [W]hen used by trained law enforcement officers, *objective* facts, meaningless to the untrained, can be combined . . . . From *objective* facts, the officers also deduced the probable point . . . .") (emphasis added).

96. *See, e.g., Wardlow*, 528 U.S. at 125, 133-35 (opinions including Thomas, Souter, Ginsburg, and Breyer); United States v. Sokolow, 490 U.S. 1, 8 (1989) (Rehnquist, Stevens, O'Connor, Scalia, Kennedy); United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985) (Rehnquist and O'Connor); Florida v. Royer, 460 U.S. 491, 525 nn.5, 6 (1983) (Rehnquist and O'Connor).

97. *See Cortez*, 449 U.S. at 419.

98. *See Wardlow*, 528 U.S. at 128.

99. *See supra* Introduction.

irrespective of whether the figures were derived from personal or professional information.[100] Conservative justices seem to believe that qualified knowledge and the associated permissible inferences encompass a broader range than what the liberal justices accept.[101] This is well illustrated in *Wardlow*, where the five more conservative justices ruled that "unprovoked flight" could form the basis for reasonable suspicion.[102] Citing *Cortez*, the Court's reasoning painted a wide boundary around adequate knowledge and proper deductions, leaving open the possibility of an officer drawing conclusions from strictly personal knowledge:

> In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.[103]

The conservative justices were not the only *Wardlow* jurists invoking *Cortez*; the liberal dissenting justices cited that opinion as well.[104] The dissent relied on *Cortez* solely to define the legal standard rather than to justify the ultimate decision. This demonstrates that the liberal justices viewed "commonsense judgments" as a significantly more narrow provision.[105]

Furthermore, conservative justices have appeared to be less concerned with the manner in which police officers obtain their knowledge. For example, Chief Justice Rehnquist and Justice O'Connor have allowed "discussions with other officers," without specifying the setting or context of the discussions, to be a factor in assessing probable cause.[106] More recently, in *City of Chicago v. Morales*,[107] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, provided an unqualified endorsement to officers: "[W]e trust officers to rely on

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100. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 700 (1996) (Rehnquist, Stevens, O'Connor, Thomas, Ginsburg, Souter, Breyer, and Kennedy) ("[T]o Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel . . . ."); United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985) ("[I]nspectors had encountered many alimentary canal smugglers . . . .").

101. *Cf.* City of Chicago v. Morales, 119 S. Ct. 1845, 1885-86 (1999) (Thomas, J., Rehnquist, C.J., and Scalia, J., dissenting) (reasoning that police could properly exercise discretion as they do in determining reasonable suspicion and that mistakes in determination are the exception, not the norm).

102. *See Wardlow*, 528 U.S. at 124-25.

103. *Id.* at 676.

104. *See id.* at 678.

105. *See id.*

106. *See* Texas v. Brown, 460 U.S. 730, 742-43 (1983).

107. 527 U.S. 41 (1999).

their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as 'probable cause' and 'reasonable suspicion' . . . ."[108] Notably, the opinion failed to mention whether that trusted "experience and expertise" was acquired strictly within the confines of law enforcement.

In terms of the hypothetical scenario, the language in cases like *Wardlow* and *Morales* suggests that the conservative majority would allow the detective to assess the circumstances in light of her personal experience as long as there was some objective support for the personal knowledge. Thus, ten years residency and frequent travel by train would likely be satisfactory. The personal experience, by itself, might not be enough to establish reasonable suspicion; however, it could serve as a factor in evaluating the totality of the circumstances.

The appearance of a racial stereotype might disturb some of the conservative justices—as it conceivably would bother the liberal judges[109]—but the conservative justices might also be persuaded that such a stereotype is similar to an inference made by an officer who decides to focus on a suspect because the suspect does not fit the demographic of a neighborhood.[110] After all, had the detective normally been assigned to patrol the train station and had the detective surveyed many first class cars as part of her duties over her tenure at the station, the conclusion would conceivably pass muster with the conservative justices.

3. *Personal Knowledge and Tip Reliability*

Turning now to whether this personal knowledge could lend credibility to the tip, *Florida v. J.L.* is instructive.[111] In *J.L.*, law enforcement was informed that a young, black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.[112] "Apart from the tip, the officers had no reason to suspect . . . illegal conduct."[113] The Court unanimously held that the officers did not have reasonable suspicion to stop and search the suspect because the anonymous tip was unreliable.[114] The Court explained that, even though the tip accurately described the suspect, it did not show that the tipster

108. *Id.* at 109-10.

109. *See supra* notes 64-69 and accompanying text.

110. *See, e.g.*, State v. Dean, 543 P.2d 425, 427 (Ariz. 1975) ("[T]he fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered . . . .").

