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# OBJECTIVE TESTS AND SUBJECTIVE BIAS: SOME PROBLEMS OF DISCRIMINATORY INTENT IN THE CRIMINAL LAW

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## INTRODUCTION

Much has changed in the area of race and the criminal law over the last thirty years, but three things remain constant. First, despite the formal repudiation of racism at all levels of government, racial bias continues to play a role in the investigation and prosecution of crimes.<sup>1</sup> Second, most of the judicial efforts to eliminate racism have focused on a particularly ugly strain of the problem: intentional discrimination by state actors.<sup>2</sup> Disparate racial effects of police or prosecutorial conduct have traditionally not been enough to induce a constitutional or statutory remedy. Finally, the increasing number of crimes and the increasing strain on the judiciary have led courts slowly, but steadily, to preclude inquiries into the allegedly biased actor's state of mind.

The first two themes are obviously related, the third, less so. Most decisions that preclude an inquiry into a state actor's motive have been formally unrelated to the problem of race; normally, the goal in moving to an objective standard has been to streamline the pretrial and trial process.<sup>3</sup> And to a great extent, this effort has succeeded. Questions about police behavior, prosecutorial decisionmaking, and the behavior of juries are far easier to resolve now than they

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1. There is a large body of scholarship discussing the significant impact of race on the criminal justice system. A few examples of the recent work are RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995); CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* (1993); Tracey Maclin, *Race and the Fourth Amendment*, 51 *VAND. L. REV.* 333 (1998). Many of the sources cited *infra* have also contributed greatly to the debate on this issue.

2. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608 (1985) (noting that an equal protection violation requires proof of both discriminatory effect and intent); *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (same). The intent requirement is not limited to challenges in criminal cases. See *Washington v. Davis*, 426 U.S. 229 (1976). For a thorough study on the impact of the intent requirement, see Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 *CORNELL L. REV.* 1151 (1991).

3. See *infra* Part III.A.

would be if a challenge required a probe into what a particular decisionmaker actually thought on a particular day.

But the results, while unintended, have been significant to those suspects and defendants who reasonably believe that their case is tinged with racial animus. My thesis is that this process of objectifying certain claims and defenses is intimately related to the first two themes, and is in fact in conflict with them. Simply put, by moving the inquiry of certain issues away from the actor's mindset, courts have undermined the ability to root out vestiges of race-based behavior. The cumulative impact of these moves has been to deny defendants the chance to have their claims of racial bias considered on the merits, thereby eroding the many other efforts that courts have made to minimize the influence of race on the criminal law.<sup>4</sup>

After Part II provides a brief background, Part III explores some of the ways that courts (particularly the Supreme Court) have undermined the anti-discrimination efforts by objectifying the pretrial process. It argues that there are a surprising number of steps in which the opportunity to raise claims of bias has been closed off, not because of judicial hostility to these claims, but because of the need to minimize the number of issues that are litigated in a criminal case. As in other areas, the high demand on judicial resources ripples through the substantive and procedural criminal law in quiet but meaningful ways.

Part IV then asks if there is a better way to reconcile the competing demands of judicial economy and bias-free decisionmaking. It suggests that one of the easiest steps to take would be to have the government gather precise data on the size and scope of the correlation between race and crime. The short-term hope is that this data collection would productively inform the debate on racial bias in the system; the long-term goal would be to use the civil power of the courts to make systemic corrections (if needed), rather than relying on the inefficient, case-by-case resolution of racial claims that is now employed.<sup>5</sup> To that end, Part IV suggests a way of modifying the procedures for detecting discriminatory intent, shifting some of the burden onto the state to show the propriety of its behavior. Recognizing the difficulties presented by these larger proposals, this Part ends with a few suggestions of smaller steps that could be taken to ensure that

4. For a discussion of some of these efforts, see *infra* notes 114-19 and accompanying text.

5. See *infra* Part IV.B.1.

police, prosecutors, and juries remain as bias-free as practical, without eroding the ability of these groups to perform their important work.<sup>6</sup>

## II. CONFLICTING THEMES

The Supreme Court has long recognized that racial bias presents a pervasive and insidious problem for the enforcement of criminal laws. And so for at least the last half century, the Court has—at least in its own eyes—“engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system.”<sup>7</sup> Even in cases where a claim of racial bias is rejected, the Court is often careful to point out that its commitment to removing this stain on the process is unwavering.<sup>8</sup>

But this commitment is qualified in an important respect. While there is plenty of statistical evidence that a disproportionate number of African Americans are arrested, charged, and convicted for crimes, and some evidence that they are disproportionately punished,<sup>9</sup> disparate impact is not enough: despite sharp criticism of the requirement, the Court continues to demand proof of discriminatory intent before it will find that Black and other minority defendants have been denied equal protection of the law.<sup>10</sup>

6. See *infra* Part IV.B.2.

7. *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (citing *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (noting Court’s “unceasing efforts” to eliminate racial bias in jury selection procedures)).

8. See, e.g., *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996) (rejecting Fourth Amendment challenge to allegedly pretextual police stop, but noting that stops based on race of suspect are improper and subject to challenge under Equal Protection Clause); *Holland v. Illinois*, 493 U.S. 474, 478, 486 (1991) (rejecting fair cross-section challenge to petit jury, but denying that decision reflects racial insensitivity); *McCleskey*, 481 U.S. at 309 (noting consistent efforts to eliminate impact of race on justice system); *Swain v. Alabama*, 380 U.S. 202, 204 (1965) (rejecting equal protection claim, but declaring that principle of equal opportunity to serve on juries has been “consistently and repeatedly applied in many cases coming before this Court”).

9. According to the March 1995 update from the U.S. Census Bureau, there were roughly 33.5 million Black Americans, making up about 12.8% of the population. See U.S. Bureau of the Census, *The Black Population in the U.S.: March 1995*, tbl.1 (visited Apr. 22, 1998) <<http://www.census.gov/population/www/socdemo/race/black95tabs.html>>. Nevertheless, in 1995 African Americans made up 30.9% of those arrested for crimes, Bureau of Criminal Justice Statistics, U.S. Dep’t of Justice, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1996, at 382 tbl.4.10 (Kathleen Maguire & Ann L. Pastore eds., 1997) [hereinafter Bureau of Criminal Justice Statistics], and 33.6% of those convicted in federal court. See *id.* at 441 tbl.5.20. Almost 81% of the convicted Black defendants were sentenced to incarceration by the federal courts; 75% of the convicted White defendants were incarcerated. See *id.* at 443 tbl.5.22. The percentage of each race sentenced to incarceration varied with the crime charged. For example, Blacks were more likely than Whites to be incarcerated following a conviction on drug charges, while Whites were more likely than Blacks to be incarcerated following conviction for property crimes. See *id.*

10. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *McCleskey*, 481 U.S. at 292. The Court has made it clear that proof of discriminatory intent requires more than simply deliberate action coupled with an awareness of the racial impact: “It implies that the deci-

This requirement has profound implications for unearthing race-based decisionmaking. Proving a person's state of mind is notoriously difficult, particularly when that person has been accused of improper behavior and has an incentive to lie. The problem is compounded when the state of mind in question belongs to a police officer or prosecutor, repeat players in the court system who have a sophisticated sense of how to testify effectively.<sup>11</sup> Put bluntly, if police perjury is as common as some suspect,<sup>12</sup> the likelihood of discovering an improper motive through the judicial process is slim indeed.

The difficulty of proving intent suggests in turn that there is a systematic under-detection of race-based behavior. Faced with the daunting task of proving state of mind, defendants will often lack the resources or the will to make the allegation.<sup>13</sup> While this means that many frivolous charges of racism will never be brought, it also means that some legitimate claims will be foregone as well. Here there is an interesting parallel to the inquiry at trial: because we prefer to free the guilty rather than convict the innocent, all twelve jurors must be convinced of guilt beyond a reasonable doubt, or we refuse to punish even those who are almost certainly guilty.<sup>14</sup> So it is with constitutional claims of racism: to establish the violation, we require evidence of individual, intentional, race-based conduct, which protects the inno-

sionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte v. United States*, 470 U.S. 598, 610 (1985) (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (some internal quotation marks and footnotes omitted)). For a discussion of the evolution of the intent standard, see Eisenberg & Johnson, *supra* note 2, at 1154-60.

11. Professors Eisenberg and Johnson have nicely summarized the difficulty presented by this standard:

Even if the discriminatory purpose standard reflects a correct view of what constitutes discrimination—decisions made "because of" race—it may be a poor vehicle for identifying instances of such decisions. Several commentators have argued that sophisticated discriminators will conceal their purposes. Drawing on developing social science data concerning the prevalence and manifestations of unconscious racism, recent writers have contended that race-based decisionmaking is common, and have pointed out the impossibility of adducing evidence that a decision was made "because of" race when the decisionmaker himself is unaware that race influenced his choice.

Eisenberg & Johnson, *supra* note 2, at 1161 (footnotes to commentary on intent standard omitted).

12. See Irving Younger, *The Perjury Routine*, *THE NATION* 596 (1967) (A former prosecutor concluded that "[e]very lawyer who practices in the criminal courts knows that police perjury is commonplace."); see also Maclin, *supra* note 1, at 379-86 (discussing effects of police perjury on Fourth Amendment doctrine).

13. See Eisenberg & Johnson, *supra* note 2, at 1153 ("The Supreme Court's [intent] standard takes its toll not through an unusually high loss rate for those plaintiffs reaching trial or appeal, but by deterring victims from even filing claims.").

14. See *FED. R. CRIM. P.* 31(a) (requiring unanimous verdict); *In re Winship*, 397 U.S. 358, 363-64 (1970) (holding that the Constitution requires proof beyond a reasonable doubt for convictions).

cent state actor by allowing questionable, even probable, cases of racist conduct to escape sanction.<sup>15</sup>

Whether we *should* require proof of a discriminatory intent is an important, but at the moment, not a very practical question. The requirement is firmly fixed in the law, judges seem at least passably comfortable applying it,<sup>16</sup> and neither the Supreme Court nor legislators has shown much interest in changing it.<sup>17</sup> So if the Court is serious about eradicating the remnants of racism in the justice system, and if the primary tool for the task—case-by-case challenges by defendants—will continue to require a factual finding of discriminatory intent, a more precise inquiry is required. Specifically, do the rules of pretrial and trial practice fairly permit defendants to raise claims when racist behavior occurs? Unfortunately, it appears they do not; in fact, the rules appear to be making it harder, not easier, to uproot instances of race-based decisionmaking.

15. See Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164-65 (1978):

Courts have long regarded such inquiries [into the intent of governmental decisionmakers] as unseemly . . . . The principle concern here is not that tender judicial sensibilities may be bruised, but that a judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims of racial discrimination even when the motives for governmental action are highly suspect.

Cf. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 48 (Dover Publications 1991) (1881) ("If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try.").

16. Cf. *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (expressing confidence that it would not impose undue judicial burden to require inquiry into prosecutor's subjective reasons for exercising peremptory strikes). Indeed, when the drafters of the Model Penal Code proposed a comprehensive change to the structure of the criminal law, they made "recklessness" the default *mens rea* for substantive offenses, even though that standard requires an inquiry into the actor's state of mind. See AMERICAN LAW INST., *MODEL PENAL CODE* § 2.02(3), (2)(c) (Proposed Official Draft 1962).

17. There are strong practical and intuitive reasons for continuing to require proof of intent. Unfavorable consequences that merely correlate with race—the disproportionate number of African Americans who are arrested and convicted of crimes, for example, see *supra* note 9—may be partly attributed to racism, but may also be explained by dozens of other factors. Poverty, lack of education, and the involvement of other family members in crime probably have great explanatory power for the overlap between race and crime, and thus, granting relief based on a disparate racial impact could be to provide a constitutional remedy for problems that have no constitutional grounding. For a variety of interesting perspectives on the intent requirement, see Gayle Binion, "*Intent*" and *Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397; Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 99-156 (1977); Eisenberg & Johnson, *supra* note 2; Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

### III. THE IMPACT OF REQUIRING INTENT

“Racism in the criminal justice system hides behind discretion,”<sup>18</sup> which means that the opportunity for racist conduct exists at every stage of the process. Police cannot investigate every situation that might result in criminal activity, nor can they (or should they) arrest every person who has committed a technical violation of the law.<sup>19</sup> Separation of powers concerns mean prosecutors have enormous leeway in deciding whom and what to charge, just as they have great control over the pretrial process and plea bargaining.<sup>20</sup> Juries have unfettered discretion in reaching a verdict, and the review of a guilty verdict will be highly deferential.<sup>21</sup> There are enormous social benefits to such a discretionary system, but the price of this discretion is giving state actors a nearly uninterrupted chance to make illegitimate judgments based on race.

The potential for abuse is especially high when decisions are made outside the public eye. This part will focus on three of those points: (1) when police detain a person for investigation; (2) when prosecutors decide whether to charge and which charges to file; and (3) when the jury decides which people are worthy of condemnation. At each stage the potential for race-based decisionmaking is acute, but the defendant's ability to prove the influence of race is at its lowest.

18. Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Color-blindness, and the Jury*, 67 TUL. L. REV. 1807, 1808 (1993).

19. For a discussion of the problems and opportunities created by police discretion, see Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

20. See *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (noting prosecutors have broad discretion to decide which charges to bring); *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (noting prosecutors have broad authority to structure plea bargains). See generally *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (noting that prosecutorial function is “special province” of executive branch).

21. Under the Double Jeopardy Clause of the Fifth Amendment (“[N]or shall any person be subject for the same offence to be twice put in jeopardy.” U.S. CONST. Amend. V.), if a jury returns a verdict of not guilty, neither the trial judge nor a court of appeals can overturn that decision. See *Burks v. United States*, 437 U.S. 1, 16 (1978). A reviewing court may overturn a jury's decision to convict, but that review will be highly deferential: on appeal the court normally will not reweigh the evidence or pass on the credibility of witnesses. Instead, it will view the evidence in the light most favorable to the prosecutor, and will affirm the conviction if a rational jury could have convicted on the evidence presented. See *Glasser v. United States*, 315 U.S. 60, 80 (1942).

### A. Police Investigations

Consider David, a twenty-one-year-old African-American student. One night while driving from campus to his apartment on the other side of town, David is pulled over by the police. The officers tell David that he was stopped because he failed to turn on his directional signal at least thirty feet before making a turn. David is suspicious of this explanation—the trivial reason for the stop, coupled with the police officer's tone of voice and demeanor, lead David to suspect that the real reason he was stopped is that he is a Black man driving through a White neighborhood in a flashy red car. He expects that the traffic stop is simply a prelude to efforts by the police to search his car for contraband.

