

Racial Profiling

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This chapter will explore the topic of racial profiling by police. First, the chapter defines the term racial profiling for purposes of the discussion. Next, the chapter describes the points at which racial profiling arises in law enforcement, and the legal tools and incentives that drive it. It then describes the harm that racial profiling does to people, and to the criminal justice system as a whole. The chapter explores the cost to public safety that racial profiling entails, and closes with five concrete suggestions for combatting this long-term problem.

INTRODUCTION

When discussions of racial profiling happen among members of community groups, especially people of color and their allies, the phrase usually brings forth reactions, stories, and statements that point to any kind of discriminatory action that reveals racial animosity—usually, though not necessarily, at the hands of the police. If, on the other hand, discussions occur among a group of police officers or their allies, the reactions differ considerably. To these people, the phrase connotes a newer, more subtle way of calling all police officers racists, or of saying that routine police practices, such as stopping vehicles for traffic enforcement, have become infected with institutional racism.

Neither of these reactions captures the meaning of racial profiling.¹ When it occurs, racial profiling does constitute one form of racial discrimination; however, not every form of discrimination that might arise, even discrimination by police officers, constitutes racial profiling. And not every use of the phrase implies racial animus by individual officers. This muddiness in the definition of racial profiling has implications beyond the semantic; if we do not understand what racial profiling really is, our chances of understanding the harm it causes or of finding ways to address it drop. Defining the problem correctly matters. Therefore, it will pay dividends to start with a working definition of the term.

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1. In fact, it might be better to use the phrase “racially biased policing,” as a number of those who read the initial draft of this chapter suggested. Racial profiling, they said, is both under-inclusive and over-inclusive, and does not accurately capture the full concept. I agree with some of this insightful criticism. But for better or worse, racial profiling is the phrase that people recognize and associate with racially biased policing. Therefore, I will use that phrase, and will attempt to compensate for its shortcomings by providing a useful definition.

Whatever we might say about the way people use the term, some things about racial profiling remain certain. It is a real, measurable phenomenon; and it causes real harm to people, and to public safety. It is not just a matter of concern to African-Americans, Latinos, and other people of color, who feel the sting of the practice directly. It is an issue for all Americans who care about fairness, justice, and public order—in short, everyone. We must do all we can to curtail it as much as possible.

I. DEFINITION

One reasonable working definition for racial profiling reads:

Racial profiling is the use of racial or ethnic appearance by police as one factor, among others, to decide who is suspicious enough to attract police attention that may result in detention, questioning, a search, or other routine police action.²

Another useful definition says:

[R]acial profiling is defined as any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.³

Other definitions might work just as well,⁴ but these, which are reasonably close, will serve as a starting point for this discussion. A few particulars deserve explanation and attention.

2. I have used similar definitions elsewhere. See, e.g., David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L. REV. 423, 426 (2003) (defining racial profiling as “the use of race by police as one factor among other in deciding whom to stop, question and search”).

3. DEBORAH RAMIREZ, JACK McDEVITT & AMY FARRELL, U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE TO RACIAL PROFILING DATA COLLECTION SYSTEMS 3 (2000).

4. See also various definitions in DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 10–11, 48–51 (2002); The End Racial Profiling Act (ERPA), S. 1670, 112th Cong. § 2(7) (2011) (defining racial profiling as “the practice of a law enforcement agent or agency relying, to any degree, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure”); *Racial Profiling*, NAT’L INST. OF JUST., <https://www.nij.gov/topics/law-enforcement/legitimacy/pages/racial-profiling.aspx> (“Racial profiling by law enforcement is commonly defined as a practice that targets people for suspicion of crime based on their race, ethnicity, religion or national origin.”).

First, note that while the phrase racial profiling focuses on race, the definition also includes ethnic profiling. (The second definition also includes national origin, for purposes of greater clarity.) In practice, racial profiles have targeted not just African-Americans but Latinos and sometimes other ethnic groups. Therefore, it makes sense to make the definition wide enough to include them. Second, note that the first definition speaks in terms of appearance. What counts, in terms of how a police officer might use racial profiling either consciously or unconsciously, is what the racial or ethnic identity of the person *appears to be* to the officer. It will be on that basis that the officer decides whether the person seems suspicious, not what the *actual* racial or ethnic identity of the person may be. What counts is what the officer thinks the person's racial or ethnic identity is.

Third, note that the police need only use racial or ethnic appearance as one factor among others, not the sole factor, in deciding whether the person observed seems suspicious. Many definitions in statutes, rules, and policies have defined the practice as based solely on racial appearance.⁵ No action a police officer takes—neither a traffic stop nor a pedestrian stop, for example—happens because of just one factor. Many factors might come into play in any explanation of an officer's behavior: the event having taken place in darkness, presence in a high-crime area, the subject's dress, or the number of subjects present, for example. Therefore, using a definition that includes this "solely" approach effectively defines the problem out of existence.

Fourth, the definition focuses on how perceived race or ethnic identity may lead a police officer to take routine enforcement actions,⁶ such as a traffic stop or stop-and-frisk.⁷ But this may be too narrow an understanding of racial and ethnic profiling. In point of fact, we have seen racial and ethnic profiling used for at least two other important purposes: profiling directed at national security—what one could call anti-terrorism racial profiling—and at

5. See, e.g., CONN. GEN. STAT. § 54-11(b) ("For the purposes of this section, "racial profiling" means the detention, interdiction or other disparate treatment of an individual solely on the basis of the racial or ethnic status of such individual.").

6. One point implied here is that this discussion of racial profiling focuses on police actions. While some use the term to describe actions outside the realm of law enforcement—for example, a taxi driver who will not pick up black passengers—racial profiling refers to police actions. The taxi driver's actions may indeed constitute racial discrimination, and they may have their own pernicious and damaging effects. But they cannot compare to the possible effects of a powerful state agent depriving a citizen of property or liberty or even life itself. Moreover, law enforcement profiling has an actual history growing out of the use of various kinds of criminal profiles; the taxi driver's behavior comes from a different context.

7. See Jeffrey Fagan, "Race and the New Policing," in the present Volume; Henry F. Fradella & Michael D. White, "Stop-and-Frisk," in the present Volume; Devon W. Carbado, "Race and the Fourth Amendment," in the present Volume.

immigration, in which people who appear foreign (especially Latinos) become targets because police suspect they may be undocumented or otherwise out of status vis-à-vis immigration laws.⁸ Therefore, each of the definitions above should include targeting for purposes not just of routine law enforcement or criminal enforcement, but also for purposes of anti-terrorism or immigration enforcement. Fifth, notice one thing that does not appear in the definition. The use of a person's racial or ethnic appearance as part of a reasonably detailed description⁹ of a known suspect does not constitute racial profiling. Rather, as long as the description, usually from a witness or victim but also from a police officer, yields a description of a particular person, using that description to attempt an apprehension of that particular person does not use race or ethnic appearance the same way that racial profiling does. Rather, it constitutes good police work and may assist in the apprehension of the right person.

With all of those points in mind, this is the definition we will use in this chapter:

Racial profiling means any police-initiated action that relies on racial or ethnic appearance as one factor among others, rather than the behavior of an individual or information, resulting in police actions such as questioning, stop-and-frisk, or searches for purposes of criminal, national-security or anti-terrorism, or immigration investigation. Racial profiling does not include the use of racial or ethnic appearance as part of a reasonably detailed description that enables police to identify an individual suspect.

II. THREE WAVES OF RACIAL PROFILING

When racial profiling first surfaced in national discussions, in the 1990s, the subject referred to police actions that formed part of drug-enforcement efforts. But, as events have illustrated in the years since, racial and ethnic profiling is a tactic that has been repurposed and used in various contexts at least since the late 1980s and early 1990s. Looking back, we can see three waves of racial

8. See generally Jennifer M. Chacón, "Criminalizing Immigration," in Volume 1 of the present Report.

9. I use the phrase "reasonably detailed" to exclude simple, very general descriptions. For example, "young black male, wearing jeans and white t-shirt, and baseball cap" would be far too general to make for a useful description. It would describe a huge percentage young black men in any neighborhood on almost any given day, and would not allow a police officer to pick out any particular person as suspicious. On the contrary, it would give the officer a license to stop almost every young black man. Rather, I refer to what seminar participant Devon Carbado of UCLA School of Law called a "thick description"—one that might include race but also enough other detail that would allow law enforcement to distinguish people of the same racial or ethnic group from each other.

profiling: The first targeted drug trafficking, the second focused on post-9/11 terrorism dangers, and the third targeted undocumented immigration.

Racial profiling, as we know it, began in the 1980s.¹⁰ The federal Drug Enforcement Administration had, for some years, focused drug-interdiction efforts at airports. The agency believed that the purveyors of a considerable amount of the illegal drugs consumed in the U.S. transported them in luggage on commercial airline flights, and DEA agents began watching airline passengers for signs that they were serving as drug transporters. Agents made some arrests and seizures in these efforts, and from the common factors observed in these seizures, the agency put together its “drug courier profile”: a list of common characteristics of those found carrying loads of narcotics. The factors included travel to or from so-called drug-source cities; paying for tickets with cash, with little or no advance notice; trips with rapid returns from the drug source cities; and various behaviors supposedly associated with drug transportation, such as getting off of the aircraft last or carrying only hand-held luggage. These drug profiles often constituted nothing more than the factual commonalities of agents’ top drug busts; they paid no attention, for example, to the largest number of stops agents made, often using the same criteria, in which police uncovered no evidence. And they used no even remotely rigorous statistical analysis to see if the factors used actually predicted the targeted behavior any better than would random selection of passengers. Nevertheless, the U.S. Supreme Court decided that such profiles of factors, any or all of which constituted innocent behavior, could in the aggregate give officers sufficient reasonable suspicion for a legal stop.¹¹

Notwithstanding the weaknesses in the profiling approach, the DEA noticed when an up-and-coming Florida State Trooper (later the sheriff of Volusia County, Florida) named Bob Vogel applied the same reasoning to making traffic stops on Florida highways, which often led to large-scale drug busts. Like the DEA in airports, Vogel accounted only for his successes in constructing his list of “cumulative similarities” and not the much larger number of stops

10. For an expanded version of this historical background, see HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 16–23, 48–51, 53–62.

