

# Michigan Journal of Race and Law

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Volume 6

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2001

## Subtracting Race from the "Reasonable Calculus": An End to Racial Profiling? *United States V. Montero-Camargo* 208 F.3D 1122 (9th Cir. 2000) Cert. Denied Sub Nom

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### Recommended Citation

Elisabeth R. Calcaterra & Natalie G. Mitchell, *Subtracting Race from the "Reasonable Calculus": An End to Racial Profiling? United States V. Montero-Camargo* 208 F.3D 1122 (9th Cir. 2000) Cert. Denied Sub Nom, 6 MICH. J. RACE & L. 339 (2001).

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SUBTRACTING RACE FROM THE “REASONABLE  
CALCULUS”: AN END TO RACIAL PROFILING?  
*UNITED STATES V. MONTERO-CAMARGO*,  
208 F.3D 1122 ( 9TH CIR. 2000) CERT. DENIED SUB NOM

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The federal government’s 1998 “Buckle Up America” campaign, an effort to increase seat belt use, had the potential of preventing needless tragedies.<sup>1</sup> The campaign’s goal was to make the failure to wear seatbelts a primary offense nationwide, thereby permitting officers to stop vehicles in which occupants were not “buckled up.”<sup>2</sup> Minority communities were expected to benefit the most from the bill, as young African Americans and Latinos are more likely to die in car accidents than Whites because of failure to wear seatbelts.<sup>3</sup>

But soon after the campaign was launched, minority civic organizations’ support began to flag.<sup>4</sup> The Urban League expressed its concern to the Department of Transportation that its members feared the primary seatbelt enforcement laws would simply give the police another tool with which to harass minority drivers.<sup>5</sup> The League said that it could not sign on to the campaign without assurances “that the necessary protections will be put in to ensure that black people and other people of color specifically are not subject to arbitrary stops by police under the guise of enforcement of seat belt laws.”<sup>6</sup> Such has been the effect of racial profiling on minority communities: a law encouraging the use of seat belts is viewed first as an opportunity for police to make arbitrary traffic stops, and second as a measure to save lives. Taking a step to prevent this pervasive police practice of racial profiling, the Ninth Circuit Court of Appeals held, in *United States v. Montero-Camargo*,<sup>7</sup> that race may not be used as a factor to determine the reasonableness of a traffic stop.

This Case Note presents the facts of *Montero-Camargo*, describes the decision of the Ninth Circuit Court in historical context, and analyzes the effect of the Court’s holding. The Case Note argues that while the

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1. See David A. Harris, *The Stories, The Statistics, and The Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 306–07 (1999).

2. See *id.*

3. *Id.*

4. See *id.*

5. See *id.*

6. *Id.* at 307 (citation omitted).

7. 208 F.3d 1122 (9th Cir. 2000), *cert. denied sub nom. Sanchez-Guillen v. United States*, 121 S. Ct. 211 (2000).

Ninth Circuit's decision to prohibit the use of race as a factor in determining the reasonableness calculus in traffic stops is progressive in spirit, implementing the decision will be difficult. Thus far, mechanisms designed to limit officers' use of race in traffic stops have been ineffective and have left victims with little recourse, resulting in a disproportionate number of innocent African American and Latino drivers being stopped pretextually.<sup>8</sup>

## I

The facts of *Montero-Camargo* are uncontested. On an October afternoon in 1996, German Espinoza Montero-Camargo and Lorenzo Sanchez-Guillen, the former driving a Chevy Blazer and the latter a Nissan sedan, were traveling with Mexicali plates on a California highway about fifty miles from the Mexican border when they were stopped by border patrol agents.<sup>9</sup> Following a tip that the drivers made U-turns shortly before the El Centro border patrol checkpoint, the agents got into separate marked cars and drove south to investigate.<sup>10</sup> About a mile from the checkpoint, the agents saw the vehicles re-entering the highway after pulling off the shoulder in an area allegedly known for picking up undocumented aliens and illegal drugs.<sup>11</sup>

