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When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies

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WHEN SUCCESS BREEDS ATTACK: THE COMING BACKLASH AGAINST RACIAL PROFILING STUDIES†

David A. Harris*

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Over the past couple of years, many Americans have become familiar with the term racial profiling: the idea that police may use race as a factor, or *the* factor, in deciding who to regard as a criminal suspect. In the context of profiling on the roads, police use traffic stops as a pretext or an excuse to stop, question, and often search African American and other minority drivers in numbers far out of proportion to their presence in the driving population. Indeed, the practice even has its own cultural nickname; African Americans sometimes say that they get stopped for the offense of “driving while Black,” a cynical twist on the crime of driving while intoxicated.¹

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1. See, e.g., David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Michael Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1 (Black men stopped so often they say they are stopped for the offense one of them “calls DWB—driving while black.”); Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 56, 59 (constant stops by police is what “many African Americans know as D.W.B.: Driving While Black.”).

The disproportionate use of pretext stops to “fish” for evidence of crimes unrelated to driving has long been a daily reality for American Blacks and other minorities, even if it has until recently been largely invisible to Whites. But there are now signs that this is changing, and that Whites have begun to understand that the practice exists and has many negative, even damaging aspects. For example, in a December 1999 Gallup Poll, not just a large majority of Blacks, but a majority of Whites said that they believe that racial profiling is widespread.² This increasing awareness of the problem of racial profiling is due in no small part to the fact that statistics demonstrating the disproportionate impact of traffic enforcement on African Americans and other minorities have become available for the first time over the last four years. These numbers came as a result of court actions in Maryland and New Jersey—the former civil, the latter criminal. The lopsidedness of these statistics surprised many people. In Maryland, though only seventeen percent of the drivers on the relevant roadway were Black, well over seventy percent of those stopped and searched were Black.³ In New Jersey, the race of the driver was the only factor that predicted which cars police stopped.⁴ In both states, the numbers also showed that the traffic stops police made did not reflect different driving behavior among minorities; rather, the evidence was clear that all drivers, regardless of race, violate the traffic code at a nearly uniform high rate.⁵ These findings and those in other studies⁶—performed in different places, at different times, with different data, and involving different police departments—all point in the same direction: The disproportionate use of traffic stops against minorities is not just a bunch of stories, or a chain of anecdotes strung together into the latest social trend. On the contrary, it is a real, measurable phenomenon.

But the result has been more than just a change in public perception. As awareness of these police practices has built, legislatures and even police departments themselves all over the country have begun to take action. This began with the Traffic Stops Statistics Act, H.R. 1443, sponsored by Rep. John Conyers (D. Mich.), which would require that police depart-

2. Frank Newport, *Racial Profiling is Seen as Widespread, Particularly Among Young Black Men*, GALLUP POLL NEWS SERVICE, Dec. 9, 1999 (77% of Blacks and 56% of Whites said they believed “racial profiling,” which was described in detail, was widespread). The wording of the questions on the survey was carefully structured to avoid casting the practice in a negative light so that respondents could applaud the practice as a crime fighting tool if they wanted to; nevertheless, over 80% of all people surveyed viewed the practice as a pernicious tactic that must be curbed. *Id.*

3. See *infra* notes 44–53 and accompanying text.
4. See *infra* notes 33–43 and accompanying text.
5. See *infra* notes 36, 49 and accompanying text.
6. See *infra* notes 54–67 and accompanying text.

ments collect basic data on all of their routine traffic stops.⁷ These data would include the race of the driver, the reason for the stop, whether a search was performed and its legal rationale, and several other important pieces of information.⁸ These data would be collected for two years and forwarded to the U.S. Department of Justice for study and analysis.⁹ Since the federal Act's introduction in 1997, state legislators have introduced similar bills in more than twenty states.¹⁰ A number of state bills have

7. H.R. 1443, 106th Cong. (1999). The predecessor of H.R. 1443 was the Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997).

8. H.R. 1443.

9. *Id.*

10. *Alabama*, Ala. H.B. 7, 1999 Reg. Sess. (Ala. 1999) (requiring data collection in connection with seat belt law); *Ala.* S.B. 374, 2000 Reg. Sess. (Feb. 2000) (forbidding profiling and requiring police departments to have written antiprofiling policies and to collect data on all traffic stops); *Florida*, H.B. 1113, 102nd Reg. Sess. (Fla. 2000) (requiring data collection; a predecessor bill, S.B. 1456, 1999 Reg. Sess., died in committee on April 30, 1999); *Illinois*, H.B. 3911, 91st Gen. Assem., Reg. Sess. (Ill. 2000) (requiring the statewide collection of statistics on all traffic stops); *Iowa*, S.B. 2183, 78th Gen. Assem., 2d Sess. (Iowa 2000) (requiring police departments to collect data on all traffic stops); *Kansas*, H.B. 2683, 78th Leg., Reg. Sess. (Kan. 2000) (requiring that proposals be sought for traffic stops study that would include data collection); *Kentucky*, Ky. S.B. 286, 2000 Reg. Sess. (Feb. 2000) (requiring police departments to have written antiprofiling policies and to collect data on all traffic stops); *Maryland*, H.B. 225, 2000 Reg. Sess. (Md. 2000) (requiring collection of data on all traffic stops); *see also*, the predecessor bill, S.B. 430, 1999 Reg. Sess. (Md. 1999) (establishing a task force to study stops for routine traffic violations); *Massachusetts*, S.B. 1180, 181st Leg., Reg. Sess. (Mass. 1999) (requiring the collection and study of information relating to routine traffic stops); *Missouri*, H.B. 2056, 90th Gen. Assem., 2d Sess. (Mo. 2000) (requiring police departments to collect data on all traffic stops); *Ohio*, H.B. 363, 123d Gen. Assem. Reg. Sess. (Ohio 1999) (requiring the statewide collection of statistics on all traffic stops); *Oklahoma*, S.B. 1444, 47th Leg., 2nd Sess. (Okla. 2000) (making racial profiling by an officer of any municipal, county, or state law enforcement agency, a misdemeanor); *Pennsylvania*, H.B. 1649, 182d Gen. Assem., Reg. Sess. (Pa. 1999) (requiring collection of data on traffic stops in most to the state's largest municipalities); *see also* H.B. 2157, 182d Gen. Assem., Reg. Sess. (Pa. 1999) (requiring training for law enforcement officers); *Rhode Island*, S.B. 2143, Jan. Sess. (R.I. 2000) (requiring data collection and authorizing attorney general to conduct a study of all routine traffic stops; H.B. 7164 is the same bill); *see also*, the predecessor bill, H.B. 8430, Jan. Sess. (R.I. 1997) (requiring superintendent of the state police to keep statistical data on traffic stops and publish it annually); *South Carolina*, S.B. 915, 114th Gen. Assembly, Reg. Sess. (S.C. 2000) (mandating particular antiprofiling policy); *see also*, the predecessor bill, S.B. 778, 113th Gen. Assembly, Reg. Sess. (S.C. 1999) (requiring the collection of traffic stop data by the Highway Patrol and the State Police); *Tennessee*, S.B. 2415, 101st Gen. Assem., Reg. Sess. (Tenn. 2000) (requiring data collection on traffic stops); *Georgia*, S.B. 376, 145th Gen. Assem., Reg. Sess. (Ga. 2000) (required racial profiling policy); *Virginia*, S.B. 743, 2000 Sess. (Va. 2000) (requiring superintendent of state police to keep statistical data on all traffic stops); *see also*, the predecessor bill, H.J.R. Res. 687, 1999 Sess. (Va. 1999) (setting up a joint subcommittee of both houses of the legislature to study pretextual traffic stops); *Washington*, S.B. 6683, 56th Leg., 2d Sess. (Wash. 2000) (requiring data collection on traffic stops); and *Wisconsin*, S.B. 354, 94th Leg., Reg. Sess. (Wis. 2000) (requiring data collection on traffic