11. United States v. Sokolow, 490 U.S. 1 (1989). *Sokolow* could be said to show the naiveté of the U.S. Supreme Court in accepting the drug courier profile without any real critical examination. Judges in lower federal courts had noticed that, even though the drug courier profile seemed to land almost uncannily on the exact constellation of factors in any given case, when looked at over the great run of cases, it varied quite significantly—often within their assessments of the very same factor in different cases. See, e.g., United States v. Hooper, 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting) (calling the drug courier profile “laughable” because “it is so fluid that it can be used to justify designating anyone a potential drug courier if the DEA agents so choose”).

in which he found nothing, despite the presence of some or all of those same similarities. Based on Vogel's work, the federal government established a program to train state and local police in his methods. The program, called "Operation Pipeline," sought to instruct state and local police departments in drug interdiction on highways using a drug-courier profile. By the early 1990s, approximately 27,000 police officers from all over the U.S. received Pipeline training, paid for by millions of federal dollars through the U.S. Department of Justice. And these officers, in turn, created profiling-based drug interdiction units in their own departments. The DEA and other agencies involved have always denied that racial or ethnic appearance played any role—even as just one factor—in any of their profiling training. But the evidence says otherwise. Training films and other materials mentioned race or ethnicity as a factor; other times, without mentioning race or ethnicity, the materials simply portrayed all the guilty parties (in a training video, for example) with the same obvious racial or ethnic markers.

To observers of these trends, it came as no surprise when, in the 1990s, following directly from the DOJ-based Pipeline training, state police drug-interdiction units seemed to concentrate on highway traffic stops of men from minority groups, particularly African-Americans, but also Latinos. The two most well-known racial-profiling cases of the 1990s, *State v. Pedro Soto*¹² in New Jersey and *Wilkins v. Maryland State Police*¹³ in Maryland, laid bare the racialized practices of those states' interdiction practices, and how deeply infected with race they had become. In *Soto*, defense expert John Lamberth's work showed that the race of the driver or occupants of the vehicles stopped is "a decisive factor or a factor with great explanatory power" in determining who is stopped, and the disparity between which drivers police stopped and the racial composition of drivers on the highway "is strongly consistent with the existence of a discriminatory policy ... of targeting blacks for stops and investigation."¹⁴ Lamberth made similar findings in the *Wilkins* case.¹⁵ Thus, by 2001, with the introduction of the End Racial Profiling Act, anti-drug police work had become the focus of racial and ethnic profiling.

12. *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

13. *Wilkins v. Md. State Police*, No. 93-468 (D. Md. filed Feb. 12, 1993).

14. HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 56 (quoting Lamberth).

15. Report of John Lamberth Ph.D. at 62, *Wilkins v. Md. State Police*, No. 93-468 (D. Md. Nov. 8, 1996).

This shifted dramatically with the terrorist attacks targeting New York City and Washington, D.C., on September 11, 2001. In reaction to these shocking and horrible attacks, carried out by 19 men from the Middle East, the focus of profiling was no longer drug trafficking, but stopping terrorists, particularly those who would try to use the aviation industry to target civilians. Polling showed the reality in this shift quite starkly. Prior to the attacks, almost 80% of Americans—all Americans, not just people of color—knew what racial profiling was, and thought it should stop.¹⁶ After the September 11 attacks, a strong majority of all Americans—including those, such as African-Americans and Latinos, who had themselves felt the sting of profiling—said they believed profiling had a legitimate place, as long as it targeted people who appeared to be Arabs and/or Muslims, in airports.¹⁷ Thus began the second wave of profiling: Anti-terrorism profiling, people said, was just a common-sense measure to make us safe from a new danger in a more perilous world. And we could not afford to let political correctness or delicate feelings get in the way of safety from murdering terrorists who wanted to kill us. Never mind that intelligence officials warned, in the direct aftermath of the September 11 attacks, that such racial or ethnic or religious targeting was itself dangerous and would make us less safe, by alienating the very allies we would need to fight the new scourge, and would play into our enemies' hands. Profiling of Arabs and Muslims became one of the consensus obvious answers to the new problem of terrorism.

Readers can see a good example of this thinking in a piece of writing by Stanley Crouch. Crouch, a well-known African-American cultural critic and novelist, and a recipient of the MacArthur Foundation's so-called "genius grant," captures the idea well in a column he wrote at the time for the *New York Daily News* that ran across the country; one paper titled it "Wake Up: Arabs Should Be Profiled." The key lines read:

All those who denounce so-called Arab profiling ... need to put their faces in a bowl of cold water for a few seconds and wake up.... [I]f pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out,

16. Frank Newport, *Racial Profiling Is Seen as Widespread, Particularly Among Young Black Men*, GALLUP (Dec. 9, 1999), <http://www.gallup.com/poll/3421/racial-profiling-seen-widespread-particularly-among-young-black-men.aspx>.

17. Jeffrey M. Jones, *Americans Felt Uneasy Toward Arabs Even Before September 11*, GALLUP (Sept. 28, 2001), <http://www.gallup.com/poll/4939/americans-felt-uneasy-toward-arabs-even-before-september.aspx> ("Nearly six in 10 Americans interviewed" after the attacks "favored requiring people of Arab descent to undergo special, more intensive security checks when flying on American airplanes.").

that is the unfortunate cost that [the innocent Arabs] must pay to reside in this nation.¹⁸

The irony that substituting a few words—“blacks” for “Arabs,” and “drug offenses and violence” for “mass murder”—would make his statement a pitch-perfect justification for racial profiling for drug offenders seems not to have occurred to Mr. Crouch. No doubt that happened because preventing terrorism seems different: The risk of such a devastating occurrence as the September 11 attacks simply does not compare to stopping some drug couriers. Yet the mechanism—and its reliance on racial and ethnic characteristics—remains the same.

The third wave of profiling began to emerge several years after the September 11, 2001, terrorist attacks. Advocates for tighter immigration controls, and for deportations of undocumented persons in the U.S., had tried for years to get local authorities to assist in deportation efforts, without success. Local police, for their part, wanted no part of this effort, because they understood that becoming adjunct forces to federal deportation efforts would cause their own immigrant communities—both undocumented and documented people—to fear involvement with them. That fear would cause people to avoid calling police with reports of crime for fear of bringing immigration policing into any given situation. This would give predators in the community—robbers, killers, domestic-violence perpetrators, even child molesters—free rein. Nevertheless, advocates proposed several pieces of legislation in the mid-2000s, such as the CLEAR (Clear Law Enforcement for Criminal Alien Removal) Act,¹⁹ with the aim of increasing immigration enforcement through local involvement. A large number of American law enforcement agencies opposed the CLEAR Act, and it did not pass. And the third wave really crested in 2010, with the passage of Arizona’s S.B. 1070,²⁰ the so-called “show your papers” law, which required police officers in Arizona to inquire about the immigration status of people they encountered—without any use of racial profiling.

As 2017 began, we saw the beginnings of a reprise of the second and third waves. The Trump administration’s executive order to ban all refugees from Syria, as well as entry into the country from seven Muslim-majority countries, showed that those who favor using the second wave of profiling have reawakened, many years after September 11 and in the age of ISIS terror attacks around the world. And the administration’s plans for a massive border

18. Stanley Crouch, *Wake Up: Arabs Should Be Profiled*, ST. LOUIS POST-DISPATCH, Mar. 19, 2002, at B7.

19. Clear Law Enforcement for Criminal Alien Removal Act, H.R. 2761, 108th Cong. (2003).

20. *Fact Sheet for Senate Bill 1070*, ARIZONA STATE SENATE (Jan. 15, 2010), <http://www.azleg.gov/legtext/49leg/2r/summary/s.1070pshs.doc.htm>.

wall, its ratcheting up of arrest and deportation actions against people guilty of, accused of, or even suspected of very minor crimes, brings the third wave of profiling back into play. The tactic has not varied during each of the waves: Racial or ethnic appearance serves as a proxy factor for suspicion of some kind of purported wrongdoing—of drug trafficking or criminal involvement, or terrorism, or of undocumented status. The impact remains the same: large numbers of people sharing a set of immutable physical characteristics, the vast majority having no plausible connection to the suspect activity at all, stopped, questioned, searched, and put under suspicion in various ways, sometimes quite publicly. And the results do not change because this tactic is ineffective, and in all probability makes us less safe from whatever it is we fear in the particular context.

III. WHERE RACIAL PROFILING MANIFESTS ITSELF

With the working definition above, we can ask how and where the practice manifests itself. The primary places in law enforcement that one sees the use of racial profiling are traffic stops and pedestrian stops (the latter usually, though not always, coming during so-called “*Terry* stops,” also known as stop-and-frisk activity). These two types of police actions make up fully half of all encounters that Americans have with police officers.²¹

Most anyone who drives in the U.S. understands how a traffic stop works. A police officer, witnessing the commission of a driving infraction (e.g., exceeding the speed limit or failure to use a required signal before a turn), or observing a defect with a vehicle’s equipment (e.g., a cracked taillight or a non-working headlight) or its required licensing items (plates, stickers or the like), any of which may violate the criminal law, may order the driver to pull over. Once stopped, the officer typically approaches the vehicle, addresses the driver, and requests the driver’s license, vehicle registration, and (usually) required proof of insurance. The officer takes these documents back to the police car and uses the police radio or an in-car computer to run checks on the driver and the stopped vehicle. Regarding the driver, the officer checks for active arrest warrants and for his or her history of driving citations, accumulated points, and/or license suspensions. As for the vehicle, the officer attempts to ascertain whether the vehicle’s registration and tags are current and proper, and to learn whether the vehicle has been reported stolen. Assuming that these checks come back “clean,”

21. *Study Finds Some Racial Differences in Perceptions of Police Behavior During Contact with the Public*, BUREAU OF JUSTICE STATISTICS (Sept. 24, 2013), <https://www.bjs.gov/content/pub/press/pbtss11rpa11pr.cfm> (Police Public Contact Survey for 2011 finds that half of all encounters with police occur during traffic and pedestrian stops).

the officer then decides whether to issue one or more citations to the driver, or instead warn the driver to avoid the conduct that caught the officer's attention or to fix problems with the vehicle. This usually takes 20 to 30 minutes.