One agent pulled behind the Blazer while the other followed the Nissan sedan for four miles before stopping it.<sup>12</sup> The officer driving behind the Blazer noticed that the passenger glanced in the rearview mirror and then picked up a newspaper and appeared to begin reading.<sup>13</sup> The officer then stopped the Blazer and asked about the occupants' citizenship.<sup>14</sup> When the officer surmised the occupants were traveling too far from the border as indicated by their identification cards, they were brought to the checkpoint for processing.<sup>15</sup> In the meantime, the officers stopped the Nissan sedan, searched the trunk, and found two large bags

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8. A 1994 statistical report of traffic stops along the New Jersey Turnpike revealed that while there was little difference in the rate at which Blacks and Whites committed traffic violations, 73.2% of those stopped and arrested were Black. The study concluded that Blacks had a higher chance of being stopped by the New Jersey State Police on the turnpike than Whites. Harris, *supra* note 1, at 277-79; see also Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role For Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 563-65 (1997).

9. *Montero-Camargo*, 208 F.3d at 1126-27.

10. *Id.* at 1126.

11. *Id.*

12. *Id.* at 1127-28.

13. *Id.* at 1127.

14. *Id.*

15. *Id.*

of marijuana.<sup>16</sup> A subsequent search of the Blazer turned up a loaded pistol in the glove compartment and an ammunition clip that fit the pistol in the passenger's purse.<sup>17</sup>

At trial in the United States District Court for the Southern District of California, Montero-Camargo, Sanchez-Guillen, the passenger in the Blazer, and Renteria-Wolff were convicted of conspiracy to possess marijuana and possession of marijuana with intent to distribute.<sup>18</sup> Sanchez-Guillen was also convicted of being an alien in possession of ammunition and aiding and abetting the carrying of a firearm during the commission of a drug trafficking crime.<sup>19</sup> The three defendants filed a pre-trial motion to suppress the evidence on the ground that the vehicle stop was not based on reasonable suspicion.<sup>20</sup>

The District Court denied the motion to suppress, conceding that the government's case was "somewhat weak," but concluding that, given the scenarios the officers encountered at each of the stops, the officers had sufficient suspicion to make an investigatory stop.<sup>21</sup> The factors the District Court considered included (1) the civilian's tip about the U-turn made in the middle of the highway, just before the checkpoint; (2) the alleged driving in tandem and the Mexicali license plates, which supported the informant's allegations; (3) the nature of the U-turn spot in question; (4) the defendant's Hispanic appearance; and (5) the fact that the passenger in the Blazer picked up a newspaper as the border patrol car approached.<sup>22</sup>

Montero-Camargo entered a conditional guilty plea to conspiracy to possess and possession of marijuana with the intent to distribute. He reserved the right to challenge on appeal two of the district court's determinations, including the denial of the motion to suppress.<sup>23</sup> Sanchez-Guillen proceeded to trial, and a jury convicted him of conspiracy to possess and possession of marijuana with the intent to distribute, as well as of being an illegal alien in possession of ammunition.<sup>24</sup>

On appeal, Montero-Camargo and Sanchez-Guillen argued that the district court erred in denying their motion to suppress.<sup>25</sup> The Ninth Circuit panel agreed with the district court's conclusion.<sup>26</sup>

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16. *Id.* at 1128.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

The appeal was heard *en banc* by the Court of Appeals for the Ninth Circuit, which affirmed the district court and the panel majority's decision, although on a more selective set of factors.<sup>27</sup> Judge Reinhardt, writing for the majority, addressed the question of whether the border patrol agents had a reasonable suspicion when they pulled over the defendants. Finding that they did, the court indicated that the U-turn, the area in which the defendants completed the U-turn, the in-tandem driving, and the Mexicali license plates were relevant factors in determining reasonable suspicion.<sup>28</sup> The court rejected the District Court's finding that Renteria-Wolff's behavior, her quick glance in the rearview mirror and newspaper reading, could be an appropriate factor.<sup>29</sup> Most importantly, however, the court held that the district court should not have included the drivers' Hispanic appearance as a factor in the reasonable suspicion calculus.<sup>30</sup>

## II

The Ninth Circuit Court of Appeals' holding, that race cannot be a factor in an officer's calculation of reasonable suspicion when stopping a vehicle, is a victory for African American and Latino drivers. However, the victory is limited in light of the decades of Supreme Court decisions that has expanded police discretion in vehicle stops while discouraging plaintiffs' claims of racial discrimination at the hands of police officers, legislators' aborted attempts to collect statistics on police stops, and negative attitudes and beliefs about minority citizens reflected in police practice.

