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# Racial Profiling and the Constitution

Albert W. Alschuler<sup>†</sup>

Until September 11, 2001, almost everyone condemned racial profiling. President Bill Clinton called the practice “morally indefensible” and “deeply corrosive.”<sup>1</sup> President George W. Bush pledged, “[W]e will end it.”<sup>2</sup> A federal court observed, “Racial profiling of any kind is anathema to our criminal justice system.”<sup>3</sup> 81 percent of the respondents to a 1999 Gallup poll declared their opposition.<sup>4</sup>

The horror of September 11 produced a shift in sentiment. Shortly after that date, 58 percent of the respondents to a Gallup poll said that airlines should screen passengers who appeared to be Arabs more intensely than other passengers.<sup>5</sup> Half the respondents who voiced an opinion favored requiring people of Arab ethnicity, including United States citizens, to carry special identification cards.<sup>6</sup> Blacks were more supportive of special scrutiny

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<sup>1</sup> Randall Kennedy, *Suspect Policy*, New Republic 31 (Sept 13–20, 1999).

<sup>2</sup> Address to the Joint Session of Congress by the President, reprinted in 147 Cong Rec H433 (Feb 27, 2001).

<sup>3</sup> *Martinez v Village of Mount Prospect*, 92 F Supp 2d 780, 782 (N D Ill 2000).

Attorney General John D. Ashcroft said, “I believe racial profiling is an unconstitutional deprivation of equal protection under our Constitution.” *Black Caucus, Ashcroft Have Tense Meeting: Attorney General Cites “Candid Exchange” and Stresses Agreement on Profiling*, Wash Post A6 (Mar 1, 2001). The Director of the Federal Bureau of Investigation, Robert S. Mueller, agreed: “Racial profiling is abhorrent to the Constitution, it is abhorrent in any way, shape or form.” Quoted in 147 Cong Rec S8683 (Aug 2, 2001). Senator Orrin G. Hatch commented, “[T]here has emerged a consensus concerning the fundamental point of the debate: racial profiling, also known as bias-based policing, is wrong, it is unconstitutional, and it must not be practiced or tolerated.” *End Racial Profiling Act of 2001, Hearing on S. 989 Before the Senate Committee on the Judiciary Subcommittee on the Constitution, Federalism and Property Rights*, 107th Congress, 1st Sess (2001), available online at <<http://www.senate.gov/%7Ejudiciary/oldsite/ogh080101sc.htm>> (visited Nov 30, 2002) [on file with U Chi Legal F].

<sup>4</sup> Kathryn K. Russell, *Symposium: Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature*, 3 Rutgers Race & L Rev 61, 62 n 5 (2001).

<sup>5</sup> *Clinton, Race Issues Top First Day for High Court*, Houston Chron 4 (Oct 2, 2001).

<sup>6</sup> *Id.*

for Arabs than were other Americans.<sup>7</sup> John Farmer, Jr., the Attorney General of New Jersey, wrote in a newspaper column:

More than 6,000 people are dead, some would argue, because of insufficient attention to racial or ethnic profiles at our airports. . . . Let's be blunt: How can law enforcement not consider ethnicity in investigating these crimes when that identifier is an essential characteristic of the hijackers and their supposed confederates and sponsors, and when law enforcement's ignorance of the community heightens the importance of such broadly shared characteristics? Law enforcement tactics must be calibrated to address the magnitude of the threat society faces.<sup>8</sup>

This article examines the constitutionality of using racial classifications in police investigation, evaluating this issue under both the Fourth Amendment and the Equal Protection Clause.

Two early sections of the article set the stage by asking readers to evaluate four cases and by venturing a guess about most readers' intuitions concerning them. Later sections draw on these cases to develop and illustrate general themes.

Five sections then offer lessons in how not to think about racial classification in the criminal justice system, criticizing some approaches of courts and commentators. The first of these sections—Part III—describes how courts often fail to subject racial classifications to strict scrutiny by denying their racial character. Some courts, for example, maintain that when law enforcement officers consider other characteristics as well as race, they do not classify by race. Among the decisions examined in Part III is the Second Circuit's ruling in *Brown v City of Oneonta*.<sup>9</sup> When the victim of a crime described the criminal only as a young black man, police officers responded by questioning hundreds of “non-

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<sup>7</sup> Clarence Page, *Look at Who Favors Profiling Now*, Orlando Sentinel A17 (Oct 4, 2001) (71 percent of blacks favored special security checks for Arabs at airports, and 64 percent favored requiring people of Arab ethnicity to carry identification cards).

<sup>8</sup> John Farmer, Jr., *Rethinking Racial Profiling*, Newark Star-Ledger § 10, p 1 (Sept 23, 2001). Floyd Abrams, a lawyer noted for his championship of civil liberties, declared, “It would be a dereliction of duty to the American public to forget the fact that the people who committed these terrible crimes all spoke Arabic to each other. . . . [W]e don't want to be in a position where we're pulling every Arab-American out of line for detailed strip-searches. At the same time, we have to protect ourselves.” Kathy Barrett Carter, *Some See New Need for Racial Profiling*, Newark Star-Ledger 21 (Sept 20, 2001).

<sup>9</sup> 221 F3d 329 (2d Cir 2000), petition for reh en banc denied, 239 F3d 769 (2000), cert denied, 534 US 816 (2001).

white persons.”<sup>10</sup> The court concluded that, because the officers relied on the witness’s description, they did not classify by race and did not violate the Equal Protection Clause.<sup>11</sup>

Although many judges have failed to subject the use of racial classifications by the police to strict scrutiny, some judges have declared, “That law in this country should tolerate use of one’s ancestry as probative of possible criminal conduct is repugnant under any circumstances.”<sup>12</sup> Part IV contends that these judges have made an equal and opposite error.

Part V focuses on the Supreme Court’s statement in *Whren v United States*<sup>13</sup> that although purposeful racial discrimination can violate the Equal Protection Clause, it cannot render a search or seizure unreasonable under the Fourth Amendment.<sup>14</sup> *Whren*’s separation of the Fourth Amendment and the Equal Protection Clause prevents courts from weighing all of the interests impaired by a police action against all of the justifications asserted for it. Part V contends that, rather than prohibit the consideration of racial discrimination in Fourth Amendment cases, the Supreme Court should read this amendment to proscribe some forms of discrimination not condemned by the Equal Protection Clause. Taking its cue from Sixth Amendment decisions forbidding the “systematic” exclusion from jury service of distinctive groups in the community, the Court should hold that when a police practice systematically subjects minorities to searches and seizures at a higher rate than the rate at which these minorities commit crimes, this practice violates the Fourth Amendment unless it is appropriately tailored to advance a significant state interest.

When a victim or witness has described an offender by race, virtually everyone agrees that law enforcement officers may consider race in deciding whether they have sufficient justification for stopping a suspect. Many commentators and some courts contend that this use of race is appropriate because it rests on “particularized” rather than “statistical” evidence. Part VI contends that this asserted distinction is illusory. In this part and else-

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<sup>10</sup> Id at 334.

<sup>11</sup> Id at 338.

<sup>12</sup> *United States v Martinez-Fuerte*, 428 US 543, 571 n 1 (1976) (Brennan, joined by Marshall, dissenting).

<sup>13</sup> 517 US 806 (1996).

<sup>14</sup> See id at 813 (“[T]he 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.”).

where, I criticize the Ninth Circuit's *en banc* ruling in *United States v Montero-Camargo*,<sup>16</sup> in which the court held that Border Patrol agents may not consider ethnicity in deciding whether to stop someone for a suspected immigration violation.<sup>16</sup>

The defendants in *United States v Armstrong*<sup>17</sup> noted that all of the defendants charged with crack cocaine offense in the federal court in Los Angeles appeared to be non-white. They claimed to be the victims of discriminatory prosecution. In holding that the defendants were not entitled to discovery from the United States Attorney's office, the Supreme Court emphasized their failure "to identify individuals who were not black and could have been prosecuted."<sup>18</sup> A few federal district courts, relying on *Armstrong*, have denied relief to litigants challenging racial profiling because they did not identify "similarly situated" whites whom the police might have stopped but did not. Part VII endorses the view of the Second and Seventh Circuits that these courts misread *Armstrong*. This part argues, moreover, that the Supreme Court was mistaken in describing the "similarly situated requirement" as an "ordinary equal protection principle." It also notes that requiring litigants to identify unapprehended white offenders would make claims of racial profiling impossible to prove.

After discussing how not to think about the use of racial classifications in the criminal justice system, the article turns to how courts should analyze the consideration of race by the police. Part VIII maintains that when the police treat race itself as an indicator of criminality and effectively declare some races more dangerous than others, their profiling stigmatizes minorities in much the same way (if not to the same degree) as the racial segregation condemned by *Brown v Board of Education*.<sup>19</sup> Not all police racial classifications, however, convey this harmful message. Part VIII maintains that when, in terms of ordinary social meaning, governmental action stigmatizes a race, proof of discriminatory purpose should be unnecessary. The government should be required to justify its delivery of this damaging message.

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<sup>16</sup> 208 F3d 1122 (9th Cir 2000) (*en banc*), cert denied as *Sanchez-Guillen v United States*, 531 US 889 (2000).

<sup>16</sup> *Id* at 1135.

<sup>17</sup> 517 US 456 (1996).

<sup>18</sup> *Id* at 470.

<sup>19</sup> 347 US 483 (1954).

Part IX focuses on the tangible burdens racial classifications impose on minorities. Even unquestionably appropriate police practices are likely to subject innocent blacks and Latinos to unwanted contact with the police at a higher rate than innocent whites. The members of the most disadvantaged racial groups pay more for law enforcement. When a search or seizure imposes no additional racial burden, however, it should require only the justification provided by the existence of reasonable suspicion or probable cause.

Every search or seizure based in part on race or ethnicity should, however, require at least this much justification. Although the Supreme Court has upheld race-based administrative detention even in the absence of particularized suspicion,<sup>20</sup> this detention should be unconstitutional. Only a life-threatening emergency might justify a departure from this principle.

Burdening minorities not only at a higher rate than their share of the population but also at a higher rate than their rate of criminality should require greater justification. A small perceived disparity in the rate of offending of two racial groups can lead to a large disparity in the allocation of law enforcement resources. The police may “pile on” or concentrate their efforts on the group whose investigation promises to yield the greater law enforcement return. Part IX argues that neither the existence of probable cause for every seizure nor increasing the police department’s batting average or rate of return can automatically justify burdening minorities at a higher rate than their rate of offending.

A trade-off between distributive justice and efficiency seems inescapable. Part IX contends that current constitutional doctrine distorts this trade-off and, if taken seriously, produces counter-intuitive results.

Part X applies the analysis suggested in the earlier sections to three contested issues. It examines the propriety of taking apparent Arab ethnicity into account in screening airline passengers, of devoting disproportionate resources to minority neighborhoods in waging the war on drugs, and of considering ethnicity in making checkpoint and roving patrol stops for suspected immigration violations.

Part XI considers questions of standing and remedy. Even when statistical evidence establishes unlawful profiling, it may not establish anyone’s standing to challenge the constitutional

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<sup>20</sup> See *Korematsu v United States*, 323 US 214 (1944); *Martinez-Fuerte*, 428 US at 543.

violation. Part XI compares *McCleskey v Kemp*,<sup>21</sup> in which the Supreme Court held that aggregated proof of discrimination in the administration of Georgia's death penalty did not establish the violation of any individual's rights, with *Northeastern Florida Chapter of the Associated General Contractors of America v Jacksonville*,<sup>22</sup> in which the Court held that a litigant challenging an affirmative action plan need not demonstrate that, without discrimination, he would have obtained the governmental benefit sought.

This part also reviews possible remedies for racial discrimination by the police. It focuses particularly on whether a criminal defendant who establishes that purposeful discrimination produced her arrest and prosecution should be entitled to a dismissal of the charges against her. It argues that *Yick Wo v Hopkins*<sup>23</sup> entitles a defendant to this remedy in some situations. It also contends, however, that the defense of "selective prosecution" or "discriminatory targeting" should not be available to defendants charged with crimes of personal violence and most property crimes. This defense should be limited to cases in which defendants are charged with crimes whose investigation usually is proactive. Part XI considers in addition the difficulty of devising effective injunctive remedies for unlawful profiling.

A subtext of this article is that courts have been more sympathetic to claims that affirmative action discriminates against whites than to claims that racial classifications in the criminal justice system discriminate against minorities. A conclusion re-emphasizes this theme.

## I. SOME CASES AND A THOUGHT EXPERIMENT

The opponents of racial profiling often have failed to define the term, and the definitions provided by legislatures and scholars have differed substantially.<sup>24</sup> Analysis of the issue can begin

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<sup>21</sup> 481 US 279 (1987).

<sup>22</sup> 508 US 656 (1993).

<sup>23</sup> 118 US 356 (1886).

<sup>24</sup> Three of the states that have forbidden racial profiling have defined it as "the detention, interdiction or other disparate treatment of an individual *solely* on the basis of the racial or ethnic status of such individual." Conn Gen Stat § 54-11(a) (West 2002) (emphasis added); 22 Okla Stat Ann § 34.3(A) (West 2003); RI Gen Laws § 31-21.1-2 (2001). Another state has defined profiling as "the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped." Cal Penal Code § 13519.4 (West 2002). Proposed federal legislation declares that racial profiling is "the practice of a law enforcement agent relying, to any degree, on race, ethnicity, or national origin in selecting which

with a description of four cases and a thought experiment about them. Please rank these cases in terms of the legitimacy or offensiveness of the use of race by law enforcement officers. Although you may be tempted to lump some cases together, tie rankings are not allowed.

In Case 1, a robbery victim uses race as an identifying physical characteristic. She calls 911 and mentions several features of the robber, including the fact that he was a black man in a green coat. An officer responding to a radio bulletin stops and frisks a person near the scene of the crime who matches the victim's description.

In Case 2, social scientists whose research methods are impeccable report that an absolute majority of the young black men on the streets of Pothole, an inner-city neighborhood, are carrying concealed knives, a criminal offense. According to the researchers, white youths are committing this crime at a considerably lower rate. An officer stops and frisks a suspect simply because he is young, black, male, and on the streets of Pothole.

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individuals to subject to routine investigatory activities, or in deciding upon the scope and substance of law enforcement activity following the initial routine investigatory activity, except that racial profiling does not include reliance on such criteria in combination with other identifying factors when the law enforcement agent is seeking to apprehend a specific suspect whose race, ethnicity, or national origin is part of the description of the suspect." End Racial Profiling Act of 2001, S 989, 107th Cong, 1st Sess 501 (5) (June 6, 2001), in 147 Cong Rec S5895 (June 6, 2001). See *Oxford American Dictionary and Language Guide* (1999) (defining racial profiling as the "alleged police policy of stopping and searching vehicles driven by people from particular racial groups"); Kennedy, *Suspect Policy*, New Republic at 35 (cited in note 1) ("[R]acial profiling occurs whenever police routinely use race as a negative signal that, along with an accumulation of other signals, causes an officer to react with suspicion."); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U Pa J Const L 296, 299 n 27 (2001) ("I use the term racial profiling to mean any stop, search, or arrest of a person based in whole or in part on the race of the suspect, except where police are acting on a racial description of the perpetrator of a crime."); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L Rev 1075, 1077 (2001) ("The emerging consensus is that racial profiling constitutes the intentional consideration of race in a manner that disparately impacts certain racial minority groups, contributing to the disproportionate investigation, detention, and mistreatment of innocent members of those groups."); Samuel R. Gross and Debra Livingston, *Racial Profiling Under Attack*, 102 Colum L Rev 1413, 1415 (2002) ("As we use the term, 'racial profiling' occurs whenever 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."); David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 Mich J Race & L 237, 237 (2001) (defining racial profiling as "the idea that police may use race as a factor, or the factor, in deciding who to regard as a criminal suspect"); *Chavez v Illinois State Police*, 251 F3d 612, 620 (7th Cir 2001) ("Racial profiling is generally understood to mean the improper use of race as a basis for taking law enforcement action.").



Case 3 is probably the paradigmatic case of racial profiling—profiling on the highway. A patrol officer stops black motorists at a higher rate than white motorists whose conduct is identical. Assume for purposes of analysis that the officer's reason for differentiating blacks from whites is not his racial hatred but his belief that blacks are more likely than whites to be transporting drugs. The officer hopes that his traffic stops will generate evidence of this more serious crime.<sup>25</sup>

Assume that the highway patrol officer in Case 3 has probable cause to believe that both the motorists he stops and the motorists he allows to proceed are guilty of minor traffic offenses. In fact, 93.3 percent of the drivers observed on one interstate highway were exceeding the posted speed limit or committing other visible traffic violations.<sup>26</sup> Although only 17.5 percent of these violators were black, 28.8 percent of the drivers stopped on the highway were black, and 76 percent of the drivers whose vehicles were searched were black.<sup>27</sup> The frequency of minor traffic violations poses a nice dilemma for the police, for drug couriers, and for other motorists. Some drug courier profiles treat obeying the

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<sup>25</sup> The federal government has strongly encouraged state and local law enforcement officers to view the highway as a battleground in the war on drugs. It has trained patrol officers to use traffic stops to investigate suspected drug offenses. See the Drug Enforcement Administration's description of "Operation Pipeline," available online at <<http://www.usdoj.gov/dea/programs/pipecon.htm>> (visited Nov 15, 2002) [on file with U Chi Legal F], and see also the Department of Transportation's description of the training courses offered by the Drug Interdiction Assistance Program of the Federal Motor Carrier Safety Administration, available online at <<http://www.fmcsa.dot.gov/ntc/pages/set.html>> (visited Nov 15, 2002) [on file with U Chi Legal F]. The federal government also has provided financial incentives for state and local drug interdiction. See 21 USCA §§ 881(e)(1)(A) & (e)(3) (2002). States have established programs like "Operation Valkyrie," a program designed to "enhance [the] capability [of the Illinois State Police] to detect and apprehend drug couriers . . . while focusing on the enforcement of highway safety regulations." *Operation Valkyrie: An Officer's Guide to Drug Interdiction Techniques*, quoted in *Chavez v Illinois State Police*, 251 F3d 612, 620 (7th Cir 2001).

<sup>26</sup> See William H. Buckman and John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, 3 Rutgers Race & L Rev 83, 105 (2001) (citations omitted).

<sup>27</sup> *Id.* On another highway, 98.1 percent of all vehicles were speeding; 15 percent of the speeding vehicles contained one or more black occupants; and 35.6 percent of the traffic stops in which police records revealed the race of the driver were of blacks. Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand L Rev 333, 347–48 (1998). Studies of vehicle and pedestrian stops in other jurisdictions reveal equally striking disparities. See Rudovsky, 3 U Pa J Const L at 299–303 (cited in note 24). Recent unpublished evidence apparently suggests, however, that blacks are much more likely than whites to drive at fifteen or more miles per hour above the speed limit. David Kocieniewski, *Study Suggests a Racial Gap Among Speeding Drivers on New Jersey Turnpike*, NY Times C13 (Mar 21, 2002). This evidence calls into question the judgment that highway patrol officers rely heavily on race in deciding whom to stop, but it does not explain the extreme disparity in the rates at which officers ask motorists to consent to searches of their vehicles.

traffic laws as an indicator of illegal activity. By driving at or below the speed limit, a motorist may make the police both more interested in stopping him and less able to stop him lawfully.<sup>28</sup>

The Fourth Amendment as the Supreme Court currently interprets it poses no bar to a thorough search of both a person who violates a minor traffic law and the interior of her vehicle. That is, the police may search at will an overwhelming majority of drivers and vehicles on the highway.<sup>29</sup> A traffic officer seeking evidence of drug activity, however, ordinarily does not exercise his power to make a custodial arrest for a minor offense and to conduct a vehicle search incident to this arrest.<sup>30</sup> Instead, after stopping a motorist, he asks her to consent to a search of her vehicle. The officer understands that few Americans believe that they are free to reply, "Sorry, Officer, not today."<sup>31</sup> In fact, a ma-

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<sup>28</sup> Peter A. Lyle, Note, *Racial Profiling and the Fourth Amendment: Applying the Minority Victim Perspective to Ensure Equal Protection Under the Law*, 21 BC Third World LJ 243, 248 (2001) (describing a 1985 Florida Department of Highway Safety Guide that directed officers to be suspicious when motorists exhibited "scrupulous obedience to traffic laws") (citations omitted).

<sup>29</sup> The Supreme Court's effective authorization of general searches on the highways proceeds from a series of decisions that seem distressing when viewed individually and terrifying when viewed collectively:

*Atwater v City of Lago Vista*, 532 US 318 (2001), held that the Fourth Amendment permits a police officer to make a custodial arrest for a minor traffic offense. The officer need have no reason to doubt that the arrestee would respond to a traffic citation.

*Whren v United States*, 517 US 806 (1996), held that a custodial arrest for a minor traffic offense on probable cause is not invalid either because the officer's subjective reason for making it is to investigate other crimes or because—objectively—the police never stop motorists for this offense except when seeking evidence of other crimes.

*United States v Robinson*, 414 US 218 (1973), held that an officer who makes a custodial arrest for a traffic offense may make a full search of the person of the arrestee incident to this arrest. The officer need not consider the search necessary to prevent the destruction of evidence or to protect the officer.

*New York v Belton*, 453 US 454, 460 (1981), held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." The search may occur although the occupants have been removed from the vehicle, and it may extend to "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." *Id.* at 460 n 4.

<sup>30</sup> Local laws and police department regulations often preclude the officer from doing what the Supreme Court's Constitution allows.

