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# Road Work: Racial Profiling and Drug Interdiction on the Highway

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# ROAD WORK: RACIAL PROFILING AND DRUG INTERDICTION ON THE HIGHWAY

*Samuel R. Gross\* and Katherine Y. Barnes\*\**

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## ROAD WORK: RACIAL PROFILING AND DRUG INTERDICTION ON THE HIGHWAY

*Colombia-based traffickers continued to control wholesale level cocaine distribution throughout the heavily populated northeastern United States . . . often employing Dominican criminals as subordinates. . . . In major U.S. cities, organized criminal groups of Cuban, Jamaican, and Mexican nationals, as well as African-American and ethnic Dominican gangs, dominated the retail market. — United States National Narcotics Intelligence Consumers Committee, November, 1998<sup>1</sup>*

*There should be no loopholes or safe harbors for racial profiling. Official discrimination of this sort is wrong and unconstitutional no matter what the context. — John Ashcroft, Attorney General of the United States, January, 2001<sup>2</sup>*

*We have emphatically rejected ethnic profiling. What we have looked to are characteristics like country of issuance of passport. . . . — Michael Chertoff, Assistant Attorney General, Criminal Division, November, 2001<sup>3</sup>*

### I. INTRODUCTION

Hypocrisy about race is hardly new in America, but the content changes. Recently the spotlight has been on racial profiling. The story of Colonel Carl Williams of the New Jersey State Police is a well-known example. On Sunday, February 28, 1999, the *Newark Star Ledger* published a lengthy interview with Williams in which he talked about race and drugs: "Today . . . the drug problem is cocaine or marijuana. It is most likely a minority group that's involved with that."<sup>4</sup> Williams condemned racial profiling — "As far as racial profiling is concerned, that is absolutely not right. It never has been con-

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1. NAT'L NARCOTICS INTELLIGENCE CONSUMERS COMM. ("NNICC"), THE NNICC REPORT 1997: THE SUPPLY OF ILLICIT DRUGS TO THE UNITED STATES 11-12 (1998) [hereinafter NNICC REPORT].

2. *Confirmation Hearing on the Nomination of John Ashcroft to Be Attorney General of the United States: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 492 (2001) (answer of Senator Ashcroft to questions submitted by Senator Feingold).

3. *Preserving Freedoms While Defending Against Terrorism: Panel I of a Hearing of the Senate Judiciary Comm.*, Fed. News Serv., Nov. 28, 2001, at 20.

4. Kathy Barrett Carter & Ron Marsico, *Whitman Fires Chief of State Police*, STAR LEDGER (New Jersey), Mar. 1, 1999, at 1A.



done in the State Police and it never will be condoned in the State Police” — but he said that the illegal drug trade is ethnically balkanized: “If you’re looking at the methamphetamine market, that seems to be controlled by motorcycle gangs, which are basically predominantly white. If you’re looking at heroin and stuff like that, your involvement there is more or less Jamaicans.”<sup>5</sup> Hours later, still on Sunday, Governor Christine Todd Whitman fired Williams from his job as superintendent of the New Jersey State Police because “his comments . . . are inconsistent with our efforts to enhance public confidence in the State Police.”<sup>6</sup> Six months later Colonel Williams sued the state for damages, arguing (among other claims) that his statements about race and drugs reflected well-known facts, and pointing out that the United States Office of National Drug Control Policy website told visitors that in Trenton, New Jersey, “crack dealers are predominantly African-American males,” powder cocaine dealers are “predominantly Latino,” heroin traffickers are “mostly Latinos,” and the marijuana market is “controlled by Jamaicans.”<sup>7</sup>

It is not news that American police officers devote a disproportionate amount of their attention to racial and ethnic minorities. The phrase “racial profiling,” however, has only recently appeared and has no set meaning.<sup>8</sup> As we use the term, “racial profiling” occurs when a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating.<sup>9</sup> The essence of racial profiling is a judgment that the targeted group — before September 11, 2001, usually African Americans or Hispanics; now often Arab Americans or visitors from

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5. *Id.* at 6A.

6. *Id.* at 1A, 6A.

7. C.J. Chivers, *Ex-Police Leader's Claim of Bias Attacked*, N.Y. TIMES, Oct. 4, 1999, at B4.

8. Professor Sheri Lynn Johnson described the practice in an excellent and prescient article in 1983, when it still had no name. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983). Jerome Skolnick and Abigail Caplovitz report, on the basis of a LEXIS search, that the first use of the term in the American press was in 1987, followed by a handful of uses through 1993, 31 in 1994 and 1995, 63 in 1996 and 1997, 187 in 1998, over 1000 in 1999, and over 1000 again from January through September of 2000. See Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drug and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 419 n.36 (2001). Our own search of the LEXIS “mega” file of all court opinions in its database reveals that the term was first used in a court opinion on any aspect of law enforcement in 1996, followed by 15 references in 1999, 38 in 2000, and 75 in 2001, as of November 28, 2001.

9. See Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002).

Middle Eastern countries — is more prone to crime in general, or to a particular type of crime, than other racial or ethnic groups.<sup>10</sup>

Racial profiling depends on police discretion in choosing suspects. At one end of the continuum, racial profiling is impossible once the police are looking for a particular person — the victim's partner, the woman in the surveillance video, Osama bin Laden — although it may be a factor at an earlier stage, in determining who to look for. At the other extreme, racial profiling can flourish in proactive investigations in which the police scan large numbers of people in search of culprits in crimes that have not been reported or have not yet occurred. Recently it has been a controversial topic in debates over the conduct of anti-terror investigations following the September 11, 2001 attacks on the World Trade Center and the Pentagon.<sup>11</sup> Before that, racial profiling was primarily an issue in investigations of crimes of possession, usually of guns or drugs. It has received particular attention in the context of highway drug interdiction, which is the subject of this study.

Did Colonel Williams's comments amount to an admission of racial profiling? At first blush, he seems to have done no more than restate the common law enforcement position that minority groups dominate major drug trafficking in the United States.<sup>12</sup> Supporters have described him as an honest cop who was fired for telling the unpleasant, politically incorrect truth.<sup>13</sup> In their view, he was saying: "We don't target by race, we arrest those who should be arrested; it's unfortunate that most of them are black and Hispanic, but it's not our fault."

But Colonel Williams's comments could also be interpreted in a somewhat different manner, as a defense of racial profiling: "Of course we stop and search motorists based on their race — because it

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10. It does not matter if the officer uses other criteria as well. As long as race or ethnicity is an essential element, targeting young black males is racial profiling even if other blacks are not directly affected. On the other hand, it is not racial profiling for an officer to stop, question, search, or arrest a person because his race matches the description of the perpetrator of a specific crime that has been reported. See *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000); see also *Brown v. City of Oneonta*, 235 F.3d 769, 771, 779, 789 (2d Cir. 1999) (opinions concurring in and dissenting from denial of rehearing en banc); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001). Likewise, a deliberate practice of discriminating between known suspects of different races — stopping all speeders but giving tickets to black drivers only, and warnings to whites — is a violation of the Equal Protection Clause of the Fourteenth Amendment, see *Whren v. United States*, 517 U.S. 806, 813 (1996), but it is not racial profiling. For a similar definition, see DEBORAH RAMIREZ ET AL., U.S. DEP'T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS 3 (2000). See *infra* Section V.B.2, notes 277-303 and accompanying text, for a discussion of alternative definitions of racial profiling.

11. See *infra* notes 233-235 and accompanying text.

12. See NNICC REPORT, *supra* note 1.

13. Heather MacDonald, *The Myth of Racial Profiling*, 11 CITY J. 14, 26 (2001), available at [http://www.city-journal.org/html/11\\_2\\_the\\_myth.html](http://www.city-journal.org/html/11_2_the_myth.html).

works. So cut us some slack." Seen in that light, his firing may not have been entirely unprincipled. Of course he didn't say that racial profiling is justified, but didn't he imply it? In the political climate of 1999, a police commander could hardly defend racial profiling directly. The most he could do is say that blacks and Hispanics do in fact commit most of the drug crimes that matter, and wink. Line officers are sometimes a bit more explicit. In June 1999, for example, Sergeant Mike Lewis of the Maryland State Police told a reporter for the *New York Times*:

Ninety-five percent of my drug arrests [used to be] dirt-ball-type whites — marijuana, heroin, possession-weight. Then I moved to the highway, I start taking off two, three kilograms of coke, instead of two or three grams. Black guys. Suddenly I'm not the greatest trooper in the world. I'm a racist. I'm locking up blacks, but I can't help it.<sup>14</sup>

So far, most disputes about racial profiling have been battles over police records. Racial profiling is impossible to detect or prove without detailed information on police conduct: whom they stop, question, and search, by race; why they take these actions; and what they discover in the process. Historically, most police departments did not systematically keep this type of information. In general, they only maintained records of arrests, and of those searches that resulted in seizures or that were conducted pursuant to court warrants. Police departments may be reluctant to allow outsiders to see the records they do keep, but they can be compelled to do so by courts in discovery in civil or criminal litigation, or by legislatures under freedom of information acts. The essential step is to require that the information be recorded and kept in the first place. For several years, police departments and police unions managed to defeat most efforts to require the sort of record keeping that would make it possible to detect racial profiling, but in the last few years, as racial profiling has become an increasingly powerful political issue, the tide has turned.<sup>15</sup> As of this writing, at least twelve states and hundreds of cities have passed laws

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14. Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 50.

15. In September 1999, for example, Governor Gray Davis of California vetoed a bill that would have required all California police agencies to collect information on the race and ethnicity of every driver they stop. The Los Angeles Police Chief, among others, opposed the bill and argued that it would do a "disservice to the community, circumvent the department's disciplinary system," and lead to a rise in civil liability by government agencies. Carl Ingram, *Davis Vetoes Racial Data Legislation*, L.A. TIMES, Sept. 29, 1999, at A3. By the time of Governor Davis's veto, however, more than thirty California police forces had record-keeping programs that were much like the vetoed bill. Armando Acuna, *More Police Agencies Keeping Racial Data*, L.A. TIMES, Sept. 30, 1999, at A3. Los Angeles is now required to keep such records under a consent decree with the United States Department of Justice. See *infra* note 218.

requiring racial record keeping,<sup>16</sup> and several additional jurisdictions must keep such records under consent decrees entered into after being sued by the United States Department of Justice.<sup>17</sup>

It's easy to understand police antipathy to the early record-keeping regimes. They had every reason to believe that the records would be used against them, and some reason to fear that they would be unfairly singled out for doing what they had been told to do. The controversy that led to the dismissal of Colonel Williams illustrates this problem. In 1996 Colonel Williams emphatically rejected a suggestion from his own subordinates that he authorize an internal "racial monitoring program" to address glaring racial disparities in the stops and searches by some state troopers.<sup>18</sup> Two months later, confronted with an investigation by the Civil Rights Division of the United States Department of Justice, the New Jersey State Police (apparently in consultation with the New Jersey State Attorney General) decided to "consistently attempt[ ] to limit what we will be giving to the Department of Justice," because they saw the federal investigation as a "witch hunt" that was "obviously intended to make us look bad."<sup>19</sup> There is no justification for this sort of cover-up, especially since Colonel Williams continued to insist publicly that his department abhorred racial profiling, but the anger and frustration behind it are understandable. The very same practices that the Civil Rights Division condemned in 1996 as racial profiling had been taught to New Jersey State troopers ten years earlier by the Drug Enforcement Administration ("DEA"), a unit of the Department of Justice, as part of a national program of drug interdiction.<sup>20</sup>

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16. The Institute on Race & Poverty at the University of Minnesota Law School reports that there were eleven such statutes as of March 1, 2001. See THE INSTITUTE ON RACE & POVERTY, COMPONENTS OF RACIAL PROFILING LEGISLATION (2001), available at <http://www.instituteonraceandpoverty.org/publications/racialprofiling.html>. Since then at least two additional racial profiling laws went into effect, in Maryland. See MD. CODE ANN., TRANSP. II § 25-113 (2002); *infra* notes 223-224 and accompanying text.

17. See *infra* notes 218-221 and accompanying text.

18. David Barstow & David Kocieniewski, *Records Show New Jersey Police Withheld Data on Race Profiling*, N.Y. TIMES, Oct. 12, 2000, at A1.

19. *Id.* (internal quotation omitted).

20. David Kocieniewski, *New Jersey Argues That the U.S. Wrote the Book on Race Profiling*, N.Y. TIMES, Nov. 29, 2000, at A1; see also *United States v. Wilson*, 853 F.2d 869, 875 (11th Cir. 1988) (noting that DEA and Georgia State Patrol taught officers that "drug couriers are frequently Hispanics"); *United States v. Valenzuela*, No. 00-CR-510-B, 2001 U.S. Dist. LEXIS 7679, at \*19-20 (D. Colo. June 1, 2001) ("Officer Cox testified that in deciding whether he has a reasonable suspicion that a car may be carrying drugs, the race or ethnicity of the driver may be one factor . . . because the Drug Enforcement Administration has informed officers that the majority of drug smugglers in his part of the state are Hispanic."); *United States v. Laymon*, 730 F. Supp. 332, 334, 337 (D. Colo. 1990) (noting that officers were trained by the DEA to use drug courier profiles, and that "being Black or Hispanic was and is a factor in their drug courier profile on which they decide who to stop and search").

Whatever its causes, this conflict over record keeping has had a predictable casualty: empirical research. Researchers who study government conduct depend on government records. In this context, that means that until recently they have had to be content with very little. So far, most studies of racial profiling, in all settings, have been limited to rough comparisons based on sketchy information.<sup>21</sup>

There is only one American jurisdiction for which detailed data on racial profiling in highway searches are available for a considerable period. Since January 1995, Maryland State Police ("MSP") troopers have been under court order to file a report on every incident in which they stop and search a motor vehicle, including information on the race of the driver, the basis for the search, and the type and quantity of the drugs recovered, if any.<sup>22</sup> Similar data have been collected in other jurisdictions<sup>23</sup> but for shorter periods of time, and the raw data are not always available to researchers. More important, the evidence at the hearing that led to the 1995 court order also included a traffic survey that recorded the race of the drivers on Interstate Highway 95 ("I-95"), the main North/South highway that the Maryland State Police patrol. Traffic surveys by race have been done elsewhere,<sup>24</sup> but never in a jurisdiction in which official records of police stops are available for the same time period. The net result is that the Maryland State Police are uniquely suitable for a study of racial profiling: their conduct may be indistinguishable from that of other agencies that police interstate highways, but our ability to study that conduct is unparalleled. Limited analyses of these data have been reported elsewhere,<sup>25</sup> but this is the first comprehensive study of racial profiling by the Maryland State Police.

In this Article we examine the data that accumulated under the 1995 Maryland court order from January 1995 through June 2000 — a total of 8027 searches. We focus in particular on the subset of 2146 searches that occurred on the northern portion of I-95, from Baltimore to the Delaware border. This part of I-95 (the "I-95 corridor") is

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21. The main exception is a major study of the New York City Police Department by the New York State Attorney General's Office: CIVIL RIGHTS BUREAU, OFFICE OF THE ATT'Y GEN. OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES (1999) [hereinafter OAG REPORT].

22. This record-keeping program is part of a court-supervised settlement in *Wilkins v. Maryland State Police*, a federal civil rights class action filed by the Maryland ACLU, charging the Maryland State Police ("MSP") with racial profiling. Settlement Agreement, *Wilkins v. Maryland State Police*, No. CCB-93-468 (D. Md. 1993) (settlement agreement approved Jan. 5, 1995) (copy on file with authors) [hereinafter Settlement Agreement, *Wilkins*]. The MSP has consistently denied that it engages in racial profiling.

23. See, e.g., *supra* note 15.

24. For a discussion of a similar traffic survey in New Jersey, see *infra* note 53.

25. See John Knowles et al., *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203 (2001) (discussed *infra* text accompanying notes 143-145).

reputed to be a drug distribution pipeline. It is also the area in which racial profiling by the MSP is most strongly suspected, and it has been the main focus of civil litigation charging the MSP with racial profiling.<sup>26</sup> As a result, we have data for the I-95 corridor that do not exist for the rest of the state: on the racial makeup of the population of drivers, and on the characteristics of all stops by the MSP, whether or not there was a search.

Unfortunately, while the data on the Maryland State Police are the best available, they cannot be taken as a complete and unbiased reflection of reality. This Article is only partly about highway searches for drugs; it is also about the difficulty of using official police information as a basis for studying police behavior. Like most archival databases, this one is intrinsically limited. Some of the most interesting aspects of the encounters between officers and drivers are simply not recorded. In addition, the data are limited by the selection process that produced them. We can only guess what the state troopers would have found if they had searched a representative sample of I-95 drivers, instead of those they in fact chose, who were mostly minorities.

Worse, the data are not only limited but probably distorted as well. The Maryland State Police did not volunteer to keep these records; that requirement was forced upon them. They knew that the information they collected would be used to judge and to criticize them, and they had every incentive to improve the picture. In other states, officers in similar circumstances have been caught falsifying information.<sup>27</sup> We don't know if that happened in Maryland, but even if it did, that sort of fabrication is not the main problem. The easy, safe way to bias records is simply to skip some cases altogether. Underreporting is inevitable in any effort of this sort; usually it's caused by ordinary laziness or forgetfulness. But cops, like everyone else, are least likely to omit the cases that make themselves look good, and they may be tempted to overlook the ones that make them look bad. There is substantial evidence that this has happened with the MSP data set,<sup>28</sup> but we do not know to what extent.

None of this means that factual conclusions are impossible. Specifically, we reach two basic conclusions that are not vulnerable to the distortions that we have described:

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26. This is true both of *Wilkins v. Maryland State Police*, No. CCB-93-468 (D. Md. 1993), and *Maryland State Conference of NAACP Branches v. Maryland State Police*, No. CCB-98-1098 (D. Md. filed 1998), a second class action suit brought by the ACLU on behalf of alleged victims of racial profiling by the MSP, which is still pending. See *Maryland State Conference of NAACP Branches v. Maryland State Police*, 72 F. Supp. 2d 560 (D. Md. 1999) (denying defendants' motion to dismiss, and denying in part and granting in part defendants' motion for summary judgment).

27. See *infra* notes 87-88, 92-93 and accompanying text.

28. See *infra* notes 99-110 and accompanying text.

1. The Maryland State Police did engage in racial profiling on I-95. They stopped and searched cars with black and Hispanic drivers much more often than cars with white drivers; it is hard to see how they could have produced these results without taking race into account in deciding who to stop and who to search.
2. There is a clear explanation for this practice: racial profiling seems to increase the probability of finding large hauls of drugs. These large hauls, however, are rare. Nearly two-thirds of all drivers searched were not carrying any illegal drugs, but drug-free Hispanic and African American drivers were far more likely to be stopped and searched than drug-free white drivers. Moreover, for each racial group, the majority of those who had any drugs were found with trace amounts or amounts consistent with personal use rather than sale. Among black and Hispanic drivers, however, a larger minority of the searches uncovered substantial quantities of illegal drugs. If this is the explanation for the racial disparities in searches by the MSP, it is noteworthy that the Maryland State Police have never said so themselves. Their position on racial profiling is that they don't do it.

On other issues, firm conclusions are impossible. In particular, we cannot say whether (and to what extent) minority drivers really do account for the bulk of the wholesale drug traffic on I-95. Our major conclusions, however, seem secure. As we will see, the data on the quantities of drugs seized are, no doubt, substantially accurate, and the evidence of racial profiling is, if anything, an understatement of actual practice.

\* \* \*

The Article proceeds as follows:

In Part II we discuss basic data on drug interdiction by the Maryland State Police in the I-95 corridor: stops, searches, and "hits" (successful searches), by race and ethnicity. We then describe the process that produced those stops and searches — the legal bases and the operational context for these investigative actions — and the limitations and distortions in the data. We show how two major patterns in the data — the surprisingly high overall hit rates reported by the MSP, and the similarity in hit rates for white and black drivers — can be explained by aspects of the process that are hidden from our view: selective reporting of stops and searches, aggressive use of investigative procedures that do not count as "searches," and racial discrimination

in the use of these subsearch investigations. We conclude that both the stops and the searches by the MSP seem to have been based at least in part on the motorists' race or ethnicity.

In Part III we re-examine the data on stops and searches on I-95 and introduce two new variables: the types and quantities of drugs found (if any) and the car's direction of travel. We find that most of the drugs seized on I-95 were found in cars with black or Hispanic drivers, and were heading south. These findings suggest that the Maryland State Police targeted drug dealers rather than users on I-95, but they reinforce the conclusion that they relied on race in the process.

In Part IV we consider changes over time in Maryland State Police practices, from 1995 through 2000. In the I-95 corridor we find a sharp break between 1996 and 1997, possibly in response to the anti-racial-profiling litigation focusing on that section of highway. Racial profiling did not stop after 1996, but it became considerably less pronounced; at the same time, the total quantities of drugs seized in the I-95 corridor decreased markedly. There were no parallel changes in MSP searches in the rest of Maryland.

Finally, in Part V we discuss the legal and social implications of these findings. *First*, we conclude that despite the high standard the Supreme Court has set for proof of racial discrimination in other criminal justice settings, the type of evidence we present here is likely to be persuasive on this issue, especially since the relevant fora are as likely to be political as judicial. *Second*, we argue that while the Fourth Amendment might permit limited use of race by police officers as a basis for individualized suspicion (even in the absence of racially specific identifying information), the Equal Protection Clause does not. However, the range of available remedies for an equal protection violation of this sort is unclear. *Last*, we consider the costs and the benefits of racial profiling. The costs depend primarily on the number of innocent people the police target because of their race, and on the treatment they receive after they are selected; the benefits are a function of the magnitude of the danger to which the practice is directed, and the effectiveness of the racial-profiling program in combating that danger. In a context in which the danger is extreme and the profiling program uniquely effective, such calculations might possibly provide a substantial argument for racial profiling — especially if the racially identified suspects are treated with respect. Highway drug interdiction fails this test on all counts. Illegal drug use is certainly a serious problem, but not a critical emergency; innocent suspects are routinely humiliated; and, most important, such programs are essentially useless. Roadside drug searches are easy to accommodate in the routine of patrolling interstate highways — that is probably why they are common — but, judging from the Maryland State Police data, they have no effect whatsoever on the supply of illegal drugs.



## II. STOPS, SEARCHES, AND HITS

### A. *The Maryland State Police Data*

#### 1. *Searches and Stops*

Across Maryland, 40% of the motorists searched by the State Police from January 1995 through June 2000 were African American and 4.4% were Hispanic. According to the 2000 census, 28% of residents of Maryland described themselves as African American, and 4.3% as Hispanic.<sup>29</sup> The racial makeup of drivers on Maryland highways may be quite different. We have data on that point, but only for the northern section of I-95, the major north-south interstate highway that passes through Maryland on its way from Maine to Florida.

As we have mentioned, the section of I-95 that passes through Maryland is important for drug interdiction because, in the words of the Maryland State Police Superintendent, it is “a well-documented portion of the East Coast drug pipeline.”<sup>30</sup> The flow through that pipeline is said to be from north to south, from New York, which is believed to be the national center for importing heroin and a regional center for distributing cocaine, to Baltimore and Washington, D.C., where these drugs are consumed.<sup>31</sup> Therefore, the logical place to try to stop the flow of drugs on I-95 is north of Baltimore, before the drugs reach their destination. That 48.5 mile stretch highway — “Interstate Highway 95 in Baltimore, Harford, and Cecil Counties between the City of Baltimore and the Delaware state line (the ‘I-95 corridor’)”<sup>32</sup> — was singled out for special attention in *Wilkins v. Maryland State Police*<sup>33</sup> and in *Maryland State Conference of NAACP Branches v. Maryland State Police*,<sup>34</sup> two major cases charging the Maryland State Police with racial profiling. About a quarter of the searches in our data (2,146/8,027) were in the I-95 corridor, and their

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29. U.S. CENSUS BUREAU, STATE AND COUNTY QUICK FACTS, at <http://quickfacts.census.gov/qfd/states/24000.html> (last visited Nov. 30, 2002).

30. David B. Mitchell, Letter to the Editor, *Racism Isn't in the Profile of the Maryland State Police*, BALT. SUN, Jul. 29, 2000, at 9A.

31. OFFICE OF NAT'L DRUG CONTROL POLICY, *The High Intensity Drug Trafficking Area Program: 2000, 2001 NAT'L DRUG CONTROL STRATEGY: THE HIGH INTENSITY DRUG TRAFFICKING AREA PROGRAM ANN. REP. 164-65* (2001) [hereinafter *High Intensity Drug Trafficking*]; NNICC REPORT, *supra* note 1, 10-12.

32. *Wilkins v. Maryland State Police*, No. CCB-468 (D. Md. filed Apr. 22, 1997) (order enforcing settlement agreement) (copy on file with authors).

33. *Id.*

34. No. CCB-98-1098 (D. Md. filed 1998).

racial makeup is different from those elsewhere in the state: a majority of those searched were black — 60% — and 6% were Hispanic. See Table 1.

**Table 1: Race of Motorists Searched by the Maryland State Police, by Location<sup>35</sup>**

	I-95 Corridor (2,146)	Elsewhere (5,881)	Entire State (8,027)
White	33.3%	62.6%	54.7%
Black	59.7%	32.2%	39.6%
Hispanic	5.9%	3.8%	4.4%
Other	1.1%	1.4%	1.3%
<b>TOTAL</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

$p < .0001$ <sup>36</sup>

35. In this table, and in the other tables in this Article, we omit cases with missing data on the variables that are reported in the table. In general, there are very few missing data in any of the analyses we have conducted, with one exception: about 18% of the searches in the I-95 corridor lack data on the direction of travel of the car that was searched. See *infra* note 56. These missing data could effect some of the findings reported in Tables 15, 16, 20, and 22, *infra*.

36. The notation at the bottom of Table 1, “ $p < .0001$ ,” is a measure of statistical significance. We report such measures for most of the tables in this Article; on some tables we report separate measures of statistical significance for various comparisons that may be made. Unless otherwise noted, they are based on  $\chi^2$  (“chi-square”) tests for independence, and state the probability of the occurrence of a distribution of outcomes as skewed as the one reflected in the table, or more skewed, if there were in fact no systematic relationship between the variables reported in the table. For Table 1, for example, “ $p < .0001$ ” means that this distribution of searches by race, or any distribution with a greater difference between I-95 and the rest of the state in the rates of searches by race, would occur by chance less often than one time in 10,000 if there were in fact no systematic racial differences in search patterns between I-95 and the rest of the state. The true figure is actually far smaller than .0001, but even at  $p < .05$  (the conventional level of “statistical significance”), it is reasonably safe to reject the hypothesis that any observed differences were caused by chance, since if chance were the operating force such patterns would occur only one time in twenty. If a finding or pattern does not meet the .05 level of statistical significance – that is if  $p > .05$  – it is conventionally described as “non-significant,” which is sometimes indicated by “n.s.” The fact that a finding is non-significant does not necessarily mean that there is no systematic relationship between the variables. This is particularly true if the data include only a small number of cases, because with few observations almost any pattern is a plausible product of chance. Most of the comparisons we make are based on samples that are large enough that sample size is not an important issue for this purpose; for those based on small subsamples, however, sample size must be kept in mind in evaluating findings are statistically non-significant.

In June and July of 1996, as part of the continuing process of monitoring the settlement in *Wilkins v. Maryland State Police*, Professor John Lamberth of Temple University's Psychology Department supervised a survey of drivers in the I-95 corridor.<sup>37</sup> The observers who conducted the survey recorded the race of each driver, and whether they were speeding (as almost all were) or appeared to violate any of four other basic traffic rules: changing lanes without signaling, unsafe lane changing, weaving, and tailgating.<sup>38</sup> In twenty-one separate periods from July 24 to July 31, totaling about forty-two hours, they observed 5,741 cars, as reflected in Table 2. Unfortunately, Dr. Lamberth's observers were not able reliably to record Hispanic ancestry as a separate category, so his data cannot be used to estimate the likelihood of stops or searches for Hispanic drivers.

**Table 2: Drivers and Traffic-Law Violators on I-95 North of Baltimore, by Race or Ethnicity, June – July, 1996**

	All Drivers (5,741)	Violators (5,354)
White	75.6%	74.7%
Black	16.9%	17.5%
Other	4.3%	4.4%
Race Unknown	3.2%	3.4%
<b>TOTAL</b>	<b>100%</b>	<b>100%</b>

The main MSP database that we use does not include information on those motorists who were stopped but not searched. This is a significant limitation that makes it difficult to draw inferences about the factors that led state troopers to search some cars but not others. However, on April 22, 1997, United States District Court Judge Catherine C. Blake of the District of Maryland, the judge supervising the settlement in *Wilkins*, ordered the MSP to keep records of all stops on I-95, from the Baltimore City limit to the Delaware border,

37. Aff. of Dr. John Lamberth, *Wilkins*, No. CCB-93-468 (D. Md. 1993) (filed Nov. 14, 1996) (copy on file with authors) [hereinafter Aff. of Dr. John Lamberth, *Wilkins*]; Mem. in Support of Plaintiffs' Motion for Enforcement of Settlement Agreement and for Further Relief, *Wilkins*, Exhibit 11 (filed Nov. 14, 1996) (copy on file with authors).

38. Aff. of Dr. John Lamberth, *Wilkins*, *supra* note 37.

whether or not the stop resulted in a search.<sup>39</sup> As a result, we have limited data on stops in the I-95 corridor starting in May 1997. We do not know which of these stops resulted in searches, but we do know the race or ethnicity of the drivers. In Table 3 we display those data, together with data on searches for that section of I-95 in the same time period.

**Table 3: Stops and Searches on I-95  
North of Baltimore, by Race or Ethnicity,  
May 1997- April 2000<sup>40</sup>**

	<b>Stops (82,410)</b>	<b>Searches (1,227)</b>
<b>White</b>	<b>65.9%</b>	<b>41.9%</b>
<b>Black</b>	<b>27.8%</b>	<b>51.3%<sup>iv</sup></b>
<b>Hispanic</b>	<b>1.3%</b>	<b>6.0%<sup>iv</sup></b>
<b>Other</b>	<b>5.0%</b>	<b>0.7%</b>
<b>TOTAL</b>	<b>100%</b>	<b>100%</b>

<sup>iv</sup>  $p < .0001$  for difference between search rate for row and white search rate

Given the overall levels of traffic on I-95, the 82,410 stops recorded in the three-year period covered by Table 2 translate into roughly one stop for every 1250 cars that traveled the length of the I-95 corridor (or any equivalent distance in that portion of I-95).<sup>41</sup> These data can also be used to calculate the relative probabilities of stops and searches for black and white motorists if we assume that the racial

39. *Wilkins v. Maryland State Police*, No. CCB-468 (D. Md. filed Apr. 22, 1997) (order enforcing settlement agreement) (copy on file with authors).