The Fourth Amendment guarantees the right of the people to be free from search and seizure.<sup>31</sup> With society's increased reliance on the automobile, necessity prompted the Supreme Court to allow police with probable cause to conduct warrantless stops and searches of vehicles; without the "automobile exception" the requirement that officers leave the scene of the stop to obtain a warrant would have provided the suspect with an opportunity to drive away.<sup>32</sup> But it was *Terry v. Ohio*,<sup>33</sup> the

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27. *Id.* at 1126.

28. *Id.* at 1138–39.

29. *Id.* at 1135–36.

30. *Id.* at 1135.

31. The Fourth Amendment states that "The right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated . . ." U.S. CONST. amend. IV.

32. See Harris, *supra* note 1, at 310.

33. 392 U.S. 1 (1968). In *Terry*, an on-duty police officer observed three men, two African American and one White, milling around outside a jewelry store in downtown Cleveland. As the men separately walked by the store, each looking through the store

landmark case that introduced the concept of investigatory stops, that marked the beginning of the Supreme Court's movement toward enlarging police discretion. Applying *Terry* to vehicle stops, officers were given little incentive to forsake the use of race as a factor in deciding which motorists to pull over and investigate.

In response to the charge that the arresting officer's behavior violated the Fourth Amendment's proscription against unreasonable searches and seizures, the *Terry* Court held that a police officer may briefly "stop and frisk" a person without a warrant or probable cause, provided that the officer has a reasonable articulable suspicion that "criminal activity may be afoot," and that the suspect is armed and dangerous.<sup>34</sup> The officer's decision to stop and frisk cannot be based on intuition or a hunch, but must be grounded in observations, training, and "the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."<sup>35</sup> The stop must be brief,<sup>36</sup> and the scope of the search must be restricted to the suspect's outer clothing, in order to find weapons.<sup>37</sup> Despite the court's attempt to limit its decision, the concept of sufficient cause to authorize police to stop a suspect remains vague and prone to abuse:

The indeterminate nature of the standard makes it easy for police officers who stop someone for discriminatory reasons, or for no reason at all, to later justify the stop by articulating other benign reasons . . . . Moreover, the lack of specificity inherent in the reasonable articulable suspicion standard permits law enforcement officers to use race as a factor in justifying their suspicion.<sup>38</sup>

Given the ambiguous standard articulated in *Terry*, the *en banc* Court of Appeals holding in *Montero-Camago* could easily be circumvented by an officer who intends to continue stopping drivers based on their race, but later justifies those stops through legal rationale.

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window as he passed, and then meeting his companions, the officer became suspicious that the group was planning an armed robbery. The officer, a White male, then approached the men and asked their names. When he received only a mumbled response, the officer frisked the men, seized weapons from two, and arrested all three. *Id.* at 1-2.

34. *Id.* at 30.

35. *Id.* at 27.

36. *See id.* at 26.

37. *See id.* at 29-30.

38. Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 332-33 (1994) (analyzing the role of race in police-citizen encounters).

In *United States v. Cortez*,<sup>39</sup> the Supreme Court broadened the scope of police officers' discretion in interpreting the reasonable suspicion standard by instructing lower courts to defer to the testifying officer's judgment.<sup>40</sup> In assessing whether the officers made an appropriate determination of particularized suspicion, the Court remarked that a trained officers' inferences and deductions may "elude an untrained person,"<sup>41</sup> and that evidence collected by officers "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."<sup>42</sup> In effect, the Court encouraged the lower courts to consider police testimony as that of experts, worthy of deference. This practice of deference to police officers' decisions will further frustrate the goal of the *Montero-Camargo* ruling. After *Montero-Camargo*, should the Court break with precedent and challenge an officer's interpretation of reasonable suspicion if race seems to have played a role in her decision to stop a driver, or should the Court defer to the officer's expert judgment?

