The Stories, the Statistics, and the Law: Why Driving While Black Matters

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Each one of those stops, for me, had nothing to do with breaking the law. It had to do with who I was. . . . It’s almost like somebody pulls your pants down around your ankles. You’re standing there nude, but you’ve got to act like there’s nothing happening.¹

It has happened to actors Wesley Snipes, Will Smith, Blair Underwood, and LeVar Burton. It has also happened to football player Marcus Allen, and Olympic athletes Al Joyner and Edwin Moses. African-Americans call it “driving while black”—police officers stopping, questioning, and even searching black drivers who have committed no crime, based on the excuse of a traffic offense. And it has even happened to O.J. Simpson lawyer Johnnie Cochran.

In his pre-Simpson days, Cochran worked hand-in-hand with police officers as an Assistant District Attorney in Los Angeles, putting criminals behind bars. Cochran was driving down Sunset Boulevard one Saturday afternoon with his two youngest children in the back seat when a police car stopped him.² Looking in his rearview mirror, Cochran got a frightening shock: “the police were out of their car with their guns out.” The officers said that they thought Cochran was driving a sto-
len car, and with no legal basis they began to search it. But instead of finding evidence, they found Cochran's official badge, identifying him as an Assistant District Attorney. "When they saw my badge, they ran for cover," Cochran said.3

The incident unnerved Cochran, but it terrified his young children. "[The officers] had their guns out and my kids were in that car crying. My daughter said, 'Daddy, I thought you were with the police.' I had to explain to her why this happened."4

Cochran's experience is a textbook example of what many African-American drivers5 say they go through every day: police using traffic offenses as an excuse to stop and conduct roadside investigations of black drivers and their cars, usually to look for drugs. Normally, if police want to conduct stops and searches for contraband they need probable cause or at least reasonable suspicion that the suspect is involved in an offense.6 But with the Supreme Court's recent cases involving cars, drivers, and passengers, none of this is necessary. Traffic offenses open the door to stops, searches, and questioning, based on mere hunches, or nothing at all.7 And African-Americans believe they are subjected to this treatment in numbers far out of proportion to their presence in the driving population.

But is this just a problem of perception, the product of years of mistrust between police and minorities? Is it a problem only in large urban centers? Are these claims supported by statistical evidence, or are they merely strong feelings born of anecdotes?

To answer these questions, a number of African-Americans—all middle class, taxpaying citizens—described their experiences in interviews. The interviewees were drawn from Toledo, Ohio, an almost prototypical medium-sized Midwestern city.8 Statistics from courts in Toledo and in three

3. Id.
4. Id.
5. I have referred specifically throughout this Article to African-American drivers, but it is also common for Hispanic drivers to face pretextual traffic stops. In fact, some legal actions against discriminatory traffic stop practices have been brought exclusively on behalf of Hispanics. See, e.g., Chavez v. Illinois State Police, 94 C-5307, 1999 WL 592187, at *1 (N.D. Ill. Aug. 2, 1999) (ruling on a civil rights action alleging that Illinois state police stop disproportionate numbers of Hispanic drivers).
6. See infra notes 175-76 and accompanying text.
7. See infra notes 177-204 and accompanying text.
8. According to the 1990 census, Toledo has a population of about
other Ohio cities—Dayton, Akron, and Columbus—were analyzed.9 Research from other areas of the country was also reviewed.10

The interviews reveal that African-Americans strongly believe that they are stopped and ticketed more often than whites, and the data from Ohio and elsewhere show that they are right. For example, the Toledo Police Department is at least twice as likely to issue tickets to blacks than to all other drivers.11 The numbers in Akron, Columbus and Dayton are similar: blacks are about twice as likely to get tickets as those who are not black.12 When adjusted to reflect the fact that 21% of all black households do not own vehicles, making blacks less likely to drive than others, these numbers increase to even higher levels. All of the assumptions built into this statistical analysis are conservative; they are structured to give the law enforcement agencies the benefit of the doubt. Statistics from cases in New Jersey and Maryland are similar. Sophisticated analyses of stops and driving populations in both states showed racial disparities in traffic stops that were "literally off the charts."13

Police departments engage in these practices for a simple reason: they help catch criminals. Since blacks represent a disproportionate share of those arrested for certain crimes,14

333,000; it is 77% white and 19.7% African-American, with a mixture of other ethnic groups rounding out the total. See U.S. Census (visited Oct. 13, 1999) <http://www.census.gov/population/censusdata>. While there have been occasional discussions on race-related issues and even (more rarely) flare-ups of racial tension, see for example, Toledo Is Sued Over Random Stopping of Blacks, N.Y. Times, Aug. 14, 1988, at A31 (describing federal civil rights suit over random stops of black youths in racially mixed neighborhoods), the racial climate has been relatively calm in Toledo for the last ten years. Some of the interviewees asked that their last names not be used because they wanted to avoid repercussions at their jobs.

9. See infra notes 94-108 and accompanying text.
10. See infra notes 63-92 and accompanying text.
11. See infra table 3.
12. See infra table 3.
14. According to some national crime statistics, this is a correct assumption. See Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 408 tbl.4.10 (1995) (showing that blacks, who make up 12% of the population, are 31.3% of all those arrested). Blacks, on average, also serve longer prison terms. See id. at 474 tbl.5.25 (stating that average federal sentence in 1992 is 84.1 months for blacks, but 56.8 months for whites); David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 4-5 (1999) (stating that statistics on crime and the criminal
police believe that it makes sense to stop a disproportionate share of blacks. Lt. Ernest Leatherbury, a spokesman for the Maryland State Police (a department that has been sued twice over race-based traffic stops), explained to the Washington Post that stopping an outsized number of blacks was not racism, but rather “an unfortunate byproduct of sound police policies.”

Carl Williams, Superintendent of the New Jersey State Police, put the matter even more bluntly in an interview with the Newark Star-Ledger. With narcotics today, he said, “it’s most likely a minority group that’s involved with that.” In other words, officers may be targeting blacks and other minorities, but this is a rational thing to do.

This type of thinking means that anyone who is African-American is automatically suspect during every drive to work, the store, or a friend’s house. Suspicion is not focused on individuals who have committed crimes, but on a whole racial group. Skin color becomes evidence, and race becomes a proxy for general criminal propensity. Aside from the possibility of suing a police department for these practices—a mammoth undertaking, that should only be undertaken by plaintiffs with absolutely clean records and the thickest skin—there is no relief available.

Pretextual traffic stops aggravate years of accumulated feelings of injustice, resulting in deepening distrust and cynicism by African-Americans about police and the entire criminal justice system. But the problem goes deeper. If upstanding citizens are treated like criminals by the police, they will not trust those same officers as investigators of crimes or as witnesses in court. Fewer people will trust the police enough to tell them what they know about criminals in their neighbor-

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justice system show blacks are disproportionately convicted and incarcerated); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 145 (1997) (arguing that “blacks, particularly young black men, commit a percentage of the nation's street crime that is strikingly disproportionate to their percentage in the nation's population.”). But as I will show, this represents an overly simplistic view that does little to illuminate the actual picture of relevant criminal behavior. See infra notes 127-36 and accompanying text.


hoods, and some may not vote to convict the guilty in court when they are jurors. Recent polling data show that not just blacks, but a majority of whites believe that blacks face racism at the hands of police. "Driving while black" has begun to threaten the integrity of the entire process not only in the eyes of African-Americans, but of everyone.

This Article begins in Part I by discussing the experiences of three of the African-Americans who were interviewed for this Article. Their stories, selected not because they are unusually harsh but because they are typical, speak for themselves. The frightening and embarrassing nature of the experiences, the emotional difficulties and devastation that often follow, and the ways that they cope, bring to life the statistics, which are discussed in Part II. Part III then shows how the problem is connected to larger issues at the intersection of criminal justice and race. Part IV puts the problem of "driving while black" into its legal context and explains how the law not only allows but encourages these practices. Finally, Part V concludes with a discussion of some approaches that might be taken to address the problem.

I. THE COST OF GETTING STOPPED: FEAR, ANGER, AND HUMILIATION

Talk to almost any black person any place in the country and you will hear accounts of pretextual traffic stops. Some say they have experienced it many times. All of those interviewed—not criminals trying to explain away wrongdoing, but people with good jobs and families—described an experience

17. See Dan Barry & Marjorie Connelly, Poll in New York Finds Many Think Police Are Biased, N.Y. TIMES, Mar. 16, 1999, at A1 (stating that less than 25 percent of New Yorkers surveyed believe that police treat blacks and whites equally); David W. Moore & Lydia Saad, No Immediate Sign That Simpson Trial Intensified Racial Animosity, GALLUP POLL MONTHLY, Oct. 1995, at 5 (reporting that 68% of blacks and 52% of whites said they believe police racism against blacks is common); Julia Vitullo-Martin, Fairness, Justice Not Simply a Matter of Black and White, CHI. TRIB., Nov. 13, 1997, at 31 (noting recent poll by Joint Center for Political and Economic Studies that indicated that more than 80% of blacks and Hispanics, and 56% of whites, agree that police are far more likely to harass and discriminate against blacks than whites); see also Michael A. Fletcher, Criminal Justice Panel Defines Racial Issues, WASH. POST, May 20, 1998, at A13 (noting that panelists appearing before President Clinton's Race Advisory Board argued, with little dissent, that the criminal justice system exhibits many biases toward blacks and other minorities).

18. I deliberately chose to interview middle-class people. By doing so, I do
common to blacks, but almost invisible to whites. The stories of several of these individuals illustrate what the experience is like and how it has impacted their lives.

Karen Brank, a licensed social worker in her early thirties with a young son, had never been in trouble with the police. But one morning, on her way to work for a monthly staff meeting, all of that changed when Brank was pulled over for speeding. Brank recalls being one of several cars that were traveling down a main thoroughfare at about the same rate of speed. The officer who stopped her told her she was going too fast. He then asked for her license and registration and took these items to the squad car. When he returned, the officer told Brank that there were outstanding warrants for her arrest for unpaid traffic tickets. Brank remembered the tickets because she did not get many and told the officer that she had paid them weeks before. But when she could not produce a receipt to prove payment (and who could have?), the officer said he would have to arrest her.

Brank was stunned. Arrest me? she thought. What do you mean arrest me? I'm not a criminal—I'm on my way to work! This could not be happening—and yet it was. It turned out later that the warrants were incorrect. Brank had paid, but a clerical error had kept the tickets in the computer system. Additional squad cars arrived, making the area around her car look like a crime scene. Mistake or not, minutes later Brank stood by the side of the road in handcuffs so tight that they left ugly red marks on her wrists for several days. She was distraught, breaking down in tears standing next to a public street. She can still feel the sting of embarrassment.

not wish to deny or exclude the experiences of others who may not fit within this group, and certainly would not argue that their experiences are any less important than those of the people on whom I have focused. But I made this choice in an attempt to show that "driving while black" is not only an experience of the young black male, or those blacks at the bottom of the socio-economic ladder. All blacks confront the issue directly, regardless of age, dress, occupation, or social station.

20. See id.
21. See id.
22. See id.
23. See id.
24. See id.
25. See id.
26. See id.
I was really upset. I was like, "Why are you guys handcuffing me about some tickets?" They had me standing outside with all these people passing by. It was so humiliating.\textsuperscript{27}

Months afterward, the pain she experienced during these moments still becomes visible on her face as she recalls the incident. She was put into a squad car and sat there, afraid to say anything.

I didn't say nothing, because I figured if I said anything, if I moved, that would just give them permission to beat me. And I did not want that to happen because I have a little boy.\textsuperscript{28}

Brank watched as the police searched her car. She says that the other officers on the scene—perhaps four or five—exchanged high fives with the arresting officer, accompanied by phrases like "good job" and "you got another one."\textsuperscript{29} Eventually, she was taken downtown and released. Brank felt unable to go to work that day. In the days that followed, her co-workers could tell something was wrong, but for some reason she hesitated to tell them what had happened. "I didn't want anyone to know. I was so embarrassed."\textsuperscript{30}

Brank is firmly convinced that she was singled out from the other cars around her, which she says were going the same speed, because she is black. She is sure that a white person would not have been handcuffed and humiliated the way she was. But the police officer who stopped her denies this. "The only reason I stopped her was because of a violation—speeding," he says, adding that he caught her on radar. "I don't care if you're black, blue, beige, brown, whatever—if you're violating the law, I'll stop you."\textsuperscript{31} And he categorically denies that any high fives or congratulatory words were exchanged.\textsuperscript{32}

James, a well-dressed, 28-year-old advertising account executive with a media company, also has been stopped for numerous traffic offenses. "I'm not one of those guys who says, 'Oh yeah, blacks, we've just got it bad,'" he says. But being stopped repeatedly by police is such an unchangeable part of life for him that "it's like the fact that I'm black."\textsuperscript{33}

\begin{itemize}
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} Id.
  \item \textsuperscript{31} Interview with Anthony Mack, Ottawa Hills, Ohio Police Officer, in Toledo, Ohio (Sept. 1996).
  \item \textsuperscript{32} See id.
  \item \textsuperscript{33} Interview with James, in Toledo, Ohio (Oct. 30, 1998). James asked that his last name not be used in any publication.
\end{itemize}
James described an incident that took place recently in an upscale neighborhood, where he had visited a friend. After socializing for a while, James left the house and got in his car to leave. As soon as he pulled out of the driveway, James noticed that a police car was following him. Although he drove with extra care, the officer pulled James over and questioned him, accused him of weaving, checked his license and registration, and threatened to give him a citation for not wearing a seat belt. "I think he saw a black male in that neighborhood and he was suspicious," James says. Months later, the anger James felt that night remains fresh.