40. The MSP search data that we have for May and June 2000, appear to be incomplete, probably because the data that we are using were reported soon after June 2000, and many of the reports for the last two months had not yet been properly filed. Therefore, to insure that the search data are comparable to the stop data, we restricted both data sets to the period ending in April 2000.

41. According to the Maryland Transportation Department's *I-95 Master Plan*, the traffic in the I-95 corridor averaged 1682 million vehicle miles traveled per year for 1997 through 1999, which is equivalent to about 34.7 million trips per year, the length of the 48.45 mile corridor. See MARYLAND TRANSPORTATION AUTHORITY, *I-95 MASTER PLAN STUDY*, available at <http://www.mdt.state.md.us/i95mps/i95mps-pn-table-a2.html> (last visited Nov. 30, 2002). At an average of 27,470 stops per year from May 1997 through April 2000, that translates into slightly less than one search for every 1250 full-length trips up or down the corridor, or their equivalent.

proportions of drivers on I-95 that Lamberth found in 1996 held from May 1997 through April 2000.<sup>42</sup> This assumption seems reasonable. As we will see, the racial breakdown of MSP *searches* on I-95 has varied greatly over time,<sup>43</sup> but the racial composition of all traffic *stops* by the MSP remained essentially unchanged from 1997 through 2000,<sup>44</sup> and it is likely that the racial composition of the far larger set of all drivers on that highway has also been comparatively stable. Given that assumption, among motorists who violated traffic laws, black drivers in the I-95 corridor were almost twice as likely to be stopped as white drivers; and more than five times as likely to be searched. See Table 4.

**Table 4: Race of Driver and Relative Risk of a Stop and a Search by the MSP on I-95, May 1997- April 2000<sup>45</sup>**

	Traffic Law Violators (11/96)	Stops	Searches	Relative Risk of a Stop	Relative Risk of a Search
White	74.7%	65.9%	41.9%	1	1
Black	17.5%	27.8%	51.3%	1.8 <sup>i</sup>	5.2 <sup>ii</sup>

<sup>i</sup>  $p < .05$  for black-white difference in relative risk

<sup>ii</sup>  $p < .01$  for black-white difference in relative risk

Since almost all drivers of all races violated the traffic laws, these ratios remain essentially unchanged if we consider all drivers rather than traffic-law violators.

The data on stops and searches can also be used to calculate the probability of a search for a car that was stopped by the MSP in the I-95 corridor. The results of these calculations are displayed in Table 5.

42. Setting the probability of a search (or a stop) of a white driver at 1, the relative probability of a search of a black driver is:

$$\frac{\% \text{ black searches} / \% \text{ black traffic violators}}{\% \text{ white searches} / \% \text{ white traffic violators}}$$

43. See *infra* Table 23, subchart (3).

44. See *infra* text following note 187.

45. See *supra* note 40.

**Table 5: Probability and Relative Risk of a Search for a Motorist Stopped on I-95, by Race or Ethnicity, May 1997- April 2000**

	Probability of a Search	Relative Risk of a Search
White	1 in 105	1
Black	1 in 36	2.9 <sup>iv</sup>
Hispanic	1 in 15	7.1 <sup>iv</sup>
All	1 in 67	1.6

<sup>iv</sup> p < .0001 for difference between relative risk for row and white relative risk

As Table 5 shows, black drivers who were stopped on I-95 north of Baltimore were almost three times more likely to be searched than white drivers, and Hispanic drivers were more than seven times as likely to be searched as whites.

2. Hits

Two-thirds of the cars searched by the Maryland State Police carried no illegal drugs, or at least none were found. The “hit rate” — the proportion of searches that produced contraband — is in the same range for white and black drivers, but somewhat higher for whites. On I-95, the rate is about 3% greater for white drivers than for blacks; elsewhere, that difference grows to 11%. The hit rate for Hispanic drivers, however, is far lower than for the other two groups, about a third the hit rate for whites in the state as a whole. See Table 6.

**Table 6: Proportions of MSP Searches that Found Drugs,  
by Race or Ethnicity and Location**

	I-95 Corridor <sup>iv</sup>	Elsewhere <sup>iv</sup>	Entire State
White	40.3%	36.8%	37.4%
Black	37.8%	25.8%	30.6%
Hispanic	15.8%	9.7%	11.9%
Other	39.1%	19.0%	23.4%
<b>All Searches</b>	<b>37.3%</b>	<b>32.0%</b>	<b>33.4%</b>

<sup>iv</sup>  $p < .0001$  for column

When drugs were found, it was usually marijuana. Hard drugs (anything other than marijuana) were found in 9% of the searches statewide, slightly more than a quarter of those in which any drugs were recovered. On I-95 north of Baltimore hard drugs were found in about 13% of the searches, or slightly more than a third of the time when any drugs were seized. See Table 7.

**Table 7: Percentages of MSP Searches in  
Which Particular Drugs Were Found<sup>46</sup>**

	I-95 Corridor	Elsewhere	Entire State
Marijuana <sup>†</sup>	28.4%	26.6%	22.1%
Cocaine <sup>iv</sup>	7.4%	3.7%	4.7%
Crack <sup>iv</sup>	3.7%	1.8%	2.3%
Heroin <sup>ii</sup>	2.5%	1.4%	1.7%
Other <sup>†</sup>	1.3%	1.2%	1.2%
<b>All Drugs</b>	<b>37.3%</b>	<b>31.9%</b>	<b>33.3%</b>

<sup>†</sup>  $p$  n.s. for row

<sup>ii</sup>  $p < .01$  for row

<sup>iv</sup>  $p < .0001$  for row

46. The percentages of individual drugs found total more than those for "All Drugs" because in some searches more than one drug was recovered. For the same reason, the percentages for all "hard drugs," which are reported in the text preceding the table, are smaller than the totals of the individual percentages of "hard drugs."

Overall, black drivers on I-95 were more likely to be found with hard drugs than white drivers (16% to 10%), and Hispanic drivers were slightly less likely, at 9%. The most common hard drugs seized were cocaine and crack,<sup>47</sup> followed by heroin. A small number of those searched, about 1.2%, were found with one or more of a long list of miscellaneous illegal drugs that we have grouped together in the category "other." The most common drugs in this category were amphetamines, PCP, and LSD.<sup>48</sup> Cocaine and crack were found most often in cars with black drivers; heroin and "other" drugs in cars driven by whites. See Table 8.

**Table 8: Percentages of MSP Searches in I-95 Corridor in Which Particular Drugs Were Found by Race<sup>49</sup>**

	White	Black	Hispanic
Marijuana <sup>iv</sup>	33.3%	27.7%	7.9%
Cocaine <sup>iv</sup>	3.9%	9.4%	5.5%
Crack <sup>i</sup>	0.6%	5.7%	0.8%
Heroin <sup>iii</sup>	3.8%	1.8%	2.4%
Other	2.2%	0.8%	0.0%
All Drugs	40.3%	37.8%	15.8%

<sup>i</sup> p < .1 for row  
<sup>iii</sup> p < .001 for row  
<sup>iv</sup> p < .0001 for row

47. Crack is a form of cocaine that has been processed for ingestion by smoking rather than sniffing or injection. Under federal law, the penalties for possession of crack are much more severe than for possession of the same quantity of powder cocaine or "cocaine base," compare 21 U.S.C. §§ 841(b)(1)(A)(iii) (2000), and 841(b)(1)(B)(iii) (2000), with §§ 841(b)(1)(A)(ii) (2000), and 841(b)(1)(B)(ii) (2000), despite the fact that powder cocaine is readily convertible to crack at about the same weight. We list crack separately because it is reported separately from cocaine in the MSP database. It is possible, however, that some seizures of crack were reported as "cocaine."

48. See *infra* note 152, for a more complete description of the distribution of drugs in the "other" category.

49. The percentages of individual drugs found total more than those for "All Drugs" because in some searches more than one drug was recovered. For the same reason, the percentages for all "hard drugs," which are reported in the text preceding the table, are smaller than the totals of the individual percentages of "hard drugs." The racial category "other" is omitted from this table because there are too few cases — 30 in all — or meaningful estimates of the frequencies of particular drugs.



*In sum*, the available data show that black motorists who violated traffic laws on I-95 north of Baltimore were almost twice as likely as white motorists who violated traffic laws to be stopped by the MSP, and once stopped they were almost three times as likely to be searched. Black motorists who were searched, however, were somewhat less likely than whites to be found with drugs. As a result, among motorists who were not carrying illegal drugs, African Americans were eight times more likely to be stopped and searched than whites.<sup>50</sup> We cannot estimate the relative probability of a stop for an Hispanic driver because we have no data on the proportions of Hispanic drivers on Maryland highways. But we can estimate the probability of a search after a stop of an Hispanic driver, and it was seven times that for a white driver — despite the fact that Hispanic motorists who were searched were much less likely to be carrying illegal drugs than either blacks or whites. Assuming that Hispanic drivers were stopped on I-95 in proportion to their numbers, drug-free Hispanic drivers were about ten times more likely to be searched by the Maryland State Police on I-95 than drug-free white drivers.

## B. *The Process*

### 1. *Pretext Stops and Operation Pipeline*

One of the truisms of American life is that the police may, if they want, stop just about any car that is driving down the highway. The laws regulating driving are so elaborate, so detailed, and so unrealistic that virtually every driver violates one or another almost all the time — or at least there is probable cause to believe she might be, which is all that's required to justify a stop.<sup>51</sup> The data that John Lamberth collected in Maryland,<sup>52</sup> and similar data that he collected in New Jersey,<sup>53</sup> confirm what everybody knows: almost all cars on interstate highways speed. But even the rare driver who doesn't speed may be stopped if an officer has probable cause to believe that he has a burned-out license-plate light, an obscured tag or rear-view mirror, a cracked windshield, misaligned headlights, or is not wearing a seat

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50. This figure is based on the proportions of black and white traffic-law violators on I-95 found by Dr. Lamberth — 17.5 % and 74.7%, respectively — and on the numbers of searches in which no illegal drugs were found for black drivers (798) and for white drivers (426). We also assume that the vast majority of travelers of both races do not carry drugs, or, alternatively, that the proportion of white drivers who carry drugs is not substantially higher than the proportion of black drivers who do so.

51. See *Whren v. United States*, 517 U.S. 806, 818-19 (1996).

52. See *supra* notes 37-38 and Table 2.

53. *State v. Soto*, 734 A.2d 350, 752-53 (N.J. Super. Ct. Law. Div. 1996) (describing a study by Dr. Lamberth on the New Jersey Turnpike).

belt. As one California Highway Patrol Officer put it: "The vehicle code gives me fifteen hundred reasons to pull you over."<sup>54</sup>

Most traffic law violations, of course, are ignored even if the police happen to detect them. Some drivers are pulled over, however, not because their driving is especially dangerous, nor even because of ordinary bad luck, but as part of a program of drug interdiction. Starting in the early 1980s, police departments around the country have been systematically using their virtually unrestricted power to stop cars as a tool to hunt for illegal drugs.<sup>55</sup> This technique picked up steam in 1984, when the Federal Drug Enforcement Administration initiated a program named Operation Pipeline, "a nationwide highway interdiction program that focuses on private motor vehicles," as part of which, "[e]ach year, state and local highway officers conduct dozens of training schools across the country, attended by other highway officers."<sup>56</sup> The Maryland State Police have participated in Operation Pipeline since its inception. In a 1999 report by the Joint Legislative Task Force of the Democratic Caucus of the California State Legislature, the California Highway Patrol described Operation Pipeline as an "intensified enforcement" program to find illegal drugs by generating "a very high volume of legal traffic enforcement stops to screen for criminal activity, which may include drug trafficking."<sup>57</sup>

By blanketing motorists on certain routes with traffic tickets or warnings, Pipeline teams are able to pull over a great many cars to find drivers who fit established "profiles" of what drug couriers reportedly look like and act like. If the motorist "fits" the profile, then the officer's goal becomes to conduct a warrantless search of the car and its occupants, in the hope of finding drugs, cash and/or guns.<sup>58</sup>

This practice — using traffic stops as a pretext for drug investigations — is perfectly constitutional. In *Whren v. United States*,<sup>59</sup> the Supreme Court held that a police officer may stop a car for a broken taillight even if his real purpose is to look for drugs, but he has no legal basis to stop the car for that purpose. As long as the officer has probable cause to believe that a violation occurred, his motivation is immaterial under the Fourth Amendment. But this does not mean that racial profiling is legal. As the Court explained:

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54. Gary Webb, *DWB\**, *ESQUIRE*, Apr. 1999, at 118, 123.

55. *Id.* at 120.

56. DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, OPERATIONS PIPELINE AND CONVOY, at <http://www.usdoj.gov/dea/programs/pipecon.htm> (last visited June 4, 2001).

57. CAL. STATE ASSEMBLY DEMOCRATIC CAUCUS TASK FORCE ON GOV'T OVERSIGHT, OPERATION PIPELINE: CALIFORNIA JOINT LEGISLATIVE TASK FORCE REPORT (Sept. 29, 1999), available at <http://www.aclunc.org/discrimination/webb-report.html> [hereinafter OPERATION PIPELINE].

58. *Id.*

59. 517 U.S. 806 (1996).

[T]he 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. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.<sup>60</sup>

In other words, under *Whren* the practices taught by Operation Pipeline are constitutional as long as the “profile” the police use to identify likely suspects does not include race or ethnicity as a factor. The DEA,<sup>61</sup> like the Maryland State Police<sup>62</sup> and the California Highway Patrol,<sup>63</sup> denies that it teaches or practices profiling by race.

We don’t know how many of the stops by the Maryland State Police were pretext stops. Most likely the great majority of the 82,000 stops in the I-95 corridor in the 1997-2000 period were straightforward traffic stops. For some stops, however, drug interdiction was the primary purpose from the outset, and those stops are sure to be overrepresented among the small proportion in which a drug search was ultimately conducted.

## 2. Consent and Probable Cause

If a trooper decides to search a car that she has stopped, she needs one of two possible legal justifications: consent<sup>64</sup> or probable cause.<sup>65</sup> In theory, under the settlement in *Wilkins*<sup>66</sup> and the MSP General Order implementing it,<sup>67</sup> a trooper is required to file a report whenever she asks for consent to search a car, whether or not consent is granted, and whether or not a search is conducted. The data the MSP compiled show that when consent was requested consent was given, 96% of the time statewide and 97% of the time on I-95. This could mean that drivers virtually always do consent when asked — there is a great deal of anecdotal evidence to that effect,<sup>68</sup> and similar patterns have been reported in other cases<sup>69</sup> — or it could mean the

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60. *Id.* at 813.

61. DRUG ENFORCEMENT ADMIN., *supra* note 56.

62. Mitchell, *supra* note 30.

63. OPERATION PIPELINE, *supra* note 57.

64. *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *see also* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT §§ 8.1, 8.1(a) (3d ed. 1996).

65. *See infra* notes 71-72.

66. Settlement Agreement, *Wilkins*, *supra* note 22.

67. Maryland State Police, General Order 01-9501, Jan. 1, 1995 (on file with authors) [hereinafter MSP General Order 01-9501].

68. *See infra* notes 77-78 and accompanying text.

69. *See, e.g.,* Chavez v. Illinois State Police, 251 F.3d 612, 622 (7th Cir. 2001) (noting that consent is given over 98% of the time); Lopez v. State, 360 S.E.2d 722, 723 (Ga. Ct. App.

troopers did not, in fact, report requests for consent unless the vehicle was actually searched.<sup>70</sup> In any event, if there were any considerable number of cases in which consent was requested and denied, they are not included in these data.

If a record indicates that consent was not given, we assume that a search was conducted based on probable cause. In the context of highway stops, probable cause can be the basis for a search under two distinct legal theories: (1) If there is probable cause to believe that the driver has violated a sufficiently serious law (for example, driving while intoxicated), then she may be taken into custody, and the arresting officer may conduct a search "incident to the arrest" of her person and personal effects, and of the passenger compartment of the car.<sup>71</sup> (2) If an officer has probable cause to believe that a car contains contraband, he may, without a search warrant, search any part of the car in which that contraband could be hidden.<sup>72</sup> Typical bases for probable cause to search on I-95 include: drugs in plain view; the odor of burnt marijuana; and occasionally a "K-9 alert" by a police dog trained to detect illegal drugs.<sup>73</sup>

About half of the MSP searches in these data were based on consent — 50% in the I-95 corridor, 56% statewide — but drugs were found more than twice as often in probable-cause searches, as shown in Table 9.

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1987) (recounting testimony of trooper that all of "around forty" drivers who were asked consented to be searched).

70. In 23% of the cases in which the reports indicate that consent was denied, they also indicate that illegal drugs were recovered. This rate is almost identical to the hit rate for searches when consent was granted, *see infra* Table 9, which suggests that in all (or virtually all) of the refusal cases in the database, searches were in fact conducted.

71. *See* *New York v. Belton*, 453 U.S. 454, 460 (1981); 3 LAFAVE, *supra* note 64, § 7.1, at 432-57.

72. *See* *United States v. Chadwick*, 433 U.S. 1, 14 (1977); *Chambers v. Maroney*, 399 U.S. 42, 47-48 (1970); 3 LAFAVE, *supra* note 64, § 7.2, at 458-508.

73. The dogs were usually wrong. In the I-95 corridor drugs were found in two of the seven cases in which they "alerted," or 29%; for the state as a whole the dogs were wrong 75% of the time (27/36).

**Table 9: Percentage of Searches in Which Drugs Were Found,  
by Legal Basis for Search and Location**

	I-95 Corridor <sup>iv</sup>	Elsewhere <sup>iv</sup>	Entire State
<b>Probable Cause</b>	<b>52.5%</b>	<b>46.7%</b>	<b>48.4%</b>
<b>Consent</b>	<b>22.2%</b>	<b>21.0%</b>	<b>21.3%</b>
<b>All Searches</b>	<b>37.3%</b>	<b>31.9%</b>	<b>33.3%</b>

<sup>iv</sup>  $p < .0001$  for column

It's not surprising that probable-cause searches were more likely to uncover illegal drugs than consent searches. Many probable-cause searches were conducted *because* the troopers had already seen or smelled some of the drugs that were later found; others may have been conducted in response to drivers who behaved in a reckless or intoxicated manner as a result of drug use.

There is no constitutional requirement that a police officer justify a request for consent to conduct a search. Nonetheless, because of the allegations of discrimination in consent searches, the MSP data include information on the reason for each such request. These data, unfortunately, are difficult to code and analyze. The most common ground given is "nervousness" or "extreme nervousness." Other reasons range from the presence of "air fresheners" (supposedly used to cover the smell of drugs) to driving from a "source city." Twenty-four drivers were asked for consent and searched because their cars displayed a suspicious number of Grateful Dead posters or stickers. Eight of them (33%) were found with small amounts of marijuana; the rest were clean.<sup>74</sup>

Searches of black drivers were somewhat more likely to be based on consent than searches of white drivers, and searches of Hispanic drivers much more so. In both cases, these differences were greater on I-95 than elsewhere, as shown in Table 10.

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74. The only clear pattern we have detected in justifications for seeking consent is that when a consent search caught a big drug dealer, *see infra* Table 11, the explanation usually mentioned "nervousness" or "excessive" or "extreme nervousness" of the driver. It's hard to know what to make of this pattern. "Nervousness" is a subjective description; in these cases it was applied after the fact, by the arresting officer, to a drug dealer who had just been caught in an unusually successful drug search.

**Table 10: Percentage of MSP Searches Based on Consent, by Race and Location<sup>75</sup>**

	I-95 Corridor <sup>iv</sup>	Elsewhere <sup>iv</sup>	Entire State
<b>White</b>	<b>41.9%</b>	<b>55.4%</b>	<b>53.2%</b>
<b>Black</b>	<b>52.9%</b>	<b>59.8%</b>	<b>57.0%</b>
<b>Hispanic</b>	<b>67.7%</b>	<b>74.3%</b>	<b>72.0%</b>
<b>All Searches</b>	<b>50.0%</b>	<b>57.6%</b>	<b>55.6%</b>

<sup>iv</sup>  $p < .0001$  for column

Probable-cause searches are sometimes dictated by circumstances (a traffic arrest, inadvertent discovery of contraband), while consent searches are always discretionary. As a result, consent searches have been a special focus of complaints about racial profiling in Maryland and elsewhere.<sup>76</sup> This distinction, however, does not nearly capture the full range of police discretion in highway stops. On the one hand, police officers are not required to arrest suspects or to conduct searches when they have probable cause to do so, and frequently they don't. On the other hand, as we will see, even in the absence of probable cause, police officers have complete discretion to take many intrusive nonconsensual actions short of a full-blown "search." Even so, the higher proportion of consent searches among black and Hispanic drivers probably means that Maryland State troopers pay greater attention to minority drivers when they have discretion to choose their targets, as reflected in the higher probability of a search for a black or Hispanic driver than for a white driver after a stop by the MSP. See Table 5.

One of the curiosities of consent searches, in Maryland and across the United States, is that almost everybody does agree to be searched, including people who are carrying drugs or other contraband. The usual explanations offered for this behavior fall into two categories: (1) The suspects think they will do better by consenting because that's the honest-sounding thing to do, so it may divert suspicion and lead

75. Searches of motorists whose race or ethnicity was listed as "other" are not listed separately in this table.

76. See, e.g., Settlement Agreement, *Wilkins*, *supra* note 22; N.J. ATT'Y GEN.'S OFFICE, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 30-31, 100-02 (1999) (describing disproportionate use of consent searches for minority drivers in New Jersey, and proposing new policies to regulate them); Daniel J. Chacon, *CHP Halts Consent Searches Amid Racial-Bias Claims*, SAN DIEGO UNION-TIMES, June 10, 2001, at A3 (reporting that faced with racial profiling lawsuit, C.H.P. bans consent searches for six months).

the cops to search lightly, or not at all; or perhaps they merely think they will do no worse by consenting because the game's up anyway and they might as well make the cops happy.<sup>77</sup> (2) The suspects don't realize that they have a choice. There's no equivalent to *Miranda* for searches — the police are not required to tell suspects that they have the right to refuse to be searched<sup>78</sup> — and the circumstances usually suggest the opposite. People generally assume that when a policeman asks them to do something they are supposed to obey, especially if the officer uses what is sometimes called the “command voice,”<sup>79</sup> and they may be afraid of displeasing an armed officer by refusing to do what is asked. At a minimum, a refusal to consent is likely to trigger further detention and investigation.<sup>80</sup>

There is also a third explanation for the near unanimity of consent: it's exaggerated. Police officers sometimes ask drivers to sign written consent forms, but that is not constitutionally required. Oral consent is easy to misinterpret or misrepresent; the officer just has to write down (or check a box) that the driver consented. Unless the case is litigated, that's all the information we'll ever have. And even if it does go to court, most judges routinely accept the word of the police officer over that of the criminal defendant.<sup>81</sup> Only rarely is there third-party evi-

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77. See, e.g., *Leavitt v. Howard*, 462 F.2d 992, 996-97 (1st Cir. 1972); *Gorman v. United States*, 380 F.2d 158, 165 (1st Cir. 1967) (“Bowling to events, even if one is not happy about them is not the same as being coerced.” (citation omitted)); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 177-80 (1991).

78. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973); see also *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (noting that police officer was not required to inform motorist that he was free to leave before asking for consent to search car).

79. Rotenberg, *supra* note 77, at 188-89. As Professor William Stuntz put in the context of street searches, in practice the test for consent “resolves into a kind of ‘jeopardy’ rule: If the officer approaches the suspect and puts the command to empty his pockets in the form of a question, the resulting search is consensual.” William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1823 (1998). In *United States v. Laymon*, 730 F. Supp. 332 (D. Colo. 1990), one of the few published opinions that analyzes the actual practice of obtaining consent, the court concluded that the arresting officer conducted stops “in a manner creating a coercive and intimidating atmosphere that most people, especially young minority citizens, would find coercive and impossible to resist.” *Id.* at 341.

80. See *infra* note 111 and accompanying text for a description of how exactly this sequence of events happened to the family of Mr. Robert Wilkins in an incident that led to the initial racial profiling law suit against the MSP, *Wilkins v. Maryland State Police*, No. CCB-93-468 (D. Md. 1993).

81. *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), presents an extraordinary example of the pressures that can emerge when a judge accepts a defendant's description of a police investigation. In *Bayless*, New York City police officers found thirty-four kilograms of cocaine and two kilograms of heroin in the defendant's car. *Id.* at 234. The district court judge, Harold Baer, Jr., found the defendant's version of the events leading up to the seizure more credible than that of the police officer who testified at a suppression hearing, and said so in a published opinion. *Id.* He also wrote that the fact that several participants in the events leading up to the search ran from the police should not be considered suspicious because in the minority-dominated neighborhood where the search took place the residents “tended to view police officers as corrupt, abusive and violent,” *id.* at 242, a statement that no doubt reflected Judge Baer's experience on a commission investigating police corruption

dence to confirm a civilian's claim that he did not consent when the officer says that he did. For example, in *Chavez v. Illinois State Police*<sup>82</sup> the trooper who stopped Mr. Chavez called for a canine unit to sniff his car, and then "asked Chavez if he would consent to a canine walk-around. [The canine officer] testified that Chavez did not consent, though [the original trooper's] report said he did."<sup>83</sup>

### 3. Intelligence

In some cases, the decision to stop and search a car is not based on anything the officer sees on the road, but on prior intelligence. A 1999 legislative report on Operation Pipeline in California discusses "whisper stops" — "cases in which the California Highway Patrol ("CHP") receives a tip from another law enforcement agency that a suspected drug courier is on the road, and a CHP officer follows the suspect and looks for a traffic violation in order to pull him over and search the vehicle."<sup>84</sup> According to a California Highway Patrol manual:

Whisper enforcement stops shall be conducted as though involved officers had not received information regarding drug trafficking. Officers are not to disclose the information provided by the allied agency requesting the whisper stop to vehicle occupants . . . . [I]f probable cause is developed and an arrest is made, in-custody reports shall not contain information regarding the whisper stop details provided by allied agencies. This information is confidential and should not be disclosed in the report. Officers should begin their report at the point of establishing independent probable cause.<sup>85</sup>

In California, the practice of concealing the intelligence on which some highway stops were based seems to have led some CHP officers to commit perjury in court.<sup>86</sup>

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in New York. The decision set off a firestorm. Congressional leaders demanded that Judge Baer be impeached; the President said that if he didn't reverse himself he should resign. See, e.g., Ian Fisher, *Gingrich Asks Judge's Ouster for Ruling Out Drug Evidence*, N.Y. TIMES, Mar. 7, 1996, at B4; Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1. After six weeks, the judge granted a rehearing, heard new testimony covering the same ground as the first hearing, and reversed himself, finding that the officers who testified the second time around were more credible than the defendant. See *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996). This, of course, was an unusual case, both because of the extraordinary political response to Judge Baer's initial order, and because that response plainly caused him to reverse himself, despite the fact that (unlike the great majority of state court judges) he is not elected.

82. 251 F.3d 612 (7th Cir. 2001).

83. *Id.* at 624.

84. OPERATION PIPELINE, *supra* note 57, at 24.

85. *Id.*

86. *Id.*



For obvious reasons, we don't know how many of the stops and searches by the Maryland State Police were based on confidential intelligence. Quite possibly, some of the most successful searches were not the clever hunches or lucky breaks they look to be. If so, the number of searches involved is probably too small to have much of an impact on the data that we have considered so far. However, if these searches included some of the largest seizures by the MSP, they may be important to our understanding the *quantities* of drugs seized, which we discuss in Part III.

### C. *Do the Data Describe Reality?*

Before we attempt to interpret the data on stops and searches by the Maryland State Police we should consider their limitations. First, misrepresentation and selective reporting may have distorted the data; second, even if complete and accurate, the data provide only a fragmentary picture of the process that produces these encounters.

#### 1. *Misreporting*

On April 19, 1999, New Jersey State troopers John Hogan and James Kenna were indicted for falsifying police reports to conceal racial profiling.<sup>87</sup> In January 2002, they pled guilty.<sup>88</sup> Hogan and Kenna are not your average troopers. On April 23, 1998, they shot into a van they had stopped on I-95 in New Jersey and wounded three of the four men inside, three Hispanics and an African American, all unarmed and all apparently drug-free.<sup>89</sup> The two officers were later indicted for the shooting as well.<sup>90</sup> But the practice that was the subject of the first indictment — concealing racial profiling — seems to have been widespread: “Two state police supervisors said it was common practice for troopers on the turnpike to jot down the license plate number of white motorists who were not stopped and use them on the reports of blacks who were pulled over. Officers called the tactic ‘ghosting.’”<sup>91</sup>

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87. David Kocieniewski, *Trenton Charges 2 Troopers With Falsifying Race of Drivers*, N.Y. TIMES, Apr. 20, 1999, at B1.

88. Owen Moritz, *N.J. Troopers Plead, Admit Race Profiling*, N.Y. DAILY NEWS, Jan. 15, 2002, at 55.

89. David M. Herszenhorn, *11 Miles of Turnpike Shut to Re-Crete a Shooting*, N.Y. TIMES, Apr. 12, 1999, at B5; *State Police Shoot 3 After Van Backs Into Trooper and Cars*, N.Y. TIMES, Apr. 25, 1998, at B6.