David has reason to be concerned. While empirical data are hard to come by, there is a strong belief in many communities that young minority men are much more likely than White men to be suspected, stopped, searched, and detained for trivial or non-existent reasons.<sup>22</sup> Stories about Black men being pulled over while driving in White neighborhoods (for the crime of "DWB," driving while Black<sup>23</sup>), or being stopped because their cars and appearance lead the police to suspect that the driver is involved with drugs, are sufficiently widespread and credible to lend some validity to this belief.<sup>24</sup>

The reported cases probably under-represent the extent of the problem. Innocent citizens who are improperly stopped and searched may not complain through official channels, choosing instead to dismiss the encounter as an unfortunate fact of life.<sup>25</sup> Those who are

22. The most active scholar on the subject of "pretext stops"—where the reason offered by the police for a stop (usually a minor traffic offense) is simply an excuse to confront the driver and perhaps search the car—is Professor David Harris. Although Harris acknowledges the lack of "systematically gathered and analyzed data" on the frequency and nature of pretext stops, he thinks there is no doubt that "pretextual stops [have been and] will be used against African Americans and Hispanics in percentages wildly out of proportion to their numbers in the driving population." David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997). Professor Harris bases his conclusion on the many stories and the few court cases that have focused on this issue. For a survey of the available evidence that race influences police decisions to stop, see *id.* at 560-73.

23. See Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, THE NEW YORKER, Oct. 23, 1995, at 56, 59; see also Harris, *supra* note 22, at 546 & n.10.

24. For a collection of stories involving traffic stops attributed to race, see Michael A. Fletcher, *Driven to Extremes; Black Men Take Steps to Avoid Police Stops*, THE WASH. POST, Mar. 29, 1996, at A1.

25. See Don Jackson, *Police Embody Racism To My People*, N.Y. TIMES, Jan. 23, 1989, at A25.

[In the view of a Black police sergeant] the police have long been the greatest nemesis of Blacks, irrespective of whether we are complying with the law or not. We have learned that there are cars we are not supposed to drive, streets we are not supposed to



improperly investigated, but who nevertheless are guilty of crimes, may be induced to plead guilty to a lesser charge if any resulting evidence from the stop is in danger of being suppressed; in clear cases of an illegal search or seizure, the charges might be dropped entirely. Even those who file a motion to suppress may not be vindicated, given that defendants facing prison are incurable liars, and in a swearing contest with police will usually lose.

As David anticipated, the police ask to search his car. When David refuses, harsh words are exchanged and David becomes agitated; as a result, the police become concerned that David might pose a threat to them, and so perform a protective search of the interior of the car.<sup>26</sup> The search reveals an illegal switchblade in the glove box, and David is arrested. David remains convinced, however, that the entire sequence of events was racially motivated, and he asks his lawyer whether he can challenge the weapons charge on the ground that the real reason the police pulled him over in the first place was his race. David believes (plausibly enough, for a non-lawyer) that if he can show that the police virtually never enforce directional-signal violations, and that the officer's real motive was to investigate this "suspicious" Black driver, he would have a defense to any charges that flowed from the improper stop.<sup>27</sup>

Whatever validity such a claim would have had before 1996, it has little viability today. In *Whren v. United States*,<sup>28</sup> two young African-American men were driving in a Nissan Pathfinder with temporary plates through a high-crime area of Washington, D.C. A team of plainclothes vice officers patrolling for drug activity saw the Pathfinder sitting at a stop sign for more than twenty seconds, and noticed that the driver was "not paying full time and attention" to his driving,

walk. We may still be stopped and asked "Where are you going, boy?" Whether we're in a Mercedes or a Volkswagen.

*Id.*

26. The police may make a protective search of a car's interior if they have a reasonable suspicion that the driver presents a danger and may gain control of a weapon. See Michigan v. Long, 463 U.S. 1032, 1049 (1983).

27. Cf. *United States v. Laymon*, 730 F. Supp. 332, 339 (D. Colo. 1990) (finding that decision to stop defendant's car based on alleged weaving in traffic a pretext, and real reason was an out-of-state license plate and the race of the occupants; evidence discovered incident to pretext stop suppressed). See generally *United States v. Trigg*, 878 F.2d 1037, 1038-39 (7th Cir. 1989) (discussing background of pretext stop claims: "[t]he subject of pretextual arrests presents some of the most intriguing historical, conceptual and practical issues in the often problematic area of fourth amendment jurisprudence.").

28. 116 S. Ct. 1769 (1996). For a useful discussion of the legal background to the *Whren* decision, see David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; Craig M. Glantz, Note, "Could" this be the End of Fourth Amendment Protections for Motorists?, 87 J. CRIM. L. & CRIMINOLOGY 864, 865-74 (1997).

a violation of D.C. traffic laws.<sup>29</sup> Although police regulations specified that plainclothes officers were to enforce traffic laws only when the violation posed a danger to the public,<sup>30</sup> the officers thought it prudent to stop the Pathfinder.<sup>31</sup> When they did, they saw that the passenger (Michael Whren) was holding two large plastic bags of crack cocaine.<sup>32</sup>

One of the telling features of *Whren* was how casual the arresting officers were about acknowledging their motives. The plainclothes officers practically admitted that they had no interest in enforcing the traffic laws or giving the driver a ticket;<sup>33</sup> they were simply looking for drug activity and saw a situation that made them suspicious. While this suspicion alone did not permit the temporary seizure of Whren and his companion, the traffic violation did. Interestingly, neither the district court, the court of appeals, nor the Supreme Court disputed the defendants' claim that the traffic stop was simply a pretext to investigate for drugs. The arresting officer denied, however, that defendants' race had played a role in the decision to stop the vehicle, and there was no evidence introduced at the suppression hearing to the contrary.<sup>34</sup>

Critically, however, the Supreme Court appeared ready to uphold the traffic stop even if there were evidence that race *had* played a role in the officers' decision. In their briefs the defendants pointed out that every driver violates *some* traffic regulation at some point, a fact which gives the police boundless discretion to stop any driver they

29. *Id.* at 1772; see 18 D.C. Mun. Regs. § 2213.4 (1995) ("An operator shall, when operating a vehicle, give full time and attention to the operation of the vehicle."). The plainclothes officers testified at the suppression hearing that the driver and passenger were looking at their laps while at the stop sign. See Petitioner's Brief at 4, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841) (citing suppression hearing transcript).

30. *Whren*, 116 S. Ct. at 1775 (quoting Metropolitan Police Department—Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992)) ("[P]lainclothes officers in unmarked vehicles [may] enforce traffic laws 'only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.'"). At the suppression hearing the officers did not claim that the defendants' vehicle was creating a hazard by its delay at the stop sign. One of the officers testified that there was a car behind the Pathfinder at the stop sign, but acknowledged that the trailing driver did not honk the horn or otherwise express impatience. The other officer testified there was no car behind the Pathfinder. See Petitioner's Brief at 4-5.

31. As the officers made a U-turn to approach the defendants, the Pathfinder quickly turned right without signaling and drove off at an "unreasonable" speed. See Petitioner's Brief at 5-6 (citing suppression hearing transcript). The officers cited these violations as additional reasons for the stop. See *id.* at 6-7. The defendants did not dispute these facts, nor did they dispute that the police had probable cause to believe that a traffic violation had occurred. See *Whren*, 116 S. Ct. at 1772.

32. See *Whren*, 116 S. Ct. at 1772.

33. See Petitioner's Brief at 6-7.

34. See *id.* at 4.

choose.<sup>35</sup> This discretion, they argued, created an unacceptable risk that the decisions to stop would be based on factors such as race. But even if race did motivate the stop, the Court made it clear that this evidence was irrelevant. "Subjective intentions," it said unanimously, "play no role in ordinary, probable-cause Fourth Amendment analysis."<sup>36</sup>

Although *Whren* was nominally about the contours of the Fourth Amendment, the decision undeniably makes it easier for the police to engage in race-based behavior.<sup>37</sup> Just as importantly, there is no reason to think that the reasoning in *Whren* will be limited to traffic stops. Assume that instead of driving home from campus, David was walking through an all-White neighborhood when the police decided to perform a *Terry* stop.<sup>38</sup> Once again, the officers' attitude and questions lead David to suspect that race played a role in the detention decision, and once again, there are reasons for David to be concerned. *Terry* stops have been criticized on a variety of grounds, many of which are independent of race.<sup>39</sup> But there have been sharp criticisms in recent years that the open-ended authority granted by *Terry* is abused with respect to decisions to stop and frisk Black suspects.<sup>40</sup> Again, it is hard to know the extent to which these claims are true—

35. See *id.* at 17-19 (noting that almost half of all drivers monitored violated 55 mph speed limit); Harris, *supra* note 22, at 545. Illinois traffic laws illustrate the discretion police officers have to stop drivers. See, e.g., 625 ILL. COMP. STAT. 5/11-601 (West 1993) (drivers have duty to decrease speed when approaching a hill crest); 5/11-606 (may not drive so slow as to impede "normal and reasonable movement of traffic"); 5/11-710(a) (may not follow another vehicle "more closely than is reasonable and prudent"); 5/11-804(b) (must use directional signal at least 100 feet before turning in business and residential areas, at least 200 feet in other areas); see also *United States v. Fiala*, 929 F.2d 285, 287 (7th Cir. 1991) (upholding validity of traffic stop where police had followed "suspicious" car for a distance, then pulled car over when it drifted over right-hand fog line for 5-10 seconds; claim of pretext rejected).

36. *Whren*, 116 S. Ct. at 1774.

37. For a thoughtful commentary on the impact of *Whren* and other Supreme Court cases on minority citizens, see Sklansky, *supra* note 28, at 308-23.

38. These stops are named after the case that approved them, *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* gives police the authority to briefly detain a suspect without probable cause if the officer has a "reasonable suspicion" that the suspect has been involved in a crime. See generally 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 9.5 (3d ed. 1996).

39. For criticisms of *Terry* which include, but are not limited to the problem of race, see, e.g., George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849; Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

40. See, e.g., KENNEDY, *supra* note 1, at 140-63 (describing use of race to establish suspicion of involvement in crime); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 669-81 (1994) (describing how case law permits, even encourages, disproportionate number of stops of minorities); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); see also, LAFAYE, *supra* note 38, at 14 ("For many of those who honestly oppose Supreme Court recognition of the power of police to stop and frisk, the central point is that police often have utilized street encounters for

young Black men commit a disproportionate number of crimes,<sup>41</sup> so we would expect them to be disproportionately targeted for *Terry* stops as well. But there is some scholarly support and strong anecdotal evidence to suggest that in a non-trivial number of cases, race influences the officer's decision on whom to stop and who might be dangerous.<sup>42</sup> The question again is whether these suspects have the ability to challenge the stop by presenting evidence of the officer's improper motives.

We might think that a court system committed to eradicating racism would be keenly interested in allegations that police were basing *Terry* stops on skin color. But some courts apparently would find that evidence irrelevant, even pre-*Whren*. In *United States v. McKie*, for example, the defendant claimed that the vial of crack that was recovered from his pocket should be suppressed because the police lacked reasonable suspicion to stop and frisk him.<sup>43</sup> As evidence, the defendant pointed to the suppression hearing testimony of the detaining officer, who failed to offer any grounds to justify the stop; he simply acknowledged that he had planned to detain the defendant until his partner could investigate another suspect. While the court admitted that this explanation was "quite summary," it still affirmed the conviction. "The *Terry* standard being one of objective reasonableness," said the court, "we are not limited to what the stopping officer says or to evidence of his subjective rationale; rather, we look to the record as

improper purposes, such as the wholesale harassment of minority groups and Blacks in particular." (footnote omitted, collecting sources)).

41. See Bureau of Criminal Justice Statistics, *supra* note 9.

42. There is no shortage of anecdotal evidence regarding the use of race in the decision to perform *Terry* stops. For a personal and poignant description, see Paul Butler, "Walking while Black;" *Encounters With the Police on My Street*, LEGAL TIMES, Nov. 10, 1997, at 23; see also Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567, 567-71 (1991) (describing an incident of a race-based stop); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 250-62 (1991) (describing instances of improper stops by police of Black males).

Although empirical evidence of this problem is harder to gather, there has been valuable research done on the extent to which race is likely to influence decisionmaking. For example, Professors Nancy King and Sheri Lynn Johnson have each explored the impact of race on criminal law juries. See Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993). Their review of the social science literature (among other things), strongly suggests that people's predictions of guilt, truthfulness, and dangerousness can all be influenced by the race of the decisionmaker and the alleged perpetrator. See Johnson, *supra*, at 1625-43; King, *supra*, at 77-99. While in many respects police officers are differently situated than potential jurors—they presumably are more sophisticated when it comes to evaluating suspects—it would be remarkable if the police were not influenced by the same stereotypes and biases that are present in the rest of society.

43. See 951 F.2d 399, 401-02 (D.C. Cir. 1991) (per curiam).

a whole to determine what facts were known to the officer and then consider whether a reasonable officer in those circumstances would have been suspicious."<sup>44</sup>

The Supreme Court has recognized that traffic stops and *Terry* stops are conceptually similar,<sup>45</sup> making it fair to assume that after *Whren*, it will be increasingly difficult to challenge not only race-based traffic stops, but *Terry* stops on a sidewalk or in a bus station as well. As long as there is an objective basis on which the officer *could* have formed the requisite reasonable suspicion, it would seem to be almost impossible for a suspect to present evidence that racial bias infected the officer's thinking, even if the allegation is true.<sup>46</sup>

44. *Id.* at 402 (citation omitted). The court concluded that because the defendant had been seen in the presence of an alleged drug dealer who was in the process of conducting business, and had briefly ridden in the dealer's car where the drugs were reportedly stored, the police had objectively reasonable grounds for the *Terry* stop. *See id.*

Other courts have reached similar conclusions. In *State v. Hawley*, 540 N.W.2d 390, 392 (N.D. 1995), for example, the officer admitted he did not have reasonable suspicion to believe that any crime or traffic violation had occurred when he approached a parked pickup truck. The court upheld the resulting *Terry* stop of the driver, noting that "the reasonable-and-articulable-suspicion standard is objective, and it does not hinge upon the subjective beliefs of the arresting officer." *Id.* And while the court stopped short of saying that an officer's state of mind would *never* be relevant, it quoted the familiar language from the Supreme Court's opinion in *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985): "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' . . . not on the officer's actual state of mind at the time the challenged action was taken." *Hawley*, 540 N.W.2d at 392 (internal citation omitted)).

45. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 880-83 (1975) (analogizing traffic stops to *Terry* stops).