I feel like I'm a guy who's pretty much walked the straight line and that's respecting people and everything. But if cops will even bother me, that makes me think, well, it's gotta be something... [W]e just constantly get harassed. So we just feel like we can't go nowhere without being bothered... I'm not trying to bother nobody. But yet I got a cop pull me over says I'm weaving in the road. And I just came from a friend's house, no alcohol, no nothing. It just makes you wonder—was it just because I'm black?

It would be a mistake to think that pretextual traffic stops are limited to younger blacks. Michael, 41, is tall, attractive, and well-spoken. He is the top executive in an important public institution and has been stopped by the police many times. One afternoon, Michael was driving to a local high school to work out. As he approached the parking lot, he saw a parked police cruiser, so he drove with extra caution. "As I pulled up and put it in park and turned the key off, this police car comes screeching up behind me—the lights flashing, the whole deal," Michael says. The squad car blocked him in to the parking space, so he could not leave. But when the officer walked up to the window, he immediately noticed Michael's official identification. Without offering any explanation for why he had

34. Since James's friend lived with his parents, his mother was with them that night. *See id.* When responding to the accusation of weaving, James recalled that there was no drinking of alcohol or use of any drugs that night. *See id.* He never uses either alcohol or drugs. *See id.*
35. *See id.*
36. *See id.*
37. *Id.*
38. *Id.*
39. *See Interview with Michael, supra note 1.*
40. *See id.*
41. *Id.*
42. *See id.*
treated Michael as if he were a dangerous criminal, the officer “just backed away and he was gone. Just disappeared.”

Michael was angry and frustrated at being treated this way, but it was not the first time it had happened. As he has done many times before, he distanced himself from the experience as a kind of emotional self-defense.

You've gotta learn to play through it. Even though you haven't done anything wrong, the worst thing you can do in a situation like that is to become emotionally engaged when they do that to you. . . . Because if you do something, maybe they're going to do something else to you for no reason at all, because they have the power. They have the power and they can do whatever they want to do to you for that period of time. . . . It doesn't make a difference who you are. You're never beyond this, because of the color of your skin.

For many blacks, the emotional cost is profound. Karen Brank missed work and experienced depression. For some time afterwards, she felt a wave of fear wash over her every time she saw a police car in her rearview mirror. In that one brief encounter, her entire sense of herself—her job, the fact that she is a mother and an educated, law-abiding person working on a master's degree—was stripped away. Kevin, an executive in his thirties with a large financial services corporation, a husband, and father with several young children, says his experiences have left him with very negative feelings about police. "When I see cops today, I don't feel like I'm protected. I'm thinking, 'Oh shoot, are they gonna pull me over, are they gonna stop me?' That's my reaction. I do not feel safe around cops."

To cope, African-Americans often make adjustments in their daily activities. They avoid certain places where they think police will "look" for blacks. Some drive bland cars. "I

43. Id.
44. Id.
45. See Interview with Karen Brank, supra note 19.
46. See Interview with Kevin, in Toledo, Ohio (Nov. 6, 1998). Kevin requested that his last name not be used.
47. Id.
48. See Fletcher, supra note 15, at A1 (describing how blacks avoid areas in which they know they will stand out and attract police attention); Interview with Karen Brank, supra note 19 (describing how after her arrest following a traffic stop revealed warrants (which turned out to be mistaken) she has changed her driving itinerary to avoid the all-white suburb in which this happened); Interview with James, supra note 33 (stating that he consciously avoids white suburban communities in which police frequently stop blacks).
49. See Fletcher, supra note 15, at A1 (describing a well-known civil rights lawyer who rents bland cars for trips from Washington, D.C. to Richmond to
drive a minivan because it doesn't grab attention," says Kevin. "If I was driving a BMW"—a car he could certainly afford—"dif-
ferent story."50 Some change the way they dress.51 Others who
drive long distances even factor in extra time for the inevitable
traffic stops they will face.52

But nowhere does the effect of racially-biased traffic stops
become more painful than when blacks instruct their children
on how to behave when—not if—they are stopped by police.
Michael remembers, "[M]y dad would tell me, 'If you get pulled
over, you just keep your mouth shut and do exactly what they
tell you to do. Don't get into arguments, and don't be stupid. It
doesn't make a difference [that you did nothing wrong]. Just do
what they tell you to do.'"53 Officer Ova Tate, a thirteen-year
veteran police officer and an African-American, told his teenage
son not to expect special treatment because Tate is a police offi-
cer. "[I]f you're black, you're out in the neighborhood, it's a fact
of life you're going to be stopped. So how you deal with the po-
lice is how your life is going to be. They say you did something,
say 'O.K.,' and let them get out of your life."54 Karen Brank's
son is young, but she says that when the time comes, she will
know what to say to him. Perhaps thinking of her own experi-
ence, she acknowledges the emotional cost, but knows it cannot
be avoided.

[The police] are supposed to be there to protect and to serve, but you
being black and being male, you've got two strikes against you. Keep
your hands on the steering wheel, and do not run, because they will
shoot you in your back. Keep your hands on the steering wheel, let
them do whatever they want to do. I know it's humiliating, but let
them do whatever they want to do to make sure you get out of that
situation alive. Deal with your emotions later. Your emotions are
going to come second—or last.55

These instructions will undoubtedly give black children a dev-
astatingly poor impression of the police, but African-American
parents say they have no choice. They know that traffic stops

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avoid attracting police attention, even though he is older and graying).

50. Interview with Kevin, supra note 46
51. See Fletcher, supra note 15, at A1 (describing a journalist who wears a
distinctive beret and removes it when driving to avoid police stops).
52. See id. (stating that one man who drives across southern Illinois al-
ways allows extra travel time because he is stopped so frequently).
53. Interview with Michael, supra note 1.
54. Interview with Ova Tate, Police Officer, in Toledo, Ohio (Aug. 28,
1998).
55. Interview with Karen Brank, supra note 19.
can lead to physical, even deadly, confrontations. Christopher Darden, the African-American prosecutor in the O.J. Simpson case, says that to survive traffic stops, he "learned the rules of the game years before... Don't move. Don't turn around. Don't give some rookie an excuse to shoot you." This may seem like an overreaction, but given the facts of life on the street, it seems likely that most African-American parents would agree.

II. THE STATISTICAL ANALYSIS

Talking with African-Americans leaves little doubt that pretextual traffic stops have a profound impact on each individual stopped, and on all blacks collectively. There is also no doubt that blacks view this not as a series of isolated incidents and anecdotes, but as a long-standing pattern of law enforcement. For those subjected to these practices, pretextual stops are nothing less than blatant racial discrimination in the enforcement of the criminal law.

But is there proof that would substantiate those strongly-held beliefs? What statistics exist that would allow one to con-

56. See, e.g., Doron P. Levin, 4 Detroit Officers Charged in Death, N.Y. TIMES, Nov. 17, 1992, at A1 (reporting that four officers were charged in connection with the beating death of Malice Green after a traffic stop); Kenneth B. Noble, The Endless Rodney King Case, N.Y. TIMES, Feb. 4, 1996, § 4, at 5 (detailing the many trials and other proceedings in the case against the officers accused of beating Rodney King); No Federal Charges in Motorist's Death, N.Y. TIMES, Feb. 21, 1999, § 1, at 26 (reporting that the U.S. Department of Justice decided not to file federal criminal charges in the death of Jonny Gammage, who was killed in a struggle with police outside Pittsburgh after a 1995 traffic stop).

57. CHRISTOPHER A. DARDE, IN CONTEMPT 110 (1996).

58. If anyone has a well-informed view of this problem, it would be Officer Ova Tate. Tate's dual perspective—as an African-American and as a member of what he calls "the blue race" of the police department—gives him a unique vantage point. Interview with Ova Tate, supra note 54. Not so long ago, Tate says, whatever the Constitution said about equal rights for all, it applied only to whites, not blacks, and wholesale racial harassment by the police was common. See id. As a result, he says, "African-Americans do not trust police officers, and they feel that they are starting off on the wrong foot in any dealings with them." Id. Tate explains by describing a stop by an imaginary intimidating police officer. The officer asks prying questions, orders the driver out of the car, and then asks if the driver is carrying drugs, all of which are perfectly legal actions. See id. A white person would simply wonder why the officer seems hostile. "But if you're black, it's another thing you file away about how police deal with blacks," he says. Id. Whites put such an experience "in general terms," because they have no history with the police. "If you're black, it's 'the police are no good, this is how the police deal with blacks.'" Id.
clude, to an acceptable degree of certainty, that “driving while black” is, indeed, more than just the sum of many individual stories?

Data on this problem are not easy to come by. This is, in part, because the problem has only recently been recognized beyond the black community. It may also be because records concerning police conduct are either irregular or nonexistent. But it may also be because there is active hostility in the law enforcement community to the idea of keeping comprehensive records of traffic stops. In 1997, Representative John Conyers of Michigan introduced H.R. 118, the Traffic Stops Statistics Act, which would require the Department of Justice to collect and analyze data on all traffic stops around the country—including the race of the driver, whether a search took place, and the legal justification for the search. When the bill passed the House with unanimous, bipartisan support the National Association of Police Organizations (NAPO), an umbrella group representing more than 4,000 police interest groups across the country, announced its strong opposition to the bill. Officers would “resent” having to collect the data, a spokesman for the group said. Moreover, there is “no pressing need or justification” for collecting the data. In other words, there is no problem, so there is no need to collect data. NAPO’s opposition was enough to kill the bill in the Senate in the 105th Congress. As a consequence, there is now no requirement at the federal level that law enforcement agencies collect data on traffic stops that include race. Thus, all of the data gathering so far has been the result of statistical inquiry in lawsuits or independent academic research.


61. See id.

62. As of this writing, North Carolina and Connecticut have passed bills requiring data collection, and a number of local police forces are preparing to do the same. Collection of data may begin late in 1999. See infra notes 221-22 and accompanying text.
A. NEW JERSEY

The most rigorous statistical analysis of the racial distribution of traffic stops was performed in New Jersey by Dr. John Lamberth of Temple University. In the late 1980s and early 1990s, African-Americans often complained that police stopped them on the New Jersey Turnpike more frequently than their numbers on that road would have predicted. Similarly, public defenders in the area had observed that "a strikingly high proportion of cases arising from stops and searches on the New Jersey Turnpike involve black persons." In 1994, the problem was brought to the state court's attention in State v. Pedro Soto, in which the defendant alleged that he had been stopped because of his ethnicity. The defendant sought to have the evidence gathered as a result of the stop suppressed as the fruit of an illegal seizure. Lamberth served as a defense expert in the case. His report is a virtual tutorial on how to apply statistical analysis to this type of problem.

The goal of Lamberth's study was "to determine if the State Police stop, investigate, and arrest black travelers at rates significantly disproportionate to the percentage of blacks in the traveling population, so as to suggest the existence of an official or de facto policy of targeting blacks for investigation and arrest." To do this, Lamberth designed a research methodology to determine two things: first, the rate at which blacks were being stopped, ticketed, and/or arrested on the relevant part of the highway, and second, the percentage of blacks among travelers on that same stretch of road.

64. 734 A.2d 350.
65. Soto was a criminal case; the defendant and the others joining his motion had been stopped and contraband seized from them, resulting in their arrests. See id. at 352. There is no doubt that now this claim would not succeed if based on the Fourth Amendment to the Federal Constitution. Under Whren v. U.S., the Fourth Amendment would play no part in the decision because the motivation of the officer is immaterial, as long as a traffic offense was, in fact, committed. 517 U.S. 806, 813 (1996). As the case was eventually decided, the trial court granted the motion to suppress based on New Jersey's own law and constitution. See Soto, 734 A.2d at 352.
66. See Lamberth, supra note 63.
67. Id. at 2.
To gather data concerning the rate at which blacks were stopped, ticketed and arrested, Lamberth reviewed and reconstructed three types of information received in discovery from the state: reports of all arrests that resulted from stops on the turnpike from April of 1988 through May of 1991, patrol activity logs from randomly selected days from 1988 through 1991, and police radio logs from randomly selected days from 1988 through 1991. Many of these records identified the race of the driver or passenger.

Then Lamberth sought to measure the racial composition of the traveling public on the road. He did this through a turnpike population census—direct observation by teams of research assistants who counted the cars on the road and tabulated whether the driver or another occupant appeared black. During these observations, teams of observers sat at the side of the road for randomly selected periods of 75 minutes from 8:00 a.m. to 8:00 p.m. To ensure further precision, Lamberth also designed another census procedure—a turnpike violation census. This was a rolling survey by teams of observers in cars moving in traffic on the highway, with the cruise control calibrated and set at five miles per hour above the speed limit. The teams observed each car that they passed or that passed them, noted the race of the driver, and also noted whether or not the driver was exceeding the speed limit.

The teams recorded data on more than forty-two thousand cars. With these observations, Lamberth was able to compare the percentages of African-Americans drivers who are stopped, ticketed, and arrested, to their relative presence on the road. This data enabled him to carefully and rigorously test whether blacks were in fact being disproportionately targeted for stops.