This describes the common, routine traffic stop. But in many such stops, another set of actions takes place. And therein lies the reason that African-Americans and Latinos have long complained that police have targeted them for traffic-enforcement action.

First, understand that traffic codes are incredibly detailed and voluminous. Each state traffic code includes literally hundreds of laws that govern operation of the vehicle, vehicle equipment, and required licenses.²² Given the exhaustive degree of vehicle regulation, no driver can avoid violations of some kind, even with the greatest degree of care and attention. Police officers know this; by watching any driver carefully for a few blocks, they know they will witness a violation. One officer, quoted in a well-known 1967 book discussing police techniques, said, "You can always get a guy on a traffic violation if you tail him for a while, and then a search can be made."²³ Another officer, in the same book, said, "In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of the traffic law."²⁴ We can forgive these officers for their lack of understanding of the nuances of the current law regarding searches following stops;²⁵ they spoke decades ago. But they get the larger point. Given that every driver violates some aspect of the vehicle code during any short drive, traffic enforcement does not focus on detecting and addressing all, or even some large percentage, of the infractions committed. Rather, it becomes a matter of selecting *which* drivers committing violations to stop. This selection of drivers, from among all violators (i.e., all drivers) constitutes a prototypical exercise of police discretion: the exercise of judgment by officers, in which they decide when, how, and against whom to direct their law enforcement authority.

22. *E.g.*, Pennsylvania Vehicle Code, <http://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/75/75.HTM> (including, for example, more than fifty provisions regarding license plates, ten provisions regarding registration suspensions, more than twenty provisions on licenses, forty-eight provisions describing "Rules of the Road in General," over fifty "Miscellaneous" provision covering "Offenses in General," "Serious Offenses," and offenses involving accidents, and many other governing vehicle equipment).

23. LAWRENCE F. TIFFANY, ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, AND ENCOURAGEMENT AND ENTRAPMENT 131 (1967).

24. *Id.*

25. Simply making a legal stop would not, without evidence of some other offense, allow the officer to conduct a search of either the vehicle or its occupants.

Police discretion is nothing new, and in an overall sense the opportunity for officers to exercise discretion should not cause fear. Police officers should exercise sound judgment in exercising their authority; not every violation of law requires formal action and sanctions. Problems arise, however, when discretion has few or no boundaries—when the behavior that violates the law is so broad that anyone might come under suspicion. Because there exist few real limits on police action against vehicle drivers, officers can convert enforcement of traffic into investigation of other matters, for different, more intrusive and far more serious purposes. Put differently, without effective legal limits on discretion, traffic enforcement, for which police have extraordinarily broad legal authority, can become a pretext for police action of other types for which no legal authority actually exists. And the U.S. Supreme Court has constructed a perfect legal regime to allow police to use traffic stops as such pretexts. In a 1996 case, *Whren v. United States*,²⁶ the practice of racial profiling came squarely before the Court. In *Whren*, Washington, D.C., vice officers, operating in plain clothes in an unmarked vehicle and on patrol for signs of drug activity, observed a sport utility vehicle. Their attention drawn, the officers followed the vehicle, which violated some traffic laws in short order. The officers stopped the vehicle, driven by a young black man, and walked up to the cab; there they observed the passenger, another young black man, in possession of cocaine.²⁷ The defendant argued that while the police may indeed have observed traffic offenses, these officers—plainclothes officers in an unmarked vehicle, whose own departmental regulations actually prohibited them from making traffic stops²⁸—were using their discretion to make traffic stops in order to investigate citizens for drug offenses, without evidence of drug crimes.²⁹ In other words, the great discretion officers possessed to stop drivers for ubiquitous traffic offenses was being used as a pretext for a wholly different type of police work: drug investigation. The Supreme Court also had before it statistics from investigations in other jurisdictions that showed how police in those places had made a practice of using traffic enforcement against African-Americans and people of color at rates far greater than their

26. *Whren v. United States*, 517 U.S. 809 (1996).

27. *Id.* at 809–10. These details can also be found in David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 547–48 (1997).

28. The D.C. Metropolitan Police Department regulations prohibited stops by plain clothes officers, and stops by any officers driving unmarked vehicles. Harris, *supra* note 27, at 549 n.38.

29. Brief for Petitioners at 13–14, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95-5841), 1996 WL 75758.

presence on the roads.³⁰ In other words, the defendant argued that police used traffic enforcement in a discriminatory manner, based on the racial or ethnic appearance of the driver—racial profiling by any reckoning.

The Court’s opinion constituted both a reaction to the legal arguments, and a validation of a pernicious police procedure. Pulling a driver over for a traffic stop operated as a full seizure, for purposes of the Fourth Amendment to the Constitution, said the Court; any such seizure would require probable cause, as required by the Fourth Amendment. The Court declared that anytime an officer observed a traffic infraction, this established the necessary probable cause for the stop. It did not matter, the Court said, whether the officer performed the stop to enforce the traffic rules and make the roads safer, or if his or her motivation came from some other purpose entirely; as long as the officer had seen a traffic offense, his or her real motivations in making the stop did not matter.³¹ The police could not, the Court continued, use the power to make traffic stops in a racially discriminatory way; but evidence that they had done so would have no impact on the power of police to make such stops. A person who felt that he or she had faced racial discrimination by police who conducted the stop could file a lawsuit under the Equal Protection Clause of the Fourteenth Amendment. But the stop, and any evidence that resulted from it, would stand.³²

Even the most obtuse observer would understand the subtext to the Court’s opinion. The police might, indeed, be using traffic enforcement as a way to investigate drug offenses, even when there existed no evidence at all of drug activity. But the courts would not intervene to stop this police practice. Henceforth, the police had the Supreme Court’s approval to use traffic enforcement as a pretext to investigate other crimes, and even evidence that police might use this tool with a decidedly racial cast, as had been proven in Maryland and New Jersey, would not change this for Fourth Amendment purposes.

Once the police stop a vehicle—and *Whren* gives them the power to stop any vehicle, almost anytime, simply by following it long enough to see the inevitable traffic violation—the police may then engage in other activities, beyond those described above that are part of the normal process of traffic enforcement. They can use their time standing outside the car and the driver’s window to look inside the vehicle, seeking evidence in plain view of an unrelated criminal violation: a partially smoked marijuana cigarette or a concealed weapon, for

30. *Id.* at 25–26.

31. *Whren*, 517 U.S. at 812–14.

32. *Id.* at 813. See generally Paul Butler, “Race and Adjudication,” in Volume 3 of the present Report.

example. The visual (or olfactory) detection of another offense would give an officer probable cause for an arrest and seizure of the contraband seen,³³ which would in turn allow an officer to fully seize (i.e., arrest) the driver and often the passengers, and also to search some or all of the vehicle's interior.³⁴ If merely looking inside the vehicle does not give officers probable cause, they can then begin to question the occupants, without benefit of *Miranda* warnings, about their activities, what might be in the car, or anything else.³⁵ The occupants need not answer, but most will. Inevitably, this questioning will land in a familiar place: "You're not carrying any drugs or illegal weapons in the vehicle, are you? Any large amounts of money?" When the answer comes—almost surely, "no"—the next question follows as night follows day: "Well, you won't mind if I search your car, would you?" Having already said they have no guns or contraband or evidence, most drivers will find themselves hard-pressed to refuse and give the police permission to perform the so-called "consent search."³⁶ And if the driver does not grant permission, the police can use a drug-sniffing dog to search the car and its contents as long as the stop has not yet ended.³⁷

Thus traffic stops, and the Supreme Court cases that have sprung up around them, have created the opportunity for police to engage in enforcement with almost no bounds on their discretion. Anyone can be stopped, during almost any short drive; and the Court has given police the ability to enlarge the traffic enforcement activity into something much larger: investigation for other crimes, primarily drug crimes, for which no evidence exists.

But just because traffic stops give police a legal pretext to stop and investigate anyone, for anything, almost anytime, this does not mean that the police will, in fact, use this power against *just anyone*. In fact, the data we have, going all the way back to the earliest racial-profiling cases in New Jersey³⁸ and Maryland,³⁹ show that the police in many jurisdictions usually use this power much more often against African-Americans and other people of color.⁴⁰ And when the

33. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plain view exception).

34. *Arizona v. Gant*, 556 U.S. 332 (2009).

35. *Berkemer v. McCarty*, 468 U.S. 420 (1984).

36. *Schneckloth v. Bustamonte*, 412 U.S. 217 (1973); *see also infra* note 60 and accompanying text.

37. *United States v. Place*, 462 U.S. 696 (1983); *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

38. *State v. Pedro Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996); *see also* HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 53–56.

39. Complaint, *Wilkins v. Maryland State Police*, No. 93-468 (D. Md. filed Feb. 12, 1993); Harris, "Driving While Black," *supra* note 27, at 563–66.