become law—in Connecticut,¹¹ North Carolina,¹² Massachusetts,¹³ Missouri,¹⁴ Rhode Island,¹⁵ Tennessee,¹⁶ Washington State,¹⁷ and Kansas.¹⁸ Two other state legislatures have passed such bills, but the bills have been vetoed by their states' governors.¹⁹ Even in states that do not require that police collect data, many police departments do, including those in Houston,²⁰ San Diego,²¹ San Jose,²² and state police in Washington State,²³ Florida,²⁴ and Michigan.²⁵ When Jerry Sanders, former Chief of the San Diego Police Department, made his agency the first in the nation to begin to collect traffic stop data, he made it clear that even if police didn't feel that they were doing anything wrong, collecting and disseminating statistics was essential for police accountability and community credibility.²⁶ All in all, these actions signify a strong trend, one focused not just on

stops); and *New Jersey*, S.B. 863, 209th Leg. (N.J. 2000) (requiring the superintendent of state police to collect and analyze data on all traffic stops); A.B. 3502, 209th Leg. (N.J. 2000) (criminal charges); S.B. 650, 209th Leg. (N.J. 2000) (filing of complaints).

11. An Act Concerning Traffic Stop Statistics, 1999 Conn. Acts 99-198 (Reg. Sess.).

12. An Act to Require the Division of Criminal Statistics to Collect and Maintain Statistics on Traffic Law Enforcement, N.C. GEN. STAT. § 114-10 (Michie Supp. 1999).

13. 2000 Mass. Adv. Legis. Serv. 228 (West).

14. 2000 Mo. Laws. §§ 590.650, 590.653.

15. R.I. GEN. LAWS § 31-21.1-4 (2001).

16. TENN. CODE ANN. § 38-1-402 (2001).

17. WASH. REV. CODE § 43.43.480 (2000).

18. 2000 Kan. Sess. Laws 180.

19. The current California bill is S.B. 1389, Reg. Sess. (Cal. 2000) (requiring collection and analysis of data on routine traffic stops). Its predecessor was vetoed in 1999 by Gov. Gray Davis. S.B. 78, Reg. Sess. (Cal. 1999) (requiring collection and analysis of data on routine traffic stops). In Wisconsin, the proposal Governor Tommy Thompson vetoed was part of Wisconsin's omnibus two-year budget bill, and as such did not have its own separate bill number. A new bill with similar provisions has been introduced this year, despite last year's veto. S.B. 354, 94th Leg., Reg. Sess. (Wis. 2000).

20. S.K. Bardwell & Lori Rodriguez, *HPD to Collect Profiling Data; Police Chief, Mayor Want to Find Out If Minorities Unfairly Targeted*, HOUSTON CHRON., Aug. 12, 1999, at 1.

21. See Michael Stetz & Kelly Thornton, *Cops to Collect Traffic Stops Racial Data*, S.D. UNION-TRIB., Feb. 5, 1999, at A1; see also Julie Ha, *Groups Seek Data on Race-Based Police Stops*, L.A. TIMES, Apr. 16, 1999, at B3 (discussing San Diego's decision to collect data because, spokesman said, "we as an organization have nothing to hide.").

22. *San Jose Will Track All Stops By Officers*, N.Y. TIMES, Mar. 28, 1999, at 29 (San Jose's chief of police began data collection effort because it is "the right thing to do" because of strong community perception that improper stops are being made).

23. Angela Galloway, *State Patrol to Note Race, Gender in Stops; Effort is Instituted to Deter Racial Profiling*, SEATTLE POST-INTELLIGENCER, Sept. 24, 1999, at A1.

24. Mike Brassfield, *Most Believe Racial Stops Widespread*, ST. PETERSBURG TIMES, Dec. 11, 1999, at 3A (Florida Highway Patrol to begin collecting data on traffic stops in 2000).

25. David Shepardson, *Cops Will Log Race of Drivers*, DETROIT NEWS, December 10, 1999, at A1 (Michigan State Police to begin tracking race of all drives in January 2000).

26. Stetz & Thornton, *supra* note 21.

profiling, but on a whole host of police accountability issues, of which profiling is the best known by the general public.

Looking ahead, one need not have supernatural powers to predict what may happen next. Some police agencies and their allies will oppose any efforts to take even the very modest first step of mandating data collection. Their efforts may focus on negative effects of data collection; they may also deny that the experiences of African Americans and Latinos at the hands of the police mean anything. But whatever else they do, they will almost certainly attack the existing statistics. These data, they will argue, do not prove racial profiling; they are at best inconclusive, and fall short of establishing the existence of any social problem, let alone something as pernicious as racially discriminatory law enforcement practices in traffic stops. Therefore, they will argue, no further action of any kind is necessary.²⁷

The data currently available are, in fact, less complete than a statistician would ideally like. Yet to take these objections at face value misses the proverbial forest for the trees, and completely ignores the single most important aspect of the context in which these numbers have been assembled: an environment of (until quite recently) nearly complete hostility to the idea that police agencies should keep any numbers on traffic stops or any other area of alleged racial bias in policing. In other words, the statistics that exist now have all been gathered not just without police cooperation, but with active police opposition and antagonism, and in the absence of standardized record keeping practices or even any record keeping at all. It is therefore hardly surprising that the data is not everything it could be. In fact, the surprising thing is how good the data have proven to be, considering the roadblocks thrown up to its collection.²⁸

If these criticisms were aimed at helping to assure better, more accurate data collection in future studies, everyone concerned with the problem would welcome it. Ensuring that data would be plentiful, freely and publicly available, and properly analyzed, in order that the racial profiling problem receive correct, competent, and unbiased analysis, could only serve the cause of justice by making for complete and well-informed discussion. Unfortunately, this is not what I expect. Rather,

27. See, e.g., Heather Mac Donald, *The Myth of Racial Profiling*, CITY J., Spring 2001 paras. 1, 15 ("The anti-'racial profiling' juggernaut must be stopped, before it obliterates the crime-fighting gains of the last decade, especially in inner cities According to the racial profiling crowd . . . [the] alleged evidence for racial profiling comes in two varieties: anecdotal, which is of limited value, and statistical, which on examination proves entirely worthless."), at http://www.city-journal.org/html/11_2_the_myth.html (last visited May 16, 2001).

28. See, e.g., David Barstow and David Kocieniewski, *Records Show New Jersey Police Withheld Data on Race Profiling*, N.Y. TIMES, Oct. 12, 2000, at A1.

these arguments will be made as a way to stymie further inquiry, especially to persuade legislative bodies not to enact any requirement that statistics on traffic stops be kept. In short, the argument will be that there is no problem, and thus no need for the scrutiny of police behavior that data collection would inevitably bring. But this view represents a cynical stacking of the deck. First, the issue is framed using the highest possible standard: Is there conclusive statistical proof of profiling? Second, the burden is placed on those who oppose profiling to make this statistically conclusive case. Third, the data needed to carry this burden and prove the case is available only when and if police agencies choose to collect it. Fourth, since there is resistance on the part of police to the idea that profiling exists and to any efforts to address it, and since some in law enforcement see it as in their self-interest to avoid collecting data, they do not collect data unless forced to do so. The upshot, of course, is that with no data collected, the case can never be proven, and the party with the burden of proof—the opponents of profiling—will lose the argument. Their failure will be foreordained, even in the face of all of the data collected and analyzed so far.