By any standard, the results of Lamberth's analysis are startling. First, the turnpike violator census, in which observers in moving cars recorded the races and speeds of the cars around them, showed that blacks and whites violated the traffic laws at almost exactly the same rate; there was no statis-

68. See id. at 3-6.
69. See id. at 6-7. The hours of observation—essentially daylight only—were selected because there would be enough light to make a racial identification, and because most of the stops in the cases at issue in Soto occurred during those hours. See Soto, 734 A.2d at 352.
70. See Lamberth, supra note 63, at 14.
71. See id. at 9.
cally significant difference in the way they drove.\textsuperscript{72} Thus, driving behavior alone could not explain differences in how police might treat black and white drivers.\textsuperscript{73} With regard to arrests, 73.2\% of those stopped and arrested were black, while only 13.5\% of the cars on the road had a black driver or passenger.\textsuperscript{74} Lambert notes that the disparity between these two numbers "is statistically vast."\textsuperscript{75} The number of standard deviations\textsuperscript{76} present—54.27—means that the probability that the racial disparity is a random result "is infinitesimally small."\textsuperscript{77} Radio and patrol logs yielded similar results. Blacks are approximately 35\% of those stopped,\textsuperscript{78} though they are only 13.5\% of those on the road—19.45 standard deviations.\textsuperscript{79} Considering all stops in all three types of records surveyed, the chance that 34.9\% of the cars combined would have black drivers or occupants "is substantially less than one in one billion."\textsuperscript{80} This led Lamberth to the following conclusion:

Absent some other explanation for the dramatically disproportionate number of stops of blacks, it would appear that the race of the occupants and/or drivers of the cars is a decisive factor or a factor with great explanatory power. I can say to a reasonable degree of statistical probability that the disparity outlined here is strongly consistent with the existence of a discriminatory policy, official or de facto, of targeting blacks for stop and investigation.

\ldots

\ldots Put bluntly, the statistics demonstrate that in a population of blacks and whites which is (legally) virtually universally subject to police stop for traffic law violation, (cf. the turnpike violator census),

\textsuperscript{72} See id. at 26.

\textsuperscript{73} Lamberth's finding was supported by the testimony of several state police supervisors and officers. All said that blacks and whites drive indistinguishably. See Soto, 734 A.2d at 354.

\textsuperscript{74} See id. at 352.

\textsuperscript{75} Lamberth, supra note 63, at 20.

\textsuperscript{76} The accepted convention for statisticians to conclude that a difference is real and not chance is the finding that if the same study was done many times, the present results would occur only five times out of a hundred. This .05 level is determined by computing the number of standard deviations that the observed result differs from the expected. The .05 level of statistical significance is reached at about two standard deviations. The probability drops to one in 100 when 2.58 standard deviations is reached.

Lamberth, supra note 13, at 5.

\textsuperscript{77} Lamberth, supra note 63, at 21.

\textsuperscript{78} This does not count those who are stopped and arrested.

\textsuperscript{79} See Lamberth, supra note 63, at 24.

\textsuperscript{80} Id. at 25.
blacks in general are several times more likely to be stopped than non-blacks. 81

B. MARYLAND

A short time after completing his analysis of the New Jersey data, Lamberth also conducted a study of traffic stops by the Maryland State Police on Interstate 95 between Baltimore and the Delaware border. 82 In 1993, an African-American Harvard Law School graduate named Robert Wilkins filed a federal lawsuit against the Maryland State Police. 83 Wilkins alleged that the police stopped him as he was driving with his family, questioned them and searched the car with a drug-sniffing dog because of their race. 84 When a State Police memo surfaced during discovery instructing troopers to look for drug couriers who were described as “predominantly black males and black females,” 85 the State Police settled with Wilkins. As part of the settlement, the police agreed to give the court data on every stop followed by a search conducted with the driver’s consent or with a dog for three years. 86 The data also were to include the race of the driver.

With this data, Lamberth used a rolling survey, similar to the one in New Jersey, 87 to determine the racial breakdown of the driving population. Lamberth’s assistants observed almost 6,000 cars over approximately 42 randomly distributed hours. As he had in New Jersey, Lamberth concluded that blacks and whites drove no differently; the percentages of blacks and whites violating the traffic code were virtually indistinguishable. 88 More importantly, Lamberth’s analysis found that although 17.5% of the population violating the traffic code on the

81. Id. at 25-26, 28.
82. Lamberth, supra note 13.
84. For a more complete description of Wilkins v. Maryland State Police, see David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 554, 563-566 (1997).
87. In Maryland, Lamberth also attempted to use a stationary survey as he had in New Jersey, but the Maryland State Police refused to allow him to do so. See Lamberth, supra note 13, at 2 n.4.
88. See id. at 5.
road he studied was black, more than 72% of those stopped and searched were black. In more than 80% of the cases, the person stopped and searched was a member of some racial minority.\textsuperscript{89} The disparity between 17.5% black and 72% stopped includes 34.6 standard deviations.\textsuperscript{90} Such statistical significance, Lamberth said, “is literally off the charts.”\textsuperscript{91} Even while exhibiting appropriate caution, Lamberth came to a devastating conclusion.

While no one can know the motivation of each individual trooper in conducting a traffic stop, the statistics presented herein, representing a broad and detailed sample of highly appropriate data, show without question a racially discriminatory impact on blacks . . . from state police behavior along I-95. The disparities are sufficiently great that taken as a whole, they are consistent and strongly support the assertion that the state police targeted the community of black motorists for stop, detention, and investigation within the Interstate 95 corridor.\textsuperscript{92}

C. Ohio

In the Spring of 1998, several members of the Ohio General Assembly began to consider whether to propose legislation that would require police departments to collect data on traffic stops. But in order to sponsor such a bill, the legislators wanted some preliminary statistical evidence—a prima facie case, one could say—of the existence of the problem. This would help them persuade their colleagues to support the effort, they said. I was asked to gather this preliminary evidence. The methodology used here presents a case study in how to analyze this type of problem when the best type of data to do so is not available.

In the most fundamental ways, the task was the same as Lamberth’s had been in both New Jersey and Maryland: use statistics to test whether blacks in Ohio were being stopped in numbers disproportionate to their presence in the driving population. Doing this would require data on stops broken down by race, and a comparison of those numbers to the percentage of black drivers on the roads. But if the goal was the

\textsuperscript{89} See id. at 5 tbl.1.

\textsuperscript{90} See id. at 9. Statewide, State Police found drugs on virtually the same percentages of black and white drivers. See id. at 5. This means that even though blacks were much more likely to get stopped and searched than whites were, they were no more likely to have drugs, putting the supposed justification for these stops in grave doubt.

\textsuperscript{91} Id. at 9.

\textsuperscript{92} Id. at 9-10.
same, two circumstances made the task considerably more difficult to accomplish in Ohio. First, Ohio does not collect statewide data on traffic stops that can be correlated with race. In fact, no police department of any sizeable city in the state keeps any data on all of its traffic stops that could be broken down by race. 93 Second, the state legislators wanted some preliminary statistics to demonstrate that “driving while black” was a problem in all of Ohio, or at least in some significant—and different—parts of the whole state. While Lamberth’s stationary and rolling survey methods worked well to ascertain the driving populations of particular stretches of individual, limited access highways, those methods were obviously resource- and labor-intensive. Applying the same methods to an entire city—even a medium-sized one—would entail duplicating the Lamberth approach on many major roads to get a complete picture. It would be impractical, not to mention prohibitively expensive, to do this in communities across an entire state. Thus, different methods had to be found.

To determine the percentage of blacks stopped, data was obtained from municipal courts in four Ohio cities. 94 Municipal courts in Ohio handle all low-level criminal cases 95 and virtually all of the traffic citations issued in the state. Most of these courts also generate a computer file for each case, which includes the race of the defendant as part of a physical description. This data provided the basis for a breakdown of all tickets given by the race of the driver.

The downside of using the municipal court data is that it only includes stops in which citations were given. Stops resulting in no action or a warning are not included. In all likelihood, using tickets alone might underestimate any racial bias that is present because police might not ticket blacks stopped

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93. The one exception is the Ottawa Hills Police Department. Ottawa Hills is a small (approximately 4,000 residents and almost exclusively white) incorporated village in Lucas County, Ohio. Village policy requires that officers issue either a ticket or a written warning for each stop, and both warnings and tickets include a space to note the driver’s race.

94. Data from Akron Municipal Court, Dayton Municipal Court, Toledo Municipal Court, and Franklin County Municipal Court, which includes Columbus, were used.

95. See OHIO REV. CODE ANN. § 1901.20 (Anderson 1998) (detailing municipal court criminal and traffic jurisdiction). A small number of citations are handled by mayor’s courts, which still exist in certain areas of the state. See id. § 1905.01 (setting out jurisdiction of mayor’s courts for ordinance and traffic violations).
for nontraffic purposes. Since using tickets could underesti-
mate any possible racial bias, any resulting calculations are
conservative and tend to give law enforcement the benefit of
the doubt. Similarly, the way the racial statistics are grouped
in the analysis is also conservative because the numbers are
limited to only two categories of drivers: black and nonblack.
In other words, all minorities other than African-Americans are
lumped together with whites, even though some of these other
minorities, notably Hispanics, have also complained about tar-
geted stops directed at them. Using conservative assumptions
means that if a bias does show up in the analysis, we can be
relatively confident that it actually exists.96

The percentage of all tickets in 1996, 1997, and the first
four months of 199897 that were issued to blacks by the Akron,
Dayton, and Toledo Police Departments and all of the police
departments in Franklin County98 are set out in Table 1.

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96. For at least Toledo and Akron, these numbers represent the total
number of traffic cases, not individual tickets; some cases include more than
one ticket given to the driver on the same occasion. By sheer coincidence, the
data for Toledo were produced twice—first, tabulating all tickets, and then all
cases. The data tabulating cases came to me by accident. The data were dif-
f erent; in the data on tickets, blacks were 35% of those ticketed; in the data
concerning cases, blacks were 31%. These data showed that blacks were more
likely than nonblacks to receive more than one ticket in the same stop, an in-
teresting fact in its own right. Because I am interested in measuring traffic
stops and am using ticketing only as a way to estimate stops, I have used the
data on cases; after all, even if more than one ticket is issued in any given en-
counter, the driver was only stopped once. It is of course possible that the fact
that blacks receive more than one ticket per incident more often than whites is
itself a reflection of race-based policing, but there may be other factors at work
here as well, such as the fact that blacks tend to drive older cars than whites
that may have more obvious safety violations, or the fact that blacks use seat
belts less often than whites. Therefore, for purposes of this study, I have cho-
sen to treat this difference as if it is not evidence of racial bias.

97. Data from Franklin County Municipal Court include only the years

98. Franklin County Municipal Court data include all communities in the
county, not just Columbus, but were not listed in a way that allowed separate
numbers to be broken out for individual police departments. See Memoran-
dum from Michael A. Pirik, Deputy Chief Clerk, Franklin County Municipal
Court, to David Harris (Aug. 28, 1998) (on file with author).

<table>
<thead>
<tr>
<th>CITY</th>
<th>PERCENTAGE OF ALL TICKETS IN CITY ISSUED TO AFRICAN-AMERICANS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Akron</td>
<td>37.6%</td>
</tr>
<tr>
<td>Toledo</td>
<td>30.8%</td>
</tr>
<tr>
<td>Dayton</td>
<td>50.0%</td>
</tr>
<tr>
<td>Columbus/Franklin County**</td>
<td>25.2%</td>
</tr>
</tbody>
</table>

** Data for Franklin County include 1996 and 1997, but not 1998, and include tickets issued by all law enforcement units in the county, not just the city of Columbus.

With ticketing percentages used as a measure of stops, attention turns to the other number needed for the analysis: the presence of blacks in the driving population. Given the concerns about the use of Lamberth's method in a statewide, preliminary study, another approach—a less exact one than direct observation, to be sure, but one that would yield a reasonable estimate of the driving population—was devised. Data from the U.S. Census breaks down the populations of states, counties, and individual cities by race and by age. This data is readily available and easy to use.99 Using this data, a reasonable basis for comparing ticketing percentages can be constructed: blacks versus nonblacks in the driving age population. This was done by breaking down the general population by race and by age. By selecting a lower and upper age limit—fifteen and seventy-five, respectively100—for driving age, the data yield a reasonable reflection of what we would expect to find if we surveyed the roads themselves. The data on driving age population can also be sharpened by using information from the Na-

99. The data in this portion of the study were obtained from the Census Bureau's website. See U.S. Census (visited Oct. 13, 1999) <http://www.census.gov>.

100. Fifteen and seventy-five are arbitrary choices, but they are reasonable ones. Fifteen is generally the minimum age at which states allows juveniles to obtain a driving permit. While many people do drive above age seventy-five, it is also the age at which population in general begins to drop fairly dramatically. See U.S. Census (visited Oct. 13, 1999) <http://www.census.gov>. Also, the census data breaks people down by ages into five-year blocks, and both fifteen and seventy-five allow the analysis to use these existing break points.
tional Personal Transportation Survey, a study done every five years by the Federal Highway Administration of the U.S. Department of Transportation. The 1990 survey indicates that 21% of black households do not own a vehicle. If the driving age population figure is reduced by 21%, this gives us another baseline with which to make a comparison to the ticketing percentages. Both baselines—black driving age population, and black driving age population less 21%—for Akron, Dayton, Toledo, and Franklin County are set out in Table 2.

**Table 2. Population Baselines**

<table>
<thead>
<tr>
<th>City</th>
<th>Black Driving Age Population* (Percentage of City Total)</th>
<th>Black Driving Age Population, Less 21% of Black Households Without Vehicles**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Akron</td>
<td>22.7%</td>
<td>17.9%</td>
</tr>
<tr>
<td>Toledo</td>
<td>18%</td>
<td>14.2%</td>
</tr>
<tr>
<td>Dayton</td>
<td>38%</td>
<td>30.0%</td>
</tr>
<tr>
<td>Columbus/Franklin County***</td>
<td>16%</td>
<td>12.6%</td>
</tr>
</tbody>
</table>

* Source: U.S. Census Bureau.
*** Data for all of Franklin County, not just the city of Columbus.