90. David M. Halbfinger, *New Jersey Troopers Again Face Charges in Turnpike Shooting*, N.Y. TIMES, Jan. 6, 2001, at A1.

91. Kocieniewski, *supra* note 87. “After reviewing the activity logs of 164 troopers in the Cranbury and Moorestown barracks in southern and central New Jersey, investigators found some troopers routinely falsified the race of drivers they stopped. As many as 10 other troopers could face criminal charges . . .” *Id.*

A safer and less elaborate trick is to list a Hispanic driver as "white." For example, in *Chavez v. Illinois State Police* the court describes how the Illinois State trooper who stopped and searched the car driven by the lead plaintiff, "completed a field report . . . and listed Chavez's race as 'white,' despite the fact that the report contained a listing for Hispanic."<sup>92</sup> If the error is noticed, the officer can describe it as an honest mistake. Sometimes no doubt it is; Hispanic ethnicity is not always obvious. That seems unlikely in the case of a driver named Peso Chavez, from Albuquerque, New Mexico, but the court was charitable: "There is nothing in the record to indicate that [the trooper] thought Chavez was Hispanic and simply decided to list his race as white in an attempt to disguise his motivations."<sup>93</sup>

We have no information that Maryland State troopers did anything similar. But even if MSP troopers did not engage in the active deception, they very likely did distort the records in these data by simply failing to report unsuccessful searches, a type of conduct that is also familiar from reports in New Jersey<sup>94</sup> and New York.<sup>95</sup>

One of the most surprising findings in the MSP database is the most basic, the hit rate: 33% for the entire state, 37% in the I-95 corridor. By the standards of the trade this is a record of enviable success. For example, only about 11% of suspects stopped and frisked by New York City Police in 1998 and 1999 were arrested,<sup>96</sup> and only 3% to 5% of passengers searched by customs agents at airports from 1996 through 1999 were found to carry contraband.<sup>97</sup> These are different contexts from highway drug interdiction, but data from that setting are similar. Two 1993 reports by the California Highway Patrol describe the performance of officers assigned to drug interdiction duty. In one period the officers searched 482 vehicles and made 44 drug arrests and in the other they conducted 95 searches and made 5 arrests, for an overall hit rate of 8.5%.<sup>98</sup>

How did the MSP manage to bat .330 or better in a league where .100 is common? Could it be that they disproportionately record hits

92. 251 F.3d 612, 624 (7th Cir. 2001).

93. *Id.* at 646.

94. William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, THE CHAMPION, Sept./Oct. 1999, available at <http://www.criminaljustice.org/public.nsf/championArticles/99sep01?OpenDocument>.

95. William K. Rashbaum, *Review Board Staff Faults Police on Stop-and-Frisk Reports*, N.Y. TIMES, Apr. 28, 2000, at B1.

96. NEW YORK ATTORNEY GENERAL, NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES 111 (1999).

97. PERS. SEARCH REVIEW COMM., U.S. CUSTOMS SERV., REPORT ON PERSONAL SEARCHES BY THE UNITED STATES CUSTOMS SERVICE 6-7 (2000), available at [http://www.customs.ustreas.gov/personal\\_search/pdfs/main.pdf](http://www.customs.ustreas.gov/personal_search/pdfs/main.pdf).

98. OPERATION PIPELINE, *supra* note 57, at 20.

and omit strikeouts? A reporting bias in that direction is virtually inevitable. It's harder to ignore a case in which drugs were seized and a suspect was arrested than one in which the driver was eventually sent on her way. Moreover, self-interest makes successful searches more memorable than failures, an impulse that is likely to get stronger when the conduct of the officers is challenged. (The statistics from the California Highway Patrol are valuable in part because they were reported before racial profiling had achieved its present notoriety.) There was also pressure from the MSP command to record searches selectively. Documents produced in discovery in *Maryland State Conference of NAACP Branches v. Maryland State Police* reveal that from January through November of 1998, Major G. H. Hall, the commander of the Northern Region of the Maryland State Police repeatedly ordered his troopers to complete overdue reports on dozens of searches.<sup>99</sup> These orders confirm that a great deal of the paperwork required by the *Wilkins* settlement was missing, and that MSP commanders attempted to remedy that problem — but only in some cases: all the searches that Major Hall listed were those that had come to his attention because drugs had been seized and/or suspects had been arrested. There is nothing improper in ordering subordinates to complete missing paperwork, but doing so for hits only while ignoring unreported misses will inflate the reported hit rate across the board.

Unfortunately, the underreporting to which Major Hall was responding may not have been evenhanded in the first place. The troopers' incentive to "improve" their racial statistics (as well as hit rates) was at least as strong in Maryland as in New Jersey, since the racial proportions of stops and searches by individual state troopers were reported by the MSP and examined in court.<sup>100</sup> And there is specific evidence of racially selective underreporting by the MSP. The second amended complaint in *Maryland State Conference of NAACP Branches v. Maryland State Police*,<sup>101</sup> the federal class-action lawsuit following up on *Wilkins v. Maryland State Police*,<sup>102</sup> describes nine searches of black and Hispanic plaintiffs by MSP troopers, conducted after January 1, 1995, that do not appear in the MSP database as required by the *Wilkins* settlement.<sup>103</sup> In each case, it is alleged that no

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99. Memoranda from Major G.H. Hall, Commander, Northern Region, Maryland State Police, to various subordinates (dating from Jan. 14 through Nov. 2, 1998) (on file with authors).

100. Aff. of Dr. John Lamberth, *Wilkins*, *supra* note 37; Second Am. Compl. and Jury Demand ¶ 45, *NAACP v. Maryland State Police*, No. CCB-93-468 (D. Md. 1993), available at [http://www.aclu.org/court/msp\\_2nd\\_comp.html](http://www.aclu.org/court/msp_2nd_comp.html) (on file with authors).

101. No. CCB-98-1098 (D. Md. filed 1998).

102. No. CCB-93-468 (D. Md. 1993).

103. Second Am. Compl. and Jury Demand ¶¶ 71, 73, 78, 82, 83, 86, 89, 92, 95, *NAACP v. Maryland State Police*, No. CCB-93-468 (D. Md. 1993).

drugs were found and no arrests were made. (So far, *Wilkins* has not come to trial, so these allegations have not been proven — or disproven — in court.)

To estimate the extent of underreporting, we need a bench mark: a survey of drivers that asks whether they were stopped, whether they were searched, and if so, whether any drugs were found. There is no such survey for drivers on I-95, or on Maryland highways generally, but there is one for the country as a whole, the Police-Public Contact Survey which was administered in 1999 by the Bureau of Justice Statistics of the Department of Justice to a national sample of over 80,000 respondents.<sup>104</sup> Over half of all reported contacts with police were traffic stops,<sup>105</sup> and in 6.6% of those stops the police searched the driver, or the vehicle, or both.<sup>106</sup> Black drivers were somewhat more likely to be stopped than white drivers, 12.3% to 10.4%, and Hispanic drivers somewhat less, 8.8%,<sup>107</sup> but both black and Hispanic drivers who were stopped reported that they were twice as likely as whites to be searched.<sup>108</sup> Among those who said they were searched, drugs or other incriminating evidence were found much more often when the driver was white (17%) than black (8%) or Hispanic (10%).<sup>109</sup>

The data from the Police-Public Contact Survey are not directly comparable to those in the MSP database. They include traffic stops by all police forces, on and off major highways, whether or not drug interdiction was a motivating force. The searches described by the respondents inevitably include many investigations that are not covered by the court order in *Wilkins*, and do not have to be reported by the Maryland State Police.<sup>110</sup> Nonetheless, this survey indicates that for the nation as a whole, drug searches of minority motorists are substantially less likely to be successful than searches of white motorists. Taken together with other evidence, that suggests that the comparatively high hit rate for searches of black motorists by the MSP may well be due in part to selective reporting.

In short, there is no doubt that some searches that should have been reported are missing from the MSP database. The real question is how many searches were omitted and how they were distributed. To the extent that they are concentrated among unsuccessful searches of

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104. PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, FINDINGS FROM THE 1999 NATIONAL SURVEY (2001).

105. *Id.* at 8.

106. *Id.* at 18.

107. *Id.* at 15.

108. *Id.* at 18.

109. *Id.* at 24.

110. See *infra* notes 111-129 and accompanying text.

cars driven by minority drivers, the consequences are predictable: the proportions of blacks and Hispanics among those searched are understated, and the hit rates for searches of the cars they drive are exaggerated.

## 2. *Preselecting*

Our data record two types of events: "stops" and "searches." The underlying reality is more complex. There may be several steps between these two points, including conduct that is clearly a *search* as that term is generally used, but not under the narrower definition of the type of "search" regulated by the Fourth Amendment. Consider the encounter that led to the lawsuit in *Wilkins v. Maryland State Police*. The lead plaintiff was Robert Wilkins, at the time an assistant public defender at the District of Columbia Public Defender Service.

On May 8, 1992, Mr. Wilkins was driving from Chicago to Washington, D.C. with his aunt, uncle and cousin. They had attended the funeral of Mr. Wilkins' grandfather, Rev. G. R. Wilkins, Sr. The family was driving a Cadillac they had rented for the trip. They had decided to drive all night so that Mr. Wilkins could arrive on time for a client's 9:30 a.m. court appearance.

At about 5:55 a.m., Maryland state police officer V. W. Hughes stopped the car on I-68 in Cumberland, Maryland. Mr. Wilkins' cousin, Scott El-Amin, was driving at the time. Officer Hughes stated that Mr. El-Amin had been driving sixty miles per hour in a forty mile per hour zone. Before issuing either a ticket or a warning, Hughes produced a form requesting consent to search the car. The family declined consent and refused to sign the form. Hughes stated that the searches were routine and further stated "if you have nothing to hide, then what is the problem?" Mr. Wilkins' uncle stated that he would not consent to the officer searching through all of their belongings on the highway in the rain. Mr. Wilkins asked Hughes why he wanted to search the car. Hughes refused to provide an explanation and merely repeated his request. He then mumbled something about "problems with rental cars coming up and down the highway with drugs." Mr. Wilkins then informed Hughes that they were returning from his grandfather's funeral in Chicago and offered to show him a copy of the obituary. Hughes declined the offer and informed the family that if they did not consent to the search, they would have to wait while he called for a narcotics dog to come and sniff the car. . . .

At approximately 6:25, Sergeant Brown arrived with a narcotics dog and ordered them out of the car. The family asked if they could remain in the car during the dog sniff so they could stay out of the rain and away from the dog. The police officers refused their request and insisted that they stand in the rain. The german shepherd sniffed slowly and thoroughly around the car while curious motorists passed on the highway. The dog detected nothing. Hughes issued a \$105 speeding ticket and at about 6:35,

the Wilkins family continued on their way. Mr. Wilkins was late for his court appearance.<sup>111</sup>

Obviously the Wilkins family was seriously inconvenienced and embarrassed. Very few drivers on interstate highways are subjected to this sort of humiliation. Nonetheless, what happened to them does not count as a “search” under the Fourth Amendment. A request for consent is considered a voluntary, noncoercive interaction;<sup>112</sup> ordering occupants out of a car is routinely permitted in a traffic stop;<sup>113</sup> and a dog sniff of the outside of a car does not violate any “reasonable expectation of privacy” that courts are prepared to protect.<sup>114</sup> This is not to say that trooper Hughes in fact had the legal authority to do what he did; as Mr. Wilkins pointed out at the time, his conduct amounted to an illegal *detention* because he held the Wilkins family for a longer period than was justified by the traffic stop.<sup>115</sup>

The *Wilkins* settlement was crafted in part to address the problems presented by the search in that case. As a result, two acts by trooper Hughes — asking for consent to search, and calling for a K-9 unit — are now subject to a reporting requirement.<sup>116</sup> But what was done to the Wilkins family — asking for consent, waiting for a drug-sniffing dog, ordering them out into the rain while the dog sniffed the car — by no means exhausts the list of available subsearch investigative techniques. Under current case law, trooper Hughes could also have ordered the entire family to get out of their car at the outset; he could have separated them and questioned them individually, with backup if necessary; and, he could have examined the interior of the car at length through the windows (and used a flashlight to do so).

In addition, if the officer developed a “reasonable suspicion” that any of the occupants was armed, he could have frisked them and searched the passenger compartment of the car for weapons, including any space in which a weapon could be concealed.<sup>117</sup> A check for weapons is viewed as a protective measure, rather than as the sort of evidence-gathering activity that constitutes a “search” under the Fourth

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111. Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 439-40 (1997).

112. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); 4 LAFAVE, *supra* note 64, § 9.3(a), at 86-112.

113. *Maryland v. Wilson*, 519 U.S. 408, 410 (1992) (passengers); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (driver).

114. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Place*, 462 U.S. 696, 707 (1983); 1 LAFAVE, *supra* note 64, § 2.2(f), at 449-64.

115. Davis, *supra* note 111, at 439.

116. See Settlement Agreement, *Wilkins*, *supra* note 22; MSP General Order 01-9501, *supra* note 67. As we have noted, *supra* notes 68-70 and accompanying text, there's some ambiguity as to whether requests for consent that are denied are in fact reported on a regular basis.

117. *Michigan v. Long*, 463 U.S. 1032, 1035 (1983).

Amendment. The Court of Appeals of Maryland describes such a weapons search in *Derricott v. State*:<sup>118</sup>

Upon Corporal Thomas' orders, Derricott exited his vehicle, and, as directed, stood between his vehicle and the police cruiser. Corporal Thomas then conducted a pat-down search of Derricott's outer clothing and concluded that he was not armed. . . .

After searching Derricott, Corporal Thomas approached the driver's side door of Derricott's vehicle, which had remained open. Corporal Thomas leaned inside the car and looked around, ostensibly to search for weapons. Between the driver's seat and the center console, Corporal Thomas saw a cellophane bag containing smaller glassine bags of what appeared to be cocaine. He seized the bag, and Derricott was placed under arrest for possession of a controlled dangerous substance.<sup>119</sup>

None of this, from the initial stop through the search for weapons, would have tripped the wire that requires including the incident in the MSP database — unless, of course, contraband was discovered in the process.

Only about one driver in seventy that the MSP stopped in the I-95 corridor was subjected to a search that was reported under the procedure instituted in the wake of the *Wilkins* case. On the other hand, recall that of respondents on the national Police-Public Contact Survey who had been subject to traffic stops, about one in fifteen — more than four times the MSP search rate — said that they had been “searched.”<sup>120</sup> That finding, of course, does not necessarily reflect MSP practices, but the two rates are easily reconciled. The survey respondents probably interpreted the word *search* as it is ordinarily used, and included many searches of the sort that the Maryland State Police might have conducted but would not have had to record. MSP troopers might, for example, have questioned the driver in one stop in five; ordered the occupants to step out of the car, questioned them separately, examined the car carefully through the windows, and possibly frisked the occupants and searched the passenger compartment for weapons, in one stop out of fifteen; and done a full-dress search in the one case in seventy that looked most promising after all that preliminary checking. The MSP's impressive hit rate is easier to explain if the denominator — “searches” — is seen as the last stage of a complex sorting process that narrows down the vast number of cars that are stopped to a much smaller group that are considerably more suspicious than average.

Do police officers do that sort of winnowing? We have no direct evidence in Maryland, but similar tactics are described in a report on

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118. 611 A.2d 592 (Md. 1992).

119. *Id.* at 594-95.

120. See LANGAN ET AL., *supra* note 104.

drug-interdiction training in California. "Once a stop has been made, motorists are compared against a well-established set of 'indicators' to see if they fit the profile of a drug courier."<sup>121</sup> If so, the officer proceeds to the next step: "the interrogation of the motorist and the passengers, if any":

The officer is trained to subtly ask questions about their registration papers, their destination, their itinerary, the purpose of their visit, the names and addresses of whomever they are going to see, etc. Officers are trained to make this conversation appear as natural and routine part of the collection of information incident to a citation or warning. They are advised to interrogate the passengers separately, so their stories can be compared. The officer will apply more "indicators" at this point, including how long it took them to answer the questions, how they acted, how consistent their stories were and what kind of eye contact they made. . . .

[In] approximately 30 hours of [actual] videotaped stops . . . [t]he questioning that was done was intense, very invasive and extremely protracted. It was not uncommon to see travelers spending 30 minutes or more standing on the side of the road, fielding repeated questions about their family members, their occupations, their marital status, their immigration status, their criminal histories and their recreational use of drugs and alcohol. . . .

During the training session . . . officers were advised to take the motorist's pulse during the interrogation, to see if the motorist's heart is beating rapidly. During the videotaped . . . stops, the officer was repeatedly seen taking motorists' pulses, pronouncing them "way up there," and then demanding to know why the motorist was so nervous. Pulse-taking was also used in conjunction with questions regarding the motorist's possible use of intoxicating drugs, particularly methamphetamines, and a high pulse rate was cited on several occasions as the officer's reasons for requiring a field sobriety test.<sup>122</sup>

Consider the program that was at issue in *City of Indianapolis v. Edmond*.<sup>123</sup> From August through November of 1998 Indianapolis Police officers set up drug inspection road blocks and stopped 1,161 cars at random, exercising no discretion in the choice of cars or the conduct of the initial investigation that followed. When a car was stopped,

Pursuant to written directives issued by the chief of police, at least one officer approaches the vehicle, advises the driver that he or she is being stopped briefly at a drug checkpoint, and asks the driver to produce a license and registration. The officer also looks for signs of impairment and conducts an open-view examination of the vehicle from the outside. A

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121. OPERATION PIPELINE, *supra* note 57, at 13.

122. *Id.* at 13-15.

123. 531 U.S. 32 (2000).



narcotics-detection dog walks around the outside of each stopped vehicle.

The directives instruct the officers that they may conduct a search only by consent or based on the appropriate quantum of particularized suspicion. The officers must conduct each stop in the same manner until particularized suspicion develops . . . .<sup>124</sup>

This inflexible procedure was obviously designed to skirt the edges of the constitutional definition of a search, and it succeeded. The program was held unconstitutional by the Seventh Circuit<sup>125</sup> and the Supreme Court, but solely on the ground that it is unconstitutional to stop motorists for this purpose without individualized suspicion. Indeed the Supreme Court specifically held that what happened after the initial stop was not a search that would require separate justification.<sup>126</sup> The information gathered by the Indianapolis police on all of the cars they stopped no doubt greatly improved their hit rate for those comparatively few cars that were actually "searched"; if they had had a constitutionally sufficient justification for the initial stops, it would have provided a legal basis for those searches as well. Ultimately, the Indianapolis police made fifty-five drug arrests during the life of this program, 4.7% of the total number of cars stopped.<sup>127</sup> Unfortunately, we don't know how many cars were "searched," so we can't calculate a hit rate that is comparable to that reported by the MSP.<sup>128</sup> Instead, the 4.7% rate of drug arrests is a proxy for the underlying rate of drug possession by drivers in those areas of Indianapolis where the road blocks were conducted, to the extent that it is detectable by this sort of aggressive screening followed by full blown searches in the most suspicious cases.

One last point: The distinction between distortion and preselection is slippery. Everybody, lawyers and judges included, has a hard time with some Fourth Amendment distinctions.<sup>129</sup> Was the search of a small paper bag on the front seat permissible on the basis of a "reasonable suspicion" that there were weapons in the car, or did it go too far? Did the officer cross the line between "plain view" and "search"

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124. *Id.* at 35.

125. *Edmond v. Goldsmith*, 183 F.3d 659, 661 (7th Cir. 1999).

126. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000).

127. *Id.* at 34-35. They also made forty-nine arrests for non-drug related crimes. *Id.*

128. *See supra* Table 6.

129. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting) ("Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow [in conducting searches]. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not 'reasonable' amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity." (citation omitted)).

when she stuck her head part-ways inside the open window of the car? Given this sort of uncertainty, it's only natural for troopers to give themselves the benefit of the doubt and fail to report some investigations that probably should have been classified as "searches." In the process, they can also improve their racial statistics by applying an especially conservative definition of "search" when the driver is black or Hispanic. Even with a great deal of information on such stops (and we have next to none), there might be no way to tell when an officer omitted a search that should have been reported, and when he merely took full advantage of information-gathering options that did not require a report.

#### D. *Is This Racial Profiling?*

The central question we address is whether these stops and searches were made because of the race or ethnicity of the drivers. A full answer requires us to consider data on the quantities of drugs seized, which we do in Part III. However, since most of the debate on racial profiling has focused on the type of data we have presented so far — racial comparisons of stop, search, and hit rates — it is useful to consider the question initially at this point. Based on the data we have examined, we conclude that the disproportionate stopping of black drivers seems to have been based on their race, and that the disproportionate searching of black and Hispanic drivers was not a byproduct of a race-neutral effort by the Maryland State Police to maximize their hit rate.

##### 1. *Stops*

Black drivers on I-95 were nearly twice as likely as white drivers to be stopped by the MSP.<sup>130</sup> We know that black drivers were hardly more likely than white drivers to exceed the speed limit, to change lanes unsafely or without signaling, to weave, or to tailgate,<sup>131</sup> but could this preference for stopping blacks reflect something else about their driving? Speeders, for example, are not all equal. Could it be that more black drivers than white drivers go way over the speed limit? Blacks are underrepresented among the few law-abiding drivers on I-95: 3.6% of black drivers are in this category, and 7.9% of whites. Is it possible that blacks are overrepresented by a similar amount among those who are stopped because their driving is not merely over the

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130. See *supra* Table 4. We have no data on this issue for Hispanics.

131. See *supra* note 38 and Table 2.

official speed limit but noticeably faster than the actual norm, or because their weaving or tailgating is particularly egregious?<sup>132</sup>

The data on stops in Maryland are too limited to answer this question with confidence. In New Jersey, however, the question of racial profiling on I-95 was the subject of a full-blown court hearing in the case of *State v. Soto*.<sup>133</sup> Dr. John Lamberth, who conducted the highway survey on I-95 in Maryland, supervised a similar set of surveys on the New Jersey Turnpike. On the basis of those surveys he and other experts found that in New Jersey, as in Maryland, black motorists were about as likely as whites to exceed the speed limit, but several times more likely to be stopped by the New Jersey State Police. In addition, the record in *Soto* includes two other types of evidence that bear on this issue: (1) The former Radar Unit of the New Jersey State Police, which exercised little or no discretion in deciding who to stop, pulled over black drivers only slightly in excess of their proportion among all speeders, 18% versus 15%, while the Patrol Unit, which policed the same population of drivers but with much greater operational discretion, stopped black drivers at about twice that rate.<sup>134</sup> (2) On the section of I-95 in New Jersey that was the focus of the *Soto* litigation, blacks were even more heavily overrepresented among drivers who were stopped but *not ticketed* (63%) than among all those stopped (46%).<sup>135</sup> In addition, several New Jersey State Police officers and supervisors and an expert on police procedure all testified in *Soto* that blacks and whites drive indistinguishably.<sup>136</sup> Given this record, the court concluded that black drivers on I-95 in New Jersey were stopped disproportionately often for reasons unrelated to their driving. That seems the likely conclusion here too, but we can't say for sure.

Perhaps black drivers were stopped twice as often as whites not because of their driving, but because Maryland State troopers suspected that they were transporting drugs. But on a highway, at a distance, from outside a car that is driving ahead of him or passing by, what nonracial information could a state trooper learn that might raise

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132. See U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE HON. JAMES E. CLYBURN, CHAIRMAN, CONG. BLACK CAUCUS, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 8-9 (2000), available at <http://gao.gov/new.items/gg00041.pdf> [hereinafter GAO, CLYBURN REPORT].

133. 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

134. *Soto*, 734 A.2d at 354.

135. *Id.* at 353, 355.

136. *Id.* at 354-55. On the other hand, reports in the press suggest that a new and so far unreleased state study of driving on the New Jersey Turnpike will show that black drivers on the southern part of the Turnpike (but not in the northern section) are considerably more likely than white drivers to exceed the speed limit by fifteen miles per hour or more. See David Kocieniewski, *Study Suggests Racial Gap in Speeding in New Jersey*, N.Y. TIMES, Mar. 21, 2002, at B1. Even so, racial profiling by the New Jersey State Police is both well-documented and officially admitted. See, e.g., *id.*, and *infra* note 221 and accompanying text.

a reasonable suspicion of a drug-law violation? To be specific: What nonracial information could an officer have that would make innocent black drivers look more like drug dealers than innocent white drivers? And if they did have such nonracial information, the level of suspicion it generated must have been very low: of the black drivers who were stopped, thirty-five out of thirty-six were sent on their way without being searched.<sup>137</sup> There's a simpler explanation for the disproportionate stopping of black motorists: the troopers took race into account in deciding who to stop.<sup>138</sup>

## 2. Searches and Hits

Once stopped in the I-95 corridor, black and Hispanic drivers were much more likely to be searched than white drivers, but no more likely to be found with drugs. For Hispanic drivers the hit rate was much lower than for whites; for black drivers it was comparable but slightly lower. Critics of the Maryland State Police argue that the roughly equal hit rates for blacks and whites demonstrate that the troopers discriminate against black drivers. David Cole, a law professor, and John Lamberth, the psychologist who conducted the traffic surveys in Maryland and New Jersey, made this point in a recent *New York Times* column:

It is no longer news that racial profiling occurs; study after study over the past five years has confirmed that police disproportionately stop and search minorities. . . . Those who defend the police argue that racial and ethnic disparities reflect not discrimination but higher rates of offenses among minorities. . . . But the racial profiling studies uniformly show that this widely shared assumption is false. Police stops yield no significant difference in so-called hit rates — percentages of searches that find evidence of lawbreaking — for minorities and whites. If blacks are carrying drugs more often than whites, police should find drugs on the blacks they stop more often than on the whites they stop. But they don't.<sup>139</sup>

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137. See *supra* Table 5.

138. Heather MacDonald, a conservative commentator who approves of the use of race as a predictor of criminality in other contexts, agrees that "highways are relatively cueless places":

In assessing the potential criminality of a driver speeding along with the pack on an eight-lane highway, an officer[']s . . . ability to observe the behavior of a suspect over time is limited by the speed of travel. In such an environment, blacks traveling 78 mph should not face a greater chance of getting pulled over than white speeders . . . .

MacDonald, *supra* note 13, at 20. MacDonald goes on to assert, with no data, that the use of race at that stage is probably not widespread. *Id.*

139. David Cole & John Lamberth, *The Fallacy of Racial Profiling*, N.Y. TIMES, May 13, 2001, § 4, at 13. Cole and Lamberth specifically cite Maryland statistics: "In Maryland, for example, 73 percent of those stopped and searched on a section of Interstate 95 were black, yet state police reported that equal percentages of the whites and blacks who were searched, statewide, had drugs or other contraband." *Id.* Although it is not specified in the compressed context of a newspaper column, the authors are apparently referring to data

The argument (which other scholars have also made<sup>140</sup>) is appealing, but incomplete.

If the police searched representative samples of black and white drivers and found drugs in equivalent numbers of cases, that would be evidence that blacks are no more likely to carry drugs than whites. But whatever else they do, the Maryland State Police do not search representative samples of drivers. They *choose* those cars that they think are most likely to be carrying drugs. Given that selection process, and in the absence of other information, hit rates alone are insufficient to distinguish discrimination from evenhanded treatment of groups with different behavior patterns.

Imagine an expensive medical screening procedure for a pathological condition that is difficult to detect. And imagine also that the condition — diabetes, for example — is more common among African Americans than among Caucasians. What if doctors at a particular hospital administered this test to 10% of their black patients and only 4% of their white patients, and in each group found that the condition exists 25% of the time: Would that mean that the condition was equally prevalent among their white and black patients, and that the doctors were discriminating by race in testing mostly blacks? Obviously not. The likely interpretation would be that the doctors were reserving the procedure for those patients, black and white, who seemed most likely to have the pathology. The fact that they found similar levels among blacks and whites who were tested would suggest that they were treating the two groups equally, and making equally good predictions based on all the information available to them — the patients' symptoms, family history, demographic traits, and other medical tests.

In theory, that could be what's going on here. Maryland State troopers might have made judgments on all available nonracial information — the driver's and passengers' behavior, their criminal history, the appearance of the car, any suspicious objects in view, etc. Using all of those sources they might have reasonably concluded that some cars were more likely than most to be carrying drugs, and decided to search those cars. If so, the fact that they found drugs in similar percentages of cars driven by black and white drivers suggests that in aggregate they had equally strong grounds for suspicion against the blacks and the whites who were searched; it is evidence that the troopers were evenhanded rather than discriminatory. Under this scenario, the fact that they got similar hit rates after searching blacks at a higher rate

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from some portion the first few years after the *Wilkins* settlement, when the percentage of blacks among drivers searched on I-95 was in the 70s. See *supra* Table 3 and *infra* Table 23.

140. See David. A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 295 (1999); see also RAMIREZ ET AL., *supra* note 10, at 10. Harris notes that there is a counterargument, but he rejects it. See Harris, *supra*, at 295 n.128.

than whites is evidence that blacks are more likely than whites to carry drugs, just as if doctors found similar rates of diabetes after testing proportionately more blacks than whites that would indicate that the disease is more common among blacks.

Conversely, equivalent hit rates are also consistent with discrimination. Consider another disease, for example tuberculosis, and assume that it is equally common among all groups in the population. If a school district with 20% foreign-born students gave TB screening tests to a randomly selected 10% of its American-born students, and to all of those born abroad, the proportion of positive tests would be the same for each group, and more than two-thirds of those who test positive would be foreign. Under those assumptions, the high proportion of foreign-born students who test positive is a product of discrimination — singling them out for the screening test because of their national origin — and the pattern of equal hit rates is perfectly compatible with that discrimination.

Which of these models describes the MSP searches in the I-95 corridor? With hit rates alone, there is no way to distinguish between them. But we can do so to the extent that we are able to obtain information on the other assumption that is built into these illustrations: the frequency of the pathology (drug offenses) by race in the population that is the object of those choices.

We know that Maryland State troopers searched blacks at five times the rate that they searched whites. If they intended to search those drivers who were most likely to be carrying drugs, that means that blacks were five times as likely as whites to be in that group; since they found drugs on the blacks they searched about as often as on the whites, that also implies that blacks were in fact several times more likely than whites to carry drugs on I-95 — which is almost certainly false. According to the 1999 National Household Survey on Drug Abuse, 6.6% of white Americans 12 years of age or older report that they have used an illicit drug in the previous month, compared to 7.7% of blacks and 6.8% of Hispanics.<sup>141</sup> There are no comparable data on drug dealers, but customers swamp sellers in any consumer market, including the market for illegal drugs. As a result, the great majority of the drug offenders arrested by the MSP were users rather than dealers, as we will see.<sup>142</sup> Drug *use*, of course, is not synonymous with drug *possession* in a *car*, but the rates are not likely to diverge by

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141. DEP'T OF HEALTH AND HUMAN SERVICES., SUMMARY OF FINDINGS FROM THE 1999 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, at <http://www.samhsa.gov/oas/NHSDA/1999/Chapter2.htm> (last visited Sept. 24, 2002). The overall national rate is 6.9%; the District of Columbia is somewhat higher (7.6%), and Maryland and Virginia somewhat lower (5.3% and 4.7%, respectively). *Id.* at 23-24. Unfortunately, this study does not report racial and ethnic drug-use data by state, but there is no reason to believe that the rough equivalence in drug-use rates does not apply in the Baltimore/Washington area.