We should avoid proceeding in this unfortunate direction. This is not, after all, a question of proving a defendant guilty beyond a reasonable doubt, or even of proving the existence of some fact in a civil suit. In the arena of public policy, especially when we debate the effects of the actions of government officials and institutions, our discussion should be governed by far different standards—standards that do not allow the institutions themselves to close off debate simply by allocating the burden of proof and then by withholding the data or evidence necessary to fully explore the truth. And in no area of law—or policy-making—should this be more true than when questions of race and its relationship to criminal justice arise. Since time out of mind, minorities have complained about unequal, harsh, and even brutal treatment at the hands of the police. Even the Supreme Court has acknowledged that aggressive policing has been used, particularly against Blacks, to control and harass minority populations.²⁹ I propose that in an ongoing debate on questions con-

29. *Terry v. Ohio*, 392 U.S. 1, 17 n.14 (1968) (acknowledging that these police practices played an important role in creating “friction” and “resentment” in minority communities of color regarding police). The Court was not alone in recognizing this connection. See, e.g., Report of the National Advisory Commission on Civil Disorders 158, 159–60 (1968) (noting that police departments had begun to adopt so-called aggressive patrol tactics utilizing stops and frisks, “without weighing their tension-creating effects [between police and Blacks] and the resulting relationship to civil disorder. . . .”); United States President’s Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 184 (1967) (“Misuse of field interrogation . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt “aggressive patrol,” in which officers are encouraged routinely to stop and question persons on the street who are unknown to

cerning the possibility of racial or other types of invidious discrimination by public institutions, we should apply a *prima facie* standard to these claims in the public arena. In other words, if African Americans or Latinos say that they have been the victims of racial profiling, we should not ask for conclusive proof in the strictest statistical sense; rather, if they can present some credible evidence beyond anecdotes, some statistics that indicate that we may, indeed, have a problem, the burden should then shift to the public institution—here, law enforcement agencies—to collect the information necessary to either confirm or dispel the perception that a problem exists.³⁰ This seems an important ingredient to the proper understanding and resolution of societal policy arguments and disagreements, especially when the governmental action alleged has such dire consequences for the individuals affected and for the integrity and legitimacy of the institutions themselves. When public confidence in our most vital institutions of government is undermined, as is clearly already happening with racial profiling, we ought not be satisfied with the declaration that conclusive proof is not available, especially when access to that proof is in every way controlled by the institutions accused of wrong doing. Instead, when victims present a *prima facie* case, the burden should shift to the government to show that its conduct is above reproach. Only that type of standard for our public debate on such crucial issues can ensure the legitimacy of our public institutions

I. THE NUMBERS SO FAR: WHAT CURRENT STATISTICS ON RACIAL PROFILING SHOW

To ground our discussion, we need an idea of what the existing statistics are and what they say. There have been a number of studies, but I will focus on three: those from New Jersey, Maryland, and Ohio. And since I have described these studies in detail elsewhere,³¹ I will use a more “bottom line”-oriented approach here.

Since until recently police rarely kept any records concerning their conduct in this area, data are scarce. This may be because law

them, who are suspicious, or whose purpose for being abroad is not readily evident.”); Brief for the NAACP Legal Defense and Education Fund, Inc., as Amicus Curiae at 60–62, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 67, and 74) (“The ill effects of stop and frisk practices, particularly in the ghetto, is as strong at least as any evidence of their good effects ‘from a purely law enforcement point of view’ We are gravely concerned by the dangers of legitimating stop and frisk, and thus encouraging, and increasing the frequency of occasions for, police–citizen aggressions. Speaking bluntly, we believe that what the ghetto does not need is more stop and frisk.”).

30. I am not arguing here for a new standard of proof in courts on these questions. Rather, my point is confined to public debates on important questions of public policy.

31. David A. Harris, *The Stories, The Statistics, and The Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 275–88 (1999).

enforcement and the public have only recently recognized the problem, or because many police agencies still oppose keeping comprehensive records of traffic stops.³² Nevertheless, as a result of statistical inquiry in legal actions (New Jersey and Maryland) and independent academic research (Ohio), there are now some statistics available.

A. New Jersey

The most rigorous statistical analysis of the racial distribution of traffic stops comes from criminal litigation in New Jersey. In the late 1980's and early 1990's, African Americans often complained that police stopped them repeatedly on the New Jersey Turnpike. In 1994, a number of defendants who alleged that New Jersey State Troopers had stopped them in racially- or ethnically-biased stops joined in a motion to suppress evidence filed in *State v. Soto*.³³ Dr. John Lamberth served as an expert in the case; his study³⁴ shows how he applied the tools of statistical analysis to this problem.

The goal of Lamberth's study was "to determine if the State Police stopp[ed], investigat[ed], and arrest[ed] black travelers at rates significantly disproportionate to the percentage of blacks in the traveling population, so as to suggest the existence of a policy—official or *de*

32. In 1997, Representative John Conyers of Michigan introduced H.R. 118, the Traffic Stops Statistics Act, which would require analysis of data on each traffic stop—including the race of the driver, whether a search took place, and the legal justification for the search—by the Department of Justice. Traffic Stops Statistics Act of 1997, 104th Cong. (1st Sess. 1997). When the bill passed the House of Representatives on a unanimous voice vote, the National Association of Police Organizations, an umbrella group representing more than 4,000 police interest group across the country, announced its strong opposition to the bill. Robert L. Jackson, *Push Against Bias in Traffic Stops Arrested*, L.A. TIMES, June 1, 1998, at A5. Officers would "resent" having to collect the data, a spokesman for the group said; moreover, there was "no pressing need or justification" for collecting the data. *Id.* 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 104th Congress. The Conyers bill has now been reintroduced in a slightly modified in the current Congress. The Traffic Stops Statistics Study Act of 1999, H.R. 1443, 106th Cong. (1st Sess. 1999).

33. 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996). 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.*, 517 U.S. 806 (1996), 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. *Id.* at 813. As the case was eventually decided, the trial court granted the motion to suppress based on New Jersey's own law and constitution. *State v. Soto*, slip op. at 13–15 (N.J. Super. Ct. Law Div. 1996).

34. Dr. John Lamberth, Revised Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers/Travelers on the New Jersey Turnpike Between Exits or Interchanges 1 and 3 from the years 1988 Through 1991 (Nov. 11, 1994) (unpublished statistical report) (on file with the Michigan Journal of Race & Law).

facto—of targeting blacks for investigation and arrest.”³⁵ In order 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 drivers on that same stretch of road. To ensure further precision, Lamberth also measured the population of violators of traffic laws, broken down by race. This was important; because it would answer the question whether disproportionate stops of minority drivers were due to their driving behavior. All of this data enabled him to test, carefully and rigorously, whether Blacks were in fact being disproportionately targeted for stops, and whether there was an explanation for it other than race.

Lamberth’s analysis made several things strikingly clear. First, Blacks and Whites violate the traffic laws at almost exactly the same high rate.³⁶ Thus driving behavior could not explain differences in how police might treat Black and White drivers.³⁷ With regard to arrests, 73.2% of those stopped and arrested were Black; 13.5% of the cars on the road had a Black driver or occupant.³⁸ The disparity between these two numbers “is statistically vast,”³⁹ Lamberth pointed out; the number of standard deviations⁴⁰ present—54.27—means that the probability that the racial disparity is a random result “is infinitesimally small.”⁴¹ Radio and patrol logs yielded similar results; Blacks were approximately 35% of those stopped (but not arrested) though they are only 13.5% of those on the road—19.45 standard deviations. Considering all stops in all three types of records surveyed, the chance that 34.9% of the cars combined would

35. *Id.* at 2 (emphasis in original).