The ticketing percentages in Table 1 and the baselines in Table 2 can then be compared by constructing a “likelihood ratio” that will show whether blacks are receiving tickets in numbers that are out of proportion to their presence in the driving age population and the driving age population less

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101. See Federal Highway Admin., U.S. Dep’t of Transp., 1995 Nationwide Personal Transportation Survey (visited Sept. 27, 1999) <http://www.bts.gov/ntd/npts>; see also Letter from Eric Hill, Research Associate, Center for Urban Transportation, to David A. Harris (Sept. 28, 1998) (on file with author). The NPTS contains other data that could also be used to sharpen the driving age population figures in the same way. For example, whites take an average of 4.4 private vehicle trips daily; blacks take an average of 3.9. This leads to the inference that, proportionately, there are likely to be fewer blacks in the driving population than whites at any given time. I have not used these figures in the analysis, but it would be reasonable to do so.

102. Letter from Eric Hill, Research Associate, Center for Urban Transportation Research, to David A. Harris (Oct. 9, 1998) (on file with author).
The likelihood ratio will allow the following sentence to be completed: “If you’re black, you’re ___ times as likely to be ticketed by this police department than if you are not black.” A likelihood ratio of approximately one means that blacks received tickets in roughly the proportion one would expect, given their presence in the driving age population. A likelihood ratio of much greater than one indicates that blacks received tickets at a rate higher than would be expected. Using both baselines—the black driving age population, and the black driving age population less 21%—the likelihood ratios for Akron, Dayton, Toledo, and Franklin County are presented in Table 3.

103. I credit John Lamberth with this idea, and for teaching me to work with this data. (He also performed some of the early analysis in the study and served as a constant check on my work. To say that I am thankful for his help does not fully express the depth of my gratitude. Of course, any errors made here should be attributed to me.) A likelihood ratio is arrived at by first calculating the ratio of blacks ticketed to blacks in the relevant population. Then the ratio of nonblacks ticketed to nonblacks in the same population is calculated. The first number is then divided by the second. For example, for ticketing by the Toledo Police compared to Toledo’s black driving age population, blacks ticketed are 30.8%, and blacks in the driving age population are 17.9%; \( \frac{.308}{.179} = 1.7206 \). Nonblacks are 69.2% of those ticketed, and 82.1% of the driving age population; \( \frac{.692}{.821} = .8428 \). The likelihood ratio is \( \frac{1.7206}{.8428} \), or 2.04.

104. For a comparison of the Toledo Police Department with other local police departments in Lucas County, Ohio, see David A. Harris, “Driving While Black: Do We Have a Problem Here in Toledo?,” TOLEDO CITY PAPER, Apr. 1999, at 16.

105. With the exception of Franklin County, the data could be broken down separately for these city police departments, and data for suburban or special jurisdiction police departments could be eliminated from the analysis. For Franklin County Municipal Court, which covers Columbus, the data for all of the police departments in the county were aggregated and could not be separated by department.
TABLE 3. LIKELIHOOD RATIO
"IF YOU'RE BLACK, YOU'RE __ TIMES AS LIKELY TO GET A TICKET IN THIS CITY THAN IF YOU ARE NOT BLACK"

<table>
<thead>
<tr>
<th>City</th>
<th>Black Driving Age Population*</th>
<th>Black Driving Age Population, Less 21% of Black Households Without Vehicles**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Akron P.D.</td>
<td>2.05</td>
<td>2.76</td>
</tr>
<tr>
<td>Toledo P.D.</td>
<td>2.04</td>
<td>2.67</td>
</tr>
<tr>
<td>Dayton P.D.</td>
<td>1.67</td>
<td>2.32</td>
</tr>
<tr>
<td>Columbus/Franklin County***</td>
<td>1.77</td>
<td>2.34</td>
</tr>
</tbody>
</table>

* Source: U.S. Census Bureau.
*** Includes all police agencies in Franklin County, not just Columbus.

Table 4 combines population baselines from Table 2 and likelihood ratios from Table 3.

TABLE 4. COMBINED POPULATION BASELINES AND LIKELIHOOD RATIOS

<table>
<thead>
<tr>
<th>City</th>
<th>Black Driving Age Population*</th>
<th>Black Driving Age Population, Less 21% of Black Households Without Vehicles**</th>
</tr>
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<tbody>
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<tr>
<td>Toledo</td>
<td>18% 2.04</td>
<td>14.2% 2.67</td>
</tr>
<tr>
<td>Dayton</td>
<td>38% 1.67</td>
<td>30.0% 2.32</td>
</tr>
<tr>
<td>Columbus/Franklin County***</td>
<td>16% 1.77</td>
<td>12.6% 2.34</td>
</tr>
</tbody>
</table>

* Source: U.S. Census Bureau.
*** Data for all of Franklin County, not just the city of Columbus.

The method used here to attempt to discover whether "driving while black" is a problem in Ohio is less exact than the
observation-based method used in New Jersey and Maryland. There are assumptions built into the analysis at several points in an attempt to arrive at reasonable substitutes for observation-based data. Since better data do not exist, all of the assumptions made in the analysis involve some speculation. But all of the assumptions are conservative, calculated to err on the side of caution. According to sociologist and criminologist Joseph E. Jacoby, the numbers used here probably are flawed because blacks are probably "at an even greater risk of being stopped" than these numbers show. For example, blacks are likely to drive fewer miles than whites, which suggests that police have fewer opportunities to stop blacks for traffic violations. In statistical terms, the biases in the assumptions are additive, not offsetting.

What do these figures mean? Even when conservative assumptions are built in, likelihood ratios for Akron, Dayton, Toledo, and Franklin County, Ohio, all either approach or exceed 2.0. In other words, blacks are about twice as likely to be ticketed as nonblacks. When the fact that 21% of black households do not own a vehicle is factored in, the ratios rise, with some approaching 3.0. Assuming that ticketing is a fair mirror of traffic stops in general, the data suggest that a "driving while black" problem does indeed exist in Ohio. There may be race-neutral explanations for the statistical pattern, but none seem obvious. At the very least, further study—something as accurate and exacting as Lamberth's studies in New Jersey and Maryland—is needed.

III. WHY IT MATTERS: THE CONNECTION OF "DRIVING WHILE BLACK" TO OTHER ISSUES OF CRIMINAL JUSTICE AND RACE

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

106. E-mails from Joseph E. Jacoby, Bowling Green State University, to David A. Harris (Feb. 2 & 3, 1999) (on file with author).
107. See Federal Highway Admin., supra note 101 (reporting that whites average 4.4 vehicle trips daily and blacks average 3.9).
108. See E-mails from Joseph E. Jacoby to David A. Harris, supra note 106.
109. See Harris, supra note 84, at 580-82 (explaining that most police agencies do not keep track of any information that allows an estimate of how many innocent people are being stopped for every person apprehended through traffic 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 scar tissue 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.\textsuperscript{115} 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 \textit{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 \textit{all} members of one racial or ethnic group as criminal suspects just because \textit{some} members of that group engage in criminal activity, this is what the law permits.

\textsuperscript{115} See, e.g., \textsc{Andrew Hacker}, \textit{Two Nations: Black and White, Separate, Hostile, Unequal} 183 (1992) (finding that blacks accounted for 50.8\% of murder victims in 1990); \textsc{U.S. Dept of Justice}, \textit{Criminal Victimization in the United States} 1993, at 15 (1996) (showing by empirical study that the rate of victimization of blacks exceeds the rates for other racial groups).
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

116. See Developments in the Law—Race and the Criminal Process, 101 HARV. L. REV. 1472, 1508 (1988) (reporting that in any particular year 97.9% of blacks and 99.5% of whites are not arrested).

117. See, e.g., KATHERINE K. RUSSELL, THE COLOR OF CRIME 122 (1998) (stating that the current use of racial labels for black crime implies that "there is something about Blackness that 'explains' criminality"); see also Samuel G. Freedman, Is the Drug War Racist?, ROLLING STONE, May 14, 1998, at 35-36 (interviewing Glen Loury and Orlando Patterson, two African-Americans described as "leading public intellectuals" in America, in which Loury declares that "we're criminalizing a whole class of young black men"). The following passage helps explain why treating people as criminal suspects on the basis of racial characteristics is morally repugnant, even if based on a statistical justification:

In the United States at present, there are real and large differences among ethnic and racial groups in their average performance in school and in their rates of committing violent crimes. (The statistics, of course, say nothing about heredity or any other putative cause.) . . . A good statistical category-maker could develop racial stereotypes and use them to make actuarially sound but morally repugnant decisions about individual cases. This behavior is racist not because it is irrational (in the sense of statistically inaccurate) but because it flouts the moral principle that it is wrong to judge an individual using the statistics of a racial or ethnic group. The argument against bigotry, then, does not come from the design specs for a rational statistical categorizer. It comes from a rule system, in this case a rule of ethics, that tells us when to turn our statistical categorizers off.

STEVEN PINKER, HOW THE MIND WORKS 313 (1997); see also Phillip Martin, Officials Trying To Determine If Racial Profiling Tactics Are Being Employed By Federal Law Enforcement Officials; Arguments Exist that Both Support and Refute Crime Statistics (National Public Radio broadcast, June 10, 1999) (stating that while police justify profiling based on arrest statistics, these statistics actually measure police activity instead of offense rates and overlook the fact that 98% of all blacks are not arrested in any year) (transcript on file with author).


119. See Joan Biskupic, High Court to Review Law Aimed at Gangs, WASH. POST, Dec. 7, 1998, at A4 (reporting that while the law was enforced, 45,000 people, mostly African-Americans and Hispanics, were arrested); David G. Savage, High Court May Move Back on "Move On" Laws, L.A. TIMES, Oct. 5,
courts found the ordinance unconstitutionally vague.\textsuperscript{120} Supporters said that the law legitimately targeted gang members who made the streets of black and Latino 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.\textsuperscript{121} Opponents, such as Professor David Cole, argued that the ordinance had, in effect, created a new crime: "standing while black."\textsuperscript{122} 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.\textsuperscript{123}

\textsuperscript{120} For the full procedural history of the case before it reached the U.S. Supreme Court, see City of Chicago v. Morales, 687 N.E.2d 53, 57-59 (Ill. 1997), aff'd, 119 S. Ct. 1849 (1999).

\textsuperscript{121} See Tracey L. Meares & Dan M. Kahan, The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales, 1998 U. Chi. LEGAL F. 197, 212-13. The arrest of mostly minority group members under the ordinance will have many negative effects, including the "enervation" of the stigma that might otherwise attach to being arrested, the disproportionate involvement of blacks and other minorities in the criminal justice system, and reinforcement of white distrust and suspicion of all African-American men, but the authors feel nonetheless that "the ordinance is an example of a policy tool that is a tolerably moderate way to steer children away from criminality." \textit{Id.} at 213. Moreover, they assert that residents of crime-ridden minority neighborhoods understand these downsides and still agree. \textit{See id.} In an earlier version of the argument, Kahan asserts that though the law may have a disproportionate impact on minorities, "giving up on the gang-loitering law will result in more, not less, racial disparity. When we deprive the police of effective law-enforcement tools, it is the members of these groups that suffer most." Dan M. Kahan, Defending the Gang-Loitering Law, CHI. TRIB., Dec. 31, 1995, at 19.

\textsuperscript{122} David Cole, "Standing While Black," \textit{NATION}, Jan. 4, 1999, at 24 ("Chicago calls the offense 'gang loitering,' but it might more candidly be termed 'standing while black."). Professor Paul Butler recently wrote that police followed him in his own neighborhood up onto the front porch of his home in Washington, D.C. because the officers apparently had some doubts about whether a black man should be walking in the area; he called his own "offense" "walking while black." Paul Butler, Walking While Black: Encounters with the Police on My Street, \textit{LEGAL TIMES}, Nov. 10, 1997, at 23. The police relented only when his neighbor came out and vouched for him. \textit{See id.} at 24.

\textsuperscript{123} \textit{See} City of Chicago v. Morales, 119 S. Ct. 1849, 1861 (1999) (holding that despite the ordinance's features that purported to limit police discretion, its broad sweep violated the requirement that a legislating body establish at least minimal guidance to govern enforcement of a criminal law under Kolen-
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.\textsuperscript{124} 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.\textsuperscript{125} Note that because


they directly affect their victims, these crimes are at least somewhat likely to be reported to the police\textsuperscript{126} 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.\textsuperscript{127} 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.\textsuperscript{128} 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

\textsuperscript{126} Homicides are much more likely to be reported then rapes.

\textsuperscript{127} See Delbert S. Elliot, \textit{Lies, Damn Lies, and Arrest Statistics}, 2-8, Sunderland Award Presentation, American Society of Criminology (Center for the Study of Prevention of Violence, Institute of Behavioral Science, University of Colorado at Boulder 1995) (on file with author) (criticizing the use of arrest statistics to understand criminal behavior); John Kitsuse & Aaron Cicourel, \textit{A Note on the Use of Official Statistics}, 11 SOC. PROBS. 131, 136-37 (1963) (noting that statistics on arrest, disposition, and incarceration may measure the behavior of criminal justice agencies within the system, but not the behavior of criminals themselves).

