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Kami Chavis Simmons

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Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem[†]

Kami Chavis Simmons*

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Introduction

Many Americans have had interactions with police officers and other law-enforcement agents, and the majority of these police-citizen encounters

[†] This article derives from a transcript of a presentation given on Friday, March 18, 2011, at the Traffic and the War on Drugs Symposium, held by the Washington and Lee Journal of Civil Rights and Social Justice.

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occur in the context of traffic stops.¹ Although mildly inconvenient, traffic stops are necessary not only for enforcing traffic rules and deterring traffic violations, but they are generally beneficial for broader public safety concerns. For many people, traffic stops are simply part of life. For many racial minorities, however, especially African-American and Latino men, even a routine traffic stop takes on an entirely different meaning.² Historically, the relationship between racial minorities and police has been strained, and many members of racial minority groups believe that law-enforcement officers unfairly target them because of their race or ethnicity.³ It is widely known that many Americans, especially minorities, believe that police officers use race as a “proxy” for criminal involvement.

There is strong evidence that racial minorities believe law enforcement officers engage in racial profiling. African-Americans have long argued that police officers scrutinize their behavior more closely, and many report that they are fearful of arrest even if they have done nothing illegal.⁴ The majority of African-Americans believe that racial profiling is wrong, yet is pervasive within their communities.⁵ The September 11th tragedy and increased attention surrounding immigration from Mexico, however, have caused other minority groups such as Arab-Americans and Latinos to become increasingly concerned that law-enforcement officers also unfairly

1. See Richard R. Johnson, *Citizen Expectations of Police Traffic Stop Behavior*, 27 POLICING 487, 489 (2004) (“Traffic stops made up 52 percent of all police-citizen contacts in the USA in 1999.” (citing P.A. Lanagan et al., *Contacts Between Police and the Public: Findings from 1999 National Survey*, Bureau of Justice Statistics (2001))).

2. See Richard A. Fausset & P.J. Huffstutter, *Black Males’ Fear of Racial Profiling Very Real, Regardless of Class*, L.A. TIMES, July 25, 2009, at A16, available at <http://articles.latimes.com/2009/jul/25/nation/na-racial-profiling25> (reporting that many members of racial minorities, particularly African-American males report the fear of racial profiling, and this fear transcends age, class, and wealth) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. See Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1199 (2008) (reviewing RONALD WEITZER & STEVEN TUCH, *RACE AND POLICING IN AMERICA: CONFLICT AND REFORM* (2006)) (“Over time, whites and blacks come to view police and policing ‘in strikingly different terms.’”). “Blacks especially are more likely than others to believe that the police are unaccountable, abusing citizens and treating minorities harshly.” *Id.*

4. See KATHERYN K. RUSSELL, *THE COLOR OF CRIME* 26–27, 34 (1998); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1797 (1998) (offering empirical research supporting this proposition).

5. See RONALD WEITZER & STEVEN TUCH, *RACE AND POLICING IN AMERICA* 83 (2006) (noting that the “overwhelming majority of Blacks (92 percent) and Hispanics (83 percent) believe that profiling is widespread in the United States”).

target them based on their race or ethnicity.⁶ Stories of the humiliation and helplessness of families stranded in the rain with their belongings strewn alongside the highway are commonplace for many members of society.⁷ Undoubtedly, the pernicious practice of racial profiling, or at least the perception that this practice occurs, has caused many citizens to alter their routine to avoid the indignity of yet another police stop. Unfortunately, there is a growing body of evidence that suggests that the perception that police unjustly target minorities is not merely an unsubstantiated feeling, but an uncomfortable reality.

While all forms of police misconduct or corruption are disturbing, racial profiling occupies a unique place among such harmful practices because it presents several unique issues that make it difficult to address through standard police accountability measures. Society entrusts law-enforcement officers with a wide-breadth of discretion in order to perform their everyday duties.⁸ While the fast-paced nature of law enforcement necessitates discretion, if left unchecked, broad grants of discretion can lead police officers to abuse their position and engage in misconduct ranging from falsifying evidence, participating in violent excessive uses of force, and engaging in racial profiling. Many forms of police misconduct and corruption leave tangible evidence that allows law-enforcement agencies to

6. See generally, Katherine Culliton, *How Racial Profiling and Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long-Standing Discrimination Against Latino Citizens and Immigrants*, 8 UDC L. REV. 141, 147 (2004) (“The anti-immigrant backlash since 9/11 has severely and negatively affected Latino communities in ways that Congress and the Administration must recognize and correct.”).

7. See, e.g., David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, ACLU (June 7, 1999) [hereinafter Harris, *Driving While Black*], <http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways> (last visited November 29, 2011) (providing various anecdotes of minorities stopped by the police and how their treatment during the stop impacted their lives) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); David A. Harris, *The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters*, 84 Minn. L. Rev. 265, 265-75 (1999) [hereinafter Harris, *The Stories, the Statistics, and the Law*] (summarizing the police stop of Gerald Rossano and his 12 year-old young son Gregory, which lasted 2 and a half hours, and during which officers terrorized the young boy with a police dog).

8. The dissenters in *Terry v. Ohio* and its progeny warned that police misconduct can almost always be characterized as allowing police discretion in performing their duties. *Terry v. Ohio*, 392 U.S. 1, 39 (1968). In his dissent, Justice Douglas explained, “To give the police greater power than a magistrate is to take a long step down the totalitarian path.” *Id.* at 38. He further noted: “Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can ‘seize’ and ‘search’ him in their discretion, we enter a new regime.” *Id.* at 39.

implement remedial measures to alleviate the problem.⁹ Racial profiling, however, is an elusive practice that can easily remain shrouded from view.

Racial profiling remains one of the most problematic issues within the criminal justice system for several reasons.¹⁰ First, claims of racial profiling are extremely difficult to substantiate using traditional measures. The Supreme Court, in *Whren v. United States*,¹¹ granted officers carte blanche authority to conduct pretextual stops, which are completely legal under the Fourth Amendment.¹² As long as an officer has probable cause to stop someone for one violation, the officer may use that violation as the basis for a stop even when though the officer may have only a “hunch” that the person is involved in other criminal activity.¹³ Thus, observing a car with a broken tail light would permit officers to stop a car when the true underlying motivation was the officer’s unsubstantiated belief that the

9. A classic example of police misconduct that leaves tangible evidence is excessive use of force. The injuries left by an officer who uses excessive force can be seen and recorded. In response to this type of police misconduct, many police departments use police psychologists who conduct pre-employment screening, on the job training, and see individual officers to help them develop the proper coping and stress management techniques. See Ellen M. Scrivner, NAT’L INST. OF JUSTICE, CONTROLLING POLICE USE OF EXCESSIVE FORCE: THE ROLE OF THE POLICE PSYCHOLOGIST, *10-20 (1994); see also Ronald Weitzer, *Can the Police be Reformed?*, CONTEXTS, Summer 2005, at 21, 25 available at http://www.gwu.edu/~soc/docs/Weitzer/Can_the.pdf (citing some of the ways in which forms of police misconduct or corruption could leave tangible evidence that allows for police departments to implement remedial measures to alleviate the problem) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Some of those methods include recording of characteristics like race, gender, and age of all motorists during stops on prepared forms or computer systems, mounting video cameras on the dashboards of patrol cars to record encounters, implementing “early warning systems” using computerized records of an officer’s complaints, civil suits, use of force and firearms, and other indicators of questionable performance. *Id.*

10. U.S. DEP’T OF JUSTICE, RACIAL PROFILING FACT SHEET 1 (2003) available at http://www.justice.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf (last visited Nov. 8, 2011) (defining racial profiling as law enforcement conduct that “rests on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of other races or ethnicities”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

11. See *Whren v. United States*, 517 U.S. 806, 819 (1996) (concluding that a stop was reasonable under the Fourth Amendment because the officers had probable cause to believe that petitioners had violated the traffic code).

12. See *id.* at 812–13 (reviewing precedent where the Court refused to invalidate arrests based on pretext and observing, “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”).