111. Florida v. J.L., 529 U.S. 266 (2000)

112. *Id.* at 268.

113. *Id.*

114. *Id.* at 274.

had special knowledge of concealed criminal activity since the tip described readily observable information.[115]

Similar logic dictates that the Court would not find the detective's personal knowledge adequate to establish the reliability of the tip in this hypothetical case. While the information that the tipster reported might be unusual according to the detective's personal knowledge, there was nothing to indicate that the tipster thought it unusual, thereby demonstrating special knowledge. The information was likewise readily observable and does not lend the tipster any heightened credibility about clandestine criminal activity.

Interestingly, had the tipster reported information that, although readily observable, could be qualified as information gained through professional knowledge, a finding of reasonable suspicion would be more plausible. For example, had the tipster said that the suspect was carrying a certain type of luggage that law enforcement knows is often used for narcotics smuggling, the total information provided by the tip would have been more valuable, even though the luggage was readily observable. The tip itself would still lack credibility because it would fail to reveal special knowledge of hidden criminal activity; however, an officer would now be armed with a tip (albeit an unreliable one) plus information that would arouse suspicion in any officer, not just one with personal knowledge. This scenario highlights an intuitive difference between personal and professional knowledge: professional knowledge is more widely known among officers and thus carries weight as a law enforcement statistic.[116] However, as explained previously, the detective's personal knowledge falls short of being a statistic and thus cannot help the tip sustain reasonable suspicion in this case.

In the end, the Court would rule—probably with the liberals and centrist conservatives making up the majority, but possibly even unanimously—that Detective Gaines did not have reasonable suspicion to detain Mr. Estevez given the totality of the circumstances. As far as the two conservative groups are concerned, the only legitimate factors to which the detective could point in reliance would be the suspect's race, as based on personal experience, and an anonymous tip. However, although personal knowledge related to race may serve as the principal factor,[117] the two factors together do not add up to reasonable suspicion because the tip is hardly credible.[118]

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115. *Id.* at 271.

116. *See supra* page 4 ("[T]he division serves to highlight the difference between an officer who relies on law enforcement statistics to find reasonable suspicion versus one who finds reasonable suspicion after applying a stereotype formed from personal beliefs.").

117. *See supra* notes 39-46 and accompanying text.

118. *Cf. J.L.*, 529 U.S. at 271 (discussing *Alabama v. White*, 496 U.S. 325 (1990), as a "close case" and noting that an anonymous tip by itself was clearly not a credible basis for reasonable suspicion).

The four liberal justices would issue an opinion concurring with the conservatives in judgment; but, due to the potential harm to minorities, the liberal justices would not permit the use of personal knowledge.[119] The justices would reason that enabling law enforcement to rely on personal knowledge in evaluating reasonable suspicion could open the door to reliance on possibly stereotypic assumptions.

B. The Critics' Reviews

Critics of this analysis could argue that the outcome reached is based on too few cases, or that the language in the surveyed cases is not strong enough to justify the conclusion. However, both of these contentions apply more to the method than the actual result. If cases were plentiful and on-point dicta were available, there would be no need for interpretation and prediction because the law and the future direction of Court rulings would be clear. In the absence of such indicia, legal scholars are forced to glean meaning from a paucity of cases that are only tangential to the inquiry and thus lack sufficiently targeted language. This type of unscientific method is best employed precisely under these constrained conditions.

A second criticism of the analysis might assert that the Court's hypothesized final decision would compel parties to litigate over the state-of-mind of the law enforcement agent. In other words, to have evidence suppressed, a defendant would have to argue that the officer's personal knowledge, which underlay reasonable suspicion, was not based on objective logic. This litigation would appear to be contrary to the Court's ruling in *Whren*, where the Court divorced subjective intention and individual motivation from Fourth Amendment challenges.[120] Moreover, the Court has been wary of converting "every discretionary judgment . . . into an occasion for constitutional review."[121]

However, this criticism is unfounded. In fact, the hypothesized judgment would hardly change the examination that courts undertake currently. The officer would still have to explain the factors on which she relied in forming her suspicion, and the court, applying its own detached evaluation, would determine the reasonableness of the suspicion. If the factors were unsubstantiated by objective information, such as personal knowledge that leads to too tenuous a conclusion, the court would simply find the suspicion unreasonable.

A third criticism that could be leveled at this analysis is that it arrives at somewhat contradictory conclusions. The analysis concludes that the Court will eventually permit reliance on an individual's personal

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119. For a discussion of liberal justices' opinions regarding minorities, see *supra* note 64 and accompanying text.

120. *See supra* notes 50-54 and accompanying text.