In *Whren v. United States*,<sup>43</sup> police power was dramatically expanded with the Court's ruling that police may make pretextual traffic stops. The Court held that, as long as a traffic offense has occurred, an officer has probable cause to stop a vehicle.<sup>44</sup> While the petitioners agreed that the officer had probable cause to believe that the traffic code had been violated, they argued that, in the context of civil traffic regulations, probable cause is not enough.<sup>45</sup> As the traffic code is so highly regulated, a persistent officer will almost invariably catch any motorist in a technical violation.<sup>46</sup> The petitioners argued that police officers may use the op-

39. 449 U.S. 441 (1981). In *Cortez*, Border Patrol officers stopped a truck driven by persons the officer believed were smuggling illegal aliens into the United States from Mexico. The officers targeted the truck after they discovered sets of distinctive human footprints in the Arizona desert; the footprints led the officers to believe that aliens were being led across the desert to a pickup point on an isolated stretch of highway. *Id.* at 413–15. The Court held that the officers' stop was constitutional: the test was whether, based on the whole picture, the detaining officers had a particularized and objective basis for suspecting the particular person stopped for criminal activity. *Id.* at 417–18, 421–22.

40. *Id.* at 418.

41. *Id.*

42. *Id.*

43. 517 U.S. 806 (1996).

44. *See id.* at 809, 813.

45. *Id.* at 810.

46. *Id.* The *Whren* Court has granted the police an extremely powerful tool in the use of traffic code. Harris writes that:

These codes regulate the details of driving in ways both big and small, obvious and arcane. In the most literal sense, no driver can avoid violating *some* traffic law during a short drive, even with the most careful attention. Fairly read, *Whren* says that any traffic violation can support a

portunity to investigate other violations of the law for which no probable cause or articulable suspicion exists.<sup>47</sup> Significantly, petitioners also argued that police officers might decide which motorists to stop based on impermissible factors, such as the race of the car's occupants.<sup>48</sup> The Court sided with the government, finding that if law enforcement officials observe a traffic violation, they have the simplest and clearest type of probable cause imaginable for a stop.<sup>49</sup> The Court only briefly addressed the petitioners' concern that race may play a role in traffic stops: as a remedy for discriminatory pretextual traffic stops, it stated that subjective intentions "play no role in ordinary, probable cause Fourth Amendment analysis"<sup>50</sup> and suggested that the Equal Protection Clause is the appropriate constitutional basis for challenging the stops.<sup>51</sup>

*Whren* dealt a dual blow to African American and Latino drivers by expanding the discretionary power of the police and removing race from Fourth Amendment protection.<sup>52</sup> Bringing a successful equal protection

stop no matter what the real reason for it is; this makes any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police.

David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997).

47. *Whren*, 517 U.S. at 810.

48. *Id.*

49. *See id.*

50. *Id.* at 813.

51. *Id.*

52. The question of remedy is a difficult one. A criminal defendant who has proven that she was singled out based on her race would not be able to have her indictment dismissed or any evidence suppressed under the Equal Protection Clause. Hecker, *supra* note 8, at 588 (citing *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1498 (1988)). Another option for the motorist is to file a claim under 42 U.S.C. § 1983 basing the action on the officer's denial of her equal protection because she was stopped on the basis of her race. If motorist brought a successful claim she could receive damages or injunctive relief. *See* Hecker, *supra* note 8, at 588.; *see also* Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425, 435, 435 n.75 (1997). 42 U.S.C. § 1983 (1994) states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.* However, it is unlikely motorists singled out because of their race would bring an action under § 1983 due to financial impracticability and because such actions may bring attention to criminal activity, a jury would be unlikely to grant relief. Hecker, *supra* note 8, at 589; *see also* Davis, *supra* at 436 n.78. It would also be difficult for a court to grant



claim is nearly an insurmountable task. Traditional equal protection analysis requires that the defendant prove that an officer intentionally discriminated against her based on her race.<sup>53</sup> The defendant must show that prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.<sup>54</sup> But showing that a minority motorist was detained on the basis of race is difficult to prove.<sup>55</sup>

In *United States v. Armstrong*,<sup>56</sup> the Court established the standard for discovery in criminal cases in which the defendant alleges race-based selective prosecution. The Court held that in order to obtain discovery, the defendant must show that the government declined to prosecute similarly-situated suspects of other races.<sup>57</sup> In *Armstrong*, the defendants, Black men, were indicted for selling crack and using a firearm in connection with drug trafficking.<sup>58</sup> When the defendants supported their claim of selective prosecution with a study showing that all 24 crack-cocaine cases closed by the district's federal public defender in the preceding year involved Black defendants, the Court found the evidence insufficient.<sup>59</sup>