13. See *id.* at 813 (“We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”).

vehicle contained drugs.¹⁴ Policies such as this do not discourage or prevent a racially-biased officer from conducting a stop. Furthermore, even when officers lack probable cause, the Fourth Amendment allows police officers to conduct investigatory stops to determine whether or not criminal activity is afoot as long as there is reasonable suspicion (a lesser standard than probable cause) for the stop.¹⁵ Unfortunately, these highly discretionary stops permit racial bias, either explicit or implicit, to go unchecked and unpunished. The Court in *Whren* noted that any claims of discrimination could be litigated under the Equal Protection clause.¹⁶ While the Equal Protection Clause prohibits discrimination on the basis of race, in order to succeed on an Equal Protection claim, claimants have to show intentional discrimination and, as is discussed *infra*, substantiating these claims is extremely difficult (especially in light of *Whren* and its allowance of race-neutral reasons to stop suspects).¹⁷

Second, racial profiling presents special problems because whether or not authorities can “prove” racial profiling claims by traditional legal measures, it is indisputable that many minorities rationally *perceive* that they are treated unfairly.¹⁸ Whether racial profiling is real or perceived, failing to implement measures to reduce or prevent the practice damages the credibility of the law-enforcement agency. The perception of injustice undermines the values of our criminal justice system.¹⁹ Ultimately, the diminished faith in law enforcement can detrimentally impact the affected community. Given the difficulties of proving racial profiling and the

14. *See id.* at 818 (“[A] traffic stop . . . is governed by the usual rule that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.”). “For the run-of-the-mine case, . . . probable cause justifies a search and seizure.” *Id.* at 819.

15. *See Terry v. Ohio*, 392 U.S. 1, 30 (holding that a police officer is entitled to conduct limited searches of citizens when the officer believes criminal activity is afoot and the citizen might be “armed and presently dangerous”).

16. *See Whren v. United States*, 517 U.S. 806, 813 (1996) (“But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”).

17. *See infra* Part I.B.

18. *See WEITZER & TUCH, supra* note 5, at 83 (showing overwhelming majorities of Blacks and Hispanics perceive widespread racial profiling).

19. *See* David A. Harris, *Using Race or Ethnicity As a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 449-50 (2003) [hereinafter Harris, *Using Race and Ethnicity As a Factor*] (stating that some law enforcement officers use a person’s skin color or ethnic features to make a prediction about criminal activity); *see generally*, L. Darnell Weeden, *Racial Profiling and the Implications of Jena Six in Undermining the Civil Rights of Blacks In America*, 36 S.U. L. REV. 239, 240-44 (2009) (describing the use of racial profiling by police).

inevitable harms that even the rational perception of profiling can have on a community, finding suitable remedies is imperative.

Police agencies are generally insular entities that cultivate a culture that can be resistant to accountability.²⁰ Increasing transparency and allowing the community access to information may alleviate many of the tensions between police officers and members of these communities. This Article argues that rather than relying on adjudicatory remedies, local law-enforcement agencies should implement proactive measures to increase transparency with respect to internal police practices. Part I explores the difficulty of proving racial profiling claims. Part II explores the harms of racial profiling and argues that policymakers should shift their attention from arguments regarding “proof” that the practice of racial profiling persists and should instead focus on repairing the distrust that the perception of racial profiling and similar injustices within the criminal justice cause.

Remedying an elusive practice such as racial profiling remains a challenging issue for the judiciary and reformers must rely on other avenues for a solution. For example, even where evidence demonstrates that minorities are disproportionately stopped and searched, courts rarely recognize the victim’s claim or provide relief.²¹ Thus, it is clear that courts will not be the catalysts of change. This Article argues that while courts may be reluctant to provide judicial remedies, police departments themselves should not ignore the perceptions and should take measures to reduce any possible profiling and increase partnerships with communities. An indication that a police department may be engaging in racial profiling has a detrimental and far-reaching impact not only on the individuals who experience it first-hand, but also on other members of the targeted community. Ultimately, this pernicious practice threatens to undermine legitimacy in law enforcement and the criminal justice system for large segments of society, which impacts society as a whole. Part III concludes by suggesting proactive remedies institutions and policymakers should consider to alleviate the tensions between communities and police officers

20. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 455 (2004) (stating that “an overly aggressive police culture that facilitates and rewards violent conduct” is the biggest hurdle to achieving lasting police reform).

21. See David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 349–59 (2011) (concluding that a large number of civil suits are not successful because of the barriers presented by the current judicial remedies).

with respect to racial profiling. Data collection efforts are imperative to educating the public and police agencies about racial profiling, but these efforts fall short as a long-term remedy. Therefore, in addition to data collection during traffic stops, this Article proposes several policy solutions that the federal government and state legislatures should implement to address racial profiling within local law enforcement agencies.

I. Racial Profiling: The Problem of Proof

Recent examples demonstrate that police misconduct continues to persist and is a systemic problem in many of our nation's local police departments. In 2011, a federal judge sentenced former Chicago police commander Jon Burge to four-and-a-half years in jail after he was convicted of lying to officials about widespread police misconduct by police officers in the area under his command.²² Months later, in August 2011, a federal jury convicted several New Orleans police officers accused of shooting unarmed citizens on Danziger Bridge in the wake of Hurricane Katrina.²³ Perhaps the most striking aspect of the Danziger Bridge case was the widespread evidence of internal corruption that followed—several supervising officers who arrived to investigate the shooting instead assisted

22. Annie Sweeney, *Burge Given 4 ½ Years in Prison*, CHICAGO TRIBUNE, Jan. 21, 2011, <http://www.chicagotribune.com/news/local/ct-met-burge-sentencing-0122-20110121,0,6520153.story> (last visited Nov. 8, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

23. Richard Fausset, *Five Police Convicted in Post-Katrina Shootings*, L.A. TIMES, Aug. 6, 2011, at A7 (reporting that Sergeants Kenneth Bowen, Robert Gisevius, Archie Kaufman and Officers Anthony Villavaso and Robert Faulcon were found guilty). Five other officers of the New Orleans Police department pled guilty to numerous charges linked to the cover-up: Lieutenant Michael Lohman, Detective Jeffry Lehrman, and Officers Michael Hunter, Robert Barrios, and Ignatius Hill. Sergeant Gerard Dugue faces trial in September for his role. *Id.* For a detailed account of all of the charges and the officer's roles in the cover-up, see *Ex-Cop Pleads Guilty in Katrina Bridge Shooting Cover-Up*, CNN.COM, Feb. 24, 2010, http://articles.cnn.com/2010-02-24/justice/katrina.cop.charges_1_danziger-bridge-police-officers-new-orleans-police?_s=PM:CRIME (last visited Nov. 8, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Ex-Police Officer Admits Role in Cover-Up of Louisiana Bridge Shooting*, CNN.COM, Mar. 11, 2010, http://articles.cnn.com/2010-03-11/justice/nopd.shooting_1_danziger-bridge-new-orleans-police-ex-police?_s=PM:CRIME (last visited Nov. 8, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Third Officer Pleads Guilty in Shooting*, N.Y. TIMES, Apr. 7, 2010, <http://www.nytimes.com/2010/04/08/us/08shooting.html> (last visited November 8, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

in an elaborate plan to conceal the actions of the other officers.²⁴ In addition to the physical brutality these widely publicized incidents characterize, police misconduct also includes falsification of records or evidence, and providing false testimony in court. Racial profiling, which the U.S. Department of Justice defines as a decision by law enforcement that “rests on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of other races or ethnicities,” is another common practice that plagues many police departments.²⁵

Unlike the forms of police misconduct mentioned above, claims of racial profiling can be difficult to substantiate. Thus, the difficulty in detecting racial profiling and determining the extent of the practice by law-enforcement agencies nationwide presents a difficult task. There are few instances where a police department will readily reveal an explicit policy that encourages officers to stop individuals based on race. Similarly, it is rare that an individual police officer will admit that the true motivation of a traffic stop or other investigative police practice was because of the race of the suspect. In contrast to instances of racial profiling, witnesses may capture physical police brutality on videotape and medical professionals can document and testify about a victim’s bruises. Occasionally, police officers may reveal other instances of misconduct or corruption within the police department. When tangible evidence or eyewitness reports exist, authorities can more easily address claims of brutality and corruption. In contrast to these instances, racial profiling remains elusive and is therefore difficult to remedy.