<sup>31</sup> In *State v Retherford*, 639 NE2d 498, 503 n 3 (Ohio App 1994), a highway patrol officer testified that during a previous year he had asked 786 motorists to consent to

majority of the people who consider themselves free to decline appear to be on the Supreme Court. Black motorists who are stopped and searched at a higher rate than white motorists are likely to conclude that their true crime consists, not of a traffic offense, but of "driving while black."

Case 4 is the Supreme Court's leading decision on the legality of racial classifications under the Fourth Amendment, *United States v Martinez-Fuerte*.<sup>32</sup> At a fixed checkpoint operated by the Border Patrol on the principal highway between San Diego and Los Angeles, a uniformed agent inspects all vehicles and then directs fewer than 1 percent to a secondary inspection area. There, other agents question occupants about their citizenship and immigration status. All or nearly all of the vehicles the "point agent" refers for secondary inspection contain one or more people of apparent Latino ethnicity.<sup>33</sup> The agent, however, does not rely on ethnicity alone in making her referrals. She also considers such circumstances as age and type of vehicle, number of occupants, hairstyle, facial expression, body language, cleanliness, and dress.<sup>34</sup> The Border Patrol discovers one or more illegal aliens

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searches of their vehicles. None had refused. *Id.* at 502. When counsel mentioned the officer's testimony during argument before the Supreme Court in another case in which the officer had obtained a motorist's consent, Justice Scalia commented, "Well, good for him, so long as he hasn't violated the Federal Constitution." Transcript of Argument at 32-33, *Ohio v Robinette*, No 95-891, U.S. Supreme Court (Oct 8, 1996), available on Westlaw at 1996 WL 587659.

<sup>32</sup> 428 US 543 (1976).

<sup>33</sup> Or so the Supreme Court assumed for purposes of decision. See *id.* at 563. The record in *Martinez-Fuerte* did not reveal the ethnicity of the people referred for secondary inspection.

I follow the practice of saying that "ethnicity" distinguishes Anglos from Latinos while "race" distinguishes whites from blacks. The ancestry of people called Latino and black in America, however, is highly diverse, and race is much more a social than a genetic concept. I distinguish between race and ethnicity because this usage is conventional, because some Latinos object to describing their ethnicity as a race, and because referring to the conventionally described races as "ethnic groups" would seem odd. I do not, however, draw the distinction because I believe it serves a purpose.

<sup>34</sup> Again I go beyond the record in *Martinez-Fuerte*, although the Supreme Court apparently concluded that the Border Patrol took account of circumstances like these. It noted that 16 percent of the California population were "Spanish-speaking or of Spanish surname" while fewer than 1 percent of the motorists passing the checkpoint were stopped for questioning. It declared, "This appears to refute any suggestion that the Border Patrol relies extensively on apparent Mexican ancestry standing alone in referring motorists to the secondary area." *Id.* at 563 n 16.

The dissenting justices objected that "[g]iven the socio-economic status" of people of "Spanish or Mexican ancestry," fewer than 16 percent of all motorists were likely to have this ancestry. *Id.* at 573 n 4. A more serious flaw in the majority's analysis, however, was its failure to consider whether the selection of Latinos for investigation might have been essentially random or based in part on the length of the queue at the secondary inspection area. See Maclin, 51 Vand L Rev at 367 n 153 (cited in note 27). Apparently without direct

in 20 percent of the vehicles it refers to the secondary inspection area.

## II. A FIRST LOOK AT THE CASES

You need not tell me your ranking of these cases. A genie has granted me mystical powers, and I believe I can discern your rankings telepathically.

I am confident, for example, that you placed Case 1, the case of the suspect who met the robbery victim's description, at one end of your spectrum. You ranked it the least troublesome of the cases. Cases in which white criminals have conjured-up phantom black offenders to draw suspicion from themselves may have given you some pause,<sup>35</sup> and so may cases in which the police have relied on descriptions consisting of little more than race to question large numbers of blacks.<sup>36</sup> Nevertheless, if the robbery victim gave a sufficiently detailed description, you probably believe that the officer's conduct was unquestionably appropriate. His use of skin color as an identifying physical characteristic was no more objectionable than his use of coat color.

My crystal ball tell me that Case 2, the case of the suspect stopped and frisked simply for being a young black man on the streets of Pothole, is at the opposite end of your spectrum. You probably consider the idea that someone could be stopped and frisked simply for being young, black, male, and the resident of an inner-city neighborhood highly offensive. Although social scientists have determined that most members of this suspect's

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support in the record, the government reported in its brief that Border Patrol agents "rel[ie]d on factors in addition to apparent Mexican ancestry" in diverting motorists. 428 US at 563 n 16. In an earlier case involving roving patrol stops, the Supreme Court observed, "The Government . . . points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut." *United States v Brignoni-Ponce*, 422 US 873, 885 (1975), citing Reply Brief for the United States 12–13, *United States v Ortiz*, 422 US 891 (1975). Many Border Patrol vehicle stops appear to rest on ethnicity, class, and very little more. See *Nicacio v INS*, 797 F2d 700, 704 (9th Cir 1985) (discussed briefly in text accompanying note 59).

<sup>35</sup> See, for example, Andrew Kopkind, *The Stuart Case: Race, Class and Murder in Boston*, *The Nation* 149 (Feb 5, 1990) (describing a case in which a white man who later appeared to have committed the crime himself attributed the murder of his pregnant wife to a black man and thus prompted the police to stop, question, and search many blacks over a period of several weeks); Jerry Adler, *Innocents Lost*, *Newsweek* 26 (Nov 14, 1994) (describing the case of Susan Smith who, after drowning her sons, claimed that a black man had abducted them).

<sup>36</sup> See, for example, *Brown v City of Oneonta*, petition for reh'g en banc denied, 239 F3d 769 (2000), cert denied, 122 S Ct 44 (2001) (discussed in text accompanying notes 63–114).

demographic group are committing crimes, you reject any principle of guilt by racial association.

I believe that you placed Case 3, the paradigmatic case of racial profiling on the highway, a step below the case of the young black man from Pothole. The step between the two cases may be small, but the consensus I sensed concerning the propriety of the police conduct in Case 1 and the impropriety of the police conduct in Case 2 is beginning to fade. Racial profiling on the highway has few defenders, but it does have some. Carl Williams, for example, the New Jersey Chief of Troopers, told the press that minorities were more likely than whites to traffic in cocaine and marihuana. Governor Christine Todd Whitman fired Chief Williams for making this statement.

Case 4, in which a Border Patrol agent investigating illegal immigration sixty-six miles inside the Mexican-United States border relies largely on ethnicity in making referrals to a secondary inspection area, is the case most likely to provoke substantial disagreement. The Supreme Court upheld the constitutionality of this practice by a 7-to-2 vote,<sup>37</sup> and although most of the academic literature has criticized the Court's decision,<sup>38</sup> some has supported it.<sup>39</sup> When forced, perhaps reluctantly, to separate this case from the others, I believe that you ranked it between Case 1 and Case 3.

You are now at the last stage of the thought experiment. Please explain your ranking of the cases. The distinctions among them may prove less sharp than you would like, and the lines you draw initially may prove less durable than other, less visible lines. The strength and clarity of your convictions may obscure the conceptual difficulty of the issues.<sup>40</sup>

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<sup>37</sup> *United States v Martinez-Fuerte*, 428 US 543 (1976).

<sup>38</sup> See, for example, Randall Kennedy, *Race, Crime, and the Law* 154-55, 157-63 (Random House 1997); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 Wash U L Q 675, 696 (2000).

<sup>39</sup> See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 NYU L Rev 956, 1006-07 (1999); Ronald J. Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law*, 37 Houston L Rev 1421, 1453-56 (2000).

<sup>40</sup> William Stuntz says that racial profiling is an "intractable" problem if confronted directly, and he calls the legal issues it presents "hard." He makes no attempt to resolve these issues. William J. Stuntz, *Local Policing After the Terror*, 111 Yale L J 2137, 2142, 2162-63 (2002).

### III. A FIRST LESSON IN HOW NOT TO THINK ABOUT RACIAL CLASSIFICATION IN THE CRIMINAL JUSTICE SYSTEM: DENYING THE RACIAL CLASSIFICATION AND AVOIDING STRICT SCRUTINY

#### A. "Relevant to the Law Enforcement Need to be Served": *Martinez-Fuerte* and the Fourth Amendment

The Border Patrol's one-in-five batting average in *Martinez-Fuerte* suggested that it might have had reasonable grounds for some of its referrals to the secondary inspection area. The Government argued, however, that these referrals and the detentions that followed them could be justified without individualized suspicion, and the Supreme Court accepted this contention.

The majority opinion by Justice Powell tracked the familiar cost-benefit formula the Supreme Court employed to resolve most Fourth Amendment issues in the era between Earl Warren and Antonin Scalia. The Court described the relevant governmental interest in macro terms: "[L]arge numbers of aliens seek illegally to enter or to remain in the United States. . . . Interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems."<sup>41</sup> It described the relevant individual interest in micro terms: "While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited. . . . [I]t involves only a brief detention of travelers during which '[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'"<sup>42</sup> The Court then declared the government victorious. Justice Powell concluded, "Border Patrol officers must have wide discretion in selecting the motorists to be diverted."<sup>43</sup>

The Court devoted only brief attention to the fact that the Border Patrol focused heavily on ethnicity in exercising its discretion. Justice Powell declared, "[E]ven if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."<sup>44</sup> A footnote ex-

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<sup>41</sup> 428 US at 551–52.

<sup>42</sup> Id at 557–58, quoting *United States v Brignoni-Ponce*, 422 US 873, 880 (1975). The Government reported that investigations at the secondary inspection area lasted three to five minutes "on average," 428 US at 546–47, but this average probably included many cases in which citizens and lawful aliens produced identification papers that promptly dispelled the agents' suspicion. When a passenger failed to carry identification papers, her detention and that of her companions might have been substantially longer.

<sup>43</sup> 428 US at 563–64.

<sup>44</sup> Id at 563.

plained, “[T]o the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint . . . that reliance clearly is relevant to the law enforcement need to be served.”<sup>45</sup> The Court reiterated its ruling a year earlier in *United States v Brignoni-Ponce*:<sup>46</sup> Although Latino ethnicity could not itself create the reasonable suspicion required for a roving patrol stop, “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough [in an area near the Mexican-U.S. border] to make Mexican appearance a relevant factor.”<sup>47</sup>

The majority’s analysis swept broadly enough to resolve in a sentence all of the thought-experiment cases described above. For Justice Powell, it was apparently enough that race was “relevant to the law enforcement need to be served”—a circumstance that, if the factual assumptions of the police were accurate, would justify the seizures in all of these cases. If one assumes that most young black men in Pothole are carrying concealed knives and most young white men are not, race is “relevant to the law enforcement need to be served.” Just as the Border Patrol is likely to arrest more illegal aliens when it concentrates on Latinos, the police in Pothole are likely to arrest more weapons violators when they concentrate on blacks. Indeed, the Pothole Precinct’s better than .500 batting average will put the Border Patrol’s average to shame.

“Relevancy,” however, is insufficient under the Constitution to justify a racial or ethnic classification. Neither the majority nor the dissenting opinion in *Martinez-Fuerte* mentioned the familiar principle that when Latinos are deliberately treated less favorably than Anglos, a “rational basis” will not do. To justify stopping Latinos even briefly while Anglos drive to Los Angeles, venerable constitutional doctrine declares that a “compelling governmental interest” is required.

Ironically, the Supreme Court first articulated the requirement that racial classifications meet this demanding standard in its most infamous decision on racial profiling. Upholding the preventive detention of Japanese Americans during World War II,<sup>48</sup> it declared, “All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must

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<sup>45</sup> Id at 564 n 17.

<sup>46</sup> 422 US 873 (1975).

<sup>47</sup> Id at 886–87.

<sup>48</sup> *Korematsu v United States*, 323 US 214 (1944).

subject them to the most rigid scrutiny.”<sup>49</sup> The Court’s current formulation of the principle appears in a decision striking down a federal affirmative action program<sup>50</sup>: “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”<sup>51</sup>

Under the Supreme Court’s decisions, only purposeful discrimination violates the Equal Protection Clause.<sup>52</sup> The Court’s rhetoric occasionally has indicated that only racial animus, bias, or a desire to subordinate the members of a race qualifies as a discriminatory purpose.<sup>53</sup> The Court’s recent decisions make clear, however, that although racial bias or invidious motivation remains sufficient, it is unnecessary. An intention to treat the members of different races differently is enough. “Our decisions have established,” the Court wrote in 1999, “that all laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized.”<sup>54</sup> The defect the Court perceives in affirmative action plans, for example, is that they intentionally classify by race, not that they reflect racial hatred or bias.

The decisions demanding a compelling reason for every racial classification arose under the Equal Protection Clause, and *Martinez-Fuerte* was decided, not under the Equal Protection Clause, but under the Fourth Amendment. Read narrowly, this case could become merely a decision about constitutional pleading. The defendant failed to say “equal protection,” and if only he had invoked the proper constitutional provision, he might have won.

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<sup>49</sup> Id at 216.

<sup>50</sup> *Adarand Constructors v Pena*, 515 US 200 (1995).

<sup>51</sup> Id at 227.

<sup>52</sup> See, for example, *Washington v Davis*, 426 US 229, 238–39 (1979).

<sup>53</sup> See, for example, *Personnel Administrator v Feeney*, 442 US 256, 279 (1979) (“Discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”) (rejecting a claim that a state law preferring veterans for civil service positions denied equal protection to women) (citations omitted). For analysis of the *Feeney* formulation, see David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U Chi L Rev 935, 962–64 (1989).

<sup>54</sup> *Hunt v Cromartie*, 526 US 541, 546 (1999).



## B. "Not Solely Because of Her Race": The Sixth Circuit and the Equal Protection Clause

Many courts, however, have refused to subject the use of racial classifications by law enforcement officers to strict scrutiny even when litigants have invoked the Equal Protection Clause. In *United States v Travis*,<sup>55</sup> for example, the Sixth Circuit held that because officers "did not choose to interview the defendant solely because of her race[,] . . . they did not violate her rights under the Equal Protection Clause."<sup>56</sup> The court declared, "[W]hen officers compile several reasons before initiating an interview, as long as some of those reasons are legitimate, there is no Equal Protection violation."<sup>57</sup> This analysis appeared to echo *Martinez-Fuerte's* emphasis on the fact that the Border Patrol did not rely on ethnicity alone in referring people for inspection and did not detain all Latinos.

As Randall Kennedy has noted, however, whenever race is one factor in a decision, it may be the decisive factor.<sup>58</sup> In a case following *Martinez-Fuerte*, a Chief Patrol Agent for the Immigration and Nationalization Service testified that, in making roving-patrol stops, his subordinates considered, in addition to Latino ethnicity, a "dirty, unkempt appearance," a "lean and hungry look," and wearing work clothes.<sup>59</sup> When the government allows unkempt Anglos to proceed and detains unkempt Latinos, it employs an ethnic classification.

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<sup>55</sup> 62 F3d 170 (6th Cir 1995).

<sup>56</sup> *Id.* at 174.

<sup>57</sup> *Id.* Subsequent Sixth Circuit decisions are in accord. See *United States v Avery*, 137 F3d 343, 353 (6th Cir 1997) ("The race issue . . . is without merit since race was only one of several factors that contributed to a reasonable suspicion."); *United States v Moss*, 2001 US App LEXIS 462, \* 5 n 1 (6th Cir 2001) (unpublished). An earlier Sixth Circuit decision, however, was to the contrary. *United States v Jennings*, 1993 US App LEXIS 926, \* 12-13 (6th Cir 1993) (unpublished). Other cases holding that the use of race does not require strict scrutiny as long as it is not the sole basis for a police classification are *United States v Weaver*, 966 F2d 391, 394 n 2 (8th Cir 1992), cert denied, 506 US 1040 (1992); *United States v Lacy*, 2000 US App LEXIS 31195, \* 3 (9th Cir 2000) (unpublished); *United States v Cuevas-Ceja*, 58 F Supp 2d 1175, 1184 (D Or 1999); and *State v Dean*, 543 P2d 425, 427 (Ariz 1975) (upholding the stop of a Latino in a white neighborhood because he was out of place). Contrary cases are *United States v Laymon*, 730 F Supp 332, 339 (D Colo 1990); *Whitfield v Board of County Commissioners*, 837 F Supp 338, 340, 344 (D Colo 1993); *People v Bower*, 597 P2d 115, 119 (Cal 1979); *State v Kuhn*, 517 A2d 162, 165 (NJ Super 1986); and *Lowery v Virginia*, 388 SE2d 265, 267 (Va App 1990) (declaring that a motorist's race is not "a permissible factor in the decision to stop his vehicle").

<sup>58</sup> Kennedy, *Race, Crime, and the Law* at 148-49 (cited in note 38).

<sup>59</sup> *Nicacio v INS*, 797 F2d 700, 704 (9th Cir 1985).

Even in our nation's shameful old days, only a small minority of blacks were lynched, and blacks were not alone in being lynched. Lynch mobs considered not only race but also gender, religion, attitude, and allegations of criminal conduct.<sup>60</sup> These mobs, however, employed racial classifications. Even old-style racists often have reasons in addition to race for hating people; we call someone a racist because race provides one of his reasons for judging other people, not because it provides the only one.

Outside the context of criminal investigation, courts have rejected the view that only classifications based exclusively on race or designed to disadvantage all members of a race qualify as racial classifications. For example, under the affirmative action plans the Supreme Court has subjected to strict scrutiny and held invalid, no one awarded government-funded contracts on the basis of race alone.<sup>61</sup> The Court has declared that the Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. . . . When there is a proof that a discriminatory purpose has been a motivating factor in the decision, [strict scrutiny is required]."<sup>62</sup>

### C. "Race Neutral on Its Face": The Second Circuit and Oneonta's Racial Sweep

In *Brown v City of Oneonta*,<sup>63</sup> the Second Circuit denied that a law enforcement officer who stops a suspect on the basis of a witness's description that includes race employs a racial classification.<sup>64</sup> Oneonta, New York is a town of ten thousand permanent

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<sup>60</sup> See, for example, Stewart E. Tolnay and E. M. Beck, *A Festival of Violence: An Analysis of Southern Lynchings 1882-1930* 47 (1995) (Table 2-5).

<sup>61</sup> See *Adarand Constructors v Pena*, 515 US 200 (1995); *Richmond v J.A. Croson Co.*, 488 US 469 (1989).

<sup>62</sup> *Arlington Heights v Metropolitan Housing Development Corp.*, 429 US 252, 265-66 (1977). In *Hunt v Cromartie*, 526 US 541 (1999), the Court declared that race could be considered with other circumstances in legislative redistricting but could not be the legislature's "predominant" criterion in the absence of compelling justification. *Id.* at 547. *Cromartie* recognized that someone proposing legislative districts would be aware of and probably would take account of the racial demographics of these districts, and it emphasized that no inquiry into motivation is necessary when, as in most of the cases considered in this article, government officials expressly classify by race. *Id.* at 546.

<sup>63</sup> 221 F3d 329 (2d Cir), petition for reh'g en banc denied, 239 F3d 769 (2000), cert denied, 122 S Ct 44 (2001).

<sup>64</sup> See *id.* at 337-38. See also Banks, 48 UCLA L Rev at 1077-78 (cited in note 24) (noting that "[n]o court has treated law enforcement reliance on a race-based suspect description as a racial classification warranting strict scrutiny under the Equal Protection Clause.").

residents, fewer than three hundred of whom are black. The 7,500 students of a state university also live in this town, and 2 percent of these students are black.

Just before 2:00 a.m. one night in Oneonta, someone broke into a home occupied by a 77-year-old woman. The victim did not see the burglar's face, but she could tell from his hands and forearms that he was black. She inferred from his movements that he was young. The burglar had a knife, and as he and the victim struggled, the burglar apparently cut his hand.

The Oneonta Police Department asked the state university to supply a list of its black male students, which it did. Although the police did their best to contact and question everyone on the list, they discovered no suspects among the students. Then, according to the Second Circuit, "over the next several days, the police conducted a 'sweep' of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period."<sup>65</sup> Once more, the police failed to identify the burglar. Black male students at the state university and others questioned by the Oneonta police sued the police department and various officials for violating their civil rights.<sup>66</sup>

In *Oneonta*, the Second Circuit vacated the trial court's determination that none of the plaintiffs had been detained involuntarily or seized. One plaintiff, for example, reported that "a police officer pointed a spotlight at him and said 'What, are you stupid? Come here. I want to talk to you.' He was then told to show his hands."<sup>67</sup> According to the Second Circuit, these allegations presented "arguably a close case," but the court declared, "[A] reasonable person in [the plaintiff's] circumstances would have considered the police officer's request to be compulsory."<sup>68</sup> Another plaintiff reported "that he encountered two police officers in his dorm lobby, and . . . they asked him to show them his hands."<sup>69</sup> The Second Circuit concluded that this plaintiff did not allege anything that "[rose] to the level of a seizure."<sup>70</sup> Although the court held that, on the plaintiffs' allegations, the police violated some people's Fourth Amendment rights, it concluded that

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<sup>65</sup> *Brown*, 221 F3d at 334.

<sup>66</sup> See *id.*

<sup>67</sup> *Id.* at 340.

<sup>68</sup> *Id.*

<sup>69</sup> *Brown*, 221 F3d at 341.