36. *Id.* at 26.

37. Lamberth’s finding was supported by the testimony of several State Police supervisors and officers. All said that Blacks and Whites drive indistinguishably. *Soto*, 734 A.2d at 354–55.

38. Lamberth, *supra* note 34, at 12, 16.

39. *Id.* at 20.

40. Lamberth explains that

[t]he 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, *infra* note 44, at 8–9.

41. Lamberth, *supra* note 34, at 21.

have Black drivers or occupants "is substantially less than one in one billion."⁴² Lamberth concluded:

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.⁴³

B. Maryland

A short time after completing his analysis of the New Jersey data, John Lamberth conducted a study of traffic stops by the Maryland State Police on Interstate 95 between Baltimore and the Delaware border.⁴⁴ In 1993, an African American Harvard Law School graduate named Robert Wilkins filed a federal lawsuit against the Maryland State Police.⁴⁵ Wilkins alleged that he and his family were stopped, subjected to questioning, and had their car searched by a drug-sniffing dog because of their race.⁴⁶ When a State Police memo instructing troopers to look for drug couriers—described as "mostly black males and black females"⁴⁷—surfaced during discovery, the State Police settled with Wilkins. As part of the settlement, they agreed to give the court data on every stop followed by a search conducted with the driver's consent or with a dog for two and a half years.⁴⁸ These data and others Lamberth and his team gathered allowed him to conclude, as he had in New Jersey, that Blacks and Whites drove no differently; the percentages of Blacks and Whites violating the

42. *Id.* at 25.

43. *Id.* at 25–26.

44. John Lamberth, Report of John Lamberth, PH.D. (Nov. 8, 1996) (unpublished statistical report, Temple University, Dep't of Psychology) (on file with the Michigan Journal of Race & Law).

45. Complaint, *Wilkins v. Md. State Police* (Civil No. MJG-93-468) (D. Md. 1993) (on file with the Michigan Journal of Race & Law).

46. *Id.* at 3. For a more complete description of the *Wilkins* case, see Harris, *supra* note 1, at 563–66.

47. Maryland State Police, Criminal Intelligence Report (Apr. 27, 1992) (unpublished report) (on file with the Michigan Journal of Race & Law).

48. Settlement Agreement at ¶ 9, *Wilkins v. Md. State Police*, (D. Md. 1993) (Civ. No. MJG-93-468) (on file with the Michigan Journal of Race & Law).

traffic code was virtually indistinguishable.⁴⁹ More importantly, Lamberth's analysis found that although 17.5% of the population violating the traffic code on the 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.⁵⁰ The disparity between 17.5% Black and 72% stopped includes 34.6 standard deviations.⁵¹ Such statistical significance, Lamberth said, "is literally off the charts."⁵² Though he used language that exhibited restraint and caution, Lamberth came to a devastating conclusion.

While no one can know the motivations 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 with and strongly support the assertion that the Maryland State Police target[ed] the community of black motorists for stop, detention, and investigation within the Interstate 95 corridor.⁵³

C. Ohio

In the spring of 1998, members of the Ohio General Assembly who wanted to sponsor legislation to require data collection on traffic stops asked that I gather some preliminary statistical evidence of the existence of a racial disparity in traffic enforcement in the state. This, they said, would help them persuade their colleagues to support such an effort. The methodology I used illustrates how one might attempt to analyze this type of problem when the best data are not available. Two circumstances made the task more difficult than that faced by John Lamberth in New Jersey and Maryland. First, there are no statewide data on routine traffic stops in Ohio that can be correlated with race. Similarly, no sizable police department in the state keeps any data at all of its traffic stops that could be broken down by race.⁵⁴ Another way of finding out who was

49. Lambreth, *supra* note 44, at 4.

50. *Id.* at 8.

51. Statewide, State Police found drugs on virtually the same percentages of Black and White drivers. *Id.* at 7-8. 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.

52. *Id.*

53. *Id.* at 10.

54. The one exception is the Ottawa Hills Police Department; Ottawa Hills is a small (approximately 4,000 residents, and almost exclusively White) incorporated village

stopped would have to be found. Second, the legislators wanted numbers from different parts of an entire state. While Lamberth's methods worked well in ascertaining the driving populations of particular stretches of individual, limited access highways—the New Jersey Turnpike and I-95 in Maryland—applying the same method to an entire city, even a medium-sized one, would require a different methodology. To do this in cities and towns across an entire state would, of course, be more so. Thus another method had to be found to ascertain the Black population on the road.

Since law enforcement agencies kept no complete records, I obtained data from municipal courts in four Ohio cities in order to find out the percentage of Blacks stopped. Municipal courts in Ohio handle all low-level criminal cases⁵⁵ and virtually all of the traffic citations issued in the state. Most of these courts also generate a computer file for each case, and that file includes the race of the defendant as part of a physical description. Using municipal court data enabled me to obtain a breakdown of all tickets correlated with the race of the driver for Toledo, Akron, and Dayton, and for Franklin County, which includes Columbus and surrounding suburbs. The downside of using this data is that it only includes stops in which police have given citations. Stops resulting in no action or a verbal warning are not included. In all likelihood, using tickets alone might underestimate any racial bias that is present in stops; the root of police discrimination lies in discretionary actions, and stops not resulting in citations or arrests likely represent the exercise of the most discretion.⁵⁶ Since using tickets could underestimate any possible racial bias, it makes any resulting calculations conservative, i.e., it tends to give law enforcement the benefit of the doubt. Similarly, the way the statistics are grouped in the analysis is also conservative because I have used only two categories of drivers: Black and non-Black. 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 targeted stops directed at them. Using conservative assumptions means that if a bias does show up in the analysis, we can be

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.

55. See OHIO REV. CODE ANN. § 1901.20 (1998 & Supp. 2000) (detailing municipal court criminal and traffic jurisdiction). Some small number of citations are handled by mayor's courts, which still exist in certain areas of the state; see also OHIO REV. CODE ANN. § 1905.01 (1998 & Supp. 2000) (setting out jurisdiction of mayor's courts for ordinance and traffic violations).

56. See, e.g., Expert Report of John J. Donohue at 12, *Moser v. Vill. of Mount Prospect*, 12 F. Supp. 2d 780 (N.D. Ill. 2000) (No. 98 C 7580) (the more severe the police action—from stop to citation to arrest—the more likely it is that defendant's behavior dictates police action) (on file with the Michigan Journal of Race & Law).

relatively confident that it exists.⁵⁷ These numbers allow us to calculate the percentage of all tickets issued in 1996, 1997, and the first four months of 1998⁵⁸ that were issued to Blacks by the Toledo, Akron, and Dayton Police Departments and all of the police departments in Franklin County.⁵⁹ We then need to compare these data to the other number needed for the analysis: a baseline of drivers on the road, broken down by race. Since direct observation of driving populations all over a state is simply not practical, another approach 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.⁶⁰ Using this data, a reasonable basis for comparison with ticketing percentages can be constructed: Black versus non-Black *driving age population*. This was done by breaking population down both by race and by age. By selecting a lower and upper age limit—fifteen and seventy-five, respectively⁶¹—for driving age, the data yield a reasonable reflection of

57. 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 different; 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 non-Blacks to receive more than one ticket in the same stop, an interesting 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 encounter, the driver was only stopped once. Using only the ticketing data will also keep the analysis conservative, so as to underestimate any bias that might be present and lend additional credence to any conclusion. 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 Blacks may tend to drive older cars than Whites that may have more obvious safety violations, or that Blacks may use seat belts less often than Whites. Therefore, for purposes of this study, I have chosen to treat this difference as if it is not evidence of racial bias.