A. Proving Racial Profiling: Dueling Statistics

Although the courts and the United States government have declared that racial profiling is an illegal practice, there is a dangerous perception among members of minority groups (particularly African-Americans and Latinos) that law-enforcement officers unfairly target them because of their race or ethnicity.²⁶ The Supreme Court has clearly established that using

24. See *Ex-Police Officer Admits Role in Cover-Up of Louisiana Bridge Shooting*, *supra* note 23, at 2 (“Lehrmann also admitted he helped compile a false report on the incidents, and was with others when they planted a gun as part of the cover-up, according to court documents.”).

25. U.S. DEP’T OF JUSTICE, *supra* note 10, at 1.

26. See WEITZER & TUCH, *supra* note 5 (documenting pervasive perception among African-Americans and Latinos that police target citizens based on race and ethnicity).

race, ethnicity, or national origin as a proxy for criminal suspicion violates the constitutional requirement that police and other government officials accord to all citizens the equal protection of the law.²⁷ Similarly, many government officials have disavowed the use of racial profiling. For example, former Attorney General John Ashcroft declared that “racial profiling is an unconstitutional deprivation of equal protection under our constitution”²⁸ and Norman Mineta, former U.S. Secretary of Transportation, publicly decried the temptation for authorities to engage in racial profiling.²⁹

Despite these admonitions and decries against racial profiling, there is a widespread perception among many citizens that racial profiling is still a pervasive problem. Unfortunately, there is a growing body of statistical evidence demonstrating that this “perception” of unfair treatment is an uncomfortable reality. Studies from various states and localities demonstrate that police are more likely to stop African-Americans and Latinos and are more likely to ask members of these groups for consent to search their person or vehicle. In the late 1990s, a startling report regarding the Maryland State Police showed that even though African-Americans comprised only 17.5% of the drivers violating traffic laws on the road, 72.9% of all of the drivers who were stopped and searched along a portion of Interstate 95 were African-American.³⁰ Similarly, the New Jersey State Police reported that 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.³¹ Data from Missouri showed that for 2000 and 2001, African-Americans were approximately one-third more likely to be stopped as compared to the rest of the population.³² In 2008, Yale Law Professor Ian Ayres prepared a

27. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (stating that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause); see also Thomas B. Edsall, *Black Caucus, Ashcroft Have Tense Meeting: Attorney General Cites “Candid Exchange” and Stresses Agreement on Profiling*, WASH. POST, March 1, 2001, at A6 (describing a meeting between Attorney General John D. Ashcroft and members of the Congressional Black Caucus).

28. Lizette Alvarez, *Ashcroft Meets With Black Lawmakers Who Opposed His Nomination*, N.Y. TIMES, March 1, 2001, at A21.

29. See David A. Harris, *New Approaches to Ensuring the Legitimacy of Police Conduct: Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 73 (2003) [hereinafter Harris, *New Approaches*] (“Even as U.S. Secretary of Transportation Norman Mineta says, repeatedly and publicly, that there will be no racial or ethnic profiling in airport security, those who run security operations have other ideas.”).

30. I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 850 (2008).

31. Harris, *The Stories, the Statistics, and the Law*, *supra* note 7, at 279.

32. Sylvia R. Lazos Vargas, *Missouri, The “War on Terrorism,” and Immigrants:*

report that also yielded staggering statistics.³³ Ayres found that “[f]or every 10,000 [California] residents, 4,569 Blacks were stopped.³⁴ For Whites, only 1,750 were stopped.³⁵ For Latinas/os, 1,773 were stopped.”³⁶ The same study found that Blacks who were stopped were 127% more likely than stopped Whites to be frisked—and stopped Latinos were 43% more likely than Whites to be frisked.³⁷ In New York City, initiatives implemented in the early 1990s, known as “quality of life” policing, contributed to a disproportionate number of police stops and frisks of racial minorities.³⁸ Recent data demonstrate that this practice remains prevalent within New York City where police continue to stop and frisk Blacks and Hispanics in numbers disproportionate to their representation in the general population. For example, in 2006, of 508,540 reported stops by New York City police officers, 55% involved Blacks, 30% involved Hispanics, and only 11% involved Whites.³⁹

In the past, policymakers focused on the dearth of statistical information related to racial profiling.⁴⁰ With many states currently gathering the data either voluntarily or because of statutory mandates, the

Legal Challenges Post 9/11, 67 MO. L. REV. 775, 813 (2002).

33. See Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department*, ACLU OF S. CAL. 31 (2008), <http://www.aclu-sc.org/documents/view/47> (last visited Nov. 8, 2011) (providing a table of statistics for the number of stops per 10,000 residents in 942 reporting districts in Los Angeles) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. See Reneeh Kim, *Legitimizing Community Consent to Local Policies: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 464 n.12 (2001) (“The New York State Attorney General’s office investigation showed that blacks were six times more likely than whites to be stopped on the street by police, and that Hispanics were over four times more likely to be stopped than whites, during a fourteen-month period in 1998-1999.”).

39. Christopher Dunn, *Civil Rights and Civil Liberties: NYPD Stops and Frisks and the Fourth Amendment*, N.Y. L.J., Feb. 27, 2007, at 3. See Tim Roche & Constance Humburg, *Stops Far Too Routine for Many Blacks*, ST. PETERSBURG TIMES, Oct. 19, 1997, at 1A (providing other statistics involving disproportionate stops and frisks).

40. For example, Representative John Conyers (MI) proposed the Traffic Stops Statistics Act of 1997, a federal statute that would have mandated police organizations to collect data during every police stop, including race and whether a search was performed. Although the legislation did not pass, it eventually prompted states to enact variations of Conyers’s bill. See Harris, *The Stories, the Statistics, and the Law*, *supra* note 7 at 320–23.

predominant issues now focus on debates about the methodology of the data collection and what the data analysis actually shows.⁴¹

To determine whether or not an entity is engaging in racial profiling, some researchers have compared the number of minority motorists stopped by police with the number of minorities living in a given area.⁴² These studies use census data to create a baseline for comparison against the data related to traffic stops.⁴³ If the percentage of minority drivers stopped is greater than that percentage of members of that group living in the area, some researchers view this as a strong indicator of racial profiling.⁴⁴ Similarly, if the percentage of minorities stopped is lower than the percentage of minorities in a particular area, police departments may view this as proof that no racial profiling has occurred. Many critics of this approach argue that the census data, which is collected only every ten years, is outdated and does not reflect the actual percentage of minorities using the road.⁴⁵ Nor does the census data indicate whether residents or non-residents are actually driving in an area. Critics of using census data have argued that results may be skewed because even though someone resides in an area, the data does not consider whether they are the legal driving age or too old or infirm to drive.⁴⁶

Skeptics offer several responses to the claims that the statistical evidence proves that police disproportionately stop minorities. First, some allege that the propensity for minorities to commit criminal acts accounts for the disproportionate number of police stops.⁴⁷ However, experts have widely discredited this proposition, and studies show that even when

41. *See id.* at 277–88 (comparing and contrasting methods of data collections in Ohio, New Jersey, and Maryland).

42. *See Harris, The Stories, the Statistics, and the Law, supra* note 7 at 277–88 (collecting studies from different jurisdictions).

43. *See id.* at 284–85 (examining how census data is gathered and used to create a baseline).

44. *See id.* at 279 (“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.”).

45. LORIE A. FRIDELL, *BY THE NUMBERS: A GUIDE FOR ANALYZING RACE DATA FROM VEHICLE STOPS* 10 (2004).

46. *Id.* at viii.