142. See *infra* Table 12.

much: Is it plausible that black drug users in Maryland are five times more likely than white drug users to carry drugs in their cars, or five times easier to spot when they do so? Unless one of these improbable assumptions is true, the vast overrepresentation of blacks among those searched cannot be explained as a by-product of an MSP plan to maximize their hit rate.

Economists John Knowles, Nicola Perisco, and Petra Todd analyzed some of the same MSP data that we use, and concluded that the observed outcomes are consistent with the *assumption* that the troopers were acting to maximize the number of searches that turned up drugs.<sup>143</sup> They distinguish between two types of police behavior: “prejudice” or “bias,” which they define as a preference for searching one racial group rather than another even though those searches are no more likely to be successful; and “statistical discrimination,” which occurs when unbiased police officers search one group more often than another because the chances of success differ by group.<sup>144</sup> They acknowledge that “statistical discrimination” — the type of selection they believe is operating here — might be the result of explicit, if “unprejudiced,” use of race as a factor in decisions to search.<sup>145</sup> We will discuss the legal implications of this distinction in Part V.<sup>146</sup> As a factual matter, however, their initial assumption is unrealistic, and equally so whether we suppose that the MSP tried to maximize its hit rate by taking race into account or did so by race-neutral means. Either way it implies that blacks possess drugs on the highway far more often than whites, which is hard to square with what we know about drug use by race. The assumption is also inherently implausible. *Why* would the MSP want to maximize the number of drug busts, however small, rather than the number of dealers they arrest or the quantities of drugs they seize? And if they did want that, why wouldn’t they shift more heavily from consent searches (with a 22% hit rate) to probable-cause searches (with a 53% hit rate)?<sup>147</sup>

How then did the MSP achieve equal hit rates for black and white motorists, if blacks were searched far more often but were not substantially more likely to carry drugs? In part, the black hit rate may

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143. Knowles et al., *supra* note 25, at 209-10. Knowles, Perisco, and Todd analyzed MSP data from January 1995 through January 1999. The economic model that they develop also depends on a second debatable assumption: that motorists who might carry drugs are deterred by the race-specific probability of being searched. *Id.* at 209.

144. *Id.* at 205, 210.

145. *Id.* at 212.

146. *See infra* text accompanying notes 285-288.

147. As we will see in Part IV, the MSP did just that after 1996: they reduced the proportion of consent searches in the I-95 corridor, increased the proportion of probable-cause searches, and the hit rate went up. *See infra* Table 23. Knowles, Perisco, and Todd also considered the possibility that the MSP attempted to maximize the number of *sizeable* drug seizures, rather than all drug seizures. We discuss that analysis in Part V.

have been inflated by selective omissions. In part, it may reflect a practice of devoting more attention to black drivers than to white drivers at every stage of the process, including those that were not recorded: more were stopped, more were questioned, more were checked out as candidates for searches, and more were ultimately searched. This means that if the MSP had devoted as much effort to white drivers as they did to blacks they could have searched one white driver in thirty-six instead of one in 105 and found drugs on about the same proportion as they did for the black drivers they searched instead. There would have been plenty of room to move in that direction. If the real rate of drug possession on I-95 is anywhere near the 4.7% found at roadblocks in Indianapolis,<sup>148</sup> thousands of white, black, and Hispanic motorists who were stopped by the Maryland State Police were carrying drugs that were not detected.<sup>149</sup>

The debate over the meaning of the similar hit rates for those white and black drivers who were searched can obscure the larger picture. There is also strong evidence of racial profiling in the initial decision to stop, as we have seen, and we have reason to believe that the search data, however lopsided, understate the true proportion of blacks searched, and overstate the hit rate for black motorists. We also know that Hispanic drivers (like black drivers) were much more likely than whites to be searched after a stop, and yet they were found to carry illegal drugs far less often than either whites or blacks. This indicates discrimination against Hispanics by any account, a point that is sometimes overlooked.<sup>150</sup> The fact that Maryland State troopers took ethnicity into account in deciding to search Hispanic drivers is evidence that they also took race into account in deciding to search black drivers, on the same highway, in the same period — if further evidence on that point is needed.

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148. See GAO, CLYBURN REPORT, *supra* note 132.

149. As we will see in Part IV, this happened to some extent after 1996: the MSP began to search a higher proportion of white drivers on I-95, and both the white hit rate and the overall hit rate increased. See *infra* Table 23.

150. Knowles, Persico, and Todd recognize that the data indicate discrimination against Hispanics even when discrimination is defined as they do to mean “bias” — singling out Hispanics despite the fact that doing so does not improve the odds of success — but they are cautious about drawing conclusions: “Our finding of lower probabilities of guilt for Hispanics suggests that police may be biased against Hispanics, but the sample size for this group is small and further investigation is warranted.” Knowles et al., *supra* note 25, at 228. This caution seems excessive, at least given our larger sample size. The differences between Hispanics and whites in the search rates for cars stopped, and the hit rates for cars searched, in the I-95 corridor are large and highly statistically significant (both  $p$ 's < .00001); in our state-wide sample the difference in hit rates is slightly larger and equally unlikely to be due to chance ( $p$  < .00001). See *supra* Tables 3, 5, and 6.



### E. *Summary*

The data we have examined are the best available for an empirical analysis of racial profiling on the highway anywhere in the nation. Nonetheless, they are limited, incomplete, and probably biased. There is credible evidence that cases that should have been reported were omitted. To the extent that these omissions reflect the self-interest of the reporting officers, they will have systematically biased the database by understating the numbers of minorities who were stopped and searched, exaggerating the success rates for searches of minority drivers, and inflating the overall success rate. Moreover, these data include only Fourth Amendment "searches" (and perhaps a scattering of nonsearch cases in which a dog sniff was used, or consent to search was requested but denied). They are merely a snapshot of the last and least-common stage of a complex process. Discrimination by race in investigative steps between the stop and the decision to "search" would be invisible to us.

Taking these data at face value, they show that black motorists who violated traffic laws were stopped by the Maryland State Police on I-95 almost twice as often as white motorists who did the same. The most likely explanation for this disparity is the obvious one: Maryland State troopers took race into account in deciding who to stop. We can't make a similar comparison for Hispanic drivers because we don't know their proportion among drivers on I-95.

Among drivers who were stopped, blacks and Hispanics were much more likely than whites to be searched. Searches of Hispanics were far less likely to find drugs than searches of whites, which strongly suggests that ethnicity played a role in the decisions to search Hispanic motorists. Blacks were slightly less likely to be found with drugs than whites, but the rates were close. The similarity in success rates for searches of blacks and whites could be interpreted as evidence that the decisions to search were the product of an attempt to efficiently detect drug possession. That interpretation, however, implies that blacks who travel on I-95 are several times more likely to possess drugs than whites, which is highly unlikely given that blacks and whites use illegal drugs at approximately equal rates. A more plausible explanation is that more black drivers than white drivers were subjected to extensive "pre-search" investigations that allowed the state troopers to limit their searches, in all racial categories, to cars that were comparatively likely to contain illegal drugs. That sort of pre-search screening would explain both the high number of black motorists found with drugs (given comparable rates of drug use for blacks and whites) and the high hit rate for all searches.

Why would Maryland State troopers discriminate in this manner if whites and minorities are in fact about equally likely to carry drugs? That question is best answered in the context of a more detailed dis-

discussion of the purposes and the outcomes of these searches, which follows.

III. DRUGS BY WEIGHT

A. Users and Dealers

As we have seen, most of those motorists searched by the Maryland State Police, 66% on I-95 and 68% elsewhere, were not carrying any illegal drugs (or at least, no drugs were found on them). Among those who were carrying drugs, the quantities varied enormously, from trace amounts of marijuana or crack to dozens of pounds of cocaine. We divided the drug seizures into four categories based on quantity by drug: *Trace Amount*, a category taken directly from the MSP reports, means a drug residue or other amount too small to weigh. *Personal Use* means that the quantity of the drug(s) seized was no greater than a user might possess for her own consumption. *Small Dealer* refers to seizures that are large enough to suggest that at least some of the drugs seized were intended for delivery to another person. *Medium or Large Dealer* means that the seizure was large enough to indicate that the drugs were intended primarily or exclusively for delivery to others; this is an open-ended category covering everything from a small retail stock of 15 grams of heroin to a large wholesale inventory of 20 kilograms of cocaine. The cutoff weights for these categories are described in Table 11; all quantities are expressed in grams (“g”), except for the miscellaneous category of “other” drugs which are measured either in grams or in “dosage units” (“du”), depending on the drug.<sup>151</sup>

**Table 11: Drug Seizure Classification**

	Marijuana	Cocaine	Crack	Heroin	Other
Trace Amount	Up to 0.1g	Up to 0.05g	Up to 0.05g	Up to 0.05g	Up to 0.05g or 0.05 du
Personal Use	0.1 to 56g	0.05 to 10g	0.05 to 10g	0.05 to 2g	0.05 to 10g or 0.05 to 25 du
Small Dealer	56 to 455g	10 to 50g	10 to 50g	2 to 10g	10 to 50 g or 25 to 150 du
Medium/ Large Dealer	More than 455g	More than 50g	More than 50g	More than 10g	More than 50g or 150 du

151. For marijuana, the cutoff amounts, while calibrated in grams, are keyed to the units in which that drug is usually traded: 56g = 2oz; 455g = 1lb.

These categories, of course, are to some extent arbitrary.<sup>152</sup> This is particularly true for the miscellaneous group of “other” drugs — many of which were found in only a single search — but those few seizures have little impact on the overall pattern. Fortunately, the exact choice of cutoff points does not seem to matter much; we have tried others, and none of the important patterns change. The comparative robustness of this classification scheme probably reflects a relatively clear distinction between users and traffickers, especially in the I-95 corridor, where most seizures fell in the “trace” and “personal” use categories, or in the “medium and large dealer” category, with relatively few cases in the intermediate “small dealer” category. See Table 12.

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152. The cutoff points are based on government estimates of the average prices and the amounts spent by users of various contraband drugs in 1998. Specifically, our scheme reflects the following estimates from WILLIAM RHODES ET AL., OFFICE OF NAT'L DRUG CONTROL POLICY, WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS 1988-1998, at 12, 16, 22-23 (2000). **Marijuana.** Estimated price, \$320/oz; estimated average cost per user: \$81/month. Cutoff point for “small dealer” category: 56g = \$640 or 8 months supply; cutoff point for “medium or large dealer” category: 455g = \$5120 or 5 years supply. **Cocaine.** Estimated price: \$149/g; estimated average cost per user: \$191/week. Cutoff point for “small dealer” category: 10g = \$1490 or about 8 weeks supply; cutoff point for “medium or large dealer” category: 50g = \$7450 or about 9 months' supply. (**Crack** — a form of cocaine — is not treated separately in the study from which we took these estimates, so we use the same categories for it as for powder cocaine.) **Heroin.** Estimated price: \$1029/g; estimated average cost per user: \$214/week. Cutoff point for “small dealer” category: 2g = \$2068 or about 9 weeks supply; cutoff point for “medium or large dealer” category: 10g = \$10,290 or about 11 months supply. **Other.** This is an extremely assorted collection of drugs that were infrequently found. The two largest categories — amphetamines (n=15) and PCP (n=14) — are usually reported in grams, as are psilocybin (n=6) and hashish (n=5), the fourth and fifth most common. The third ranking miscellaneous drug — LSD (n=12) is usually reported in “hits” or “tabs.” About 25 other types of contraband pills were found in one to four searches each, ranging from Valium (n=4) to MDMA (n=1). Obviously no single scheme can meaningfully categorize all these varied drugs. We have sorted the seizures of those miscellaneous drugs that were measured in grams using the same categories we used for cocaine and crack. For those that were measured in pills, tabs, or hits, we divided the seizures into categories based on very rough estimates of the significance of different quantities measured in “dosage units” or “du's:” cutoff point for “small dealer” category: 25 du's; cutoff point for “medium or large dealer” category: 150 du's. The classification scheme for “other” drugs is particularly rough; fortunately, it is relatively unimportant because so few seizures include drugs in that group.

The lines we drew are intended to balance price and use. Thus, we assume that a mere consumer of marijuana might possess as much as eight months estimated supply for the “average” user because that represents an investment of only \$640, but that anyone who possesses more than 10 grams of cocaine is likely to be at least a “small” dealer, despite the fact that the average user consumes that quantity in eight weeks, because 10 grams is estimated to cost almost \$1,500.

**Table 12: MSP Drug Searches  
by Location and Quantity Seized**

	I-95 Corridor	Elsewhere	Total
<b>No Illegal Drugs</b>	<b>62.7%</b>	<b>68.1%</b>	<b>66.7%</b>
<b>Trace Amounts</b>	<b>6.1%</b>	<b>7.0%</b>	<b>6.7%</b>
<b>Personal Use</b>	<b>20.0%</b>	<b>21.5%</b>	<b>21.1%</b>
<b>Small Dealer</b>	<b>2.6%</b>	<b>1.9%</b>	<b>2.1%</b>
<b>Medium/ Large Dealer</b>	<b>8.6%</b>	<b>1.5%</b>	<b>3.4%</b>

**p < .0001**

Most drug seizures by the Maryland State Police were small. State-wide, 84% of those found with drugs were carrying only trace or personal-use amounts, and 68% were found with trace or personal-use quantities of marijuana only. The minority of drivers carrying larger quantities of drugs were concentrated on I-95 north of Baltimore. Elsewhere, 11% of those with some illegal drugs, or 3.4% of the motorists searched, were "dealers" of some type. On I-95, 30% of those with illegal drugs, or 11% of all motorists searched, were dealers. Overall, searches in the I-95 corridor accounted for about one-quarter of the statewide total, but they included over half of all dealers arrested and two-thirds of the medium and large dealers.

The significance of the I-95 corridor becomes even more apparent when we examine the total quantities of drugs seized. By weight, the dominant drugs seized by the MSP were marijuana (535kg) and cocaine (about 198kg), with crack (41kg) and heroin (6.7kg) far behind. Cocaine is believed to account for most of the money spent on illegal drugs in the United States, about 60% for crack and powdered cocaine combined.<sup>153</sup> This is even more true for drugs seized by the Maryland State Police. At the government's estimated retail prices for 2000, the cocaine seized in this five-and-a-half year period was worth about \$30 million, the crack about \$6.1 million, the heroin \$6.8 million, and the marijuana about \$5.5 million.<sup>154</sup> Searches on I-95 accounted for the

153. RHODES ET AL., *supra* note 152, at 27. Crack is not treated separately in this report, but as a form of cocaine.

154. *See id.* at 16, 22 (estimated drug prices).

vast majority of the marijuana and cocaine seized — 93% and 79%, respectively — and most of the crack (61%), heroin (67%), and other drugs (73%) as well. Interstate 95 north of Baltimore really does seem to be a “drug smuggling pipeline,” or at least more of a drug pipeline than any other area patrolled by the MSP.

Most of the drugs seized came from a few large hauls. For cocaine, over half the total amount seized in the I-95 corridor was found in the five largest seizures, out of 159; two-thirds in the ten largest; and nearly three-quarters in the top fifteen. For marijuana and heroin the concentration at the top was even more extreme. Ninety percent of the marijuana came from the top ten seizures, out of 610; and 82% of the heroin came from the top ten seizures out of 54. See Table 13.

**Table 13: Percentages of Total Amounts of Drugs Seized that Were Found in the Largest MSP Seizures in the I-95 Corridor**

	Five Largest Seizures	Ten Largest Seizures	Fifteen Largest Seizures
<b>Marijuana (610)</b>	<b>78%</b>	<b>90%</b>	<b>93%</b>
<b>Cocaine (159)</b>	<b>53%</b>	<b>66%</b>	<b>74%</b>
<b>Heroin (54)</b>	<b>60%</b>	<b>82%</b>	<b>95%</b>

Needless to say, as targets for law enforcement, drug users and drug dealers are very different animals. The arrest and punishment of a mere user may deter drug use, generally or by the person arrested. The arrest and punishment of a large dealer, and the seizure of a large haul of drugs, has greater implications: it might deter drug *dealing* generally, or by that person, and it may incapacitate him for a substantial period of time. In addition, the seizure will take a large quantity of illegal drugs off the market, and the arrest may disrupt a drug distribution network. What’s more, a drug dealer who’s arrested may be induced to cooperate with the authorities and provide intelligence that could help bust other dealers, seize additional hauls, generate intelligence from future defendants, and so forth. The extent to which drug busts actually reduce the supply of illegal drugs is debatable,<sup>155</sup> but that is the main purpose of many drug interdiction programs — including drug interdiction by the Maryland State Police on I-95. For that purpose, the searches that matter are those that find big dealers and large caches of drugs.

155. See *infra* text accompanying notes 338-341.

### B. *The Legal Bases for the Searches*

As we saw in Table 9, the MSP were more likely to find some drugs when their searches were based on probable cause rather than consent. But those successes were concentrated at the low end of the scale, in the Trace and Personal Use categories; among big dealers, the pattern reverses. See Table 14. Probable-cause searches accounted for 80% of the drivers arrested in the I-95 corridor with trace or personal-use quantities of drugs, but only 35% of the medium and large dealers arrested. Half of the searches on I-95 were based on probable cause, but they yielded only 27% of the cocaine seized, 14% of the marijuana, and 15% of the heroin. This makes sense: a driver who is carrying five kilograms of cocaine is likely to be more careful than one who is carrying half a gram not to smoke marijuana, have a gun in plain view, or otherwise attract the attention of the police (and incidentally provide them with probable cause to conduct a search). On the other side, the police are interested primarily in large drug busts. They'll seize small amounts when they happen to run across them (e.g., when plain view or odor give them probable cause) but are more likely to embark on an open-ended search (e.g., by asking for consent to search) if they think they may have a dealer. Searches based on intelligence are particularly likely to fit this mold: if successful, they yield substantial quantities, but the traffickers who carry those quantities are not likely to make it easy by giving the police probable cause.<sup>156</sup>

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156. The question remains: Why would drug traffickers, with large quantities of illegal drugs in their possession, consent to searches? But whatever the reason, they do consent, or at least the police say so. Judging from these MSP reports, they almost never refuse to consent. We have discussed some of the possible reasons above: they may not realize that they have a choice (especially if the police don't want them to think so), they may think that consenting is the best of two bad alternatives, they may be too nervous or afraid to resist, or the police may misinterpret ambiguous responses or misreport clear ones. See *supra* text accompanying notes 77-80.

**Table 14: Basis for Search by Quantity of  
Drugs Found for MSP Searches on I-95**

	Probable Cause (1073)	Consent (1073)	All Searches (2146)
No Drugs	47.5%	77.8%	62.7%
Trace Amount	8.7%	3.4%	6.1%
Personal Use	34.0%	6.1%	20.0%
Small Dealer	3.7%	1.5%	2.6%
Medium/ Large Dealer	6.1%	11.2%	8.6%
<b>TOTAL</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

$p < .0001$

### C. Direction of Travel

According to the Office of National Drug Control Policy, drug shipments in the Baltimore/Washington area mostly flow south, from the regional distribution center in the New York/New Jersey metropolitan area.<sup>157</sup> Drug interdiction by the MSP on I-95 reflects this southbound bias. The direction of travel is noted for 82% of the I-95 corridor searches,<sup>158</sup> and for those searches about two-thirds of the cars were traveling south, despite the fact that over time the volume of travel on an arterial highway must be virtually identical in both directions. The hit rate for southbound cars was higher than for those going north, 41% versus 33%, but the differences in the quantities of drugs found in those hits is much more striking, as reflected in Table 15.

157. *High Intensity Drug Trafficking*, *supra* note 31, at 163-65.

158. The remaining 18% — 381 searches in total — were in aggregate extraordinarily successful, yielding total quantities of drugs comparable to those found in the much larger set of southbound seizures: 167.3kg of marijuana; 55.8kg of cocaine; 8.9kg of crack; 1.7kg of heroin. Obviously, MSP troopers were less likely than usual to record the direction of travel for those searches that produced large seizures. It seems plausible that this common record-keeping failure is connected, in some manner, to the unusual nature of these searches. How it is connected, however, we can only guess. Is it because such seizures are frequently the result of unusual investigations involving more preparation and coordination than routine stops, and that in such an investigation the direction of travel is not as salient as it is for an officer on routine patrol? Or does the excitement of a major bust cause some officers to forget to record information on the events leading up to it?

**Table 15: Hit Rate for MSP Searches in I-95 Corridor, by Drugs Found, Quantity, and Direction of Travel**

	Northbound (624)	Southbound (1141)
<b>All Drugs</b>	<b>32.7%</b>	<b>41.5%</b>
<b>User<sup>†</sup></b>	<b>30.0%</b>	<b>27.7%</b>
<b>Dealer<sup>iii</sup></b>	<b>2.7%</b>	<b>13.8%</b>
<b>Big Dealer<sup>iii</sup></b>	<b>1.6%</b>	<b>9.7%</b>
<b>Marijuana</b>	<b>27.4%</b>	<b>31.6%</b>
<b>User<sup>†</sup></b>	<b>26.4%</b>	<b>27.4%</b>
<b>Dealer<sup>iii</sup></b>	<b>1.0%</b>	<b>4.2%</b>
<b>Big Dealer<sup>i</sup></b>	<b>0.5%</b>	<b>1.8%</b>
<b>Cocaine</b>	<b>3.9%</b>	<b>8.6%</b>
<b>User<sup>†</sup></b>	<b>2.9%</b>	<b>2.5%</b>
<b>Dealer<sup>iii</sup></b>	<b>1.0%</b>	<b>6.1%</b>
<b>Big Dealer<sup>iii</sup></b>	<b>0.6%</b>	<b>5.0%</b>

<sup>†</sup> p n.s. for row

<sup>i</sup> p < .05 for row

<sup>iii</sup> p < .001 for row

Going north, only 8% of the cars with drugs had quantities beyond those consistent with personal use. Going south, 33% of those with drugs were dealers (by our definition), and almost 70% of them were medium or large ("big") dealers. The difference by direction of travel is particularly conspicuous for cocaine. Going north, cocaine users outnumbered cocaine dealers by almost three to one; going south, *dealers* outnumber *users* by two-and-a-half to one, and over 80% of them were big dealers.

The first rule of duck hunting is to go where the ducks are. Of the twenty largest marijuana seizures in the I-95 corridor for which direction of travel is reported, eighteen were found in southbound cars; so were nineteen of the twenty largest cocaine and heroin seizures for which direction is known, and all of the twenty largest crack seizures. Clearly, in this hunt most of the big trophies were bagged flying south.



The pattern for the total quantities of drugs seized is similar, with one exception. One of the two major hauls taken from a northbound car consisted of nearly 200 kilograms of marijuana, the single largest marijuana seizure by the MSP in our data. It accounts for nearly 37% of all the marijuana seized in this five-and-a-half-year period, and 99% of the marijuana seized from northbound cars in the I-95 corridor. As a result, the total marijuana seized from northbound cars exceeds that seized from southbound cars. For other drugs, however, the pattern is the opposite and extremely lopsided. Southbound cars were found with 23 times as much cocaine as northbound cars, 29 times as much heroin, and 80 times as much crack. See Table 16.

**Table 16: Total Quantities of Drugs Seized  
in I-95 Corridor, by Direction of Travel**

	Northbound	Southbound
Marijuana <sup>†</sup>	199.2 kg	114.8 kg
Cocaine <sup>  </sup>	3.0 kg	65.2 kg
Crack <sup>i</sup>	0.2 kg	16.1 kg
Heroin <sup>i</sup>	0.1 kg	2.2 kg

<sup>†</sup> p n.s. for row

<sup>i</sup> p < .05 for row

<sup>||</sup> p < .01 for row

The same preference for southbound cars shows up in the stop data, but it is diluted. Southbound *searches* were 75% more common than northbound, but southbound *stops* were only 11% more common. The 11% advantage for southbound traffic translates into 5448 more southbound stops than northbound stops, compared to 587 more searches. Since overall the MSP stopped about 67 cars for every one they searched, the relative disproportion for southbound cars suggests that the great majority of traffic stops on I-95 were probably routine traffic stops that had little to do with drug interdiction. For the minority of searches that are exclusively or primarily pretext stops to look for drugs, Maryland State troopers prefer the southbound lanes; that produced an excess of nearly 5500 southbound stops, of which about one in nine matured into a search.

## D. Race

## 1. Quantities Seized, by Race

The quantities of drugs seized by the MSP were unevenly distributed by race. Table 17 shows the breakdown of searches on I-95 by race and by the quantities of drugs seized:

**Table 17: Searches in I-95 Corridor by Race or Ethnicity and Quantity of Drugs Found**

	White	Black	Hispanic	All Searches
Trace Amounts	9.0%	4.9%	2.4%	6.1%
Personal Use	27.2%	17.5%	6.3%	20.0%
Small Dealer	1.8%	3.2%	0	2.6%
Medium/Large Dealer	2.4%	12.2%	7.1%	8.6%
Any Illegal Drugs	40.3%	37.8%	15.7%	37.3%

$p < .0001$

Overall, whites who were searched were slightly more likely to be carrying some drugs than blacks, and three times as likely as Hispanics. But that's because most of those with drugs were users; for dealers, the picture is very different. Black motorists who were searched on I-95 north of Baltimore were more than three-and-a-half times as likely as whites to be dealers, and five times as likely to be medium or large dealers. Hispanics who were searched on I-95 were about 1.8 times as likely as whites to be dealers, and three times as likely to be medium or large dealers. Of the whites who were found with any drugs on I-95, 10% were dealers and 6% were medium or large dealers; of the blacks with drugs, 40% were dealers and 32% were medium and large dealers; of the Hispanics with drugs, 45% were medium or large dealers.

The net result of these differences is that 84% of the big dealers arrested on I-95 north of Baltimore were black. See Table 18. For cocaine and heroin, the number of big Hispanic dealers was roughly proportional to the number of Hispanics searched; for marijuana and "other" drugs there were no Hispanic dealers. Whites were underrepresented among medium and large dealers for every type of

drug except the small category of “other” drugs (where two of four were white), but especially underrepresented for cocaine and crack.

**Table 18: Proportions of Medium and Large Dealers Found, and of all Drivers Searched, on I-95 by Race or Ethnicity**

	<u>Large and Medium Dealers</u>						<u>All Searches</u> (2146)
	<u>All Dealers</u> <sup>iv</sup> (185) <sup>159</sup>	<u>Marijuana</u> <sup>iii</sup> (68)	<u>Cocaine</u> <sup>iv</sup> (94)	<u>Crack</u> <sup>iv</sup> (58)	<u>Heroin</u> <sup>†</sup> (26)	<u>Other</u> <sup>†</sup> (4)	
White	9.2%	7.4%	5.3%	5.2%	25.9%	50.0%	33.3%
Black	84.3%	89.7%	87.2%	91.4%	65.2%	50.0%	59.7%
Hispanic	4.9%	0	5.3%	1.7%	5.7%	0	5.9%

<sup>†</sup> p n.s. for column

<sup>iii</sup> p < .001 for column

<sup>iv</sup> p < .0001 for column

Table 19 shows the distribution of the total amounts of drugs seized on I-95 by race. The pattern is basically the same as in Table 18. The biggest shift is for Hispanic cocaine traffickers. They represented 5.3% of the big cocaine dealers, but were found with 16% of the cocaine that was seized. This difference is entirely attributable to a single seizure of nearly 20 kilograms of cocaine from a car with a Hispanic driver, over 12% of the total cocaine seized on I-95 from 1995 through mid-2000. Overall, black and Hispanic drivers accounted for over 90% of the marijuana, cocaine, and crack found by the MSP on I-95, and 72% of the heroin.

159. Some of the dealers were found with medium or large quantities of more than one drug.

**Table 19: Proportions of the Total Amounts of Drugs Seized in I-95 Corridor, by Race or Ethnicity<sup>160</sup>**

	Marijuana	Cocaine	Crack	Heroin
<b>White</b>	<b>0.9%</b>	<b>7.1%</b>	<b>1.8%</b>	<b>25.2%</b>
<b>Black</b>	<b>96.2%</b>	<b>75.0%</b>	<b>96.7%</b>	<b>57.7%</b>
<b>Hispanic</b>	<b>0</b>	<b>16.2%</b>	<b>0.4%</b>	<b>14.2%</b>

2. *Do the Quantities of Drugs Seized Explain the Racial Patterns of Stops and Searches?*

Heather MacDonald, a conservative journalist, recently wrote in an article entitled *The Myth of Racial Profiling*: “The fact that hit rates for contraband tend to be equal across racial groups, even though blacks and Hispanics are searched at higher rates, suggests that the police are successfully targeting dealers, not minorities.”<sup>161</sup>

As we have seen, equivalent “hit rates for contraband” are not persuasive evidence for this argument,<sup>162</sup> not to mention that in Maryland the hit rate for Hispanics does not “tend to be equal” to those for whites and blacks but is much lower.<sup>163</sup> Nonetheless, the data we have presented do illustrate one of MacDonald’s points: the Maryland State Police target dealers. How successfully the troopers do so is another matter. But do they use race in choosing those they think are likely to be dealers? MacDonald is agnostic on that point: “Race may play a role in that targeting, or it may not.”<sup>164</sup> We think race clearly does.

The main objectives of all drug interdiction programs are the arrest of drug traffickers and the seizure of large quantities of drugs. Police agencies, from the Drug Enforcement Administration<sup>165</sup> through the

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160. As we have noted, *supra* Table 13, most of the total quantities of drugs seized in the I-95 corridor were concentrated in a few large seizures. This means that it is hard to eliminate chance as an explanation for the distribution of the total quantities seized, by race, because the impact of one or a few seizures could be great. (We saw this effect with respect to the distribution of quantities seized by direction of travel. See *supra* Table 16.) As a result, tests of statistical significance are not useful in this context, and we have not calculated them. The racial differences in the numbers of large or medium size dealers arrested, by contrast, do not depend on the amounts seized in a few “outlier” seizures and are statistically significant. See *supra* Table 18.