40. David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 277–81 (1999).

stop leads to a consent search, this power is also used disproportionately: People of color get asked for consent to search much more often than others.⁴¹

Racial profiling also manifests in another common type of police/citizen encounter: stop-and-frisks. In the 1968 case of *Terry v. Ohio*,⁴² the U.S. Supreme Court set out the Fourth Amendment standards applicable to stop-and-frisks: temporary detentions of persons for investigation of suspected criminal activity, and cursory searches of outer clothing (often called “pat-downs”) for suspected weapons. The Court said that when a police officer possesses reasonable, fact-based suspicion that crime is afoot and it involves a particular individual, the officer may temporarily detain that person to ask questions or otherwise dispel the officer’s suspicions.⁴³ In the event that the officer also has reasonable, fact-based suspicion to believe that the person may be armed and dangerous (either because the crime suspected would likely require a weapon or because the officer sees evidence of the presence of a weapon, such as a bulge under the clothing in a place where people carry weapons), the officer may perform a limited search of the suspect by patting down the person’s outer clothing to detect weapons.⁴⁴ A hunch or a gut feeling will not support a stop or frisk; rather, the officer must have a reasoned, fact-based suspicion.⁴⁵

Even in the *Terry* opinion itself, the Supreme Court conceded that police had used this very type of activity in abusive ways against people of color.⁴⁶ It should not surprise anyone, then, to learn that patterns of racial profiling have also arisen in stop-and-frisks in the 21st century. The most prominent example of this comes from New York City. During the eight years of the mayoral administration of Rudolph Giuliani, the police increased stop-and-frisk activity significantly; by 1999, New York Police Department officers conducted roughly 100,000 *Terry* stops per year.⁴⁷ That number seemed huge—until Michael Bloomberg became mayor in 2002 and appointed Raymond Kelly as police commissioner. Between 2004 and 2012, the police in New York conducted 4.4

41. *Id.*

42. *Terry v. Ohio*, 392 U.S. 1 (1968). See generally Fradella & White, *supra* note 7.

43. *Terry*, 392 U.S. at 21, 23.

44. *Id.* at 27.

45. *Id.* at 22, 27. Note that the officer need not have enough evidence to amount to probable cause, the usual standard for an arrest and a full search; rather, reasonable suspicion, a lower standard, suffices, but must still be based on facts, not instinct or intuition.

46. The Court noted “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain,” even as it minimized the ability of the exclusionary rule to successfully tame these problems. *Id.* at 14–15.

47. THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICE: A REPORT FROM THE OFFICE OF THE ATTORNEY (Dec. 1, 1999) [hereinafter OAG REPORT].

million stops.⁴⁸ By 2004, stops reached 314,000 per year; roughly triple the pace of the late 1990s; by 2011, *Terry* stops had more than doubled again, totaling 686,000 per year.⁴⁹ With the number of *Terry* stops climbing every year along with a ballooning number of complaints by minority citizens, opponents brought a federal civil-rights action, *Floyd v. City of New York*, challenging the constitutionality of the stop-and-frisk practices.⁵⁰ A 2013 trial laid bare the facts: Among those 4.4 million *Terry* stops, 52% involved African-Americans, 31% involved Latinos, and 10% involved whites (the city's population at the time was 23% black, 29% Latino, and 22% white); 88% of these actions yielded no contraband, no arrests or even summonses; and only 1.5% turned up guns (the stated goal of the actions).⁵¹ While the Court carefully noted that it only passed upon the *constitutionality* of the stop-and-frisk activity, and made no judgment concerning the *effectiveness* of that activity,⁵² the data disclosed in the trial nevertheless told an important story about standards and effectiveness. Officers were much more likely to stop and frisk African-Americans and Latinos than whites, but they were *more likely to find weapons or contraband on whites than either African-Americans or Latinos*.⁵³ This means that police officers viewed African-Americans and Latinos as suspicious based on less evidence than they did when judging suspiciousness among whites. Based on these judgments and the actions taken as a result, they got a lower return (in terms of stop-and-frisks resulting in seizures of guns or other contraband, or resulting in arrests or summonses) than when they stopped and frisked whites.

Given all of this information, the federal judge made the following findings:

[T]he evidence at trial revealed that the NYPD has an unwritten policy ... targeting ... young black and Hispanic men.... This is a form of racial profiling. While a person's race may be important if it fits the description of a particular crime suspect, it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group are criminals. The Equal Protection Clause does not permit race-based suspicion.⁵⁴

48. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 588 (S.D.N.Y. 2013).

49. *Id.*

50. Complaint, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034). See Fagan, *supra* note 7.

51. *Floyd*, 959 F. Supp. 2d at 558–59.

52. *Id.* at 556.

53. *Id.* at 559.

54. *Id.* at 561.

IV. WHAT MAKES PROFILING GO?

Given everything we know, what makes racial profiling attractive to police officers? What makes it possible to use racial profiling as part of a tactical response to crime?

The answer to the first question concerns belief, rather than fact. In short, some number of police officers—it is impossible to state a percentage—simply remain convinced that racial profiling remains the right tool to help them focus on the proper suspects. Thinking in terms of the tens of thousands of cars that stream down a busy highway each day, the police tasked with drug interdiction may not know which few of those vehicles contain loads of drugs, and they cannot stop them all, so they look for clues to enable themselves to target their efforts. They may look for neutral clues, such as rental vehicles (more likely, they believe, to be used for this purpose than privately owned vehicles) that adhere very closely to the speed limit (which few drivers do), and the like, but the race of the driver also plays a role in the constellation of factors. Marshall Frank, a writer and retired former police officer who retired as a captain from the Miami-Dade Police Department, spelled out the rationale in an article he wrote for the *Miami Herald*. Frank says people can “[l]abel me a racist if you wish, but the cold fact is that African Americans comprise 12 percent of the nation’s population, but occupy nearly half the state and federal prison cells.”⁵⁵ This, he says, justifies taking race into account in deciding which people seem suspicious.

The same reasoning applied in the New York Police Department under Commissioner Kelly. In the *Floyd* litigation, the court heard testimony from a number of high-ranking officers who testified that NYPD officers stopped disproportionate numbers of African-Americans and Latinos because they understood how to look for “the right people”⁵⁶ when they were on patrol. With African-Americans and Latinos overrepresented among the criminal suspect populations in particular areas, the highest-ranking uniformed person in the NYPD testified that those “right people” were usually young black and Latino men, because “who is doing those shootings? Well, it’s young men of color in their late teens, early 20s.”⁵⁷

Aside from the question of why officers use racial profiling, there is the question of what makes it work. The answer involves, first, one particular legal tool, and then more broadly the incentives within police departments and

55. Marshall Frank, *Racial Profiling: Better Safe than Sorry?*, MIAMI HERALD (Oct. 19, 1999).

56. *Floyd*, 959 F. Supp. 2d at 561.

57. *Id.* at 604.

agency structures. For racial profiling that occurs during traffic stops, recall that the Supreme Court gave the green light for the stop itself in the *Whren* case: Any observed traffic offense gives police full probable cause to stop the vehicle, and in doing so, run criminal- and traffic-activity checks on the driver, look through the windows and talk to the driver and occupants. But a legal stop, without more—finding a warrant for the driver’s arrest, or seeing evidence of a criminal offense inside the car—would not allow the officer to take any other action, and in particular, the officer could not search the car itself. However, as mentioned earlier, police have a powerful tool to get the search to happen: a consent search. The consent search is a search made pursuant to a request made by a police officer to search the vehicle and perhaps the driver, or any pedestrian, as long as the person freely grants permission. This tool, conferred by the Supreme Court in a 1973 case called *Schneckloth v. Bustamonte*,⁵⁸ allows police to ask for consent to search in cases in which they have no probable cause to search and no reasonable suspicion for even a *Terry* frisk. Under *Schneckloth*, asking for consent does not require probable cause, or fact-based suspicion, or any evidence at all, the Court has said. Making the request is completely discretionary, and police do not have to tell the person that he or she has a constitutional right to refuse consent.⁵⁹ The police need only get non-coerced permission, and naturally most people feel hesitant to deny a police officer’s request. The officer is, of course, the literal embodiment of state authority: clothed in the state’s uniform, carrying a weapon, and possessed of discretion to take police action (e.g., making an arrest or giving a citation) or not. Few people will want to say no and seem uncooperative or guilty. Caught in this vice, the overwhelming number of drivers agree to the search and allow police to comb through their cars.⁶⁰ This allows police to convert many traffic stops into full searches for drugs, guns, or any other contraband, with no evidence of these crimes. As long as the consent comes freely and without coercion, the Supreme Court has said, a consent-based search remains perfectly valid. Without the ability to conduct consent searches, many traffic stops would remain just traffic stops; no further investigation (for hidden drugs or weapons) based on racial profiling would take place.

58. *Schneckloth v. Bustamonte*, 412 U.S. 217 (1973). See generally Carbado, *supra* note 7.

59. *Schneckloth*, 412 U.S. at 227; *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

60. E.g., Ilya Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the Consensual Police-Citizen Encounter 199–200* (1999) (unpublished Ph.D. dissertation, Rutgers University); see also Ilya Lichtenberg, *Impact of a Verbal Warning on Police Consent Search Practices*, 32 J. CRIM. JUST. 85 (2004). This includes many drivers whose vehicles actually contain contraband.