The Court made the task of proving a selective prosecution claim even more arduous by holding that the defendant must first show that the government declined to prosecute similarly-situated suspects of other races before he may access the prosecutor's files.<sup>60</sup> Thus, "the defendant must furnish evidence of the correctness of his claim, without access to the very evidence needed to prove his claim—a Catch 22 if ever there was one."<sup>61</sup> If an African American or Latino driver alleged that a police officer's use of a pretextual traffic stop constituted a denial of equal protection, he would need to show that similarly-situated White motorists could have been stopped, detained, or arrested, but were not.<sup>62</sup> Such evidence would be impossible to procure, because "[p]olice officers do

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injunctive relief because how would a court enjoin police officers from conducting pretextual stops? *Id.* at 436.

53. See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

54. See *id.* at 239.

55. See *Davis*, *supra* note 52, at 437 (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319–23 (1987)) (stating that discrimination on the basis of race is difficult to prove because it is difficult to prove "invidious discrimination" by the police officer).

56. 517 U.S. 456 (1996).

57. *Id.* at 458.

58. *Id.* at 458–59.

59. See *Harris*, *supra* note 46, at 552 (citing *Armstrong*, 517 U.S. at 459).

60. *Id.* at 552.

61. *Id.* at 552–53 (citing David Cole, *See No Evil, Hear No Evil*, LEGAL TIMES, July 29, 1996, at S29).

62. See *Davis*, *supra* note 52, at 437–38.

not keep records of instances in which they could have stopped a motorist for a traffic violation, but did not."<sup>63</sup>

Even when there are instances in which statistical evidence is available to demonstrate constitutional violations, the Court has not looked favorably upon it.<sup>64</sup> In *McCleskey v. Kemp*,<sup>65</sup> the defendant, a Black man, was convicted in a Georgia trial court of armed robbery and murder.<sup>66</sup> The jury recommended the death penalty, and the defendant appealed the decision, claiming that the Georgia capital sentencing process was administered in a racist manner.<sup>67</sup> The defendant supported his claim with a statistical study that purported to show a disparity in the imposition of the death sentence in Georgia based on the murder victim's and the defendant's race.<sup>68</sup> Despite the correlation that the statistics seemed to show between the perpetrator's race and the likelihood that the perpetrator would be sentenced to death, the Court found that the study did not support an inference that McCleskey's sentence rested on purposeful discrimination.<sup>69</sup> The Court found that a petitioner would have to present evidence that "the decision makers *in his case* acted with a discriminatory purpose."<sup>70</sup> By this ruling, the Court disallows proof of patterns of racial bias to support equal protection violation claims, foreclosing a logical avenue to demonstrate a discriminatory application of the law.<sup>71</sup>

Extra-judicial efforts to prevent police officers from relying on race as a factor in conducting traffic stops have been met with only tepid enthusiasm. Federal legislation, such as the Traffic Stops Statistics Study Act of 1999,<sup>72</sup> aimed at requiring officers to collect data on traffic stops, was billed as a tool to help demonstrate that minority communities'

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63. *Id.* at 438; see also Susskind, *supra* note 38, at 341.

64. "The Court has accepted statistics as proof of intent to discriminate in certain limited contexts." *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) (emphasis added).

65. 481 U.S. 279 (1987).

66. *Id.* at 283. The convictions stemmed from the robbery of a furniture store and the killing of a White police officer during the course of the robbery.

67. *Id.* at 286.

68. *Id.* The Baldus study was comprised of two statistical studies analyzing murder cases that occurred in Georgia during the 1970's. The study revealed that while defendants convicted of killing Black individuals only received the death penalty in 1% of the cases, 11% of defendants convicted of killing a White individual received the death penalty. The Baldus study concluded that Black defendants were more likely to receive the death penalty than White defendants and that Black defendants who are convicted of killing White victims are the most likely to receive the death penalty. *Id.*

69. *Id.* at 292.

70. *Id.* (emphasis added).