161. MacDonald, *supra* note 13, at 24.

162. See *supra* notes 139-150 and accompanying text.

163. See *supra* Table 6; note 150 and accompanying text.

164. See MacDonald, *supra* note 13, at 24.

165. See <http://www.usdoj.gov/dea/stats/> (DEA website on total drug seizures) (last visited Sept. 24, 2002); <http://www.usdoj.gov/dea/major/seizures.htm> (DEA website on major

Maryland State Police,<sup>166</sup> hold press conferences to publicize big drug busts and boast about the total quantities of drugs they seize. The perceived wisdom, supported by substantial evidence, is that most drug shipments on I-95 in Maryland travel south. Accordingly, MSP troopers search mostly southbound cars, and they seize far more drugs and arrest many more dealers among those heading that way. Could these same troopers be oblivious to the fact that among the searches they conduct, race is an even better predictor of drug seizures than direction of travel — that minorities account for 90% or more of the cocaine, marijuana, and crack they seize?

Table 20 displays the racial patterns of searches in the I-95 corridor separately for northbound and southbound cars:

**Table 20: MSP Searches in the I-95 Corridor, Hit Rate and Relative Risk of a Search, by Race and Direction of Travel**

	Northbound			Southbound		
	Number of Cars Searched	Hit Rate	Relative Risk of a Search <sup>167</sup>	Number of Cars Searched	Hit Rate	Relative Risk of a Search <sup>168</sup>
White	273	39.6%	1	334	45.8%	1
Black	302	29.8%	4.7	749	40.5%	9.6
Hispanic	44	13.6%		48	20.8%	
All <sup>169</sup> <sup>iii</sup>	624	32.7%		1141	41.5%	

<sup>iii</sup>  $p < .001$  for difference between overall hit rates northbound and southbound

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drug seizures) (last visited Sept. 24, 2002); [http://www.usdoj.gov/dea/pubs/news\\_releases.htm](http://www.usdoj.gov/dea/pubs/news_releases.htm) (DEA website press release page, with current press releases and archive of releases on major drug seizures) (last visited Sept. 24, 2002).

166. See Mitchell, *supra* note 30.

167. This column reports the relative risk of a search for a driver of a given race on that section of I-95, compared to that of a white motorist. See *supra* Table 5. As in Table 5, we assume that the proportion of drivers by race in the I-95 corridor throughout the period of this study was the same as the proportion reported by Dr. Lamberth for June and July of 1996. We also assume that these proportions were equal northbound and southbound. As before, we have no data on the proportion of Hispanic motorists on I-95 and, therefore, cannot calculate the relative risk of a search for a Hispanic driver.

168. See *supra* note 167.

169. Searches of motorists whose race or ethnicity was reported as "other" are not listed separately in this table.

As we have already seen, whites were slightly more likely to be found carrying drugs in both directions, but blacks were more often searched. As we have also seen, nearly twice as many searches were conducted for southbound cars. But notice where these additional searches are concentrated: Maryland State troopers conducted 9% more searches of southbound Hispanic drivers than of those going north; 22% more searches of southbound white drivers; and 148% more searches of southbound black drivers than of blacks going the opposite direction — even though the blacks searched were less likely to have drugs than the white drivers searched, in both directions. As a result, the relative risk of a search for a black driver, compared to a white driver, is about twice as high heading south as heading north: in the southbound lanes, black drivers were 9.6 times more likely to be searched than whites; in the northbound lanes, 4.7 times more likely. Is it a coincidence that for years the DEA told local police agencies that most of the drugs distributed in the Baltimore/Washington area were supplied by blacks and Hispanics traveling south from New York,<sup>170</sup> or that more than 90% of the big dealers who were actually arrested by the MSP on I-95 north of Baltimore were blacks driving south?<sup>171</sup> Is there any plausible, nonracial explanation for this and similar patterns in the MSP's stops and searches?<sup>172</sup>

Racial differences in driving habits are not a likely explanation, as we have already discussed.<sup>173</sup> Nor is it plausible that nonracial information about the drivers or the cars led the troopers to suspect drug possession far more often for blacks and Hispanics than for whites.<sup>174</sup> But what about nonracial information that might have led the MSP to suspect drug trafficking?

To return to an example we used before: consider a clinic that uses an expensive test to screen high-risk patients for diabetes. If they rely on nonracial predictors to choose who to test — a family history of diabetes, or an abnormally high level of insulin in the blood, or both — they will end up with a disproportionate number of African Americans among those who are tested and found to have diabetes,

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170. See, e.g., THE NNICC REPORT 1995, THE SUPPLY OF ILLICIT DRUGS TO THE UNITED STATES 2 (1996), available at <http://www.usdoj.gov/dea/pubs/nnic-95/nnic-95.htm>; *High Intensity Drug Trafficking*, *supra* note 31, at 163-65.

171. The figure in the text is for arrests in cases in which the direction of travel is recorded. See *supra* note 158.

172. For example, for northbound cars equivalent proportions of the searches were based on consent for black and for white motorists, 45% and 44% respectively, while among southbound cars, consent searches — the type that produce fewer hits but more big dealers, see *supra* Table 14 — were 56% of the total for blacks and 42% for whites. For Hispanics, the group with the lowest hit rate and the highest proportion of big dealers, the consent-search rate was high in both directions, 63% going north, and 68% going south.

173. See *supra* text at notes 130-136.

174. See *supra* text at notes 137-138.

and among those who are tested and are found not to have the disease. Could it be that something similar is going on here: that Maryland State troopers are searching those drivers who, without reference to race, look most like drug dealers, and that African Americans turn up disproportionately among the hits and the misses alike?

For that to work there must be one or more nonracial factors that are correlated both with race and with drug dealing. We have such nonracial predictors for diabetes. African Americans are more likely to have elevated levels of insulin, and elevated insulin is associated with diabetes for both blacks and whites. What nonracial factor fits that bill for drug trafficking? To be specific, what, other than race, might make blacks who do not deal drugs five times more likely to look like drug dealers than whites who do not deal drugs?<sup>175</sup> Nothing comes to mind, in part because drug dealing is as fundamentally different from chronic illness as policing the highway is from medicine. Drug trafficking is a behavioral pattern rather than a physiological syndrome; its best predictors are likely to be related types of behavior, past and present, which are invisible to the state trooper, rather than physical symptoms that a doctor can observe. One reason that the clinic will screen more nondiabetic blacks than whites is that diabetes, as we define it, is the end point on a physiological continuum; some of those who test negative are nonetheless at high risk to develop the disease, and may do so in the future. There is no equivalent group of innocent motorists with mild symptoms or early stages of drug dealing.

Hispanic drivers stopped by the MSP were searched seven times as often as whites. Considering that they were found with drugs about one-third as often as white drivers, it's hard to believe that most of these Hispanics were searched because they seemed more likely to be carrying drugs than whites. And if they weren't carrying drugs, what, apart from ethnicity, would make them look more like drug traffickers? Of course, the troopers who conducted these searches probably had at least some general sense of one of the patterns summarized in Table 21: searches of Hispanics included more major cocaine busts than searches of whites. The average cocaine seizure from a Hispanic was nine times larger than the average seizure from a white, and the average amount seized per search was twelve times greater, even taking into account the many searches in which no cocaine was found at

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175. To qualify, a nonracial factor must be something that not only makes blacks who have it more likely to be drug dealers than those who don't, but that also is more prevalent among blacks than whites. Even if (let's assume) most black drug dealers on I-95 in Maryland have New York license plates, having a New York license plate won't do the trick unless it's also true that black drivers on I-95 are more likely than white drivers to have one. And, given that blacks were several times more likely to be searched than whites, the nonracial factor or factors at work would also have to be several times more common among blacks than whites.

all. We see similar patterns for each drug listed, for blacks, for Hispanics, or for both. Surely these numbers provide the simplest and most credible explanation for the troopers' behavior: they searched innocent Hispanic drivers seven times as often as whites — and more than twice as often as blacks — in an attempt to find a few major Hispanic drug traffickers.

**Table 21: Average Quantities of Particular Drugs Seized in the I-95 Corridor, for All Searches, and for Searches in Which that Drug Was Found, by Race or Ethnicity<sup>176</sup>**

	White	Black	Hispanic
<b>Marijuana</b>			
All Searches	6.1g	371.7g	0.3g
Drug Found	18.3g	1342.3g	3.9g
<b>Cocaine</b>			
All Searches	15.6g	91.4g	199.6g
Drug Found	398.5g	968.2g	3621.8g
<b>Crack</b>			
All Searches	0.6g	19.2g	0.9g
Drug Found	115.9g	337.2g	113.0g
<b>Heroin</b>			
All Searches	1.6g	2.0g	5.0g
Drug Found	42.0g	112.7g	213.1g

Isn't this exactly what the Maryland State Police should be doing: Concentrating their attention on those groups that are most likely to include big-time drug dealers? At first blush this seems right — and yet, over the course of half-a-dozen years of defending their conduct on I-95, no representative of the Maryland State Police or the State of

176. Differences in average quantities seized are not subject to meaningful tests of statistical significance for the same reason that such tests are not useful for differences in total quantities seized. See *supra* note 160. In this case, however, the Table summarizes the information on past drug seizures on which state police troopers may base their decisions. Unless the troopers are uncommonly sophisticated about inferential statistics, it probably does not matter whether the pattern is statistically significant. Most likely, they respond primarily to the few highly visible big busts, most of which involve minority defendants.



Maryland has ever mentioned this explanation.<sup>177</sup> Why not? We can dismiss the possibility that it has gone unnoticed. Big drug seizures are rare, conspicuous events, the grand slams of drug interdiction. It is inconceivable that they are not well remembered, or that the troopers involved, and their colleagues and supervisors, failed to notice that most of the suspects in these big busts were black and Hispanic.

On the other hand, someone in the Maryland State Police command, or in the Maryland State Attorney General's office, may well have recognized that this is not actually a legitimate explanation for racial disparities. Quite the opposite: to endorse it would be an admission of racial profiling. The state, in effect, would be saying that its troopers target black and Hispanic drivers for searches not because they are more likely than whites to be drug offenders (which they are not) but because they are members of ethnic or racial groups that include most of the tiny proportion of drivers who are major drug traffickers. This may or may not be an efficient way to run a drug interdiction program — that depends on other factors that we discuss in Part V — but it is bad policy and it is unconstitutional.

### 3. *Do the Quantities of Drugs Seized Reflect the Reality of Drug Trafficking?*

We have pointed out that our data are flawed. Might those flaws have created the false appearance that most of the illegal drugs that are seized on I-95 in Maryland, by weight, are transported by blacks and Hispanics? Ordinary errors or omissions could not produce as clear and strong a pattern as we see here, but what about deliberate distortion? As we have said, it is likely that Maryland State troopers have selectively omitted some cases, and they may also have falsified other entries, but deceptive record-keeping could hardly produce this finding. To do that the troopers would have had to fail to report large seizures of drugs from cars driven by whites. That is not a realistic possibility. Unless they are bribed to turn a blind eye, or are involved in the drug trade themselves, police officers cannot neglect to report a search in which a substantial amount of contraband was found, because both the contraband itself and any suspects who are present must be taken into custody and booked. Besides, when a large cache of drugs has been found, the arresting officer will want to boast about it, not conceal it, whatever the race of the suspect.<sup>178</sup>

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177. Telephone Interview with William Mertens, Esq., Counsel for plaintiffs in Maryland State Conference of NAACP Branches v. Maryland State Police, and Samuel R. Gross (Nov. 16, 2001); E-mail message from William Mertens to Samuel R. Gross (Nov. 20, 2001) (on file with authors).

178. See, e.g., Douglas A. Campbell & Howard Goodman, *The Path to Glory for N.J. Troopers: Arrests, Arrests*, PHILA. INQUIRER, Mar. 7, 1999, at A1 (“The seizure of 99 kilograms of cocaine was Trooper Raymond Lasso’s route to stardom.”).

Could we have put the shoe on the wrong foot? Perhaps the concentration of drugs in cars with minority drivers is an effect of the MSP's search policies, rather than a cause. Only about 17% of the cars on I-95 were driven by blacks, but they accounted for about 61% of the searches; we don't have similar estimates for Hispanics, but let's assume for the moment that the disproportion is the same. If Maryland State troopers had searched comparable numbers of cars driven by white drivers, more white drivers would have been arrested for drug crimes, and more drugs would have been seized from the cars they drove. Instead, most of the drugs seized were found in cars driven by blacks and Hispanics for the simple and inevitable reason that most of the cars searched were driven by blacks and Hispanics.<sup>179</sup>

This is true, but only in part. To achieve the same search rate for white motorists as for blacks, the MSP would have had to search about five times as many cars driven by whites as they actually did. Even if they had done that — and assuming the quantities of drugs they found in these additional searches were proportional to the amounts found in the searches of white-driven cars that they in fact conducted — 64% of the medium and large drug dealers arrested would still have been black or Hispanic, despite the fact that under these imaginary circumstances black and Hispanic drivers would constitute only 27% of all drivers searched. Looking at the three drugs that made up most of the seizures, 93% of the marijuana, 70% of the cocaine, and 90% of the crack would still have been found in cars with minority drivers.<sup>180</sup> In other words, the disproportionate searching of minority-driven cars explains some of the overwhelming racial and ethnic disparities in the quantities of drugs seized, but not all or even most.

In addition, a different aspect of MSP search practices may also have exaggerated the appearance of minority domination of drug trafficking. As we have noted, the decisions to conduct some searches may have been based on prior intelligence rather than race or suspicious behavior, confidential information that a particular car was carrying drugs. In general, police officers try not to reveal the undercover intelligence on which some of their actions are based because doing so makes it more difficult to use the same sources in the future, or to guarantee secrecy to future informants. In some cases, officers have been caught lying to hide their informants,<sup>181</sup> but that's usually unrec-

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179. See, e.g., HARRIS, *supra* note 140, at 297; PETER VERNIERO & PAUL H. ZOUER, ATTORNEY GEN. OF N.J., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 67-68 (1999); Ramirez et al., *supra* note 10, at 11.

180. The predictions of quantities of drugs seized — unlike those that focus on the number of dealers — are very rough, because, as we have seen, the total quantities actually seized were concentrated in a small number of large seizures. See *supra* Table 13 and note 160.

181. See *supra* text accompanying note 86.

essary. If confidential information is a necessary part of the justification for a search, and if there is litigation over the legality of that search, officers may have to reveal the nature of that information in court, and possibly the identity of the source.<sup>182</sup> If there is an independent legal justification for their actions, however, they may never have to mention the existence of such intelligence, even if the issue is litigated.<sup>183</sup> In any event, most defendants who are caught with drugs plead guilty without ever challenging the legality of the searches, so the issue never arises. As a result, what looks to us like a typical search by the MSP — a discretionary stop to enforce a minor traffic rule, followed by a search based on consent from the driver — might actually have been undertaken because of a tip from an undercover source that the car in question would be carrying cocaine from New Jersey to Washington, D.C.

We have no direct information on how frequently the Maryland State Police relied on confidential intelligence on drug trafficking, or on how successful they were in searches based on such intelligence. It seems unlikely that such information played a role in more than a small fraction of the thousands of stops and searches that we have considered. But it is possible that undercover intelligence led the MSP to some of their larger drug seizures, and was the basis for a significant proportion of the total amounts of drugs seized. There are hints in the data that point in that direction. Consider Table 22, which displays the outcomes of consent searches on I-95 north of Baltimore, by direction of travel.

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182. *McCray v. Illinois*, 386 U.S. 300, 310-11 (1967) (citing *Roviaro v. United States*, 353 U.S. 53, 65 (1957)); 2 LAFAVE, *supra* note 64, § 3.3(g), at 188-203.

183. *McCray*, 386 U.S. at 312-14; AMERICAN LAW INST., MODEL CODE OF PRE-ARRAIGNMENT PROC. 575 (1975); 2 LAFAVE, *supra* note 64, §3.3(g), at 188-203.

**Table 22: Consent Searches in I-95 Corridor, by Direction of Travel and Quantities of Drugs Found**

	Northbound	Southbound
Trace Amounts	4.4%	.9%
Personal Use	6.6%	6.4%
Small Dealer	0	2.7%
Medium/ Large Dealer	1.5%	11.9%
Any illegal drugs	12.5%	24.8%

$p < .0001$

Going north, 88% of the drug seizures in consent searches were from people we classify as users. Going south (the direction in which the drug pipeline is believed to flow), the MSP arrested users at about the same rate as going north, and dealers, especially big dealers, at ten times the northbound rate. Dealers carrying more than a pound of marijuana or more than 50 grams of cocaine were arrested more often than users carrying less than a fifth as much. Long-haul drug traffickers may be more common in the southbound than in the northbound lanes of I-95 — perhaps even 10 times more common — but, unless they carry drugs primarily to sell to each other, they could not be nearly as common as local users traveling in either direction.<sup>184</sup> If cigarettes were outlawed there might be a sharp increase in the number of passenger cars carrying more than ten cartons, but they would still be vastly outnumbered by those with anything from a burnt butt to ten or twenty packs. Could it be that Maryland State troopers are highly skilled at picking out southbound dealers and ignoring most of the much larger group of users, on the basis of their own observations? That seems unlikely for these searches, which were conducted without probable cause and which were unsuccessful more than three times out of four. If not, perhaps a substantial portion of these southbound

184. It's possible to imagine how that could be otherwise: if users consume their drugs on the spot when they buy them; if they transport their drugs on foot, or bicycle, or bus, but in any event don't drive with them; or if users, unlike dealers, avoid interstate highways. These are improbable scenarios. We know that a fair number of users and nonpipeline dealers drive on I-95; they get arrested doing so in the northbound lanes. Is it credible that the southbound driving pipeline dealers from New York and New Jersey swamp their numbers?

dealers were caught in “whisper stops,”<sup>185</sup> on the basis of prior intelligence.

The use of informants, however, will only produce racial and ethnic disparities in the quantities of drugs seized if the police get more confidential intelligence on black and Hispanic drug dealers than on white drug dealers. That in turn could happen if the confidential information itself is a product of racially disproportionate searches at earlier times. If so, reliance on intelligence could amplify the impact of disproportionate attention to minority motorists on the proportions of drugs seized from minority group members.

Few confidential informants are volunteers. Most are drug dealers themselves who have had the misfortune to be caught, and who agree to provide information about their colleagues in order to avoid prosecution or reduce their punishment. Since more black and Hispanic drivers are stopped and searched, more black and Hispanic dealers are likely to be caught and thus become subject to recruitment as undercover informants. If they are recruited as informants, the ex-colleagues they can turn on are also likely to be black and Hispanic, since segregation is probably as common among drug dealers as elsewhere in America. The preferred method of using drug-dealer informants is to go up the criminal hierarchy: get a retailer to turn in a wholesaler, and then get the wholesaler to set up a major distributor. If that works (a significant qualification), the seizures associated with the original informant — and which, let’s assume, all involve suspects of the same race as that informant — metastasize from medium, to large, to monster, and the racial concentration that is linked to this race-specific chain grows in proportion.

In short, because almost all the drugs seized by the MSP on I-95 were found in a small number of conspicuous and highly successful searches, the reported totals of drugs seized are likely to be substantially accurate. These same reports, however, overstate the proportions of illegal drugs that were transported by blacks and Hispanics because the MSP disproportionately stopped and searched black and Hispanic motorists. The data may be further biased if (as seems likely) a significant number of large drug seizures were based on undercover intelligence that was derived from this same racially disproportionate pattern of highway searches. As a result, we cannot say to what extent blacks and Hispanics dominated the transportation of illegal drugs on I-95.<sup>186</sup>

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185. See *supra* note 84 and accompanying text.

186. It’s worth noting that the MSP seem to catch less than 1% of the illegal drugs that are transported on I-95, see *infra* text accompanying notes 338-342, and that the 99% or more that gets through may not be carried by the same sorts of drivers or in the same manner as the tiny proportion that is stopped.

## IV. CHANGES OVER TIME, 1995-2000

So far we have analyzed the MSP data set as a single temporal unit. We have tacitly assumed that the object of our study — the investigatory practices of the Maryland State Police — remained fixed from January, 1995 through June, 2000. That assumption is false — or rather, a simplification. We know that many of the patterns we have discussed changed over this period. Here we will briefly discuss the most conspicuous changes. Again, we are limited by the quality of the underlying data. The problems of omission and distortion that trouble us for the data set as a whole only get worse as we slice it into smaller pieces, and our data on searches and stops cover different (if overlapping) time periods.

Table 23 combines several of the more interesting temporal patterns in the MSP searches on I-95. It consists of seven subcharts with a cross-cutting division. The searches described by these data seem to divide into two distinct periods, those conducted in 1995 and 1996, and those conducted after 1996.

In subchart (1) we see that the number of searches on I-95 varied greatly from year to year. There were 45% fewer searches in 1996 than in 1995, and 80% fewer in 1997. After that, the search rate recovered, just as quickly, and by 1999, it was back above the 1995 level. The likely explanation is that the ongoing litigation and controversy over MSP's search practices affected its conduct. In particular, the December 1994 settlement agreement in *Wilkins v. Maryland State Police* required the MSP to adopt several new policies and training programs that bear on highway searches, and to keep records that are the basis for this study.<sup>187</sup> Maryland State troopers and their supervisors may well have spent the next few years coming to terms with the new regime, which could explain why the number of searches they conducted on I-95 plummeted and then recovered.

In subchart (2) we see that the racial distribution of these searches changed over time. The top line shows that the percentage of whites searched increased from about 21% in 1995-96 to over 40% from 1997 on. The second line shows a corresponding decrease in the percentage of blacks searched, from more than 70% through 1996 to slightly over 50% from 1997 through 2000. These two lines, and several others in Table 23, are shaded to indicate that there was a clear break between 1996 and 1997: the measure in question was sharply higher (or lower) for 1997 and for every year after that than it was for either 1995 or 1996. The lines for proportions of searches for whites and for blacks both qualify under this standard. The line for Hispanics does not, probably because those proportions are much more variable, as one

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187. See Settlement Agreement, *Wilkins*, *supra* note 22.

would expect for such a small group (8 to 35 searches per year, approximately one-tenth the number for blacks).

**Table 23: Changes over Time in MSP Searches, in the I-95 Corridor**

		1995	1996	1997	1998	1999	2000 (Jan-June)
1. Number of Searches		564	309	116	374	607	[352]*
2. Searches by Race	White	20.7%	22.0%	39.7%	47.3%	39.0%	39.2%
	Black	74.5%	66.0%	53.5%	45.5%	54.7%	53.4%
	Hispanic	3.6%	9.7%	6.9%	6.1%	5.8%	6.3%
3. Percent of Searches that Found Drugs	White	25.6%	16.2%	47.8%	40.1%	52.3%	43.5%
	Black	35.2%	40.7%	37.1%	37.7%	38.0%	42.6%
	Hispanic	10.0%	13.3%	12.5%	13.0%	17.1%	35.4%
	All	32.5%	32.4%	39.7%	37.2%	42.5%	42.6%
4. Percent of Searches Based on Consent		74%	64%	41%	30%	38%	41%
5. Percent of Medium and Large Dealers	White	3.4%	2.9%	8.7%	2.3%	1.3%	0%
	Black	16.9%	24.5%	11.3%	1.8%	5.1%	8.5%
	Hispanic	10.0%	13.3%	0%	0%	2.9%	18.2%
	All	13.8%	18.8%	9.5%	1.9%	3.5%	5.7%
6. Total Drugs Seized	MJ	357.8kg	43.9kg	37.7kg	2.5kg	32.7kg	[41.3kg]*
	Cocaine	49.7kg	97.4kg	1.9kg	1.0kg	4.8kg	[2.4kg]*
	Crack	6.8kg	9.5kg	1.1kg	0.4kg	6.8kg	[2.0kg]*
	Heroin	1.6kg	2.1kg	0.0kg	0.1kg	0.2kg	[0.8kg]*
7. Average Seizure Across All Searches	MJ	634g	142g	325g	7g	54g	117g
	Cocaine	88g	315g	17g	3g	8g	7g
	Crack	12g	31g	9g	1g	11g	6g
	Heroin	3g	7g	0.2g	0.3g	0.3g	2g

\* Estimated total for year based on data for January through June, 2000. Data for May and June, 2000, may be incomplete; see *supra* note 40.

Subchart (3) displays the hit rate by race, over time. Overall, it was comparatively level, although it reached new highs in both 1999 and 2000. There was certainly no clear break between 1996 and 1997. However, for whites the only shaded line in this subchart, the hit rate more than doubled in 1997 and never returned to its pre-1997 level. In other words, the relatively flat global hit rate conceals two counter-vailing changes: (i) The percentage of whites searched increased sharply in 1997. That would have lowered the overall hit rate, since the rate for whites in 1995-1996 was lower than for blacks, except that (ii)

the hit rate for whites increased simultaneously, moving from about 10% to 20% below that for blacks to an average of about 10% above.

In subchart (4) we see that the proportion of searches based on consent declined after 1996 from about 70% to less than 40%. This decline occurred across all three racial categories, although the rate of consent searches for whites was always lower than for blacks, which in turn was lower than for Hispanics.

As we have seen, consent searches were less likely than probable-cause searches to find *some* drugs, but more likely to find big dealers. The decrease in the proportion of consent searches after 1996 contributed to the simultaneous increase in the hit rate we see in subchart (3). It also no doubt contributed to the sharp decrease in the proportion of medium and large dealers arrested, as reflected in subchart (5). The total proportion of big dealers arrested dropped by half from 1996 to 1997, and declined further after that. Since the great majority of all such dealers were black, this pattern is reproduced among the searches of black motorists — the other shaded line on subchart (5). The percentage of big dealers found in searches of whites may have started to decline later, in 1998, but that pattern is less clear.

The drop in the proportion of big dealers arrested after 1995 was paralleled by a similar decrease in the amounts of drugs seized, both the total quantities (subchart (6)) and the average seizure per search (subchart (7)). These changes vary greatly by type of drug. There may be a general decline over time in the quantities of marijuana and crack seized, but that is far from clear. The totals fluctuate, and are heavily affected by small numbers of large seizures. For heroin and especially cocaine, however, the picture is unambiguous. Total and average seizures both dropped sharply after 1996 and never recovered. For cocaine the change is stark: over 90% of all the cocaine found by the MSP was seized in the first two years of this five-and-a-half year period. This is particularly significant since cocaine is easily the most important drug of the four, accounting for more than half of the medium and large dealers arrested, and perhaps 60% of the total retail value of the drugs seized.



**Table 24: Changes over Time in MSP Searches, Outside the I-95 Corridor**

		1995	1996	1997	1998	1999	2000 (Jan-June)
1. Number of Searches		851	869	909	1205	1525	[1042]*
2. Searches by Race	White	62.3%	63.5%	61.2%	63.5%	61.2%	65.8%
	Black	34.1%	30.3%	31.5%	30.5%	34.4%	30.5%
	Hispanic	2.8%	5.1%	5.4%	3.9%	3.0%	3.3%
3. Percent of Searches that Found Drugs	White	33.4%	35.9%	35.1%	36.9%	36.7%	46.4%
	Black	25.2%	22.4%	21.0%	26.4%	28.0%	32.7%
	Hispanic	16.7%	11.4%	10.2%	4.3%	6.7%	17.7%
	All	30.1%	30.4%	28.9%	32.0%	32.5%	41.1%
4. Percent of Searches Based on Consent		66.4%	59.8%	59.5%	54.3%	54.8%	51.8%
5. Percent of Medium and Large Dealers	White	0.4%	0.4%	0.7%	0.3%	0.8%	0.9%
	Black	6.2%	4.6%	0.7%	2.2%	3.4%	1.3%
	Hispanic	8.3%	11.4%	2.0%	2.1%	0%	0%
	All	2.6%	2.2%	0.8%	1.0%	1.6%	1.0%
6. Total Drugs Seized	MJ	2.7kg	5.5kg	9.8kg	11.0kg	7.8kg	[5.2kg]*
	Cocaine	9.8kg	10.4kg	2.0kg	5.7kg	14.2kg	[0.2kg]*
	Crack	2.3kg	8.8kg	1.1kg	0.7kg	1.5kg	[1.5kg]*
	Heroin	0.6kg	0.1kg	0.1kg	0.1kg	1.3kg	[0.1kg]*
7. Average Seizure Across All Searches	MJ	3.2g	6.4g	10.8g	9.2g	5.1g	4.9g
	Cocaine	11.6g	12.0g	2.2g	4.8g	9.3g	0.2g
	Crack	2.7g	10.2g	1.2g	0.6g	1.0g	1.5g
	Heroin	0.7g	0.1g	0.1g	0.1g	0.8g	0.1g

\*Estimated total for year based on data for January through June, 2000. Data for May and June, 2000, may be incomplete; see *supra* note 40.

Table 24 contains the same information as Table 23 for MSP searches that were not in the I-95 corridor. Given the major shifts on that section of highway, it is striking how little changed in the rest of the state. The number of searches increased every year from 1995 through 1999; in 1998 and 1999 the growth was comparatively rapid, 25% to 30% a year (subchart (1)). On I-95, in contrast, every yearly change was much larger, in one direction or the other. Outside the I-95 corridor, the proportions of whites, blacks, and Hispanics searched remained basically unchanged across the entire period (subchart (2)). Off I-95, the overall hit rate and the separate hit rates

for whites and for blacks were stable, except that they all increased in 2000; the hit rate for Hispanics dropped from 1995 to 1998 and then recovered (subchart (3)). The percentage of consent searches decreased modestly from 1995 to 2000 by 14% (subchart (4)), whereas on I-95, it dropped by 30%, with two-thirds of that drop occurring between 1996 and 1997.

The MSP searches outside the I-95 corridor do not exhibit the clear break between 1996 and 1997 that we see for the searches on I-95, with two exceptions. As in the I-95 corridor, the percentage of big dealers caught (already low by I-95 standards) declined markedly after 1996, for all searches and for those of blacks and Hispanics separately (subchart (5)). And, unlike on I-95, the amount of crack seized fell sharply at the same time (subcharts (6) and (7)), a drop that could be due to chance if a few large seizures happened to cluster in 1995 and 1996. In contrast, most of the comparatively small amounts of marijuana, cocaine and heroin seized off I-95 were found after 1996.