Two incentives also underlie the use of profiling. First, law enforcement tends to incentivize police activities such as arrests. This seems understandable, in at least one sense: arrests mean that an officer has apprehended an alleged criminal. It is also understandable in another sense: We can count arrests, and therefore they make good benchmarks and measurements of success. (In contrast, it is much harder to measure something like how an officer improves relations with his or her community, or how the officer connects with citizens.) An officer who makes more arrests will receive greater recognition, will have a better chance for promotion or plum assignments, and other similar benefits. Therefore, any activity that will get an officer more arrests will have greater value. Stop-and-frisks or traffic stops can lead to arrests (though not as often as many people think).⁶¹ This means that these activities (traffic stops and *Terry* stops) will proliferate, and since racial profiling can infect them, as we have seen, racial profiling will also increase. In addition, a police department might actually incentivize stop-and-frisks or traffic stops *as ends in themselves*, not just as activities leading to arrests. This is precisely what happened in New York City, resulting in hundreds of thousands of stop-and-frisks every year, with much of this activity based upon racial profiling.⁶²

We must add another incentive to this discussion: civil asset forfeiture. Civil asset forfeiture allows police to seize property of any kind—vehicles, homes, or cash—upon allegations that the assets are or have been involved in criminal activity.⁶³ Seized items could include cash earned from criminal activity or intended for use in such activity (e.g., drug profits or money to make drug purchases), or property purchased with that money. When law-enforcement agencies seize these assets, the owner must go to court and prove the “innocence” of the asset, at his or her own expense. Should the owner fail to do so, the property can be kept by the government—perhaps in whole or in part by the law enforcement agency itself. Sometimes the asset, such as a

61. For example, the *Floyd* litigation revealed that the millions of stops in New York City uncovered enough evidence to result in either an arrest or a citation only twelve percent of the time. Those police did not arrest or cite those who they stopped a full 88% of the time. *Floyd*, 959 F. Supp. 2d at 558–59.

62. *Id.* at 560–61 (“The foregoing evidence shows that officers are routinely subjected to significant pressure to increase their stop numbers, without corresponding pressure to ensure that stops are constitutionally justified.... [T]his is a predictable formula for producing unjustified stops. To paraphrase a statement by [a high ranking NYPD official] from his 2010 memo, imposing numerical performance goals for enforcement activities, without providing effective safeguards to ensure the activities are legally justified, “could result in an officer taking enforcement action for the purpose of meeting a [performance goal] rather than because a violation of the law has occurred.”).

63. See Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

vehicle, may find a place as a piece of police equipment (perhaps an unmarked police car); other times, assets like cash find their way into law enforcement budgets.⁶⁴ This may happen under state law or (when state law does not permit this) through a federal program called “equitable sharing,”⁶⁵ in which forfeitures by state or municipal law enforcement agents are “adopted” by the federal government, with a substantial percentage of the seizure’s value kicked back to the seizing agency. This amounts to policing for profit: Agencies go out and “earn” increasing shares of their budgets by seizing the property of citizens, who are often unable to mount the fight it takes to get the property back. This activity has become quite a valuable source of law enforcement funding, thus strongly incentivizing the police conduct during which these forfeitures occur: chiefly (though not only) traffic stops.⁶⁶ And to the extent that traffic stops are a major—perhaps *the* major—place in the system in which racial profiling may manifest itself, these incentives propel it forward.

V. THE HARM RACIAL PROFILING DOES TO INDIVIDUALS AND THE CRIMINAL JUSTICE SYSTEM

The use of racial or ethnic appearance as an indicator of suspicion inflicts significant harm on both individuals subjected to police attention, and on the system as a whole. For individuals, they find their freedom of movement restricted in a way that is perhaps infrequent and not permanent, but arbitrary and more than a little inconvenient. As the Supreme Court has said, a stop-and-frisk is not a “mere ‘petty indignity.’”⁶⁷ It halts a person’s progress through the day, at the insistence of police officers—and thus at the hands of the state. The subject experiences questioning, and may suffer probing physical touching, including in private areas, from outside the clothing. All of this occurs in public, in full view of passersby and perhaps neighbors, many of whom may wonder what the subject has done—or, who assume that the subject *has* done something—to deserve this sort of negative attention. A traffic stop may not (in fact, without more evidence, cannot) include even a brief cursory physical search of the person. But any traffic stop that moves beyond the ordinary

64. E.g., Ronald Fraser, *It’s Time to End Pa’s Civil Forfeiture Nightmare*, PENN LIVE (Sept. 23, 2016), http://www.pennlive.com/opinion/2016/09/its_time_to_end_pas_civil_fore.html.

65. U.S. DEP’T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2009), <https://www.justice.gov/criminal-afmls/file/794696/download>.

66. For an excellent overview of federal and state forfeiture practices, the use of these practices to pad law enforcement budget, and even the involvement of private companies in these practices, see Michael Sallah et al., *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged With Crimes*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

67. *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

“license, registration, please stay in the vehicle” procedure, with the occupants moved out of the car and perhaps seated on the curb, and especially with a driver’s vehicle undergoing a search, will surely produce the same sorts of feelings in the subject and in other people in the area. With African-Americans sometimes experiencing force and even violence at the hands of police more often than whites,⁶⁸ stop-and-frisks and traffic stops may even inspire fear for one’s life. In short, the effects on the individuals involved may include apprehension, fear and anger at the physical violation, public embarrassment, or worse. Each of these incidents becomes a story that is shared with others in the family, with others in the same neighborhoods, and with others in the same racial and ethnic groups. This leads to widely held perceptions across these groups that they—all the members of these racial or ethnic groups, not just the few individuals who may have engaged in some criminal conduct—are the actual target.⁶⁹

This aggregation of individual damage points to why racial profiling is deeply damaging on a societal level—not just to the communities subjected, but to all citizens, and even to police and their efforts to fight crime and disorder. When whole groups share stories about being targeted by police, this reinforces (or creates anew) the message that police enforcement practices land on people not because of what they do, but because of how they look—that is, the racial or ethnic group to which they belong. By any moral measure, this seems wrong; regarding people as suspicious and therefore subject to police intrusion simply because they share a set of immutable physical characteristics with some very small number of people who have engaged in criminal acts cannot meet any standard of individualized justice. The state—through its agents, the police—has the power to step in to investigate and prevent crime, but in order to do so, police must meet legal standards that require some amount of evidence stemming from the personal conduct of the suspect, or because they match the appearance of a perpetrator (in a somewhat detailed, not general, way) witnessed by others. This is the meaning behind our constitutional requirements of probable cause and reasonable suspicion; the latter may be a lower standard than the former, but even reasonable suspicion requires some particularized, individual evidence upon which to base suspicion of the individual observed.⁷⁰

68. E.g., William Terrill, Eugene Paoline & Jacinta Gau, *Race and the Police Use of Force Encounter in the United States*, BRITISH J. CRIMINOLOGY (forthcoming 2017) (white officers use greater force on black suspects than they do on white suspects, but African American officers use force against both black and white suspects at similar rates).

69. See HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 90–92, 94–99.

70. United States v. Cortez, 449 U.S. 411 (1981) (requiring individualized, particularized suspicion).

When this type of harm, both to individuals and to groups, accumulates, we experience real injury to the collective good. When people suspect or begin to believe that the police treat them suspiciously based upon racial or ethnic appearance, it undermines the very legitimacy of the police, and even of the law itself. The work of Tom Tyler⁷¹ demonstrates that when the police treat people in ways that seem unfair, discriminatory, rude, and heedless of their viewpoint and their humanity, people regard the action, and the very authority the officer exercises, as illegitimate. It makes the citizen less likely to accept the outcome, less likely to obey the law, less likely to assist an officer when he or she needs help, and less likely to regard the police as a force for good and for safety. Tyler's work on these concepts, referred to broadly as "procedural justice," has shown that when people are treated fairly and with due regard to their humanity, they have a much greater willingness to accept the outcome of the encounter—a traffic citation, a summons or an arrest—with some degree of equanimity. The effect goes beyond police/citizen encounters as well. Police make arrests all the time, and they make more of them, of more dangerous people, in neighborhoods with higher levels of more serious crime. Eventually, cases that stem from these arrests for serious cases move through the court system, and some number of them go to trial. When most street crime cases go to trial, police often serve as witness; in some number of those cases, they are the *only* witnesses. When police testify in trials, they usually do so in front of a jury. And in communities in which police/community relations have suffered because of racial profiling, jury members, drawn from that community may feel a degree of real skepticism about the honesty of police testimony. When jurors feel reluctant to believe the police, because of their own negative experiences with them or because they have heard stories of such bad experiences from family or community members for years, this may cause untoward consequences. Jurors who feel they cannot accept the word of police officers under oath may vote to acquit a defendant—sometimes, a truly bad and dangerous defendant who should go to prison—who then goes free. Obviously, this cannot benefit the communities to which such dangerous actors return; those communities need to have predators taken off their streets, not put back on them. Freedom allows these defendants to continue their criminal conduct and victimize others, further damaging the community. This outcome can only frustrate police officers, who have worked to make the arrest and have it stick. Yet one can see how racial profiling may create exactly the conditions—deep mistrust of the police, unwillingness to accept police authority, and with it, police testimony—that may lead to this negative outcome.

71. TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2d ed. 2006).

VI. THE COST IN PUBLIC SAFETY AND POLICE ACCURACY: WHY RACIAL PROFILING IS NOT “WORTH IT” DESPITE THE SOCIAL COSTS

It is easy to envision a response to the cost arguments—both personal and societal—from proponents of racial profiling. We see them in comments from many defenders of pretext-based traffic stops and stop-and-frisks that have a racially disproportionate impact upon people of color, such as Marshall Frank. The bottom line: We should use racial or ethnic targeting as part of a crime-control strategy, because it works. It helps police officers target “the right people,” to quote from the testimony in the *Floyd* stop-and-frisk case, and that brings down crime and especially lethal gun violence. Since young black men become victims of gun homicide at the hands of other young black men far more often than others, the use of race-based profiling actually saves black lives, and those who oppose racial profiling are racists. Since racial profiling works, we must and we will do it, regardless of the costs to individual or group dignity. People in those crime-ridden communities will have to bear those costs, unfortunately, because that is what it takes to combat crime and restore order, or to fight terrorism (another context where profiling—in this instance, of people who appear Arab or Muslim—has found many defenders).