58. Data from Franklin County Municipal Court include only the years 1996 and 1997, but none from 1998.

59. 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 Memorandum from Mike Pirik, Chief Deputy Clerk, Franklin County Municipal Court, to David Harris (Aug. 28, 1998) (on file with the Michigan Journal of Race & Law).

60. The data in this portion of the study were obtained from the Census Bureau's web site, <http://www.census.gov>.

61. 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, *1990 Census Data*, available at <http://www.census.gov>. Also, the Census data breaks people down by

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 National Personal Transportation Survey, a study done every five years by the Federal Highway Administration of the U.S. Department of Transportation.⁶² The survey indicates that 21% of Black households have no vehicle.⁶³ If the driving age population figure is reduced by 21%, this gives us another baseline figure.

Comparing ticketing percentages for Blacks and the two baseline numbers can then be compared by constructing a "likelihood ratio": a number that will show whether or not 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 21%.⁶⁴ The likelihood ratio will allow the blank in the following sentence to be filled in: "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 are receiving tickets at a rate higher than would be expected. Using both baselines—the Black driving age population, and the Black driving age

ages into five-year blocks, and both fifteen and seventy-five allow the analysis to use these existing break points.

62. U.S. DEP'T OF TRANSP., 1995 NATIONWIDE PERSONAL TRANSPORTATION SURVEY (1995), available at <http://www-cta.ornl.gov/npts>. 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. U.S. DEP'T OF TRANSP., OUR NATION'S TRAVEL: 1995 NPTS EARLY RESULTS 27 (1995), available at http://www-cta.ornl.gov/npts/1995/Doc/NPTS_Booklet.pdf. 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.

63. Email from Eric Hill, Center for Urban Transportation Research, to David Harris (Oct. 9, 1998) (on file with the Michigan Journal of Race & Law).

64. 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 getting the ratio of Blacks ticketed to Blacks in the relevant population. Then the ratio of non-Blacks ticketed to non-Blacks 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 percent, and Blacks in the driving age population are 17.9 percent; $.308/.179 = 1.7206$. Non-Blacks are 69.2 percent of those ticketed, and 82.1 percent of the driving age population; $.692/.821 = .8428$ the likelihood ratio is $1.7206/.8421$, or 2.04.

population less 21%—the likelihood ratios for the Toledo,⁶⁵ Dayton, Akron and Franklin County⁶⁶ are presented in Table 1.

TABLE I
 LIKELIHOOD RATIO “IF YOU’RE BLACK, YOU’RE ___
 TIMES AS LIKELY TO GET A TICKET IN THIS CITY
 THAN IF YOU ARE NOT BLACK”

City	Black Driving Age Population*	Black Driving Less 21% of Black Households Without Vehicles**
Columbus/Franklin County***	1.8	2.4
Akron P.D.	2.04	2.73
Toledo P.D.	2.02	2.7
Dayton P.D. (Dayton)	1.8	2.5
* Source: U.S. Census Bureau ** Source: National Personal Transportation Survey, Federal Highway Administration, U.S. Department of Transportation (1995); Eric Hill, Research Associate, Center for Urban Transportation Research *** Includes all police agencies in Franklin County, not just Columbus		

As is surely obvious, the method used here to attempt to discover whether racial disparity in traffic enforcement is a problem in Ohio is less exact than the method used in New Jersey and Maryland. There are assumptions built into the analysis at several points, all in an attempt to arrive at reasonable substitutes for observation-based data. But all of the assumptions are conservative, calculated to err on the side of caution.⁶⁷

65. 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 15.

66. 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.

67. According to sociologist and criminologist Joseph E. Jacoby, the numbers used here probably are flawed—Blacks are probably “at an even greater risk of being stopped” than these numbers show. Emails from Joseph E. Jacoby, Bowling Green State University, to David Harris (Feb. 2 & 3, 1999) (on file with the Michigan Journal of Race &

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 non-Blacks are. 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—another conservative assumption—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 seems obvious. At the very least, further study—something that a data collection bill might mandate so that more accurate data could be used—is needed.

II. THE COMING BACKLASH: CRITICISM OF THE CURRENT STATISTICS

With some familiarity with the best statistical information available on racial profiling on the road, we can now examine the arguments that will be made to contradict it. These arguments come down to several separate but related ideas; all concern information missing from the existing data.

A. *The Data Do Not Include All Stops Police Make*

This is a common criticism. A full picture of police traffic stop practices, the argument goes, must include data not just on traffic citations, but all stops police make, whether a citation is issued or not. Police do not issue tickets every time they make a traffic stop; as everyone who has ever been stopped knows (and hopes), officers have discretion to issue a warning, sometimes written, often simply verbal, in lieu of actually citing the driver for any infraction. In fact, most drivers have probably attempted—whether through overt request or something more subtle, such as a cooperative attitude or an outright confession of wrongdoing—to persuade a police officer not to issue a ticket. For their part, police officers may decide to forgo the more formal ticket if the driver and vehicle turn up “clean” in a computerized records check, and if the

Law). For example, Blacks are likely to drive fewer miles than Whites; the National Personal Transportation Survey, which reports that Whites average 4.4 vehicle trips daily and Blacks average 3.9, supports Jacoby’s contention. See U.S. DEP’T OF TRANSP., OUR NATION’S TRAVEL, *supra* note 62, at 27. Since better data do not exist, all of the assumptions made in the analysis involve some speculation. But the important point, Jacoby says, is that all of the assumptions probably result in an *underestimate* of the risk of Blacks being stopped. In statistical terms, the biases in the assumptions are additive, not offsetting. Emails from Jacoby, *supra*.

offense is not of the most serious type. Thus any statistical analysis that relies on traffic tickets alone risks basing any conclusions on an incomplete picture, and should be disregarded.

This very criticism has been made of my own work in Ohio. Because data on all stops—both with and without citations—were not available on a statewide or even local basis,⁶⁸ I used data on traffic tickets for the four metropolitan areas I studied. As discussed above and elsewhere, there is reason to believe that the data I used may actually underestimate the presence of any bias against African Americans.⁶⁹ Nevertheless, it is true that the data are less complete than would be ideal.

B. *The Data Do Not Include Violator Rates*

Another criticism will be that the data do not include violator rates: the rates at which various populations of drivers violate the traffic laws. The idea of including them in any study is that what one ideally wants is a comparison between the rates at which any particular group *could have been stopped*, because they violated the law, and the rate at which *they were, in fact, stopped*. This comparison, the argument goes, is what will show whether or not the police stop particular groups at rates disproportionate to what their driving behavior indicates would be justified. Put another way, perhaps the reason for racially disproportionate stops is not race at all, but driving behavior between racial groups. Only two studies—those in New Jersey and Maryland—have included violator rates. Others, including mine, have not.