47. *See* Heather MacDonald, *Fighting Crime Where the Criminals Are*, N.Y. TIMES, June 26, 2010, at A19 (arguing that “[s]uch stops happen more frequently in minority neighborhoods because that is where the vast majority of violent crime occurs”); *see also* Mathias Risse & Richard Zeckhauser, *Racial Profiling*, 32 PHIL. & PUBLIC AFFAIRS, no. 2, 2004, at 131, 132 n.2 (citing empirical studies that purport to show a correlation between membership in certain racial groups and the tendency to commit crimes).

stopped at higher rates than non-minorities, minorities are *less* likely to have contraband in the form of weapons or drugs.⁴⁸ For example, one study reported that in Highway Patrol searches of vehicles driven by non-minorities, successful “hits” for contraband occurred in 33.0% of the searches, while only 26.3% of the searches of cars driven by African-Americans revealed contraband.⁴⁹ Similarly, statistics from California show that although Blacks who had been stopped were 127% more likely to be frisked than stopped Whites, Blacks were 25% less likely to be found with drugs and 33% less likely to have other contraband.⁵⁰ The same study found that even though police disproportionately stopped Latinos, they too, were less likely to have contraband than their White counterparts.⁵¹ While some experts have found the hit rate numbers to indicate a disparity between minorities and Whites, others researchers have found the hit rate to be consistent, with the same percentage of stopped drivers across racial groups yielding hits for contraband.⁵²

There are several critiques regarding the analysis of existing racial-profiling data including a report issued by the Government Accounting Office (“GAO”). In a 2000 report, the GAO noted that much of the data analysis related to racial profiling “did not fully examine whether different groups may have been at different levels of risk for being stopped because they differed in their rates and/or severity of committing traffic violations.”⁵³ The GAO also stated that of the quantitative studies it reviewed, there was a dearth of information concerning the level of seriousness regarding the traffic violations that provided the officer with the requisite level of suspicion or cause to stop the vehicle.⁵⁴ Similarly, the

48. See, e.g., Richard L. Lundman, *Driver Race, Ethnicity, and Gender and Citizen Reports of Vehicle Searches by Police and Vehicle Search Hits: Toward a Triangulated Scholarly Understanding*, 94 J. CRIM. L. & CRIMINOLOGY 309, 315 (2004) (discussing an analysis of data collected by sixty-five Minnesota police departments).

49. *Id.*

50. M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH J. RACE & L. 109, 119 (2009).

51. *Id.*

52. See Chet K.W. Prager, *Lies, Damned Lies, Statistics and Racial Profiling*, 13 KAN. J.L. & PUB. POL’Y 515, 521 (2004) (noting that “studies in several states have revealed a remarkable consistency: whether white or black . . . approximately 30% of police highway searches yield contraband”).

53. U.S. GOV’T ACCOUNTABILITY OFF., GAO/GGD-00-41, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 1 (2000), <http://www.gao.gov/new.items/gg00041.pdf>.

54. See *id.* at 8–11 (reviewing studies analyzing (1) motorists traveling on the New

GAO reported that “missing” data from the comparison groups may have skewed results.⁵⁵

Despite these critiques, information collection on traffic stops can be integral to creating much-needed transparency in law enforcement. Furthermore, commentators recently have argued that there have been marked improvements in the data collection and analysis related to racial profiling, and that researchers have remedied many of the limitations of previous studies.⁵⁶ Continually improving upon the data collection methods and analysis will help policymakers determine what, if any, measures are necessary to combat racial profiling.

B. The Difficulty Sustaining Racial Profiling Claims Based on Equal Protection

Compared to other forms of police misconduct, racial profiling is difficult to prove under current standards. The difficulty in substantiating the existence of racial profiling, and the emphasis policy makers have placed on proving its existence, has made it difficult to implement remedial measures. Unlike physical police brutality which can be proved through tangible evidence (photos, medical reports, or eyewitness testimony) or other instances of corruption, racial profiling is far more difficult to substantiate, and may be nearly impossible to prove in a court of law. In the case of *Wilkins v. Maryland State Police*,⁵⁷ one of the most famous successful racial profiling suits, a rare “smoking gun,” tangible evidentiary proof of a policy of racial profiling, likely prompted settlement.⁵⁸ In this case, Maryland State Police files actually revealed a written memorandum

Jersey Turnpike—one by researcher J.L. Lamberth and another by the New Jersey State Police; (2) a study along Interstate 95 in Maryland; (3) stops of motorists in Florida; and (4) an ACLU report on motorists in Philadelphia).

55. *See id.* at 11 (discussing the significance of the limitations of the available analyses).

56. *See* Melisa Whitney, Note, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 287–88 (2008) (discussing the increased quality of data collection related to racial profiling).

57. For a more complete discussion 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, 563-66 (1977).

58. *See* Harris, *The Stories, the Statistics, and the Law*, *supra* note 7 at 280 (describing the Maryland State Police settlement with Robert Wilkins after discovery revealed an internal police memo instructing troopers to target “black males and black females”).

that set forth a criminal profile explicitly based on race.⁵⁹ Despite the statistics showing the disproportionate stops and searches of minorities, in most instances, victims of racial profiling will not be able to produce these “smoking” memoranda. Ironically, without this crucial evidence of purposeful discrimination, courts will likely bar equal protection claims because plaintiffs have failed to show that the police officers intentionally discriminated against them.⁶⁰

Several courts have refused to grant relief despite evidence of disproportionate traffic stops of minorities. For example, in *United States v. Avery*,⁶¹ the Sixth Circuit held that the defendant’s equal protection claim could not be sustained, and rejected statistics showing that police disproportionately targeted African-Americans because the officers had a plausible, non-racial reason for detaining the defendant.⁶² Similarly, in *Bingham v. City of Manhattan Beach*,⁶³ the Ninth Circuit affirmed summary judgment because appellant failed to provide evidence to refute the officer’s race neutral explanation for the traffic stop.⁶⁴ The Eighth Circuit reached a similar result in *Johnson v. Crooks*,⁶⁵ where the court denied relief because the plaintiff could not provide affirmative evidence of the discriminatory reason for a traffic stop.⁶⁶ Given the constitutional framework of Equal Protection claims and these perverse results, David Harris has noted that racial profiling is “one of those abhorrent creatures that the law prohibits . . . a practice, that if proven, will bring the legal equivalent of lightning bolts hurled by Zeus down on the perpetrators.”⁶⁷ Unsurprisingly,

59. See *id.* n.85 (citing *Armed Drug Traffickers in Allegany County, Maryland: Police Officer Safety*, CRIMINAL INTELLIGENCE REPORT (Md. State Police, Apr. 27, 1992)).

60. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (stating that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause).

61. *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997).

62. See *id.* at 353 (rejecting the defendant’s equal protection claim because the officers had a reasonable explanation for the stop).

63. *Bingham v. City of Manhattan Beach*, 329 F.3d 723 (9th Cir. 2003).

64. See *id.* at 731–32 (affirming summary judgment because appellant failed to provide sufficient evidence to counter the officer’s testimony that the traffic stop was not motivated by appellant’s race); see also *Johnson v. Crooks*, 326 F.3d 995, 999–1000 (8th Cir. 2003) (denying relief because plaintiff failed to provide evidence of discrimination to counter the officer’s race-neutral justification of the traffic stop).

65. *Johnson v. Crooks*, 326 F.3d 995 (8th Cir. 2003).

66. *Id.* at 999–1000 (denying the plaintiff’s claim that she was stopped due to racial profiling because she did not have affirmative evidence).

67. Harris, *New Approaches*, *supra* note 29, at 75.

there is widespread consensus that courts have been “largely ineffective in the battle against profiling.”⁶⁸

Furthermore, racial profiling remains elusive and difficult to remediate because, even in the absence of intentional forms of discrimination, individual officers may be motivated by their unconscious racial biases. Despite much progress on racial issues, racial discrimination is not a “relic of the past” but instead remains a contemporary feature of modern society.⁶⁹ Today, overt displays of discrimination are rare, but racial prejudice “often goes unrecognized even by the individual who responds unconsciously to such motivation.”⁷⁰ For example, several psychological studies testing implicit bias demonstrate that images of African-Americans evoke more fear than other groups and confirm that members of minority groups, particularly African-American males, are associated with aggressive behavior.⁷¹

Whether or not there is definitive proof of discrimination, it is indisputable that many members of minority groups *perceive* that many police officers harbor and exercise racial animus when policing communities of color.⁷² This perception itself can be damaging to the credibility and legitimacy of a law-enforcement agency.

II. The Harms of Racial Profiling

Even assuming statistical evidence of racial profiling is inconclusive and courts fail to find intentional discrimination, these facts have little

68. *Id.*

69. See Seth Kotch & Robert Mosteller, *The Racial Justice Act and the Long Struggle With Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2102 (2010) (discussing the importance of unconscious racial motivation in death penalty sentencing).

70. *Id.*

71. See generally Catherine A. Cottrell & Steven L. Neuberg, *Different Emotional Reactions to Different Groups: A Sociofunctional Threat-Based Approach to Prejudice*, 88 J. PERSONALITY & SOC. PSYCHOL. 770 (2005) (discussing studies of the connection of racial images and bias).