First, declaring that a social cost—even one parceled out based on race or ethnic appearance—simply must be accepted for the greater good is easier for those who do not bear it. Such costs, imposed by but not borne by the proponent or others of his or her group, are externalized: they are external to those imposing the cost, and therefore easy to ignore or to just pronounce acceptable. This is an understandable (if not very persuasive or moral) argument. But we must not fail to see what the argument assumes without questioning: that profiling actually does work, in the way that its proponents believe—that is, that it does help police apprehend more criminals. That fundamental question remains unanswered by profiling’s advocates: Does racial profiling actually work? Does it have the positive effects that its proponents believe in terms of boosting the effectiveness of police efforts to bring down crime?

Rigorous analysis of the data, in study after study, performed in areas around the country and in various law-enforcement contexts, says no. Using racial or ethnic appearance as one factor, among others, in deciding which drivers or pedestrians to target for routine police actions such as brief detentions, questioning, frisks, and searches does not increase the productivity of these kinds of police activity. In my work, I have referred to this idea as the hit rate: the rate at which officers’ activity results in the recovery of contraband or guns, the detection of other offenses, the making of arrests, or the writing

of summonses.⁷² On the contrary, using racial or ethnic appearance to target enforcement activity actually results in lower hit rates as compared to the rate of hits when not using racial or ethnic appearance—i.e., hits when stopping and searching whites.

Recall the evidence put before the court in *Floyd v. New York City*, the stop-and-frisk case decided by the federal district court in 2013. Notice that even though blacks bore a disproportionate number of stops, this did not result in a disproportionate number of seizures from them. Police seized contraband other than weapons in 1.8% of stops of blacks, in 1.7% of stops of Latinos, but in 2.3% of stops of whites. Police actions resulted in seizures of guns 1.0% of the time for blacks, 1.1% of the time for Latinos, but 1.4% of the time for whites.⁷³ In other words, while NYPD officers targeted a disproportionate number of people of color for stops and searches, their hit rates for those actions measured lower than the hit rates for those same actions against whites—directly contradicting the “it works” justification for these actions. The *Floyd* case was not the first time that data analysis had demonstrated the abysmal hit rates for blacks and Latinos, compared to the hit rates for whites. As early as 1999, a study by the New York State Attorney General’s Office showed the same pattern. Blacks and Latinos were “over-stopped” relative to their representation in the population of New York City; the stops yielded contraband, guns, arrests, and summons at lower rates for blacks and Latinos than they did for whites.⁷⁴

Given that so many in law enforcement have believed so strongly and for so long that racial profiling “works,” the data seem counterintuitive at best. Why would using a factor like racial or ethnic appearance not as the sole indicator but one among many not just fail to help, but seemingly hurt, law enforcement efforts? The answer lies in understanding what really counts in a law enforcement context, and in grasping some of what we have learned about how human attention works. What really counts, in brief, is behavior. When we have a description of a particular person who has engaged in a particular kind of criminal behavior, we look for someone who matches that particular description who may also be engaged in behavior like hiding or escaping. But when, instead, we know that criminal behavior may be taking place in a particular place among many people, *but the behavior is hidden and we have no description of who is engaging in that behavior*, police must focus tightly on the particulars of *behavior* that will tip us off to the crime. Of course, this latter situation describes perfectly what police face if they believe that one or a few

72. HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 78–84.

73. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013).

74. OAG REPORT, *supra* note 47.

of the tens of thousands of vehicles coming down an interstate highway may contain a cache of drug contraband. They cannot hope to stop any more than a fraction of the vehicles they see. And if they believe in racial or ethnic profiling, they think that using racial or ethnic appearance will increase their odds of finding “the right people.” This will give them a shortcut to finding the few vehicles to stop. What it does, instead, is create a short *circuit*: it pulls their eyes and their attention off of what counts—the particulars of behavior—and on to a factor that does not, in fact, predict criminal involvement—appearance. Profiling does not have to pull all police attention off of behavior for it to hurt their efforts; even just somewhat less attention to behavior is enough to make them less accurate in assessing suspicion. To use a baseball analogy, when the eye is taken off the ball, even just a little, it makes a difference in the ability to hit.

Beyond the stark fact that focusing on racial or ethnic appearance does not net more apprehensions of criminals, there are other, perhaps less obvious costs entailed in using racial or ethnic profiling. First, racial profiling generates false positives that actually cost law enforcement time, energy, and resources. Proponents of profiling say that using profiling is a way to narrow the pool of suspects, or that it’s a way to implement a kind of “better safe than sorry” regime—better to make sure you have all the possible right suspects, and direct efforts to them, instead of risking missing any of them.⁷⁵ But the reality of the situation is quite the opposite. Racial profiling is supposed to be a predictive tool, according to its proponents: In a large pool of possible suspects, it helps police or security officials predict which persons are the most likely suspects, and allows police to focus on them. Put another way, trying to figure out which vehicles on a busy interstate highway contain large loads of drugs is like trying to find the proverbial needle in a haystack. If this is true, the last thing one should do is (to stretch the analogy) add more hay to the stack. That is what racial profiling does, by focusing police on appearance, a factor unrelated to criminality, and taking attention away from behaviors that might provide actual clues to wrongdoing.

Moreover, using racial or ethnic profiling damages the ability of police to obtain intelligence about actual criminal activity. Police cannot, we know, be everywhere at once (nor would we want them to be, despite our eagerness to increase public safety). They will not witness most of the crime committed; they know about it from reports they receive—from victims or other members of the community who witness it. Thus in a very real sense, police depend on the community for information about what happened when officers were not present. An old saw among police captures this: When a shooting happens on

75. Thus the subtitle of Marshall Frank’s article, *supra* note 55: “Better Safe than Sorry.”

Saturday night, everyone in the neighborhood knows who did it by Monday morning—except the police. If the police want to receive this information, they must have real relationships—relationships built on mutual trust—with people in the communities they serve. Without those relationships, they fly blind, and must gather information catch as catch can or generate what evidence they can through other means—something that is never as easy as it appears on TV dramas featuring forensic-science miracles every week. When police have relationships with people in communities, information about criminal activity flows more freely—not only the shooting last weekend, but the low-level drug-dealing or thievery in the neighborhood every night. This kind of information also helps the police know the neighborhood and its residents better, which can become critical. For example, it can help officers know which one of the 20 kids in hooded sweatshirts who live on the street actually presents a danger, while the other 19 do not.

Racial profiling strikes at the heart of this kind of relationship. At bottom, by including racial or ethnic appearance as one of the factors police use to decide who to regard as suspicious, all black and brown people become suspect to some degree. When the suspiciousness of race combines with other factors, they logically seem more suspicious than whites, and the outcome is exactly what we see in study after study on traffic stops and stop-and-frisks: Police stop African-Americans and Latinos more often than whites, even though stops of whites yield contraband or arrests or summonses more often. Black and brown people know when their communities are being targeted, of course, and they understand it for what it is: Police using racial profiling consider the whole community suspect. Not surprisingly, this only alienates them from the police, making them less likely to want to help and cooperate with them—even if they know that such cooperation might help their communities. Some still do cooperate, of course; in fact, many support the police in these communities. But the use of racial profiling cannot help but discourage the level of cooperation with police, to some degree. And that hurts the ability of individual officers and their departments to fight crime.

VII. WHAT CAN BE DONE?

A. FEDERAL LEGISLATION AND DEPARTMENT OF JUSTICE POLICY GUIDANCE HAS NOT DONE THE JOB

Federal legislation on racial profiling has been introduced in every successive session of Congress beginning in 1997 with the Traffic Stops Statistics Study Act,⁷⁶ and then the End Racial Profiling Act.⁷⁷ All of these bills would have required data collection on traffic and/or pedestrian stops, and they also mandated other actions by police. None of these pieces of legislation passed, and proposals like them seem even less likely to pass in the near future.

In 2003, the U.S. Department of Justice, under then Attorney General John Ashcroft, issued a “Policy Guidance” on racial profiling.⁷⁸ The document, which was not a regulation or a policy, described how federal agencies performing policing activities should confront the issue of racial profiling. The Guidance contained a reasonably good definition of racial profiling, and prohibited its use in most circumstances.⁷⁹ But even so, it did not go far enough. First, it was a federal document, and as such applied only to federal agencies (and in fact, it could not apply to state or local agencies, as the federal government has no power to order state or local agencies to conduct police activity in any particular way).⁸⁰ With the exception of, perhaps, the U.S. Park Police or the U.S. Capitol Police, federal police agencies do not make traffic stops or perform stop-and-frisks; that activity occurs almost entirely at the state and local level. In addition, the Guidance created specific exceptions to the ban on profiling for the two areas in which the federal government had actually begun to use racial and ethnic appearance after the 9/11 terrorist attacks: national security and immigration.⁸¹ A revised version of the Policy Guidance, issued in 2014, improved on some of these issues, but it still applied only to the limited

76. Traffic Stops Statistics Study Act of 1998, H.R. 118, 105th Cong. (1997).

77. End Racial Profiling Act of 2015, H.R. 1933, 114th Cong. (2015).

78. The Policy Guidance is described in *Fact Sheet: Racial Profiling*, U.S. DEP’T OF JUSTICE (June 17, 2003), https://www.justice.gov/archive/opa/pr/2003/June/racial_profiling_fact_sheet.pdf.

79. *Id.* at 3 (“federal law enforcement officers may not use race or ethnicity to any degree”).

80. The exception is the federal pattern or practice law, found at 42 U.S.C. § 14141, which gives the Department of Justice the power to investigate and litigate civilly when a state or local police department exhibits a pattern or practice of constitutional violation.

81. *Fact Sheet*, *supra* note 78, at 5 (“[F]ederal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our nation’s borders.... Therefore, the racial profiling guidance recognizes that race and ethnicity may be used in terrorist identification”).

universe of federal law-enforcement agencies.⁸² Thus, assuming that the 2014 Guidance remains in effect in the new federal administration that took office in 2017, it represents at best a partial measure that will not address most of the problem, which lies in the states.