Including violator rates is indeed useful, but this argument can only be taken so far. It is indeed important to know whether the driving of different racial groups might differ so much that this behavior could explain who police stop. The New Jersey and Maryland studies showed beyond any doubt that this hypothesis did not hold up: almost everyone, in every racial and ethnic group, was violating the traffic laws at the same rate.⁷⁰ And this strongly supported the testimony of every law enforcement officer in the New Jersey case who was asked about it; all said, without qualification, that minority and White drivers did not drive differently from one another.⁷¹

Beyond these facts, state traffic laws themselves show why the violator rate is less important than it might at first seem. An examination of any state's vehicle code shows that it contains an incredible array of

68. See *supra* notes 46–47 and accompanying text.

69. See *supra* note 62 and accompanying text.

70. See *supra* notes 36, 49 and accompanying text.

71. *State v. Soto*, 734 A.2d 350, 354–55 (N.J. Super. Ct. Law Div. 1996) (specifying that all officers who testified said that there were no racial and ethnic differences in driving behavior).

offenses—not just the usual “moving violations” like speeding, failing to signal a lane change, and not stopping at a light or stop sign, but a catalogue of vehicular arcana that few people know exists. Add to this an almost equally voluminous array of regulations concerning vehicle equipment—required mirrors and lights, tire tread depth, darkness of tinted glass, and the like—and the conclusion is inescapable: there’s an offense for every driver during any short drive. In fact, in the jurisdiction in which I formerly worked, police officers had the “three block” rule: no driver could drive for longer than three blocks without violating *some* aspect of the traffic code. This means that the violator rate is only so important: unless we see marked differences in driving patterns between racial groups (and the New Jersey and Maryland data, as well as the police testimony in New Jersey, tell us that we don’t), everyone can be stopped with justification. Thus it isn’t a question of who is breaking the law at what rate; rather, it’s a question of who police decide to enforce the law against, since everyone is breaking traffic laws almost all the time at the same rate.

*C. The Data Do Not Account for Different Levels
of Police Discretion in Stops*

This is a more subtle form of the argument about violator rates. Essentially the idea is that not all traffic violations are equally likely to draw police attention and intervention. For example, erratic driving behavior—swerving from lane to lane, driving far too fast, and failure to exercise control of the vehicle—that could indicate driving while intoxicated will almost always result in a stop. Catching drunk drivers and eliminating the great safety hazard they pose is a top priority for most police departments, and the risks to public safety posed by an intoxicated driver are immediate, so any officer who notices this type of driving is highly likely to pull the car over. These could be termed low discretion stops—situations in which almost any officer would be very likely to make a stop. In contrast, violations like driving a few miles an hour over the speed limit, failing to signal a lane change, or a minor defect in a piece of equipment, such as a cracked taillight lens, which do not pose much of an immediate safety hazard might be called “high discretion” stops: offenses for which officers would only stop a vehicle if they had some reason other than the traffic violation itself to do so. There might even be a middle group of offenses—a medium discretion category—consisting of those violations more likely to attract attention and result in stops than the high discretion group, but not by any means nearly certain to do so, as with evidence of drunk driving. Examples of this might be exceeding the speed limit by more than fifteen miles per hour, but with-

out evidence of recklessness that might accompany drunken driving.⁷² As one government report put it, the level of discretion exercised would vary according to behavior, and if different groups of drivers vary in the driving behaviors this is an alternative hypothesis that must be explained.⁷³

It is almost certainly true, however, that the number of high discretion traffic offenses will be small, relative to the massive amount of regulation in state vehicle codes. For every infraction like drunken or reckless driving, which are immediate threats to public safety, there may be a hundred or more that are regulatory in nature. Moreover, one wonders how easy it will be to separate medium from high discretion offenses; indeed, the line between them may prove to be illusory.

This argument also confuses two important ideas. Drivers who commit dangerous traffic offenses may be at greater *risk* of police intervention. But this does not necessarily mean that there is *greater police activity* organized and taking place concerning these offenses. Put simply, risk of enforcement is not the same thing as actual enforcement.⁷⁴ While it would not be surprising if, in this instance, there *was* higher actual enforcement of laws against these offenses, this represents an unproven assumption.

D. *The Data are Not Adjusted to Reflect Differentials in Police Deployment, Which Often Depend on Crime Rates*

This argument seeks to explain higher levels of traffic stops of minorities as a consequence of heavier police presence in minority neighborhoods. Areas with higher minority populations, the argument runs, tend to have higher crime rates in general. As a consequence, police departments often react by assigning greater numbers of officers, patrol cars, and other resources to these neighborhoods. This is where there is greater demand for police services, so it makes sense to have more officers in the area. As a consequence, there are more traffic stops

72. See DEBORAH RAMIREZ ET AL., U.S. DEP'T OF JUSTICE A RESOURCE GUIDE ON RACIAL PROFILING AND DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSON LEARNED 81-82 (2000) (on file with the Michigan Journal of Race & Law).

73. GENERAL ACCOUNTING OFFICE, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 19 (2000) (calling driving behavior a "plausible alternative explanation"), available at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IpAddress=162.140.64.21&filename=gg00041.pdf&directory=/diskb/wais/data/gao>.

74. See Samuel Walker, Traffic Stop Data Collection: Making Sense of the Data 23 (2000) (distinguishing between "exposure to potential police intervention" and actual officer behavior) (unpublished manuscript, University of Nebraska at Omaha) (on file with the Michigan Journal of Race & Law).

in these areas, the argument goes. Since these areas are heavily populated by minorities, we should expect more stops of minority drivers there.⁷⁵

On closer examination, this argument does not hold up. First, as with the argument concerning levels of discretion differing with the type of violation observed,⁷⁶ this viewpoint confuses the risk of enforcement with actual levels of police activity. It is true that people in areas with larger numbers of police present are at higher risk to encounter a police officer, whether driving, walking or simply waiting for a bus. But this does not mean that police enforcement activity would be organized, targeted, or used in ways that would in fact result in more traffic stops in these neighborhoods. In fact, the opposite might well be true. If police officers are in these areas to fight higher levels of crime, it seems plausible that they may be focused away from traffic enforcement relative to what might be done in another neighborhood with less crime.

Second, the evidence does not support this argument. A test of the deployment hypothesis comes from the analogous practice of using stops and frisks to assert a police presence and deter and detect crime. In the wake of the shooting of African immigrant Amadou Diallo by four members of the New York Police Department's aggressively proactive Street Crimes Unit, many people alleged that police targeted minorities with stops and frisks with a frequency that bordered on harassment. The Police Department denied the allegations, arguing that the aggressive use of stops and frisks was in direct proportion to the crime rates of the areas that they patrolled, and had nothing to do with the race of those stopped. In an effort to learn the truth, the office of New York State Attorney General Elliot Spitzer undertook a study of the records of 175,000 stops and frisks by the NYPD over a period of fifteen months. The study was designed to control for crime rates and the racial compositions of the neighborhoods. The results were disturbingly stark.

[B]lacks comprise 25.6% of the City's population, yet 50.6% of all persons "stopped" [during the period] were black. Hispanics comprise 23.7% of the City's population yet, 33.0% of all "stops" were of Hispanics. By contrast, whites are 43.4% of the City's population, but accounted for only 12.9% of all "stops". . . . Blacks comprise 62.7% of all persons stopped by the SCU [NYPD's Street Crimes Unit] [After accounting for the effect of differing crime rates, during the covered period,] blacks were "stopped" 23% more often than whites, [across all crime categories. In addi-

75. *E.g.*, SAN JOSE, CALIFORNIA POLICE DEP'T, VEHICLE STOP DEMOGRAPHIC STUDY FIRST REPORT 6-1 to 6-2 (1999).