72. See Wesley G. Skogan, Steven A. Tuch & Ronald Weitzer, *Police-Community Relations in a Majority-Black City*, 45 J. OF RES. IN CRIME & DELINQUENCY 398, 398–428 (2008) available at http://www.gwu.edu/~soc/docs/Weitzer/Police_Community.pdf (describing perception of police misconduct); Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1226 (2000) (noting that, “[w]hile needing protection from crime, many distrust the police and see their order-maintenance efforts as bullying and fear producing”).

practical impact for certain individuals or the police officers who work within those communities to keep residents safe. With or without the imprimatur of a court decision, it is indisputable that many members of minority groups perceive an injustice, and this perception is dangerous and harmful to both the community and law enforcement. Even the perception that certain groups are treated unfairly undermines the legitimacy of the law enforcement agency, and thus has a deleterious effect on crime control and prevention.⁷³

A. Racial Profiling Imposes a Racial Tax on Impacted Individuals and Groups

Racial profiling leads to the societal stigmatization of victims known as a “racial tax.”⁷⁴ Both the individual and the targeted community as a whole suffer psychological and emotional harms of racial profiling. Casual observers may view multiple police stops as a mere inconvenience, but in reality this “mere inconvenience” is really a harsh form of social stigmatization. Those who become targets of racial profiling suffer the emotional and psychological burden of racial profiling, and some members of minority groups have reported psychological harms of humiliation and depression as a result of racial profiling.⁷⁵

The “broad taint of suspected criminality”⁷⁶ that burdens the entire ethnic or racial group that has been profiled, has been referred to as a “racial tax.”⁷⁷ Randall Kennedy, a professor at Harvard Law School,

73. See Stephen J. Schulhofer, Tom R. Tyler, & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 347 (“When perceptions of procedural justice and legitimacy decline, people’s willingness to obey also declines, but when authorities build their legitimacy, people are more willing to comply with the law.”).

74. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 213–14 (2002) (noting that Professor Randall Kennedy popularized the term “racial tax”).

75. Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 15–16 (2003) (discussing minority right to respect); AMNESTY INT’L, *Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States* xiv (2004) [hereinafter *Threat and Humiliation*], available at http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf (noting that African-Americans have reported various emotional harms of racial profiling).

76. See Harris, *Using Race and Ethnicity As a Factor*, *supra* note 19, at 454.

77. See Alschuler, *supra* note 74, at 213–18 (explaining the definition of a “racial tax”).

widely publicized this term, which is used to describe the additional burdens placed upon African-American, Arabic, Latino and Asian minorities for their membership within their specific race/ethnic group.⁷⁸ The “tax” has a particularly acute impact upon those of Latino descent, since they are often forced to prove their citizenship in addition to suffering the injustice of racial profiling.⁷⁹ Officers create an environment where Latinos are “cast as foreigners,” and those of the working class in emerging Latino communities are questioned more often since they might bear a resemblance to the “stereotypical image of what illegal immigrants supposedly look like.”⁸⁰ Because a large majority of Latinos live in the United States are citizens or legal immigrants, this means that legal and lawful residents unjustly bear the burden of these “citizenship encounters.”⁸¹ Each of these forms of racial taxation unduly burdens the targeted group, for no other reason than a person’s membership to that group.⁸²

B. Racial Profiling Detrimentally Impacts Minority Communities

In addition to the unjust burdens racial profiling places on minorities, racial profiling implicates several broader societal problems. First, pervasive racial profiling is one factor that may lead to higher incarceration rates among racial minorities.⁸³ Despite significant progress in the sphere of race relations, members of racial minority groups are overrepresented in the criminal justice system.⁸⁴

78. *See id.* (“Randall Kennedy observes that a Latino stopped at an immigration checkpoint is made to pay a type of racial tax for the campaign against illegal immigration that whites, blacks, and Asians escape.”).

79. *See* Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 20 (2005) (noting that Latinos bear a double-burden by shouldering both a criminal and an illegal immigrant stigma).

80. *Id.*

81. *Id.*

82. *See id.* (discussing the burdens placed upon Latinos as a result of racial taxation).

83. *See* Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 344 (2003) (discussing how a higher percentage of traffic stops of minorities may be correlated to the higher percentage of minorities in prison).

84. *See* DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 75–76 (2002) (noting that Blacks and Latinos are disproportionately arrested and incarcerated).

Targeting specific groups for stops, searches, and arrests is linked to increased incarceration rates of those belonging to the targeted groups.⁸⁵ One example involves targeting African-Americans, specifically African-American males, in the investigation and prosecution of drug crimes.⁸⁶ Even if the racial profiling of African-American males for drug crimes leads to the arrest of guilty individuals, innocent members of these minority communities still suffer.⁸⁷ The overrepresentation of racial minorities in the criminal justice system should prompt policymakers to carefully scrutinize the earliest interactions between police and racial minorities. It is within these crucial early stages of investigation that racial profiling is likely to occur.

High incarceration rates exacerbate the overall harm to the community because those who are incarcerated come from the “same racially isolated and socioeconomically disadvantaged neighborhoods.”⁸⁸ By losing a number of the adults from an already disadvantaged area, the community and children suffer without adult members of their society.⁸⁹ In addition, those that return to their community bring with them emotional and psychological effects from the brutality of prison life.⁹⁰ The families of those sent to prison also

85. *See id.* (noting the consequences of targeting a specific group for law enforcement purposes).

86. *See* R. Richard Banks, *Beyond Profiling: Race, Policing and the Drug War*, 56 STAN. L. REV. 571, 594–96 (2003) (examining instances of police profiling of African-American males for such crimes). Banks goes on to note:

During the past quarter century, aggregate increases in incarceration, coupled with growing racial disparities, have resulted in staggering and unprecedented levels of incarceration for black men in particular. A recent study by the Bureau of Justice Statistics found that in 2001 nearly seventeen percent of black men were currently or previously imprisoned. Black men are more than five times as likely as white men to enter prison These disparities have grown dramatically in recent years. While a variety of factors account for these developments, the importance of the drug war is beyond dispute.

Id.

87. *See id.* (“Such distributive injustice is reinforced to the extent that, as the following discussion suggests, the incarceration of the guilty also indirectly burdens the innocent.”).

88. *Id.* at 596; *see also* D. J. Sifton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 54 (2002) (describing the devastating cycle that racially disparate incarceration and sentencing creates).

89. *See* Banks, *supra* note 86, at 596 (“The families of inmates lose the social and economic support that the person might otherwise have provided.”).

90. *See id.* (stating that adults may have trouble with reentry into the community after

suffer, emotionally and economically.⁹¹ Many families often lose their primary breadwinner, and the organization of the familial structure can be destabilized.⁹² If pervasive and unjust racial profiling can be remediated, this may ease some of the economic, political, sociological, and familial harms felt across minority communities that suffer from higher incarceration rates.⁹³

C. Racial Profiling Detrimentally Impacts Police-Citizen Partnerships

Finally, and perhaps most importantly, the perception that certain groups are treated unfairly undermines the legitimacy of the law enforcement agency, and thus has a deleterious effect on crime control and prevention.⁹⁴ Many members of minority communities are also disproportionately victims of crime and may live in areas that experience higher rates of crime.⁹⁵ For example, in many large urban areas, a disproportionate number of crime victims are African-American, and thus partnerships between citizens and police are essential to crime prevention.⁹⁶ As one scholar noted, “[T]here is a causal link between the perception of the law and levels of compliance. Unfortunately, the perception in many poor and minority communities is that the law, as exemplified by the police, is illegitimate, a perception that encourages non-compliance.”⁹⁷

It follows that areas in need of the greatest amount of law enforcement protection are also likely to have a large proportion of residents who distrust law enforcement. Racial profiling also exacerbates tensions between racial minorities and law enforcement,

having endured the conditions of prison).

91. *See id.* (stating that families lose the social and economic support of the imprisoned family member).

92. *See id.* (“The organization and stability of families may be undermined.”).

93. *See id.* (discussing the social harms of incarceration).