121. Atwater v. City of Lago Vista, 532 U.S. 318, 321 (2001).

knowledge—albeit perhaps substantiated by information that creates an aura of statistical credibility—to infiltrate reasonable suspicion determinations. Yet, the analysis infers that inclusion of race as an element of a criminal profile, which is essentially an aggregation of personal and professional knowledge as accumulated by numerous law enforcement individuals, is less likely to be sustained by the court.

There are three ways to explain this apparent contradiction, none of which call into question the integrity of the analysis or the conclusions. The first explanation relates to the manner in which the Court functions: cases turn on precedent and the specific fact pattern before the Court. In the present case, the precedent is held only tenuously.[122] The specific facts, by design, do not lend themselves to an easy resolution, leading the reasoning into unsettled areas of the law where contradiction is a possible outcome. The resulting contradiction supports the old adage that "bad facts make bad law."

The second explanation hinges on the fact that, at bottom, the Court is made up of nine individuals and the individuals may change at any moment, hence changing the composite opinion of the Court.[123] The precedent opinions were decided before most of the current justices joined the Court and whether the current Court would decide those precedent cases the same way remains unclear.[124] Moreover, attitudes towards race have changed in the almost thirty years since *Martinez-Fuerte*[125] was decided. Thus, analyzing a hypothetical scenario from the perspective of the present Court might logically end in contradiction where a past Court would find convergence.

The third and final explanation is an attempt to reconcile the contradiction: the systematic use of race for determining reasonable suspicion is frowned upon, while the occasional use by an individual with first-hand knowledge is sanctioned. This explanation is in accord with the Court's mandate of objectively examining the underlying facts.[126] Furthermore, it appears to strike a balance between the Court's concern for protecting individuals from undue seizures under the Fourth Amendment, while not stripping the officer of expertise-based tools for ferreting out crime.[127]

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122. *See supra* Part II.A.2.

123. For a discussion of the importance of the views of the individual justices, especially in reasonable suspicion jurisprudence, see *supra* Introduction.

124. *See supra* note 90.

125. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

126. *See supra* notes 26-36 and accompanying text.

127. *See supra* notes 26-37 and accompanying text.

Conclusion

Reasonable suspicion determinations involving race have received renewed attention in the wake of September 11. Increasing their efforts to prevent terrorist attacks, law enforcement agencies have started to closely scrutinize those in the United States of Middle Eastern descent,[128] no doubt formulating a terrorist profile. Regardless of whatever willingness the public may have to allow law enforcement wide latitude to prevent attacks, terrorist profiles that include race may not be a "reasonable" option.

The analysis in this article supports two deductions. First, despite the Court's previous ruling upholding the constitutionality of separately using race and criminal profiles to form reasonable suspicion, the use of racial profiling is far from presumably constitutional. Second, this Court will eventually permit reliance on personal knowledge—albeit perhaps substantiated by objective statistics—to infiltrate reasonable suspicion determinations.

Admittedly, because this analysis concentrates on understanding the views of the nine justices and because the personal opinion of each justice as to what is "reasonably suspect" is so important,[129] the predictive value of this analysis is limited. If the balance between conservative and liberal justices is altered or a justice is replaced, the deductions must be re-thought. This seems almost inevitable since one or more of the justices will likely retire soon.[130] The Chief Justice has been a member of the Court since 1972, Justice Stevens since 1975, and Justice O'Connor since 1981.[131] However, with the election of George W. Bush as President for the 2001 term, the Court's conservative slant is likely to remain the equilibrium disposition and this analysis will remain highly relevant.[132]

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128. *See* James Sterngold and Diana Jean Schemo, *10 Arrested in Visa Cases in San Diego*, N. Y. TIMES, Dec. 13, 2001, at B1 ("[T]he sweep was focusing for now only on students . . . from eight countries . . . . The countries are Iran, Iraq, Sudan, Pakistan, Libya, Saudi Arabia, Afghanistan and Yemen. The official rejected criticism . . . that focusing on specific nationalities amounted to discrimination.").

129. *See supra* Introduction.

130. *See id. See also* Kevin Sack with Gustav Niebuhr, *After Stem-Cell Rift, Groups Unite for Anti-Abortion Push*, N. Y. TIMES, Sept. 4, 2001, at A1 ("While there is no vacancy on the court, three justices—Chief Justice William H. Rehnquist and Justices John Paul Stevens and Sandra Day O'Connor—are over 70. Many court watchers expect at least one retirement within the next few years.").

131. *See* THE AMERICAN BENCH 73, 79, 89 (Ruth A. Kenndy ed., 1999).

132. *See* Taylor, *supra* note 4, at 48.