B. CRIMINAL PROHIBITION: NOT A LIKELY SOLUTION

Another possible avenue of redress would be for legislative bodies to create criminal penalties for engaging in profiling. Under this kind of scheme, the relevant jurisdiction's law would make racial or ethnic profiling a criminal offense, punishable with criminal penalties such as incarceration and fines. The appeal of this seems logical: for citizens who feel they have suffered the sting of racial profiling, without seeing relief from the responsible government agencies, officers faced with the possibility of criminal charges would at least hesitate to use the tactic, and might leave it behind altogether.

But problems with this approach make it an unattractive option. First, assuming that the officer involved did not exhibit obvious signs of racial bias—use of a racial slur, for example—proving the use of racial profiling by a single officer in a particular instance, beyond a reasonable doubt, could prove quite difficult. Given the large number of possible explanations other than race for any particular officer's action, proving the officer engaged in racial profiling would constitute a formidable task. (In contrast, proving that a police agency, as a whole, used or condoned racial profiling in the actions of all or a significant number of its officers would allow statistical evidence of much wider patterns of evidence, covering all of the officers in the department, and would take place in civil court with the lower burden of proof used there.) Second, the fact that a police officer would face a criminal sanction might make prosecutors less, not more, willing to bring actions. The criminal law carries with it the stigma of criminal blameworthiness, and can result in the loss of a person's freedom. One can easily imagine a prosecutor—especially one who works with members of the defendant officer's own department day after day—feeling that a criminal charge for an offense as controversial as racial profiling (which a significant number of people in law enforcement still consider a legitimate tool) is simply too serious an action to take. Third, it is worth noting that, even over the last two and a half years, with multiple cases of police officers shooting unarmed African-Americans in the news constantly, prosecutors have brought relatively

82. U.S. DEP'T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (Dec. 2014), <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

few criminal homicide cases against police, even on less serious homicide charges such as manslaughter.⁸³ And among those brought, convictions have not always resulted. Think, for example, of the trial of Michael Slager, the police officer in North Charleston, South Carolina, seen on a passerby's video shooting a fleeing civilian, Walter Scott, in the back. Even with video evidence, the trial ended in a hung jury.⁸⁴ With juries unwilling to convict even in cases in which the action of the police officer has resulted in death, we would likely see prosecutors unwilling to charge criminal cases of racial profiling; the stakes—the injury done to the civilian by profiling—seem much lower than in a shooting.

C. STATE LEGISLATION REQUIRING TRACKING OF TRAFFIC AND PEDESTRIAN STOPS USING STANDARDIZED DATA

Various states have enacted laws concerning racial profiling. Contents of these laws varied, but many defined racial profiling, prohibited the practice, and required some data collection on traffic stops by police.⁸⁵ Many of these laws had sunset provisions, and have gone out of existence. The best of them, in Missouri, continues to require that every police agency in the state collect data on traffic stops by its officers, that the data go to the state's attorney general, and that the data be released to the public.⁸⁶ In the overwhelming majority of these statutes, engaging in the prohibited practice of racial profiling carried no consequences. In the Missouri statute—again, the best of the lot—the law describes a potential consequence: police departments that failed to submit data on their traffic stops could lose state funding.⁸⁷ But when a few Missouri departments refused to give the required data, their funding went undisturbed.

Overall, legislation has not had much of an impact on the profiling problem, even in Missouri, but this situation could be different. States could enact more robust legislation that prohibits the practice and requires actions by all police departments in the state. The legislation must continue on an indefinite

83. See generally L. Song Richardson, "Police Use of Force," in the present Volume.

84. Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html>.

85. E.g., 50 ILL. COMP. STAT. 727; CONN. GEN. STAT. § 54-11; CAL. GOV'T CODE § 12525.5; CAL. PENAL CODE §§ 13012, 13519.4.

86. MO. REV. STAT. § 590.650.

87. *Id.* subsec. 6 ("If a law enforcement agency fails to comply with the provisions of this section, the governor may withhold any state funds appropriated to the noncompliant law enforcement agency.").

basis—i.e., it should not sunset, and could lose effect only through regular and customary repeal; the presumption would keep the law in effect, like any other law. Moreover, the law would contain the following provisions:

- The law would prohibit racial or ethnic profiling, using the definition at the beginning of this article, or another substantially equivalent definition. It would also require all police departments to have an internal policy prohibiting profiling, using the same definition.
- The law would require that all police departments track—collect data about—every traffic and pedestrian stop conducted by its officers. These data would have to be tabulated or stored in an electronic format that makes analysis, search, and publication of the data possible. The data collected for traffic stops would include all of the following: (1) time, place, and length of the stop; (2) race or ethnic group of the subject driver as perceived by the officer; (3) the offense(s) witnessed by the officer that led to the stop; (4) whether the driver or other occupant of the vehicle was ordered to exit the vehicle, and for what purpose; (5) whether citation(s) or warnings were given, and for what offenses; (6) whether the driver, other occupants, or the vehicle were searched; (7) the legal basis for any searches (e.g., arrest, *Terry* suspicion, consent search, canine, etc.); (8) whether any search resulted in the discover of contraband; and (9) the nature of the contraband, including its likely identity and approximation amount if it is a suspected illegal drug. For pedestrian stops, the data collected would include all of the following: (1) time, place and length of the stop; (2) race or ethnic group of the pedestrian as perceived by the officer; (3) the basis for the officer's reasonable suspicion about the subject, in narrative form; (4) whether a frisk was performed; (5) the basis for the officer's reasonable suspicion that the subject was armed and dangerous; (6) whether the frisk revealed the presence of a weapon, and the type of weapon; (7) whether the frisk resulted in the recovery of other contraband, and if so, the nature of the contraband (if illegal drugs, type and approximate amount); and (8) whether the police action resulted in an arrest, summons, or other official action. The law would also require that the policy of each police department reflect this requirement to collect these data.
- The law would require that each police department would submit these data, in aggregate form and without identifying individual officers, to the state's attorney general or other appropriate officer at least once a year. That official would be required to perform a statistically

appropriate analysis of the information and report on the data and the analysis to the public at least as frequently as the data are submitted, in an electronic form that would allow further analysis of the data by any interested party.

- The law would require that each police department in the state create processes to periodically assess the traffic and pedestrian stop practices of each individual officer performing routine police duties in the department, utilizing the individual-level data on these activities for each officer, at least quarterly. For agencies using an early-intervention system, this assessment should be part of the operation of that system.
- The law would require that each department develop training on the policy, and create or utilize robust systems for supervision that assure that officers follow the policy, and hold officers accountable for breaking with policy if that happens.

D. INTERNAL DEPARTMENTAL REGULATIONS

Police departments are creatures of state and local governments; they exist and have authority by virtue of state and local law. They must, of course, honor and follow the U.S. Constitution (and its interpretations by courts) in their law enforcement practices, generally and in specific cases. And they must follow state law as well, such as the kind of statute described in the immediately preceding section.

Nevertheless, we should note that much police conduct responds to the internal rules, regulations, and procedures that each department has for its officers. These internal rules may simply codify, restate, or implement the rules and statutes that come from superior authorities: U.S. Supreme Court decisions on search procedures, for example, or state laws that govern record-keeping or other processes. Thus the recommendations above for state legislation say that the requirements of the hypothetical state anti-profiling legislation should also appear in departmental policies and rules. But this may not be enough. In order to meet the challenge of profiling, internal police department rules and regulations should take the principles and commands of state law and put them into concrete commands applicable in that department. Even more important, police department regulation must emphasize the primacy of policy; of training that reflects that policy; of ongoing, active supervision of officers by sergeants and lieutenants to assure compliance with policy and training; and of accountability for officers who fail to follow these rules (as well as supervisors who do a lousy job of supervision on these and other issues).

Where appropriate, accountability should lead to closer supervision; or to counseling and retraining; to discipline; or (in rare cases) to termination. Many departments attempt to assure compliance with policy with early-intervention systems, which track officer behaviors that show failure to comply with policies or even misconduct; these systems also track how supervisors responded. Not every department has, or needs, an early-intervention system, but all must have a sufficiently clear and strong policy against profiling, and mechanisms for assuring that officers follow that policy. To do the most we can to make this happen, the legislation recommended above must be joined with robust internal departmental rules aimed at the same issue.

E. ELIMINATING CONSENT SEARCHES FROM TRAFFIC AND PEDESTRIAN STOPS

As explained above, consent searches form a major part of the toolkit for police performing traffic stops as a pretext for investigating other crimes for which there exists no evidence to support probable cause. An officer who has a legal basis to stop a car for a traffic violation under the *Whren* case cannot proceed to search either the vehicle, the driver or other occupants without more: observed evidence of a crime other than the traffic offense, or discovery of a warrant for the arrest of the driver. But the Supreme Court allows police officers to ask for consent to search, and such consent constitutes complete legal justification for a search as long as the civilian gives consent freely and without coercion.⁸⁸ But, as discussed above, a request for consent from a police officer does not give a person receiving that request any kind of real choice to say yes or no. Rather, civilians respond to the police officer's request for consent to search with high rates of assent because they do not wish to displease authority and hope to avoid legal consequences that the officer can impose. The way the Supreme Court describes legal consent for a search simply creates a legal definition, or some would say, a legal fiction; it does not, in any real sense, reflect the reality of freely given permission. Add the fact that police ask African-Americans and Latinos for consent to search at rates far out of proportion to their (already disproportionate) share of police stops, and it becomes clear that police agencies use consent searches with no evidence of criminal conduct in a racially and ethnically disproportionate way. Use of consent searches is part and parcel of racial profiling; indeed, it is no exaggeration to say, as Professor

88. *Schneckloth v. Bustamonte*, 412 U.S. 217 (1973).