94. *See Harris, New Approaches, supra* note 29, at 83 (noting that “[w]hen one segment of society is seen as unfairly targeted or persecuted by the system, the system itself loses legitimacy—not just in the eyes of those on the receiving end of the abusive treatment, but also in the eyes of all citizens”).

95. *See Andrew E. Taslitz, Foreword: Loyalty and Criminal Justice*, 49 *How. L.J.* 405, 413-14 (2006) (noting that in large cities, African-Americans represent a “hugely disproportionate” number of victims).

96. *See id.* (stating that the hugely disproportionate number of African-American crime victims has negatively impacted many African-American communities).

97. Capers, *supra* note 30, at 842.

and undermines the rationale for community policing. Thus, efforts to engage these citizens in crime prevention partnerships with law enforcement face challenges that may not be present in other communities. David Harris also notes that racial profiling can have a negative impact on the way in which minority groups view law enforcement. Harris writes, “Racially targeted traffic stops cause deep cynicism among blacks about the fairness and legitimacy of law enforcement and courts Thus it is no wonder that Blacks view the criminal justice system in totally different terms than whites do.”⁹⁸ For example, San Diego Police Chief Jerome Sanders and the San Diego Police Department voiced concern that the “growing public perception that police target minority drivers [] was ‘eroding public trust and need[ed] to be addressed if community policing . . . [was] [] to be successful.’”⁹⁹

Not only is racial profiling harmful to individuals and communities, but, as previously discussed, there is evidence demonstrating that racial profiling is an ineffective law-enforcement tool. Despite the disproportionate number of stops and searches of African-Americans and Latinos, studies show that when searched, these groups were less likely than Whites to have contraband.¹⁰⁰ Together, these facts confirm not only the existence of racial profiling, but that racial profiling is an ineffective tool for law enforcement whose costs outweigh any negligible benefit. Given these societal costs, innovative solutions are required to address racial profiling.

98. Harris, *The Stories, the Statistics, and the Law*, *supra* note 7, at 298.

99. David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 389 n. 157 (2001). Thus, to prevent the tensions associated with the perception from racial profiling from undermining the gains he had made in community policing, Sanders decided that the San Diego Police Department would “become the first major city police department to begin collecting traffic stop data on its own initiative, without any federal or state mandate.” *Id.* at 389.

100. See Capers, *supra* note 30, at 850 (providing statistics showing that although Blacks and Hispanics were stopped more, Whites were found with evidence of criminal activity more often); see also Darmer, *supra* note 50, at 119 (discussing the unique problems involved in teaching racial profiling issues in racially homogeneous classrooms). Darmer stated:

Although stopped Blacks [in California] were 127% more likely to be frisked than stopped Whites, they were 42.3% less likely to be found with a weapon after they were frisked, 25% less likely to be found with drugs and 33% less likely to be found with other contraband. We found similar patterns for Latinos.

Id.

III. Remedies to Eradicate Racial Profiling

A. Federal and State Legislation Specifically Addressing Racial Profiling

There are several possible measures that policymakers could implement to address racial profiling at both the national and local levels. The almost insurmountable legal standards and the difficulty in sustaining Equal Protection claims, suggests that reliance on judicial remedies is ill-advised. Alternatively, legislative efforts, may offer a more promising strategy to address racial profiling. For many years, Representative John Conyers and others in Congress have been working to pass federal legislation that would address racial profiling. Conyers first proposed the Traffic Stops Statistics Act in 1997, but efforts to pass this legislation failed.¹⁰¹ Then in 2001, Conyers introduced a more comprehensive End Racial Profiling Act of 2001.¹⁰² Despite wide bi-partisan support, this Act also failed to pass but was reintroduced in 2004, 2005, 2007, 2009, and 2010. The End Racial Profiling Act of 2011 was introduced again in 2011 and proponents are anxiously awaiting the bill's fate. The End Racial Profiling Act would prohibit and attempt to eliminate racial profiling by federal, state, local, and tribal law-enforcement agencies and would allow the federal government or private plaintiffs to sue for declaratory or injunctive relief.¹⁰³ Furthermore, if enacted, the law would authorize the United States Department of Justice ("DOJ") to provide grants for "the development and implementation of best policing practices, such as, early

101. See Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997) (requiring data to be collected during all traffic stops for trend analysis); see also Traffic Stops Statistics Act of 1999, H.R. 1443, 106th Cong. (1999) (requiring officers to collect data during all traffic stops for subsequent trend analysis).

102. See End Racial Profiling Act of 2001, H.R. 2074, 107th Cong. (2001) (expanding the aim of Congressman's Conyers proposed legislation).

103. See End Racial Profiling Act of 2010, H.R. 5748, 112th Cong. (2010) (refining a definition of racial profiling). The proposed legislation states:

[T]he practice of a law enforcement agent or agency relying, to any degree, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except when there is trustworthy information, relevant to the locality and timeframe, that links a person of a particular race, ethnicity, national origin, or religion to an identified criminal incident or scheme.

Id.

warning tracking systems, technology integration, and other management protocols that discourage profiling.”¹⁰⁴

Many groups, including the National Association for the Advancement of Colored People and the American Civil Liberties Union, have lobbied Congress to pass the federal legislation that specifically prohibits racial profiling.¹⁰⁵ Despite these efforts, Congress has repeatedly failed to pass the End Racial Profiling Act. Perhaps one positive externality of these repeated, yet unsuccessful efforts to pass federal legislation is that many states have passed their own legislation aimed at addressing racial profiling.¹⁰⁶ More than half of the nation’s states have enacted legislation either prohibiting racial profiling and/or requiring jurisdictions within the state to collect data on law enforcement stops and searches.¹⁰⁷ Even many states that do not statutorily prohibit racial profiling have made voluntary efforts to collect information related to race and traffic.¹⁰⁸

B. Using DOJ’s Pattern or Practice Authority to Remedy Racial Profiling

Much of the contemporary debate related to racial profiling focuses upon whether definitive proof exists regarding an officer’s intentional discrimination or whether an agency has a policy or custom of racial profiling.¹⁰⁹ It is unlikely that an officer will admit his or her bias or that an agency will produce their racially-biased policy, thus making definitive proof of profiling difficult to ascertain. A more effective strategy to

104. 156 CONG. REC. E1341-02 (daily ed. Jul. 15, 2010) (Statement of Rep. John Conyers).

105. Press Release, ACLU, Forum Calls on Congress and Administration to End Racial Profiling: ACLU Hosts Event to Stop Discrimination (Oct. 27, 2011), available at http://www.aclu.org/files/assets/three_faces_merged_document.pdf (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Press Release, NAACP, NAACP-Supported *End Racial Profiling Act* Introduced in the U.S. Senate (Oct. 6, 2011), <http://www.naacp.org/action-alerts/entry/naacp-supported-end-racial-profiling-act-introduced-in-the-u.s.-senate> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

106. Data Collection Resource Center at Northeastern University, *Legislation and Litigation*, <http://www.racialprofilinganalysis.neu.edu/legislation/> (last visited November 8, 2011) (describing legislation passed by different states to end racial profiling) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

107. *Id.*

108. *Id.*

109. See Darmer, *supra* note 50, at 114–18 (recalling *Whren* and subsequent cases that hold an officer’s subjective belief is not a relevant inquiry for reviewing the propriety of a stop).

address racial profiling involves ameliorating systemic policies and practices that encourage or tolerate racial profiling and to assist the police department in implementing practices that will rehabilitate minority's confidence in the police department. It is now widely accepted among scholars that much police misconduct is attributable to an organizational culture within law enforcement agencies that "cultivates or tolerates" police misbehavior.¹¹⁰ Experts have agreed that adjudicatory remedies that are focused on the past misconduct of individual officers are largely ineffective, and that the best way to address police misconduct is to implement proactive practices that encourage broader institutional changes.¹¹¹ For example, the Christopher Commission, which examined the Los Angeles Police Department after the infamous police beating of Rodney King, found that a small number of officers within a police department were responsible for the majority of complaints.¹¹² Therefore, many experts theorize that identifying, monitoring, re-training, or disciplining "problem" officers is likely to lead to the greatest reduction in misconduct.¹¹³ Civil rights suits against officers and municipalities, internal investigations, and citizen-complaint review boards are all tools to address police misconduct. These tools, however, are reactionary and are only utilized to remedy previous, discrete instances of misconduct. It is clear that these adjudicatory measures are inadequate to change the culture of a police department that engages in racial profiling or other systemic issues of misconduct.