<sup>70</sup> *Id.*

the police had denied no one the equal protection of the laws—neither the suspects they detained nor the suspects whose supposedly voluntary cooperation they secured.<sup>71</sup>

The Second Circuit reiterated the Sixth Circuit's view that because the police were "not alleged to have investigated 'based solely upon . . . race, without more,'" there was no "actionable claim under the Equal Protection Clause."<sup>72</sup> Because the police considered "not only race, but also gender and age, as well as the possibility of a cut on the hand,"<sup>73</sup> they did not employ a racial classification. Presumably the police did not classify by age or gender either, because they did consider race. In the magic land of Oneonta, police officers who classify on more than one basis classify on none. One plus one equals zero.

The court advanced a second reason for its conclusion that the plaintiffs did "not identif[y] any law or policy that contains an express racial classification."<sup>74</sup> The racial classification had come from the victim, and the police department's own policy was race-neutral:

[The plaintiffs] were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description.<sup>75</sup>

The Second Circuit apparently imagined that the Oneonta Police Department would have questioned all of the young white men in Oneonta if only the victim had described the burglar as white. Because, in the court's view, the Department's policy was to pursue all witness descriptions evenhandedly, it presumably would have questioned thousands of white suspects.

Perhaps, however, the court imagined something less absurd—that the police would have questioned all of the young white men in Oneonta if the victim had identified the offender as white *and* whites constituted only three hundred of the people in town. When someone believes that a needle may be hidden in a haystack, she may search the haystack if it is small enough.

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<sup>71</sup> See *id.* at 339 (internal citations omitted).

<sup>72</sup> *Id.* at 338.

<sup>73</sup> *Brown*, 221 F3d at 337.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Perhaps, then, it was not race but simply the fact that blacks were a discrete minority that led to their disparate treatment, and perhaps any other discrete minority would have been treated the same way. For example, if a black victim had spotted a St. Christopher medal around a white burglar's neck and there were only three hundred Catholics in Oneonta, a police officer might have approached each of the town's white Catholics with a greeting like, "What, are you stupid? Come here. I want to talk to you."

Imagining that the Oneonta police would have questioned every white Catholic if the burglar had been one seems naïve. R. Richard Banks says of *Oneonta*, "Research has unearthed not one case anywhere in the United States in which law enforcement authorities conducted a search of comparable scope and intensity for a white perpetrator of a crime against a black victim."<sup>76</sup>

Even on the assumption that the Oneonta police questioned blacks only because their numbers were small and that they would have treated any other small group the same way, the department's action would have been unconstitutional. In 1914, the Supreme Court held that the differential treatment of blacks and whites cannot be justified on the ground that the differing sizes of the two groups make this treatment efficient. In the era of separate-but-equal, a railroad that provided sleeping cars for whites could not refuse to provide them for blacks even if too few blacks would use the cars to make them profitable. The argument from economic efficiency would, the Court said in *McCabe v Atchison, Topeka & SF Railway Co*, "make[] the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws."<sup>77</sup> The government may not impose distinctive burdens on blacks simply because there are fewer of them.

After disregarding a constitutional principle the Supreme Court settled in 1914, the Second Circuit disregarded a principle the Court settled in 1948. It emphasized in *Oneonta* that the

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<sup>76</sup> Banks, 48 UCLA L Rev at 1113 (cited in note 24). The *Oneonta Daily Star* observed, "Police were overzealous from the start because the woman was visiting a prominent Oneonta family. It is probable that such an aggressive investigation would not have occurred if the burglary had taken place in different quarters." "Black List" Case Ought to be Settled, *The Oneonta Daily Star* (Oct 3, 2001), available online at <<http://www.thedailystar.com/opinion/edits/2001/10/ed1003.html>> (visited Nov 15, 2002) [on file with U Chi Legal F].

<sup>77</sup> 235 US 151, 161-62 (1914).

classification “originated not with the state but with the victim.”<sup>78</sup> When a state adopts and acts upon a private individual’s racial classification, however, it also classifies by race. This action would not become constitutional even if the state ratified automatically every racial classification a private person supplied. In 1948, the Supreme Court held that state courts could not enforce racially restrictive real estate covenants approved by private parties, and it observed that the Equal Protection Clause does not countenance the “indiscriminate imposition of inequalities.”<sup>79</sup> The Court noted in a later case, “It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.”<sup>80</sup>

One can imagine a superstitious upstate New York police chief who lunched every Monday at a Chinese restaurant. On one Monday, the chief discovered a message in his fortune cookie, which read, “Hassle blacks.” The following Monday, the message read, “Hassle whites.” Then, on the next Monday, the message read, “Hassle Asian-Americans, sparing only the owner of this restaurant.” Every Monday afternoon, the chief told his officers to do as that week’s message instructed. Neither the fact that the racial classifications originated with a private person nor the fact that the chief approved all of them would warrant the conclusion that the police department had employed no racial classification.

*Oneonta* and all of the thought-experiment cases are cases of express racial classification. When an officer, relying on a witness description, restricts the liberty of black men in green coats and not the liberty of white men in green coats, this officer differentiates by race. Of course the officer’s conduct may nevertheless be legitimate. Identifying a racial classification begins, not ends, the inquiry, and as the Supreme Court has noted, judges and commentators may have been too hasty in announcing that “strict in theory” means “fatal in fact.”<sup>81</sup>

Finding and prosecuting burglars surely qualifies as a compelling interest,<sup>82</sup> and although not everyone agrees that the interest in prosecuting drug offenders is compelling, appropriate

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<sup>78</sup> 221 F3d at 338.

<sup>79</sup> *Shelley v Kraemer*, 334 US 1, 22 (1948).

<sup>80</sup> *Powers v Ohio*, 499 US 400, 410 (1991). See *Shaw v Reno*, 509 US 630, 651 (1993) (“[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.”).

<sup>81</sup> See *Adarand*, 515 US at 237 (citation omitted).

<sup>82</sup> See *United States v Salerno*, 481 US 739, 749 (1987) (“[T]he government’s interest in preventing crime by arrestees is both legitimate and compelling.”).

deference to the judgments of legislatures and other respected authorities precludes courts from denying that it is. Textbook equal protection analysis therefore suggests that when the police employ a racial classification in investigating crime, the critical question is simply whether this classification is “narrowly tailored” to advancing the government’s crime-fighting goal.

When a police department employs a racial classification found in a fortune cookie, its means are not adapted to this end. When, in an effort to find one burglar, the police question hundreds of suspects on the basis of a description consisting of race, age, and gender alone, they are barely a step from the fortune cookie. A claim that police sweep in *Oneonta* was “narrowly tailored” to advance a compelling governmental interest could not survive the laugh test.<sup>83</sup>

When, however, the police, relying on a thicker description, stop a black man in a green coat near the scene of a robbery, their means are well adapted to apprehending the robber. Although eyewitness descriptions are fallible,<sup>84</sup> precluding the police from using them would bring law enforcement to a halt, and requiring the police to disregard a witness’s references to race (which, like gender, comprises one of the most salient features of an individual’s appearance<sup>85</sup>) would greatly diminish the effectiveness of these descriptions.<sup>86</sup>

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<sup>83</sup> One wonders what the police would have done if they had discovered a young black man with a cut on his hand. Being young, black, male, and injured does not supply probable cause for an arrest. The police could not lawfully have detained this suspect for viewing by the victim. The victim, who did not see the burglar’s face, probably could not have provided a useful identification in any event. Being young, black, male, and injured also does not supply justification for searching the suspect’s home. Moreover, the burglar apparently had not taken any of the victim’s property. At most, the circumstances would have supplied grounds for a brief investigative detention.

Of course the discovery of a young black man with a cut on his hand might have resolved the case. The suspect might have agreed voluntarily to answer questions, lied inartfully about how he sustained the cut, and then confessed when a skilled interrogator confronted him with his falsehoods. He also might have been carrying the knife used in the burglary or another unlawful weapon for which he could have been arrested. The odds, however, were against it. Even if the *Oneonta* police had found what they were seeking, it seems doubtful that their sweep would have led to a successful prosecution. (Of course I assume that, if the police had located someone with a cut on his hand, they would have employed only lawful methods of investigation and, if these methods did not reveal incriminating evidence, would have released the suspect.)

<sup>84</sup> See Elizabeth F. Loftus, *Eyewitness Testimony* 7 (1979).

<sup>85</sup> Here is a thought experiment suggested by R. Richard Banks. I have embellished it slightly:

A victim has given the police a detailed description of a black bicycle thief. Later a police officer notices two men, one black and one white, each riding an unusual bicycle like the one reported stolen. Apart from

Notice that, when the police seek to justify their use of a racial classification in making a stop or arrest, analysis of the “means-end fit” under the Equal Protection Clause has much in common with analysis of whether the stop or arrest was justified by reasonable suspicion or probable cause under the Fourth Amendment. Notice, too, that when the police target people for investigation and questioning on the basis of race but do not seize them, they glide beneath the radar of the Fourth Amendment, and the Equal Protection Clause has work to do.<sup>87</sup> In *Oneonta*, the Second Circuit did not play by the hornbook.

The court’s refusal to apply ordinary equal protection principles to the police became clearer when the court denied the plaintiffs’ motion for rehearing en banc.<sup>88</sup> Dissenting from this denial, Judge Calabresi proposed granting relief on a theory different from the one the plaintiffs had advanced, a theory described and considered below.<sup>89</sup> He said that approving his alternative theory would avoid the “complex” and “highly divisive”<sup>90</sup> question whether, by acting on the basis of a witness description that includes race, the police employ a racial classification.<sup>91</sup>

To people who use the English language in the ordinary way, questioning blacks and not whites does appear to classify by race, but Judge Calabresi declared,

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race, the white man matches the victim’s description exactly. The black man appears to be four inches taller and twenty-five pounds heavier. The two men are bicycling in opposite directions, and Banks asks which of them the officer is more likely to stop.

Banks then imagines that the victim has described the thief as a light-skinned black while the black observed by the officer is dark-skinned. This black man’s skin color differs as much (or more) from the victim’s description as the white man’s. Again Banks asks which suspect the officer is more likely to stop. Banks observes that race is “the most prominent component of suspect descriptions . . . primarily because of its social and cultural significance.”

Banks, 48 UCLA L Rev at 1109–10 (cited in note 24).

<sup>86</sup> In addition, directing the police to consider the “green coat” part of a witness’s description and disregard the “black man” part would demand the impossible (and would be weird besides).

<sup>87</sup> In many situations in which the police investigate crimes without seizing suspects, individualized suspicion might not be required and the “compelling governmental interest” formula might be inappropriate. Every classification on the basis of race, however, should require some affirmative justification. See text at notes 86–88, 220–22, 340–41.

<sup>88</sup> 235 F3d 769 (2d Cir 2000) (denying rehearing en banc), cert denied, 122 S Ct 44 (2001).

<sup>89</sup> See text accompanying notes 101–12.

<sup>90</sup> 235 F3d at 785 (Calabresi dissenting).

<sup>91</sup> See id at 779, 785–86.



If an action is deemed a racial classification, it is very difficult, under the Supreme Court precedents, ever to justify it. And, were such justification made easier in cases of police following a victim's description, the spillover to other racial classification contexts would be highly undesirable. In other words, were the requirements of strict scrutiny to be relaxed in the police/victim's description area, it would be hard indeed to keep them from also being weakened in other areas in which racial classifications ought virtually never to be countenanced.<sup>92</sup>

Chief Judge Walker, the author of the panel opinion in *Oneonta*, endorsed this portion of Judge Calabresi's opinion. He similarly feared "undermin[ing] the strict scrutiny standard . . . because apprehending dangerous criminals in almost all instances would constitute a compelling state interest."<sup>93</sup> Judge Jacobs also spoke of "trivializing" strict scrutiny.<sup>94</sup>

A fair paraphrase of the argument offered by these judges might be:

We would not hold all police racial classifications unconstitutional, especially when these classifications rest on witnesses' descriptions of criminals. If we applied the same standards to these classifications that we apply to other classifications, we therefore would recognize that they sometimes advance compelling interests. Acknowledging this fact would embolden people to think that racial classifications by actors other than the police also might advance compelling interests. We should not weaken the equal protection standards we apply to these other officials, and we therefore will not subject the police to the same standards as everyone else. We will either avoid the issue for now (Judge Calabresi) or deny that police racial classifications qualify as racial classifications (Judges Walker and Jacobs). Because upholding police classifications that advance compelling interests would

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<sup>92</sup> *Oneonta*, 235 F3d at 786. I doubt that Judge Calabresi is as strong an opponent of affirmative action as this statement makes him seem. Most of the people who insist that racial classifications by people other than police officers should "virtually never be countenanced" would not have approved of the admissions practices of the Yale Law School under any of its recent deans.

<sup>93</sup> *Id.* at 772 (Walker concurring).

<sup>94</sup> *Id.* at 778 (Jacobs concurring).

undermine suitably demanding equal protection standards, we will uphold a police action that fell ridiculously short of meeting these standards. By upholding a police department's sweep of hundreds of people guilty only of "breathing while black,"<sup>95</sup> we will preserve our unbending commitment to the strictest scrutiny of racial classifications.

This article will contend that the demand for a "compelling governmental interest" in all cases of racial classification is misguided.<sup>96</sup> This standard requires too little justification for some racial classifications and too much for others. In some unobtrusive investigations, the police should be permitted to classify by race even when their classification is not narrowly tailored to advance a compelling interest. For example, following an anonymous threat to avenge Vicki Weaver by bombing a specified federal building on the anniversary of Ruby Ridge,<sup>97</sup> law enforcement officers near the building should be allowed to watch whites more closely than blacks.<sup>98</sup> Recognizing the legitimacy of taking race into account in some investigations might indeed have a "spill-over" effect, but this effect would not be regrettable. For example, reconsidering use of the Supreme Court's conventional formula in affirmative action cases and other cases far removed from those that generated the formula might be to the good.<sup>99</sup>

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<sup>95</sup> See Bob Herbert, *Breathing While Black*, NY Times A29 (Nov 4, 1999).

<sup>96</sup> See text at notes 231–38.

<sup>97</sup> Vicki Weaver was the wife of white separatist Randy Weaver. She was killed at Ruby Ridge by an F.B.I. agent seeking to arrest Weaver after he had failed to appear in court on a weapons charge and after an initial attempt to arrest him had ended in a shootout in which both an F.B.I. agent and Weaver's fourteen-year-old son were killed. See Thomas Clouse, *Slow Fade from Ruby Ridge: Wounds Have Yet to Heal from 10-Year-Old Siege that Sparked Nation's Anti-Government Movement*, Spokane Spokesman-Rev A1 (Aug 18, 2002).

<sup>98</sup> Of course the legality of this surveillance from a distance would be unlikely to come before a court. A white person subjected to unequal scrutiny usually would not know it, and if the surveillance were brief and unlikely to reveal personal information, he probably would not care much about it if he knew.

<sup>99</sup> Eric Posner and Adrian Vermeule have carefully analyzed the moral and constitutional issues raised by proposals to award reparations for slavery to blacks. They have considered, for example, whether an award to blacks would deny equal protection to the members of other historically victimized racial and ethnic groups. Posner and Vermeule conclude that the judiciary should allow Congress to address one situation at a time. Although a Congressional award of reparations to blacks and not others would classify by race, Congress's classification should be subject, not to strict, but to virtually no scrutiny. See Eric A. Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, \_\_\_ Colum L Rev \_\_\_ (forthcoming in 2003).

To avoid results it believed straightforward application of the conventional formula would produce, the Second Circuit denied that police racial classifications are what they are. It sought to have things both ways, avoiding reconsideration of the conventional standard while refusing to employ this standard to limit a manifestly unreasonable race-specific investigation by the police.

Of course the Second Circuit lacked the authority to revise or depart from a standard approved by Supreme Court. Its duty, however, was to apply this standard without dodging rather than attempt to save the higher court from the consequences of its sweeping assertions in cases finding discrimination against whites—declarations, for example, that “[r]acial classifications of any sort pose the risk of lasting harm to our society”<sup>100</sup> and that, regardless of context, these classifications are “immediately suspect.”<sup>101</sup>

Moreover, *Oneonta* reveals that, under the conventional formula, the alternative to subjecting a police classification to strict scrutiny is subjecting it to almost none. Perhaps racial classifications in some police investigations need not be narrowly tailored to advance compelling interests, but confronting hundreds of blacks as suspects should require more than the “rational basis” supplied by a witness’s statement that a black person somewhere in *Oneonta* committed a crime.

Judge Calabresi contended that the court could avoid the divisive issue raised by the plaintiffs because the *Oneonta* police had questioned many people who did not meet the victim’s description. Their dragnet allegedly included one woman, all black male students of the state university regardless of their age, and many other “non-white persons” whose appearance failed to match the description.

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For Congress to award reparations for past wrongs to, say, Irish-Americans while not awarding them to blacks would seem discriminatory and unconstitutional. “One case at a time” may not be the appropriate constitutional standard. Congress, however, could have plausible reasons for awarding reparations to blacks and not Native Americans, just as it could have plausible reasons for awarding reparations to Native Americans and not blacks. Congress’s defensible reasons should make an award of reparations to either group constitutional, at least if the only constitutional challenge were that it had left the other group out. Certainly, as Posner and Vermeule maintain, distinctions among victimized groups in granting reparations should not be subject to strict scrutiny. A court that accepted this position, however, could not continue to resolve affirmative action and other equal protection cases by proclaiming that all “[c]lassifications of citizens solely on the basis of race ‘are by their very nature odious to a free people . . . .’” *Shaw v Reno*, 509 US 630, 643 (1993), quoting *Hirabayashi v United States*, 320 US 81, 100 (1943).

<sup>100</sup> *Shaw*, 509 US at 657.

<sup>101</sup> *Id* at 642.

The numbers recited by the panel opinion themselves indicated that the police might not have confined their sweep to young black men. According to the court, only three hundred blacks resided in Oneonta. Many of these blacks probably were female, and many of the males probably were children or older men. The court reported, however, that *after* the police had completed their investigation of the university students, they questioned more than two hundred “non-white persons” over the course of several days.<sup>102</sup> Some of the people questioned may have been students away from the campus or others questioned and counted more than once. It seems likely, however, that the police confronted people who failed to match the victim’s description.

Judge Calabresi maintained that the police had “ignor[ed] essentially everything but the racial part of [the] victim’s description.”<sup>103</sup> By doing so, they had “creat[ed] an express racial classification that can only be approved if it survives strict scrutiny.”<sup>104</sup>

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<sup>102</sup> 221 F3d at 334 (panel opinion).

<sup>103</sup> 235 F3d at 781 (Calabresi dissenting).

<sup>104</sup> *Id.* Judge Calabresi explained why the court should not address the issue raised by the plaintiffs:

The question of when, if ever, merely following a victim’s description that is predominantly racial might violate equal protection norms is an extremely difficult one. A couple of examples will suggest why. Suppose an armed robbery occurs in which the victim cuts the arm of the robber. The robber, described by the victim in racial terms, runs into a crowded bar where there are only three others who could be so described. Is it wrong for the police to ask the four to show whether they have a cut on their arm? Of course not. But imagine, instead, that a passer-by sees someone illegally swimming naked in a park pond and describes the swimmer to the police in racial terms, adding that the swimmer can readily be identified because he has a distinctive tattoo on his posterior. Can it possibly be acceptable for the police to ask every male in town who fits that racial description to strip, even if the police do so with utmost politeness and in full conformity with Fourth Amendment strictures? I would certainly think not.

*Id.* at 785.

For a court to distinguish Judge Calabresi’s cases under the Equal Protection Clause would not be difficult. Apprehending robbers constitutes a compelling governmental interest, but apprehending nude swimmers does not. Asking four suspects to show their arms is a “narrowly tailored measure,” but asking every black man in town to undress is not.

After noting the difficulty of the issue, Judge Calabresi declared:

[C]ourts should recognize severe limitations on their competence to deal with victim racial descriptions. But limitations do not mean impotence, they mean that courts ought to be reluctant to act alone. Rather, courts should encourage legislatures to develop guidelines for this area. Such legislative guidelines could make nuanced distinctions between what is needed and acceptable police behavior, and what is not.

Judge Calabresi articulated a strong basis for affording relief to the *Oneonta* plaintiffs who did not match the victim's description. The Second Circuit could not properly have refused to decide, however, whether the plaintiffs who did match this description also had a cause of action. Embracing Judge Calabresi's theory might not have saved the court from the issue he struggled to avoid.<sup>106</sup>

Moreover, Judge Calabresi's formulation of the issue was confusing in at least two respects. First, the *Oneonta* police may have disregarded "the racial part" of the victim's description as well as the other parts. If only a few of the more than 200 people they questioned were women and only 150 of the men in town were black, some of the "non-white" men they questioned probably were "non-black" men as well.<sup>106</sup> Second, insofar as the police departed from the victim's description, their classification lacked a rational basis. Judge Calabresi's insistence that the classification was racial and subject to strict scrutiny therefore seemed beside the point.<sup>107</sup>

For the police to treat as suspects blacks and others who did not meet the victim's description was plainly irrational. Nevertheless, Chief Judge Walker refused to acknowledge that this practice would violate the Equal Protection Clause. He declared, "The fact that no legal opinion, concurrence, dissent (or other judicial pronouncement) has ever intimated, much less proposed, any such rules of equal protection confirms a strong intuition of

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Id at 786–87. Judge Calabresi maintained that taking his view of the case "would . . . have furthered a legislative/judicial dialogue." Id at 787. He did not explain why. His opinion showed signs of having been written by someone from Yale.