\textsuperscript{128} Lamberth, \textit{supra} note 13, at 7-8. In a very helpful and insightful comment, Professor Richard Friedman pointed out to me that perhaps this lack of statistical difference between black and white hit rates, even though many more blacks were being searched, may mean that in fact police are doing exactly what they should be: responding to very subtle cues and simply finding more blacks carrying contraband because they are engaged in this activity. I disagree; there is simply no evidence that this is so. But even if it were true, the fact that many more blacks who are completely innocent of any wrongdoing must be stopped and searched in order to expose officers to these cues would make this method of operating an unacceptable policy choice.
forty-three percent of 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.\textsuperscript{129} There is also a considerable amount of data on drug use that belies the standard beliefs.\textsuperscript{130} 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.\textsuperscript{131} 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.\textsuperscript{132}

Nevertheless, many believe that African-Americans and members of other minority groups are responsible for most

\begin{footnotesize}
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\item See U.S. Customs Service, Personal Searches of Air Passengers Results: Positive and Negative, Fiscal Year 1998, at 1 (1998) (finding that 6.7% of whites, 6.3% of blacks, and 2.8% of Hispanics had contraband); see also David Stout, Customs Service Will Review Drug-Search Process for Bias, N.Y. Times, Apr. 9, 1999, at A18 (explaining that the Customs Service faces numerous lawsuits alleging discrimination on the basis of race and gender in the use of intrusive searches at airports).
\item Statistics on drug use are interesting for our purposes not just as a more accurate measure than arrest statistics on who may be drug involved, but as a reasonably good measure of the crime of drug possession, since users must at some point be in possession of drugs.
\item See Substance Abuse and Mental Health Servs. Nat'l Admin., U.S. Dept. of Health and Human Servs., National Household Survey on Drug Abuse, Preliminary Results from 1997, at 13, 58 tbl.1A (finding that thirteen percent of all illicit drug users were black).
\item See National Inst. on Drug Abuse, Drug Use Among Racial/Ethnic Minorities, 64-66 figs.1-5 (1997) (showing past-year use of marijuana, inhalants, cocaine, and LSD by black twelfth graders lower than use by whites in every year from 1977 to 1997, and tobacco use by blacks lower since 1982); see also Bureau of Justice Statistics, U.S. Dept. of Justice, Drugs, Crime, and the Justice System 28 (1992) (reporting similar findings). It is important to note that these statistics only count those still in school; those who have dropped out or who were not in school on the particular day the information was gathered were not included. Therefore, we do not know about the rates of drug use among all young people. There could be a greater degree of drug use among those who have left school than those who have not; of course, this is probably just as true for white dropouts as it is for black dropouts. See Substance Abuse and Mental Health Servs. Admin., U.S. Dept. of Health and Human Servs., National Household Survey on Drug Abuse, Preliminary Estimates from 1995, at 13 (1997) (stating that among white, black, and Hispanic youth, "the rates of use are about the same").
\end{enumerate}
\end{footnotesize}
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. 133 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. 134 While only 33% of whites who are convicted are sent to prison, 50% of convicted blacks are jailed, 135 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. 136

134. See BUREAU OF JUSTICE STATISTICS, supra note 125, at 338 tbl.4.10, 422 tbl.5.46.
135. See id. at 426 tbl.5.51 (citing figures for 1994).
136. See id. at 428 tbl.5.55 (citing figures for 1994).
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 effects 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 respect.

1. 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.137 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.138 Michael describes constant police scrutiny as something blacks have to "play through," like athletes with injuries who must perform despite significant pain.139

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

137. Interview with Karen Brank, supra note 19.
138. See Interview with James, supra note 33.
139. Interview with Michael, supra note 1.
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

140. See Neil MacFarquhar, Police Get Good Ratings From Most, but Not All, New Yorkers, N.Y. TIMES, June 5, 1999, at B3 (reporting that a national survey conducted by the Bureau of Justice Statistics and the Office of Community Oriented Police Services of the U.S. Department of Justice indicated that almost two and one-half times as many blacks as whites say they are dissatisfied with their police).

141. See supra note 17 and accompanying text.

many cases do. The result may be more cases that end in acquittals or hung juries, even factually and legally strong ones.143

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.144

143. See Jeffrey Rosen, One Angry Woman, NEW YORKER, Feb. 24 & Mar. 3, 1997, at 54, 64 (arguing that rising percentage of mistrials may be because, as one senior Justice Department official says, "[Blacks] see black defendants and white prosecutors. They get stopped for no reason. Those are the things that stick out in your mind." (emphasis added)); see also Roger Parloff, Race and Juries: If It Ain't Broke . . ., AM. LAW., June 1997, at 5. Although Parloff argues persuasively that there does not seem to be any impending crisis caused by a dramatic increase in hung juries or acquittals, he reveals considerable factual support for the proposition that minority communities do exhibit more skepticism toward police that whites do. See id. Professor Paul Butler has made a related argument: black jurors ought to use the power of nullification, and refuse to convict obviously guilty black men in certain cases, because of the unjust way in which the system treats blacks. See Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677, 679 (1995).

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"

"politics of distinction," in which law enforcement efforts, even if excessive, against law-breaking blacks are seen not as racial discrimination but as a net benefit to law-abiding blacks, because so much crime is intraracial); see also Regina Austin, The Black Community, Its Lawbreakers, and a Politics of Identification, 65 S. CAL. L. REV. 1769, 1772 (1992) (explaining this idea as "the difference that exists between the 'better' elements of 'the [black] community' and the stereotypical 'lowlifes' who richly merit the bad reputations the dominant society accords them"). But see David Cole, The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction," 83 GA. L. REV. 2547 (1995) (arguing that while Kennedy astutely recognizes the paradox posed by the fact that blacks, who are disproportionately victims of crime by other blacks suffer from both over- and under-enforcement of the criminal law, he is wrong to try to make the false choice of benefiting "good" over "bad" blacks).


146. ERIC LOTKE, NATIONAL CTR. FOR INSTS. AND ALTERNATIVES, HOBBLING A GENERATION (1997) (on file with author).

147. See THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2, 8-10 tbl.3 (1998) (on file with author) (arguing that 1.4 million black men are disenfranchised, representing 13% of the adult male black population, and 36% of all those disenfranchised; in seven states, one in four black males is permanently disenfranchised).
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 driver they want to stop. Police are free to pick and choose the motorists they will pull over, so factors other than direct evidence of law breaking come into play. In the “driving while black” situation, of course, that factor is race. In other law enforcement areas in which the state has nearly limitless discretion to prosecute, the decision could be based on political affiliation, popularity, or any number of other things. What these arenas have in common is that enforcement depends upon external factors, instead of law breaking.

Arguments examining law enforcement discretion have great resonance in the wake of the impeachment of President Clinton. The President was pursued by Independent Counsel Kenneth Starr for four years. Starr had an almost limitless
budget, an infinite investigative time frame, and an ever-expandable mandate to investigate a particular set of individuals for any possible criminal activity, rather than to investigate particular offenses. In other words, Starr had nearly complete discretion. This was foreseen in 1988 by Justice Scalia in his dissent in *Morrison v. Olsen*, the case in which the Supreme Court held the independent counsel statute constitutional. In a long final section of his opinion, Scalia decried the Independent Counsel Act not only as unconstitutional but also as bad policy, precisely because it gave the prosecutor nearly unlimited discretion. Among the words Justice Scalia chose to express this idea were those of Justice Robert Jackson, who, as Attorney General, talked about prosecutorial discretion in a speech to the Second Annual Conference of United States Attorneys. Jackson could just as easily have been discussing police discretion to make traffic stops; in fact, he used that very activity as an illustration.

"Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. . . . *We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning.* . . .

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. . . . It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself."  

By substituting "the police" for "the prosecutor" in this excerpt, one gets a strong sense of the unfairness of pretextual traffic stops. The person subjected to a pretextual stop is not targeted for his or her law breaking activity, but for other reasons—in this case, membership in a particular racial or ethnic

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149. Id. at 727-28 (Scalia, J., dissenting) (quoting Robert Jackson, The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)) (emphasis added).
group thought to be disproportionately involved in drug crimes. And the law leaves police absolutely free to do this.150

4. Sentencing

"Driving while black" also distorts the sentences that African-Americans receive for crimes. Research shows that blacks receive longer sentences than whites for the same crimes.151 One might hope that, with the advent of guidelines systems designed to limit judicial discretion in sentencing through the use of strictly applied nonracial criteria, this discrepancy might begin to disappear, but it has not.152

A recent federal sentencing decision illustrates the point. In December of 1998, Judge Nancy Gertner of the Federal District Court for the District of Massachusetts sentenced a defendant named Alexander Leviner for the crime of being a felon in possession of a firearm.153 Under the Federal Sentencing Guidelines, a major determinant of the sentence a defendant receives is his or her record of prior offenses. The worse the record, the greater the offender score; the greater the offender score, the longer the sentence.154 Judge Gertner found that Leviner's record consisted "overwhelmingly" of "motor vehicle violations and minor drug possession offenses." Since all of the available evidence indicated that African-Americans experience a proportionally greater number of traffic stops than whites,155 Judge Gertner reasoned that allowing Leviner's of-

150. See infra notes 177-83 and accompanying text. Ironically, the Court's opinion in Whren, the case that completely freed the police from any Fourth Amendment-based restriction on their discretion to make traffic stops, was written by Justice Scalia. See Whren v. United States, 517 U.S. 806 (1996).
152. See MUSTARD, supra note 151.
154. See A.L.I.-A.B.A., FEDERAL SENTENCING GUIDELINES 1 (1988) ("Factors in determining the appropriate sentence range ... include ... the defendant's criminal history.").
156. See id. at 33 & n.26.
fender score to be inflated by these traffic stop-related offenses represented a continuation of the racial discrimination implicit in the prior offenses into the sentencing process. The judge felt this was improper, and as a result accorded Leviner a "downward departure"—a cut in the usual sentence he could expect, given his criminal record.

It is not clear whether Judge Gertner's decision will survive an appeal. It may be true that police, in general, discriminate against black motorists in their use of traffic stops. But this does not mean that any of the particular stops Leviner experienced in the past were the result of bias. Thus, an appellate court may not find Leviner deserving of the downward departure. Nevertheless, Judge Gertner's opinion points out something important, and not just in Leviner's case. "Driving while black" can have grave consequences not just immediately, when drivers may be at best irritated and at worst arrested or abused, but in the long term, as a minor criminal record builds over time to the point that it comes back to haunt a defendant by enhancing considerably the sentence in some future proceeding. This is simply less likely to happen to whites.

E. DISTORTION OF THE SOCIAL WORLD

"Driving while black" distorts not only the perception and reality of the criminal justice system, but also the social world. For example, many African-Americans cope with the possibility of pretextual traffic stops by driving drab cars and dressing in ways that are not flamboyant so as not to attract attention. More than that, "driving while black" serves as a spatial restriction on African-Americans, circumscribing their movements. Put simply, blacks know that police and white residents feel that there are areas in which blacks "do not belong." Often, these are all-white suburban communities or upscale commercial areas. When blacks drive through these areas, they may be watched and stopped because they are "out of

157. See id. at 33.
158. See id. at 31, 34.
160. See Fletcher, supra note 15, at A1 (describing ways that blacks attempt to avoid police attention by staying out of black areas); Interview with Kevin, supra note 46 (stating that he drives a minivan specifically to avoid police scrutiny).
place." Consequently, blacks try to avoid these places if for no other reason than that they do not want the extra police scrutiny.\textsuperscript{161} It is simply more trouble than it is worth to travel to or through these areas. While it is blacks themselves who avoid these communities, and not police officers or anyone else literally keeping them out, in practice it makes little difference. African-Americans do not enter if they can avoid doing so, whether by dint of self-restriction or by government policy.

Another recent example shows even more clearly how "driving while black" can distort the social world. In 1998, the federal government launched "Buckle Up America" in an effort to increase seat belt use.\textsuperscript{162} The goal of this national campaign was to make the failure to wear seat belts a primary offense in all fifty states.\textsuperscript{163} In many states, seat belt laws are secondary offenses—infractions for which the police cannot stop a car, but for which they can issue a citation once the car is stopped for something else and the seat belt violation is discovered.\textsuperscript{164} If seat belt laws are made primary instead of secondary laws, the reasoning is that this would increase seat belt use, which would save thousands of lives per year. Since studies have shown that young African-Americans and Hispanics are more likely to die in automobile accidents than whites because of failure to wear seat belts,\textsuperscript{165} any effort to increase seat belt use would

\begin{itemize}
  \item \textsuperscript{161} See Interview with Karen Brank, supra note 19 (stating that she avoids the white suburban community where she was stopped before); Interview with James, supra note 33 (stating that he avoids a white suburban area because of its reputation for stopping and harassing black motorists).
  \item \textsuperscript{162} See Warren Brown, Urban League Quits Seat Belt Drive; Group Cites Fear of Increased Police Harassment of Minorities, WASH. POST, Dec. 11, 1998, at A14.
  \item \textsuperscript{163} See id.
  \item \textsuperscript{164} See, e.g., 625 ILL. COMP. STAT. ANN. 5/12-603.1(e) (West Supp. 1999) (stating that police cannot stop a vehicle “solely on the basis of a violation or suspected violation of this Section”); MICH. COMP. LAWS ANN. § 257.710(e)(5) (West Supp. 1999) (stating that enforcement of seat belt requirement may be done only as a “secondary action”); OHIO REV. CODE ANN. § 4513.263(D) (Anderson Supp. 1998) (stating that the police may not stop a motorist solely for a seat belt violation).
  \item \textsuperscript{165} See Susan P. Baker et al., Motor Vehicle Occupant Deaths Among Hispanic and Black Children and Teenagers, 152 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 1209, 1210-11 (1998) (noting that higher rates of death in motor vehicle accidents among young blacks and Hispanics than among whites, which could be attributable to “racial/ethnic and sex differences in the use of safety belts and child restraints”); see also CENTER FOR DISEASE CONTROL AND PREVENTION, U.S. DEPT OF HEALTH AND HUMAN SERVS., VITAL AND HEALTH STATISTICS: HEALTH OF OUR NATION'S CHILDREN, SERIES 10: DATA FROM THE NATIONAL HEALTH INTERVIEW SURVEY, NO. 191, at 45 tbl.14
\end{itemize}
likely benefit the black and Hispanic communities more than any other groups.