46. The problem is compounded by courts that make evidence of the officer's racial bias irrelevant, but permit testimony on how the suspect's race legitimately informed the detention decision. Although race standing alone is never a legitimate grounds for a *Terry* stop, a few courts have found that race is one of many factors that the police may consider. *See, e.g., United States v. Weaver*, 966 F.2d 391, 394 & n.2 (8th Cir. 1992) (finding race of airline passenger legitimate consideration in decision to detain, where drug couriers bringing cocaine into city are frequently Black gang members); *United States v. Bautista*, 684 F.2d 1286 (9th Cir. 1982) (finding presence of a person of one race in an area where such a person would not be expected to be can inform officer's reasonable-suspicion calculation).

More commonly, in deciding whether the police had reasonable suspicion to justify a stop, some courts have found it probative that the suspect was present in a high crime area, *see United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995); that the suspect had a criminal record or was reputed to be a criminal, *see United States v. Withers*, 972 F.2d 837 (7th Cir. 1992). *But see State v. Beasley*, 674 S.W.2d 762 (Tex. Crim. App. 1982) (noting that the fact that suspect is a "known offender" not grounds for stop); or, that the suspect acted furtively when he saw the police, *see United States v. Lender*, 985 F.2d 151 (4th Cir. 1993); *cf. Peters v. New York*, 392 U.S. 40, 66-67 (1968) ("[D]eliberately furtive actions and flight at the approach of . . . law officers are strong indicia of *mens rea*."); *see also Harris, supra* note 40, at 660 ("A substantial body of law now allows police officers to stop an individual based on just two factors: presence in an area of high crime activity, and evasive behavior."). There is no doubt that each of these factors made it more likely than criminal behavior is afoot, but there also is no doubt that these factors can mask a police officer's decision to stop a suspect because of his race. Many urban Blacks live in high crime districts, and it is no secret that young African Americans are disproportionately likely to have had a prior entanglement with the justice system. For these and other reasons, it can hardly

Perhaps recognizing the broad implications of *Whren*, the Court took pains to limit its decision to the Fourth Amendment, noting that it was simply deciding whether the traffic stop in question was “reasonable.”<sup>47</sup> “We of course agree,” said the Court, “that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”<sup>48</sup>

There are several problems with the *Whren* court’s view. First, it is far from clear that the exclusionary rule applies to an equal protection violation.<sup>49</sup> While it seems likely that David would have a defense to the traffic stop if he could prove improper intent—and perhaps a defense to the weapons charge that resulted from the pat down—the Court has pointedly left open the issue of what remedy a defendant is entitled to in this context.<sup>50</sup> The second problem is that even if Fourth Amendment rules can be imported into the Equal Protection Clause, it is qualitatively harder to prove a Fourteenth Amendment violation. Demonstrating that the police stopped Black motorists in situations where they would not have stopped White motorists probably requires proof of police conduct over time,<sup>51</sup> a show-

be a surprise that if police can consider flight or distrustful behavior in their presence, a higher number of Black citizens will be detained.

47. See *Whren*, 116 S. Ct. at 1774.

48. *Id.*

49. Compare *United States v. Jennings*, 985 F.2d 562, 1993 WL 5927, at \*\*4 (6th Cir. Jan. 13, 1993) (suggesting in dicta that if a defendant was chosen by police for consensual encounter based on his race, the exclusionary rule should apply; “evidence seized in violation of the Equal Protection Clause should be suppressed”); with *id.* at \*\*7 (concurring opinion) (finding that authority cited by court provides “absolutely no support for the majority’s position” on this point) and *United States v. Travis*, 62 F.3d 170, 174 (6th Cir. 1995) (rejecting equal protection challenge, noting in dicta that “defendant in this case argues that the exclusionary rule should apply, even though that rule usually applies only to violations of the Fourth Amendment.”), *cert. denied*, 116 S. Ct. 738 (1996). See also *Elkins v. United States*, 364 U.S. 206, 215 (1960) (using supervisory power to reject silver platter doctrine, noting in dicta that “surely no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth”).

50. See *United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1996) (“We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race.”).

51. A defendant raising an equal protection challenge to discriminatory police stops would have to show that the stops were based on race, and that other, similarly situated White drivers were not being stopped. See *Armstrong*, 517 U.S. at 465. The need to present evidence of police practices in other cases is strongly suggested by the observation that “[a] defendant may demonstrate that the administration of a criminal law is ‘directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive’ that the system of prosecution amounts to ‘a practical denial’ of equal protection of the law.” *Id.* at 1486 (citation omitted); see also *id.* at 1489 (rejecting defendant’s allegations for lack of evidence, and noting that “respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California”).

ing that most indigent defendants and hard-pressed defense counsel simply cannot make. Indeed, when a civil suit alleging an improper arrest was brought against the city of Reynoldsburg, Ohio in 1993, the eventual settlement was at least in part the product of police department admission that it had a group of officers on the force that referred to itself as “SNAT”—Special Nigger Arrest Team.<sup>52</sup> Whether the plaintiff could have prevailed in the absence of that admission is far from clear.

Finally, the Court’s suggestion that there are other constitutional avenues for attacking a pretextual stop is questionable in light of a decision reached just two years earlier. In *Albright v. Oliver*,<sup>53</sup> the Court rejected a claim that defendants have a substantive due process right to be free of arrest except on probable cause. While no opinion in *Oliver* commanded a majority, there was a consensus for the view that defendants who objected to the illegal arrest had to proceed under the Fourth Amendment, not the Due Process Clause.<sup>54</sup> In particular, the Court noted the limits of relying on the Fourteenth Amendment in criminal cases:

[our case law] has substituted, in these areas of criminal procedure, the specific guarantees of the various provisions of the Bill of rights embodied in the first 10 Amendments to the Constitution for the more generalized language contained in the earlier cases construing the Fourteenth Amendment. . . . Where a particular amendment “provides an explicit textual source of constitutional protection” against a particular sort of government behavior, “that Amendment, not the more generalized notion of ‘substantive due process’ must be the guide for analyzing these claims.”

. . . [Here t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.<sup>55</sup>

*Whren* says the Fourth Amendment is unavailable to defendants like David but the Equal Protection Clause might be; *Oliver* says that when the Fourth Amendment covers the practice in question (e.g., traffic stops), it is the exclusive source of relief. And so while there are strong counter-arguments that neither *Oliver* nor *Whren* forecloses an equal protection claim for race-based stops by police, the combination of cases casts doubt on whether the Fourteenth Amendment provides a meaningful weapon in the battle to uncover biased police practices.

52. See Fletcher, *supra* note 24, at A1.

53. 510 U.S. 266 (1994).

54. See *id.* at 271 (Rehnquist, C.J.); *id.* at 281 (Kennedy, J., concurring).

55. *Id.* at 273-74 (Rehnquist, C.J.) (citations and footnotes omitted).

### B. Decisions to Prosecute

After his arrest, David tells his lawyer that he is anxious to get his case resolved before he is drawn too far into the criminal system. Defense counsel is reassuring: in this jurisdiction, she says, charges like carrying an illegal knife are routinely dropped, particularly when there was no harm done and the arrestee turns out to have no criminal record. David is not convinced; he fears that the same attitude and practices that led to his original stop and arrest will carry over to the prosecutor's charging decision, and that the district attorney will be less forgiving of Black arrestees than he would be of Whites.

David has reason to be concerned. There have been frequent allegations that district attorneys are more likely to investigate and charge Blacks than Whites for similar conduct;<sup>56</sup> that Blacks are likely to be charged with more serious crimes than their White counterparts; and that Blacks who violate both state and federal law are more likely to be diverted into the federal system where the sentences are harsher.<sup>57</sup>

56. The claims of selective charging have been particularly acute when the criminal accusations are leveled against Black public officials. In a 1992 article recounting the frequency of such charges, the A.B.A. Journal offered the following information:

A 1990 study by the National Council of Churches shows that more than 14 percent of the public corruption cases over the past five years targeted Black officials, who make up less than two percent of the country's elected officials. In the South, where three percent of all elected officials are Black, the study found that 40 percent of public corruption cases were pursued against Blacks.

.....

Though less than one-half of one percent of the federal judiciary is Black, three of the five U.S. District Court judges indicted in the past decade were Black.

.....

In 1990, 77 percent of Black respondents to a poll conducted by the *New York Times* said they believed that "the government deliberately singles out and investigates Black elected and appointed officials in order to discredit them in a way it doesn't do with White officials." Thirty-four percent of the Whites responding also believed that such selective prosecution "could be going on."

Mark Curriden, *Selective Prosecution: Are Black Officials Investigative Targets?*, 78 A.B.A. J. 54, 55 (1992). Even the president of the National District Attorney's Association admitted that "while I do not believe that Blacks are being selectively prosecuted, I certainly can understand how such a theory is gaining popularity." *Id.*

57. There has been little systematic study of the problem. Claims of race-based prosecution are raised infrequently in the reported cases, and when they are raised, usually fail. *See, e.g., Stephens v. State*, 456 S.E.2d 560 (Ga. 1995) (noting defendant introduced statistical evidence to support unsuccessful claim that prosecutors more likely to seek mandatory life sentences against Black drug dealers than against White dealers); *see also* Joseph L. Gastwirth & Tapan K. Nayak, *Statistical Aspects of Cases Concerning Racial Discrimination in Drug Sentencing*: *Stephens v. State and U.S. v. Armstrong*, 87 J. CRIM. L. & CRIMINOLOGY 583, 587-96 (1997) (discussing *Stephens*). The statistical studies that have been conducted lend some credence to the allegations, although the authors are careful to note the limits of their research and the risks of generalizing. *See, e.g.,* Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC. REV. 587, 615-19 (1985) (concluding that race of victim and defendant influenced decisions to "upgrade" degree of homicide charged); *see also* P.S. Kane,



This was the claim before the Supreme Court in *United States v. Armstrong*,<sup>58</sup> where an African-American defendant moved to dismiss the charges of possession of crack cocaine, alleging that Blacks were being selectively prosecuted by the U.S. Attorney's Office.<sup>59</sup> Armstrong had only paltry evidence to support this allegation,<sup>60</sup> but the claim apparently struck a chord with the trial judge, who ordered the government to provide discovery on the issue. When the government refused, arguing that it was legally improper and strategically unwise to give defendants access to the prosecutor's thoughts on charging decisions, the judge dismissed the charges.<sup>61</sup>

The Supreme Court reversed, finding that defendants had failed to make the threshold showing of racial bias that would entitle them to discovery. While continuing to insist on proof of intentional discrimination to prove vindictive prosecution, the Court now made the proof of discriminatory intent merely inaccessible, rather than inadmissible. To gain access to the prosecutor's files, said the Court, there must be a significant preliminary showing of bias;<sup>62</sup> but of course, without the access it is nearly impossible to show the bias needed to gain the access. And so while there are good reasons to extend prosecutors great charging discretion, there is no doubt that *Armstrong*

Comment, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293, 2295-2300 (1993) (summarizing studies on disparate charging of minorities).

Despite the scarcity of hard data, the claims continue to be widely advanced. See, e.g., *supra* note 56. Even the former United States Solicitor General, while denying that the evidence shows improper charging, has noted that "there appears to be a significant disparity between the percentage of African Americans who use illicit drugs in a given year and those arrested for drug crimes who are African American." Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 181, 186-87 (1996) (footnote omitted).

58. 517 U.S. 456 (1996).

59. Armstrong claimed that Black defendants' cases were being diverted to federal court where the mandatory sentences for drug crimes were more severe, while similarly situated White defendants were being allowed to proceed in the state courts. See *id.* at 460-61.

60. The only evidence offered in support of the allegation was an affidavit by a paralegal, attached to which was a study of the disposition of 24 other drug defendants. See *id.* at 459. Even Justice Stevens, the lone dissenter, acknowledged that defendants proffered evidence "was not strong enough to give them a right to discovery, either under Rule 16 or under the District Court's inherent power to order discovery in appropriate circumstances." *Id.* at 477 (Stevens, J., dissenting).

61. The Court of Appeals for the Ninth Circuit, sitting *en banc*, affirmed the dismissal of the charges, finding that the discovery order directed at the U.S. Attorney's office was proper. See *United States v. Armstrong*, 48 F.3d 1508, 1516 (9th Cir. 1995).

62. See 517 U.S. at 464-65, 469-70.

cripples a defendant's ability to attack race-based decisionmaking when it occurs.<sup>63</sup>

*Armstrong* may be the most visible barrier to uncovering discriminatory charging decisions, but it is not the only one. Suppose the prosecutor in David's case became convinced that the original stop and arrest were in fact motivated by race, and thinks that the best course of action is to dismiss this case in a hurry. She is worried, however, that David is going to sue the police and the city over the event, so she offers him a deal: all criminal charges will be dropped if David will sign an agreement not to bring a civil action arising from the arrest.<sup>64</sup>

"Release-dismissal" agreements are controversial devices that can force a defendant to choose between going to jail and vindicating a civil rights claim. These agreements are often highly attractive to the parties involved. Defendants might be happy enough to have the criminal charges dropped; they at least want the choice to drop both cases rather than be forced to go forward on each.<sup>65</sup> The government also has a great deal to gain from the arrangement. Civil suits, whether meritorious or not, are costly, diverting, and embarrassing events in the lives of public officials, and there are powerful arguments for resolving disputes between the government and citizens quickly and efficiently. The problem, of course, is that these agreements are designed to ensure that neither the alleged crime nor the alleged civil misdeeds are ever exposed and remediated.<sup>66</sup>

The ability to mask race-based decisionmaking through release-dismissal agreements is shown in the well-known case of *Dixon v. Dis-*

63. *Armstrong* is worth a good deal more discussion than has been given here. For a more detailed analysis of the case, see Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998).

64. A typical civil rights claim in this context might allege that the arrest was based on an improper stop or search, or the use of excessive force by the police. For a discussion of the types of police behavior that can give rise to claims under the various civil rights statutes, see National Lawyer's Guild, *POLICE MISCONDUCT* § 2.1 to § 2.3 (1995).

65. Defendants will not always be pleased to have the choice. There may be some cases in which a person's civil rights are violated that the police or prosecutor will invent a charge, or will increase the severity of the crime charged simply to give the government something to bargain away in return for the dropped civil suit. In such cases, the availability of the release-dismissal agreements could put defendants in a worse position than they would otherwise face. See also *infra* note 76 (describing additional dangers of release-dismissal agreements).