As we have said, the changes on I-95 after 1996 probably reflect the scrutiny that has been focused on MSP practices on that highway. One consequence of that scrutiny was the court order that required the MSP to collect and maintain data on stops as well as searches in the I-95 corridor.<sup>188</sup> Unfortunately that data collection began in May 1997, after the 1996/1997 watershed in MSP search practices on I-95. The data that are available from that date through the end of 2000 are remarkably uniform from year to year on every variable of interest. The number of stops per year goes up or down by a few percentage points; the proportion of whites stopped ranges from a low of 64.5% in 2000 to a high of 66.2% in 1998; for blacks the range is from 27.6% to 28.3%; and so forth. These flat lines could mean that stops, unlike searches, do not vary much from year to year, at least not on these dimensions. Or they could mean that we missed big changes that took place before May 1997.

In the absence of stop data from 1995 and 1996 we cannot usefully plot changes in the relative risks of a search given a stop for different racial groups.<sup>189</sup> We can, however, estimate changes over time in the relative risks of a search for black and white drivers on I-95, assuming, as before, that the racial proportions of drivers that Dr. Lamberth found in 1996 apply throughout the period covered by our search data.<sup>190</sup> In Table 4 we saw that the comparative risk of a search for a black driver was 5.2 times that for a white driver, from May 1997 through April 2000. In Table 25 we see that, as with other measures we have examined, this ratio changed drastically after 1996. The MSP

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188. See *supra* note 32.

189. See *supra* Table 2.

190. See *supra* text at note 42.

continued to search black drivers at several times the rate for white drivers through 2000, but the magnitude of that disparity decreased by more than half after 1996. This could mean that the Maryland State troopers reacted to the litigation and complaints about racial profiling by searching fewer black drivers and more white drivers, to some extent. At the same time they also shifted from consent searches, the low probability/high yield type, to probable-cause searches, the type that succeed more often but usually in a small way. Predictably, the overall hit rate went up and the number of big dealers arrested went down.<sup>191</sup>

**Table 25: Risk of Search for a Black Driver, Compared to a White Driver, in the I-95 Corridor**

1995	1996	1997	1998	1999	2000
X 15.4	X 12.5	X 5.7	X 4.1	X 6.0	X 5.8

Another possible interpretation of this shift is that it reflects a change in record keeping rather than practice. Isn't it possible that as the issue of racial profiling heated up, MSP personnel became increasingly conscious of the importance of these records, and increasingly likely to omit searches that could make them look bad? Might they not also have become increasingly careful to pre-screen searches in order to minimize the number of unsuccessful ones they report, especially when those searched are black or Hispanic? Perhaps, but the question is not whether these omissions occur. It is whether they became more common to an extent that could explain the other changes that we have observed, which is improbable. A major increase in the proportion of omitted searches would reduce the total number of recorded searches for the year in question. Needless to say, any factors that influence the true number of searches — changes in stop policies, or personnel, for example — would also affect the reported total. Even so, if these apparent changes in search patterns were primarily the product of selective recording we would expect them to be more pronounced in years for which fewer searches are recorded. In fact, the percentages of searches by race, the hit rates, and the proportions of consent searches were all essentially the same in 1997, with 116 reported searches, and in 1999, with 607.

While the number and the distribution of searches might be biased by systematic underreporting, the quantities of drugs seized are likely to be substantially accurate, as we have explained.<sup>192</sup> And yet the total

191. See *supra* Table 23, subcharts (3) and (5).

192. See *supra* Section III.D.3.

amounts of cocaine and heroin seized in the I-95 corridor changed more drastically over time than any other quantity we have discussed. The average amount of heroin seized per year dropped by about 85% after 1996; the average amount of cocaine seized plunged more than 95%. Some of that steep decline may be due to other changes we have discussed, but not much. A 20% reduction in the number of blacks searched and a 30% decrease in the percentage of consent searches can hardly explain a 95% decline in the amount of cocaine found, especially when the quantities of marijuana and of crack seized were comparatively unaffected. Something else is going on: a change in aspects of Maryland State Police searches that are not reflected in these data, or in the information on which the troopers acted, or in their overall drug interdiction program, or in the behavior of the drug traffickers themselves.

## V. COMMENTARY

In this section we consider the implications of the data we have reviewed, from three points of view: (1) As a *factual* matter, we conclude that while the evidence of racial profiling that we have presented might not persuade some courts, especially if presented by the defense in a criminal case, it is strong enough to satisfy the decision makers who matter most on this issue: police administrators and their superiors, legislatures, and the public. (2) The *legal* status of racial profiling turns on two separate constitutional provisions. Some comparatively old Fourth Amendment cases permit police officers to rely in part on race in deciding who to stop or search, but courts have increasingly shied away from those rulings; on the other hand, the Equal Protection Clause of the Fourteenth Amendment clearly prohibits the use of race for these purposes, but the remedy for such a violation is unclear. (3) Finally, we discuss the wisdom and morality of racial profiling as a *policy*. We conclude that while in theory some racial profiling programs might conceivably be worth the fear, humiliation and disruption they cause to countless innocent suspects, this one cannot possibly be justified because the entire drug interdiction program of which it is a part produces no discernable benefits.

### A. *Do These Data Prove Racial Profiling?*

The data we have presented are complex, but the central question to which they are addressed is simple: Did Maryland State troopers stop and search black and Hispanic motorists because of their race or ethnicity? The answer seems clear: yes. The Maryland State Police did use race and ethnicity as a basis for choosing motorists to stop and to search for drugs on I-95 in Maryland, north of Baltimore, from 1995 into 2000. The drug interdiction program that included this racial pro-

filing component focused primarily on southbound cars, reflecting the widely held law-enforcement view that most illegal drugs sold in the Baltimore/Washington, D.C. area come from a regional distribution center in New York to the north. There is no evidence the blacks were more likely than whites to carry drugs, and some evidence that Hispanics were less likely to do so, so this use of race did not improve the MSP's hit rate. But blacks and Hispanics were overrepresented among the small minority of drug traffickers in our data, and they accounted for the great majority of the total quantities of drugs seized by the Maryland State Police.

Despite these findings, the issue is contested. The Maryland State Police continue to deny that they practice racial profiling, and *Maryland State Conference of NAACP Branches v. Maryland State Police*,<sup>193</sup> the second class action lawsuit alleging racial profiling by the MSP, is still pending. In that and other contexts, will the sort of evidence we have presented be convincing?

The persuasive power of any information depends on the audience, and one important audience has been exceedingly demanding. In *McCleskey v. Kemp*, the Supreme Court considered powerful statistical evidence of racial discrimination in the administration of the death penalty in Georgia, and decided that it wasn't strong enough.<sup>194</sup> McCleskey relied primarily on a well-known study by Professor David Baldus and his colleagues, who collected and analyzed detailed data on homicide prosecutions in Georgia over a period of several years, and concluded, after taking into account hundreds of nonracial variables that might explain sentencing outcomes, that defendants convicted of killing white victims were several times more likely to be sentenced to death than those convicted of killing black victims.<sup>195</sup> This is a remarkable study. It was described in the record in *McCleskey* as "far and away the most complete and thorough analysis of sentencing" ever conducted.<sup>196</sup> Our conclusions may be persuasive, but no more so than those by Baldus et al. which the Supreme Court rejected.

Doctrinally, the holding in *McCleskey* was an application of the rule in *Washington v. Davis* that a litigant who claims that he was the victim of a violation of the Equal Protection Clause must prove purposeful discrimination.<sup>197</sup> The difficulty of proving purposeful dis-

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193. See *Maryland State Conference of NAACP Branches v. Maryland State Police*, No. CCB-98-1098 (D. Md. filed 1998); *Maryland State Conference of NAACP Branches v. Maryland State Police*, 72 F. Supp. 2d 560 (D. Md. 1999).

194. 481 U.S. 279, 293-99 (1987).

195. See DAVID C. BALDUS, GEORGE WOODWARD & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

196. *McCleskey v. Kemp*, 753 F.2d 877, 907 (11th Cir. 1985) (Johnson, J., dissenting and concurring in part) (quoting Dr. Richard Berk, member of a National Academy of Sciences panel on research on sentencing in the United States).

197. *Washington v. Davis*, 426 U.S. 229, 239-40 (1976).

crimination, however, varies from one context to another, and is particularly great where, as in *McCleskey*, the challenged conduct consists largely of discretionary acts by prosecutors, judges and juries. Specifically, the Court held that because discretion is an essential component of our system of criminal justice, statistical evidence is inherently insufficient to prove discriminatory intent.<sup>198</sup> To win, *McCleskey* would have had to present specific evidence of purposeful discrimination by the actual decision makers whose actions resulted in his death sentence.<sup>199</sup>

Statistics at most may show only a likelihood that a particular factor entered into some decisions . . . *McCleskey* asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.<sup>200</sup>

The holding in *McCleskey* has been widely criticized, and rightly so.<sup>201</sup> As Justice Brennan points out in dissent, there was no real doubt that race did influence capital sentencing in Georgia; everybody who dealt with the issue in practice knew it and acted on that knowledge.<sup>202</sup> The Court denies the obvious. It acknowledges, as it must, that the Equal Protection Clause prohibits racial discrimination in state criminal prosecutions, but it demands evidence that is generally impossible to obtain. If the same burden of proof applies to claims of racial profiling on the highway, then the evidence we have presented is also "clearly insufficient."

But does *McCleskey's* rejection of the Baldus study set the standard for proving racial profiling? Perhaps not, even in the context of an equal protection claim in a criminal case. In *State v. Soto*,<sup>203</sup> Judge Robert Francis of the New Jersey Superior Court decided a challenge to racial profiling on the New Jersey Turnpike based primarily on evidence much like the data on traffic law violations and traffic stops that we have presented. His interpretation of the value of statistical evi-

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198. See *McCleskey*, 481 U.S. at 297 ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. . . . Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decision makers in *McCleskey's* case acted with discriminatory purpose.").

199. *Id.* at 298.

200. *Id.* at 308-09.

201. See, e.g., BALDUS ET AL., *supra* note 195, at 370-93; SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 159-227 (1989); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

202. *McCleskey*, 481 U.S. at 321.

203. 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

dence seems very different from that of the Supreme Court in *McCleskey*:

Statistics may be used to make out a case of targeting minorities for prosecution of traffic offenses . . . . While defendants have the burden of proving “the existence of purposeful discrimination,” discriminatory intent may be inferred from statistical proof presenting a stark pattern or an even less extreme pattern in certain limited contexts.<sup>204</sup>

He goes on to hold that the defendants did in fact prove racial profiling by the New Jersey State Police.

How did Judge Francis distinguish *McCleskey*? At first blush it looks as though he didn’t really try. Instead of relying on the bits of nonstatistical evidence of discrimination in the record — mostly training materials and testimony by disaffected ex-troopers — he cites *McCleskey* itself for the proposition that statistics *may* prove discrimination. The *McCleskey* opinion does say that a sufficiently stark statistical discrepancy may prove discrimination in criminal prosecution, but the 1886 case it points to, *Yick Wo v. Hopkins*,<sup>205</sup> was so extreme it has never been duplicated. Yick Wo, who was prosecuted for operating a laundry without a permit, showed that “all but one of the white applicants received permits [to operate laundries in wooden buildings], but none of the over 200 Chinese applicants were successful.”<sup>206</sup> The evidence in *Soto* was a far cry from the rejected Baldus study, let alone the extraordinarily one-sided showing in *Yick Wo*. The *McCleskey* Court, however, also acknowledges that it has accepted less extreme statistical disparities as proof of intentional discrimination in other settings — specifically, jury composition and employment discrimination — where the decisionmaking process is simpler and involves fewer decision makers than capital charging and sentencing: “In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.”<sup>207</sup> Judge Francis picks up this theme, citing an earlier New Jersey state court opinion that “implies that discriminatory intent may be inferred from statistical proof in a traffic stop context probably because only uniform variables . . . are relevant to the challenged stops . . . .”<sup>208</sup>

This enigmatic statement in *Soto* apparently means that because traffic stops are supposed to be based on a few relatively simple variables, the influence of race is comparatively easy to detect. It is a plausible argument: it may be easier to describe how traffic laws

204. *Id.* at 360 (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

205. 118 U.S. 356 (1886).

206. *McCleskey*, 481 U.S. at 293 n.12.

207. *Id.* at 295.

208. *Soto*, 734 A.2d at 360 (citing *State v. Kennedy*, 588 A.2d 834 (N.J. Super. Ct. App. Div. 1991)).

should be enforced than how homicides should be prosecuted, and there may be less variation in policy from one jurisdiction to another.<sup>209</sup> Some may disagree, however, and Judge Francis refers (curtly) to only one of the two considerations the Supreme Court discusses in *McCleskey*. The other factor — the number of decision-makers — does not support his position, since stops on the New Jersey Turnpike are made by many different officers.

There is a related argument, however, that may be more persuasive. *McCleskey* relies heavily on the claim that we must not constrain the types of decisions at issue in that case. The Court repeatedly emphasizes the importance of wide-ranging prosecutorial discretion in charging,<sup>210</sup> and of open-ended jury sentencing in capital cases.<sup>211</sup> Our legal system has no similar commitment to police officer discretion in traffic law enforcement.<sup>212</sup> The New Jersey State Police is a paramilitary organization. Troopers can be given specific orders on how, when and why to conduct traffic stops. For these purposes, a police force may be less like a prosecutor or a jury, whose independence the Supreme Court was concerned to protect, and more like the contrasting examples the Court offered in *McCleskey*: “The decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer,”<sup>213</sup> even if they were made by many separate individuals within the organization.

Not only is the police discretion that was examined in *Soto* less favored than the prosecutorial and jury discretion in *McCleskey*, but the government function it serves is less important. *McCleskey* was about murder prosecutions. There is an unmistakable sentiment running through the Court’s opinion: This is difficult but essential work; let’s not make it impossible by demanding more consistency than prosecutors and juries can deliver. Drug interdiction has not achieved that dignity. We are ambivalent about the enterprise as a whole, and less willing to tolerate injustices and inequities. Releasing guilty drug dealers is a cost, but they leave no mutilated bodies or grieving relatives, and we know that most are never caught in the first place. Releasing convicted murderers is another matter entirely.

*Soto* is unique. There is only one other reported opinion in any American jurisdiction (also from New Jersey) in which evidence in a

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209. See GROSS & MAURO, *supra* note 201, at 173-80.

210. *McCleskey*, 481 U.S. at 311-13, 319.

211. *Id.* at 293-94, 308-11.

212. See, e.g., *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131, 1141 (N.D. Cal. 2000); Carl J. Schifferle, *After Whren v. United States: Applying the Equal Protection Clause to Racially Discriminatory Enforcement of the Law*, 2 MICH. L. & POL’Y REV. 159, 175 (1997); Joseph H. Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717, 727 (1971).

213. *McCleskey*, 481 U.S. at 295 n.15.



criminal case was suppressed because of racial discrimination under the Equal Protection Clause,<sup>214</sup> and none in which a court did so on the basis of statistical evidence. *Soto* is also a narrow decision; it concerns stops only. Even a court that agreed with *Soto* in that setting might conclude that because the separate decision to conduct a search after a stop may be based on more elaborate information, statistical evidence is inherently insufficient to prove discrimination at that stage. But the main reason that *Soto* stands alone may be practical rather than doctrinal: it is a specimen of a rare species.

*Soto* was a systematic challenge to racial profiling in the context of a criminal prosecution, or rather seventeen criminal prosecutions that were joined for consideration of that issue. Most criminal cases that raise similar issues are individual cases, where the issue is the legality of a particular search under the Fourth Amendment. Systemic challenges to racial profiling are generally litigated as civil actions, usually complaints under 42 U.S.C. § 1983 alleging that the police deprived the plaintiffs of federal constitutional rights under color of state law. In theory, *McCleskey* applies to civil and criminal cases alike; it addresses the requirements for proof of an equal protection violation, not the remedy. In practice, equal protection claims follow very different paths in civil and criminal cases even when the underlying issues are identical.

Civil cases have several interrelated advantages over criminal cases as vehicles for challenging racial discrimination in the criminal justice system. Because the challenging parties are plaintiffs rather than defendants, they and their lawyers can take the initiative, structure the cases, and assemble resources beyond the reach of all but the rarest criminal defendant. The named plaintiffs are generally innocent victims of police misconduct, not criminals who were caught as a result of that misconduct. They are more credible as witnesses, and they personify the costs of discrimination rather than its occasional benefits. Liberal civil discovery rules make it possible for civil plaintiffs to conduct depositions, subpoena documents and obtain the sort of evidence that defendants in run-of-the-mill criminal cases can only dream of; as a result, they are more likely than criminal defendants to find

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214. The case is *State v. Maryland*, 771 A.2d 1220 (N.J. 2001), in which the New Jersey Supreme Court ordered suppression on both Fourth Amendment and equal protection grounds. New Jersey is the only American jurisdiction in which it is settled that suppression is an appropriate remedy for an equal protection violation, a position first articulated by the Appellate Division in *State v. Kennedy*, 588 A.2d 834 (N.J. Super. Ct. App. Div. 1991), then followed in *Soto*, and finally endorsed by the New Jersey Supreme Court in *Maryland*. See *infra* notes 291-292 and accompanying text. In *United States v. Pollard*, 209 F. Supp. 2d 525 (D.V.I. 2002) the court suppressed evidence on the ground that 8 C.F.R. § 235.5(a), which requires an immigration inspection before United States citizens may travel from the Virgin Islands to other parts of the United States, lacks a rational relationship to a permissible governmental goal and therefore violates the Equal Protection Clause and the Fifth Amendment.

and present nonstatistical evidence of discrimination to accompany any statistics. For systemic civil challenges, the relief sought is primarily prospective, new rules for future conduct rather than the dismissal of pending prosecutions. This makes it easier to agree on terms for settlements, especially since settlements usually include a ritual disclaimer that by settling the defendant police department is not admitting to any past misconduct. The focus on reform rather than individual misconduct also makes the value of aggregate statistical evidence more apparent: How else can one describe how an entire agency is behaving? And if the case does not settle, the risk to the state is usually greater in a civil discrimination trial than at a hearing in a criminal case, both because the civil case is likely to be better prepared and litigated, and because the dismissal of a drug prosecution is a small cost compared to an injunction or a sizeable award of damages against a police force.

In the end, most defense motions based on claims of racial discrimination in criminal cases are denied, and most civil cases raising similar claims settle.<sup>215</sup> *Wilkins v. Maryland State Police*<sup>216</sup> is an example. The settlement in *Wilkins* required the defendants to pay modest damages to the named plaintiffs, and fees to their lawyers, but the main provisions were forward looking: the Maryland State Police reiterated its official opposition to racial profiling, and agreed to formulate an official policy embodying that position, to conduct various training programs, and to undertake the record-keeping program that produced the database that we have relied on in this Article.<sup>217</sup>

The major obstacle to success in civil actions against police departments is the complexity and expense of litigation. A major advantage is that some of the most important civil law suits alleging racial profiling have been brought by the United States Department of Justice rather than by private plaintiffs. Under 42 U.S.C. § 14141, the Department of Justice has the authority to investigate and, if warranted, to sue a police department in order to eliminate a pattern and practice of discrimination on the basis of race, ethnicity or na-

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215. See Laura L. Scarry, *Racial Profiling Litigation, The Defense Perspective* 6, (unpublished paper presented at Nat'l Symp. on Racial Profiling & Traffic Stops, Northwestern University Center for Public Safety, Sept. 30-Oct. 2, 2001) (on file with authors) (“[O]nly a small percentage of these [civil racial profiling] cases, for whatever reason, actually proceed to trial. The majority of the cases settled . . . .”); see also David Rudovsky, *Law Enforcement by Stereotype and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 352 n.349, 358 n.388, 360-63 (2001) (discussing several settlements in civil law suits over racial profiling); Julia C. Martinez, *Settlement Reached in Tinicum Suit*, PHILA. INQUIRER, Oct. 6, 1994, at B1.

216. Settlement Agreement, *Wilkins*, *supra* note 22.

217. *Id.*

tional origin.<sup>218</sup> Considering the prestige, the resources and the power of the Justice Department, it is no surprise that most defendants agree to settle.<sup>219</sup> *United States v. New Jersey*<sup>220</sup> is instructive. It concerned the same pattern of racial profiling by the New Jersey State Police that was the subject of the *Soto* case and it was based to a great extent on the same evidence as *Soto*. *New Jersey*, however, resulted in an elaborate consent decree, including provisions for training, supervising and disciplining troopers to prevent similar conduct in the future, for record-keeping of the sort required by the *Wilkins* settlement in Maryland (but more detailed), and for a court-appointed monitor to supervise compliance with these provisions.<sup>221</sup>

And then there is politics. In the past several years, as racial profiling has become an increasingly powerful political issue, attempts to address the problem have shifted from litigation to legislation and administration. Two examples are particularly telling for our purposes:

- On April 20, 1999 the New Jersey State Attorney General's office — after years of defending the New Jersey State Police in court and in public — simultaneously issued a report conceding that racial profiling by the State Police was “real,”<sup>222</sup> and dropped its appeal of the trial court decision in *State v. Soto*. The problem had become so notorious that the governor and the attorney general decided to switch to the winning side in the court of public opinion.<sup>223</sup>

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218. See Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 14141 (1994); see also Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 815 (1999).

219. As of February 1, 2001, the Justice Department had filed five such pattern and practice law suits, and was conducting fifteen additional pattern and practice investigations, some but not all of which included claims of racial profiling. Three of the lawsuits had been resolved through consent decrees entered by federal district courts, and in a fourth a consent decree was awaiting court approval which has since been granted. At least two of these consent decrees included provisions directed at racial profiling, and at least one additional racial profiling investigation was resolved by a non-judicial settlement agreement between the Department and the local government defendants. U.S. Dep't of Justice, Department of Justice Police Misconduct Pattern or Practice Program 7-8 (document distributed by Steven H. Rosenbaum, Chief, Special Litigation Section, Civil Rights Division, U.S. Dep't of Justice, at Nat'l Symp. on Racial Profiling and Traffic Stops, Northwestern University Center for Public Safety, Sept. 30-Oct. 2, 2001) (on file with authors). As of November, 2001, one additional consent decree had been entered, including provisions prohibiting racial profiling, and an additional out-of-court settlement had been reached. SPECIAL LITIGATION SECTION, U.S. DEPT. OF JUSTICE, DOCUMENTS AND PUBLICATIONS, available at <http://www.usdoj.gov/crt/split/findsettle.htm> (last visited Sept. 24, 2002).

220. No. 99-5970 (MLC) (D.N.J. Dec. 30, 1999), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (last visited Oct. 1, 2002).

221. *Id.*

222. VERNIERO ET AL., *supra* note 179, at 4.

223. See David M. Herszenhorn, *Reversal Has Some Questioning Attorney General's Motives*, N.Y. TIMES, Apr. 20, 1999, at B8.

- On May 15, 2001, Maryland became the thirteenth state to enact legislation on racial profiling, in this case a law prohibiting the practice and requiring all police officers to record and report, among other things, the race or ethnicity of every driver they stop — in effect, a broader and more permanent legislative version of the *Wilkins* settlement in 1995.<sup>224</sup> The Washington Post reports that “at a bill-signing ceremony packed with jubilant black lawmakers,” Governor Parris N. Glendening said: “It is simply outrageous that African Americans are being targeted for traffic stops. We know it does happen. And under this bill, it is illegal and it will stop.”<sup>225</sup>

Needless to say, the politicians and administrators who have taken action against racial profiling, from the President of the United States<sup>226</sup> to city councils and police chiefs around the country,<sup>227</sup> have not demanded the type of evidence required by the Supreme Court in *McCleskey*. At the end of his opinion for the majority in *McCleskey*, Justice Powell added a final reason for the Court’s rejection of statistical evidence: “McCleskey’s arguments are best presented to the legislative bodies . . . . Legislatures . . . are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts . . . .’ ”<sup>228</sup>

On the issue in *McCleskey* itself, Justice Powell was no prophet. Legislative bodies have been no more willing than courts to tackle racial discrimination in capital sentencing.<sup>229</sup> For racial profiling, however, his argument has force; legislative bodies and executive officers are acting to address the problem, and doing so on the basis of

224. MD. CODE ANN., TRANSP. II § 25-113 (2002).

225. Lori Montgomery, *Racial Profiling in Maryland Defies Definition — or Solution*, WASH. POST, May 16, 2001, at A1.

226. Steven A. Holmes, *Clinton Orders Investigation on Possible Racial Profiling*, N.Y. TIMES, June 10, 1999, at A22.

227. See, e.g., *Council Names 14 Citizens to Racial Profiling Study Group*, SEATTLE POST-INTELLIGENCER, Mar. 20, 2001, at B2; Sam Skolnik, *Drug Arrests Target Blacks Most Often, Study Finds Racial Disparity; Chief Pledges to Review Issue*, SEATTLE POST-INTELLIGENCER, May 15, 2001, at B1; TUCSON POLICE DEPT., RACIAL PROFILING — TPD’S RESPONSE TO COMMUNITY CONCERNS (2000), available at [http://www.ci.tucson.az.us/police/Public\\_Info/Racial\\_Profiling/body\\_racial\\_profiling.html](http://www.ci.tucson.az.us/police/Public_Info/Racial_Profiling/body_racial_profiling.html) (last visited Oct. 22, 2002).

228. *McCleskey v. Kemp*, 481 U.S. 279, 319 (citations omitted).

229. There have been several attempts to override *McCleskey* by act of Congress, all unsuccessful. See, e.g., Racial Justice Act of 1993, H.R. 3329, 103d Cong. (1993). The only state statute that attempts to address the issue of racial discrimination in capital sentencing is the Kentucky Racial Justice Act, KY. REV. STAT. ANN. §§ 532.300-305 (Michie 1999), which was enacted in 1998.

evidence that does not satisfy *McCleskey's* requirements for proof of intentional discrimination. The difference is easy to explain. The victims of racial discrimination in capital sentencing are convicted murderers — as small, isolated, despised and powerless a group as one can imagine. The many innocent blacks and Hispanics who have been victimized by racial profiling, and the countless others who fear they might be, are a vastly more powerful political constituency.

The courts, of course, are not immune to politics. As Mr. Dooley (satirist Finley Peter Dunne's philosopher/bartender) told us a century ago, "th' supreme court follows th' iliction returns."<sup>230</sup> So far the high court has had no opportunity to address the issue, but some lower courts, like politicians, have been willing to act. They have been more receptive to statistical evidence of discrimination in civil racial profiling cases than in criminal prosecutions — in the typical case, they permit the suit to proceed, and supervise the eventual settlement — and in one major criminal case, *State v. Soto*, a court relied on statistical evidence of racial profiling to suppress evidence for a whole class of criminal defendants.

We do not mean to say that the attempted reforms have been successful. That's less clear, regardless of their source. Racial profiling continued in New Jersey after *Soto*;<sup>231</sup> the settlement in *Wilkins* did not end the dispute over racial profiling on I-95 in Maryland; and the new Maryland statute prohibiting "race based stops" may do no better.<sup>232</sup> Legislative reforms may prove ineffective; proof of discrimination in criminal cases is extremely difficult;<sup>233</sup> civil cases are hard to mount, and sometimes lose. Our claim here is simply that for racial profiling, in the forums that matter — of which the most important may be public opinion — the type of evidence we have presented is frequently persuasive.

### B. *Is It Legal?*

Assuming it is clear that the Maryland State Police did intentionally use race to decide which drivers to stop and to search, are the legal consequences equally clear? If race were used as a factor in charging or sentencing, there would be no debate. Everybody agrees that prosecutors, judges, and juries may not take race into

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230. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

231. Associated Press, *Report: NJ Minorities Still Profiled*, July 17, 2001, 2001 WL 24713260.

232. MD. CODE ANN., TRANSP. II § 25-113 (2002). This statute is only addressed to traffic stops, and includes a limiting "narrow" definition of racial profiling. See *infra* note 278 and accompanying text.

233. See David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 307-08, 326.

account in deciding who to prosecute or what punishment to impose. Criminal investigation is another matter. At that early stage of the legal process police officers must make critical choices based on sketchy information. Some argue that they should be allowed to consider race as one factor among others in deciding what to do.

In the wake of the September 11 attacks, some commentators have said that we should reexamine our opposition to racial profiling, at least when physical security is at stake. Liberal columnist Nicholas Kristoff, for example, writes that “We must . . . relax a taboo, racial profiling, for one of the lessons [we have learnt] is that it sometimes works.”<sup>234</sup> He is not alone<sup>235</sup> — and he is not unopposed. Others argue that even in the face of terrorist attacks, the government must not base criminal investigations and arrests on race or ethnicity.<sup>236</sup> This recent debate, however, has focused entirely on searches for weapons or explosives at airports or other sensitive locations, and on investigations that might help identify terrorists or uncover their plans. After September 11, as before, very few people publicly support racial profiling for drug interdiction. The most influential of this small group is probably Heather MacDonald.<sup>237</sup>

MacDonald believes that it is appropriate for the police to rely on race in deciding who to search. According to MacDonald, race should not be a basis for a decision to stop a car on the highway because at that point the officer has so little to go on.<sup>238</sup> Searches are another matter: “But if race does play a role in the request to search, it is a much

234. Nicholas D. Kristof, *Liberal Reality Check*, N.Y. TIMES, May 31, 2002, at A23.

235. See, e.g., Stanley Crouch, *Drawing the Line on Racial Profiling*, N.Y. DAILY NEWS, Oct. 4, 2001, at 41 (arguing that current Arab-American profiling differs from African-American profiling); Michael Kinsley, *When Is Racial Profiling Okay?*, WASH. POST, Sept. 30, 2001, at B7 (arguing that racial profiling is sometimes appropriate, and may be acceptable at airport security checkpoints); Editorial, *Profiling Debate Resumes*, DENVER POST, Oct. 3, 2001, at B6 (suggesting that race should be taken into account in finding law enforcement targets); Dorothy Rabinowitz, *Hijacking History*, WALL ST. J., Dec. 7, 2001, at A18 (arguing that Arab-American profiling is markedly different from past forms of racial profiling); Stephen J. Singer, *Racial Profiling Also Has a Good Side*, NEWSDAY, Sept. 25, 2001, at A38 (suggesting that race, in conjunction with other factors, can signal the need for further investigation).