<sup>106</sup> Perhaps the game was this: Relying on the victim's description, the police had questioned blacks or "non-white persons." They thereby had employed a racial classification. This classification was improper, however, because it included women, older men, and children who did not match the description. Although black men who did match the description could have been questioned lawfully, they were part of the improper class (all blacks or all "non-white persons"). Accordingly, they also should have a cause of action, and the court need not decide whether questioning people who meet a witness's description can ever violate the Equal Protection Clause. The game of classification can become too clever.

<sup>106</sup> For what it's worth, the names of two of the plaintiffs in *Oneonta* were Quinones and Gonzales.

<sup>107</sup> "Sweeping" some unpopular whites along with blacks and others would have made the police investigation even more overbroad. Doing so, however, apparently would have eliminated Judge Calabresi's reason for applying strict scrutiny and might have saved the sweep from his condemnation. Compare *Chavez v Illinois State Police*, 251 F3d 612, 637 (7th Cir 2001) ("Allowing defendants to escape liability for discriminating against Hispanics simply because they occasionally mistreat white motorists would dismantle our equal protection jurisprudence.").

their non-viability.”<sup>108</sup> According to the chief judge, if the court approved Judge Calabresi’s position, “[p]olice work, as we know it, would be impaired and the safety of all citizens compromised. The most vulnerable and isolated would be harmed the most and, if police effectiveness is hobbled by special racial rules, residents of inner cities would be harmed most of all.”<sup>109</sup> Chief Judge Walker made this statement in a case in which the police responded to a white person’s complaint by confronting hundreds of “non-white persons” and in which this response apparently was unmatched by any investigation ever triggered by a black person’s complaint over the course of American history.

Although Chief Judge Walker himself had recited the numbers indicating that the police probably had questioned suspects other than young black men, he was confident that no such thing could have happened: “[I]t strikes me as nonsensical to believe that the police, who have been given a description of the attacker, would disregard the description and look for someone else.”<sup>110</sup> In a similar spirit, Judge Jacobs declared that the court need not consider Judge Calabresi’s theory “because I don’t see how it would ever arise in an actual case: if, for example, the description is of a short black man with cropped hair, why would the police stop all black men, women and children, short and tall, long hair, short hair, or bald?”<sup>111</sup> That the police might have harassed “non-white persons” who failed to meet a victim’s description seemed inconceivable to Judges Walker and Jacobs, because such harassment would have been irrational. One wonders how much of the lives of some judges has been spent inside their country clubs.<sup>112</sup>

Chief Judge Walker wrote for the Second Circuit:

We are not blind to the sense of frustration that was doubtlessly felt by those questioned by the police during this investigation. The actions of the police were under-

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<sup>108</sup> 235 F3d at 771 (Walker concurring).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 773 (Walker concurring).

<sup>111</sup> *Id.* at 778 (Jacobs concurring).

<sup>112</sup> Two Second Circuit judges in an often-told story are conversing about a case as they walk home from the country club. One says, “Look. There’s a five-dollar bill on the sidewalk.” The other replies, “I’m sorry. There cannot be a five-dollar bill on the sidewalk.” When the first judge insists there is a five-dollar bill on the sidewalk, the second explains, “If there were a five-dollar bill on the sidewalk, someone would have picked it up.”

A five-dollar bill cannot be on the sidewalk, and the police never would harass minorities simply because they enjoyed it. Moreover, a governmental action cannot fail the rational-basis test, because any official who took this action would be irrational.

standably upsetting to the innocent plaintiffs who were stopped to see if they fit the victim's description of the suspect. . . . Law enforcement officials should always be cognizant of the impressions they leave on a community, lest distrust of law enforcement undermine its effectiveness.<sup>113</sup>

What the court said of law enforcement officials seems true of judges too. On the first day of its October 2001 Term, the Supreme Court denied certiorari in *Oneonta*.<sup>114</sup>

#### IV. A SECOND LESSON IN HOW NOT TO THINK ABOUT RACIAL CLASSIFICATION IN THE CRIMINAL JUSTICE SYSTEM: DECRYING ALL RACIAL CLASSIFICATIONS

Justice Brennan, joined by Justice Marshall, filed a dissenting opinion in *Martinez-Fuerte*. In response to Justice Powell's claim of "rationality," this opinion protested, "That law in this country should tolerate use of one's ancestry as probative of possible criminal conduct is repugnant under any circumstances."<sup>115</sup> Like the majority, the dissenting justices swept broadly enough to resolve in a sentence all of the thought-experiment cases described at the outset of this article. When the victim of a robbery has described the robber as a black man in a green coat, however, Justice Brennan probably did not mean that the police must disregard the "black man" part of the description and consider only the green coat. Neither Justice Brennan's blanket condemnation of racial classification nor Justice Powell's talk of rationality carried the analysis of the use of racial classifications in police investigation very far.

#### V. A THIRD LESSON IN HOW NOT TO THINK ABOUT RACIAL CLASSIFICATION: DIVORCING THE FOURTH AMENDMENT AND THE EQUAL PROTECTION CLAUSE

In *Whren v United States*,<sup>116</sup> plain-clothes vice-squad officers seeking drugs stopped a vehicle for a traffic offense—one so mi-

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<sup>113</sup> 221 F3d at 339 (panel opinion).

<sup>114</sup> 122 S Ct 44 (2001).

<sup>115</sup> 428 US at 571 n 1 (Brennan dissenting). Justice Brennan discussed at length the differential burdens checkpoint stops impose on Latinos, but his analysis proceeded no further.

<sup>116</sup> 517 US 806 (1996).

nor that traffic officers assertedly would have ignored it.<sup>117</sup> The black defendants who challenged this stop noted the danger of racial profiling the police practice posed. The Supreme Court declared, “We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”<sup>118</sup>

Eight years before *Whren*, a commentator observed that the Court’s Fourth Amendment decisions had “ignore[d] the distinctive class of harms that racially discriminatory police behavior inflicts. The resulting Fourth Amendment case law . . . is remarkably silent on the racial dimension of encounters between citizen and police.”<sup>119</sup> For the most part, the Supreme Court’s Fourth Amendment decisions have evaluated searches and seizures in what Anthony Thompson describes as “a raceless world.”<sup>120</sup> By declaring race the concern of a different amendment, *Whren* supplied a doctrinal explanation for the narrow focus of these decisions.

The Court appeared to treat the Fourth Amendment and the Equal Protection Clause as hermetically sealed units whose principles must not contaminate one another. Both before and after *Whren*, a flood of apparently unanimous commentary has opposed this bifurcation of the two constitutional provisions.<sup>121</sup>

*Martinez-Fuerte* illustrates why the Court’s compartmentalization is artificial. Focusing on the Fourth Amendment, the Su-

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<sup>117</sup> See *id.* at 808.

<sup>118</sup> *Id.* at 813.

<sup>119</sup> *Developments in the Law: Race and the Criminal Process*, 101 Harv L Rev 1472, 1498 (1988).

<sup>120</sup> Thompson, 74 NYU L Rev at 962 (cited in note 39).

<sup>121</sup> See David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* 39–40 (New Press 1999); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757, 808–09 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv L Rev 820, 839–41 (1994); David A. Slansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 S Ct Rev 271, 327; Sherry F. Colb, *Stopping A Moving Target*, 3 Rutgers Race & L Rev 191, 204–05 (2001); Rudovsky, 3 U Pa J Const L at 320 (cited in note 24); Maclin, 51 Vand L Rev at 368 (cited in note 27); Thompson, 74 NYU L Rev at 961 (cited in note 39); Abraham Abramovsky and Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 83 Alb L Rev 725–28 (2000); Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 Colum Hum Rts L Rev 383, 405–06 (2001); Lyle, Note, 21 BC Third World L J at 256–58 (cited in note 28); Christopher Hall, Note, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong, and the Evolution of Police Discretion*, 76 Tex L Rev 1083, 1109 (1998).



preme Court concluded that the Border Patrol's detentions were so brief and unintrusive that "reasonable suspicion" was unnecessary to justify them. The Equal Protection Clause, however, declares that only a compelling governmental interest can support a racial or ethnic classification, and a compelling reason for acting on the basis of a law enforcement officer's whim or hunch is difficult to conceive. If the Supreme Court had read the Fourth Amendment and the Equal Protection Clause together, it might have noticed this incongruity. Reasonable suspicion (or more) should be required to establish the governmental interest needed to support a seizure based on a racial classification.

In Fourth Amendment and equal protection litigation alike, the Supreme Court has balanced individual against governmental interests,<sup>122</sup> and genuine interest balancing requires weighing all individual interests against all governmental interests at the same time. A court should ask, for example, whether the interests asserted by the government in *Martinez-Fuerte* justified both the intrinsic burdens of a brief checkpoint detention and the additional burden of being selected for this detention on the basis of skin color. Dividing the individual interests in half and declaring that one half does not defeat the government (under the Fourth Amendment) while the other half does not defeat the government either (under the Equal Protection Clause) is playing a utilitarian shell game. Jeremy Bentham would not have approved of it. One participant in a contest should not be allowed to fight with both hands while the other is required to switch from one hand to the other. The Fourth Amendment declares the right of the people to be secure against unreasonable searches and seizures, and this language requires a court to consider in one package all circumstances tending to make a seizure unreasonable. These circumstances include the imposition of differential burdens on the basis of race.

Rather than treat racial discrimination by the police as immaterial to Fourth Amendment litigation, the Supreme Court might have read the Fourth Amendment as it has the Sixth Amendment to go beyond the Equal Protection Clause in countering racial inequality. According to the Court, the Sixth Amendment, unlike the Equal Protection Clause, does not require proof of a discriminatory purpose. This amendment forbids the systematic exclusion from jury service of any "distinctive groups in the

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<sup>122</sup> See text at notes 224–32.

community.”<sup>123</sup> The exclusion need not be purposeful and need not be total, but it must be regular and foreseeable. Systematic exclusion can be justified only by showing that it is “appropriately tailored” to advance “a significant state interest.”<sup>124</sup>

Tracey Maclin writes, “In America, police targeting of black people for excessive and disproportionate search and seizure is a practice older than the Republic itself.”<sup>125</sup> This practice has persisted on a grand scale into the twenty-first century.<sup>126</sup> Partly as a result, what the NAACP Legal Defense and Educational Fund told the Supreme Court in 1968 still seems true: “[T]he policeman . . . is the object of widespread and intense hatred in our inner cities.”<sup>127</sup> In some places, “many blacks have come to see the police as just another gang.”<sup>128</sup> The correction of racial discrimination by the police is no less vital than the correction of racial discrimination in jury selection, and police officers and police administrators should be subject to constitutional standards like those applied to court clerks and jury commissioners.<sup>129</sup> When a police practice systematically subjects minorities to searches or seizures at a higher rate than their rate of offending, courts should hold that this practice violates the Fourth Amendment unless the challenged practice is “appropriately tailored” to advance “a significant state interest.”<sup>130</sup>

Later sections of this article will explain more fully the need to consider whether a burden is disproportionate not only to a group’s share of the population but also to its rate of offending.

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<sup>123</sup> See *Taylor v Louisiana*, 419 US 522, 538 (1975); *Duren v Missouri*, 439 US 357, 364 (1979).

<sup>124</sup> See *Duren*, 435 US at 367–70. In this respect, the Sixth Amendment appears to be less demanding than the Equal Protection Clause. “Appropriately” tailored to serve a “significant” state interest is a less deafening phrase than “narrowly” tailored to serve a “compelling” state interest.

<sup>125</sup> Maclin, 51 Vand L Rev at 333 (cited in note 27) (citation omitted).

<sup>126</sup> For empirical proof, see David A. Harris, *Profiles in Injustice: Why Profiling Cannot Work* 53–72 (New Press 2002) (documenting systematic profiling in New Jersey, Maryland, Florida, Illinois, Colorado, and Michigan); Jeffrey Fagan and Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 Fordham Urb L J 457, 477–96 (2000) (documenting systematic profiling in New York City street stops).

<sup>127</sup> Brief for the NAACP Legal Defense and Educational Fund, Inc, as Amicus Curiae at 60–61, *Terry v Ohio*, 392 US 1 (1968), reprinted in Philip B. Kurland and Gerhard Caspers eds, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* at 636–37 (Univ Pub of Am 1975).

<sup>128</sup> David K. Shipler, *Living Under Suspicion*, NY Times A33 (Feb 7, 1997), quoted in Maclin, 51 Vand L Rev at 388 (cited in note 27).

<sup>129</sup> See *Rose v Mitchell*, 443 US 545, 555 (1979) (“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”).

<sup>130</sup> See *Duren*, 439 US at 367–370.

Briefly, however, when the members of different races commit crimes at different rates, a decision to arrest every offender the police can discover will impose disproportionate burdens on the races whose crime rates are highest. The justification for systematically imposing burdens disproportionate to these races' share of the population is evident. No apparent justification exists, however, for systematically burdening the members of a race at a higher rate than the rate at which they commit crimes. Crime rates, not population figures, provide the appropriate baseline for requiring the government to justify systematic, foreseeable disparities in the rates at which the police search and arrest the members of different racial groups.

*Whren's* language is in fact consistent with this reading of the Fourth Amendment. The *Whren* opinion said only, "[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."<sup>131</sup> The Court explained, "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."<sup>132</sup> A fourth-amendment anti-discrimination principle modeled after the anti-discrimination principle of the Sixth Amendment would be objective, not subjective. Later sections of this article will describe some implications of this reading of the Fourth Amendment.<sup>133</sup>

#### VI. A FOURTH LESSON IN HOW NOT TO THINK ABOUT RACIAL CLASSIFICATION: PARTICULARIZED AND STATISTICAL EVIDENCE

When critics of the Supreme Court's ruling in *Martinez-Fuerte* and of profiling on the highway have mentioned cases in which witnesses have described offenders by race, they generally have set these cases aside in a phrase or footnote.<sup>134</sup> From their perspective, an officer who stops a person with the features mentioned by a witness is not "profiling."

A defender of *Martinez-Fuerte* might wonder, however, why the statement of a victim or witness should make a difference

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<sup>131</sup> 517 US at 813.

<sup>132</sup> *Id.*

<sup>133</sup> See text accompanying notes 205-06, 239-40, 276-77, 359-60.

<sup>134</sup> See, for example, many of the definitions of racial profiling set forth in note 24; Kennedy, *Race, Crime and the Law* at 137 n \* (cited in note 38); Rudovsky, 3 U Pa J Const L at 299 n 27 (cited in note 24); Jerome H. Skolnick and Abigail Caplovitz, *Guns, Drugs and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 Ariz L Rev 413, 421 (2001) (citation omitted). A notable exception is Banks, 48 UCLA L Rev (cited in note 24).

when the information this witness could provide can be known without her help. A Border Patrol agent needs no eyewitness, for example, to know that illegal immigration has occurred, nor does she need a witness to know that most immigration offenders on the highway between San Diego and Los Angeles have distinctive ethnic characteristics.<sup>135</sup> One wonders whether the critics of *Martinez-Fuerte* would view the case differently if a troop of alert Girl Scouts camping in the desert had observed hundreds of illegal border crossings and informed the Border Patrol of the ethnicity of each offender.

Typically, the officers accused of racial profiling in train stations, in airports, and on highways claim to have received intelligence from informants and undercover agents that drug suppliers are employing as their couriers young black and Hispanic women or other racially described suspects.<sup>136</sup> These officers claim to rely on suspect descriptions of a sort. By contrast, the Islamic Jihad might credibly claim responsibility for an assassination without confirming the belief that its membership consists entirely or almost entirely of Arabs. An officer who considered Arab ethnicity along with other circumstances in stopping a person suspected of this crime would not rely on a witness description.

A lawsuit by the Department of Justice to enjoin racial profiling in New Jersey ended with a 1999 consent decree that the Department considered a victory. This decree forbade state highway patrol officers from considering race in deciding whether to stop or search motorists, but it excepted cases in which suspects previously had been identified by race.<sup>137</sup> When, on September 11, word arrived of the terrorist attacks in New York, Washington, and Pennsylvania, John Farmer, Jr., New Jersey's Attorney General, was discussing the state's progress in eliminating racial profiling at a meeting of legislators and law enforcement officials.

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<sup>135</sup> Moreover, just as the officer who stops a suspect on the basis of a witness's description considers race together with other innocent characteristics (the suspect's green coat), a Border Patrol agent considers ethnicity and other innocent characteristics like clothing and hairstyle.

<sup>136</sup> See, for example, *United States v Travis*, 837 F Supp 1386, 1390 (E D Ky 1993) (to explain statistics showing a highly disproportionate questioning of blacks at the Greater Cincinnati Airport, an officer testified he had learned at a seminar that most drug trafficking was "done by black gangs out of Los Angeles"); *United States v Weaver*, 966 F2d 391, 394 n 2 (8th Cir 1992) ("intelligence information" indicated that "young, roughly dressed male blacks" from Los Angeles were transporting cocaine to Kansas City—relying on this information, the court approved the consideration of race in the selection of targets), cert denied, 506 US 1040 (1992).

<sup>137</sup> See *New Jersey Enters into Consent Decree on Racial Issues in Highway Stops*, 66 Crim L Rptr 251 (2000).

Farmer, “visibly shaken,” left the room.<sup>138</sup> He later informed a gathering of Sikhs that the police might need to “stop, question, and scrutinize New Jerseyans who look Middle Eastern solely because of their ethnicity.” The Attorney General added, “A lot of people who are innocent are going to be questioned. . . . Everyone has to take a step back and let law enforcement do what it needs to do.”<sup>139</sup> Farmer declined to describe the questioning he endorsed as racial profiling,<sup>140</sup> and he argued in a newspaper column that it was consistent with the consent decree. The decree, he explained, “allows race or ethnicity to be considered when it is related to specific suspect information, and there are nearly two hundred ‘be on the lookout’ warnings currently for people of the same ethnicity as the alleged hijackers.”<sup>141</sup> With enough descriptions of Arab suspects in hand, an officer could be confident that every Arab would match one of them.

Among the critics of racial profiling who have set aside in a footnote the case of the black man in a green coat is the en banc United States Court of Appeals for the Ninth Circuit. In *United States v Montero-Camargo*,<sup>142</sup> the court declared it unconstitutional for the Border Patrol to take ethnicity into account in deciding whether to stop someone for a suspected immigration violation.<sup>143</sup>

The court’s opinion expressed a common intuition: unlike profiling, which rests on statistical evidence, the stop of a suspect matching a witness’s description is based on particularized evidence. In explaining why Border Patrol officers could not consider ethnicity in making immigration stops, the court declared, “Reasonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination.”<sup>144</sup>

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<sup>138</sup> Carter, *Need for Racial Profiling*, Newark Star-Ledger at 21 (cited in note 8).

<sup>139</sup> Alexander Lane, *WTC Probers Pay Attention to Race*, Newark Star-Ledger 6 (Sept 25, 2001).

<sup>140</sup> Id.

<sup>141</sup> Farmer, *Rethinking Racial Profiling* at 11 (cited in note 8).

<sup>142</sup> 208 F3d 1122 (9th Cir 2000) (en banc), cert denied in *Sanchez-Guillen v United States*, 531 US 889 (2000).

<sup>143</sup> See id at 1135. Seven judges joined the majority opinion by Judge Reinhardt. Judge Kozinski and three other judges filed a concurring opinion that said nothing about the issue. See id at 1140 (Kozinski dissenting).

<sup>144</sup> Id at 1134.

The Ninth Circuit recognized that a 1975 Supreme Court decision, *United States v Brignoni-Ponce*,<sup>145</sup> had declared Latino appearance a relevant circumstance in stopping a motorist to investigate a possible immigration violation.<sup>146</sup> Although the court's ruling seemed inconsistent with Supreme Court precedent, the Ninth Circuit characterized the Supreme Court's statement as dictum.<sup>147</sup> It also noted that the Supreme Court had approved the use of ethnicity when Latinos constituted a smaller portion of the population of the West and Southwest than they do today.<sup>148</sup> With the rapid growth of the Latino population, the court declared, "The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."<sup>149</sup> A predictable footnote then set forth the predictable exception: "Hispanic appearance, or any other racial or ethnic appearance, including Caucasian, may be considered when the suspected perpetrator of a specific offense has been identified as having such an appearance."<sup>150</sup>

The Ninth Circuit might have applied its argument against the use of ethnicity more easily to the case in which it permitted this use than to the case in which it forbade it. The court might have declared, "The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact the robber described by yesterday's crime victim is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus." Presumably few judges, even of the Ninth Circuit, would have endorsed this statement, yet the probability that a particular Hispanic in a majority-Hispanic area would prove to be the robber described by a victim seems even less substantial than the probability that he would prove to be an illegal immigrant. The Ninth Circuit's denial of the relevancy of ethnicity was as unfortunate as other courts' treatment of relevancy as conclusive. A later section of this article will consider in greater detail the issue addressed in *Montero-Camargo* and *Brignoni-Ponce*—the

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<sup>145</sup> 422 US 873 (1975).

<sup>146</sup> See *id.* at 886–87.

<sup>147</sup> See *Montero-Camargo*, 208 F3d at 1132–33.

<sup>148</sup> See *id.* at 1133.

<sup>149</sup> *Id.* at 1132.