Given that less frequent use of seat belts has a high cost in the lives and suffering of people of color, one would think that any responsible black organization would do everything possible to support efforts like Buckle Up America. And that is what made the position taken by the National Urban League on the issue so puzzling, at least at first blush. The Urban League told the Secretary of Transportation that its "affiliates' willingness to fully embrace [the] campaign began to stall" because of concern that primary seat belt enforcement laws would simply give police another tool with which to harass black drivers.166 The League said it could not sign on to the campaign without assurances "that the necessary protections will be put in to ensure that black people and other people of color specifically are not subject to arbitrary stops by police under the guise of enforcement of seat belt laws."167

This is a truly disturbing distortion of social reality. Faced with a request to join a campaign to save lives through encouraging the use of a known and proven safety device, the use of which might require some greater degree of traffic enforcement, the decision is not easy for African-Americans. On the contrary, it presents an agonizing choice: encourage the seat belt campaign to save lives and hand the police another reason to make arbitrary stops, or oppose the campaign because of the danger of arbitrary police action, knowing that blacks will be injured and killed in disproportionate numbers because they use seat belts less frequently than others do. Stated simply, it is a choice whites do not have to make.

F. THE UNDERMINING OF COMMUNITY-BASED POLICING

Until recently, police departments concentrated on answering distress calls. The idea was to have police respond to reports of crime relayed to them from a central dispatcher. In essence, the practice was reactive; the idea was to receive reports of crimes committed and respond to them.168

166. Brown, supra note 162, at A14.
167. Id.
168. See, e.g., William J. Bratton, New Strategies for Combating Crime in
But over the past few years, modern policing has moved away from the response model. It was thought to be too slow and too likely to isolate officers from the people and places in which they worked. The new model is often referred to as community policing. Though the term sometimes seems to have as many meanings as people who use it, community policing does have some identifiable characteristics. The idea is for the police to serve the community and become part of it, not to dominate it or occupy it. To accomplish this, police become known to and involved with residents, make efforts to understand their problems, and attack crime in ways that help address those difficulties. The reasoning is that if the police become part of the community, members of the public will feel comfortable enough to help officers identify troubled spots and trouble makers. This will make for better, more proactive policing aimed at problems residents really care about, and engender a greater degree of appreciation of police efforts by residents and more concern for neighborhood problems by the police.169

In many minority communities, the history of police/community relations has been characterized not by trust, but by mutual distrust. In Terry v. Ohio,170 the fountain head

New York City, 23 FORDHAM URB. L.J. 781, 782 (1996) (describing the dominant mode of policing in the 1970s and 1980s as "largely reactive" or "rapid response" oriented, in which officers were "reacting to 911 calls, random patrol, riding around waiting for something to happen ... and the reactive investigation," leaving police "ill-prepared" to face greater rates of crime and violence that came with the crack cocaine trade); Bureau of Justice Assistance, U.S. DEP'T OF JUSTICE, UNDERSTANDING COMMUNITY POLICING, A FRAMEWORK FOR ACTION, MONOGRAPH, Aug. 1994, at 6 (explaining how rapid response policing "became an end in itself" and cut officers off from the community); Veronica Jennings, Community Policing Is on the Way, WASH. POST, July 2, 1992, at M1 (noting that community policing "puts the emphasis on preventing crime rather than on responding to radio dispatched calls").

169. See, e.g., COLE, supra note 14, at 192-93 (defining community policing as an effort to "make the police an integral part of the neighborhoods they serve"); COMMUNITY RELATIONS SERV., U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 5 (1993) ("Community policing is a philosophy in which the police engage the community to solve problems ... based on a collaboration between police and citizens in non-threatening and supportive interactions. These interactions include efforts by police to listen to citizens, take seriously the citizens' definitions of problems, and solve the problems that have been identified."); Bratton, supra note 168, at 784-85 (stating that community policing emphasizes "the three P's": partnership with the community, problem solving, and prevention of crime).

of modern street-level law enforcement, the Supreme Court candidly acknowledged that police had often used stop and frisk tactics to control and harass black communities.¹⁷¹ As one veteran African-American police officer put it, "Black people used to call the police 'the law.' They were the law .... The Fourth Amendment didn't apply to black folks because it only applied to white folks."¹⁷² For blacks, trusting the police is difficult; it goes against the grain of years of accumulated distrust and wariness, and countless experiences in which blacks have learned that police are not necessarily there to protect and serve them.

Yet, it is obvious that community policing—both its methods and its goals—depends on mutual trust.¹⁷³ As difficult as it will be to build, given the many years of disrespect blacks have suffered at the hands of the police, the community must feel that it can trust the police to treat them as law-abiding citizens if community policing is to succeed.¹⁷⁴ Using traffic stops in racially disproportionate numbers will directly and fundamentally undermine this effort. Why should law-abiding residents of these communities trust the police if, every time they go out for a drive, they are treated like criminals? If the "driving while black" problem is not addressed, community policing will be made much more difficult and may even fail. Thus, aside from the damage "driving while black" stops inflict on African-Americans, there is another powerful reason to change this police behavior: it is in the interest of police departments themselves to correct it.

¹⁷¹ See id. at 14-15 & n.11.
¹⁷² Interview with Ova Tate, supra note 54.
¹⁷³ See COLE, supra note 14, at 192-93 ("Where such programs develop effective channels for communication between the police and the community about their respective needs, the programs can play an important role in restoring community trust and overcoming the adversarial relationship too many police departments have with disadvantaged communities.").
¹⁷⁴ Unfortunately, strong negative feelings about police among members of minority groups, especially African-Americans, is not a thing of the past. See Barry & Connelly, supra note 17, at A1 (citing a 1999 survey indicating that "fewer than a quarter of all New Yorkers believe police treat blacks and whites evenly").
IV. THE LEGAL CONTEXT: HOW THE LAW ALLOWS AND ENCOURAGES "DRIVING WHILE BLACK" STOPS

When they hear some of the personal stories concerning traffic stops, some lay people (almost always whites) are genuinely surprised. Aside from issues concerning the racial aspects of the problem, the same questions almost always come up: Can the police do this? Does the law allow police to stop any driver, any time they wish? Don't they have to have a reason, some rationale, to think the occupants of the car committed a crime? The answer usually surprises them. Yes, police need a reason to stop the car, but they virtually always have it, without seeing any criminal activity. And the law makes it very easy to proceed from the stop to questioning and searching, with no more evidence than a hunch.

For many years, the Supreme Court has allowed police to stop and search a vehicle without a warrant when they have probable cause to believe that it contains contraband or evidence of a crime. The Court reasoned that since automobiles were inherently mobile, it made no sense to require officers to leave and obtain a warrant because the suspect would simply drive away. Over the years, the Court has broadened the rationale for the "automobile exception," saying that in addition to mobility, the fact that cars are heavily regulated and inherently less private means that warrants should not be required.

But the automobile exception only represents the beginning of the Court's cases that allow police considerable discretion over cars, their drivers, and their passengers. In 1996, the Supreme Court addressed directly the constitutionality of pretextual traffic stops. The Court used Whren v. United States to resolve a circuit split, ruling that police can use traffic

175. See Carroll v. United States, 267 U.S. 132, 153, 156, 161-62 (1925) (holding that when law enforcement agents have probable cause, a warrantless search of the vehicle is justified "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the ... jurisdiction").

176. See, e.g., California v. Carney, 471 U.S. 386, 390, 393 (1985) (creating an exception to the warrant requirement justified by a motor home's mobility and the fact that it has "a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulations inapplicable to a fixed dwelling").


178. The federal circuits had divided, with some ruling that any time an officer could have made a traffic stop, based on a traffic infraction, it was legitimate. See Whren v. United States, 53 F.3d 371, 374-75 (D.C. Cir. 1995)
DRIVING WHILE BLACK

stops to investigate their suspicions, even if those suspicions have nothing to do with traffic enforcement and even if there is no evidence of criminal behavior by the driver upon which to base those suspicions. The officer's subjective intent makes no difference.\footnote{Whren, 517 U.S. at 813 (holding that "subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis").} This is true, the Court said, even if a reasonable officer would not have stopped the car in question. As long as there was, in fact, a traffic offense, the officer had probable cause to stop the car.\footnote{See id. at 812-19.} The fact that traffic enforcement was only a pretext for the stop had no Fourth Amendment significance, and no evidence would be excluded as a result.\footnote{See id. at 818-19.} Since no one can drive for even a few blocks without committing a minor violation—speeding, failing to signal or make a complete stop, touching a lane or center line, or driving with a defective piece of vehicle equipment—\textit{Whren} means that police officers can stop any driver, any time they are willing to follow the car for a short distance.\footnote{To the same effect, see David A. Harris, \textit{Car Wars: The Fourth Amendment's Death on the Highway}, 66 GEO. WASH. L. REV. 556, 559-60 (1998) (arguing that vehicle codes "contain an almost mind-numbing amount of detailed regulation" of driving and vehicle equipment, and listing numerous offenses for which one could be stopped beyond the usual moving violations).} In other words, police know that they

\footnotesize{aff'd, 517 U.S. 806 (1996); United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (en banc); United States v. Johnson, 63 F.3d 242, 247 (3d Cir. 1995); United States v. Scopo, 19 F.3d 777, 782-84 (2d Cir. 1994); United States v. Ferguson, 8 F.3d 385, 389-91 (6th Cir. 1993) (en banc); United States v. Hassan El, 5 F.3d 726, 729-30 (4th Cir. 1993); United States v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990); United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989); United States v. Causey, 834 F.3d 1179, 1184 (5th Cir. 1987) (en banc). Two other circuits ruled that a traffic stop was sufficient to constitute probable cause only when a reasonable officer would have made the stop. See United States v. Cannon, 29 F.3d 472, 475-76 (9th Cir. 1994); United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986).}
can use the traffic code to their advantage, and they utilize it to stop vehicles for many nontraffic enforcement purposes.

But Whren does not stand alone. It represents the culmination of twenty years of cases in which the Court has steadily increased police power and discretion over vehicles and drivers. Once the police stop a car, utilizing Whren, the plain view exception may come into play. During the traffic stop, officers have the opportunity to walk to the driver's side window and, while requesting license and registration, observe everything inside the car. This includes not only the car and its contents, but the driver. If it is dark, the officers can enhance a plain view search by shining a flashlight into any area that would be visible if it were daylight. If the officers observe an object in plain view and it is immediately apparent, without further searching, that it is contraband, they can make an arrest on the spot. During this initial encounter, they can also have both the driver and the passenger get out of the vehicle, without any reason to suspect them of any wrongdoing.

If there is an arrest, the police can go further. They can do a thorough search of the passenger compartment and all

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184. The plain view exception is so widely used that it sometimes goes unmentioned and is often misunderstood. Briefly stated, an officer can seize an item in "plain view" without a warrant, when the officer sees the object from a lawful vantage point, the officer has a right of physical access to it, and the item's contraband nature is immediately apparent, without any further searching. See generally Horton v. California, 496 U.S. 128, 136-37 (1990) (reviewing the "plain view" doctrine); Arizona v. Hicks, 480 U.S. 321, 326-27 (1987) (explaining the "immediately apparent" requirement); Coolidge v. New Hampshire, 403 U.S. 443, 464-67 (1971) (same). If all three of these things are true, there is probable cause for an immediate seizure.

185. Thus the officer can look into the car from a lawful vantage point, fulfilling the first criterion for the exception. This means more than simply being in a place from which the officer can see the evidence; in the words of Justice Stewart, "in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure." Coolidge, 403 U.S. at 465. Rather, the officer must not have violated the Fourth Amendment in coming to the spot from which the evidence is seen. See id. at 465-66.

186. See United States v. Lee, 274 U.S. 559, 563 (1927) (determining that using artificial illumination to see what would be visible in daylight is not a search for Fourth Amendment purposes).


188. See Maryland v. Wilson, 519 U.S. 408, 415 (1997).

189. The usual rule is that the stop of a vehicle for a traffic infraction, alone, will not justify a search of the vehicle. There must be something more if
closed containers inside. They can also "frisk" the car if there is anything resembling a weapon in plain view. Even if police wish to go further than simply hand out a citation, ask a few questions, or give a warning: evidence establishing probable cause or reasonable suspicion that a crime has been committed, or voluntary consent to search. New York v. Belton, 453 U.S. 454 (1981), changes this in any case in which police arrest a person inside the car. In Belton, when an officer pulled over a car for a traffic offense, he noticed the smell of burnt marijuana and saw an envelope with "Supergold" on it, a word he associated with marijuana. See id. at 455-56. The officer ordered all four of the occupants out of the car, arrested them, and stood them in separate places along the highway so that they could not touch each other. See id. at 456. The officer discovered marijuana when he opened the envelope and then searched the rest of the inside of the car, including the zipped pocket of a jacket which contained cocaine. See id. The Supreme Court used Belton to announce a bright-line rule: an officer may conduct a warrantless search of the passenger compartment of a vehicle, including any closed containers found inside, contemporaneous with a lawful arrest of any of the vehicle's occupants. See id. at 460-61. Note that the Court did not limit the Belton rule to cases involving arrests of drivers. Rather, it used the words "occupant of an automobile," id. at 460, so arrests of passengers would seem to trigger the rule. This rule applies in every case, not just when there appears to be a danger either to the officer or to the integrity of the evidence; if the defendant is taken from a car and arrested, the officer may search the car, even though it is physically impossible for the defendant to get to the car to reach a weapon, destroy evidence, or escape.