236. E.g., Lisa Biank Fasig, *ACLU Urges Police: Refuse to Help U.S. Government Detain Immigrants*, PROVIDENCE J. BULL., Dec. 3, 2001, at B3 (stating that ACLU charges that program to interview Middle Eastern men is “thinly disguised racial profiling”); Chisun Lee, *Let Us Not Be Suckers for Anybody*, VILLAGE VOICE, Jan. 1, 2002, at 52 (criticizing post-9/11 racial profiling); Jim Schaefer & Tamara Audi, *Antiterror Plan Raises Anxieties*, DETROIT FREE PRESS, Nov. 16, 2001, at 1B (reporting anger of Arab-American leaders and civil rights activists); see also Gross & Livingston, *supra* note 9 (discussing the post-9/11 debate over racial profiling).

237. Thus, for example, nationally syndicated columnist George Will wrote: “So who is Heather MacDonald to cast decisive doubt on the prevalence, even the existence, of racial profiling? She is the indispensable journalist.” George F. Will, *Exposing the Myth of Racial Profiling*, WASH. POST, Apr. 19, 2001, at A19.

238. MacDonald, *supra* note 13, at 16.

diminished one compared with a car stop,” since the officer has more information after he gets a close look at the car and talks to the driver.<sup>239</sup> In that context, she argues, taking race into account is permissible because it improves the officers’ ability to predict which searches will uncover drugs.<sup>240</sup> Similarly, John Knowles and colleagues conclude that Maryland State troopers were not guilty of “prejudice” or “bias,” which they define as choosing suspects on the basis of race for no good reason. Instead, the troopers seem to have pursued what these researchers consider to be an acceptable policy of “statistical discrimination,” using race as a predictor of criminality because it is effective.<sup>241</sup> As we have seen, while racial profiling by the MSP does not increase the hit rate for highway searches,<sup>242</sup> it probably does increase the number of drug traffickers who are found.<sup>243</sup> This brings us back to the central question: Is “statistical discrimination” acceptable as a matter of law and policy?

Racial profiling is not a subspecies of racial bigotry. Knowles et al. define racial profiling as irrational acts of discrimination that are “biased” or “prejudiced”; MacDonald repeatedly identifies racial profiling with “racism.” These terms are misleading. Racial profiling could be a perfectly logical program with no racial animus. Consider an example discussed earlier. If African Americans are more prone than whites to a particular disease (e.g., diabetes), then it is completely proper — indeed, good practice — for doctors to act on the assumption that some black patients have that disease, even though, other things being equal, they would conclude the opposite for whites. No one objects to explicit reliance on race if it makes medical decisions more accurate. Similarly, a nonracist police officer may decide to search blacks more readily than whites because she believes it makes her decisions more accurate. This may be the main reason why police officers use race to decide who to search. Nonetheless, it is racial profiling to do so, and many people do object, even if it’s true that blacks are more likely than whites to be drug dealers. But is it legal to use race for that purpose?

### 1. *Does the Fourth Amendment Forbid Any Consideration of Race?*

The major constitutional basis for objecting to searches and seizures is the Fourth Amendment. Two comparatively old Supreme Court cases form the starting point for Fourth Amendment jurispru-

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239. *Id.* at 24.

240. *Id.*

241. Knowles et al., *supra* note 25.

242. *See supra* accompanying text at notes 141-150.

243. *See supra* Table 21 and accompanying text.

dence on this issue. In *United States v. Brignoni-Ponce* the Court held that under the Fourth Amendment, the Border Patrol needed a "reasonable suspicion" to stop a car on a roving patrol to search for illegal aliens, and that apparent Mexican ancestry alone was insufficient: "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."<sup>244</sup> In *United States v. Martinez-Fuerte*, the Court held that the Border Patrol could stop all cars, without individual suspicion, at a fixed checkpoint 60 miles from the Mexican border, and that after such a lawful stop it could refer a car to a "secondary area" for a more detailed check based "largely" on the ethnicity of the driver.<sup>245</sup> The Court relied in part on its characterization of this referral as a lesser imposition than the sort of investigatory stop that normally requires "reasonable suspicion,"<sup>246</sup> and on evidence that in the area where this checkpoint was located Mexican ethnicity was a good predictor of immigration law violations.<sup>247</sup> The context of *Brignoni-Ponce* and *Martinez-Fuerte* bears little resemblance to that of ordinary encounters between police officers and civilians. Mexican ethnicity is uniquely important for immigration policing on the southern border, and the Border Patrol has the unusual authority to detain people without individualized suspicion at the border itself or at checkpoints in the border area. Nonetheless, these two cases, taken together, have generated a general view that race may not be the sole basis for deciding who to stop or search, but that it may constitutionally be considered as one factor among others.<sup>248</sup>

A review of lower court Fourth Amendment cases reveals a legal picture that is more complex than this shorthand description, and on the whole less friendly to the use of race in police investigations. The two federal circuit court cases most on point seem to be in direct conflict. In *United States v. Weaver*, in 1992, the Eighth Circuit held that under *Brignoni-Ponce* and *Martinez-Fuerte* the reasonable suspicion required to justify the detention of the defendant's bags could be based on several factors, including his race.<sup>249</sup> Eight years later, in *United States v. Montero-Camargo*, the Ninth Circuit refused to permit road stops by the Border Patrol based on Mexican appearance among other factors: "Hispanic appearance is, in general, of such little proba-

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244. 422 U.S. 873, 886-87 (1975).

245. 428 U.S. 543, 562 (1976).

246. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 26-27 (1967).

247. *Brignoni-Ponce*, 22 U.S. at 886-87.

248. See *infra* notes 279-280 and accompanying text for a more detailed discussion of the use of race as the "sole basis" for police action.

249. 966 F.2d 391, 394 n.2 (8th Cir. 1992).



tive value that it may not be considered as a relevant factor where particularized or individualized suspicion is required."<sup>250</sup> The Ninth Circuit distinguished *Martinez-Fuerte*, pointing out that the Supreme Court held that the intrusion in that case was "sufficiently minimal that no particularized reason need exist to justify it;"<sup>251</sup> and it distinguished *Brignoni-Ponce* on the ground that in the quarter century since that case was decided, the population of Mexican American citizens had grown enormously and the probative value of Hispanic appearance as evidence of illegal entry into the country had correspondingly decreased.<sup>252</sup> State court cases are also in conflict. Some courts permit the use of race as a factor in determining "individualized suspicion,"<sup>253</sup> while others hold that "[n]o rational inference may be drawn from the race of [a person] . . . that he may be engaged in criminal activities."<sup>254</sup>

The central question under the Fourth Amendment is whether a search or seizure was "reasonable." One could rationally argue that it is "unreasonable" to stop, search, or arrest a person because of her race, whether or not there is a rational inference from race to criminal activity,<sup>255</sup> but the Supreme Court said the opposite in *Whren v. United States*: "[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."<sup>256</sup> Concern about discrimination seeps into some Fourth Amendment racial profiling opinions, pre-*Whren*<sup>257</sup> and post-*Whren*,<sup>258</sup> but the courts' basic task is to decide whether the officer had

250. 208 F.3d 1122, 1135 (9th Cir. 2000); *see also* *Whitefield v. Bd. of Comm'rs*, 837 F. Supp. 338, 340, 344 (D. Colo. 1993) (agreeing that the fact that officers relied on race to some extent justifies summary judgment against them for Fourth Amendment violation).

251. *Montero-Camargo*, 208 F.3d at 1132 n.16 (explaining *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976)).

252. *Id.* at 1132-34.

253. *E.g.*, *Castaneda v. Commonwealth*, 376 S.E.2d 82, 83, 86 (Va. Ct. App. 1989) (noting that trooper had reasonable suspicion based on drug courier profile that explained occupants of cars with drugs were "frequently Hispanic or black").

254. *State v. Kuhn*, 517 A.2d 162, 165 (N.J. Super. Ct. App. Div. 1986); *see also* *People v. Bower*, 597 P.2d 115 (Cal. 1979).

255. *See, e.g.*, *Lowery v. Commonwealth*, 388 S.E.2d 265, 267 (Va. Ct. App. 1990) ("[U]se of a person's race or national origin to justify a vehicle stop to investigate drug trafficking . . . violates the reasonableness requirement of the fourth amendment of the United States Constitution.").

256. 517 U.S. 806, 813 (1996); *see supra* notes 51-63 and accompanying text.

257. *See, e.g.*, *United States v. Weaver*, 966 F.2d 391, 397 (8th Cir. 1992) (Arnold, C.J., dissenting) ("Use of race as a factor simply reinforces the kind of stereotyping that lies behind drug-courier profiles. When public officials begin to regard large groups of citizens as presumptively criminal, this country is in a perilous situation indeed.").

258. *See, e.g.*, *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) ("Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone.").

enough information to justify his actions. In most cases lower courts dispose of such claims, one way or another, on evidentiary grounds. In *Derricott v. State*, for example, a Maryland State trooper admitted that he stopped the defendant on the basis of a drug courier profile that included race as an element, but he denied that he relied on the defendant's race.<sup>259</sup> The Maryland Court of Appeals, taking the trooper at his word, held that the nonracial factors he considered did not amount to a reasonable suspicion, and suppressed the drugs he found in the subsequent search.<sup>260</sup> In *United States v. Davis*, on the other hand, the Second Circuit affirmed the trial court's findings that the officer who stopped the defendant had a reasonable suspicion, and did not stop the defendant because of his race.<sup>261</sup>

It is difficult, perhaps impossible, to draw general conclusions about how race is treated as a Fourth Amendment factor in courts across the United States. We will hazard only a couple of tentative generalizations. *First*, comparatively few cases explicitly approve of the use of race as a criterion for selecting targets for stops or searches. One reason is that the issue is rarely presented clearly. In the two settings in which racial profiling seems most common, the officer does not need to rely on a profile, racial or otherwise, to approach the suspect. She either pulls him over for a traffic violation on the highway, or approaches and asks him to "voluntarily" answer questions in an airport. Once the officer has gotten close enough to talk to the suspect, she can usually get him to consent to a search,<sup>262</sup> if the information she has gathered doesn't already provide probable cause to search or to arrest.<sup>263</sup> As a result, when race is mentioned in Fourth Amendment cases, it is typically as a side issue. For example, several Eleventh Circuit cases from the 1980s discuss drug courier profiles

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259. 611 A.2d 592, 596 (Md. 1992).

260. *Id.* at 597-98; *see, e.g.*, *United States v. Ferguson*, 130 F. Supp. 2d 560 (S.D.N.Y. 2001) (suppressing evidence for lack of probable cause; defendants had argued racial profiling had occurred, but court notes that this was "nothing other than a random stop."); *State v. Paul*, 638 So. 2d 537 (Fla. Dist. Ct. App. 1994) (affirming trial-court finding that officer lacked reasonable suspicion, with no mention of race; dissent argues officer should have been allowed to rely on racial drug courier profile).

261. *See also* *United States v. Rosales*, No. 93-30300, 1995 U.S. App. LEXIS 18897 (9th Cir. Jul. 5, 1995); *United States v. Thomas*, 787 F. Supp. 663, 676 (E.D. Tex. 1992) ("If it were proven that a stop were intentionally based on race, serious constitutional issues would entail," but the evidence does not prove that claim).

262. *E.g.*, *United States v. Bullock*, 94 F.3d 896 (4th Cir. 1996); *United States v. Gonzales*, 842 F.2d 748 (5th Cir. 1988); *United States v. Suarez*, 694 F. Supp. 926 (S.D. Ga. 1988); *Beguiristain v. State*, 369 S.E.2d 774 (Ga. Ct. App. 1988); *Lopez v. State*, 360 S.E.2d 722 (Ga. Ct. App. 1987).

263. *E.g.*, *Bullock*, 94 F.3d at 899; *United States v. Wilson*, 853 F.2d 869 (11th Cir. 1988).

that included race in deciding whether a traffic stop was a pretext for a drug investigation,<sup>264</sup> an issue that is now immaterial under *Whren*.

*Second*, it seems that over time courts are becoming more hostile to the use of race as a basis for police action under the Fourth Amendment. In 1973, for example, in *State v. Ruiz*, the Arizona Court of Appeals, without comment, upheld a stop on the basis of testimony from the arresting officers "that it had been their experience in the past that the few 'whites' or Mexicans who were in the area [where Ruiz was stopped] were there for the purpose of purchasing narcotics."<sup>265</sup> Two years later in *State v. Dean*, the Arizona Supreme Court was explicit: "While detention and investigation based on ethnic background alone would be arbitrary and capricious and therefore impermissible, the fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an officer. . . ."<sup>266</sup>

But in 1982, in *State v. Graciano*, the Arizona Supreme Court overruled *Ruiz* and *Dean*:

[I]n the ordinary case, the mere fact that an individual is of a specific race, nationality or ethnic background is not a reasonable ground for a founded suspicion which will justify a stop and detention. To the extent that *State v. Ruiz* might be read to the contrary, it is disapproved.<sup>267</sup>

Similarly, in 1989, in *Castaneda v. Commonwealth*, the Virginia Court of Appeals casually relied on testimony that "[a]ll of the profile characteristics enumerated by the Department of State Police as common to drug couriers were present in this case"<sup>268</sup> — including, specifically, that the suspects were "frequently Hispanic or black."<sup>269</sup> The next year, in *Lowery v. Commonwealth*, the court reversed course: "[U]se of a person's race or national origin to justify a vehicle stop to investigate drug trafficking . . . violates the reasonableness requirement of the fourth amendment of the United States Constitution."<sup>270</sup>

There is no single time line for this change in attitude. In 1990, for example, Judge Carrigan of the District of Colorado concluded, with strong comments on the side, that "profile stops may not be predicated on unconstitutional discrimination based on race, ethnicity or

264. See, e.g., *Wilson*, 853 F.2d at 875; *United States v. Harris*, 716 F. Supp. 1470, 1472 (M.D. Ga. 1989); *Suarez*, 694 F. Supp. at 934-36.

265. 504 P.2d 1307, 1307 (1973).

266. 543 P.2d 425, 427 (1975).

267. 653 P.2d 683, 687 n.7 (Ariz. 1982) (citation omitted).

268. 376 S.E.2d 82, 86 (Va. Ct. App. 1989).

269. *Id.* at 83.

270. 388 S.E.2d 265, 267 (Va. Ct. App. 1990).

state of residence”<sup>271</sup> Two years later the Eight Circuit, over the dissent of Chief Judge Arnold, upheld an airport stop based largely on the fact that the defendant was a young black man from Los Angeles because “facts are not to be ignored simply because they may be unpleasant.”<sup>272</sup> In 2000, the Ninth Circuit, en banc, held that “Hispanic appearance . . . casts too wide a net to play any part in a particularized reasonable suspicion determination,”<sup>273</sup> and that “[s]tops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone.”<sup>274</sup> In the process, the court explicitly overruled two earlier Ninth Circuit cases, from 1991 and from 1994, in which profiles that included race were considered without a blink.<sup>275</sup> Still, there seems to be a long-term shift. Twenty years ago race might be mentioned casually in a Fourth Amendment opinion as a factor among others;<sup>276</sup> in the past few years it’s more likely to be the subject of judicial attack.<sup>277</sup>

*In short*, despite apparent approval from the Supreme Court, American judges are ambivalent and divided about the use of race as a basis for individualized suspicion under the Fourth Amendment. Lower court cases go both ways, but increasingly the tone is negative. There are comparatively few cases on point, and they will probably be

271. *United States v. Laymon*, 730 F. Supp. 332 (D. Colo. 1990); *see id.* at 339 (“[The arresting officer] carried out policies that systematically violated the constitutionally protected rights of Blacks and Hispanics to travel and be free from unreasonable seizures on an equal basis with other persons traveling the highways of this nation.”); *see also* *United States v. Thomas*, 787 F. Supp. 663 (E.D. Texas 1992) (stating in dicta that “law enforcement intentionally predicated in any measure upon racial considerations is repugnant to this country’s values of individual treatment and equal justice”).

272. *United States v. Weaver*, 966 F.2d 391, 394 n.2 (8th Cir. 1992).

273. *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000).

274. *Id.* at 1135.

275. *Id.* at 1134 n.22 (overruling *United States v. Rodriguez-Sanchez*, 23 F.3d 1488 (9th Cir. 1994) and *United States v. Franco-Munoz*, 952 F.2d 1055 (9th Cir. 1991)).

276. *See, e.g., United States v. Place*, 660 F.2d 44, 48 (2d Cir. 1981); *United States v. McClain*, 452 F. Supp. 195, 199 (E.D. Mich. 1977).

277. Perhaps the more telling attacks are those made in passing, *see, e.g., People v. Anderson*, No. F035357, 2001 Cal. App. LEXIS 2649, at \*11 (Cal. Ct. App. Oct. 15, 2001) (“These conclusions are far too consistent with racial profiling to be permitted by the Constitution.”) (statement in an unpublished, uncitable opinion of the California Court of Appeal), or in a context in which the Fourth Amendment is not directly implicated. In *United States v. Leviner*, 31 F. Supp. 23, 33 (D. Mass. 1998), for example, the court refused to consider traffic convictions in setting a black defendant’s sentence under the federal sentencing guidelines because “African American motorists are stopped and prosecuted for traffic stops[ ] more than any other citizens,” and in *United States v. Stone*, the court found that the decision to approach the defendant was “very likely . . . based initially on racial stereotyping,” and pointed out that even though suppression was unavailable because the officers had not yet effected a seizure, “[t]his does not mean that these actions are necessarily free from further review, perhaps in the context of a civil action.” 73 F. Supp. 2d 441, 447-48 n.15 (S.D.N.Y. 1999).

fewer yet in the future since the general message from the courts to the police seems pretty clear: “We don’t want to hear that you relied on race.”

## 2. *What Form of Racial Profiling Is Prohibited by the Equal Protection Clause?*

*Brignoni-Ponce* and *Martinez-Fuerte* have led some states, local governments, police departments and law enforcement organizations to define racial profiling narrowly as police initiated conduct that is based *exclusively* or *solely* on the race of the person affected.<sup>278</sup> They claim, along with some conservative commentators,<sup>279</sup> that it is perfectly constitutional for the police to stop or search people because of their race as long as race is one factor among several. This “narrow” definition competes with the “broad” definition of racial profiling as police action that is based on a suspect’s race, even in combination with other factors.<sup>280</sup> The broad definition — which we use in this Article<sup>281</sup> — is endorsed by a different set of local governments, police forces and law enforcement associations.<sup>282</sup>

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278. See, e.g., MD. CODE ANN., TRANSP. II § 25-113 (2001); R.I. GEN. LAWS § 31-21.1-2 (2000) (“For purposes of this chapter, ‘racial profiling’ means the detention, interdiction or other disparate treatment of an individual *solely* on the basis of the racial or ethnic status of the individual.” (emphasis added)); Portland Police Bureau, Community Policing News, Dec. 2000/Jan. 2001 (blue ribbon advisory panel to Portland Police Department defining “racial profiling” as “[t]he use of race as the *sole basis* for justifying traffic stops or other police action”) (emphasis added), at <http://www.portlandpolicebureau.com/news1200.html> (last visited Sept. 24, 2002). On April 14, 1999, the National Association of Police Organizations, which “represents more than 220,000 sworn law enforcement officers through 4,000 police unions and associations nationwide,” issued a statement that it “is strongly opposed to any instances of blatant racial discrimination, such as pulling over an automobile, searching personal property or detaining an individual, when *based solely* on the individual’s race, ethnicity, gender or age and not on any reasonable suspicion of danger or violations of law.” Press Release, National Association of Police Officers, National Police Group Alarmed with Bill That Would Require the Collection of Data During Traffic Stops (Apr. 14, 1999) (emphasis added), available at [http://www.napo.org/press\\_alarmed\\_apr99.htm](http://www.napo.org/press_alarmed_apr99.htm) (last visited Sept. 24, 2002).

279. John Derbyshire, *In Defense of Racial Profiling, Where is our common sense?*, NAT’L REV. ONLINE, Feb. 19, 2001, available at <http://www.nationalreview.com/19feb01/derbyshire021901.shtml>; MacDonald, *supra* note 13.

280. For a discussion of the distinction, see JANET NAPOLITANO, OFFICE OF THE ARIZ. ATT’Y GEN., REPORT ON RACIAL PROFILING 2-4 (2001) (on file with authors).

281. See *supra* note 8 and accompanying text.

282. See, e.g., INT’L ASS’N OF CHIEFS OF POLICE, SAMPLE PROFESSIONAL TRAFFIC STOPS POLICY AND PROCEDURE 4 (“[A] person’s race, ethnicity, gender or sexual orientation . . . shall not be a *factor* in determining probable cause for an arrest or reasonable suspicion for a stop.”) (emphasis added), available at [http://theiacp.org/documents/index.cfm?fuseaction=document&document\\_type\\_id=1&document\\_id=139](http://theiacp.org/documents/index.cfm?fuseaction=document&document_type_id=1&document_id=139) (last visited Mar. 3, 2003); JANET NAPOLITANO, *supra* note 280, at 2 (“[A]ny reliance on race and/or ethnicity in articulating reasonable suspicion is prohibited . . . .”); TUCSON POLICE DEP’T, *supra* note 227, at 1 (“[A]ny *consideration* . . . of race or ethnicity . . . is expressly prohibited.”) (emphasis added). In some jurisdictions, both broad and narrow definitions are used, with no attempt

Proponents of the narrow definition of racial profiling argue that relying on race as one of a number of factors is an effective tactic and that it is categorically different from the “exclusive” reliance on race that they condemn as “racial profiling.” Consider, for example, a statement by Steve Young, National Vice President of the Fraternal Order of Police, testifying in the United States Senate:

I also want to say a word about the police practice of criminal profiling. This is a legitimate and effective law enforcement tool. . . . Race can be a factor in a criminal profile, but it is never the only factor, nor is it the most significant factor. It is simply one of many.

No one ought to be stopped solely on the basis of their race; this practice is wrong and does not serve the law enforcement mission. But to contend that the successful practice of profiling — *which does not consider race exclusively* — be abandoned when it has proved to be a successful tool to prevent crime and catch criminals is not the answer.<sup>283</sup>

Even if Mr. Young is right that profiles that include race are effective law enforcement tools — a debatable point<sup>284</sup> — the distinction he makes between good and bad profiling does not hold water. Nobody is stopped or searched *solely* because of his race. As John Derbyshire, an editor of the *National Review*, wrote in a column entitled *In Defense of Racial Profiling*: “[O]f course . . . [race] always is only one factor. I have been unable to locate any statistics on the point, but I feel sure that elderly black women are stopped by the police much less often than are young white men.”<sup>285</sup> Under Young’s definition, it would not be racial profiling for the police to stop every young black male wearing blue jeans and a t-shirt who walks quickly away from his car in the parking lot at the mall, but no whites who fit all the these criteria except race.

This sort of definition not only permits blatant discrimination, it also makes it impossible to prove that an officer ever engaged in the “narrow” type of racial profiling that its proponents would prohibit. Over the years, police officers have tried to justify stops on the basis of

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to reconcile them. Thus, for example, on November 6, 2000, the Seattle City Council passed a resolution stating, among other things, that “[t]he use of race or ethnicity *as a factor* in deciding to stop . . . is illegal, reprehensible, and will not be tolerated,” and directing the Seattle Police Department to have “in place a policy against racial profiling.” CITY OF SEATTLE LEG. INFO. SERV., RES. NO. 30223, at 2 (emphasis added). That policy, however, which was signed by the police chief in August 2000 — before the city council resolution — prohibits “practices based *solely* on race.” SEATTLE POLICE DEPT DIRECTIVES, DIRECTIVE D00-66, Sept. 14, 2000 (emphasis added) (on file with authors).

283. *End Racial Profiling Act of 2001: Hearing on S. 989 Before the Senate Subcomm. on the Constitution, Federalism & Property Rights of the Senate Comm. on the Judiciary*, 106th Cong. (2001) (testimony of Steve Young, Vice President, Fraternal Order of Police), available at <http://www.grandlodgefop.org/legislation/testimony/profiling.html>.

284. See *infra* notes 315-341 and accompanying text.

285. Derbyshire, *supra* note 279, ¶ 8.

an ever changing array of "drug courier profiles." Across their entire range, these profiles contain nearly every observable fact about the suspect, including dozens of paired opposites: traveled alone/traveled with a companion, acted too calm/acted too nervous, made eye contact with the officer/avoided making eye contact with the officer, and so forth.<sup>286</sup> Apparently almost any human trait can be a basis for suspicion, and nearly everybody exhibits several potentially suspicious non-racial factors at any given time.

The main problem with the narrow definition of racial profiling, however, is that it is inconsistent with the requirements of the Equal Protection Clause. As the Supreme Court made clear in *Whren*,<sup>287</sup> while the question in a Fourth Amendment case is whether the officer had enough information to stop or detain or search, the question in an equal protection case is whether the officer acted for an improper reason. Under the Equal Protection Clause, a government decision to take action against a person because of her race is almost impossible to justify. The use of race as a basis for a decision to detain or to search or to prosecute can only be constitutional if it satisfies the requirements of "strict scrutiny": it must be necessary to achieve a compelling state interest, and narrowly tailored to suit that purpose.<sup>288</sup> Assuming that a state has a compelling interest in enforcing its drug laws, it is hard to argue that highway drug interdiction is necessary for that goal. And even if highway drug interdiction is accepted as a necessary program, it is impossible to claim that the racially discriminatory practice at issue here — stopping thousands of minority motorists because of their race, searching one in forty, and locating a drug dealer in one search out of nine — is a *necessary* aspect of that program, or that it is *narrowly tailored* to achieve the government's compelling interest.

A court might uphold a traffic stop under the Fourth Amendment, at least in some circumstances, even if the state trooper admits that the race of the driver was one of several factors that led him to decide to pull over the defendant's car. But, no American court would ever uphold a death sentence under the Equal Protection Clause if the prosecutor admits that she asked for the death penalty in part because of the defendant's race, regardless of any nonracial factors that entered into that decision. And many such nonracial factors are inevitable components of any capital prosecution, however discriminatory: that the defendant committed a homicide, that he did so in the course of a robbery, that he had a substantial prior criminal record, etc.

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286. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 48-49 (1999); see also Charles L. Becton, *The Drug Courier Profile: "All Seems Infected that th' Infected Spy, as All Looks Yellow to the Jaundic'd Eye,"* 65 N.C. L. REV. 417 (1987).

287. *Whren v. United States*, 517 U.S. 806 (1996).

288. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

*McCleskey*, however troublesome, made it difficult to *prove* discrimination in capital charging; it did not reach the absurd conclusion that equal protection is satisfied as long as a black defendant is not plucked at random from the population and executed *solely* because of his race. Mr. Young, of the Fraternal Order of Police, illustrates this point inadvertently in his Senate testimony: "When any employer is considering applicants, they have an idea of not only the skills and abilities that the job requires, but also what kind of person would make the best fit — a 'profile,' if you will".<sup>289</sup> True, and under the Fourth Amendment the analogy might have some value. But under the Equal Protection Clause, a public employer — for example a police department — may not use an "employment profile" that disfavors black applicants even if it happens to be true that overall black applicants are less likely to be qualified than whites.

In practice, the value of the Equal Protection Clause as a remedy for discrimination in criminal investigations is deeply compromised by the near impossibility of proof. As a result, few cases are litigated, and the legal doctrine remains undeveloped. Even the central issue of remedy is unsettled. The Supreme Court has explicitly left the question open,<sup>290</sup> and few lower court opinions address the issue.

The few reported cases that are available are often muddled. In *State v. Maryland*, for example, the New Jersey Supreme Court describes the stop: "the police officers approached defendant only because he was one of three young black males the officers had seen at the train station a week earlier" and explains that these facts establish "selective law enforcement because defendant's race would then have been the sole basis for the approach."<sup>291</sup> Plainly, however, race was not the *sole* basis but *a basis* for the stop, along with age, sex, number of companions, and the fact that the officers had seen them before, together, at the same location. (*Maryland* and *State v. Soto*<sup>292</sup> are the only two published search and seizure cases in which criminal defendants won suppression on equal protection grounds.) In *Lowery v. Commonwealth*, the Virginia Court of Appeals found that the use of

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289. Hearing on S. 989 Before the Senate Subcomm. on the Constitution, Federalism & Property Rights, *supra* note 283, at 5.

290. 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."); *United States v. Travis*, 62 F.3d 170, 176 (6th Cir. 1995) (finding it unnecessary to decide whether an equal protection violation in police investigation requires suppression of evidence); Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107 (2000); Pamela S. Karlan, *Race, Rights and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998).

291. 771 A.2d 1220, 1229 (N.J. 2001).

292. 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996); see also *supra* note 214.



race as a factor in a drug investigation violated the Equal Protection Clause, but that suppression was not required because there was an independent nonracial reason for the decision to detain the defendant.<sup>293</sup> In other cases courts have found that the defendants failed to prove equal protection violations, sometimes discussing the nature of the problem in dicta along the way. In *United States v. Taylor*, for example, the Sixth Circuit says that if the police had “implemented a general practice or pattern that primarily targeted minorities . . . or . . . had incorporated a racial component into the drug courier profile” that “would have given rise to due process and equal protection constitutional implications cognizable by this court.”<sup>294</sup> Some opinions, such as *Taylor*, mention broad definitions of racial profiling,<sup>295</sup> some narrow ones,<sup>296</sup> and some none,<sup>297</sup> but the issue is never addressed in any detail and does not seem to effect the outcome. *State v. Soto*<sup>298</sup> is the only criminal case to hold that a state violated the Equal Protection Clause by racial profiling on the highway, and to do so primarily on the basis of statistical evidence. There is no suggestion in *Soto* that the defendants proved, or were required to prove, that they

293. 388 S.E.2d 265, 267 (Va. Ct. App. 1990).

294. 956 F.2d 572, 579 (6th Cir. 1992) (en banc).