66. For an overview of the effects of release-dismissal agreements, see Brian L. Fielkow, 42 U.S.C. § 1983—*Buying Justice: The Role of Release-Dismissal Agreements in the Criminal Justice System*, 78 J. CRIM. L. & CRIMINOLOGY 1119 (1988); Elizabeth Pascale Francis, Note, *Trading Civil Rights Claims for Dismissal of Criminal Charges: Release-Dismissal Agreements*, 17 STETSON L. REV. 491 (1988).

trict of Columbia.<sup>67</sup> Miller Dixon was an African-American driver pulled over by two White officers for obstructing traffic.<sup>68</sup> To the undoubted dismay of the officers, Dixon turned out to be a retired detective sergeant, and after some apparent unpleasantness, Dixon was released with no arrest made and no ticket issued. Two days later, Dixon filed a complaint with the department concerning the White officers' behavior.<sup>69</sup> Although until that point the government had shown no interest in prosecuting the traffic violations, it now offered not to proceed with the traffic charge as long as Dixon agreed to forego his administrative action.

Maybe the government in *Dixon* was trying to cover up its own misdeeds, maybe not. But if our goal is reducing official decisions influenced by race, the availability of these agreements is surely counterproductive. Indeed, it was precisely because "these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society" that the D.C. Circuit in *Dixon* condemned the use of release-dismissal agreements.<sup>70</sup> (Milton Dixon changed his mind after entering into the agreement, and proceeded with his complaint anyway.<sup>71</sup>) But when the Supreme Court finally considered the validity of these agreements in *Town of Newton v. Rumery*,<sup>72</sup> it found that this interest was insufficient to overcome the benefits of out-of-court settlements. And while the Court's holding was narrow—it simply ruled that these agreements were not *per se*

67. 394 F.2d 966 (D.C. Cir. 1968).

68. The reported opinions do not describe the events giving rise to the traffic stop or the decision to charge. The events were not even clear to the Court of Appeals, which noted that "we do not know the full story of the decision to prosecute appellant." *Id.* at 968.

69. Although the nature of the complaint is not specified, there is a suggestion that it involved police brutality. *See id.* at 968 n.2.

70. *See id.* at 969; *see also* *Rumery v. Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985) (stating that release-dismissal agreements "tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights"), *rev'd*, 480 U.S. 386 (1987).

It is unclear whether "the court" in *Dixon* actually held that release-dismissal agreements were impermissible. The quoted language is from the lead opinion written by Chief Judge Bazelon. In addition to disapproving release-dismissal agreements, he found that it was an abuse of prosecutorial discretion for the prosecutor to proceed with the charges against Dixon, *see* 394 F.2d at 968; the two concurring judges agreed that the criminal charges should be dismissed, although they did not join Bazelon's opinion. *See* 394 F.2d at 971. Moreover, given that the Board of Commissioners of the District of Columbia had already declared that release-dismissal agreements were improper, *see id.* at 969, there was no need for the D.C. Circuit to rule on their validity except in deciding whether these particular charges should be dismissed.

71. *See Dixon*, 394 F.2d at 968. Not surprisingly, the traffic charges were filed soon thereafter. *See id.*

72. 480 U.S. 386, 395-96 (1987).

invalid<sup>73</sup>—its reasoning once again put a premium on objective considerations in deciding whether to bar the civil rights claim.

Returning to David's case, assume that the prosecutor offered the agreement immediately after the arrest, before the criminal charges or misconduct claim had been thoroughly investigated.<sup>74</sup> If David signs and abides by the agreement, that ends the matter—the bias claim disappears. Suppose, however, that after signing the agreement David discovers that there is strong evidence to support his civil rights claim (it turned out that his arresting officer was Mark Fuhrman, for example<sup>75</sup>), and seeks to void the contract. Although *Rumery* freely acknowledges the risks of prosecutorial overreaching that attach to these agreements,<sup>76</sup> David would have a difficult time convincing a court to hear his claim of biased decisionmaking.

To have his civil rights claim heard on the merits, David will first have to persuade a court that the release-dismissal agreement is void. Among the considerations courts will look at in considering the validity of the deal are the knowledge and experience of the defendant, the severity of the criminal charges, and whether the defendant was advised by counsel when he agreed to waive his claim.<sup>77</sup> Evidence that race played a role in the arrest giving rise to the civil action would be irrelevant at this stage, except to the extent that the *prosecutor's* motives for offering the agreement could be uncovered. Here the evidence of racial bias *would* be relevant when the court considered if there was a "legitimate criminal justice objective" for dropping the

73. See *id.* at 397.

74. Cf. *id.* at 401 (O'Connor, J., concurring in part and concurring in the judgment) ("Release-dismissal agreements are often reached between the prosecutor and defendant with little or no judicial oversight."). Because leave of court is often needed to dismiss formal charges after they have been filed, see, e.g., FED. R. CRIM. P. 48(a), the incentive is to execute a release-dismissal agreement soon after arrest.

75. As anyone who owned a television during 1995 will remember, Mark Fuhrman was the Los Angeles detective who helped investigate the murder charges against football legend O.J. Simpson. Fuhrman badly damaged the prosecution's case when it turned out that he had bragged about mistreating Black suspects in other cases. See Kathryn Wexler, *Witnesses Tell of Fuhrman's Displays of Racial Animosity*, WASH. POST, Sept. 6, 1995, at A2.

76. The dangers were recognized at several points in the opinions upholding Bernard Rumery's agreement. The majority said "[w]e agree that some release-dismissal agreements may not be the product of an informed and voluntary decision. The risk, publicity, and expense of a criminal trial may intimidate a defendant, even if he believes his defense is meritorious." 480 U.S. at 393. A plurality also noted that "the Court of Appeals [in this case] . . . believed these agreements 'tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights.' We can agree that in some cases there may be a substantial basis for this concern." *Id.* at 394 (plurality opinion) (citation omitted).

77. See *id.* at 401-02 (opinion of O'Connor, J., concurring in part and concurring in the judgment) (outlining relevant considerations when assessing validity of release-dismissal agreements).

charges.<sup>78</sup> Even here, however, the courts can accept the desire to “[s]par[e] the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution” as a legitimate objective.<sup>79</sup> Given this interest will be present in virtually all cases like David’s, and given the obvious societal benefits that flow from reducing litigation, any allegation of racial decisionmaking could have a hard time carrying the day.

The point is not that *Rumery* was wrongly decided, or that release-dismissal agreements do more social harm than good. The more narrow point is simply that rules designed to streamline and simplify the justice system often work at cross-purposes with the desire to detect and correct race-based conduct. Release-dismissal agreements provide a method for masking this conduct by buying a defendant’s silence, albeit at a price that may be enticing to the parties most directly involved.

The difficulties of proving improper conduct are not limited to the initial charging decision. Indictments that were influenced by racial considerations are extremely hard to establish, in part because of grand jury secrecy, and in part because objective considerations will often moot the inquiry into the subjective parts of the process (more on juries below).<sup>80</sup> The prosecutor’s enormous control over the plea bargaining process can also smooth over any race-based misconduct, in much the same way that a release dismissal can.<sup>81</sup> While provable cases of these types appear to be rare, these rules, when coupled with the investigative rules discussed above, leave defendants with little chance to expose the misconduct when it occurs.

78. *See id.* at 401.

79. *See id.* at 399-400. Perhaps recognizing the ease with which prosecutors could mask their reasons for offering a release-dismissal agreement, the Third Circuit imposed an additional requirement on the government. While continuing to recognize that the avoidance of civil suits is a legitimate public interest, the court of appeals also requires proof that the proffered public interest is *in fact* the reason the deal was offered. The court apparently will consider testimony as to the prosecutor’s state of mind that (for example) the agreement was offered simply as a means for hiding a civil rights violation. *See Cain v. Darby Borough*, 7 F.3d 377, 380-81 (3d Cir. 1993) (en banc); *see also Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 527 (3d Cir. 1996) (explaining and applying *Cain* standard), *cert. denied*, 117 S. Ct. 1311 (1997).

80. *See infra* Part III.C.

81. By inducing defendants to forego a public trial, plea bargains offer prosecutors the ability to mask problematic conduct by the police or other prosecutors in much the same way that release-dismissal agreements can. Indeed, *Rumery* recognized the functional similarity between plea bargains and these agreements. *See* 480 U.S. at 393. *But cf. id.* at 393 n.3 (noting that the analogy between agreements and plea bargains is not complete).

### C. Juries

Following his arrest and charge, David asks his lawyer about his pending jury trial. Although counsel believes there is a decent chance at an acquittal, David is worried about the composition of his jury. He knows that Blacks and other minorities tend to be under represented in jury pools,<sup>82</sup> and he fears that if the jury is forced to choose between the testimony of a White police officer and a Black defendant, the jury might either find the White witness inherently more credible, or else assume that a Black man is guilty of something without bothering to fully evaluate the evidence.

There is reason for David's concern. Whether it was freeing the White defendants who murdered Emmett Till<sup>83</sup> or convicting Black defendants who were falsely accused, history is littered with ugly incidents of juries using their powers to disadvantage minorities.<sup>84</sup> The situation is far better today than in the past, but it is by no means trouble free. Cases involving the police officers who beat Rodney King, the men who beat Reginald Denny, and other less notable defendants<sup>85</sup> strongly suggest that some cases continue to be tinged with racial considerations that are unrelated to the evidence. Sophisticated

82. There is wide-spread agreement that racial minorities are often statistically under represented in the pools from which grand and trial jurors are drawn. See David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 803-04 (1977) (table indicating disparity between percentage of racial minorities in community and percentage in jury pools of between approximately 18% and 40%); Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-section by Design*, 79 JUDICATURE 273, 273-74 (Mar.-Apr. 1996) (The "[i]nability to secure racial and ethnic diversity on lists of qualified jurors remains the most intractable problem in jury administration today.").

83. Emmett Till was a fifteen-year-old Black youth from Chicago who in 1955 went to visit relatives in Tallahatchie County, Mississippi. On a dare, Till asked a White, married store cashier for a date, and whistled at her. A few days later he was pistol-whipped, shot in the head, and thrown in the river with a weight around his neck. Two White men were arrested, and the evidence of their guilt was fairly strong (they admitted abducting Till, but claimed they had released him unharmed). In its closing, the defense stated that despite the pressures by "outside agitators," he was sure that "every last Anglo-Saxon one of you" would have the courage to free the defendants. After one hour and seven minutes of deliberations, the jurors acquitted; as one juror noted, "If we hadn't stopped to drink pop, it wouldn't have taken that long." The defendants then sold their story of how they had killed Till to a newspaper. For a summary of the *Till* case, see KENNEDY, *supra* note 1, at 60-62.

84. For a historical discussion on how juries (along with other government actors) often used their powers to discriminate in the application of the criminal laws, see KENNEDY, *supra* note 1, at 76-135; see also Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 704-07 (1995).

85. See, e.g., Daniel Klaidman, *Racial Politics in the Jury Room*, LEGAL TIMES, Apr. 23, 1990, at 1 (discussing a murder trial in Washington, D.C., where a Black defendant accused of killing a Black victim is acquitted by an all-Black jury; post-verdict interviews suggest that verdict was influenced by belief that justice system is stacked against African Americans, and by some jurors' unwillingness to send another Black man to prison).

scholarship has buttressed the view that race continues to influence jurors, consciously or otherwise, in their deliberations.<sup>86</sup>

The flashpoint in the debate over race and juries has been the imposition of the death penalty.<sup>87</sup> The now-famous Baldus Study,<sup>88</sup> for example, offered empirical evidence that those who killed Whites were more likely to be executed than those who killed Blacks, raising an inference that jurors find the lives of White victims more valuable than the lives of Black victims. While the methodology of the Baldus study has been questioned,<sup>89</sup> it is telling that few observers are willing to take the opposite view, and declare that race exerts *no* influence in the handing out death sentences.

The Supreme Court's response to this evidence was, of course, *McCleskey v. Kemp*,<sup>90</sup> which upheld the validity of the Georgia sentencing scheme that Professor Baldus and his colleagues studied. The Court assumed the validity of the proffered statistics, but found that they failed to prove the crucial question: that a *particular jury intentionally* discriminated against a defendant who killed White victims. At most, said the Court, the statistics showed a *risk* that race may influence some jury decisions in some cases, but this risk fell short of proving intentional discrimination against Warren McCleskey.<sup>91</sup>

Here a defendant's ability to prove racial bias is not just reduced, it is eliminated; the inquiry has been narrowed so that now even objective evidence that "some juries" in capital cases discriminate is

86. In her careful analysis of the influence of race on juries, Professor Sheri Lynn Johnson concludes that a racial bias continues to influence the outcome of cases, even though much of it appears to be unconscious rather than deliberate. See Johnson, *supra* note 42, at 1616-51. Professor Nancy King has also noted the existence of some bias in her important article on the subject. See King, *supra* note 42, at 77-105. The work of King and Johnson are confirmed by the now-dated, but still leading, research on jury behavior, the Chicago Jury study. In that study, Professors Kalven and Zeisel noted instances where the race of the victim or defendant affected the decisions of largely White juries. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 340-41 (1966).

87. For a readable overview of the debate, see JEFFREY ABRAMSON, WE, *THE JURY* 207-39 (1994); see also MANN, *supra* note 1, at 200-19; Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 *STAN. L. REV.* 27 (1984).

88. DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* (1990). For a discussion of other studies that have examined the impact of race on capital sentences, see Johnson, *supra* note 42, at 1622-23.

89. The district court which rejected McCleskey's claim that the Georgia death penalty scheme was unconstitutional was particularly critical of the Baldus study. See *McCleskey v. Zant*, 580 F. Supp. 338, 352-79 (N.D. Ga. 1984), *aff'd in part and rev'd in part sub nom.*, *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc), *aff'd*, 481 U.S. 279 (1987). The authors of the study respond strongly to the criticisms in BALDUS, *supra* note 88, at app. B.

90. 481 U.S. 279 (1987).

91. See *id.* at 308. The Court also rejected a claim that the statistics revealed a violation of the Eighth Amendment ban on cruel and unusual punishment. See *id.* at 301-13.

inadmissible.<sup>92</sup> The problem, however, is not really *McCleskey*, but the rules on impeaching jury verdicts. Even if Warren McCleskey had sworn statements from the actual jurors in his case, saying that they and other members of the jury deliberately decided to sentence him to death because McCleskey was Black and the victim was White, his equal protection claim might well fail. The Federal Rules of Evidence (and the rules of many states) disallow the post-trial impeachment of a verdict if the challenge is based on the discussions that took place in the jury room.<sup>93</sup> Unless the deliberations were infected by an outside influence—bribes or threats by non-jurors, access to information that was not admitted at trial—defendants may not use juror statements about the deliberations to undermine the verdict, even if there were clear agreement among the jurors that race was taken into account.<sup>94</sup>

The refusal to treat jurors like other government decisionmakers extends to the pretrial and post-trial process as well. When grand jurors decide to indict, any racial influence that affected their decision will almost certainly remain hidden. Under the *Costello* Rule, as long as the grand jury is fairly drawn, the return of a facially valid indict-

92. See BALDUS, *supra* note 88, at 370 (criticizing Court's opinion, noting "[b]y so limiting capital punishment equal-protection claims, the Court in *McCleskey* created a nearly insuperable barrier to proof").