190. See California v. Acevedo, 500 U.S. 565 (1991). Prior to 1991, the law's treatment of closed containers found during searches of vehicles depended upon the facts of each case. If police happened to find a closed container in a vehicle when they had probable cause to search the entire vehicle, they did not need a warrant to open and search the container. See U.S. v. Ross, 456 U.S. 798, 821-22 (1982) (holding that when police have probable cause to search an entire vehicle, a warrantless search of the vehicle and any containers that may contain the contraband sought is reasonable). If, on the other hand, they had probable cause to search a particular container and happened to find it in a vehicle, they did need a warrant. See United States v. Chadwick, 433 U.S. 1, 11-13 (1977) (holding that search of locked footlocker placed in automobile and later seized by police required a warrant); Arkansas v. Sanders, 442 U.S. 753, 761-66 (1979) (find that the "automobile exception" does not allow warrantless search of luggage just because it is located in a lawfully stopped vehicle). The Court clarified this situation in Acevedo, in which the police had probable cause to believe that contraband would be found in a particular kind of bag which happened to be deposited in a car trunk. See Acevedo, 500 U.S. at 579. The Court wiped away the dual set of rules which had governed; instead, one rule would determine the outcome in both types of situations. Speaking for the Court, Justice Blackmun said that "[t]he protections of the Fourth Amendment must not turn on... coincidences." Id. at 580. Instead, the Court said, "police may search without a warrant if their search is supported by probable cause." Id. at 579. Even though police in Acevedo had probable cause to search the bag, it is important to note that they had the right to search the trunk into which they had seen the bag put only to the extent necessary to find the bag. Nevertheless, Acevedo allows a search of any areas of an automobile and the opening and search of any closed containers found there, as long as police have probable cause to believe the evidence,
nothing is seen in plain view, police can question the driver and passengers without giving them *Miranda* warnings. The of-

fruits or instrumentalities of crime will be found. *See id.*

191. *Terry v. Ohio*, 392 U.S. 1 (1968), and the cases that have followed it, for example, *Minnesota v. Dickerson*, 508 U.S. 336, 372-74 (1993) (reiterating *Terry* standard), *Adams v. Williams*, 407 U.S. 143, 145-46 (1972) (same), permit a brief detention when there is reason to believe that crime is afoot and that a particular person is involved. *See Terry*, 392 U.S. at 30. If outward appearances indicate that the suspect is armed and dangerous, or if the crime suspected is one that by its nature requires weapons, *Terry* allows a frisk—pat-down of the outer clothing of the suspect—for the purpose of finding weapons. *See Dickerson*, 508 U.S. at 373; *Adams*, 407 U.S. at 146; *Terry*, 392 U.S. at 24; *see also* *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979) (reviewing the *Terry* standard). *Michigan v. Long*, 463 U.S. 1032 (1983), extended the idea of a frisk to automobiles. Police in *Long* stopped to investigate a car that had swerved into the ditch; the defendant, who appeared intoxicated, met them at the rear of his car. *See id.* at 1035. When the defendant moved toward his car at the request of the officers to get his registration, one of the officers observed a hunting knife on the floorboard near the driver's seat. *See id.* at 1036. The defendant was outside the car and could not reach the weapon, but the officer did a cursory search of the car's interior anyway—a "frisk" of the car—and found a pouch of marijuana. *See id.* Once the defendant had been arrested for the marijuana inside the car, a further search of the car's trunk revealed 75 pounds of marijuana. *See id.* According to the Supreme Court, this search comported with the Constitution. *See id.* Even though the weapon did not pose any current danger since the defendant was outside the vehicle, the Court said it was reasonable to search areas in the car from which the defendant could get a weapon. *See id.* at 1049-50. If the police find contraband in the course of such a search, it need not be suppressed. *See id.* at 1050. The circumstances of the case, the Court said, justified a reasonable belief that the defendant posed a danger if he returned to his car. *See id.* It is difficult to understand the Court's conclusion. Among the "circumstances" on which the Court relies are the lateness of the hour, the rural location, and the defendant's careless driving and apparent intoxication. *See id.* The Court also felt that the restricted nature of the search also made it reasonable. *See id.* at 1051. But the fact remains, that the defendant was outside his car and under the control of more than one police officer. He only moved toward the car in response to the officers' request for his license and registration. Thus, simply maintaining the status quo would have protected the officers fully and there was no need to search the car, and no need for a new rule of law.

192. To be sure, officers can do more than make a request to see one's license and registration. They may question the driver and attempt to get substantive answers. If this sounds like it might be custodial interrogation that would trigger the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), think again. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Supreme Court decided that the typical roadside encounter does not bring *Miranda* into play. According to the majority, the concerns that drive *Miranda* do not apply to the questioning of motorists by officers. *See id.* First, these encounters take place in public and usually involve only one or two officers. *See id.* at 438. Traffic stops do not include the secretive, police-controlled atmosphere of the station house and the driver is therefore unlikely to feel completely within the power of the police. *See id.* at 438-39. Indeed, he can even refuse to answer questions. *See id.* at 439. Second, these encounters are "presumptively temporary
ficers are likely to keep the tone of the questioning amicable, but this is more than just carside chit-chat. It is a purposeful, directed effort to get the driver talking.\textsuperscript{193} The answers may disclose something that seems suspicious.\textsuperscript{194}

Police may continue questioning even after a driver answers every question satisfactorily and in a way that does not raise any suspicion of guilt. The real goal of the questioning is to gather information and impressions that will help the officers decide whether they want to search the car. In the event that they do, the officers will try to obtain the driver's consent.\textsuperscript{195} A great number of vehicle searches begin with a re-
quest for consent. The initial friendly discussion helps put the driver in the frame of mind to respond to the troopers helpfully, making cooperation and consent more likely. And this technique usually works. Whether out of a desire to help, fear, intimidation, or a belief that they cannot refuse, most people consent. The police need not tell the driver that she has a right to refuse consent, or that she is free to go. As one veteran state trooper told a reporter, in two years of stops, “I’ve never...

... the legitimate need for such searches and ... the requirement of assuring the absence of coercion.” Id. at 227. Requiring the state to show that the defendant knew he had a right to refuse consent and nevertheless waived it, would “create serious doubt whether consent searches could continue to be conducted,” because the prosecution would find it quite difficult to prove the defendant’s awareness of his right to refuse. Id. at 229-30. The Court was unwilling to promulgate such a rule and was candid about its reasons: in many situations, where police have some evidence of illicit activity but not enough to constitute probable cause, “a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.” Id. at 227. Of course, another possibility is that in some cases, this “insufficient evidence” is not indicative of criminality at all. The Court rejected the obvious answer—having officers advise the defendant of his right to refuse before asking for consent—as impractical, because consent searches, as a “standard” part of law enforcement’s investigatory arsenal, are typically used in a less “structured” atmosphere than a trial, or even the custodial interrogation situation of Miranda. Id. at 231-32. The Court assumed, rather than explain, why this makes the alternative of a warning impractical. The reason seems obvious: the Justices fear that citizens who would otherwise consent to a search might actually listen to a brief warning ("You don’t have to let us, but we’d like to search your car.") and refuse, thus depriving the police of the use of this “standard investigatory technique” that allows searches in the absence of any other legal justification.

Ohio v. Robinette, the most recent case in this line, arose under different factual circumstances, but arrived at the same conclusion. 519 U.S. 33, 36 (1996). While the officer was engaged in ongoing questioning and investigation in Schneckloth, the officer in Robinette had actually completed any investigation and had resolved to let the defendant go with a verbal warning as shown by the officer’s questioning of the defendant before the request for consent. See id. Nevertheless, the Supreme Court refused to see Robinette as any different than Schneckloth, and gave exactly the same kind of answer in almost the same words: Schneckloth’s "it would be thoroughly impractical" to tell defendants of their right to refuse becomes "it [would] be unrealistic" in Robinette. Id. Both cases are almost nakedly result-oriented; Robinette is different only because it lacks even the small amount of analysis present in Schneckloth.

196. See Webb, supra note 142, at 125.
197. See Schneckloth, 412 U.S. at 227-28 (holding that lack of knowledge of the right to refuse a search does not necessarily negate the "voluntariness of the consent").
198. See Robinette, 519 U.S. at 34 (upholding the consent search even though the police failed to tell the defendant he was free to go).
had anyone tell me I couldn’t search." And while a driver could surely limit consent—"You can look through my car, but not my luggage"—most of the searches are in fact quite thorough and include personal effects.

But even if there is no contraband in plain view, and the driver refuses consent, the officers' quiver is still not empty: they may still use a dog trained to detect narcotics. Since the Supreme Court has declared that the use of these dogs does not constitute a search, police may use them without probable cause or reasonable suspicion of any kind. This makes them ideal tools for the "no consent and no visible evidence" situation, because no consent or evidence—in fact, no justification at all—is necessary. Any police department with the funds to

199. Shatzkin & Hallinan, supra note 193, at B6.

200. See Webb, supra note 142, at 125 (explaining how officers who obtain consent literally “take your car apart with an air hammer” or an electric screwdriver); see also Curliss, supra note 194, at 1A (attesting to thoroughness of troopers’ searches); Neff & Stith, supra note 194, at A1 (describing searches so thorough that cars are permanently damaged). See, e.g., Harris, supra note 84, at 566-68 (noting a pretextual stop by police resulted in an hour-long search of the car’s interior, trunk, and engine compartment).

201. In United States v. Place, 462 U.S. 696 (1983), the Court assessed the constitutionality of allowing a dog trained to find drugs to sniff the luggage of an airline passenger. Although a decision on the constitutional validity of dog sniffs was unnecessary to the resolution of the case, the Court found the detention of the defendant’s luggage that preceded the sniff unreasonable. See id. at 705-06, 710. Accordingly the Court did not have to reach the issue of the constitutionality of the sniff. Even though the issue had neither been briefed nor argued the Court decided the issue anyway. See id. at 720-21 (Blackmun, J., concurring in the judgment). The Justices declared that having a trained dog sniff a defendant’s luggage located in a public place (a significant limitation, making it not at all clear that Place should apply to dog sniffs of people, or to the public exteriors of homes) was not a search. See id. at 707. The Court offered two reasons. First, the dog was unintrusive. See id. Using the dog did not even entail the opening of the luggage and the exposure of personal effects to public view, as a search by hand at an airport security checkpoint does. See id. Second, the dog only gave the authorities limited information: whether drugs were, or were not, present. See id. The Court observed, “in these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.” Id. Canine sniffs did not prove to be sui generis for very long. Just the next term, the Court put drug field testing kits in the same category. See U.S. v. Jacobsen, 466 U.S. 109, 142 (1984) (Brennan, J., dissenting).

202. Place is critically important to understanding how police conduct traffic stops and searches of cars. Since the Court has said that using a drug-sniffing dog is not a search for Fourth Amendment purposes, these dogs can be used without a warrant, without probable cause or reasonable suspicion—without any evidence at all to provide individualized suspicion. See Place, 462 U.S. at 707. This makes these dogs an indispensable part of the modern day
pay for them has one or more "K-9 teams" available at all times.\textsuperscript{203} The dogs can be called in to search when there is a refusal. Better yet, officers might short circuit the whole process by using the dog as soon as a car is stopped, without even seeking consent.\textsuperscript{204} If the dog indicates the presence of narcotics by characteristic barking or scratching, that information itself constitutes probable cause for a full-scale search.

The upshot is that officers are free to exercise a vast amount of discretion when they decide who to stop. And as the statistics show, police stop African-Americans more often than their presence in the driving population would predict, since blacks and whites violate the traffic laws at about the same rate.\textsuperscript{205} There are two likely explanations for this. First, the decisions of the last twenty years surveyed here allowing police ever-greater power over vehicles, drivers and even passengers, come from the crime-control model of criminal procedure.\textsuperscript{206} One can see this in numerous decisions, but especially in the consent search cases, \textit{Schneckloth v. Bustamonte}\textsuperscript{207} and \textit{Ohio v. Robinette}.\textsuperscript{208} In both, the Court used the rhetoric of balancing, but in reality gave short shrift to any interest other than law enforcement. It would be "thoroughly impractical" to tell citizens they have a right to refuse to consent to a search, the Court said in \textit{Schneckloth}, because this might interfere with

\textsuperscript{203} Police have a limited amount of time to bring drug dogs to the traffic stop. Drivers can only be detained for a reasonable amount of time in order to bring a dog to the scene. \textit{See} Harris, \textit{supra} note 84, at 575-76. In fact, the constitutional violation in \textit{Place} occurred because the detention of the luggage was longer than reasonable to obtain the dog. \textit{See} 462 U.S. at 707-10.

\textsuperscript{204} \textit{But see}, e.g., \textit{Ohio v. Montoya}, No. L-97-1226, 1998 Ohio App. Lexis 824, at *7 (Ohio Ct. App. Mar. 6, 1998) (suppressing evidence when an initial stop was justified by commission of traffic offense, but subsequent questioning "unlawfully expanded the scope" of the detention).