295. *Id.* In *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997), the Sixth Circuit says in dicta that at the earliest stages of investigation, when choosing suspects for surveillance or for consensual encounters, “the use of race as *one* factor in the pre-contact stage may not violate equal protection principles,” *id.* at 353, but that even at that early stage “an investigation of a citizen based *solely* on that citizen’s race” would violate equal protection, *id.* at 355 (emphases added). See also *United States v. Travis*, 62 F.3d 170 (6th Cir. 1995). Racial profiling at this stage of an investigation — before the officer exercises any compulsory authority over a suspect — is related to the practices discussed in the text, but distinct. Unfortunately, the court’s treatment of the issue runs into the sort of trouble that may be more common in dicta, when no immediate consequences are at stake. The Sixth Circuit reasons that the Fourteenth Amendment is not violated when “officers . . . decide to interview a suspect for many reasons, some of which are legitimate and some of which may be based on race.” *Travis*, 62 F.3d at 174 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). In *Mt. Healthy*, however, the legitimate reason was a *sufficient* explanation for the governmental action — the teacher involved would have been fired anyway, even without the allegedly unconstitutional motivation. *Id.* at 174. If that is what the Sixth Circuit means — that it’s constitutional to interview a suspect *because* he’s black if you would have interviewed him *anyway* — it is an uncontroversial position. No one doubts that it’s constitutional to interview a suspect because he was found standing over the victim’s body with a smoking gun, *and* because he’s black. On the other hand, if the court means to extend that rule to the case of a suspect who was interviewed for several reasons, but would not have been interviewed if he had been white, the argument is inconsistent with *Mt. Healthy*, inconsistent with *Taylor*, and makes little sense.

296. *United States v. Valenzuela*, No. 00-CR-510-8, 2001 U.S. Dist. LEXIS 7679 (D. Colo. May 31, 2001); *United States v. Ocampo*, No. 85-414-W, 1986 U.S. Dist. LEXIS 29408 (D. Mass. Feb. 11, 1986).

297. *United States v. Arreola-Delgado*, 137 F. Supp. 2d 1240, 1248 (D. Kan. 2001); *United States v. Tomas* 787 F. Supp. 663 (E.D. Tex. 1992).

298. 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996). *State v. Maryland*, 771 A.2d 1220 (N.J. 2001), dealt with a stop on a city street rather than a highway, and included no statistical evidence.

were stopped *solely* because of their race, and no conceivable way they could have done so given that it was conceded on all sides that they were also stopped because they violated traffic laws.

The opinions in civil cases are no more helpful to the proponents of the narrow definition of racial profiling. Some dismiss or grant summary judgment against equal protection racial profiling claims for unrelated defects in pleading or proof;<sup>299</sup> others deny motions to dismiss or for summary judgment made on similar grounds;<sup>300</sup> none suggest that a plaintiff must plead or prove that she was stopped or searched *solely* because of her race. Most civil cases are resolved by settlement rather than judgment, and the settlements that we know of all prohibit any consideration of race. In *Wilkins v. Maryland State Police*, for example, the Settlement Agreement specifies, among other provisions, that “[t]he policy [of the Maryland State Police] shall specifically prohibit consideration of race *as a factor* for the development of policies for stopping, detaining, or searching motorists;”<sup>301</sup> and that “it is the policy of the Maryland State Police that racial characteristics *not be considered* in requesting consent to search or in utilizing a canine for drug detection purposes.”<sup>302</sup> Similarly, the out-of-court settlement between the Department of Justice and the Montgomery County, Maryland, Police Department states that officers “will not, *to any degree*, use the race or national or ethnic origin of drivers or passengers in deciding which vehicles to subject to a traffic stop, or a checkpoint or roadblock stop, or in deciding upon the scope or substance of any action in connection with [such a stop].”<sup>303</sup> The consent decrees in racial profiling cases filed by the Department of Justice under 42 U.S.C. § 14141 all contain virtually identical language.<sup>304</sup>

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299. *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001); *Harris v. City of Virginia Beach*, No. 00-1704, 2001 U.S. App. Lexis 10573 (4th Cir. May 22, 2001); *Nat'l Congress for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154, 167-68 (S.D.N.Y. 1999) (dismissed with leave to amend to allege “through statistical evidence or other evidence” that similarly situated whites were treated more favorably); *Perez v. City of New York*, 1999 U.S. Dist. LEXIS 21137 (E.D.N.Y. Nov. 16, 1999).

300. *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000); cf. *Maryland State Conference of NAACP Branches v. Maryland State Police*, 72 F. Supp. 2d 560, 566 (D. Md. 1999) (“It is clearly established, according to both plaintiffs and defendants, that stopping, detaining, or searching motorists on the basis of race violates the constitution.”).

301. Settlement Agreement, *Wilkins*, *supra* note 22, ¶ 6 (emphasis added).

302. *Id.* ¶ 11 (emphasis added).

303. Mem. of Agreement between the U.S. Dep't of Justice, Montgomery County, Md., Montgomery County Dep't of Police, and the Fraternal Order of Police, Montgomery County Lodge 35, Inc. (Jan. 24, 2000), available at <http://www.usdoj.gov/crt/cor/Pub/mcagrmt.htm> (emphasis added).

304. See U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE POLICE MISCONDUCT PATTERN OR PRACTICE PROGRAM, *supra* note 219.

To summarize, it is plainly unconstitutional to use race as a criterion for choosing who to stop or search. Most opinions on the issue, not surprisingly, are under the Fourth Amendment where the remedy is clear — suppression — but the legal standard is fuzzy. Two Supreme Court cases, *Brignoni-Ponce* and *Martinez-Fuerte*, say that Mexican appearance may be considered by the Border Patrol as one factor among others in deciding who to stop for possible immigration law violations. Despite the special setting of these decisions, some lower courts have followed *Brignoni-Ponce* and *Martinez-Fuerte* and permitted the use of evidence found in ordinary drug searches that were based in part on a suspect's race. Other lower courts, however, have excluded evidence under the Fourth Amendment if race played any role in the decision to stop or search the suspect, even in conjunction with other factors, and there are indications that the tide may be running in that direction. The use of race as a factor in decisions to stop, search, or arrest is clearly prohibited by the Equal Protection Clause, but the remedy is unclear and proof is very difficult. As a result, few cases have been litigated under that provision, and the law on the issue remains sparse and undeveloped.

### C. *Is It Worth It?*

The argument for racial profiling is not just that it is legal, but that it's a good idea because it produces considerable value at low cost. Heather MacDonald, for example, argues that racial profiling in the decision to conduct a search "is both legitimate and not overly burdensome on law-abiding minorities."<sup>305</sup> No one denies that racial profiling imposes costs on minorities: more innocent blacks and Hispanics than whites are stopped, detained, questioned and searched. Professor Randall Kennedy calls this a racial tax,<sup>306</sup> which suggests three practical questions: How many people pay that tax? How steep is it? And what benefits does it buy?

(1) *How widespread is the burden of racial profiling?* MacDonald focuses on searches. We know that on I-95 in Maryland, drug-free African Americans and Hispanics are five to ten times as likely as drug-free whites to be searched,<sup>307</sup> but that's only a small fraction of the problem. The Maryland State Police search two or three hundred minority motorists a year in the I-95 corridor out of the millions who

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305. MacDonald, *supra* note 13, at 9; see *supra* text at notes 237-243; see also William Tucker, *The Tragedy of Racial Profiling: It's Unjust — and It Works*, WKLY STANDARD, May 21, 2001, at 23 ("[R]acial profiling is an effective law enforcement tool, though it undeniably visits indignity on the innocent.").

306. RANDALL KENNEDY, RACE, CRIME AND THE LAW 159 (1998).

307. See *supra* note 50 and accompanying text.

travel that highway,<sup>308</sup> but behind these hundreds who are searched there are thousands of minority motorists who are questioned, ordered out of their cars or frisked because of their race, and tens of thousands who are stopped. Across police forces, over the years, the cumulative impact is enormous. On a national poll in 2001, 52% of African-American men said that they had been victims of racial profiling at some point in their lives.<sup>309</sup> Some, no doubt, were mistaken, but the number would be shocking even if it were only half that size.

(2) *How high is the cost to those who are affected?*<sup>310</sup> Law abiding minorities, like all citizens, are willing to put up with inconvenience in return for greater security. We all happily line up at security checkpoints at airports, walk through metal detectors and submit to baggage and body searches if requested. Since the terrorist attacks of September 11, some passengers get mad if they are *not* checked carefully enough.<sup>311</sup> Racial profiling on the highway is different. The burden on those who are merely pulled over and ticketed is comparatively light, but only comparatively. Most of us have been through this experience; it can be a passing item of bad news, or it can ruin a day. But it's a lot worse than being told to open your bags three times between the taxi and the plane, and that's the low end of the spectrum.

As the level of the police officer's interest increases, the cost to the innocent citizen escalates rapidly. It's one thing to get a speeding ticket and an annoying lecture from a state trooper; it's quite another to be told to step out of the car and to be questioned: Where are you coming from? Where did you sleep last night? Where are you going to? Who do you plan to see? What is their address? What is your business? How long have you known your passengers? And so on. The questions may seem intrusive and out of line, but you can hardly refuse to answer an armed cop. At some point you realize that you are not just another law-abiding citizen who's being checked out for the sake of general security, like everybody else. You've been targeted. The trooper is not going through a routine so he can let you go on your way and move on to his next task; he *wants* to find drugs on you.

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308. See *supra* Table 22.

309. Richard Morin & Michael H. Cottman, *Discrimination's Lingering Sting*, WASH. POST, June 22, 2001, at A1.

310. For extended discussions of our claim that the extent of the harm from racial profiling depends on the nature of the treatment of those targeted by the police because of their race, see Gross & Livingston, *supra* note 9, at 1413; William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2194 (2002).

311. See generally John Reid Blackwell, *Flights Mostly On Schedule: Screening Steps Largely Invisible*, RICHMOND TIMES-DISPATCH, Jan. 19, 2002, at A1 (illustrating the positive reaction of passengers subjected to increased airport security measures); *All Things Considered, Analysis: Increased Security for U.S. Airlines* (NPR radio broadcast, Jan. 18, 2002), available at 2002 WL 3494730 (reporting positive reactions of passengers subjected to increased airport security measures).

He hopes and believes that he will, or he wouldn't have gone this far. He will be disappointed if you turn out to be clean; he might get mad. He wants to prove that you are a criminal, preferably a big criminal.

Robert Wilkins, whose family's ordeal triggered the litigation in *Wilkins v. Maryland*, described the experience in testimony in the United States Senate:

So there we were. Standing outside the car in the rain, lined up along the road, with police lights flashing, officers standing guard, and a German Shepard jumping on top of, underneath, and sniffing every inch of our vehicle. We were criminal suspects; yet we were just trying to use the interstate highway to travel from our homes to a funeral. It is hard to describe the frustration and pain you feel when people presume you to be guilty for no good reason and you know that you are innocent.<sup>312</sup>

Those of us who have not been through this sort of experience probably underestimate its impact. To be treated as a criminal is a basic insult to a person's self-image and to his position in society. It cannot easily be shrugged off. Of course, many victims of racial profiling are not surprised by this sort of treatment. They know why they were chosen — which makes it worse. It's bad enough to have the accidental misfortune to be mistaken for a bad guy; it's worse to feel that you are assumed to be a criminal because of your race. Robert Wilkins again:

I particularly remember a car driving past with two young white children in the back seat, noses pressed against the window. They were looking at the policemen, the flashing lights, the German Shepard, and us . . . . They saw some black people standing along the road who certainly must have been bad people who had done something wrong, for why else would the police have them there?<sup>313</sup>

Stop and consider: If you had been driving by that night and saw the roadside scene that Wilkins describes — what would you have thought of the black people standing in the rain with state troopers around them?<sup>314</sup>

Effective law enforcement depends on the cooperation and trust of the citizens. Treating law abiding blacks and Hispanic like criminals is

312. *The Traffic Stops Statistics Study Act of 1999: Hearings on S. 821 Before the Subcomm. on the Constitution, Federalism and & Property Rights of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Robert L. Wilkins, Esq.), available at <http://judiciary.senate.gov/oldsite/330200rw.htm>.

313. *Id.*

314. John Derbyshire, columnist and contributing editor for the *National Review*, has a different view of the costs of racial profiling. He recognizes that innocent people will get caught in the net, but considers it a small problem. We must, he writes, “shed the idea that deference to sensitivities of racial minorities — however overwrought those sensitivities may be, however over-stimulated by unscrupulous mountebanks, however disconnected from reality — trumps every other consideration . . . .” Derbyshire, *supra* note 279. We can only attribute this diatribe to an acute failure of imagination.

counterproductive, to say the least. If you've been stopped, searched, and perhaps humiliated because of your race, you don't forget it; the next time a cop stops or questions you, whatever the true reason, you'll probably assume that once again, it's your race. To the extent that this is known to be a general problem, its impact spreads from those who are affected directly to their relatives, friends and neighbors. Large segments of minority communities learn to see the police as a threat, to avoid rather than to help them;<sup>315</sup> some of those who are most often picked on — young black and Hispanic men — may come to identify with criminals even though they are not criminals themselves. This is a heavy price to pay, above and beyond the immediate consequences that are visited directly on the innocent victims of racial profiling.

(3) *Are the gains from racial profiling worth these costs?*<sup>316</sup> In other settings, away from the highway, away from drug interdiction, this may be a difficult question. A couple of examples will suffice. Starting in 1994, the New York City Police Department conducted an aggressive stop-and-frisk campaign with the explicit purpose of removing guns from the streets and discouraging New Yorkers from carrying them.<sup>317</sup> The Police Department claims that this campaign was a major cause of the steep decline in homicide and other violent crime in New York City in the mid-and late-1990s.<sup>318</sup> Others dispute that claim,<sup>319</sup> but let's assume for the moment that it's true. The New York City Police Department has also been accused of racial profiling in conducting

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315. See James Forman, Jr., *Arrested Development, The Conservative Case Against Racial Profiling*, NEW REPUBLIC, Sept. 10, 2001, at 25-26.

316. For a more extensive discussion of this issue, see Gross & Livingston, *supra* note 9, at 1429.

317. The NYPD's strategic plan was articulated in a public document issued by the Department. New York Police Dep't, *Police Strategy No. 1, Getting Guns Off the Streets of New York* (1994). In 1999, New York's Attorney General issued a report in response to public concern about the impact of the use of aggressive stop-and-frisk tactics upon minority communities in New York City. This report analyzed some 175,000 "UF-250s" — forms that NYPD officers were required to complete after many "stop" encounters — for the period of January 1, 1998 through March 31, 1999. This report concluded that about 51% of all persons "stopped" during the period were black and 33% were Hispanic. OAG REPORT, *supra* note 21; see also Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 470-71 (2000); Skolnick & Caplovitz, *supra* note 8, at 413-15.

318. See Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1313-18 (1998) (concluding that policing may have caused or helped cause drop in gun related homicides); see also David Garland, *Criminology, Crime Control, and "The American Difference"*, 69 U. COLO. L. REV. 1137, 1150 (1998) (arguing that street stops and searches discourage casual gun possession and thus reduce the potential violence of unplanned street incidents).

319. See, e.g., Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Fox Butterfield, *Cities Reduce Crime and Conflict Without New York-Style Hardball*, N.Y. TIMES, Mar. 4, 2000, at A1.

this operation<sup>320</sup> and has been sued on that account.<sup>321</sup> The Department denies the charge,<sup>322</sup> but lets assume that it too is true (and in any event, the widespread perception of racial profiling is a serious problem in itself). Given those assumptions, did the benefits of the anti-gun campaign outweigh its costs? This is not an easy question. On the one hand, hundreds of homicides and thousands of violent crimes prevented is a major gain. On the other hand, many thousands of unarmed black and Hispanic men were stopped and searched, complaints of police misconduct multiplied, and relations between the New York City Police Department and minority communities deteriorated to the point of crisis.<sup>323</sup> In this messy context (and ignoring, for the moment, strictly legal considerations) we are driven to ask questions that are not easily answered: Would a less controversial policy have been equally effective?<sup>324</sup> To what extent are we willing to tolerate discrimination for the sake of security?

In the wake of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, many people have said that racial or ethnic profiling may be justified in order to prevent further attacks.<sup>325</sup> In this climate, the likely targets are men who seem to be from the Middle East, or of Middle Eastern descent, or Muslim. Few would question a policy of searching the bags or the bodies of every Middle Eastern air passenger if we *knew* that doing so would prevent an airline hijacking that would otherwise occur — but that's a big *if*. Most of us would probably also be willing to tolerate such a policy if it merely minimizes the risk of hijacking. But if extensive searching is necessary, can we justify limiting it to those who look like the September 11 hijackers? A program of searching everybody would be more expensive than an ethnically selective program, but no less effective, and it would avoid the nasty stigmatizing effects of racial profiling. In fact, searching everybody would be more effective. If we concentrate on particular ethnic groups, we risk making terrible mistakes

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320. OAG REPORT, *supra* note 21; UNITED STATES COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY 6 (Aug. 2000) (on file with authors); Fagan & Davies, *supra* note 317.

321. *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001) (class action certified).

322. NEW YORK CITY POLICE DEP'T, NYPD RESPONSE TO THE DRAFT REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS — POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY 3 (2001) (on file with authors).

323. Fagan & Davies, *supra* note 317, at 462; Skolnick & Caplovitz, *supra* note 8, at 415-17.

324. See, e.g., Fox Butterfield, *Police Are Split on Questioning Mideast Men*, N.Y. TIMES, Nov. 22, 2000, at A1.

325. See, e.g., William Glaberson, *Racial Profiling May Get Wider Approval by Courts*, N.Y. TIMES, Sept. 21, 2001, at A16; Kinsley, *supra* note 235; Henry Weinstein et al., *Racial Profiling Gains Support as Search Tactic*, L.A. TIMES, Sept. 24, 2001, at A1.

by fighting the last war. The deadliest terrorist attack on American soil before September 11 was by Timothy McVeigh, a clean-cut, white, army veteran. Now that the potential to wreak havoc has become so well known, the next terrorist may be another all-American guy, or a Cuban refugee, or a Basque separatist. Still, organized Muslim terrorist cells probably pose the greatest threat of mass terror, so if we can't search everybody — if we must do our best to identify those who present the highest risk — shouldn't we consider ethnicity, and even religion, together with other factors, to decide who to single out? Maybe — but notice how qualified and conditional the answer becomes when the stakes are truly high, and how we immediately focus on the costs and benefits. We don't want to alienate Arab Americans — we need their help. We don't want to question every foreign student from Turkey while a salesman from Springfield drops twenty anthrax loaded letters into a mailbox. And, most important, we have a long and depressing history of racism — in law enforcement and elsewhere — and should be extremely reluctant to take action against people because of their race or ethnicity.<sup>326</sup> Not surprisingly, in the wake of September 11 several police departments around the country have refused to participate in a Department of Justice program to interrogate thousands of Middle Eastern men. They say it sounds too much like racial profiling.<sup>327</sup>

Do these digressions tell us anything about racial profiling on I-95 from the Baltimore city line to the Delaware border? We think they do, by contrast.

*First*, racial profiling on the highway is comparatively easy to spot. The New York City Police Department claims that blacks and Hispanics were disproportionately stopped and frisked on the streets of New York because the Department deployed its officers disproportionately in high-crime neighborhoods — which are mostly minority dominated — and not because of racial profiling. All motorists on I-95 drive in the same six or eight lanes. Street stops are free form; they can occur in many ways and may be based on a legion of factors. Highway stops are stylized; the officer chooses his target based on the few facts he can see from a distance, one of which is race.

*Second*, profiling on the highway is heavy handed. The consequences for all of those who are targeted are significant; for many they are severe, much worse than a second search at a security checkpoint, on a par, perhaps, with being frisked on the sidewalk in front of your apartment building.

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326. See Gross & Livingston, *supra* note 9, at 1414-15.

327. See, e.g., Butterfield, *supra* note 324; see also Gross & Livingston, *supra* note 9, at 1414. Local police departments might be concerned that once again, as with Operation Pipeline, the Department of Justice will lead the way in a racially oriented policing program, and then leave them holding the bag. See *supra* note 20 and accompanying text.



Finally, and most important, the benefits of racial profiling on I-95 are negligible. This is a strong conclusion, but it is not in doubt even under the most generous assumptions.

An actual evaluation of the benefits of drug profiling in the I-95 corridor would require answers to several difficult questions. *What proportion of the drugs seized and of the dealers arrested were found as a result of confidential intelligence?*<sup>328</sup> It wouldn't take many successful tips to have a big impact; recall that half the cocaine seized in the I-95 corridor was found in five searches.<sup>329</sup> If confidential intelligence played a big role in drug interdiction by the MSP, the possible benefits of racial profiling would be correspondingly reduced. In the absence of information on that issue, we'll proceed as though prior intelligence played no role at all in this program. *How successful might the MSP have been if they had not considered race?* Other police agencies have succeeded in curtailing racial profiling without reducing their efficiency,<sup>330</sup> but we'll assume that the Maryland State Police could not have cut their reliance on race without substantially decreasing the volume of drugs seized. *Is drug interdiction a plausible strategy for reducing the use of illegal drugs?* This is a debatable point, to say the least. The centerpiece of the War on Drugs — the attempt to limit the supply of contraband drugs in the United States — has been a conspicuous failure.<sup>331</sup> To cite just one finding, according to government estimates, annual cocaine consumption in the United States was virtually unchanged from 1990 through 1998, while the price declined slightly.<sup>332</sup> Nonetheless, we'll assume for the moment that drug interdiction is a worthy goal.

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328. See *supra* notes 84-86 and accompanying text.

329. See *supra* Table 13.

330. For example, in March 2000, a General Accounting Office report found, among other things, that black, female, U.S. citizen airline passengers were nine times more likely than white, female, U.S. citizens to be subjected to x-ray searches by the Customs Service, but less than half as likely to be found carrying contraband. U.S. GEN. ACCOUNTING OFFICE, U.S. CUSTOMS SERV., BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 2 (Mar. 2000). In response to this and other charges of racial profiling, the customs service instituted changes in policies that resulted, among other things, in a decrease of nearly 80% in the number of personal (as opposed to baggage) searches conducted by the Service, but no decrease in the level of drug seizures. *End Racial Profiling Act of 2001: Hearing on S. 989 Before the Senate Subcomm. on the Constitution, Federalism and Property Rights of the Senate Comm. on the Judiciary*, 106th Cong. (2001) (testimony of Raymond W. Kelly), available at <http://judiciary.senate.gov/oldsite/te080101sc-kelly.htm>. See Skolnick & Caplovitz, *supra* note 8, at 432-35 (describing Customs Service shift from searches based on "profile" factors, to behavioral factors, to reduce reliance on race and improve efficiency).

331. See, e.g., STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR 203-07 (1993); SAMUEL WALKER, SENSE AND NONSENSE ABOUT CRIME AND DRUGS 262 (3d ed. 1994); Ethan A. Nadelmann, *The Case for Legalization*, in THE CRISIS IN DRUG PROHIBITION 13, 21 (David Boaz ed., 1990).

332. RHODES ET AL., *supra* note 152, at 15-18.

Even with these forgiving assumptions, drug interdiction on I-95 has no value to speak of. Stopping and searching cars on interstate highways without prior intelligence is a hopeless strategy for eradicating drug trafficking. Identifying drug dealers on the highway is inefficient for the same reason that racial profiling is easy to spot: because the officer has so little information to go on. Taking the Maryland State Police data at face value, the troopers conducted about one search for every seventy stops in the I-95 corridor,<sup>333</sup> and found a dealer about once in 600 stops.<sup>334</sup> In the process they must have missed some of the dealers they pulled over — maybe even most — but we'll assume nonetheless that the troopers found all of the drugs that were in the cars they stopped. Even so, highway drug interdiction is doomed to fail.

Consider: How likely are you to be stopped by an officer in the course of a single car trip from New York City (the source of drugs in this pipeline) to Baltimore (the destination)? The chance of being stopped in the I-95 corridor in Maryland is about one in 1250;<sup>335</sup> since you're traveling south the risk may be up to about one in 1100;<sup>336</sup> if you're a black driver headed toward Baltimore, the risk of a stop in Maryland may be one in 650,<sup>337</sup> or perhaps one in 180 for the entire 200 mile trip. In other words, even with racial profiling, 99.4% of minority drug traffickers driving from New York to Baltimore are never stopped at all — and that's without considering the possibility that they take even simple steps to reduce the risk even further, such as hitting every possible rush hour along the way. A trooper may be taking his best shot at finding a drug dealer on the interstate by stopping a black driver, but it's a very long shot, and ten other drivers, identical in every respect that he could observe, will have sped by before he asks for license and registration.

This is not speculation. From January 1995 through June 2000 the Maryland State Police seized about 182 kilograms of powder cocaine and crack in the I-95 corridor,<sup>338</sup> an average of about 33 kilograms a year. In that same period, the government estimates that Americans consumed 1606 metric *tons* of cocaine.<sup>339</sup> The Baltimore-Washington,

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333. See *supra* Table 5.

334. See *supra* Table 12 and accompanying text (reporting that about 11% of searches in I-95 corridor found drug dealers).

335. See *supra* note 41.

336. See *supra* text following Table 16.

337. See *supra* Table 4.

338. See *supra* text accompanying notes 153-154 (combining powder cocaine and crack). A small proportion of the cocaine seized on I-95 was northbound, see *supra* Table 16, but we will assume (conservatively) that it was all headed toward the Baltimore-Washington D.C. metropolitan area.

339. RHODES ET AL., *supra* note 152, at 17, tbl.7.

D.C., metropolitan area has about 2.7% of the national population,<sup>340</sup> if they used cocaine at the average rate for the country, the amount seized by Maryland State Police on the major drug pipeline into the region amounted to about 0.4% of the cocaine consumed. A similar estimate for heroin is even lower, just over 0.2%.<sup>341</sup> These are rough estimates, of course, and even if I-95 is the major drug pipeline to the area a significant proportion of the cocaine and heroin sold in Baltimore and Washington probably arrives by other routes. Maybe we have underestimated (or overestimated) the impact of this effort by a factor of two or three. Maybe, with luck and effort, the troopers could do better; in 1996, the most successful year for which we have data, they seized about three times the average amount of crack and cocaine, and more than twice the average amount of heroin. It doesn't matter. Even multiplied five-fold, these amounts are trivial. The entire I-95 drug interdiction program in Maryland could end tomorrow, racial profiling and all, without raising a ripple on the surface of local drug markets one way or the other.<sup>342</sup>

On reflection, why would anybody ever think that the state police could choke off the supply of illegal drugs by stopping one car in 1000 on the highway? Surely the impetus for this practice is not that it is effective but that it is easily done. The most important duties of state police troopers on interstate highways are infrequent events: responding to periodic emergencies and policing extreme violations of traffic regulations. In between times they may deter routine traffic violations to some extent by occasional enforcement of the official rules, but their most important jobs are to be available and to be visible. As long as all they need to do is be there and give out some tickets, why not troll for drugs along the way? After all, the troopers have virtually unlimited discretion in choosing who to stop, and are at least as visible as otherwise when they question a suspect by the side of the road or conduct a search. Of course, once such a program takes hold, it's self-perpetuating. A big drug bust, unlike a traffic ticket, is a catch — \$10,000 worth of cocaine seized, two bad guys put away. It's a satisfying, career-building success, even if a hundred similar fish swim by

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340. According to the 2000 Census, the national population was 281.4 million, [http://factfinder.census.gov/bf/\\_lang=en\\_vt\\_name=DEC\\_2000\\_SF1\\_U\\_DP1\\_geo\\_id=01000US.html](http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_DP1_geo_id=01000US.html), and the population of the Baltimore-Washington D.C. Consolidated Metropolitan Area was 7.6 million, [http://factfinder.census.gov/servlet/DTTable?\\_ts=42817970970](http://factfinder.census.gov/servlet/DTTable?_ts=42817970970).

341. See RHODES ET AL., *supra* note 152, at 17, tbl.7, for the estimate of heroin consumption. The total seized by the MSP in the I-95 corridor in the study period was about 4.5 kilograms. See *supra* text accompanying notes 153-154.

342. According to the Superintendent of the MSP, in 1997, "an agency of the Drug Enforcement Administration recognized the Maryland State Police for recovering more crack cocaine during traffic stops than any other police department in the country." Mitchell, *supra* note 30. If that is any indication of the comparative success of other high way drug interdiction programs generally, it is a pretty dismal signal.

undisturbed. Unfortunately, the circumstance that makes this method possible — the discretion to stop, question, and search any one of thousands of drivers — also means that the troopers must make their initial choices based on very limited information, and that they rarely find what they are looking for. Not surprisingly, the troopers use any clue that might improve their odds, and race is a clue that is always available. The defining features of highway drug interdiction — unchecked police discretion, low information, low probability of success, and high rewards for the rare big hit — combine to make racial profiling a temptation that is hard to resist.

## V. CONCLUSION

The data on drug interdiction by the Maryland State Police are the best available, but they are limited. We have done our best to describe a complex process with the information at our disposal. Fortunately, the basic outlines are not hard to see. The first step is both the clearest and the most important: The Maryland State Police transparently *do* use race and ethnicity to decide who to stop and to search. There is no other credible explanation for the patterns of stops, searches, and seizures. We cannot observe the process by which these racial preferences are put into effect, but a plausible story emerges from our data together with other information on highway drug interdiction: Maryland State troopers seem to discriminate against black and Hispanic motorists at every stage of their encounters, from initial stop to final search, including especially the large number of “pre-search” interrogations and investigations that precede the comparatively small number of full-dress searches. The purpose of this discrimination is plain, to maximize the number of drug traffickers arrested, and the quantities of contraband drugs seized. Whether it works is less clear. The great majority of the drugs seized on I-95 in Maryland are found in cars with black and Hispanic drivers, but that fact is hard to evaluate; we know that proportion is exaggerated by the racial disparities in the MSP’s intelligence and interdiction practices, but we don’t know to what extent.

The legal status of racial profiling may be the murkiest issue we consider, but only at the margins: How does the Equal Protection Clause apply in an area that traditionally has been governed by the Fourth Amendment? What remedies are available? And so forth. These questions are less important than they might appear, since all significant audiences — including especially political actors — seem to agree that racial profiling on the highway is illegal and should be stopped. That consensus should be no surprise. Racial profiling on interstate highways inflicts heavy costs on thousands of innocent minority motorists in an attempt to find a few dozen drug dealers, and it achieves nothing in return. The impulse that fuels the practice — to

increase the haul of illegal drugs — also provides a measure of its success, and by that measure it is an unqualified failure. At their best, the Maryland State Police seize less than one percent of the illegal drugs that flow around them.