<sup>150</sup> *Id.* at 1134 n 22.

propriety of stopping suspected immigration offenders partly on the basis of their ethnicity.<sup>161</sup>

From her own perspective, a robbery victim's description of the robber is particularized; she describes a particular offender. From the perspective of a law enforcement officer, however, the evidence she supplies is statistical. The victim's description identifies a class of suspects—a group composed of everyone in the population with the characteristics specified by the victim. The critics of racial profiling who treat as inapposite the case of the black man in the green coat have not noticed that the victim's front-end particularity becomes the police officer's demographic generality at the point of arrest or detention.<sup>162</sup>

Opponents of racial profiling sometimes observe that an officer who stops a suspect on the basis of a witness's description does not use race as a predictor of criminal behavior. This statement is useful if "prediction" is understood to refer to treating race without more as an indicator of criminality in the past, the present, or the future. As a later section of this article will emphasize, effectively declaring some racial or ethnic groups particularly likely to commit crimes injures them. In none of the thought-experiment cases, however, do law enforcement officers employ race to predict future criminality. In all of them, officers hope to identify people who already have committed crimes (and who in most cases of drug, weapons and immigration-law violations are still committing them). The cases involve prediction only in the sense that, in each of them, an officer uses race to predict whether a person will prove guilty of a past or continuing offense.<sup>163</sup>

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<sup>161</sup> See text accompanying notes 277–99.

<sup>162</sup> Some commentators have recognized that all evidence is statistical. See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv L Rev 1329, 1330 n 2 (1971) ("I am, of course, aware that *all* factual evidence is ultimately 'statistical,' and all legal proof ultimately 'probabilistic' . . ."); Michael Saks and Robert Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 Law & Society L Rev 123, 151 (1980–81) ("All identification techniques place the identified object in a class with others."); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv L Rev 851, 870 (1984) ("[T]he entire notion that 'particularistic' evidence differs in some significant qualitative way from statistical evidence must be questioned. . . . 'Particularistic' evidence . . . is in fact no less probabilistic than is the statistical evidence that courts purport to shun.").

<sup>163</sup> Of course law enforcement officers sometimes use race to identify people who have not yet committed crimes but whom they consider dangerous. It may be difficult in some situations to distinguish this practice from the use of race to identify past offenders. The New Jersey officers who stopped people of Arab ethnicity after September 11 probably had both goals in mind. The prevention of further terrorism was probably their dominant

VII. A FIFTH LESSON IN HOW NOT TO THINK ABOUT RACIAL CLASSIFICATION: DEMANDING THE IDENTIFICATION OF A "SIMILARLY SITUATED" MEMBER OF ANOTHER RACE WHOM THE POLICE HAVE LEFT ALONE

In *Brown v City of Oneonta*,<sup>154</sup> the trial court dismissed the plaintiffs' equal protection claims on a different ground from the one later advanced by the Second Circuit. The court said that the plaintiffs had failed to show "specific instances . . . where [they] were singled out for unlawful oppression in contrast to others similarly situated."<sup>155</sup> Similarly, in *Chavez v Illinois State Police*,<sup>156</sup> a federal district judge dismissed an action to enjoin racial profiling by state highway patrol officers because the plaintiffs had failed "to identify similarly situated white motorists who were treated differently from [them]."<sup>157</sup>

The Second Circuit in *Oneonta* and the Seventh Circuit in *Chavez* set aside these trial court rulings. Both Courts of Appeals held that a litigant challenging an express racial classification by the police need not identify a similarly situated member of another race whom the police had treated differently.<sup>158</sup>

The district courts in *Oneonta* and *Chavez* relied on the Supreme Court's decision in *United States v Armstrong*,<sup>159</sup> in which the Court "consider[ed] the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race."<sup>160</sup> The defendants in *Armstrong* offered preliminary evidence that whites were never prosecuted for crack cocaine offenses in the federal district court in Los Angeles. The reason for the absence of whites among the ranks of defendants, moreover, was not their absence from the ranks of offenders.

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objective, but the possibility of apprehending past offenders made it unnecessary for them to draw any distinction.

<sup>154</sup> 221 F3d 329 (discussed in text accompanying note 63 et seq).

<sup>155</sup> Id at 335 (quoting the trial court's decision).

<sup>156</sup> 27 F Supp 2d 1053 (N D Ill 1998), affd on other grounds, 251 F3d 612 (7th Cir 2001).

<sup>157</sup> Id at 1066.

<sup>158</sup> *Oneonta*, 221 F3d at 337; *Chavez*, 251 F3d at 636–40. The *Oneonta* court held that the police had not employed a racial classification, see 221 F3d at 338, and the *Chavez* court held that the plaintiffs' proffered evidence failed to establish their claim of racial profiling, see 251 F3d at 648.

<sup>159</sup> 517 US 456 (1996).

<sup>160</sup> Id at 458.



The defendants' evidence consisted of an affidavit noting that all twenty-four of the crack defendants represented by the Federal Public Defender in 1991 were black, another affidavit reporting the view of an intake coordinator at a drug treatment center that approximately half of all crack users and sellers were white, and a third affidavit by an experienced defense attorney reporting that many non-black defendants were prosecuted for crack offenses in the California state courts.<sup>161</sup> On the basis of this showing, the defendants sought an order requiring the United States Attorney's office to supply information about the races of the crack defendants it had prosecuted during the previous three years and other information. The Supreme Court held that the defendants were not entitled to this discovery from the government.<sup>162</sup>

Information not included in the record in *Armstrong* but published before the Supreme Court's decision revealed what the defendants would have been able to prove if they had been afforded discovery. In another Los Angeles crack case, the United States Attorney's office supplied much of the information the *Armstrong* defendants had sought.<sup>163</sup>

Only one of the 149 defendants charged with selling crack in the federal district court in Los Angeles between January 1992 and March 1995 was white.<sup>164</sup> This defendant was the last defendant charged, and repeated undercover purchases were necessary to bring his sales to the level the United States Attorney required for prosecution.<sup>165</sup> He was charged only after the Federal Public Defender's office had alleged discriminatory prosecution in *Armstrong* and had filed its affidavit declaring that all of its clients in crack cases in 1991 were black.<sup>166</sup> The district court remarked that the inference that one white defendant had been targeted "deliberately so that a white person could be . . . included in subsequent prosecution statistics is almost irresistible."<sup>167</sup>

Two statistical studies also were published after the trial court decision in *Armstrong*. In a national household survey, 52 percent of the people who reported crack use during the previous

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<sup>161</sup> See *id.* at 459–60.

<sup>162</sup> See *id.* at 458.

<sup>163</sup> *United States v Turner*, 901 F Supp 1491 (C D Cal 1995), *revd.*, 104 F3d 1180 (9th Cir 1997).

<sup>164</sup> *Id.* at 1496.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1496.

<sup>167</sup> *Turner*, 901 F Supp at 1496.

year were white,<sup>168</sup> and a study by UCLA researchers showed a significant number of white crack defendants in the state court in Los Angeles.<sup>169</sup>

Explaining why the *Armstrong* defendants were not entitled to discovery, the Supreme Court observed that their “study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged.”<sup>170</sup> It said, “[R]espondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court.”<sup>171</sup> A concurring justice declared, “[I]t should have been fairly easy for the defendants to find, not only instances in which the Federal Government prosecuted African-Americans, but also some instances in which the Federal Government did not prosecute similarly situated caucasians.”<sup>172</sup> Statements like these led the district court in *Chavez*, the Illinois highway profiling case, to conclude that the plaintiffs were required to “identify white motorists

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<sup>168</sup> National Institute on Drug Abuse, *1993 National Household Survey on Drug Abuse* 58 (Table 4.4).

<sup>169</sup> Richard Berk and Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, Fed Sent Rptr at 37 Table 1 (July/Aug 1993) (showing 17 percent of the defendants charged with selling crack cocaine were white). But see Joseph E. Finley, *Crack Charging in Los Angeles: Do Statistics Tell the Whole Truth About “Selective Prosecution”?*, Fed Sent Rptr at 113–14 (Sept/Oct 1993) (criticizing the Berk-Campbell study).

The Supreme Court said in *Armstrong*:

If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant’s claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors’ resources and may disclose the Government’s prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

517 US at 468.

The Supreme Court might have denied discovery in *Armstrong*, however, not because it feared forcing prosecutors to waste resources responding to an insubstantial claim, but because it realized how substantial the defendants’ claim would be if they obtained the information they sought. Some of the material outside the record was mentioned at argument and in Justice Stevens’s dissenting opinion in *Armstrong*. Of course a litigant challenging a governmental affirmative action plan would be able to discover information comparable to that sought by the *Armstrong* defendants. See FRCP 26(b) & 34(a). Prosecutors are especially privileged people.

<sup>170</sup> 517 US at 470.

<sup>171</sup> Id.

<sup>172</sup> Id at 476 (Breyer concurring).

treated differently.”<sup>173</sup> The court declared that statistical evidence alone could not establish differential treatment.<sup>174</sup>

The district court misread *Armstrong*. As the Seventh Circuit noted,<sup>175</sup> *Armstrong* declared a prior Supreme Court decision “consistent with . . . the similarly situated requirement” although the only evidence offered of discriminatory effect was statistical.<sup>176</sup> Proof that similarly situated but unprosecuted offenders exist should satisfy the “similarly situated requirement” regardless of the character of this evidence. A litigant should not be required to identify a similarly situated offender by name, occupation, and social security number.

The *Armstrong* opinion declared, “The requirements for a selective-prosecution claim draw on ‘ordinary equal protection standards,’”<sup>177</sup> and it called the “similarly situated requirement” an “ordinary equal protection principle.”<sup>178</sup> This requirement, however, departs from customary equal protection standards. When there is a rational basis for treating one person differently from another, the two are not “similarly situated.” To require an equal protection claimant to establish that people whom the government has treated differently were “similarly situated” is to require her to establish the lack of any reason for the government’s classification. When the government deliberately treats blacks and whites differently, however, ordinary equal protection standards require the government to show a “compelling” reason for its classification. This classification must be “narrowly tailored” to the government’s objective.<sup>179</sup> The “similarly situated requirement” undercuts these basic requirements of equal protection law.

In *Oneonta*, for example, blacks and whites were not “similarly situated.” The crime victim’s statement that a black man had invaded her home provided a reason for treating blacks and whites differently. That blacks and whites were not “similarly situated,” however, did not make the police “sweep” of every

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<sup>173</sup> 27 F Supp 2d at 1066–67.

<sup>174</sup> See *id.*

<sup>175</sup> 251 F3d at 636–40.

<sup>176</sup> 517 US at 467 (discussing *Hunter v Underwood*, 471 US 222, 227 (1985), which invalidated an Alabama statute disenfranchising people convicted of passing bad checks because this statute denied the vote to ten times as many blacks as whites).

<sup>177</sup> *Id.* at 465.

<sup>178</sup> *Id.*

<sup>179</sup> See text accompanying notes 48–51.

young black man in town a narrowly tailored measure furthering a compelling governmental interest.

In *Armstrong*, because the defendants alleged discriminatory prosecution, the Supreme Court considered only the actions of the United States Attorney's office. The focus of counsel and the Court on prosecutors, however, was divorced from the realities of the criminal justice system. A reader of the *Armstrong* opinion might have concluded that there could be only two possible explanations for a racial disparity in crack prosecutions. Either blacks and whites committed crack offenses at different rates, or prosecutors had discriminated. The practice that in fact produced the racial disparity in *Armstrong*—differential targeting by law enforcement officers—was off the Supreme Court's screen.

The likelihood that, when federal prosecutors considered the comparable cases of white and non-white defendants, they filed the cases of the non-white defendants in the federal court and instructed law enforcement officers to refer the cases of the white defendants to state prosecutors seems remote. Every federal prosecutor I know (even the few who are not nice) would regard such screening as lunacy. That law enforcement "stings" targeted only non-whites, however, so that cases involving white defendants never reached the United States Attorney's office seems entirely plausible. *Armstrong*, with its exclusive focus on the prosecutor, was a never-never land case.

The evidence presented in another federal crack case in Los Angeles made clear why virtually every defendant charged with a crack offense in the Central District of California was non-white. *United States v Turner*<sup>180</sup> arose after the Ninth Circuit held that the *Armstrong* defendants were entitled to discovery and before the Supreme Court held that they were not. When the defendants in *Turner* alleged that they had been selected for prosecution on the basis of their race, the United States Attorney's office supplied much of the evidence it had refused to supply in *Armstrong*. On the basis of its disclosures, the district court concluded that the vast majority of federal crack prosecutions in Los Angeles were the product of sting operations by two law enforcement task forces. These task forces had "concentrate[d] their investigative efforts on members of black street gangs to reduce violent street crime."<sup>181</sup>

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<sup>180</sup> 901 F Supp 1491 (C D Cal 1995), revd, 104 F3d 1180 (9th Cir 1997).

<sup>181</sup> Id at 1492.

The district court ordered the United States Attorney to supply additional information to the defendants. It said:

The Court finds before it four defendants who were stung and charged with crack offenses. In every meaningful sense, these defendants are to be deprived of their liberty for eleven to twenty-five years not because they committed the charged offense, but because law enforcement officers want them incarcerated for other reasons. . . . If these defendants had been white persons engaged in the same criminal activities, they would not have been suspected of any gang association, they would not have been stung by the government to increase the penalty for the offense, and they would not have been selected by the U.S. Attorney for prosecution. They would not be here today. Their real offense is alleged gang association, not the crack offenses with which they are charged.<sup>182</sup>

Following the Supreme Court's decision in *Armstrong*, the Ninth Circuit reversed the district court's discovery order.<sup>183</sup>

The Supreme Court said in *Armstrong*, "The similarly situated requirement does not make a selective-prosecution claim impossible to prove."<sup>184</sup> If applied to police profiling and interpreted to require the identification of unprosecuted offenders, however, the "similarly situated requirement" would make proof of an equal protection violation nearly impossible. A black motorist stopped on a highway cannot identify the white speeders whom the police allowed to pass, and a black crack offender in Los Angeles has no way of knowing what white crack offenders the police might have "stung" but did not.

*Armstrong* and *Turner* differ from the thought-experiment cases described at the outset of this article. The thought-experiment cases, like most of the other cases discussed in this article, are cases of express racial classification, and the intent of the police to classify by race qualifies as a discriminatory purpose.<sup>185</sup> When law enforcement officers target a street gang for proactive investigation, however, they do not expressly classify by race. They may realize that all members of the gang are black,

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<sup>182</sup> Id at 1501.

<sup>183</sup> *United States v Turner*, 104 F3d 1180 (9th Cir 1997).

<sup>184</sup> 517 US at 466.

<sup>185</sup> See text accompanying notes 52-54.

but their knowledge is not enough. Absent proof of a racial motive, targeting a particular gang is not subject to heightened scrutiny under the Equal Protection Clause. The differential treatment of blacks and whites may be knowing, foreseeable, foreseen, and systematic, but it is not purposeful.

An earlier section of this article proposed reading the Fourth Amendment to prohibit some racial discrimination the Equal Protection Clause does not reach. Courts should hold that systematically subjecting racial minorities to searches or seizures at a higher rate than their rate of offending violates the Fourth Amendment unless this practice is appropriately tailored to advance a significant state interest.<sup>186</sup>

When law enforcement officers have sound reasons for regarding a particular black street gang as more threatening than any white gang, targeting the black gang for special investigation (and for more frequent searches and arrests) could be constitutional under this standard. Police officers, however, should be required to justify practices that they know will subject non-whites to searches and seizures at a higher rate than their rate of offending. One need not collect crime statistics to know that the practice of targeting only non-white gangs for investigation will subject non-whites to searches and seizures at a highly disparate rate.

The proposed reading of Fourth Amendment would allow courts to scrutinize some police practices that, despite the absence of formal racial classification and racial animus, systematically burden minorities. The following section of this article will propose a revision of equal protection doctrine to facilitate the judicial review of police practices that systematically impose a less tangible sort of racial burden—social stigmatization of the kind that prompted the Supreme Court's decision in *Brown v Board of Education*.<sup>187</sup>

#### VIII. A FIRST LESSON IN HOW TO THINK ABOUT RACIAL CLASSIFICATION: SOCIAL MEANING AS AN ALTERNATIVE TO DISCRIMINATORY PURPOSE AND EFFECT

When, on the anniversary of his coronation, the King of Prentendia appeared on a balcony before the multitude, a soldier failed to remove his hat. The Master of Dignity charged the sol-

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<sup>186</sup> See text accompanying notes 123–33.

<sup>187</sup> 347 US 483 (1954).

dier with insulting the king, and the soldier then sought the opinion of the Learned Lawyers on the meaning of this offense. Could he have insulted the king if he was unaware that he was expected to remove his hat and intended no disrespect? Could he have insulted the king if the king's back was turned so that he did not know of the soldier's default? Could the soldier have insulted the king if the crowd did not regard the soldier's omission as insulting? Whose perspective counted—the soldier's, the king's, or the crowd's? Might more than one perspective matter?<sup>188</sup>

In *Plessy v Ferguson*,<sup>189</sup> in which the Supreme Court upheld the constitutionality of racial segregation, it wrote, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."<sup>190</sup> The Supreme Court recognized that for the government to declare one race inferior to another was unconstitutional. The belief of the members of a race that they had been branded inferior, however, was not decisive. Separate but equal facilities were not inherently insulting—no more than a soldier's failure to remove his hat. The colored race and the king should just get over their sensitivity.

When *Brown v Board of Education*<sup>191</sup> overruled *Plessy*, the Court reversed direction and emphasized the perspective of the victimized race: "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>192</sup>

Twenty-five years after *Brown*, in *Washington v Davis*,<sup>193</sup> the Court declared the perspective of the asserted wrongdoer at least as important as that of the asserted victim. Establishing an equal protection violation required proof of discriminatory purpose as well as discriminatory effect.<sup>194</sup> Although current doctrine thus takes the viewpoint of both the soldier and the king, it seems to disregard the crowd. According to the Court, the meaning of a

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<sup>188</sup> Philippe Nonet suggested an illustration like this one in conversations twenty years ago.

<sup>189</sup> 163 US 537 (1896).

<sup>190</sup> Id at 551.

<sup>191</sup> 347 US 483 (1954).

<sup>192</sup> Id at 494.

<sup>193</sup> 426 US 229 (1979).

<sup>194</sup> Id at 238–39.

challenged act (segregating the races or wearing a hat) lies in the eye of the victim and the asserted wrongdoer. It is not determined by the chorus of bystanders. The act's social meaning—its objective meaning<sup>195</sup>—not only is not decisive; it is irrelevant.

Disregarding social meaning is an odd way of looking at language, verbal or nonverbal. Although equal protection doctrine formally emphasizes the soldier's perspective and the king's, *Brown* is best understood as a decision about the crowd. Of course the circumstances of *Brown* itself did not focus the issue sharply, for everyone—soldier, king, and crowd—understood that America's regime of apartheid branded one race as inferior.

When *Brown* declared, however, "Separate educational facilities are inherently unequal,"<sup>196</sup> the Court did not have all forms of separation in mind. Separation does not always convey the same social message, as three cases indicate: (1) Directing all students whose surnames begin with the letters A through N to Classroom 1 and those whose names begin with the letters O through Z to Classroom 2 stigmatizes no one. (2) Directing whites to Classroom 1 and blacks to Classroom 2 brands a race. (3) Directing male students to Classroom 1 and female students to Classroom 2 sparks an argument: What statement does this separation of the sexes make about women? A lawyer challenging separate educational facilities for women who rested her case after reciting *Brown*'s declaration that separate facilities are inherently unequal would not be a good lawyer.

The competing perspectives can all be relevant. The actor's perspective matters most when the issue is punishment, and the victim's perspective seems most salient when the issue is compensation or damages. Nevertheless, when the question is whether a group has been socially stigmatized, the crowd's perspective is the most important of the three.

If a student considered himself stigmatized by being assigned to Classroom 2 on the basis of his surname, one could offer the *Plessy* response: "Get over it."<sup>197</sup> Similarly, if an administrator hoped to punish students with end-of-the-alphabet names by

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<sup>195</sup> The "objective" meaning of an act consists of the subjective meaning attributed to it by a great many people.

<sup>196</sup> 347 US at 495.

<sup>197</sup> If this illustration seems fantastic, consider the confrontation between the dean of a Chicago-area law school and a faculty member. The faculty member protested that another member of the faculty had been assigned a larger office. The dean replied that she did not believe the other faculty member's office was larger. "Yes, it is," the indignant faculty member declared. "I measured. His office is two inches longer than mine."



separating them from students with front-of-the-alphabet names, one could dismiss his malevolent madness on the ground it caused no harm.

If the administrator realized, however, that a hypersensitive student named Quaver could be injured by assignment on the basis of his surname, one might not care about the crowd. If the administrator's improper purpose and his act's injurious effect were evident, social meaning might not matter. The victim and the victimizer might speak a private language. Social meaning also might not matter if a slow-witted victim failed to perceive an injury recognized by the crowd. One possible response to this situation (probably not the best response) would be: No harm, no foul.

Despite these qualifications, the wisdom and triumph of *Brown* lay in the fact that the Supreme Court disregarded the asserted formal meaning of racial segregation and recognized the social meaning. The Court judged the message of segregation in the way language always should be judged—in the context of a particular culture at a particular time.

Some critics of *Brown* were troubled by the Court's move to realism. Although sympathetic to the result in *Brown*, these critics were suspicious of a rationale that might cause constitutional doctrine to vary with shifting cultural circumstances.<sup>198</sup> They sought neutral, enduring principles, apparently oblivious to how neutral and enduring *Brown's* anti-subordination principle was.<sup>199</sup> The vice of segregation was its message of racial inferiority and the rippling outward of this message through society—its ratification and encouragement of the view that blacks are less valued than whites.<sup>200</sup>

Social meaning distinguishes the case of the black man in the green coat from the other thought-experiment cases described at the outset of this article. No one views the stop of a black man who meets a robbery victim's description as a statement that blacks are more likely to commit robberies than anyone else. The stop of the black man in the green coat does not brand a race.

