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Derrick A. Carter

INTRODUCTION TO TRACEY MACLIN'S ARTICLE, *"BLACK AND BLUE ENCOUNTERS"—SOME PRELIMINARY THOUGHTS ABOUT FOURTH AMENDMENT SEIZURES: SHOULD RACE MATTER?*

Derrick A. Carter*

An enduring article identifies creative perceptions of unresolved truths. Race and criminal injustice are one of America's premier Fourth Amendment truths. In *"Black and Blue Encounters"—Some Preliminary Thoughts about Fourth Amendment Seizures*, Professor Tracey Maclin argues that "when assessing whether a police encounter constitutes a seizure under the Fourth Amendment, [the Court] should consider the race of the person confronted." In construing "unreasonable stops," the U.S. Supreme Court engages the "totality of the circumstances" approach, which seldom recognizes the powerful impact of race in the prevailing "reasonable person" standard. The Court's totality-of-the-circumstances test presupposes the reasonably "innocent person," a society of eunuchs.

The U.S. Supreme Court has notably said, in cases concerning "consent to police searches" and "flight from police stops," that a person can disregard an officer's inquiry and walk away. Professor Maclin takes the Court to task for the near absurdity of this statement. American history and the current state of affairs reflects case after case of brutal beatings, killings, and arrests by police officers who encounter black men who dare protest their stop and seizure.

Professor Maclin's argument, recognized in several lower courts, seeks to individualize the objective standard to include physical dimensions and cultural characteristics, such as race and gender. In the famous Bernard Goetz case,[1] where the New York subway shooter was white and the victims were black, the Court of Appeals of New York invoked a standard of reasonableness that included a person's prior experiences and cultural characteristics.

Invidious to Professor Maclin's claim is America's long history of racial injustice and fear. The U.S. Supreme Court sanctions racial profiling pretext stops if the police can objectively enunciate some minor infraction. To counter the racial claims of inequality, Justice Scalia stated in *Whren v United States*[2] (where unmarked police stopped a carload of black men at

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1 *See* People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

2 *See* Whren v. United States, 517 U.S. 806 (1996).

a stop sign) that racial inequality claims should be addressed under the Equal Protection Clause, not Fourth Amendment jurisprudence.

Consequently, numerous class actions have been filed throughout the country for unreasonable stop and frisks of black men, the Department of Justice has entered agreements with numerous police agencies on new training methods sensitive to cultural characteristics, and many civil rights cases have exposed police interrogation torture practices of black men long ignored by the criminal justice system. Racial pofiling of African-American drivers—Driving While Black—served as the predominant police practice until the data irrevocably convinced the courts in civil rights pursuits.

To redress many more of these institutional problems, body cameras are used by the police during on-the-scene encounters and confessions are videotaped. These are long-awaited civil remedies, but Professor Maclin's argument still remains with Fourth Amendment jurisprudence.

Professor Maclin challenges a neutralized reasonable person standard. Black men on buses, black men who flee from the police, and black men who are stopped on the street have an entirely different notion of reasonableness because the police have historically approached the Fourth Amendment with a heightened sense of racial scrutiny, privilege, and brutality.

American race relations and the collusion of the criminal justice system have secured the lynching of 4000 black men, memorialized at the Civil Rights Museum in Montgomery, Alabama, which exhibits America's fundamental original sin. The mandatory drug sentences for crack cocaine created a new Jim Crow where blacks are disproportionately stopped and imprisoned for possessing small amounts of crack cocaine and marijuana. Ironically, legalized marijuana has now become the profitable reign for the white businessmen, and blacks still suffer the collateral effects of marijuana prosecutions. The current remedial approaches for those addicted to opioids, primarily the middle and upper classes, demonstrate that when whites are addicted, the government applies remedial approaches; when blacks are addicted, the government seeks to incarcerate. Review the forty-year history of those addicted to crack cocaine and the mandatory lengthy imprisonment of the sizable population of the black community. Race issues are deep within the American criminal justice genome. A black man's encounter with the police is permeated with this crucible in the lake of fire.

In *J.D.B. v North Carolina*,[3] the Supreme Court recognized that the reasonable person standard should specifically include some physical

[3] *See* J. D. B. v. North Carolina, 564 U.S. 261 (2011).

characteristics, such as age, in gaining a confession. The Court recognized that the totality-of-the-circumstances test insufficiently leverages important physical and cultural characteristics. Age is a specific part of the "reasonableness" calculus, said the Court. Here, Professor Maclin is making a similar case for race.

Professor Maclin challenges the invincible fallacy that police encounters tend to be equal or race-neutral. The data, the video cameras, the trials, the false confessions, and the settlement agreements loudly proclaim that heightened police scrutiny of black men justifies a new approach to reasonableness.