An institutional culture that encourages or tolerates racial profiling necessitates an institutional remedy. One of the most promising models to remedy systemic police misconduct is the DOJ's "pattern or practice" authority, which the federal government has used to implement systemic reforms within several local police departments nationwide. In 1994, Congress enacted 42 U.S.C. § 14141, a statute that seeks to address the policies and practices of a police agency, and has shown great promise in

110. See generally Armacost, *supra* note 20, at 457.

111. See Harris, *New Approaches*, *supra* note 29 at 85–87 (describing police departments independently enacting proactive policies).

112. See INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT ix–xi (1991), http://www.parc.info/client_files/Special%20Reports/1%20-%20Chistopher%20Commision.pdf (last visited Nov. 8, 2011) (explaining the findings of the Christopher Commission) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

113. See Armacost, *supra* note 20, at 532 (noting that scholars have concluded that "a focus on re-mediation and retraining rather than increasingly punitive sanctions may actually lead to more certain and lasting reform").

spurring institutional reforms in several local law-enforcement agencies.¹¹⁴ Pursuant to its “pattern or practice” authority under 42 U.S.C. § 14141, the DOJ has required several police departments nationwide, including the Los Angeles Police Department and the District of Columbia Metropolitan Police Department, to reform their policies and practices.¹¹⁵ Section 14141 grants the U.S. government the authority to sue for injunctive relief to change policies within a local police department where DOJ has found a pattern or practice of constitutional violations.¹¹⁶ Generally, the resulting consent decrees or agreements have included reforms of both substantive and procedural policies to create more transparency and ensure accountability.¹¹⁷ One reform includes modifying use of force policies to provide guidelines regarding what type of force is appropriate in apprehending a suspect and defining or limiting circumstances when certain uses of force are appropriate.¹¹⁸ Another common reform DOJ has required

114. See 42 U.S.C. § 14141 (2006) (authorizing the Attorney General to conduct investigations and, if warranted, file civil litigation to eliminate a “pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States”).

115. Press Release, U.S. Dep’t of Justice, Justice Department Reaches Agreement to Resolve Police Misconduct Case Against Columbus Police Department (Sept. 4, 2002), http://www.justice.gov/opa/pr/2002/September/02_crt_503.htm (“Today’s agreement is the eighth settlement under the 1994 Crime Bill.”). “Other settlements entered during the Bush Administration include the Cincinnati Police Department, the District of Columbia Metropolitan Police Department and the Highland Park, Illinois Police Department.” *Id.* Additionally, “[t]he Justice Department continues to monitor settlements covering the Los Angeles Police Department, the New Jersey State Police, the Steubenville, Ohio Police Department and the Pittsburgh Bureau of Police.” *Id.*

116. See 42 U.S.C. § 14141(b) (2006) (“[T]he Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the practice.”).

117. See Memorandum of Agreement Between the United States and the City of Mt. Prospect, Illinois 3 (Jan. 22, 2003), http://www.justice.gov/crt/about/spl/documents/mtprospect_moa.pdf (last visited Nov. 8, 2011) (listing the different procedures the police department was required to implement pursuant to the written policy) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

118. Letter from Shanetta Y. Cutlar, Chief, Special Litigation Section, U.S. Dep’t of Justice, to Subodh Chandra, Director, Dep’t of Law, City of Cleveland 1 (Feb. 9, 2004), available at http://www.justice.gov/crt/about/spl/documents/cleveland_uof_final.pdf (agreement required the modification of the use of force policy, including prohibiting officers from “intentionally firing at moving vehicles unless there is imminent danger of death or serious injury, and other means are not available to avert or eliminate the threat, and, where feasible, some warning has been given”); Press Release, U.S. Dep’t of Justice, Justice Department Reaches Agreement with Buffalo Police Department to Resolve Police Misconduct Investigation (Sep. 19, 2002), http://www.justice.gov/opa/pr/2002/September/02_crt_535.htm (last visited Nov. 29, 2011) (agreement required the modification of the use of force policy specifically for the use of chemical sprays by implementing a new policy, but

is the implementation of an early-warning tracking system to help supervisors identify officers who might need to be re-trained or disciplined.¹¹⁹ Collecting this type of information and using it to make training and personnel decisions may deter the intentional wrongdoing of individual officers. Yet another reform is the implementation of fair and comprehensive complaint processes for citizens who wish to report alleged misconduct.¹²⁰ Many citizens, especially minorities, are reluctant to file complaints against police officers because they simply believe that their complaints will not be fairly processed. To ensure fairness and reduce the possibility for retaliation, officers assigned to investigate citizen complaints should be sufficiently independent from the officers they are investigating. Notably, DOJ has also required several jurisdictions to compile information related to racial profiling.¹²¹ Compiling and publishing information related

also required the police department to revise general use of force policies and procedures for reporting all uses of force) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Memorandum of Agreement, United States Department of Justice and the District of Columbia and the District of Columbia Metropolitan Police Department (Jun. 13, 2001), <http://www.justice.gov/crt/about/spl/documents/demoa.php> (last visited Nov. 29, 2011) (the agreement required the police department to implement general use of force policy modifications that emphasized de-escalation procedures, such as advisements, warnings, and verbal persuasion, as well as specific modifications regarding the use of firearms, canines, Oleoresin Capsicum Spray) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

119. United States v. City of Los Angeles, No. CV 00-11769 GAF (RCx) (C.D. Cal.) (Order Re: Transition Agreement), at 5–7, http://www.justice.gov/crt/about/spl/documents/US_v_LosAngeles_TA-Order_071709.pdf (mandating the continued use of a Training, Evaluation, and Management System (“TEAMS II”) “in the manner in which it was intended—an early warning or risk management system”); Memorandum of Agreement Between the United States Department of Justice and the City of Buffalo, New York and the Buffalo Police Department, the Police Benevolent Association, Inc., and the American Federation of State, County, and Municipal Employees Local 264, at 5–6, ¶¶ 20–23 (Sep. 19, 2002), <http://www.clearinghouse.net/chDocs/public/PN-NY-0004-0001.pdf> (requiring the creation of a management and supervision system for tracking excessive use of force incidents and complaints and using them to correct police officer conduct through evaluation and training, akin to an “early warning system”); Memorandum of Agreement, United States Department of Justice and the District of Columbia and the District of Columbia Metropolitan Police Department, at Section I(a)(2) (Jun. 13, 2001), <http://www.justice.gov/crt/about/spl/documents/demoa.php> (“[T]he Department of Justice has provided MPD with on-going technical assistance recommendations regarding its use of force policies and procedures, training, investigations, complaint handling, canine program, an early warning tracking system. Based upon these recommendations, MPD has begun to implement necessary reforms in the manner in which it investigates, monitors, and manages use of force issues.”).

120. See Memorandum of Agreement *supra* note 117, at 7 (describing the complaint process available to citizens).

121. Racial Profiling Data Collection Resource Center at Northeastern University,

to race and traffic stops and searches may help jurisdictions determine whether officers are disproportionately stopping racial minorities. With vigorous enforcement, DOJ's pattern or practice authority could lead to reforms that will ultimately address many of the systemic issues contributing to tension between minorities and the police.