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<sup>198</sup> Most notably, Herbert Wechsler affixed an A+ title to a B- article advancing this thesis. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1 (1959).

<sup>199</sup> A classic response to the critics of *Brown* is Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L J 421 (1960).

<sup>200</sup> See *Strauder v West Virginia*, 100 US 303, 308 (1880) (condemning governmental discrimination in jury selection as "a stimulant to race prejudice").

The Pothole police, the drug-profiling troopers on the highway, and the Border Patrol agents at the INS checkpoint, however, all treat race itself as an indicator of criminality. Their actions declare that blacks or Latinos are more likely to be weapons violators, drug offenders, or immigration offenders than other people. Even when the officers' statements are statistically accurate, they mark a race.<sup>201</sup> These statements ratify and encourage the view that minorities are crime-prone.<sup>202</sup>

America's history of racial subordination makes the meaning of racial profiling more disturbing here than it would be elsewhere. This practice occurs against a background of slave patrols, lynch mobs, Klan terrorism, all-white juries, discriminatory use of the death penalty, disenfranchisement, segregation, the third degree, Los Angeles choke holds, Birmingham water hoses, police perjury, planted evidence, the beating of Rodney King, the torture of Abner Louima, and the shooting of Amadou Diallo.<sup>203</sup> "Driving while black" comes at the end of a long and shameful list.

Reinforcing the view that some racial groups are dangerous is likely to encourage discrimination, not only in the administration of criminal justice, but throughout society. The sense that black men in particular are dangerous may make black men hesitant to wear either old clothes or flashy clothes, to drive red or white cars, to travel by air, to drive some highways, to appear boisterous, to wear jewelry, or even to approach strangers of other races to ask directions. It may lead whites and others to over-perceive the danger blacks pose. It may even encourage some blacks to see themselves as others see them and to become

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<sup>201</sup> See *J.E.B. v Alabama ex rel T.B.*, 511 US 127, 139 n 11 (1994):

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalizations.

<sup>202</sup> See Lu-in Wang, "Suitable Targets"? Parallels and Connections Between "Hate" Crimes and "Driving While Black", 6 *Mich J of Race & L* 209, 233-34 (2001).

<sup>203</sup> For a chilling review of the history, see Kennedy, *Race, Crime, and the Law* at 29-135 (cited in note 38). See also A. Leon Higginbotham, *In the Matter of Color: Race in the American Legal Process* (Oxford 1978).

more dangerous. A view of minorities as crime-prone sometimes may become a self-fulfilling prophecy.<sup>204</sup>

Racial profiling today sparks controversy, outrage, jokes, lawsuits, and legislation. Gender profiling, however, goes unnoticed. The explanation for this disparity does not seem to be that gender profiling occurs less often. Instead, the explanation is cultural and historic. Men, the usual targets of this profiling, have not been abused by the police and subordinated by American society in the same way racial minorities have. Social meaning is contextual, and although gender profiling does declare men more crime prone than women, no one believes that it expresses contempt for men or marks them as the less worthy gender.

The Supreme Court has concluded that racial classifications have an impermissible effect simply because they are not color-blind. The Court seeks a society in which race will not matter. The Court also has declared that a discriminatory purpose exists whenever a government officer classifies by race. Racial profiling, however, works a greater injury than that produced by racial classification alone. It makes a negative, not merely a color-conscious, statement.

The police may not always intend the harm their profiling produces. The purpose of their classifications may be only to apprehend as many criminals as they can. Nevertheless, the brand sensed by the objects of their profiling does not arise, in *Plessy's* words, "solely because the colored race chooses to put that construction on it."<sup>205</sup> This brand is visible to the crowd.

As indicated in the previous section of this article, a brand may be evident to the crowd even when the police do not expressly classify by race and do not act for racial reasons. Targeting only black street gangs or only black drug dealers, for example, clearly conveys the message that blacks are more to be feared than whites. The Equal Protection Clause should require the government to justify its delivery of this message.

Henry Louis Gates, Jr., notes, "Blacks—in particular, black men—swap their experiences of police encounters like war stories, and there are few who don't have more than one story to tell."<sup>206</sup> In 1999, United States District Judge Filemon Vela drove

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<sup>204</sup> See Ellis Cose, *The Envy of the World: On Being a Black Man in America* 7 (Pocket Books 2002).

<sup>205</sup> *Plessy*, 163 US at 551.

<sup>206</sup> Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, *New Yorker* 58 (Oct 23, 1995).

from Brownsville, Texas, where his wife is the mayor, to a court session in Laredo, Texas. Three members of his staff were with him in his Ford Explorer. The Border Patrol agent who pulled him over explained that there were “too many people in the vehicle.”<sup>207</sup> A year later, Judge Vela was alone in his car when he drove to Laredo. This time, the Border Patrol agent who stopped him explained that the car had tinted windows. Another judge in Brownsville declared, “It feels like occupied territory. It does not feel like we’re in the United States of America.”<sup>208</sup> Members of Congress, prominent entertainers, prosecutors, off-duty police officers, and countless others have had like experiences. When blacks and Latinos are stopped under circumstances in which whites are not, they—indeed all blacks and Latinos—are branded. As the following section of this article will indicate, however, the social meaning of racial profiling is not the only reason this practice is unjust. Profiling also distributes the tangible burdens of law enforcement inequitably.

IX. A SECOND LESSON IN HOW TO THINK ABOUT RACIAL  
CLASSIFICATION IN THE CRIMINAL JUSTICE SYSTEM:  
THE SYSTEMATIC IMPOSITION OF DIFFERENTIAL BURDENS ON THE  
BASIS OF COLOR

A. Racial Taxation

Randall Kennedy observes that a Latino stopped at an immigration checkpoint is

made to pay a type of racial tax for the campaign against illegal immigration that whites, blacks, and Asians escape. Similarly, a young black man selected for questioning by police as he alights from an airplane or drives a car is being made to pay a type of racial tax for the war against drugs that whites and other groups escape.<sup>209</sup>

Although the word “tax” may seem regrettably antiseptic when applied to the resentment, fear, and sense of physical restraint that unwanted police contact often generates,<sup>210</sup> Kennedy’s obser-

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<sup>207</sup> Harris, *Profiles in Injustice* at 4–5 (cited in note 126).

<sup>208</sup> *Id.* at 6.

<sup>209</sup> Kennedy, *Race, Crime, and the Law* at 159 (cited in note 38).

<sup>210</sup> See Johnson, 78 Wash U L Q at 713 (cited in note 38).

vation captures an important part of the injustice of racial profiling.

Kennedy implies that the government imposes a racial tax only when it uses “race as a proxy for increased risk of criminality” and not when it relies on a witness’s description of a criminal.<sup>211</sup> Shari Lynn Johnson writes, “The use of race to identify a particular perpetrator . . . does not disadvantage any racial group and thus does not require strict scrutiny. . . . Because suspects in all racial groups will be identified in part by their race, reliance upon the witness’s description of the perpetrator’s race seems to impose equal burdens on all races.”<sup>212</sup>

This analysis overlooks the fact that, in Kennedy’s words, “blacks, particularly young black men, commit a percentage of the nation’s street crime that is strikingly disproportionate to their percentage in the nation’s population.”<sup>213</sup> People arrested on probable cause and stopped on reasonable suspicion may be innocent,<sup>214</sup> and when blacks commit crimes at a higher rate than whites, innocent blacks are likely to be stopped and arrested more often than innocent whites. They simply fit victims’ descriptions of criminals more often. In this respect, the obligations of citizenship are more onerous for blacks than for whites. The members of the most disadvantaged racial and ethnic groups pay more.

A regressive, racially disparate tax for law enforcement is troublesome, especially when it takes the form of police detention. Presumably, however, neither Professor Kennedy nor most of the rest of us would repeal this tax. When the victim of a robbery has described the robber as a black man in a green coat and an officer discovers a black man in a green coat near the scene of the crime, the officer should classify on the basis of race and risk adding to the tax that innocent blacks regularly pay for law enforcement because of their color.

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<sup>211</sup> Kennedy, *Race, Crime, and the Law* at 137 n \* (cited in note 38).

<sup>212</sup> Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L J 214, 242–43 (1983).

<sup>213</sup> Kennedy, *Race, Crime, and the Law* at 145 (cited in note 38). See Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* 49–80 (Oxford 1995).

<sup>214</sup> See, for example, *Hill v California*, 401 US 797, 802 (1971) (upholding the arrest of a misidentified person who matched the description of a criminal); *United States v Turner*, 699 A2d 1125, 1128–30 (DC 1997) (upholding the stop of a suspect on reasonable suspicion although the police stopped at the same time a second suspect who equally matched their description of the person sought).

When minorities are stopped not merely at a higher rate than their share of the population but also at a higher rate than their rate of offending, the tax described by Professor Kennedy becomes harsher. The government's classification becomes not only racially over-inclusive but racially under-inclusive as well.

Consider the case of profiling on the highway. Little evidence suggests that blacks and Latinos commit drug crimes at higher rates than whites, and whether racial profiling has even a rational basis is disputed.<sup>215</sup> In many jurisdictions in which the police stop blacks more frequently than whites they discover evidence of crime substantially less often when they stop blacks. In these jurisdictions, the police apparently overpredict on the basis of race.<sup>216</sup>

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<sup>215</sup> See Rudovsky, 3 U Pa J Con L at 308–13 (cited in note 24).

<sup>216</sup> Harris, *Profiles in Injustice* at 73–90 (cited in note 126). The subtitle of Harris's book is *Why Racial Profiling Cannot Work*, and Harris declares that "racial profiling doesn't help police catch criminals." Id at 84. The data he presents, however, stop short of establishing this thesis. Harris writes:

The rate at which officers uncover contraband in stops and searches is *not* higher for blacks than for whites, as most people believe. Contrary to what the "rational" law enforcement justification for racial profiling would predict, *the hit rate for drug and weapons in police searches of African Americans is the same as or lower than the rate for whites*. Comparing Latinos and whites yields even more surprising results. Police catch criminals at *far lower rates* than among whites. These results hold true for studies done in New York, Maryland, New Jersey, and other places. We see the same results in data collected by the U.S. Customs Service, concerning the searches it does of people entering the country at airports: the hit rate is lower for blacks than it is for whites, and the hit rate for Latinos is lower still.

Id at 13.

When, as in the Maryland highway study Harris mentions, the "hit rates" for blacks and whites are identical, these rates do not indicate a failure of racial profiling. They are consistent with the possibility that the police achieved the highest attainable rate of success by using a formula that included race as one indicator of criminality. One would in fact expect identical rates of success if racial profiling were working perfectly. The data are also consistent, however, with the possibility that random stops would have yielded identical "hit rates." In short, these data say nothing at all about the empirical success or failure of racial profiling.

In all of the other studies Harris mentions, the "hit rate" for minorities was significantly lower than the rate for whites. Id at 78–84. These studies do indicate that the police overpredicted on the basis of race and that their racial profiles were inaccurate. But see George C. Thomas, *Blinded by the Light: How to Deter Racial Profiling—Thinking about Remedies*, 3 Rutgers Race & L Rev 39, 44 (2000) (noting that successful police searches of minority motorists generally have yielded larger quantities of drugs than successful searches of white motorists). Establishing that the police overpredicted on the basis of race is important. It does not establish, however, that race lacks any predictive power or, in Harris's words, that "racial profiling cannot work."

Race *cannot* have any predictive power—and racial profiling on the highway cannot work—if rates of drug possession and drug dealing do not differ by race. Contrary to

Suppose, however, that an officer has reason to believe that stopping one hundred blacks will, on average, yield six arrests for drug offenses while stopping one hundred whites will yield only five. If race were this officer's only predictor of illegal drug activity and if the officer had an unlimited number of blacks and whites to stop, she could maximize the number drug arrests by stopping only blacks. A 6 percent rate of return is better than a 5 percent rate. A patrol officer therefore might stop one hundred blacks while allowing, say, 850 whites to proceed—all to make one additional arrest. Although the disparity in the rate of drug offending by blacks and whites would be minuscule, the disparity in the rate of police stops and searches would be infinite.

The economics of proactive policing often encourage the police to "pile on." A small perceived disparity in the rate of offending of two groups can make it economically rational to concentrate enforcement resources on the group whose investigation appears to yield the greater payoff in arrests and convictions. The result may be a "multiplier effect," a "cop cascade," or a "race to the black or brown race." Police officials whose political incentives encourage them to denounce racial profiling may have economic incentives to do it. These incentives are independent of the racial biases that continue to infect American policing.<sup>217</sup>

The racial tax is likely to be highest when policing is proactive—when the police select their own targets as they do in most drug, weapons, and immigration cases (and as they do in other cases in which ascertainable victims have not initiated police investigations). Crimes of personal violence and property crimes pose a lesser danger. When the police make an effort to apprehend all offenders rather than just a portion of them and when they respond to victims' descriptions of offenders in roughly the same way, they may stop blacks at a higher rate than the proportion of blacks in the population, but they will not stop blacks at a higher rate than the proportion of blacks in the universe of race-identified criminals.

Of course, as *Brown v Oneonta* illustrates, the police may treat some victims' complaints more seriously than others. When

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common stereotypes and as best we can tell, whites do commit all sorts of drug offenses at roughly the same rates as blacks and Latinos. See the data recited in Rudovsky, 3 U Pa J Con L at 309–10 (cited in note 24).

<sup>217</sup> See Albert W. Alschuler and Stephen J. Schulhofer, *Antequated Procedures or Bedrock Rights? A Response to Professors Meares and Kahan*, 1998 U Chi Legal F 215, 223–25 (documenting the persistence of racial bias).

the police expend more resources responding to a report that a black has victimized a white than responding to a report that a white has victimized a black (for example, when they attempt to question every black youth in town), they again tax blacks at a higher rate than their rate of offending. In this situation, moreover, the racial tax may lack even an efficiency justification.<sup>218</sup> Focusing on whether a police practice taxes a race at a higher rate than this race's rate of offending may sometimes order our intuitions about racial profiling better than focusing on whether the police are seeking one criminal or many, whether they have obtained a witness description, or whether they employ particularized or statistical evidence.

Racial classifications in criminal investigation often pose a classic trade-off between distributive justice and efficiency.<sup>219</sup> As noted above, distributive unfairness is evident even in the case of the black man in the green coat. Law-abiding black men should not be subject to unwanted police contacts at a higher rate than law-abiding white men simply because the members of their race commit crimes at an above-average rate.<sup>220</sup>

When blacks do commit crimes at a higher rate than whites, however, the only way to end this distributive unfairness (this "racial tax") would be to bring law enforcement to a halt—for example, by ordering the police not to stop a possibly innocent black man in a green coat even on probable cause. Stopping a person who matches a victim's detailed description seems so plainly necessary that we barely notice the distributive unfairness if we notice it at all. Routine, unquestioned law enforcement practices may have a systematic disparate impact on innocent blacks, but when stops based on reasonable suspicion and arrests based on probable cause burden minorities at no higher rate than the minorities' rate of offending, these stops and arrests should require no further justification. In this situation, reasonable suspicion or

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<sup>218</sup> Recall that in *Oneonta*, the differing sizes of the two racial groups did provide a weak efficiency rationale for the police department's differing treatment of blacks and whites. Recall, too, that the Supreme Court held eighty-eight years ago that this sort of efficiency cannot justify treating blacks and whites differently. See the discussion in text accompanying notes 75–77.

<sup>219</sup> But see Louis Kaplow and Steven Shavell, *Fairness Versus Welfare*, 114 Harv L Rev 961, 982, 1028–38 (2001) (denying that trade-offs between justice and efficiency are necessary).

<sup>220</sup> This distributive injustice is aggravated by the fact that it reflects and compounds earlier injustices. The higher crime rate of blacks is presumably attributable to centuries of racial subordination. The accident of being born a member of a historically subordinated race generates an increased personal tax for law enforcement today.



probable cause provides a sufficiently compelling reason and a sufficiently tight means-end fit to justify the racial classifications used by the police.

In the absence of reasonable suspicion or probable cause, however, seizures based on racial classifications lack a compelling justification. *Martinez-Fuerte* to the contrary notwithstanding, detentions based in whole or in part on ethnicity and lacking any particularized evidentiary basis warrant condemnation under both the Fourth Amendment and the Equal Protection Clause.<sup>221</sup> Perhaps a life-threatening emergency could justify a departure from this principle, but nothing less could.

When law enforcement practices burden minorities not only at a higher rate than their share of the population but also at a higher rate than their rate of offending, the racial tax grows harsher and the justification for it less apparent. In this situation, neither the evidentiary justification for individual stops and arrests nor increasing the government's batting average or rate of return should automatically justify the tax. It makes sense to place one's cash in the bank offering the highest rate of return, but the government must allocate the burdens of criminal investigation more evenly. In the case of the black man in the green coat, effective or efficient law enforcement justifies some distributive unfairness. In the case of the young man from Pothole, however, hardly anyone would contend that efficiency justifies stopping someone on the basis of race, age, gender, and residency alone.

## B. The Unbearable Lightness of Doctrine

The case of the young man from Pothole illustrates both the power of distributive concerns and the failure of current constitutional doctrine to take appropriate account of them. Taken at face value, Fourth Amendment doctrine does not appear to condemn the stop in this case.<sup>222</sup> Probable cause requires only a "substantial basis" for concluding that a person whom the police arrest is guilty of a crime,<sup>223</sup> and a stop can be justified by reasonable sus-

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<sup>221</sup> Note that at this point I am speaking only of seizing suspects, not of approaching them simply to ask for information. For discussion of the use of racial classifications in investigations that stop short of seizures, see text at notes 96–98, 236–38, 359.

<sup>222</sup> I emphasize "taken at face value," for a court might tug, haul, and shove the doctrine to reach an appropriate result.

<sup>223</sup> *Illinois v Gates*, 462 US 213, 236 (1983).

picion, a less demanding standard.<sup>224</sup> A better than 50 percent likelihood that a person is carrying an illegal weapon seems to satisfy the reasonable suspicion requirement.

The Supreme Court's Fourth Amendment jurisprudence has five tiers. Requesting people's voluntary cooperation—the kind that (astonishingly) drug-carrying motorists usually provide when the police ask to search their vehicles—is not a search or seizure and requires no justification (tier one).<sup>225</sup> Searches, seizures and stops that serve “special needs, beyond the normal need for law enforcement” are subject to whatever safeguards the Supreme Court considers appropriate but often are allowed en masse without reasonable suspicion (tier two).<sup>226</sup> Brief stops in the course of criminal investigation and some brief seizures of property require reasonable suspicion (tier three).<sup>227</sup> Most arrests, searches, and seizures require probable cause (tier four).<sup>228</sup> A few very highly intrusive arrests, searches, and seizures (those requiring the use of deadly force or major surgery) require justification beyond probable cause (tier five).<sup>229</sup> The Supreme Court's Fourth Amendment jurisprudence, which balances interests by fits and starts, could be described as “clunky utilitarianism.” As noted earlier, however, the Court has placed a thumb on the utilitarian scale by declaring that the intentional imposition of differential burdens on the basis of race is the concern of a different amendment.<sup>230</sup>

The stop of the young man from Pothole does not appear to violate the Equal Protection Clause either. The Supreme Court's equal protection jurisprudence has three clunky tiers. Every classification of persons must have at least a rational basis (tier one). Some classifications are subject to “intermediate” scrutiny. They “must serve important governmental objectives and must be substantially related to the achievement of those objectives” (tier two).<sup>231</sup> Other classifications, including those based on race and

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<sup>224</sup> *Terry v Ohio*, 392 US 1, 20, 30–31 (1968).

<sup>225</sup> See, for example, *United States v Drayton*, 122 S Ct 2105, 2110 (2002); *Florida v Bostick*, 501 US 429, 434–35 (1991).

<sup>226</sup> See, for example, *Board of Education v Earls*, 122 S Ct 2559, 2564–65 (2002); *Vernonia School District v Acton*, 515 US 646, 653 (1995); *Michigan Department of State Police v Sitz*, 496 US 444, 455 (1990).

<sup>227</sup> *Terry v Ohio*, 392 US 1 (1968); *United States v Place*, 462 US 696, 706 (1983).

<sup>228</sup> See, for example, *Illinois v Gates*, 462 US 213, 227–28 (1983).

<sup>229</sup> See *Tennessee v Garner*, 471 US 1, 3 (1985) (deadly force); *Winston v Lee*, 470 US 753, 759–63 (1985) (major surgery).

<sup>230</sup> See text accompanying notes 116–23.

<sup>231</sup> *Craig v Boren*, 429 US 190, 197 (1976).

ethnicity, are subject to “strict” scrutiny. They are constitutional only when they are “narrowly tailored measures that further compelling governmental interests” (tier three).<sup>232</sup>

The stop of the young man from Pothole does rest on a racial classification, but the government’s interest in arresting weapons offenders and seizing illegal weapons is compelling. Moreover, the government’s classification seems well adapted to achieving its goal.

Unlike the Fourth Amendment, the Equal Protection Clause is insistent distributive; distributive justice is what it’s about. Under the Supreme Court’s decisions, however, distributive fairness always is subject to a utilitarian constraint. When the end is compelling and the government’s means are well adapted to achieve it, this end justifies the means. The conventional law of both the Fourth and the Fourteenth Amendments appears to have left something out.