93. FED. R. EVID. 606(b) provides in part:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

The rule goes on to say, however, that "a juror may testify on the question whether *extraneous* prejudicial information was improperly brought to the jury's attention or whether any *outside* influence was improperly brought to bear upon any juror." *Id.* (emphasis added). The Supreme Court has construed this provision to mean that almost any influence of the jurors' own making is off limits to a litigant seeking to undermine the verdict. See *Tanner v. United States*, 483 U.S. 107 (1987) (ruling allegations of drug and alcohol use by jurors inadmissible in proceeding to impeach verdict).

94. Thus, as long as the racial bias came from the jurors themselves rather than from some outside source (newspapers, for example) the fact that race played an explicit part in the verdict would generally not be considered by a court. See, e.g., *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980) (finding testimony concerning jurors' prejudices incompetent); *Smith v. Brewer*, 444 F. Supp. 482, 488-90 (S.D. Iowa) (holding where juror allegedly mimicked Black defendant's manner of speaking, evidence of juror's behavior inadmissible), *aff'd*, 577 F.2d 466 (8th Cir. 1978). And while some courts leave open the possibility of considering racial evidence that is so severe as to render a verdict fundamentally unfair, see, e.g., *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158-59 (7th Cir. 1987) (noting evidence of racist statement by juror incompetent, but noting in dicta that "[t]he rule of juror incompetency can not be applied in such an unfair manner as to deny due process"), courts normally do not find the bias that severe. See e.g., *id.* at 1159-60. The rule has been criticized by courts and commentators, but the incompetence of this type of testimony appears to be the prevailing view. See Christopher B. Mueller & Laird C. Kirkpatrick, *EVIDENCE* 519 (1995); see also *Developments in the Law—Race and the Criminal Process: Racist Juror Misconduct During Deliberations*, 101 HARV. L. REV. 1595, 1597-1603 (1988) (citing sources).



ment will cure almost all problems that occurred in the process.<sup>95</sup> And while courts of appeals will examine verdicts to see if they were influenced by passion, prejudice, or racial hostility, a defendant is again foreclosed from providing direct evidence of bias. The reviewing court will ask what the jury saw and heard, and will consider the circumstances surrounding the trial, but will uphold the verdict if it concludes that these factors would not have influenced reasonable jurors.<sup>96</sup> What courts will *not* do is remand for a hearing, so that the jurors who heard the case can testify about what actually occurred.

Like the other rules discussed above, there are compelling reasons for not questioning jurors about their decision.<sup>97</sup> The cumulative effect of these rules, however, is that a defendant can be pulled over by a racist police officer, charged more seriously than other defendants because of his race, offered a release-dismissal agreement before charges are formalized to hide a civil rights violation, indicted by a grand jury that thinks young Black males should be charged on general principles, convicted by a jury that is more protective of White interests than Black, and have his conviction affirmed despite claims and statistics suggesting racial decisionmaking—all with hardly a word of inquiry into the state of mind of the actor who made the decision. The Supreme Court's commitment to ending the influence of race in criminal trials may have been unceasing, but it surely has not been unqualified.

#### IV. COMPETING INTERESTS AND REMEDIES

Criticizing is easy, offering helpful solutions is hard. Part II tried to show how the problems with proving race-based decisionmaking have a common origin; having bundled the problems together, the temptation now is to seek a single remedy. But the problems of race are too thorny, and the competing interests too weighty, to allow a

95. See *Costello v. United States*, 350 U.S. 359, 363 (1956). A distinction should be drawn between improper comments by the *prosecutor* who is trying to prejudice the jury and improper comments or considerations raised by the grand jurors themselves during deliberations. The former could almost certainly be challenged, see *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (holding constitution prohibits prosecutors from making racially-biased arguments), while the latter claim might well be barred by *Costello*. For a discussion on the scope of the *Costello* rule, see 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.4(a) - (c), § 15.5(c), (g) (1984).

96. See generally *Patton v. Yount*, 467 U.S. 1025 (1984) (refusing to overturn conviction despite evidence that jury might have been influenced by community prejudice toward defendant in high-profile murder case; passage of time between crime and trial sufficient to rebut any presumption of partiality).

97. See *infra* note 168 and accompanying text.

sweeping solution. For legal and practical reasons, a more layered approach is required.

### A. Competing Interests

Courts frequently justify limits on challenges to official discretion by citing administrative concerns.<sup>98</sup> Motions to suppress evidence, quash an indictment, or vacate a verdict are often cost-free to the defendant, or if they are not free, bring with them such a significant reward that the challenge is worth the cost. Courts are afraid that, like any underpriced good, these challenges will be overused, putting a significant resource burden on an already busy justice system. The response has been to make claims easy to process, by making the outcome turn on easily provable facts (was there a traffic violation?), or by setting the defendant's burden of production so high that most challenges can be dismissed without a hearing.

But while the administrative concerns are legitimate, the explanation is unsatisfying. When problems of race have loomed large enough in the past, the Court has been willing to intervene in the criminal process despite the high resource costs. The best recent example of this is *Batson v. Kentucky*:<sup>99</sup> the practice of using peremptory strikes to remove all potential Black jurors was so widespread that the Court stepped in and added an expensive and time-consuming constitutional requirement to the voir dire.<sup>100</sup> Perhaps *Batson* is

98. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 468 (1996) (requiring rigorous standard for discovery for selective prosecution claims, in part because discovery requests divert prosecutorial resources); *Newton v. Rumery*, 480 U.S. 386, 395-96 (1987) (recognizing release-dismissal agreements can serve important role in protecting system and public officials from burdensome claims); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (noting prosecutors must have great discretion over charging decisions, because courts are not competent to second guess how best to allocate scarce resources among high number of potential cases); *Costello v. United States*, 350 U.S. 359, 363 (1956) (noting challenges to indictments strongly disfavored, inter alia, because of costs of resulting delay while challenges resolved). *But cf.* *Whren v. United States*, 116 S. Ct. 1769, 1775 (1996) (noting decision not based solely, or even primarily, on evidentiary difficulty of proving intent).

99. 476 U.S. 79 (1986).

100. In *Batson*, the Court reaffirmed that the use of peremptory challenges to remove potential jurors because of their race violated equal protection, and made it significantly easier to prove that the prosecutor acted with discriminatory intent. Specifically, although the defendant still has the burden of proving an improper motive, he need only create a prima facie case of discrimination to shift the burden on the prosecutor to explain how she had *not* intentionally discriminated. See *id.* at 97-98. This model might profitably be used in other challenges involving race, as discussed *infra* at the text accompanying notes 142-46.

For a discussion on the use of race-based peremptory challenges to exclude Blacks from juries, see KENNEDY, *supra* note 1, at 193-230; Douglas L. Colbert, *Challenging the Challenge, Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 93-101 (1990).

an anomaly, but a fair inference to draw from that case is that if the Court believes that a racial problem is corrosive enough, administrative concerns will be subordinated.<sup>101</sup> A corollary inference is that the Court is not convinced that race-based decisionmaking remains a big enough problem to justify opening the gates to large numbers of new claims.

Although the size of the racial problem is difficult to quantify, there has been no lack of effort to educate courts on the scope of the problem. Parties and amicus curiae, often drawing on academic writing, routinely provide courts with facts and figures about the pernicious influence of race on law enforcement.<sup>102</sup> Judges and justices have seemed largely unmoved by these data, leading some observers to conclude that over the last quarter century, the Supreme Court (especially, but not uniquely) has been at least indifferent, and at most hostile to claims of racial bias.<sup>103</sup>

There is no doubt that the Burger and Rehnquist Courts generally view claims by *all* criminal defendants, including those who allege discrimination, less favorably than the Warren Court did.<sup>104</sup> But hostility toward minority defendants is too blunt an explanation, one that

101. Cf. William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 155 ("If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time consuming in the world, it would be difficult to find a better starting point than *Batson*.").

102. See, e.g., Brief of NAACP Legal Defense & Educational Fund & American Civil Liberties Union as Amicus Curiae in Support of Respondents, *United States v. Armstrong* 517 U.S. 456 (1996) (No. 95-157) (citing books, law review articles, and court studies on racism in the justice system); Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841) (citing law review articles).

103. See, e.g., Angela Davis, *Conference on Race, Law, and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 639-41 (1996); Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597, 599-600 (1994); Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1270-73, 1310-22 (1992).

104. See DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 317-18 (1992):

During the Earl Warren era, the liberal majority often agreed to hear appeals from convicted criminals and used their cases to rewrite the standards for criminal procedures. . . . In the Rehnquist Court the process worked in reverse. The conservative majority rarely agreed to hear an appeal from a criminal whose conviction was upheld by a state or federal court. However, when the prosecutors lost a case in the lower courts, the Rehnquist Court could be counted on to hear the appeal filed by a state of the Justice Department. . . . Where the Warren Court gave a second chance to convicted criminals, the Rehnquist Court gave prosecutors a second chance to affirm convictions.

It is worth noting, however, that some of the decisions that created great problems for African-American suspects, including *Terry v. Ohio*, 392 U.S. 1 (1968) discussed *supra* in Part III.A, were products of the Warren Court. See also *supra* note 131 (discussing Warren-Court era decision in *Swain v. Alabama*, making it more difficult to prove that prosecutor used peremptory strikes to deny Black defendants equal protection; later overruled by Burger Court in *Batson v. Kentucky*).

brings the search for answers to a jarring halt: if the Justices are biased, the only solution is hand wringing and waiting for the passage of years to bring about a new Court. But there is a more refined explanation for this judicial attitude, one that fits more comfortably with the case law. This explanation has two parts. The first involves the nature of common-law decisionmaking. The second involves the Court's optimistic, perhaps unrealistic, view of criminal juries.

The Supreme Court has extensively constitutionalized criminal procedure, finding in the Bill of Rights detailed rules allowing a search of the glove compartment but not the trunk of a car,<sup>105</sup> rules that make the admissibility of confessions turn on whether the defendant or the police initiated a conversation,<sup>106</sup> and rules defining what evidence can and must be admitted at the sentencing phase of a capital trial.<sup>107</sup> These rules were typically constructed to provide guidance to police and judges in circumstances where legislators had been silent. But as necessary as these steps were for the orderly administration of justice, they appear to have conditioned both judges and lawmakers to think of pretrial criminal procedure as principally a matter of constitutional common law development, rather than a subject of legislative primacy with interstitial judicial rulings.<sup>108</sup>

Judicial primacy has come at a cost. Appellate courts—those most responsible for the rulemaking—see only the guilty who have been caught with the goods; they never see the many innocent citizens who are improperly stopped and then released, and rarely hear the stories of White defendants who receive relatively more favorable treatment by juries or prosecutors. While appellate judges can read briefs about disparate treatment or suspicionless stops, they never hold legislative hearings or read mail from constituents, and so they

105. See *New York v. Belton*, 453 U.S. 454, 460 & n.4 (1981) (holding that the Fourth Amendment permits the search of automobile incident to a lawful arrest; search may include "glove compartments, consoles, or other receptacles located anywhere within the passenger compartment," but may not include the trunk).

106. See *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that once accused requests assistance of counsel, any further information obtained by police in absence of counsel is inadmissible unless accused initiated communication).

107. See *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (finding that victim impact evidence may be admitted at sentencing phase of capital trial); *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (finding that the trial judge erred in excluding mitigating evidence from sentencing phase of capital trial).

108. For an insightful discussion of this topic, see Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993). Legislators have not entirely abandoned the field, of course, as the Federal Rules of Criminal Procedure show. Nevertheless, many areas of police and prosecutorial practices are still regulated in broad terms by constitutional common law.

never see the people or hear the words of those on whom the burdens of race-based decisionmaking fall most heavily.<sup>109</sup> And while this insular feature has always accompanied judicial rulemaking, the inability to see the mosaic of contacts between citizens and the criminal system means that the contours of the rules are disproportionately shaped by the backgrounds, assumptions, and world views of the judges and justices. How serious judges perceive the problem of race-based decisionmaking to be may depend as much on the attitudes that they bring to the bench as on the limited, and necessarily sterile, information they learn while judging.<sup>110</sup>

More importantly, courts must worry about intellectual consistency in ways that legislatures do not. In *McCleskey*, for example, the Court worried that if the Fourteenth Amendment is offended by statistics showing a correlation between race and the death penalty, it might be equally offended by similar correlations between race and imprisonment, or race and charging decisions.<sup>111</sup> In such a case, the demands of consistency could have brought the criminal system to its knees, and thus, the first link in the chain of logic was rejected. Legislators need not worry about such niceties. It would be perfectly acceptable for Congress or a state to find the statistics in *McCleskey* legally significant and worthy of remediation, while rejecting even

109. Cf. Jeffrey Rosen, *The Agonizer*, *NEW YORKER*, Nov. 11, 1996, 82, 84 (recounting interview with Justice Kennedy, who worried about the appointment of young judges because appellate judging is such a "quiet existence": "You have the blue brief and the red brief for thirty years, and that's about it. You don't see real people—you're not in a real courtroom, in the sense of juries, and attorneys shouting at each other.")

110. The point is not that appellate judges are clueless about the "real world" of criminal procedure (a charge that could perhaps be better leveled against academics). Judges had a life before the bench, and a judge who practiced criminal law before her elevation to the bench is probably better in touch with the realities of criminal procedure than many legislators. The point is simply that courts are *institutionally* ill-equipped to address the broad-gauge problems presented by the intersection of race and the criminal law. Courts are structurally designed to be reactive to problems, and when they act proactively—making a new rule of law or procedure to address a recurring concern—they necessarily act on the limited records that are generated in the litigation process. This process may be the best way to dispense individual justice, but is probably not the best way to make social policy.

111. There is no doubt that the fear of a "runaway" *McCleskey* rationale influenced the Court's decision in that case. As the majority candidly observed:

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . . [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges.