Several of the agreements and consent decrees that DOJ has entered with local departments have explicitly contained provisions to alleviate racial profiling.¹²² DOJ required in its agreements with police departments in Prince George's County, Maryland, Mt. Prospect, Illinois, and the State of New Jersey that these entities implement measures to eradicate racial profiling. For example, in its agreement with the Mt. Prospect Police Department, the police department was required to develop and implement the following: a written policy against discrimination in policing, including nondiscrimination in conducting traffic stops; documentation of all traffic stops by recording the driver's race, ethnic origin, and gender; the reason for the stop and the nature of any post-stop actions; improved supervisory review of traffic stops and other police enforcement practices; a community outreach and information program, under which officers will give their names and the reason for a traffic stop at the outset of the stop and provide complaint forms in English or Spanish to persons who object to an officer's conduct; increased training regarding nondiscrimination, interpersonal communications, cultural diversity, and ethics; and provide semi-annual public reports providing traffic stop statistics by race and summary information on complaint investigations.¹²³

Legislation and Litigation—DOJ Investigations, <http://www.racialprofilinganalysis.neu.edu/legislation/doj.php> (last visited Nov. 23, 2011) (summarizing several U.S. Department of Justice investigations against police departments in Cincinnati, Buffalo, Columbus, L.A., Pittsburgh, D.C., Highland Park, Montgomery County, the State of New Jersey, and the Village of Mount Prospect that involved investigation for racial profiling and requiring those police departments to collect data regarding racial profiling) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

122. See *In re Cincinnati Policing*, 209 F.R.D. 395, 395 (S.D. Ohio 2002) (describing a Collaborative Agreement that was written to serve this purpose); see also Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Dep't 2 (Apr. 12, 2002), http://www.justice.gov/crt/about/spl/documents/cincinnati_pd_amend_agree_7-25-06.pdf (last visited Nov. 8, 2011) (stating that the parties resolved an alleged pattern or practice of excessive force through a Memorandum of Agreement) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

123. Memorandum of Agreement Between the United States and the City of Mt. Prospect, Illinois 3 (Jan. 22, 2003), http://www.justice.gov/crt/about/spl/documents/mtprospect_moa.pdf (listing the different procedures the police department was required to implement pursuant to the written policy).

DOJ's pattern or practice authority becomes increasingly relevant in the struggle to combat racial profiling for several reasons. First, while some states have passed revolutionary legislation to address racial profiling, the legislative requirements regarding data and other measures to combat profiling vary widely.¹²⁴ Without comprehensive federal legislation that

124. Compare MONT. CODE ANN. § 44-2-117 (West 2011) (prohibiting peace officers from engaging in racial profiling). The Montana statute also requires:

law enforcement agencies to adopt a policy on race-based traffic stops prohibiting the use of race as a pretext for investigation, provides for periodic reviews and collection of data to assess patterns of racial profiling, and authorizes investigations when patterns emerge; that all stops be documented to gather information to be used in assessing violations of racial profiling; state law enforcement agencies to create a detailed written policy that the agency will use to address written complaints of racial profiling, which must include prompt review, a designated person to carry out reviews, acknowledge receipt of complaints within ten days, and report the results of the review to the complainant; cultural awareness training and training in racial profiling through programs certified by the Montana public safety officer standards and training council; counseling and training of peace officers found to have engaged in race-based traffic stops within ninety days of a review; authorizing investigations into individual peace officers' conduct and punishments consistent with applicable laws, rules, ordinances, or policies; periodic reports to the law and justice interim committee; and encouraging law enforcement agencies to apply for federal grants to purchase video camera and voice-activated microphones to be mounted on police cars and used during traffic stops,

with CONN. GEN. STAT. ANN. § 54-1m (West 2011) (requiring each municipal police department to adopt a written policy prohibiting racial profiling). The Connecticut statute also provides the following:

requiring the same to use a form developed and promulgated pursuant to the Chief State's Attorney in conjunction with other agencies and councils guidelines; reports to include information about the number of persons stopped for traffic violations, characteristics of race, the nature of the alleged violation prompting the stop, whether a warning or citation was issued or arrest made, and any additional information the police department deems appropriate; mandating that a copy of each report be retained; mandating that the local law enforcement agency receive complaints and provide both a copy of the complaint and written notification of the review and disposition of the complaint to the Chief State's Attorney and the African-American Affairs Commission; providing civil liability protection for police officers who in good faith record traffic stop information so long as the officer's conduct was not unreasonable or reckless; authorizing the Secretary of the Officer of Policy and Management to order the withholding of state funds to any police department that fails to comply with the provisions of the statute; requiring all local police departments to provide a summary report of all recorded information from traffic stops to the Chief State's Attorney and the African-American Affairs Commission; requiring the African-American Affairs Commission to review the prevalence and disposition of traffic stops and complaints and to report to the Governor, the General Assembly, and also other entities as necessary.

specifically addresses racial profiling, implementing broader reforms that indirectly address profiling may present a reasonable alternative. Second, even where states have enacted legislation to address racial profiling, these laws are not immune to repeal by newly elected state legislatures. For example, in Wisconsin, Governor Tommy Thompson created the Governor's Task Force on Racial Profiling to study racial profiling.¹²⁵ The Task Force found that there was anecdotal evidence of racial profiling within Wisconsin law enforcement agencies and recommended training, community participation, and the collection of data on traffic stops.¹²⁶ After the Task Force issued the report, then-governor Scott McCallum issued an executive order requiring "all enforcement agencies in the State of Wisconsin to enact a policy prohibiting the practice of racial profiling."¹²⁷ Finding that many agencies were not following the recommendations or complying with the executive order, the Wisconsin state legislature passed a racial profiling bill that required all Wisconsin law-enforcement officers to begin collecting and submitting data from traffic stops to determine "whether the number of traffic stops between minorities and non-minorities 1) is disproportionate and 2) whether the number of traffic stop searches between minorities and non-minorities is disproportionate."¹²⁸ However, amid fierce opposition from law-enforcement agencies, the Wisconsin legislature quickly repealed the bill in June 2011.¹²⁹ The repeal of this state law strengthens the arguments that federal protections are necessary to ensure sustained efforts to eradicate racial profiling.

One recent example of how DOJ's enforcement of its pattern or practice authority can address racial profiling is quickly unfolding in several communities near Los Angeles. Pursuant to its pattern or practice

125. OFFICE OF JUSTICE ASSISTANCE, RACIAL DISPARITIES, <http://oja.wi.gov/section.asp?linkid=1344&locid=97> (last visited Nov. 8, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

126. See STATE OF WISCONSIN GOVERNOR'S TASK FORCE ON RACIAL PROFILING 11-19 (2000), available at <http://oja.state.wi.us/docview.asp?docid=15466&locid=97> (last visited Nov. 8, 2011) (describing instances of anecdotal profiling) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

127. Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 740 (2004).

128. OFFICE OF JUSTICE ASSISTANCE, TRAFFIC STOP DATA COLLECTION, <http://oja.wi.gov/section.asp?linkid=1643&locid=97> (last visited Nov. 8, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

129. *Id.*

authority, DOJ recently opened an investigation into the Los Angeles County Sheriff's Department amid violations of racial profiling in the communities of Lancaster and Palmdale.¹³⁰ These communities have experienced a dramatic increase in the number of African-Americans and Latinos in recent years, many of whom live in the communities' public housing.¹³¹ Residents allege that city officials and police have engaged in widespread harassment of many minorities in order to encourage them to move from the community.¹³² DOJ had previously investigated whether officials were violating the Fair Housing Act, and Assistant Attorney General Tomas Perez recently announced that the investigation would expand to include the Los Angeles County Sheriff's Department, which contracts with Palmdale and Lancaster to provide police protection.¹³³ In his announcement, Assistant Attorney General Perez stated that

“[DOJ officials] are analyzing arrest data in the Palmdale and Lancaster [police] stations. These stations appear to have disproportionately high rates of misdemeanor and obstruction arrests compared to the rest of Los Angeles County. While the rates of felony arrests are similar to elsewhere in the county, the two cities appear to have unusually high rates of misdemeanor arrests, and particularly high rates of arrests of African Americans.”¹³⁴

Depending on the outcome of DOJ's investigation, these communities may be required to implement reforms to not only collect data on their traffic stops, searches, and arrests, may be mandated to implement training and other measures to alleviate profiling.

While efforts to collect data on racial profiling should continue, the focus must shift beyond proving racial profiling to changing the perceptions and mending the rift between police and communities of color. The difficulty in capturing the true extent of racial profiling makes it extremely challenging to propose suitable remedies, but implementing widespread

130. See Thomas E. Perez, Assistant Attorney General, Speech at the Antelope Valley Investigation Announcement (Feb. 19, 2011), *available at* <http://www.justice.gov/crt/opa/pr/speeches/2011/crt-speech-110819.html> (last visited Nov. 8, 2011) (noting that “[i]n particular, we are investigating serious allegations of systematic harassment of African-American and Latino residents of these communities, including whether certain leadership in these communities adopted a policy or practice designed to drive certain residents out of the community”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

internal organizational reforms advocated by police practices experts represents a promising strategy to combat this unconstitutional and ineffective practice.