In some situations, utility ought to trump distribution. People of normal moral sensibilities usually seek a middle ground between Immanuel Kant’s insistence on desert-based distribution<sup>233</sup> and Jeremy Bentham’s insistence on the greater good for the greater number.<sup>234</sup> If the alternative to imposing a small, undeserved racial burden were a nuclear explosion in Cleveland, imposing this racial burden would be justified. In ethics as in Gilbert and Sullivan’s *H.M.S. Pinafore*, the answer to the question “What, never?” often may be, “Well, hardly ever.”<sup>235</sup> Generally appropriate principles of justice fade in life-threatening emergencies and other situations, and for people who shun the moral extremism of both Kant and Bentham, some squishy balancing seems unavoidable.

As the case of the young man from Pothole illustrates, however, concern for distributive justice should not vanish altogether whenever an interest labeled “compelling” and a suitable means-end fit appear. Trade-offs between distributive justice and efficiency are characterized by continuous (not dichotomous) variables on both sides, and these trade-offs frequently are complicated by concerns extrinsic to the balance. Problems of distribu-

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<sup>232</sup> *Adarand Constructors v Pena*, 515 US 200, 227 (1995).

<sup>233</sup> See Immanuel Kant, *The Philosophy of Law* 47 (Augustus M. Kelley 1974) (W. Hastie, trans).

<sup>234</sup> See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 11–16 (Anthalone 1970) (J. H. Burns and H. L. A. Hart, eds).

<sup>235</sup> William Schwenk Gilbert, *H.M.S. Pinafore*, in Ian Bradley, ed, *The Complete Annotated Gilbert and Sullivan* 127 (Oxford 1996).

tive fairness cannot be solved with an on-off switch. Proclaiming the government's interest in fighting crime "compelling" should not validate every crime-fighting measure likely to prove effective.

Just as the phrase "compelling governmental interest" may demand too little justification for a racial classification, it may demand too much. The Supreme Court has stretched the Fourth Amendment category of voluntary interaction with the police to the point at which it includes many highly resented contacts,<sup>236</sup> but one can envision courteous police requests for cooperation by people of a single race who are not themselves suspects. Moreover, without questioning or approaching anyone, the police might watch people of one race more closely than those of another. The police should have a reason for focusing greater attention on one group than another,<sup>237</sup> but demanding that unobtrusive preliminary investigation constitute a "narrowly tailored" response to a "compelling" law enforcement interest seems excessive. The formula employed in Sixth Amendment jury-selection decisions seems more appropriate: the challenged action must be "appropriately tailored" to advance "a significant state interest."<sup>238</sup>

In the end, the talismans "compelling governmental interest" and "narrowly tailored measure" may not notably constrain decision. If the constraint provided by these words is not illusory, however, it is misguided.

### C. A Recapitulation and Some Implications

This section has examined the tangible, differential burdens a police racial classification can impose, drawing on Randall Kennedy's useful metaphor of racial taxation. The evaluation of a racial classification by the police requires examining both the extent to which this classification burdens minorities at a higher rate than their share of the population and the extent to which it burdens them at a higher rate than their rate of offending. Police

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<sup>236</sup> See, for example, *Drayton*, 122 S Ct 2105 (2002); *Florida v Bostick*, 501 US 429 (1991).

<sup>237</sup> An unpublished analysis of police computer traffic found that patrol officers ran license checks on automobiles driven by blacks more often than those driven by whites. Although the legality of race-specific surveillance from a distance is unlikely to be litigated, see note 98, in the absence of appropriate justification it is surely unconstitutional. See Gross and Livingston, 102 Colum L Rev at 1425 (cited in note 24) (describing Albert J. Meehan and Michael Ponder, *Race and Place: The Ecology of Racial Profiling African-American Motorists* (unpublished 2001)).

<sup>238</sup> See *Duren v Missouri*, 439 US 357, 367, 370 (1979).

racial classifications produce both racially skewed false positives and racially skewed false negatives.

Even routine, unquestioned police practices (like stopping suspects who meet witness descriptions) may tax innocent blacks at a higher rate than innocent whites. The systematic imposition of differential burdens on the innocent members of a historically subordinated race is always unjust, for it fails, in Plato's words, to "render each his due."<sup>239</sup> Nevertheless, this imposition of unjust burdens is not always invalid. For everyone other than a Kantian or Benthamite, a trade-off between justice and efficiency is unavoidable.

Current equal protection doctrine botches the trade-off. Occasionally this doctrine tilts too far in favor of equal distribution. Approaching blacks but not whites in an unobtrusive manner simply to ask questions requires some justification. In this context, however, talk of compelling governmental interests and narrow tailoring seems out of place.

More often, current doctrine tilts too far in favor of efficiency. The police should not be allowed to stop all the young black men in Pothole even when there is good reason to believe that most of them are carrying unlawful weapons. Although the governmental purpose is compelling and the means employed by the police well designed to achieve it, the maldistribution of burdens is too great.

Like the preceding section on social meaning, this section on racial taxation has focused on one sort of discriminatory effect, not on discriminatory purpose. When express racial classifications by the police produce unequal racial burdens, current doctrine does treat the police purpose as discriminatory. The police could produce equally disproportionate burdens, however, without an express racial classification and without the discriminatory purpose courts now consider crucial to an Equal Protection Clause violation.

For example, a police department might devote a large share of its resources to apprehending and punishing the members of a gang called the Bloods, the largest gang in town. Sting operations might target the Bloods; the department might designate Blood

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<sup>239</sup> See Plato, *The Republic* 21 (Harvard 1978) (Paul Shorey, trans) (G.P. Goold, ed). See also *The Institutes of Justinian* 5 (Longmans 1962) (Thomas Collett Sandars, trans) ("Justice is the constant and perpetual wish to render everyone his due."); William Blackstone, 1 *Commentaries on the Laws of England* 40 (Chicago 1979) (listing among the immutable principles of good and evil "that we should live honestly, should hurt nobody, and should render every one it's [sic] due.").

territory as a zone in which the local gang loitering ordinance would be rigorously enforced; and the police might stop and frisk suspected Bloods whenever the law allows. Assume that the Bloods have only black members and the police know it. Assume in addition that the police could target gangs with white members but do not. The imposition of a disproportionate tax for law enforcement—disproportionate to blacks' share of the population and to their rate of offending—would be systematic and knowing. Absent proof of racial animus, however, it would not be purposeful. The police can engage in racial profiling (or at least duplicate the evils of profiling) without employing an express racial classification. The absence of this express classification would not reduce the distributive unfairness.

To address this unfairness, this article has proposed that when a police practice systematically subjects the members of a race to searches and seizures at a higher rate than their rate of offending, courts should hold the practice unconstitutional unless it is appropriately tailored to advance a significant state interest. Under the proposed standard, a qualitative difference between the activities of the Bloods and those of other gangs might justify targeting only this group, but the prospect of improving the police department's batting average could not. The police could no longer simply pile on.

Although this section has emphasized the racial tax profiling imposes on the innocent, the distributive unfairness extends to the guilty as well. Targeting only blacks ultimately will send only blacks to prison, and a policy that predictably sends guilty blacks to prison while guilty whites go free is unjust. Once again, this policy cannot be justified simply by the fact that targeting only blacks yields a higher rate of return. The distributive injustice is clearest when the police concentrate their investigative resources almost entirely on blacks and make little or no effort to discover guilty whites, but the unfairness exists whenever a practice or policy systematically subjects the guilty members of one race to punishment at a higher rate than the guilty members of another.

## X. THREE APPLICATIONS

### A. Security Screening at Airports

In *Martinez-Fuerte*, the Supreme Court rejected a Fourth Amendment challenge to brief "administrative" detention although the people detained were chosen largely on the basis of

their ethnicity. Ethnicity, the Court said, was “clearly . . . relevant to the law enforcement need to be served.”<sup>240</sup> As noted at the outset of this article, most Americans in the period after September 11 favored requiring airline passengers who appeared to be Arabs to submit to searches and detentions from which other passengers were excused.<sup>241</sup> Like the stops at issue in *Martinez-Fuerte*, preboarding searches of airline passengers and their luggage are “administrative” or “special needs” searches conducted without individualized suspicion.<sup>242</sup> Proposals to subject people of apparent Arab ethnicity to more intense screening than other passengers raise issues resembling those presented by *Martinez-Fuerte*.

One may doubt, however, that apparent Arab (or Middle-Eastern or any other<sup>243</sup>) ethnicity is “clearly relevant” to the need to be served by airport screening. For at least three reasons, ethnicity seems less relevant to identifying hijackers than to identifying illegal immigrants on the highway between San Diego and Los Angeles.

First, defenses of racial and ethnic profiling depend upon the ability of law enforcement officers to do it—to distinguish racial and ethnic groups from one another. Although Mexicans and Latinos often cannot be distinguished from others on the basis of

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<sup>240</sup> 428 US at 564 n 17.

<sup>241</sup> See text accompanying notes 5–6.

<sup>242</sup> See *United States v Davis*, 482 F2d 893, 908–12 (9th Cir 1973). Because people can avoid being searched at airports either by giving up their right to travel or by using trains, busses, bicycles, steamships, motorcycles, automobiles, or horses, some courts have characterized preboarding searches as consent searches. See *United States v Henry*, 615 F2d 1223, 1226, 1228–29 (9th Cir 1980); *United States v Edwards*, 498 F2d 496, 500 (2d Cir 1974). The consent of air travelers, however, is obtained through leverage, and the consent-search rationale for preboarding searches knows no limits. It apparently validates all searches to which passengers submit rather than forego air travel regardless of how intrusive and unjustified these searches are. Moreover, even if consent could justify security screening at airports, it could not justify the similar screening that occurs at places where appearance is often involuntary—notably courthouses.

<sup>243</sup> The Afghans who fought for the Taliban were not Arabs. Moreover, militantly anti-American Pakistanis are neither Arab nor Middle Eastern. The assertedly relevant category is far from clear. People who hate America live in many lands, including of course America.

their appearance,<sup>244</sup> Arabs seem even less distinctive in appearance than Latinos.<sup>245</sup>

A substantial majority of the people whom the “point agent” at the *Martinez-Fuerte* checkpoint identified as Latino probably were Latino. Moreover, this agent’s “false negatives” (her failure to identify some Latinos) was not notably disturbing. The agent did not seek to stop more than a minority of Latinos in any event. If directed to subject people of “Arab appearance” to special screening, however, airport security personnel probably would detain many non-Arabs while overlooking many Arabs.<sup>246</sup> If Arab ethnicity truly were a legitimate indicator of danger, the screeners’ false negatives would be a matter of concern. So would their false positives—detaining and searching, largely on the basis of color, people who were not in fact members of the targeted ethnic group.<sup>247</sup>

Second, post-September 11 proposals to subject Arabs (and others who cannot be distinguished from Arabs) to distinctive screening have been shaped by what one might call the “September 11 availability heuristic.” (The term “availability heuristic” refers to people’s tendency to overestimate the likelihood of dramatic, easily remembered events,<sup>248</sup> and few events are more “available” to Americans than those of September 11.)

Of course, even before September 11, Arabs committed acts of terrorism against Americans and others at a higher rate than,

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<sup>244</sup> “[Many Mexicans] are blond, blue-eyed and ‘white,’ while others have red hair and hazel eyes.” Johnson, 78 Wash U L Q at 715 (cited in note 38) (emphasis omitted), quoting Julian Samora and Patricia Vandel Simon, *A History of the Mexican People* 8 (rev ed 1993).

<sup>245</sup> One might test this proposition, but I know of no one who has. If it seems disconcerting to debate which ethnic groups are distinctive in appearance and just how distinctive they are, you may count the discomfort as an argument against ethnic profiling.

<sup>246</sup> Even experienced, well trained, carefully selected security personnel would be likely to make errors, and prior to September 11, low pay and unattractive working conditions contributed to a high turnover of airport security personnel. See Donna Smith, Comment, *Passenger Profiling: A Greater Terror than Terrorism Itself?*, 32 J Marshall L Rev 167, 188–89 (1998). The “federalization” of airport security after September 11 seems to have produced only limited improvement. See John Hilkevitch, *Air Security Tightens; but Gaps Remain*, Chi Trib 1 (Sept 11, 2002); Ricardo Alonso-Zaldivar, *Air Security Deadline Not on Track; Security: Mineta Warns Congress that Budget Cuts Will Probably Delay Airport Screening Goals*, LA Times 16 (July 24, 2002).

<sup>247</sup> Arab terrorists may not be able to alter their skin color, but they can leave distinctive garb at home and obtain forged identification papers bearing names like Rodriguez, Mastroianni, Balibanian, Anastaplo, Gandhi, and Goldfarb.

<sup>248</sup> See Paul Slovic, et al, *Facts Versus Fears: Understanding Perceived Risk*, in Daniel Kahneman, et al, eds, *Judgment Under Uncertainty: Heuristics and Biases* 463, 464–65 (Cambridge 1982); Amos Tversky and Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in Kahneman, *Judgment Under Uncertainty* at 163.



say, Canadians did. The deadliest act of terrorism in the United States prior to September 11, however, was the murder in Oklahoma City of 186 people by Timothy McVeigh and other white citizens of the United States.<sup>249</sup> White Americans appear to have been responsible for many other terrorist acts as well, including anthrax mailings and airplane hijackings.<sup>250</sup> Permitting the “availability” of September 11 to drive concerns about domestic terrorists to the background seems perilous. Perhaps non-Latinos could be excluded from the pool of suspected illegal immigrants on the highway between San Diego and Los Angeles without diminishing the effectiveness of the government’s screening, but non-Arabs cannot be excluded from the pool of potential terrorists and hijackers.

Third, a Latino who wants to enter the United States illegally must cross the border herself. She cannot “beat the profile” by sending a Minnesota wheat farmer in her place. When terrorists realize that law enforcement officers are profiling, however, they are likely to seek operatives who do not match the profile. Tomorrow’s terrorists are unlikely to duplicate yesterday’s, and militantly anti-American Islamic groups apparently have some ability to use Americans (like John Walker Lindh and Jose Padilla) and other non-Arabs (like Richard Reid) to carry out unlawful acts.<sup>251</sup> Profiling may embolden terrorists to believe they can outsmart the profilers. It then may prove not only ineffective but counterproductive.

For these reasons, one may doubt that subjecting people of apparent Arab ethnicity to special scrutiny at airports would be

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<sup>249</sup> See Jo Thomas, *The Oklahoma City Bombing: The Overview; McVeigh Guilty on All Counts in the Oklahoma City Bombing; Jury to Weigh Death Penalty*, NY Times A1 (June 3, 1997); Lois Romano, *McVeigh Is Executed; Bomber Is 1st Federal Prisoner Put to Death Since 1963*, Wash Post A1 (June 12, 2001).

<sup>250</sup> See Laurent Belsie, *Reminder in a Vial: Many Terror Threats are Homegrown*, The Christian Sci Mon 2 (Mar 15, 2002) (describing the focus of the ongoing anthrax investigation and noting that “[b]etween 1980 and 2000, three-quarters of the nation’s 335 suspected terrorist incidents came from domestic groups, not foreign ones, according to the Federal Bureau of Investigation”); Peter St. John, *Air Piracy, Airport Security, and International Terrorism* 49–50 (1991) (noting that only 65 of 560 reported airplane hijacking incidents between 1947 and 1986 were attributed to Palestinians or Islamic fundamentalists).

<sup>251</sup> See Evelyn Nieves, *A U.S. Convert’s Path from Suburbia to a Gory Jail for Taliban*, NY Times B1 (Dec 4, 2001) (Lindh); Jodi Wilgoren and Jo Thomas, *Traces of Terror: The Bomb Suspect; from Chicago Gang to Possible Al Qaeda Ties*, NY Times A19 (June 11, 2002) (Padilla); Pam Belluck, *Crew Grabs Man; Explosives Feared*, NY Times A1 (Dec 23, 2001) (Reid).

effective.<sup>252</sup> Assume, however, that it would and that efficiency would support this ethnic profiling.

This article has criticized the result in *Martinez-Fuerte* and maintained that, except in life-threatening emergencies, searches and seizures based on ethnic classifications should rest on individualized suspicion at least. People of apparent Arab ethnicity should not be subject to preboarding searches and seizures that other people avoid.

Columnist Charles Krauthammer describes this view as “crazy.” He says that he “roll[s his] eyes in disbelief” as “the 80-year-old Irish nun” is “randomly chosen and subjected to head-to-toe searching.” He declares, “[W]e are spending 90% of our time scrutinizing people everyone knows are no threat,” and he protests that Americans have exalted “political appearances” over “real security.”<sup>253</sup>

There is no denying the truism that the alternative to efficiency is waste, and waste is not to be cheered. Airport screening makes the trade-off between efficiency and distributive fairness particularly visible—more visible than it might have been in *Martinez-Fuerte*.

Prohibiting the use of ethnic classifications at the *Martinez-Fuerte* checkpoint probably would have led the INS to abandon the checkpoint. Everyone, including some illegal immigrants, would have driven happily to Los Angeles. Forbidding the use of ethnic classifications in airport screening, however, has not brought this screening to an end. It has led to uniform searches, random searches, and searches on the basis of non-racial, non-ethnic standards—standards that sometimes may have swept 80-year-old Irish nuns into the net.

Although sacrificing efficiency for distributive fairness causes economic waste by definition,<sup>254</sup> forbidding ethnic profiling at air-

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<sup>252</sup> The “hijacker profile” used by airport screeners to identify potential hijackers before 1973—a profile based on undisclosed but reportedly nonracial characteristics—has been called “extremely ineffective.” It was far less effective than the mandatory screening of all passengers that followed it. See Smith, 32 J Marshall L Rev at 171 (cited in note 246).

<sup>253</sup> Charles Krauthammer, *The Case for Profiling*, Time Magazine 104 (Mar 18, 2002). Other columnists have expressed similar views. See Michael Kinsley, *When is Racial Profiling Okay?*, Washington Post B7 (Sept 30, 2001); Stanley Crouch, *Drawing the Line on Racial Profiling*, NY Daily News 41 (Oct 6, 2001); Stephen J. Singer, *Racial Profiling Also Has a Good Side*, Newsday A38 (Sept 25, 2001); Editorial, *Profiling Debate Resumes*, Denver Post B6 (Oct 3, 2001).

<sup>254</sup> Economists can, however, make both the trade-off and the waste disappear by positing that people have a “taste” for justice and by supposing that the only reason for doing justice is to satisfy this taste. See generally Kaplow and Shavell, 114 Harv L Rev 874–75 (cited in note 219).

ports need not produce precisely the waste that offends Krauthammer. As this article has noted, gender profiling and age profiling stand on a different footing from racial and ethnic profiling.<sup>255</sup> If it truly were efficient to exempt 80-year-old women (or all women and all octogenarians) from intensive airport screening, I for one would not object. Leaving Irish nuns out of it, the issue might become whether young men who appear to be Arabs or Arab-Americans should be subject to some forms of screening that other young men escape.<sup>256</sup>

Krauthammer may have assumed that racial, gender, and age classifications should be treated alike, and whether not-quite-alike cases should be treated alike can be a challenging issue. This article has noted, for example, that the subordination of blacks in America has given racial profiling a different social meaning here than it might have elsewhere.<sup>257</sup> Although discrimination against blacks has made the message of profiling especially troublesome, forbidding the police from “profiling” blacks but not other minority races and ethnic groups would be offensive. Even if profiling by gender and age should not be equated with racial profiling, minority races and ethnic groups should be treated alike.

Imagine, then, a long line of “Arab-looking” young men awaiting search and interrogation at an airport while Charles Krauthammer, other white men, and I move quickly through the screening considered appropriate for our race, age, and gender.<sup>258</sup> Although the great majority of the “Arab-looking” men awaiting special interrogation would be as law-abiding as Krauthammer and probably more law-abiding than I, Krauthammer apparently would not feel guilty as he passed them by.

Perhaps Krauthammer would be more uneasy if the line we passed at the airport consisted of young black men, some of whom he recognized. Would he think it appropriate to subject black men to special screening following a suicide bombing causing the

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<sup>255</sup> See text accompanying notes 204–05.

<sup>256</sup> One could add characteristics other than age, gender, and ethnicity to the profile without significantly altering the legal and ethical issues. No matter how many characteristics the profile included, some Arab-Americans would be subject to screening that others with identical non-ethnic characteristics would avoid.

<sup>257</sup> See text at notes 202–04.

<sup>258</sup> Krauthammer and I might rank close to elderly Irish nuns on the non-dangerousness index. We are not only white but also older than Osama bin Laden. We clearly pose no threat.

death of thousands by nineteen black terrorists who appeared to be part of an international organization?

Perhaps one could distinguish the profiling of blacks from the profiling of Arabs on the ground that blacks bear the scars of their race's long and continuing subordination in America. Imposing further race-specific indignities on young black men might seem especially unjust. Even if this racial distinction seemed plausible, however, one should not act on it. Allowing the profiling of some minority groups and not others seems unthinkable. Discrimination against blacks remains the paradigm of racial discrimination in America, and this paradigm properly shapes the principles that apply to racial profiling generally.

Reasons less defensible than the one just noted might make the intensive screening of Arabs more acceptable to some Americans than the intensive screening of blacks. Arabs have less political power in the United States and less ability to make their grievances heard. They are likely to appear more "foreign" and, to some, more menacing. If sentiments like these led Americans to restrict the liberty of Arabs although they would not restrict the liberty of blacks, the distinctive treatment of people of Arab ethnicity would seem especially invidious. As happened with many of our ancestors, recent and seemingly less assimilated immigrants would be disfavored.

The line of men at the airport might not be composed of Arabs or blacks. If a large number of white terrorists had bombed several federal buildings and other facilities, Charles Krauthammer and I might be required to line-up by race while black men, Asian men, Latino men, Native-American men, and Arab men passed us by. Krauthammer, a person of consistent principle, has written that he would not resent this profiling,<sup>259</sup> but I would.