76. *See supra* notes 72-74 and accompanying text.

tion, after accounting for the effect of differing crime rates,] Hispanics were stopped 39% more often than whites [across crime categories]⁷⁷

When crime rate is used to project a stop rate for each precinct, precincts (mostly minority precincts) with the highest stop rates had stop rates in excess of what would be predicted simply based upon their crime rates. By contrast, precincts with the lowest stop rates (mostly White precincts) had stop rates far below what would be predicted based upon their crime rates.⁷⁸ In other words, in a situation closely analogous to the use of traffic stops, utilizing data from the police themselves covering tens of thousands of police/citizen encounters, the “stops follows deployment” argument does not hold water. Racial bias still shows through.

III. STACKING THE DECK: THE BURDEN OF PROOF AND THE LACK OF DATA

If the dominant thrust of each argument criticizing current data collection practices is that more, better and more detailed data would improve our knowledge of what is happening in policing, surely everyone would agree. This, in fact, is the thrust of the main arguments of proponents of data collection on traffic stops: collect the data to give us a thorough understanding of the reality on the streets. It is in everyone’s interest to have a complete set of facts to work from; only with solid information can we come to accurate and defensible judgments that must underlie any good policy decision.

But arguing for more or better data collection is not, in fact, the way that opponents will structure their arguments. Instead, the arguments concerning incomplete data and alternative explanations for profiling will become reasons *not* to gather data. The reasoning may bear a resemblance to sophisticated social science, but in fact it closes the door to any real inquiry aimed at learning the facts. The evidence, the argument goes, is simply inconclusive; it does not—indeed, could not—demonstrate the existence of racial bias in traffic enforcement. Therefore, there is simply no basis to conclude that any problem exists.⁷⁹

77. OFFICE OF THE N.Y. ATTORNEY GEN., THE NEW YORK CITY POLICE DEPARTMENT’S “STOP AND FRISK PRACTICES” Ch. 5 pt. 1A (1999), available at http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html.

78. *Id.*

79. *Study Indicates Blacks Receive More Tickets*, AMARILLO GLOBE-NEWS, Oct. 4, 2000 (despite study showing Blacks more likely than Whites to be ticketed in Texas, chair of state Department of Public Safety refused to take any action because study is flawed and “I’m not going to start a massive investigation unless and until there is some indication

And this is where the debate goes off the track. In the name of seeking conclusive proof, opponents of any action to address profiling stack the deck. It is one thing to wish for conclusive proof, based on the best possible data. But it is another thing entirely to say that there is no problem to address because the data can't prove it, *when police themselves have the power to collect the data but refuse to do so*. Police departments themselves could begin efforts to collect the data available that would prove or disprove the existence of profiling. More than a hundred departments nationwide, including those in Houston, San Jose, San Diego, and state police in Michigan, Florida, Washington State and many other jurisdictions, have already begun to do.⁸⁰ The answers are, in other words, completely within their power to obtain. Are there difficult questions and choices to be made on how any individual police department does this? Assuredly. Won't this cost money? No doubt it will, though not as much as opponents seem to think it may. But simply saying it will be hard or cost a lot does not mean that the problem does not exist. In fact, proof—whether or not it demonstrates that a problem exists—is within reach, as long as we have the desire to know the answer and the political will to do the work necessary to know the truth. But by casting the burden on the opponents of profiling to prove their assertions conclusively, and by refusing at the same time to obtain the necessary data to settle the question when it is in their power to do so, opponents manipulate the situation in a way that makes it impossible to meet the challenge.

This situation brings to mind the U.S. Supreme Court's 1984 decision in *United States v. Leon*.⁸¹ In *Leon*, the Court considered whether it should recognize a so-called "good faith" exception to the exclusionary rule. In the case, a search was performed by police who had obtained a warrant. It turned out later, however, that the magistrate should not have granted it.⁸² The police had done exactly what the law required: they had obtained a warrant from a neutral judicial officer before taking action that crossed the Fourth Amendment line.⁸³ The question was whether

that something is going on."), available at http://www.amarillonet.com/stories/100400/tex_studyindic.shtml.

80. Robert Tanner, *Many Police Agencies Tracking Race*, AP, Mar. 2, 2000, LEXIS, AP File ("well over 100" police agencies nationwide tracking race); KEVIN J. STROM & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE, *TRAFFIC STOP DATA COLLECTION POLICIES FOR STATE POLICE*, NCJ 180776 (1999) (Listing jurisdictions that collect racial statistics for traffic stops), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tsdcp99.pdf>. See also *supra* notes 7–25 and accompanying text.

81. 468 U.S. 897 (1984).

82. *Id.* at 903–04.

83. *Id.* at 902.

the trial court should have suppressed the evidence. The warrant was, in fact, bad, but the police had relied on it in good faith.⁸⁴

Ultimately, the Supreme Court decided that trial courts should not exclude evidence obtained with a warrant later found defective.⁸⁵ But the interesting aspect of the case for our purposes is not what the justices decided, but how. They began by casting their inquiry not as a search for Fourth Amendment values, history, or guidance, but in another, more pragmatic direction: a cost/benefit analysis. On the cost side of the ledger, the Court said that there were substantial costs associated with the exclusion of probative evidence.⁸⁶ Exclusion of evidence impedes the search for truth, and may bring the entire judicial system into disrepute.⁸⁷ As for benefits, the Court found that the sole purpose of the exclusionary rule was deterring misconduct by the police or other relevant actors.⁸⁸ Thus the only benefits that might accrue from excluding the evidence would have to take the form of deterrence. The Court found no evidence that either police officers or magistrates issuing warrants would be deterred by excluding evidence gathered in good faith reliance on bad warrants. Police officers in such situations had, after all, done exactly what we would have wanted: they obtained and acted upon warrants. There was therefore no reason to think about deterring them, and no evidence that would support any argument to the contrary. Magistrates would very likely not even know of any decision to exclude evidence, so the message exclusion supposedly sends would probably not even get to them.⁸⁹ Quoting an earlier case, the Court summed up its view succinctly: "No empirical researcher, proponent, or opponent of the [exclusionary] rule, has yet been able to establish with any assurance whether the rule has a deterrent effect"⁹⁰ With these considerations in mind, the Court said, applying the exclusionary rule made no sense: it brought no measurable benefit, at a fairly steep cost.⁹¹

Notice what the Court did in *Leon* that implicitly decided the outcome of the case. The burden is placed squarely upon proponents

84. *Id.* at 904.

85. *Id.* at 905, 922.

86. *Id.* at 907.

87. *Id.* at 908.

88. *Id.* at 908–09. Of course, the purposes of the exclusionary rule were not always thought to be so limited. Cf. *Mapp v. Ohio*, 367 U.S. 643, 656–660 (1961) (rule serves both to deter police misconduct and to uphold judicial integrity).

89. *Leon*, 468 U.S. at 916–917.

90. *Id.* at 918 (quoting *United States v. Janis*, 428 U.S. 433, 452 n.22). Of course, this is no longer true. See Myron W. Orfield, *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992) (all actors in the criminal justice system report that exclusionary rule deters police misconduct, particularly in "big" cases).

91. *Leon*, 468 U.S. at 922.

of applying the exclusionary rule. They must demonstrate the existence of benefits outweighing the “substantial” costs of suppression. The only possible benefit of deterrence was one that could never be proven because, as the Court said, there were no data to support either side of the argument. By structuring the discussion in this way, the outcome is foreordained. Requiring empirical proof when no data exist, and then allocating the burden to one side or the other, means that the party with the burden will lose every time. The dissenting justices made exactly this point.