71. See Harris, *supra* note 46, at 552.

72. H.R. 1443, 106th Cong. (1999).

complaints of racial profiling were not unfounded.<sup>73</sup> John Conyers, a Democrat from Michigan, introduced the bill in 1997,<sup>74</sup> and it was passed by the House of Representatives.<sup>75</sup> When the bill reached the Senate it met with failure, largely due to the opposition of the International Association of Chiefs of Police, who argued that making officers record such data would “discourage [officers] from making legitimate traffic stops for fear of action being taken against them or their department.”<sup>76</sup> Regardless of the possibility that officers could anonymously record and submit data, the bill has been resubmitted twice and its future is uncertain.<sup>77</sup>

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73. Under this proposed legislation, an effort to collect data on traffic stops would be directed up by the Attorney General. Analysis of this data would be divided into two phases. First, the “initial analysis” of existing data would be conducted by the Attorney General, “including complaints alleging and other information concerning traffic stops motivated by race and other bias.” *Id.* at § 2(a)(2). After the initial analysis, the Attorney General would collect data on traffic stops at a nationwide level. The following data would be collected in the second phase:

- (A) The traffic infraction alleged to have been committed that led to the stop.
- (B) Identifying characteristics of the driver stopped, including the race, gender, ethnicity, and approximate age of the driver.
- (C) Whether immigration status was questioned, immigration documents were requested, or an inquiry made to the Immigration and Naturalization Service with regard to any person in the vehicle.
- (D) The number of individuals in the stopped vehicle.
- (E) Whether a search was instituted as a result of the stop and whether consent was requested for the search.
- (F) Any alleged criminal behavior by the driver that justified the search.
- (G) Any items seized, including contraband or money.
- (H) Whether any warning or citation was issued as a result of the stop.
- (I) Whether an arrest was made as a result of either the stop or the search and the justification for arrest.
- (J) The duration of the stop.

*Id.* at § 2(a)(3)(A)-(J). The bill provides for grants to be given to law enforcement agencies to collect the data. *Id.* at § 3.

74. Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997).

75. Harris, *supra* note 1, at 320.

76. INT’L ASS’N OF CHIEFS OF POLICE, LEGISLATIVE UPDATES, at [http://www.theiacp.org/leg\\_policy/Legupdate/legupdate42000.htm](http://www.theiacp.org/leg_policy/Legupdate/legupdate42000.htm) (last visited May 10, 2001). The IACP also criticizes the legislation introduced because it does not specify the way in which the data is to be analyzed. *Id.*

77. In 2000, the bill was proposed for a third time. The House Judiciary Committee has reported the bill and it will go to the House floor. It is uncertain when the bill will be considered. NEW JERSEY LEAGUE OF MUNICIPALITIES, WASHINGTON WATCH, LEGISLATIVE REPORT, at <http://www.cityconnections.com/njleag/wwlegpr4.html> (last visited May 10, 2001).

Just as federal legislation has been met with some resistance, states attempting to enact legislation to address the problem of race-based pretextual stops have not been successful.<sup>78</sup> In 1998, both houses of the California State Assembly passed a bill patterned after the Traffic Stops Statistics Study Act.<sup>79</sup> Subsequent to the passage of the legislation, amendments weakening the bill were attached and Governor Pete Wilson eventually vetoed the bill.<sup>80</sup> A second bill, introduced and passed by both houses of the state assembly, was vetoed by Governor Gray Davis who stated that police departments should be encouraged to collect data on their own.<sup>81</sup> The failure of legislation on both the state and federal levels adds to the difficulty in preventing law enforcement officers from using race as a factor in pretextual stops.

Compounded by the obstacles faced by litigants and legislators, implementation of the Court's ruling in *Montero-Camargo* seems to run contrary to the interests of many police officers who believe that racial profiling is a useful tool. From an officer's perspective, race may serve as a proxy for a higher probability of criminal activity.<sup>82</sup> An officer may reason that minorities, particularly African Americans, make up a large share of those arrested, prosecuted, and jailed in this country.<sup>83</sup> In this light, racial disparities in detentions are "an unfortunate byproduct of sound police policies."<sup>84</sup>

Constantly on the alert for evidence of criminal activity, the officer is trained to watch for "traits" that correlate with criminal behavior.<sup>85</sup> Officers' tendency to link race and criminality is in part a result of the type of thought and analysis in which officers must engage as a part of their profession. Categorization becomes a necessity in police work in which officers must synthesize vast amounts of information in short periods of time.<sup>86</sup> Police officers' duties involving judging and evaluating behavior, leading officers to think in "us vs. them terms."<sup>87</sup> As officers begin to

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78. Harris, *supra* note 1, at 321; but see David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. OF RACE & L. 237, 240 nn. 11-19 (2001) (listing states that have recently enacted various racial profiling statutes).