\textsuperscript{205} \textit{See} supra notes 72, 88 and accompanying text.


\textsuperscript{207} 412 U.S. 218 (1973).

\textsuperscript{208} 519 U.S. 38 (1996).
the ability of the police to utilize consent searches. In other words, if people were told they did not have to consent, some might actually exercise this right and refuse. Because of law enforcement’s interest in performing consent searches, it is preferable to enable the police to take advantage of citizens’ ignorance of their rights. Robinette, decided more than twenty years later, sounded the same note. It would be “unrealistic” to tell citizens whom the police have no reason to detain that they are free to go before the police ask for consent to search. This statement is unaccompanied by even the barest explanation or analysis, save reference to Schneckloth. Years of cases like these make it obvious that the Court has control of crime at the top of its criminal law agenda, and it has decided cases in ways designed to enable the police to do whatever is necessary to “win.”

Second, by making the power of the police to control crime its top priority in criminal law, the Court—whether intentionally or not—has freed law enforcement from traditional constraints to such a degree that police can use blackness as a proxy for criminal propensity. In other words, officers are free, for all practical purposes, to act on the assumption that being black increases the probability that an individual is a criminal. The statistics presented here suggest that is exactly what the police are doing. But this means that all African-Americans get treated as criminal suspects, not just those who have committed crimes. And there are virtually no data that tell us just how many innocent people police officers stop for each criminal they catch.

V. WAYS TO ADDRESS THE PROBLEM

With the Supreme Court abdicating any role for the judiciary in regulating these police practices under the Fourth Amendment, leadership must come from other directions and

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210. See Robinette, 519 U.S. at 39.
211. See id. (citing Schneckloth, 412 U.S. at 227).
212. See Harris, supra note 84, at 572 (stating that disproportionate use of traffic stops against African-Americans indicates police “are using race as a proxy for the criminality or ‘general criminal propensity’ of an entire racial group”); Sherri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 YALE L.J. 214, 220, 236-239 (1983) (noting that police use minority race as a proxy for a greater possibility of criminal involvement, even though such use is problematic at best).
other institutions. What other approaches might be fruitful sources of change?

A. THE TRAFFIC STOPS STATISTICS ACT

At the beginning of the 105th Congress, Representative John Conyers of Michigan introduced House Bill 118, the Traffic Stops Statistics Act of 1997. This bill would provide for the collection of several categories of data on each traffic stop, including the race of the driver and whether and why a search was performed. The Attorney General would then summarize the data in the first nationwide, statistically rigorous study of these practices. The idea behind the bill was that if the study confirmed what people of color have experienced for years, it would put to rest once and for all the idea that African-Americans who have been stopped for “driving while black” are exaggerating isolated anecdotes into a social problem. Congress and other bodies might then begin to take concrete steps to channel police discretion more appropriately. The Act passed the House of Representatives in March of 1998 with bipartisan support, and then was referred to the Senate Judiciary Committee. When police opposition arose, the Senate took no action and the bill died at the end of the session. Congressman Conyers reintroduced the measure in April of 1999.

The Traffic Stops Statistics Act is a very modest bill, a first step toward addressing a difficult problem. It mandated no concrete action on the problem; it did not regulate traffic stops, set standards for them, or require implementation of particular policies. It was merely an attempt to gather solid, comprehensive information, so that discussion of the problem could move ahead beyond the debate of whether or not the problem existed. Still, the bill attracted enough law enforcement opposition to kill it. But even if the Act did not pass the last Congress and subsequent bills also fail, it seems to have had at least one in-

214. See id. § 2.
215. See id. § 3.
216. See Jackson, supra notes 60, at A5.
218. See supra notes 60-61 and accompanying text.
teresting effect: it has inspired action at the state and local level.

B. STATE LEGISLATION

As important as national legislation on this issue would be, congressional action is no longer the only game in town. In fact, efforts are underway in a number of states to address the problem. For example, last year in California, Assembly Bill (A.B.) 1264, a bill patterned on Representative Conyers' federal effort, passed both houses of the state assembly. Weakening amendments were attached during the legislative process, but A.B. 1264 nevertheless represented the first state-level legislative victory on this issue. Unfortunately, then-Governor Pete Wilson vetoed the bill. A new bill was introduced in the California State Assembly in 1999.219 The bill passed both houses of the state legislature by large bipartisan margins, but it was vetoed by Governor Gray Davis, who then urged all California police departments to collect this data voluntarily.220

This is not the only effort underway. By mid-1999, two state bills had become law: one in North Carolina221 and one in Connecticut.222 Bills have also been introduced in Arkansas,223 Rhode Island,224 Pennsylvania,225 Illinois,226 Virginia,227 Massachusetts,228 Ohio,229 New Jersey,230 Maryland,231 South Caro-
While all of these measures differ in their particulars, they are all variations on Representative Conyers' bill—they mandate the collection of data and analyses of these data. But it is important to remember that legislative efforts can take other approaches. There is no reason not to consider other options, such as the use of funding as either carrot or stick or both, to require the enactment of state law that mandates implementation of specific law enforcement policies, or the like.

C. LOCAL ACTION

Of course, legislative action is not required for a police department to collect data and to take other steps to address the "driving while black" problem. When a department realizes that it is in its own interest to take action, it can go ahead without being ordered to do so. This is precisely what happened in San Diego, California. In February 1999, Jerome Sanders, the city's Chief of Police, announced that the department would begin to collect data on traffic stops, without any federal or state requirement. The Chief's statement showed a desire to find out whether in fact the officers in his department were engaged in enforcing traffic laws on a racially uneven basis. If so, the problem could then be addressed. If the numbers did not show this, the statistics might help to dispel perceptions to the contrary.

Thus far, San Diego, San Jose, Oakland, and Houston are the largest urban jurisdictions to do this, but they are not

233. See S.B. 590, 47th Leg., 1st Sess. (Okla. 1999) (requiring two-year study of traffic stops "to consider relationships of traffic stops to criminal offenses, races, ethnicity, gender, and age").
234. See H.R. 769, 1999 Reg. Sess. (Fla. 1999) (requiring the Florida Department of Law Enforcement to conduct a study of routine traffic stops identifying characteristics of individuals stopped).
236. See id.
Police in over thirty other cities in California, as well as departments in Michigan, Florida, Washington and Rhode Island, are also collecting data. Police departments, not courts, are in the best possible position to take action—by collecting data, by re-training officers, and by putting in place and enforcing policies against the racially disproportionate use of traffic stops. Taking the initiative in this fashion allows a police department to control the process to a much greater extent than it might if it is mandated from the outside. And developing regulations from inside the organization usually will result in greater compliance by those who have to follow these rules—police officers themselves. This represents a promising new approach to the problem. The police must first, of course, realize that there is a problem, and that doing something about it is in their interest.

237. I am currently consulting with a small jurisdiction in Northwest Ohio to help them set up a system for collecting comprehensive data on all stops, and to enable them to calculate the base rate by counting vehicles that pass through the municipality and the races of their drivers. This system should enable them to duplicate John Lamberth’s work in New Jersey and Maryland.

238. See M. Charles Bakst, Little to Remember in 1999 General Assembly Session, PROVIDENCE J.-BULL., June 20, 1999, at 1C (reporting that police are keeping data voluntarily on race of all drivers stopped); Margaret Downing, If You’re Black or Brown, Driving a Nice Car Will Get You Noticed by Police in Houston, HOUSTON PRESS, Sept. 2, 1999 (stating that the Houston Police Chief announced that officers must collect racial data on traffic stops); Angela Galloway, State Patrol to Note Race, Gender in Stops, SEATTLE POST-INTELLIGENCER, Sept. 24, 1999 (noting the Washington State Patrol will record race and gender of every driver stopped); Patrick McGreevy, Council Asks Parks To Consider a Study on L.A.P.D. Racial Profiling, L.A. TIMES, Oct. 21, 1999, at B5 (reporting the Governor’s letter urging the L.A.P.D. to join 34 other California cities in data collection); Pamela J. Podger, Cops Rap Veto of Traffic-Stop Tally, S.F. CHRON., Sept. 30, 1999, at A23 (reporting that thirty-five California Cities will collect data on traffic stops despite the governor’s veto a bill making such collection mandatory); David Shepardson & Oralandar-Brand Williams, Cops Fight Race Targeting, DETROIT NEWS, July 12, 1999, at A1 (noting that Michigan State Police began recording the race of all motorists ticketed); Jill Taylor, Highway Patrol Plans To Collect Data To Debunk Profiling, PALM BEACH POST, Oct. 3, 1999, at 14A (stating that the Florida Highway Patrol will collect data on race and ethnicity of all drivers stopped).

239. See Wayne R. LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich. L. Rev. 442, 451 (1990) (stating that police-made rules are most likely to be followed and enforced by police).
D. Litigation

Another way to address racial profiling is to bring lawsuits under the Equal Protection Clause and federal civil rights statutes. In Whren, the U.S. Supreme Court said that under the Fourth Amendment of the U.S. Constitution courts can no longer suppress evidence in pretextual stop cases. But the Court did leave open the possibility of attacking racially-biased law enforcement activity under the Equal Protection Clause with civil suits. There are a number of such suits around the country that are either pending or recently concluded, including cases in Maryland, Florida, Indiana, and Illinois.

It is important not to underestimate the difficulty of filing a lawsuit against a police department alleging racial bias. These cases require an "attractive" plaintiff who will not make a bad impression due to prior criminal record, current criminal involvement, or the like. They also require a significant amount of resources. For this reason, organizations interested in this issue, particularly the American Civil Liberties Union, have taken the lead in bringing these cases. Last but not least, it takes a plaintiff with guts to stand up and publicly sue a police department in a racially-charged case. Most people would probably rather walk away from these experiences, no matter how difficult and humiliating, than get into a legal battle with law enforcement.

240. There are actually two Maryland cases—one in which attorney Robert Wilkins is the plaintiff and that led to the collection of the Maryland stop data, see Wilkins v. Maryland State Police, No. MJG-93-468 (D. Md. 1993), and a more recently filed class action.

241. Two civil actions brought in Florida failed. The judge in the combined cases denied class certification, meaning that the plaintiffs had to prove individual racial animus, a nearly impossible burden to carry. See Washington v. Vogel, 880 F. Supp. 1542, 1543-44 (M.D. Fla. 1995), aff'd, 106 F.3d 415 (11th Cir. 1997). When the plaintiffs could not make a prima facie showing, the court dismissed their cases. See id.

242. See Johnson v. City of Fort Wayne, 91 F.3d 922 (7th Cir. 1996).


244. Both of the Maryland cases, Wilkins, No. MJG-93-468 (D. Md. 1993), and the Illinois case, Chavez, 27 F. Supp. 2d at 1066-68, were brought by the ACLU.
E. SEARCH AND SEIZURE CHALLENGES UNDER STATE CONSTITUTIONAL PROVISIONS, CASE LAW, AND STATUTES

Another possibility is the use of state constitutional provisions, cases and statutes to challenge these stops. For example, in the New Jersey case for which Lamberth conducted his study, the defendant brought his motion to dismiss under state case law that is different from Whren. New Jersey law affords more protection to its citizens than the federal Constitution does. Under New Jersey case law, a judge can grant a motion to suppress when there is evidence of racial bias, but the Fourth Amendment, as interpreted by the Supreme Court in Whren, would not allow this. A second example comes from New York. In People v Dickson, a New York state judge recently reaffirmed that New York's state constitution prohibits the use of pretextual stops, in direct contradiction to Whren. And in Whitehead v. State, the Maryland Court of Special Appeals ruled that even if the pretextual stop of the defendant met Whren's constitutional standard, the detention that followed the stop was too long, resulting in the suppression of evidence. All of these cases represent promising approaches spurred by state court hostility to pretextual traffic stops, which made these courts willing to consider creative state law-based legal theories.

VI. CONCLUSION

Everyone wants criminals caught. Few feel this with more urgency than African-Americans, who are so often the victims of crime. But we must choose our methods carefully. As a country, we must strive to avoid police practices that impose high costs on law abiding citizens, and that skew those costs heavily on the basis of race.

247. See Kennedy, 588 A.2d at 840.
African-Americans clearly feel aggrieved by pretextual traffic stops. It is virtually impossible to find black people who do not feel that they have experienced racial profiling. The statistics presented here show that this is more than just the retelling of stories based on isolated instances of police behavior. Rather, the patterns in the data are strong, even when the data are not ideal. These experiences have a deep psychological and emotional impact on the individuals involved, and they also have a significant connection to many of the most basic problems in criminal justice and race.

Surely a solution will not be easy to achieve. There are, after all, many among the law enforcement community and its supporters who disfavor even the most basic first steps toward an understanding of the problem through the collection of comprehensive, accurate data. Yet it is with these same people that the best hope for any solution rests. Changes in law enforcement policies, training, and supervision, and a determination from the top to end race-based policing are where the effort to come to grips with this problem will ultimately succeed or fail. And lest we lose hope, the first effort to legislate the collection of data—Rep. Conyers’ H.R. 118—has spawned a dozen imitators on the state level.

The bottom line is that we—every citizen and every police officer—must realize that “driving while black” is a problem not just for African-Americans, but for every American who believes in basic fairness. When blacks feel like criminals whenever they do something as common as driving a car, and when they feel so distrustful of the police that they will not believe officers testifying in court, things have come to a dangerous point. “Driving while black” destroys the ideal that holds us together as a nation: equal justice under law. And when that goes, we are all in trouble.