481 U.S. at 314-17 (citations and footnotes omitted).

more compelling statistics about race and other areas of the criminal law. The gravitational pull of *stare decisis* does not limit a legislature's freedom to enact partial solutions to global problems.<sup>112</sup>

The second explanation for the Court's lack of sympathy toward bias claims is tied to its view of juries. The Court correctly sees the jury as a shield against oppression,<sup>113</sup> and has devoted a great deal of attention to ensuring that juries are fairly selected in a race-neutral manner. It has long prohibited the intentional exclusion of Blacks from juries,<sup>114</sup> and when states adopted underhanded schemes to ensure all-White panels, the Court was willing to look behind the state's rationalizations and insist on fairness in fact as well as in theory.<sup>115</sup> When the equal protection standard seemed too difficult to meet, the Court created the fair cross-section doctrine, so that even inadvertent underrepresentation could be remedied.<sup>116</sup> *Batson* made it significantly harder for the prosecutor to deny minorities the right to serve on juries,<sup>117</sup> and subsequent cases have expanded the protection.<sup>118</sup> When there is a substantial likelihood that a trial might be infected by

112. This ability to pick and choose specific problems to address is shown in the Violent Crime Control and Law Enforcement Act of 1994, which included special provisions for women but not men, children but not adults, and the elderly but not younger citizens. See Pub. L. 103-322, 108 Stat. 1796, 1910-16, 2038-43, 2081 (codified as amended in scattered sections of 26 & 42 U.S.C. (1994)). Indeed, Congress attempted to attack legislatively the issue raised in *McCleskey* in the Racial Justice Act, which eventually was deleted from the 1994 law. For a summary of the Racial Justice Act, see KENNEDY, *supra* note 1, at 345-48. For a more detailed discussion, see Vada Berger, et al., *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437, 461-96 (1989).

113. See *McCleskey*, 481 U.S. at 310 ("[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880))).

114. See *Strauder*, 100 U.S. at 308-09.

115. See, e.g., *Avery v. Georgia*, 345 U.S. 559, 560-61 (1953) (noting that jurors purportedly selected by choosing names at random from box, but names of Black jurors placed on different color tickets than names of White jurors); *Smith v. Texas*, 311 U.S. 128, 129 (1940) (noting practice of placing names of prospective Black jurors last on list, then selecting jurors in order that names appeared on list); *Norris v. Alabama*, 294 U.S. 587, 591-96 (1935) (using a key man system to select jurors resulted in no Blacks being selected for jury service; apparent altering of court records to make it appear that Blacks were considered); see also KENNEDY, *supra* note 1, at 172-73.

116. See *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). For a discussion of the development of the fair cross-section doctrine, see Martha Craig Daughtrey, *Cross Sectionalism in Jury Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1, 19-50 (1975).

117. See *supra* note 100.

118. See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992) (extending prohibition on race-based peremptory challenges to defense counsel); *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding that defendant may raise *Batson* challenge even when he does not share the race of the removed juror). Other decisions in the *Batson* line of cases have been less favorable to defendants. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (finding no *Batson* violation for peremptory strikes of Latino jurors where reason for strikes unrelated to ethnicity, despite prosecutor's knowledge that strikes would have disparate impact on group).

racial prejudice, the Constitution requires that potential jurors be questioned about their biases.<sup>119</sup> In short, the Court has actively constitutionalized the jury system, put enormous faith in the idea that if racial bias is detected and eliminated at the pre-trial stage, this will minimize the bias at the result stage.

The Court's reliance on juries to be the primary backstop against race-based behavior leaves several problems unaddressed. The first is that most cases never get to a jury—roughly 90% of the defendants convicted in federal court plead guilty rather than proceed to trial.<sup>120</sup> The second is that even if juries prevent unjust *convictions*, they can do little to prevent illegitimate *practices*. Juries are never asked to decide if a *Terry* stop was legitimate, whether a prosecutor is treating Black and White defendants differently, or whether legislatively mandated sentences disproportionately punish African Americans. Juries only decide the case before them, and are rarely given the information they would need if their task was to evaluate the government's conduct.<sup>121</sup> Even when a jury occasionally detects a bad odor emanating from the prosecutor's case, its only option is to nullify the charges, an awkward and unsatisfying solution.<sup>122</sup>

The overarching problem with relying on juries to be the prime cleansing agent of discrimination has been neatly identified by Professor Albert Alschuler: we put far too many resources into selecting a jury, and too few resources into evaluating what juries do once selected.<sup>123</sup> Jurors intent on giving play to their biases will not be forth-

119. See *Ham v. South Carolina*, 409 U.S. 524, 527 (1973); see also *Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (holding that a defendant accused of interracial capital crime entitled to have potential jurors questioned on racial bias); cf. *Ristaino v. Ross*, 424 U.S. 589, 598 (1976) (limiting *Ham*).

120. See Bureau of Criminal Justice Statistics, *supra* note 9, at 448 tbl.5.27. In 1996, 60,255 criminal defendants were processed by the federal district courts, 52,270 (roughly 87%) of whom were convicted. See *id.* Of those who were convicted, 48,196 (92%) pled guilty or nolo contendere. See *id.* Of the total number of criminal defendants processed by the district courts (including those who were acquitted or had their case dismissed), only 4175 (roughly 7%) ever appeared before a jury. See *id.*

121. Jurors would not, for example, be able to evaluate a claim that Black defendants were being charged with more serious crimes or receiving harsher sentences than Whites, since evidence of other charges or possible sentences normally would not be admissible at trial. Cf. *United States v. McKenzie*, 922 F.2d 1323, 1327 (7th Cir. 1991) ("[T]he sixth amendment requires that a jury determine only questions of guilt or innocence; punishment is the province of the court.").

122. For a discussion of the problems with jury nullification, including an argument that juries lack sufficient evidence to make a rational nullification decision, see Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 303-04 (1995).

123. See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989):

[Current jury selection practices] have captured the worst of two worlds, creating burdensome, unnecessary and ineffective jury controls at the front end of the criminal trial

coming about their prejudices, so even the combination of challenges for cause and peremptories may not be enough to catch those for whom skin color is an important piece of evidence. By making verdicts virtually unreviewable<sup>124</sup> and disabling jurors from impeaching the verdict, we probably put more faith in *voir dire* than may be appropriate.<sup>125</sup> In short, solving the problem of biased decisionmaking requires more than juries can give.

### B. *The Problem Reconsidered*

Given the Court's apparent lack of interest in these claims, the obvious means for reducing the impact of race are the ones least likely to occur. Suggesting that the Court overrule *Whren*, lower the discovery bar in *Armstrong*, and otherwise reverse course is tilting at legal windmills, at least for the foreseeable future. The current Court seems convinced that the problem is too small and the remedial costs too large to make dramatic changes, and so the search for solutions should begin by taking the case law close to where we find it.

Some suggestions are offered below. All require further thought; none is a complete cure. Each, however, can produce small gains in the battle at relatively little cost.

#### 1. Challenges to discretion, writ large

Judicial indifference to bias claims is partly the product of earlier triumphs. Courts and lawmakers have done a remarkable job over the last few decades at eliminating the overt manifestations of racism: from official intolerance of improper remarks and behavior, to standardized sentencing, to greater minority representation on the bench, at the bar, and in the jury box, the journey toward formal equality has been imperfect but impressive. One consequence, however, has been to drive most racial animosity underground, making it harder to detect

while failing to implement badly needed controls at the back end. Although we have devoted substantial resources to implementing our front-end procedures, we generally have refused to expend significant resources to determine whether they have worked. Indeed, we often have turned aside clear evidence of their failure.

*Id.* at 154-55.

124. The reluctance to review jury decisions is reflected not only in the rules against impeaching a verdict, see *supra* note 93, but also in the double jeopardy rule against appealing an acquittal, and in the judicial reluctance to use special verdicts in criminal cases. For an opinionated view on granting verdicts such great deference, see Leipold, *supra* note 122, at 260-78.

125. For a valuable discussion of this issue, see Alschuler, *supra* note 123; see also Johnson, *supra* note 42, at 1651 ("Unfortunately, all of the traditional protections against racially biased verdicts—the assurance of a representative jury, the screening out of biased jurors, or the control of the content of the jury's deliberations—are inappropriate tools for neutralizing the effects of the amount and kind of bias documented in [Johnson's article].").



or even measure. A police officer, prosecutor, or juror can no longer admit their biases against minority defendants in public, but can still act on them in carrying out their duties.<sup>126</sup>

A critical preliminary step to attacking the problem would be to reach common ground on its size and dimensions. Traffic stops, *Terry* stops, charging decisions, and indictments are all official public acts, and thus their frequency and characteristics can properly be compiled and scrutinized.<sup>127</sup> Although relying on statistics is fraught with dangers of imprecision and manipulation,<sup>128</sup> they can still provide valuable insight on how the police and prosecutors as a group are exercising their discretion.<sup>129</sup> A police department that, over time, stops Black motorists twice as often as White drivers should arouse suspicion (at least in the absence of an explanation), even though this statistic would admittedly tell us nothing about what a particular officer was thinking when he turned on the blue lights.

Gathering information on discretionary police and prosecutor decisions would help both judges and legislators. Properly gathered and

126. Cf. Eisenberg & Johnson, *supra* note 2, at 1169 ("Dominative racists, those who express bigoted beliefs and hostility openly and frequently through physical force, are now rare; aversive racists, prejudiced persons who do not want to associate with Blacks but rarely will say so, are more common.")

127. The Department of Justice's Bureau of Criminal Justice Statistics (among other organizations) already compiles statistics on arrests, charges, and convictions, often broken down by race. See Bureau of Criminal Justice Statistics, *supra* note 9, tbls. 4.11, 5.20, 5.51; see also Bureau of Justice Statistics Homepage (visited Apr. 24, 1998) <<http://www.ojp.usdoj.gov/bjs/>>. These statistics tend to be highly generalized, however, making it impossible to determine whether disparities (if any) that correlate to race are caused by some other factor.

Some, more focused, information is also gathered, but is sufficiently inaccessible as to be meaningless for those trying to study system-wide behavior. Many police departments keep track of the contacts their officers have with suspects, for example, and virtually all keep track of traffic stops if an arrest or seizure results (although if there is no arrest or seizure, records often are not kept; see Harris, *supra* note 22, at 561). A defendant seeking access to this information, however, is likely to be frustrated. Under both federal and state laws, most records compiled for law enforcement purposes are exempt from disclosure under freedom of information statutes. See 5 U.S.C. § 552(b)(7) (1994) (exempting from disclosure records that would interfere with law enforcement proceedings, invade a person's privacy, or disclose police investigative techniques); 5 ILL. COMP. STAT. 140/7(c) (West 1996) (similar provisions under Illinois law). More to the point, the material is rarely compiled in a format that would be useful for a defendant seeking to establish patterns of decisionmaking, and may not be gathered in any central location, such as the Attorney General's Office. Thus, to make the information useful, the legislature would have to compel a data-collection scheme that would both provide the information and protect legitimate law-enforcement interests. An example of this is shown *infra* in note 135 and accompanying text.

128. Besides the general difficulties created by the use of statistics, courts have noted the specific problems with trying to isolate the racial variable from raw data that simply show a correlation. See, e.g., *Washington v. Vogel*, 880 F. Supp. 1545, 1547-48 (M.D. Fla. 1995); *McCleskey v. Zant*, 580 F. Supp. 338, 352-79 (N.D. Ga. 1984), *aff'd in part and rev'd in part sub nom.*, *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc), *aff'd*, 481 U.S. 279 (1987).

129. Jury decisionmaking presents unique problems, discussed *infra* in Part IV.B.2.

analyzed, the information would provide a more reliable database on which judges could draw when assessing claims of racial decisionmaking. Anecdotes and dispersed, unanalyzed complaints about police behavior are usually unpersuasive evidence on which to ground constitutional rules, especially if the complaints come from those hoping to avoid a criminal conviction. Perhaps *Whren* and *Armstrong* would have come out the same way even if there were reams of information about police and charging practices, but it is at least possible that the contours of those decisions would have changed if the evidence were as stark as the allegations.<sup>130</sup>

Providing more detailed data could also help both defendants and prosecutors. One serious barrier to proving race-based conduct by police and prosecutors is the need to present evidence of similar behavior in other cases, information that defendants seldom have the resources to gather.<sup>131</sup> Whatever its other failings, governments are good at collecting data, and thus at least some of the statistics that a defendant might need could be gathered at relatively little cost.<sup>132</sup> Even police and prosecutors could benefit from the increased information: to the extent the statistics reveal no disparate impact, or explain an apparent disparity, there is less risk that a sympathetic judge will rely on anecdotes and impose an unwarranted remedy.<sup>133</sup>

Legislators and academics have recognized the importance of gathering reliable statistics in this sensitive area. In March 1998, the House of Representatives passed the Traffic Stops Statistics Study Act

130. See *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (denying request for discovery of prosecutorial practices, noting, *inter alia*, that proffered evidence "failed to identify individuals who were not black, could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted;" proffered evidence also "recounted hearsay and reported personal conclusions based on anecdotal evidence").

131. Over ten years ago the Court recognized that requiring a criminal defendant to show discriminatory conduct in cases other than his own can impose a "crippling" burden of proof, one that will rarely be met. In *Swain v. Alabama*, 380 U.S. 202, 223, 227 (1965), the Court ruled that the race-based exercise of peremptory challenges could violate the Equal Protection Clause, but required proof of a pattern of their discriminatory use. Twenty years later, the Court acknowledged that the bar had been raised too high, and permitted proof of discriminatory peremptories based solely the prosecutor's conduct in the moving defendant's case. See *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986); cf. Charles J. Ogletree, *Just Say No!: A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1101-02 (1994) ("A list of jury-discrimination claims under *Swain* reveals that between 1966 and 1984, over 75 defendants failed to meet the *Swain* test; during those same years only two succeeded (against the same prosecutor)." (footnote omitted)).

132. See *supra* note 127.

133. Cf. *Armstrong*, 517 U.S. at 469-70 (using government statistics to criticize court of appeals's assumption that people commit crimes in proportion to numbers in the population, stating: "Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.").

of 1988,<sup>134</sup> a bill that had originally been introduced by Representative John Conyers shortly after the Supreme Court's decision in *Whren*. Under the proposed Act, the Attorney General would be required to conduct a study of the relationship between police decisions to stop motorists and the motorists' race, age, and ethnicity. The study would include data on the number of people stopped for traffic violations (including their race and age), the traffic infraction that was allegedly committed, whether a ticket was issued, whether a search was conducted as a result of the stop, and the degree to which any search resulted in seizures of drugs and drug proceeds. The data obtained by the Attorney General would be compiled and presented to Congress, but the use to which the information would be put is limited. To make the bill politically palatable, there are no quotas, behavior targets, or penalties for police; the bill is also explicit in providing that the collected data "shall not be used in any legal or administrative proceeding to establish an inference of discrimination on the basis of particular identifying characteristics."<sup>135</sup> There is no

134. H.R. 118, 105th Cong. § 1 (1998). As of the date of this article, the bill is before the senate Judiciary Committee.