79. Harris, *supra* note 1, at 321 (citing S.B. 78, Reg. Sess. (Cal. 1999)) (requiring collection and analysis of data on routine stops).

80. *Id.*

81. *Id.*

82. Harris, *supra* note 46, at 571.

83. *Id.*

84. *Id.*

85. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 986 (1999).

86. *Id.*

87. *Id.* at 987.

associate difference with deviance, a salient cue for difference is often race.<sup>88</sup>

Even if officers recognize that they may not use race as a factor in a reasonable suspicion analysis, they may do it unwittingly, or subconsciously. Although the ruling in *Montero-Camargo* implies that officers can make assessments of criminality independent of their attitudes about race, social science research shows the stereotypic judgments and biases that an individual brings to an event fundamentally shape her perceptions.<sup>89</sup> For example, negative attitudes toward African Americans create a perceptual norm of viewing African Americans as prone to criminal conduct.<sup>90</sup> Even if an officer perceives people of color as more likely to engage in criminal activity than Whites, the perception may be unbeknownst to her: “[e]specially as it has become less socially acceptable to acknowledge racial prejudices and because people increasingly tend to view themselves as egalitarian, discriminatory treatment is often the byproduct of unconscious racism.”<sup>91</sup>

Conscious or subconscious, the effect of racial profiling is that *all* minority citizens become probable criminal suspects as police greatly overestimate the value of race as a predictor of criminal behavior.<sup>92</sup> This point is especially pertinent in light of our country’s increasingly multi-ethnic population.<sup>93</sup> Where “minorities” are quickly becoming the majority, as in California, officers will not be able to rely on race as a distinguishing factor, simply as a practical matter: “[w]here the majority of people share a specific characteristic, that characteristic is of little or no probative value in such a particularized and context-specific analysis.”<sup>94</sup> Just as admissions committees must resort to qualifications other than grades when the top applicants all have 4.0 averages, police officers will have to identify factors other than race in conducting pretextual stops when the population has a high percentage of minority drivers.

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88. *Id.*

89. *Id.* at 987–88.

90. *Id.* at 988.

91. *Id.* at 989 (citation omitted).

92. Harris, *supra* note 46, at 572.

93. *United States v. Montero-Camargo*, 208 F.3d 1122, 1133 (9th Cir. 1999) (the court referring to the U.S. Census Bureau as of January 1, 2000, indicates that “Hispanics are heavily concentrated in certain states in which minorities are becoming, if not the majority, then at least the single largest group, either in the state as a whole or in a significant number of counties.” California has the largest Hispanic population of any state—estimated at 10,112,986 in 1998).

94. *Id.* at 1131 (footnote omitted).

## III.

The above analysis suggests that precedence hasn't prepared the lower courts or law enforcement agents to follow the progressive direction of *Montero-Camargo*. While the court in *Montero-Camargo* noted that its decision does not conflict with precedent, its prohibition against using race as a factor in traffic stops should require courts to re-think their policy of deference to the testimony of police officers. But outside of court, what can be done to prevent officers from continuing to use race as a factor in a reasonable suspicion analysis?

One suggestion may be to encourage creation of police department policy and efforts to self-regulate. Police department self-regulation makes for better policy decisions, in part because it focuses the department on the implications on the community of the police practices being regulated.<sup>95</sup> The development of department-wide rules reduces the influence of bias by increasing uniformity in new officer training and guiding and controlling discretion.<sup>96</sup>

Where police departments have voluntarily implemented their own policies, some have opted to collect data on traffic stops,<sup>97</sup> which has been proven to be a very effective method of monitoring police discretion. "Police departments . . . are in the best possible position to take action—by collecting data, retraining officers, and by putting in place and enforcing policies against the racially disproportionate use of traffic stops."<sup>98</sup> Law enforcement officers may be more inclined to follow such policies if they are created internally.<sup>99</sup>

Training and recruitment of officers who are willing to work in partnership with communities of color is also crucial in changing the conduct of all officers.<sup>100</sup> Training to promote officers' awareness of their own biases may be a prerequisite for changing their behavior.<sup>101</sup> Furthermore, recruiting officers from diverse backgrounds may be helpful.