George Thomas has, that consent searches form the engine that powers the whole traffic-stop/racial-profiling mechanism, and restraining this power would do a lot to cut off profiling.⁸⁹

It is time that we recognize this. The existence of consent searches as defined by the Supreme Court completes and extends police power to use racial profiling. This should end. States can, and should, pass laws that prohibit their police from asking for consent to search during traffic stops and pedestrian stops, absent at least a reasonable, fact-based suspicion to believe that the vehicle and/or the driver, or the pedestrian, is involved in current criminal activity.⁹⁰ This is what New Jersey did a decade and a half ago, in *State v. Carty*⁹¹: the Supreme Court of New Jersey declared that, under the state's own Constitution, "consent searches following a lawful stop of a motor vehicle should not be deemed valid" unless, prior to the stop, there was "reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity."⁹² The use of the *Carty* standard would not abolish consent searches altogether, but it would bring them into a more reasonable balance. Police could not use them without having at least a fact-based reason for suspicion of crime that they could articulate to a court. There is no indication that this would be an unworkable standard for police to meet; with 15 years of experience with the *Carty* rule, no evidence exists that it has harmed public-safety efforts in New Jersey. Failing passage of a state law, municipalities can pass such laws or ordinances that govern their own agencies; departments can enact a ban on evidence-less consent searches in their own interval rules. Stopping the use of consent searches without any evidence would go a long way toward bringing racial profiling under control.

Of course, many in law enforcement will not want to give up this convenient and powerful tool. They will see it as a valuable source of authority to perform searches the law would not otherwise allow, which allows them to catch more criminals. But this shortsighted view ignores the fact that using this power comes at a price. Americans are not fools; they know the difference between asking a person for permission, and a request to search that is really no request at all. And black or brown Americans know that police seek their "permission" to search all the time, while if they were white this would happen much more

89. George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 *MISS. L. REV.* 525, 542, 548 (2003) ("The consent search doctrine is the handmaiden of racial profiling" and should, at the very least, require *Terry*-level reasonable suspicion before an officer can request consent.").

90. This proposal is Professor Thomas' idea, from the previous note, in my words.

91. *State v. Carty*, 170 N.J. 632 (2002).

92. *Id.* at 647.

rarely, if at all. And that represents a cost: to the humanity and dignity of these Americans, and also to police legitimacy, to their believability when they testify in front of juries, and to their credibility in their community.

*F. ELIMINATING LAW ENFORCEMENT'S RETENTION
OF MOST OF FORFEITURE FUNDS*

Seizing assets via civil forfeiture actions has become a major source of law enforcement revenue for some police departments, and these forfeitures have become one of the main purposes for traffic stops in some jurisdictions.⁹³ Therefore, if we want to curtail racial profiling in traffic stops, the discussion must include reform of civil asset forfeiture.

Asset forfeiture rests on an important principle: Those engaged in criminal activity have no entitlement to their ill-gotten gains, or to any tools or property used to commit crimes. Few would object to these ideas, standing alone. The problem arises when we look at where the proceeds of the forfeitures go. As discussed above, in many jurisdictions, some or even all of the seized assets (or the proceeds of those assets, when sold) may find their way into the hands of the seizing agencies—the police departments themselves—where these assets and funds have become important supplements to agency budgets and equipment stocks. Continued pressure on all kinds of public budgets, including those of police departments, will create incentives to use the forfeiture tool, and one of the easiest ways to do this is to increase the use of traffic stops. This, in turn, will create a greater number of opportunities for racial or ethnic profiling to take place.

There are many reasons to discuss reforming of civil asset forfeiture. Some contend that civil asset forfeiture has no place in our society, which values private property;⁹⁴ others say that forfeiture is a necessary tool, with only a little adjustment needed. Given the subject of this chapter, however, we need another intervention, because the civil asset forfeiture tool has long been wagging the traffic-stop dog in far too many places. The answer will not please many in law enforcement, but it is not complicated. We need not eliminate forfeiture, but the assets and proceeds seized simply cannot go to the seizing agency without creating a strong incentive for more forfeitures. All proceeds of forfeitures by police departments, except for the actual investigation costs

93. See *supra* notes 63–66 and accompanying text; see also Colgan, *supra* note 63.

94. See, e.g., DICK M. CARPENTER II ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* (2nd ed. 2015), <http://ij.org/report/policing-for-profit/>.

encountered by the agency,⁹⁵ therefore, must go to the general fund of the state. Any agency that can gain financially by using this tactic will do more of it. But the financial needs of police agencies should not determine whether or how many civil asset forfeitures take place. If forfeitures should be part of the justice system's constellation of tools, for appropriate situations, we can also agree the use of the tool should not be driven by unrelated fiscal issues. If forfeitures do not impact the financial situation of police agencies, we will see them when they are legally appropriate, and not when they are good for police agencies' fiscal needs. The current federal arrangement—the so-called “equitable sharing” program, in which federal agencies “assume” forfeitures that happen in states or localities that prohibit those agencies from keeping the proceeds of forfeitures, and share the proceeds with those state or local agencies—simply perpetuates the program, with a slightly less strong incentive.

G. CHANGING INCENTIVES WITHIN POLICE DEPARTMENTS

As things stand in most police departments, officers receive rewards—status as “good cops,” promotions, raises, favorable assignments and postings—because they perform well at easily measurable tasks: arrests, traffic stops, stop-and-frisks, seizures of drugs and weapons, and other “proactive” actions. It is easy to see that these sorts of patterns coincide with the very same behaviors identified here with racial profiling. Thus, another way of attacking the existence of profiling is to change those incentives, and to reward other types of behaviors.

For example, a police department might reward a police officer not for how he or she acts—the kinds of actions listed in the prior paragraph—but instead for the effect these actions have. In other words, the department should take the view that what will count for advancement and recognition of all kinds is what happens to crime and disorder in the officer's assigned area. Further, the department might couple this with rewarding measurable improvements in community regard for the police in each assigned area, as ascertained through regular community surveys. Were the incentives for individual officers to reflect these other types of actions, we could very well see a drop in the types of behavior that allow for racial and ethnic profiling to take root.

95. I thank Professor Mike Scott of Arizona State University for this insight. As he states, giving police the power to recover only their costs through forfeiture but not more might “encourage police to consider whether the strategy is worthwhile financially.” E-mail correspondence from Prof. Mike Scott (on file with author).

CONCLUSION

Racial and ethnic profiling by police has long been and remains a serious irritant in relations between police and communities of color. It poisons race relations, alienates communities of color from their police agencies, and does not improve law-enforcement results. Its costs burden communities of color specifically, but also society as a whole, with no discernable return in terms of public safety—all aside from its moral offensiveness. Racial and ethnic profiling has a corrosive and damaging effect on individual citizens, on racial and ethnic groups as a whole, and on the justice system itself. With that much damage done, and with no evidence that the practice makes policing more productive or efficient, it is high time to eliminate it, or at least reduce it to the greatest extent that we can. The recommendations here will move us in that direction.

RECOMMENDATIONS

The following steps will help to combat the persistent problem of racial profiling, even if they do not entirely eliminate it.

1. **Internal police department rules and regulations should incorporate and explicitly restate any applicable state laws enacted to combat racial profiling.** These rules—often regarded by departments and officers as the real rules, the ones they must follow—must make state anti-profiling laws into concrete commands and policy applicable in that department. This allows for training based on that policy, and accountability based on violation of that policy and training.
2. **States must enact legislation requiring that police officers track each and every traffic and pedestrian stop, using standardized data.** Without this kind of requirement, those wishing to make rules and public policy cannot know the extent of the problem they have, and how it may be changing—for better or for worse over time. Additionally, the tracking of these data serves as an accountability mechanism for police agencies.
3. **States must eliminate the use of consent searches in traffic and pedestrian stops, absent at least a reasonable, fact-based suspicion to believe that the vehicle and/or the driver, or the pedestrian, is involved in current criminal activity.** The current standard, based on Supreme Court case law, states that consent need only be voluntary and not coerced: a rule that seems to willfully ignore the reality of citizen/police interactions, with the purpose of extending state power to conduct searches without any evidence. Moving to a standard that requires at least reasonable, fact-based suspicion might help to at least recalibrate a system badly out of

balance. One state, New Jersey, has operated under this kind of rule for years, with no downside significant or apparent enough for any lawmaker to attempt to reverse the rule.

4. **Law enforcement agencies seizing cash or assets through civil asset forfeiture should keep only enough of the proceeds to pay for those enforcement actions.** As currently structured, civil asset forfeiture laws create far too strong an incentive to stop drivers in a hunt for cash and valuable assets. In many jurisdictions, the seizing police department can keep the money and use it to feed its own budgetary needs, and use assets for its purposes (e.g., using a seized vehicle as an undercover police car) or liquidate them for the resulting cash. This creates the incentive to use asset forfeiture—seizure of property from people, without the requirement of a guilty verdict—to supply funds for law enforcement activity. The concept and purpose of civil asset forfeiture remains a good one in the abstract: wrongdoers should not retain their ill-gotten gains after the authorities apprehend them. But giving much or all of those gains to law enforcement, beyond what would pay for the costs of the operations, creates incentives that have resulted in significant abuses.
5. **Incentives must change within police departments, moving from traditional “proactive” police action to crime reduction and community engagement.** Police officers behave just like other people in their professional settings: they respond to incentives. Currently, and for many years, police officers have received rewards—promotions, plum assignments, and raises—based on their most easily measurable tasks: arrests, stop-and-frisks, traffic stops, citations written, and seizures of weapons, drugs, other contraband, cash or assets. This creates an incentive for many of the actions that form part of, or accompany, racial profiling. Instead, police agency incentive structures should base rewards on crime reduction and order restoration, and on community engagement and satisfaction. Measurement of community engagement and satisfaction presents challenges, but new tools have or will soon become available for this purpose.