135. The relevant parts of the bill are as follows:

Sec. 2 ATTORNEY GENERAL TO COLLECT

The Attorney General shall conduct a study of stops for routine traffic violations by law enforcement officers. Such study shall include collection and analysis of appropriate available data. The study shall include consideration of the following factors, among others:

- (1) The number of individuals stopped for routine traffic violations.
- (2) Identifying characteristics of the individual stopped, including the race and or ethnicity as well as the approximate age of that individual.
- (3) The traffic infraction alleged to have been committed that led to the stop.
- (4) Whether a search was instituted as a result of the stop.
- (5) How the search was instituted.
- (6) The rationale for the search.
- (7) Whether any contraband was discovered in the course of the search.
- (8) The nature of such contraband.
- (9) Whether any warning or citation was issued as a result of the stop.
- (10) Whether an arrest was made as a result of either the stop or the search.
- (11) The benefit of traffic stops with regard to the interdiction of drugs and the proceeds of drug trafficking, including the approximate quantity of drugs and value of drug proceeds seized on an annual basis as a result of routine traffic stops.

Sec. 3. LIMITATION ON USE OF DATA.

Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of any individual who is stopped or any law enforcement officer. Data acquired under this section shall not be used in any legal or administrative proceeding to establish an inference of discrimination on the basis of particular identifying characteristics.

Sec. 4. RESULTS OF STUDY.

Not later than 2 years after the date of the enactment of this Act, the Attorney General shall report the results of the study conducted under this Act to Congress.

H.R. 118, 105th Cong. §§ 2-4 (1998).

obvious reason why the information gathering required by this Act could not be done in other areas of the criminal process as well.<sup>136</sup>

But as the Traffic Stops Statistics Study Act recognizes, the crucial question is how these data would be used. Here the focus should shift away from an individual defendant challenging to an individual decision and toward the behavior of institutions; rogue police and prosecutors are troublesome, but rogue departments are worse. It would conserve resources and lead to better judicial decisions if those who felt aggrieved by racially based conduct brought a group-wide, civil rights action for relief.<sup>137</sup> By class action or otherwise, parties could present evidence—including the government's data on the decisionmaking pattern in question—that the police department or prosecutor's office was engaging in discriminatory conduct, and seek an injunction against future violations.<sup>138</sup> If the court found a violation, it could monitor the department's future behavior, and ensure compliance with the court's contempt power.<sup>139</sup> These actions could be

136. Some legislative efforts have been made to obtain more focused statistics. The 1994 Crime Control Bill, for example, requires the U.S. Attorney General to "acquire data about the use of excessive force by law enforcement officers." 42 U.S.C. § 14142(a) (1994). As with the information sought under the Conyers Bill, *supra* note 135, the data are to be used only for research or statistical purposes, and the results are to be published annually. *See id.* § 14142(b)-(c).

137. The most likely manner of raising these challenges would be pursuant to 42 U.S.C. § 1983, which permits a civil cause of action against any person acting under the color of state law who deprives another of rights guaranteed by the Constitution. *See* 42 U.S.C. § 1983 (1994); *see also supra* note 64. This remedy would supplement the current ability of defendants to challenge decisions, either through motions to suppress or more direct challenges. *See infra* Part IV.B.

138. *Cf. Carter v. Jury Commission of Green County*, 396 U.S. 320, 336-37 (1970) ("The federal courts are not incompetent to fashion detailed and stringent injunctive relief that will remedy any discriminatory application of [a facially neutral] statute at the hands of the officials empowered to administer it."). Although prosecutors are normally immune from paying damages, *Burns v. Reed*, 500 U.S. 478, 486-87 (1991), they could be required to bring their future practices into conformity with the law.

139. This suggestion is by no means new. There have been several efforts to use civil class actions to combat race-based police practices in different states, with mixed results. For example, Professor David Harris has described the efforts made in Florida, Maryland, Illinois, and Colorado. *See Harris, supra* note 22, at 561-73. The Maryland and Colorado cases resulted in favorable settlements for the plaintiffs: in addition to paying damages, the Maryland police agreed to stop using race-based drug courier profiles, and to maintain records for three years on the race of the drivers stopped and the results of the stops. *See id.* at 565-66. *But see id.* at 566 (noting that records kept by police suggest continuation of prior practices). The Colorado litigation also resulted in a cash settlement, and the disbanding of a police Task Force that the federal district court found had violated the Constitution by making race-based stops. *See id.* at 569.

The result in Florida shows some of the difficulties with using civil remedies. *See id.* at 563. Plaintiffs in central Florida filed two lawsuits, each apparently seeking class action certification. *See id.* The district court denied the request to certify the class, finding that the individual plaintiffs and the civil rights organization lacked standing. *See id.*; *Washington v. Vogel*, 156 F.R.D. 676, 681, 683, 684 (M.D. Fla. 1994). The plaintiffs then apparently proceeded individually, but their claim was dismissed because the evidence was insufficient as a matter of law to show that

brought by criminal defendants, but would not have to be; innocent citizens who were unfairly investigated or charged might be able to bring the challenge directly,<sup>140</sup> thereby avoiding the awkwardness of granting relief to a defendant who is accused of a serious crime.

Targeting the whole governmental unit, rather than the individual officer or prosecutor, should make the data on investigations and charging decisions more relevant, thereby removing one of the problems defendants now face—gaining access to similar decisions in other cases. Now, however, there would be less need to show that a single police officer or prosecutor discriminated against a specific suspect. Since the challenge would be brought on behalf of a large number of citizens, it should be enough to show that race played a part in *some* of the official decisions. Although institutions cannot “intend” to discriminate, the collective, intentional decisions of the institution’s actors can surely be the culmination of individual biases. Police departments and prosecutor’s offices have folkways and patterns of behavior, and if those patterns show a persistent, unexplained correlation to race, it is hard to understand why courts should not intervene, even if the precise state of mind of a named government actor cannot be conclusively established.<sup>141</sup>

Even showing a systemic bias through the use of statistics would be difficult, of course, and thus some assistance from the courts would be required. If the Court is serious about abolishing bias from the system, the most straightforward and least intrusive way to do so would be to borrow the procedures already used in another equal protection context: those employed in *Batson v. Kentucky*.<sup>142</sup> Courts

the traffic stops were based on race. See *Washington v. Vogel*, 880 F. Supp. 1542, 1545 (M.D. Fla. 1995), *aff’d*, 106 F.3d 415 (11th Cir. 1997) (unpublished table decision); *Harris, supra*, at 563 & n.110.

140. In some areas there would appear to be plenty of innocent citizens who might be candidates for plaintiffs in a class action. See *Maclin, supra* note 42, at 251-55 & 255 n.50 (citing examples of police stops of innocent Blacks in Massachusetts, Los Angeles, and Dayton). See also *Butler, supra* note 42 (African-American law professor describing how Black police officers followed and questioned him, wondering if he was homeless or drug addict because he was walking through (his) residential neighborhood at night).

141. *Alexander v. Louisiana*, 405 U.S. 625 (1972) provides a useful (but not perfect) example. There a defendant offered statistical evidence to support his claim that Blacks were being systematically excluded from grand jury lists. The Court found that the numbers, coupled with the procedures followed by jury commissioners, created a prima facie case of discrimination, and thus the burden shifted to the state to explain the disparity. See *id.* at 631-32. Although the clerk of the trial court swore that race had not been a factor in the selection process, the Supreme Court was unconvinced. In telling language, the Court found it unnecessary to decide that a specific commissioner had discriminated: “The result bespeaks discrimination,” said the Court, “whether or not it was a conscious decision on the part of any individual jury commissioner.” *Id.* at 632 (citation omitted).

142. For a discussion of *Batson* see *supra* note 100.

could permit statistics to create a *prima facie* case of governmental discrimination, which would shift the burden to the state to show that there were race-neutral reasons for those decisions.<sup>143</sup> If the state offered such an explanation, the party claiming discrimination would then be able to put on evidence that the reasons were a pretext; the moving party would always have the ultimate burden of proving intentional discrimination.<sup>144</sup> Statistics would thus occupy a middle ground—not *per se* proof of intent, but a warning sign that shifts the onus to the state to explain the disparities.

While such a scheme would demand some allocation of judicial resources, the burden on the system should be relatively slight. Unlike *Batson* challenges, which can occur in any case, defendants or civil plaintiffs would only rarely have the data to mount a challenge, but when they did it would be a system-wide challenge that would allow for a single (if temporary) resolution.<sup>145</sup> Although the government would have to spend time and money defending its practices, in most cases it would probably rest its defense on showing alternative explanations for the proffered statistics, and allow the plaintiff's burden of proof to work to the government's benefit. Nonetheless, judges would remain free to detect fire if they smelled smoke: if the statistics were especially stark, and the prosecutor's explanation unconvincing, the courts would remain free to decide that racial considerations were the dominant influence and take appropriate remedial steps.<sup>146</sup>

143. Cf. *McCleskey v. Kemp*, 481 U.S. 279, 296 n.18 (1987) (noting Court's "longstanding precedents . . . that a prosecutor need not explain his decisions *unless* the criminal defendant presents a *prima facie* case of unconstitutional conduct with respect to his case" (emphasis added)).

144. Cf. *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam) (describing three steps of a *Batson* challenge: (1) The moving party must establish a *prima facie* case of discrimination; (2) the burden of production then shifts to the non-moving party (usually the government) to provide a race-neutral explanation for the decision; (3) the trial judge must then decide if the moving party has proved purposeful racial discrimination).

145. Cf. *supra* note 139 and accompanying text (describing class-action challenges to allegedly discriminatory police stops).

146. *Batson* itself has been sharply criticized, and so any proposal that follows a *Batson* model would naturally raise similar concerns. The primary worry seems to be that courts too readily accept the prosecutor's "race neutral" explanation for his decisions, making the prohibition against race-based peremptories illusory. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 376-78 (1991) (Stevens, J., dissenting); Ogletree, *supra* note 131, at 1106-08; see also Alschuler, *supra* note 123, at 175-76 (noting "difficult and burdensome task" of deciding race-neutral explanations, "[e]ven when prosecutors are forthcoming").

The judicial inquiry in a class-wide challenge need not be so deferential. Explaining why large numbers of prosecutors or police made similar decisions about Black suspects may not be as easy for the government as explaining why a single prosecutor decided to remove a juror peremptorily. Cf. Alschuler, *supra*, at 176 (noting the prosecutors have successfully explained peremptory strikes by pointing to jurors' posture, demeanor, and head-nodding toward defense). Moreover, it may be that judges are not as tolerant of explanations as is popularly believed.

At least two objections to this scheme suggest themselves. One is that this route is foreclosed by *McCleskey v. Kemp*, where the Court held that jurisdiction-wide statistics concerning the impact of race on the imposition of the death penalty were insufficient to establish the required discriminatory intent.<sup>147</sup> It would not strain the law or logic, however, to limit *McCleskey* to its context—an unsuccessful effort to use multiple verdicts to prove discriminatory intent by a specific jury. Stated simply, juries are different enough from other government decisionmakers that a conclusion about verdicts should tell us little about other official decisions.

One of the infirmities of Warren McCleskey's claim was that he tried to extract proof of a single motive based on the conduct of a large number of decisionmakers. The various juries in the Baldus study had no connection to each other, their verdicts did not represent government policy except in the most formal sense, and who, because they would not make any future decisions, could be stopped from engaging in the conduct only by removing the death penalty as a sentencing option. Using statistics to create an inference of discriminatory intent by police departments and prosecutor's offices is a much smaller leap. Both groups are repeat players in the justice systems, all police and prosecutors are subject to the same training and rules as others in their group, all answer to a hierarchy, and most importantly, the future conduct and decisions of police officers and prosecutors can be influenced by the courts. Even if the biased decisionmaking is limited to a few bad cops or prosecutors, it still seems entirely fair to assume an office-wide policy of intentional bias if the statistics are sufficiently stark. And so while the Court might ultimately rely on *McCleskey* in rejecting a statistics-based argument, the differences between juries and other government actors are sufficiently great that the opinion does not compel that result.<sup>148</sup>

Professor Kenneth Melilli looked at all reported *Batson* decisions over a seven-and-half-year period, and discovered that the courts rejected the prosecutor's explanation in about 16% of those cases. See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 456, 459 (1996).

147. See *supra* Part III.C.

148. The Court in *McCleskey* noted that juries making decisions in capital cases were a far cry from the normal type of decision where statistics had been accepted to prove discriminatory intent:

[T]he nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII [employment discrimination] cases. . . . Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.

A second objection is that the proposal violates the working premise of this section—that solutions should work with existing law, not fight against it. Moving to a *Batson*-like model of shifting presumptions would admittedly be a change in the law, perhaps an unmanageably large one. But on reflection, it seems that the proposal is more a matter of implementation than of substantive change. The causes of action, most procedural rules, and intellectual foundation for such challenges are already in place. Indeed, the Court has already recognized the most important point in any proposal to attack race-based decisions: that claims of racial bias are different from other challenges, and that it is permissible, even proper, to adopt different rules to attack this unusually elusive problem.

The Supreme Court has acknowledged that claims of race-based decisionmaking can be treated differently in some settings, although the depth of its commitment to the principle is unclear. In *Vasquez v. Hillery*,<sup>149</sup> the Court upheld the reversal of a twenty-four year old murder conviction because Blacks had been intentionally excluded from the indicting grand jury. Upsetting an otherwise valid conviction because of a tainted indictment would have significant implications for trial practice, and later that same term, the Court moved to limit the breadth of *Hillery*. In *United States v. Mechanik*,<sup>150</sup> the question was whether an admittedly flawed grand jury process (but one with no claim of racial bias) was grounds for overturning a subsequent conviction. The Court ruled it was not, reasoning that a later, valid conviction conclusively showed that the error at the grand jury stage was harmless.<sup>151</sup> Recognizing the tension this created with *Hillery*, the Court distinguished its holding in a footnote: *Hillery*, it explained, was

compelled by precedent directly applicable to the special problem of racial discrimination. . . . [R]acial discrimination in the selection

481 U.S. at 294 (citation omitted). This distinction is telling. Prosecutors choosing juries, or employers making hiring and firing decisions, seem much more like the investigative, detention, and charging decisions that might properly be the subject of statistical presumptions of intent.