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95. See Harris, *supra* note 46, at 576–77.

96. *Id.* at 577.

97. For example, a police department in San Diego began to collect data on traffic stops without being prompted by the state or federal government. Harris, *supra* note 1, at 322 (citing Michael Stetz & Kelly Thorton, *Cops to Collect Traffic-Stop Racial Data*, SAN DIEGO UNION-TRIB., Feb. 5, 1999, at A1).

98. *Id.* at 323.

99. *Id.* (citing Wayne LaFave, *Controlling Discretion By Administrative Regulations: The Use, Misuse, and Nonuse, of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 451 (1990) (stating that police-made rules are most likely to be followed and enforced by police)); see also Hecker, *supra* note 8, at 593 (stating that law enforcement may be resistant to external controls.)

100. See Thompson, *supra* note 85, at 1010.

101. *Id.* at 1011.

A second suggestion is the development of a race-conscious Community Policing Model, which would counteract negative expectations that White police officers tend to hold about people of color and expose police to more positive experiences.<sup>102</sup> Introducing White police officers to communities of color in less confrontational ways may broaden officers' perceptions about community members and reduce some of the antagonistic feelings between police officers and individuals of color.<sup>103</sup>

In addition to police monitoring their intra-department activities, where a version of community policing has been implemented, police and civilians have joined together to create civilian review boards that supervise the activities of law enforcement officials, filter civilian complaints of police misconduct, and recommend action.<sup>104</sup> Civilian review boards provide more direct action in response to racial profiling than the proposed legislation discussed above. Such groups have the power to hold police officers directly responsible for their conduct.<sup>105</sup> Civilian review boards have benefited communities in several ways; among them, by assisting in drafting rules placing limits on the use of police discretion in traffic stops.<sup>106</sup>

Finally, statistical tracking of race in searches and seizures is another important tool in implementing a race-conscious police culture; acquiring data on the race of individuals stopped by police provides a useful foundation for making changes.<sup>107</sup>

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102. *Id.* at 1009–10.

103. *Id.*

104. These civilian review boards can be categorized into four classes. See Hecker, *supra* note 8, at 595. Class one review boards are the most independent out of all the classes. These agencies conduct the initial fact-finding, review investigative reports, receive complaints, and make recommendations during the disciplinary process. *Id.* Police officers investigate civilian complaints in class two review agencies. *Id.* These boards may also be partially made up of civilians who review the investigative reports and who make recommendations to a law enforcement executive with regard to what action should be taken. *Id.* In class three agencies, investigations and reviews of complaints are done by police departments. Recommendations are made to the chief executive by internal affairs. Boards, partly comprised of civilians, hear any appeals and may make recommendations of an alternative to the chief executive. *Id.* Only two cities, San Jose and Seattle, have implemented class four agencies. *Id.* In this scheme, the internal complaint review procedures are reviewed by auditors who may make recommendations for procedural changes. *Id.*

105. *Id.*

106. An example of such a rule is one that prohibits law enforcement officers who are not specifically assigned to traffic duty from making pretext stops except in cases of exigent circumstances. *Id.* at 601 (citations omitted).

107. Thompson, *supra* note 85, at 1010–1111.

## CONCLUSION

Practically, the significance of the Ninth Circuit's opinion in *Montero-Camargo* is largely theoretical. Eliminating race as a consideration in the reasonable suspicion calculus ultimately will take an effort on the part of every police officer, for those men and women are the mechanism through which the law is implemented. Without their commitment to race neutrality in policing, the court decision alone will be woefully inadequate to remedy this vast problem.

If links can be forged between communities of color and the law enforcement officers assigned to them, the Court's vision of more effective policing in *Montero-Camargo* is likely to be realized. As officers come to see the communities they patrol as made up of individuals, instead of a collective of adversaries, innocent people will be spared the embarrassment and humiliation that results from being wrongfully targeted. Community members, in turn, will have a reason to view officers with more trust and respect. The Ninth Circuit has recognized the importance of police accountability; now is the time to take the steps necessary to ensure the transition from rhetoric to action.