The Court has sought to turn this uncertainty [over whether the exclusionary rule deters] to its advantage by casting the burden of proof upon the proponents of the rule [But] “the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative. [The] assignment of the burden is merely a way of announcing a predetermined conclusion.”⁹²

What is happening in the discussion of racial profiling statistics is even worse than what happened in *Leon*. Just as in *Leon*, the empirical evidence—at least in the best form—exists only rarely now, as a result of rare phenomena such as lawsuits. But unlike in *Leon*, these data can, in fact, be obtained by the very people who say there is no evidence. But as long as they continue to refuse to collect data, they win the argument. Thus the refusal to collect data even as police departments continue to assert that they have no problem with racial profiling can in the last analysis be seen as nothing less than a grand manipulation. When you don’t like your opponents’ assertions and you control the flow of information, insist on conclusive proof while at the same time cutting off the flow of data.

IV. PROPOSAL: SHIFTING THE BURDEN BY PRESENTING A PRIMA FACIE CASE ON PUBLIC POLICY QUESTIONS INVOLVING RACIAL DISCRIMINATION

The analogy to the *Leon* case exposes the fundamental flaw in the argument of those challenging racial profiling statistics. They cast the debate in a form that gives them ultimate control of the facts, and then refuse to produce them. Thus what should be—must be—an open, fair, and accurate discussion of a vitally important issue—the role that race may be playing in our criminal justice system—becomes instead an un-

92. *Id.* at 942–43 (Brennan, J., dissenting) (citing Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 *IND. L.J.* 329, 332–333 (1973)) (last alteration in original).

enlightening circle of assertion of the existence of a problem, denial, refusal to collect the evidence necessary to actually answer the question, and a conclusion that the assertion has not been proven. No one gains by this. Those who make the charge that police target minorities for traffic stops remain angry, frustrated, and unsatisfied, and ultimately come to regard not only the police but the entire criminal justice with cynicism and deep distrust. Police officers—not their departments or supervisory hierarchies, but the on-the-front-lines officers themselves—must do their already difficult jobs under even more trying conditions when those they police do not trust them and may regard them as agents of a repressive system. And the debate does not get resolved. Instead, for African Americans and other minorities, it becomes just one more festering, long-term wound set against a background of untold years of accumulated injuries and slights at the hands of police. For police, it becomes another issue that splits them from everyone else, that encourages an “us vs. them” mentality in their relations with the public.

There is a better way, and it depends not on new rules for courts or other tribunals (though these might help) or on newer or more sophisticated types of proof. Instead, we must focus on the ways that we understand and conduct our discussions of public policy, particularly on question of justice and race. In the realm of public policy debate, we certainly wish to make all of our important decisions based on the best, most complete information possible. But it cannot help any of us to deny the existence of a problem because the data could be better, when better data can become available if we are willing to act. This is especially true when the problem involves an issue that goes to the heart of what our country stands for: the allegation that agents of the government itself who are empowered to enforce the criminal law are doing so on the odious basis of race. Assertions like these present question of transcendent importance. Our nation fought a civil war, and in its aftermath added the Fourteenth Amendment to the Constitution to specifically assure that no state would ever again deny to any of its people the equal protection of the laws. The more than one hundred years since the Fourteenth Amendment have seen a more or less continuous struggle for equal protection, peaking in the 1950's and 60's with the struggles for civil rights and the dismantling of the Jim Crow system in the South. An integral part of this struggle was the effort to set limits on policing, particularly as it had been used as an instrument of racial oppression.⁹³

93. *E.g.*, Michael J. Klarman, *Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the World War II Era* (Dec. 2000) (unpublished manuscript, University Of Virginia School of Law) (“the linkage between the birth of modern criminal procedure and southern black defendants is no fortuity”), available at http://papers.ssrn.com/sol3/papers.cfm?cfid=529821&cftoken=72278805&abstract_id=252071.

This was a consistent theme of the Warren Court's criminal procedure cases, in which the Court asserted unprecedented power over police in the states in order to assure that all citizens were treated fairly, regardless of race or ethnicity.

In this context, a question of racially biased law enforcement raises an issue of paramount importance for our republic and the ideals of our government. It challenges the legitimacy of the entire criminal justice system, and without a satisfactory resolution threatens to corrode the rule of law that bind us together as Americans. Because issues of race and law enforcement are so vital, they should not be approached in the way we might consider either a scientific question—for example, a requirement that a new drug be proven safe and effective before it can be made available—or a question in the courts, in which the complaining party would have to carry the burden of proof or lose. Instead, we should use a different concept: the idea of a *prima facie* case. The *prima facie* case is an idea familiar to everyone who works with the law. In the simplest terms, it means that a party making an assertion of an injury or wrongdoing by another must advance *some evidence*—not necessarily conclusive proof, but some credible evidence—that tends to prove the case. When this *prima facie* burden is met, the burden then shifts to the other party to offer evidence rebutting it. In the case of allegations of racially-biased activity by a government agency, presenting some evidence of profiling, even if it is not conclusive, should shift the burden to the agency to at least collect the data or information that would allow the truth of the allegations to be tested where the institution has it within its power to do so. This would mean that when African Americans come forward with sure evidence of racial bias by police over the general run of cases, and the police could collect facts to disprove this, they would be under an obligation to do so. Failure to do so should be viewed as a concession that the complaining party's assertions are correct, or would in fact be borne out if the evidence were collected. Alternatively, failure to answer the question when it is possible to do so should encourage institutional sanctions—withholding of police department funding, perhaps, or the tying of funding to the taking of particular actions aimed at rooting out the problem.

This approach has several advantages. By reconceptualizing the ground rules for our discussion of important issues like race and policing, we put ourselves in a position that moves us away from endless posturing and defensiveness and toward the gathering of real facts upon which we can make the best choices. For example, if a state or municipality collected data on its traffic stops and found that the data did not support the assertion that police were using race as a factor in traffic stops, those concerned with the issue might feel the beginnings of some greater degree of trust in the police, and all involved could move on to work together on important issues of public safety. If, on the other hand, the

data show some evidence that profiling is taking place, the department could begin to root it out and make changes in training and supervision that seem indicated. Police and those they serve could then begin a better relationship in which they work together, instead of perceiving themselves on the opposite sides of some great divide. And best of all, the issue would be resolved not in the courts, where the adversarial system can encourage a mentality of war and confrontation, but within the institutions that have the expertise and the mission of working on and solving these problems.

CONCLUSION

Much of the current debate over racial profiling has centered on the quest for evidence and hard numbers in an effort to move beyond the anecdotal. Some of this has, in fact, been accomplished in early studies, and all of them point in the same direction: Using different data from different police departments, we see that we may, indeed, have a problem. Nevertheless, it is true that the data are not all that one could want. That is why those who feel profiling is a problem have proposed the comprehensive collection of data on all routine traffic stops to fill the blanks in our knowledge. But opponents have used the lack of data to argue that there is no problem—despite the fact that it is within their control to collect the data and make it available for study. Thus they stack the deck: they claim there is no problem, but block any attempt to obtain the information to draw this—or any other—conclusion.

The terms of the debate, and any debate involving sensitive question of race and criminal justice should be changed. As long as there is *prima facie* evidence that indicates that a problem may, indeed, exist, the burden should shift to the public institutions accused of discrimination to produce data where it is within their power to do so. Only by requiring that institutions respond to us in this way can citizens have the confidence that our police departments are using the vast and important powers we give them in a fair and even handed way—a way that honors the overarching American principle of equal justice under law.