The differences between jury verdicts or indictments and other official decisions work both ways, however. Just as *McCleskey* tells us relatively little about proving police and prosecutorial motives, the unique features of juries would prevent a defendant from bringing the type of class-wide challenges discussed above. For more on the ability to challenge jury decisions, see *infra* Part IV.B.2.

149. 474 U.S. 254 (1986).

150. 475 U.S. 66 (1986).

151. The error in *Mechanik* was that two witnesses testified in tandem in the grand jury room, even though Federal Rule of Criminal Procedure 6(d) permits only the "witness under examination" to be present. The Court assumed for purposes of its opinion that the rule had been violated. See *Mechanik*, 475 U.S. at 69.



of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future. . . .

We think that these considerations have little force outside the context of racial discrimination in the composition of the grand jury. No long line of precedent requires the setting aside of a conviction based on a rule violation in the antecedent grand jury proceedings, and the societal interest in deterring this sort of error does not rise to the level of the interest in deterring racial discrimination.<sup>152</sup>

The Court has also recognized that race is different when it comes to constitutionalizing voir dire. In the line of cases beginning with *Batson*, the Court for the first time required trial judges to inquire into the prosecutor's reasons for exercising peremptory challenges, but only if there was evidence that the prosecution was using its strikes in a racially discriminatory manner.<sup>153</sup> Part of the reasoning behind *Batson*—jurors should not arbitrarily be denied the opportunity to serve on juries<sup>154</sup>—would seem to apply across the board, suggesting that peremptory challenges based on *any* constitutionally protected activity (e.g., political views, group memberships) should also be prohibited. But to date, it is only when the prosecutor is exercising peremptories based on race or gender<sup>155</sup> that courts will intervene.<sup>156</sup>

Ultimately, even if the courts refuse to soften the procedures for proving intent, data collection and class-wide civil claims could provide an important collateral benefit, one that may prove more important than detecting deliberate bias. It seems probable that a large percentage of the conduct that minority suspects find objectionable is not the result of firmly held prejudices, but rather, of "unconscious" racism. Police and prosecutors might believe in their hearts that they

152. *Id.* at 70 n.1 (citations omitted).

153. See *Batson v. Kentucky*, 476 U.S. 79, 100 (1986).

154. The prohibition on race-based peremptories is designed to protect not only the jurors, but also defendants and societal interests in a fair trial. See *Georgia v. McCollum*, 505 U.S. 42, 48-49 (1992).

155. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

156. The Supreme Court has hinted, but has never held, that *Batson* is limited to peremptory strikes based on race and gender. See, e.g., *id.* at 128 ("potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." (emphasis added)); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) (noting that *Batson* was based on need to eliminate legacy of race discrimination). Nonetheless, it has been argued that the *Batson* rationale should also prevent the exclusion of jurors because of their beliefs, associations, and other First Amendment activity. See Cheryl G. Bader, *Batson Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights*, 24 *HOFSTRA L. REV.* 567 (1996); see also Andrew D. Leipold, *Constitutionalizing Jury Selection In Criminal Cases: A Critical Evaluation*, 86 *Geo. L.J.* (forthcoming, Apr. 1998). Limiting *Batson* to race and gender would be consistent with the notion that these specific problems are worthy of special handling by the courts.

have no racial animus, but if they see that those whom they arrest and convict are disproportionately minority race citizens, they might find it easier to believe that these groups are more likely to lie, more likely to be dangerous, or are more crime prone than others, and make their charging or detention decisions accordingly.<sup>157</sup> If confronted with data about the overall behavior of their office, however, some prosecutors and police might recognize their unconscious assumptions, and pause before acting. Under the Conyers bill,<sup>158</sup> for example, the obvious hope is that when police see the statistics on traffic stops, they will check themselves before pulling over the next young Black man for a trivial violation. Whether this check comes from the officer's desire not to discriminate against African Americans, from a desire not to be a defendant in a civil action, or from a desire to please their superiors, the result should be a more equitable distribution of stops.

We should not assume, however, that data compilation would be an unqualified benefit. Even among well-meaning state actors, more data may, for example, solidify the view that young men from certain ethnic groups are more likely to commit certain crimes than those from other groups, or perhaps are more prone to carry weapons. The opposite may also be true, of course, but the point is that more data could *increase* the current suspicions that police, prosecutors, and juries now hold—a more statistically valid correlation is easier to translate into causation, increasing the likelihood that race will inform a decision to stop, charge, or convict. There are enough instances of statistics being used (and misused) in this manner to make increased official studies a potential source of concern.<sup>159</sup>

157. The literature on aversive racism is far more subtle than is suggested here. For an extended discussion of the issue, see Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027-28 (1988) (citing social science literature on topic); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Tanya Katerí Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845, 852-55 (1990).

158. See *supra* note 135.

159. The use of sensitive racial information can already be seen in the *Terry*-stop cases, see *supra* note 46, and drug-courier profile cases. See, e.g., *United States v. Travis*, 62 F.3d 170, 176 (6th Cir. 1995) (rejecting equal protection challenge where defendant alleged consensual airport contacts based on race; to be improper, decision to approach suspect must be based "solely" on race), *cert. denied*, 516 U.S. 1060 (1996). In Maryland, for example, where African-American drivers sued to enjoin race-based traffic stops (which routinely led to canine drug sniffs or requests to search the car), the settlement included a promise by police not to use "race profiles" in deciding whom to search. See Fletcher, *supra* note 24, at A1. Although the state denied the profiles were ever used, the police apparently remained convinced of the correlation between race and drugs. See *id.* The Maryland State Police described the high number of African Americans stopped as an unfortunate byproduct of sound police work, and noted that "[t]he facts speak for themselves." See *id.* For a criticism of the use of race in profiles, see Christopher Slobogin, *The World Without A Fourth Amendment*, 39 U.C.L.A. L. REV. 1, 84-86 (1991).

But we cannot be afraid of knowledge; whatever the truth about race and crime, we are better off knowing it. If some of the correlations between race and crime are the product of conscious bias, the data can be a first step toward combating it. To the extent decisions are the product of unrecognized bias, exposing official conduct to public scrutiny might be the most effective method for ameliorating its effects.

## 2. David's remedies

Gathering data and shifting burdens could make it easier to prove bias claims in the future, but they are large steps that are unlikely to occur without great debate and political ferment. In the meantime, what are defendants like David to do?

For police investigations, the most troubling of the recent cases is *Whren*. Defendants now have no ability under the Fourth Amendment to show that race influenced the decision,<sup>160</sup> apparently leaving the field open for those inclined to discriminate. The critical question therefore becomes how serious courts will be about recognizing an equal protection challenge. If the courts read *Oliver* as limiting Fourteenth Amendment challenges,<sup>161</sup> or if they find that statistical evidence is incompetent in light of *McCleskey*,<sup>162</sup> suspects like David have little hope. But if the opening left in *Whren* is genuine, the evidence of improper police motivations might still come to light.

*Whren* decided that the relevant question is not whether a reasonable police officer *would* have stopped the car anyway (a position urged by Mr. Whren<sup>163</sup>), but rather, whether an officer *could* have validly stopped the suspect.<sup>164</sup> In an equal protection case, however, defendant must prove that the officers acted with discriminatory intent and that *similarly situated* people had not been stopped.<sup>165</sup> In considering the latter point, the question of what a reasonable police officer would have done comes back into play. A defendant can plausibly argue that if most officers would not have pulled the car over for the alleged offense (e.g., if police do not usually stop drivers who stay too long at a stop sign), then the second prong of the test should be

160. See *supra* text accompanying note 48.

161. See *supra* note 55 and accompanying text.

162. See Harris, *supra* note 22, at 553 ("It is hard to avoid the conclusion that, given *McCleskey* and *Armstrong*, the Justices do not mean for many equal protection claims to succeed.")

163. Petitioner's Brief at 30-37, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

164. See 116 S. Ct. at 1777.

165. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (noting "ordinary equal protection standards" applied (citation omitted)).

satisfied. The fact that the police *could* have pulled similarly situated drivers over would be irrelevant, because this fact will always be true in selective prosecution cases. Defendants may thus be able to present through the back door what *Whren* says cannot come in through the front.<sup>166</sup>

Making accommodations for race-based charging decisions is tougher, because prosecutorial discretion is nearly sacrosanct. Other than the civil remedies outlined above, the best that can realistically be accomplished here is monitoring the decisions, in the hopes that data about charging patterns will guide prosecutorial discretion in a productive way. While discretion this broad is always fraught with peril, in many ways it is less troublesome than the discretion given to police and jurors. Prosecutors are a smaller group, make more visible decisions than police do, and are more accountable than jurors. It also seems probable that prosecutors would be more responsive to any data that showed a disparate impact of their decisions than either of the other groups.<sup>167</sup>

Jury decisions are the hardest to deal with, because the interests in preserving the integrity of verdicts are so strong. We would not tolerate for long a system where jurors could be pursued by the losing party after trial, hoping to find a disgruntled member who would help impeach the verdict. Even if post-verdict inquiries occasionally uncovered clear evidence of racial influence, the information-gathering costs would be so high, and the damage done to the jury system so potentially great, the achievement would be pyrrhic.<sup>168</sup> Here the best method for recognizing the special problems of race may be to put all trial participants on notice that any attempts to introduce race as a

166. Defendants would still have to jump the hurdle of proving discriminatory intent, a proposition that *Armstrong* makes very difficult to establish. Here defendants would at least need the type of data discussed *supra* in Part IV.A and perhaps the benefits of shifting presumptions suggested *supra* in Part IV.B.1. The point here is not that equal protection claims will (or should) be easy to prove, only that there may still be an avenue for presenting evidence of discriminatory purpose.

167. See generally *Days*, *supra* note 57, at 184-89 (noting Justice Department efforts to fully explore allegations of race-based treatment of African-American crack defendants, not only to ensure compliance with legal requirements but also to ensure fair treatment).

168. Justice O'Connor vividly captured this point when she wrote: "There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Tanner v. United States*, 483 U.S. 107, 120 (1987). Fears of chilling discussions in the jury room, undermining public confidence in the verdicts, plus the desire to keep jurors from being hounded by losing parties have led courts to limit a defendant's ability to offer evidence of the deliberations. See *id.* at 119-21; *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

factor is prohibited, and encourage judges to take swift action *before* the verdict is returned if the threat of racism appears.

A Louisiana rule of criminal procedure illustrates the possibilities. In state cases, a defendant is entitled to a mistrial on request:

when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:

(1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury.<sup>169</sup>

This is a significant step, but not a radical one. Because it is difficult to know what influences a jury, and impossible to correct many errors once the verdict is returned, it is proper to warn counsel and the court in advance that any attempt to influence the jurors with racial references will have serious consequences. And while many trials will continue to have strong racial overtones even if nothing is said, in the more typical case the absence of racial references should help keep the jury focused.<sup>170</sup>

If race was an obvious and inevitable part of the trial, a more direct approach might be required: jurors could be instructed that they have an affirmative obligation to report to the judge pre-verdict if race appears to be playing an unhealthy role in the deliberations. A judge has some ability to discipline a jury for misconduct until the verdict is reached, and so a specific instruction to this effect might encourage jurors to think about, and perhaps guard against, their unarticulated biases.<sup>171</sup> For those inclined to make race an explicit part of their decisionmaking, the threat of being reported to the judge by another juror, coupled with the risk of an inquiry and mistrial, might be enough of a muzzle to ensure that the bias remains unspoken.

169. LA. CODE CRIM. PROC. ANN art. 770 (West 1996). The comment to the Article notes that mistrials are granted under the Rule for "remarks and comments which normally are not cured and cannot be cured by an admonition." *Id.* cmt. a.

170. For an extended discussion of how "playing the race card" can influence a jury, see KENNEDY, *supra* note 1, at 256-310.

171. The reasoning behind this suggestion underlies a provision of the 1994 Crime Control Bill related to the death penalty. Section 3593(f) provides that before a jury begins considering the sentence, the judge must instruct that the defendant's or victim's race can play no part in the deliberations, and that the jury must not return a death sentence unless it is convinced that it would sentence any other defendant to death under the circumstances presented, regardless of race. At the close of the deliberations, each juror must then sign a certificate affirming that race played no role in his or her decision. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1966 (codified at 18 U.S.C. § 3593(f) (1994)). While jurors can obviously lie about the basis for their decision without fear of punishment, the hope is that forcing the jurors to affirm the need for race-neutral decisionmaking will be beneficial.

## CONCLUSION

The problem of race and criminal justice will never be solved, only managed. The only way to remove the influence of race is to remove discretion, and so while there is no morally acceptable level of racial bias, as a practical matter the issue must be recast: are there ways to reduce the amount of race-based decisionmaking without unduly undermining the goals of detecting, prosecuting, and punishing criminal behavior?

The suggestions offered above try to strike this balance. The proposals might be fairly criticized for offering only limited promise in the face of an urgent, even overwhelming, social problem.<sup>172</sup> The suggestions are admittedly modest, but any plan that focuses only on the criminal justice system will suffer this defect. Problems with the legal system are in large part a consequence of racial problems found elsewhere in our lives, and it would be naive to think that even sweeping changes in criminal procedure would fix the social conditions and attitudes that breed the problems in the first place. This realization does not excuse foolish and short-sighted decisions that exacerbate racial problems, nor does it forgive the lack of courage to experiment and take risks with the criminal system. It is simply a recognition that incremental change, even if frustratingly slow, is as likely to succeed in the long run as sweeping revisions that are too far in front of our current knowledge.

Some of the ideas would be politically unpopular; prosecutors and police would object to a requirement that they compile even more records, just as they would resent having the burden shifted to them to explain how they *didn't* discriminate in carrying out their jobs. These concerns are legitimate, but short-sighted. All of us—judges, lawyers, defendants, citizens—have an enormous stake in the proper functioning of the justice system, making it critical that the operators of that system be as free from invidious influences as possible. If the problems caused by bias are large, we should detect and correct them; if they are small, we should monitor official behavior to ensure they stay that way. The current system, with its high suspicions but low

172. In some parts of the country the clash between the criminal law and the African-American community is extraordinary. In Washington, D.C., nearly 50% of the young Black men ages 18 to 35 are in prison, in jail, on probation, on parole, out on bond, or being sought on a warrant. Five years ago the figure was 42%, revealing that the problem is getting worse despite a relatively stable national crime rate. See Eric Lotke, *Hobbling a Generation: Young African American Men in D.C.'s Criminal Justice System Five Years Later*, (visited Apr. 19, 1998) <<http://www.igc.org/ncia/hobb.html>>.

tolerance of bias claims, should not be the end point of the efforts to minimize race-based decisionmaking.