The Supreme Court has held that roadblock stops without particularized suspicion can be constitutional in some situations although police stops of individual motorists would not be.<sup>260</sup> When the Court first suggested this distinction, Justice Rehnquist remarked in dissent that the Court had "elevate[d] the adage 'misery loves company' to a novel role in Fourth Amend-

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<sup>259</sup> Krauthammer, *The Case for Profiling* (cited in note 253).

<sup>260</sup> See, for example, *Delaware v Prouse*, 440 US 648, 661 (1979); *Michigan Department of State Police v Sitz*, 496 US 444, 454–55 (1990); *City of Indianapolis v Edmond*, 531 US 32, 39–40 (2000).

ment jurisprudence.”<sup>261</sup> Despite Rehnquist’s arresting wisecrack, there is force to the old adage. What Tracey Meares and Dan Kahan call “community burden sharing” is relevant both to the reasonableness of a seizure under the Fourth Amendment and to its ethical justification.<sup>262</sup>

The willingness of the majority to share the burden of a restriction of liberty demonstrates its judgment that the benefits of this restriction exceed the costs. Majority and minority groups together pay higher airline ticket prices or taxes, wait in line, empty their pockets, submit to magnetometer and x-ray screenings, and suffer the confiscation of their nail clippers.

Burden sharing also makes political remedies more likely when the burden becomes excessive. Although the Supreme Court has upheld the constitutionality of drunk-driving roadblocks,<sup>263</sup> few law enforcement agencies now inflict the inconvenience and indignity of these roadblocks on middle-class motorists. The agencies might not have been as quick to abandon similarly burdensome measures limited to minorities.

The social meaning of burden sharing is that the members of a community act together—as “one nation indivisible,” not just collected groups with differing actuarial profiles. Burden sharing demonstrates to people of Arab ethnicity and others that the hassles to which they are subjected do not flow from suspicion of their appearance or other invidious motives. (In that sense, misery does indeed love company.) Exempting 80-year-old Irish nuns and others from the burdens of intensive airport screening need not undercut the sense of democratic sharing when other majority-group passengers assume these burdens. All things considered, Charles Krauthammer and I should take our lumps.

## B. The War on Drugs

Some numbers make apparent the racial cast of the war on drugs. From 1965 until 1973, the arrest rates of whites and nonwhites for drug offenses increased sharply but equally. Throughout this period, nonwhites were arrested at about twice the rate

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<sup>261</sup> *Prouse*, 440 US at 664 (Rehnquist dissenting).

<sup>262</sup> See Tracey L. Meares and Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U Chi Legal F 197, 209. Meares and Kahan treat burden sharing as more than a relevant circumstance, and in my view, they find it where it does not exist. See Alschuler and Schulhofer, 1998 U Chi Legal F at 238–44 (cited in note 217).

<sup>263</sup> *Sitz*, 496 US at 454–55.

of whites. In 1973, however, the arrest rate for whites leveled off while the rate for nonwhites continued to climb. Fifteen years later, the rate for nonwhites was five times the rate for whites.<sup>264</sup>

Blacks reportedly constitute about 12 percent of the United States population, 13 percent of all chronic drug users, 35 percent of the people arrested for drug possession, 55 percent of the people convicted of drug offenses, and 74 percent of the people sentenced to prison for drug crimes.<sup>265</sup>

A black arrested for a drug offense might cite these numbers and seek dismissal of his case on grounds of discriminatory prosecution. The Supreme Court has held, however, that state and national statistics are insufficiently focused to establish discrimination by local officials.<sup>266</sup>

To overcome the defects of national statistics, a future drug defendant might present comparable figures for the Kojack Sheriff's Department, a currently nonexistent law enforcement agency in Ohio. The defendant might show that anonymously self-reported drug use occurs in Kojack County at about the same rate for blacks and whites, that nearly all users report buying drugs from sellers of their own races, and that the Kojack Sheriff's Department nevertheless arrests blacks for drug offenses at two, three, or five times the rate for whites. The defendant might claim on the basis of this evidence that he would not have been arrested and prosecuted if he had been white.

Prosecutors might respond that survey evidence is unreliable and might argue that the defendant's proof is inconclusive in other ways. Fair-minded people applying a standard of proof less demanding than "deadbang" or "hogchoker," however, would accept the defendant's claim.

The Kojack statistics, like the national figures, establish a massive discriminatory effect, and the inference that this disparity did not arise by chance is overwhelming. In the absence of a nonracial explanation for the disparity, the numbers appear to

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<sup>264</sup> See Tonry, *Malign Neglect* at 110–11 and Figure 3-10 (cited in note 213).

<sup>265</sup> Deborah Small, *The War on Drugs Is a War on Racial Justice*, 68 *Social Research* 896, 897 (2001), citing Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs* (2000). These numbers are not very well-documented, but there seems to be no doubt that, as Micheal Tonry observes, "[b]lacks . . . are arrested and imprisoned for drug crimes in numbers far out of line with their proportions of the general population, of drug users, and of drug traffickers." *Malign Neglect* at 4 (cited in note 213).

<sup>266</sup> See *McCleskey v Kemp*, 481 US 279 (1987) (discussed in text accompanying notes 304–13).

establish a discriminatory purpose as well as a discriminatory effect.

When the New York City Police Department began a program of vigorous gun-law enforcement in 1994, critics observed that it was stopping and frisking blacks and Latinos at a far higher rate than whites. They charged the department with racial profiling.<sup>267</sup> In response, the department noted the races of the people described in 911 calls as carrying guns, the races of the violent offenders described by crime victims, and the races of the people the department had arrested for violent crimes.<sup>268</sup>

Although the department stopped blacks and Latinos at a substantially higher rate than their share of the population, its evidence indicated that its stops were not disproportionate to the rate at which blacks and Latinos committed serious gun crimes.<sup>269</sup> In the terms suggested by this article, the department was not "piling on" or seeking "more bangs for the buck." Disparities in the races of the people it stopped matched disparities in rates of offending. The department might have stopped everyone it had grounds to stop.

If this evidence had stood alone, the analysis proposed by this article suggests that the department should have borne no further burden of justification. Other evidence revealed, however, that officers made arrests substantially less frequently after stopping blacks and Latinos than after stopping whites. This evidence indicated that the police had applied a less demanding standard of suspicion for stopping minorities.<sup>270</sup>

Evidence of differing rates of offending of the sort recited by the New York City Police Department disappears when the focus shifts from guns to drugs. One can plausibly explain most of the disparity in the rates at which blacks and whites are arrested

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<sup>267</sup> See United States Commission on Civil Rights, *Police Practices and Civil Rights in New York City* ch 5, 106 (Aug 2000) (declaring that the clear predominance of blacks and Latinos among the people stopped by the police "strongly suggest[s] that racial profiling plays some role in the stop and frisk practices of the overall department").

<sup>268</sup> See Gross and Livingston, 102 Colum L Rev at 1418 (cited in note 24) (citing several sources).

<sup>269</sup> Responding to a charge of police racial discrimination by citing police arrest rates is problematic, for these rates could be the product of discrimination themselves. The arrest rates, however, apparently did not offer a notably different picture of crime in New York from the other data. The department's evidence supplied only a crude basis for estimating the rates at which people carried guns unlawfully, but it did indicate differing rates of unlawful gun use.

<sup>270</sup> See Jeffrey Fagan and Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 Fordham Urb L J 457, 478 (2000).

and convicted of crimes against the person and property crimes on the ground that blacks commit these crimes at higher rates than whites. No informed person believes, however, that different rates of offending begin to explain the extremely different rates at which minorities and whites are arrested, prosecuted, convicted, and punished for drug crimes.

Michael Tonry writes:

[F]or nearly a decade there has been a near consensus among scholars and policy analysts that most of the black punishment disproportions result not from racial bias or discrimination within the system but from patterns of black offending and of blacks' criminal records. Drug enforcement is the conspicuous exception. Blacks are arrested and confined in numbers grossly out of line with their use and sale of drugs.<sup>271</sup>

Although the higher drug-arrest rates of minorities cannot be explained primarily as a product of their higher rates of offending, people seeking to alibi the racially skewed focus of the war on drugs have a second line of defense: Higher arrest rates do not disadvantage minorities. They are instead a form of affirmative action. Just as the blacks who commit violent crimes victimize mostly blacks,<sup>272</sup> the blacks who sell illegal drugs injure mostly black drug users and black communities. Arresting and prosecuting minorities more frequently than whites and sentencing them to prison for longer periods may be a special service the government provides to minority victims. Kate Stith writes, "While it appears true that the enhanced penalties for crack cocaine more often fall upon black defendants, the legislature's action might also have been viewed as a laudatory attempt to provide enhanced protection to those communities—largely black . . .—who are ravaged by abuse of this potent drug."<sup>273</sup>

Presumably Stith would not suggest that a legislature might have engaged in laudable affirmative action if it had expressly provided for sentencing blacks more severely than whites. The principal beneficiaries of this legislative action also might have

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<sup>271</sup> Tonry, *Malign Neglect* at 49 (cited in note 213).

<sup>272</sup> See Kennedy, *Race, Crime, and the Law* at 19 (cited in note 38) ("[F]our-fifths of violent crimes are committed by persons of the same race as their victims.").

<sup>273</sup> Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, in Stephen E. Gottlieb, ed., *Public Values in Constitutional Law* 137, 153 (Michigan 1993).



been prospective black victims. Arresting blacks at a higher rate than the rate at which they commit crimes seems no more defensible as affirmative action than discriminatory sentencing. Moreover, a judiciary that sees little difference between affirmative action and discrimination against minorities could not consistently accept an "affirmative action" or "victims are minorities too" defense of race-specific drug-law enforcement.

Another defense of differential drug enforcement appears to be more persuasive. There may be as much unlawful drug use among Wall Street traders as among unemployed people on Harlem street corners, but the problems posed by unlawful drug use in the two places are different. A police commissioner who acknowledged focusing drug-enforcement efforts primarily on inner city neighborhoods might note the absence on Wall Street of drive-by shootings, gang loitering, open-air drug dealing, and twelve-year-olds guarding crack houses with shotguns. The commissioner might report that her department had concentrated its drug-enforcement efforts, not necessarily in the neighborhoods where drug use is most frequent, but in the neighborhoods where drug trafficking is most disruptive.

Without doubting the truth of the commissioner's explanation, one might doubt its completeness. Drug law enforcement is easier in inner city neighborhoods, both because "more of the routine activities of life, including retail drug dealing, occur on the streets and alleys" and because "it is easier for undercover narcotics officers to penetrate networks of friends and acquaintances in poor urban minority neighborhoods."<sup>274</sup> Moreover, even a moderately higher rate of drug crime in the inner city can lead the police to "pile on." Indeed, perceptions of differential offending can prompt a "race to the black or brown race" even when these perceptions are inaccurate.

Although the problems associated with drug trafficking in minority neighborhoods are severe, intensive drug-law enforcement is probably more harmful than helpful to these neighborhoods. I subscribe to only a few of the conspiracy theories circulating in black communities,<sup>275</sup> and I am confident that George Bush, Dick Cheney, Bill Clinton, and Al Gore never met in the

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<sup>274</sup> Tonry, *Malign Neglect* at 105–06 (cited in note 213).

<sup>275</sup> See Patricia Turner, *I Heard it Through the Grapevine: Rumor in African American Culture* (California 1993); S. Parsons et al, *A Test of the Grapevine: An Empirical Examination of Conspiracy Theories Among African-Americans*, 19 *Sociological Spectrum* 201 (1999).

White House basement to plan the subordination of inner-city blacks. If they had, however, I wonder whether they could have done any better than America has done in fact.

A promising plan for subordinating inner-city blacks might begin by ensuring racially segregated, low quality schools in inner-city neighborhoods. Poor education combined with the disappearance of manufacturing jobs would guarantee a lack of economic opportunity in these neighborhoods. One important economic opportunity would remain, however, for many of the neighborhoods' residents would be likely to seek the temporary escape provided by recreational drugs. A key part of the plan would be punishing the sale of these drugs with life-destroying penalties, removing many males from the neighborhoods and ensuring that they would not contribute economically or socially to their families. Additional benefits of the plan would include the social disruption that would accompany the unlawful drug trade and the sense of scrutiny, invasion, and mistrust that intrusive law enforcement would generate.

A potential defect of the plan would be that enforcing the drug laws might diminish drug use and drug-related violence and thereby improve the conditions of inner city life. The risk of this occurrence, however, seems small. Especially when economic opportunities are limited, the arrest and incarceration of one drug seller would merely enable another to take his place. The pieces of the plan fit together nicely.<sup>276</sup>

The rationales offered for intensive drug-law enforcement in minority neighborhoods seem unconvincing, and racially skewed enforcement may be prompted in part by the relative ease of making drug arrests in minority neighborhoods. It also may be driven by "more bangs for the bucks" law enforcement strategies. Nevertheless, a judge probably could not reject the claim that racial disparities in drug arrest and prosecution rates reflect the judgment of responsible officials that drugs pose different and more serious problems in inner city neighborhoods.

The rationales offered by these officials appear to rebut the inference of discriminatory purpose the unexplained statistics might support. Officials who accept these rationales do not have an improper purpose, and a judge could not reasonably find the officials insincere.

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<sup>276</sup> For discussion of the harmful effects of the drug war on inner city neighborhoods, see Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am Crim L Rev 191, 206-07 (1998).

Although the analysis proposed by this article places less emphasis on discriminatory purpose, it would be unlikely to alter the bottom line. This analysis requires affirmative justification for systematically searching and arresting minorities at a higher rate than their rate of offending. When officials concentrate drug-enforcement efforts in the neighborhoods most disrupted by drug activity, however, their practices seem appropriately tailored to the advancement of a significant state interest. A judge could not reject the judgment of these officials without substituting her own debatable views of appropriate drug policy for theirs—and also for the views of most other officials, many knowledgeable experts, and most Americans.

Constitutional analysis of the war on drugs leads to discouraging conclusions. In American policing generally and in drug-law enforcement especially, the most harmful racial profiling may be done by officials behind desks and in legislatures and budget committees rather than by patrol officers. The evidence needed to challenge these officials' allocation of law enforcement resources is rarely available. Administrative decisions beyond the prospect of effective judicial review may impose greater burdens on minorities than decades of racial abuse by a group of old-style Los Angeles police officers. The courts probably lack the ability to correct American law enforcement's most serious racial injustice.

### C. Immigration Cases

The use of ethnic classifications in the enforcement of immigration laws seems to produce greater hesitation and provoke greater disagreement than other instances of racial profiling. Focusing on whether law enforcement practices burden minorities at a higher rate than their rate of offending may indicate why immigration cases have proven especially problematic.

Assume that all illegal immigrants residing in a particular area are Latinos but that most Latinos in this ethnically diverse area are lawful residents of the United States. In other words, all offenders are Latinos, but all Latinos are not offenders. In this area, concentrating law enforcement activity on Latinos would burden or tax the members of this group at a higher rate than their share of the area's population but not at a higher rate than their rate of offending.

In the absence of reasonable suspicion or probable cause, I have suggested that subjecting the Latino residents of this hypo-

thetical area to even brief administrative detention based in whole or in part on their ethnicity would be unjustified. Nevertheless, on the assumptions set forth above, my view is that law enforcement officers should not be precluded from considering ethnicity together with other circumstances in judging whether reasonable suspicion or probable cause supports a stop or arrest. On the issue on which the Ninth Circuit's decision in *Montero-Camargo*<sup>277</sup> purported to set aside a statement of the Supreme Court in *Brignoni-Ponce*,<sup>278</sup> I side with the Supreme Court. Unlike the use of ethnicity in *Martinez-Fuerte*, the use of ethnicity approved by *Brignoni-Ponce* seems justified.

Both the Supreme Court and the Ninth Circuit neglected half the issue. The Supreme Court wrote in *Brignoni-Ponce*, "The likelihood that any given person of Mexican ancestry is an alien is high enough [in an area near the Mexican-U.S. border] to make Mexican appearance a relevant factor."<sup>279</sup> Emphasizing the increase in the Latino population since *Brignoni-Ponce*, the Ninth Circuit pronounced the Supreme Court's empirical judgment no longer sound: "The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."<sup>280</sup>

The question before the Supreme Court and the Ninth Circuit, however, was not simply whether "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."<sup>281</sup> It was also whether the probability that a person of black, white, Asian-American, or Native American ancestry had entered the United States illegally was *low* enough to justify a border patrol agent's decision to focus his attention elsewhere. Both the Supreme Court and the Ninth Circuit appeared to overlook the fact that ethnic classifications exclude as well as include.

The defendant in *Montero-Camargo* was arrested in a county whose population was almost three-quarters Latino.<sup>282</sup> The Ninth Circuit undoubtedly was correct that this defendant's ethnicity

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<sup>277</sup> *United States v Montero-Camargo*, 208 F3d 1122 (9th Cir 2000) (en banc), cert denied in *Sanchez-Guillen v United States*, 531 US 889 (2000).

<sup>278</sup> *United States v Brignoni-Ponce*, 422 US 873 (1975).

<sup>279</sup> *Id* at 886–87.

<sup>280</sup> 208 F3d at 1132.

<sup>281</sup> *Brignoni-Ponce*, 422 US at 886–87.

<sup>282</sup> *Montero-Camargo*, 208 F3d at 1133.

had very little tendency to establish his violation of the immigration laws. The size and changing proportion of the county's Latino population had no bearing at all, however, on whether non-Latinos were sufficiently unlikely to be illegal immigrants that they usually could be eliminated from the pool of potential suspects. An ethnic classification often gains its power, not from whom it identifies, but from whom it sets aside.<sup>283</sup>

In the hypothetical case described above, all non-Latinos *can* be set aside: all of the illegal immigrants in the area are assumed to be Latinos. In this situation, considering ethnicity in deciding whether reasonable suspicion justifies a stop does not seem significantly different from considering race when a robbery victim has described the robber as black.

The two situations do not differ in principle simply because, in one, law enforcement officers are attempting to identify the members of a group of offenders and, in the other, only one offender. If a crime victim reported that she recently had been robbed by six tall young black men, each of them wearing a black mask and a green coat, the apparent presence in the neighborhood of multiple offenders meeting the victim's description would only increase the justification for stopping a tall young black man in a green coat. Moreover, the way in which the group's characteristics became known seems immaterial. When information from a source other than an eyewitness is as reliable as the statements of a witness, an officer should not be precluded from considering it.

To be sure, the members of a criminal group are unlikely to share many physical characteristics, and a description of their common characteristics is likely to be thin. For this reason, the description may not provide much affirmative justification for seizing or questioning anyone—no more, perhaps, than the victim's description of the single offender in *Oneonta*. Just as the police should be allowed to use the *Oneonta* victim's description together with other circumstances, however, they should be allowed to use what they know about the common characteristics of a group of offenders. Although the victim's description in *Oneonta* consisted essentially of race, age, and gender, this description should have excluded non-blacks, older men, and all women from

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<sup>283</sup> Samuel Gross and Debra Livingston observe, "While a suspect's race alone is never proof of guilt, a suspect's race is frequently powerful evidence of *innocence*." Gross and Livingston, 102 Colum L Rev at 1428 (cited in note 24).

the pool of suspects.<sup>284</sup> Similarly, the police should be permitted to use their knowledge of the characteristics of a group of offenders to exclude from suspicion people lacking these characteristics.

Of course the hypothetical case just discussed was oversimplified. In the world as it is, all immigration offenders do not belong to the same ethnic group. When real-world immigration cases depart from the hypothetical model, the use of ethnic classifications in immigration law enforcement becomes more problematic.

In *Brignoni-Ponce*, the Supreme Court assumed that the world as it is was close to the model. It repeated the government's estimate "that 85% of the aliens illegally in the country are from Mexico."<sup>285</sup> In *Martinez-Fuerte*, the Court emphasized in addition that the justification for considering Latino ethnicity varies from place to place: "Different considerations would arise if . . . reliance were put on apparent Mexican ancestry at a checkpoint operated near the Canadian border."<sup>286</sup> For the Court, the relevant geographic territory was the area near the Mexican-United States border, and it assumed that illegal immigration there had a brown face.

The government's claim in *Brignoni-Ponce* that 85 percent of the illegal aliens in the United States were from Mexico was probably too high.<sup>287</sup> The Immigration and Naturalization Service recently put the figure at about 50 percent.<sup>288</sup> Latinos, however—a very different category from Mexican nationals—appear to constitute 83 percent or more of the illegal immigrants in the United States.<sup>289</sup>

Revise the demographics of our hypothetical area so that Latinos constitute only 50 rather than 100 percent of the illegal immigrants. Latinos in this area still are much more likely to have committed immigration offenses than the members of other groups, so a policy of "more bangs for the buck" might focus law

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<sup>284</sup> As noted above, it probably did not. Law enforcement officers apparently confronted older black men, people of color who were not black, and at least one woman in addition to people who matched the suspect's description. See text accompanying notes 101–12.

<sup>285</sup> 422 US at 879 (citation omitted).

<sup>286</sup> 428 US at 564 n 17.

<sup>287</sup> See Johnson, 78 Wash U L Q at 708 (cited in note 38).

<sup>288</sup> United States Department of Justice, *1999 Statistical Yearbook of the Immigration and Naturalization Service* 241 at table 1, 242 (2002).

<sup>289</sup> See *id.* (estimating that in 1997 3,585,000 illegal immigrants were citizens of Mexico, El Salvador, Guatemala, Honduras, the Dominican Republic, Nicaragua, Ecuador, and Peru while 721,000 others—some of whom may have been Latino—were citizens of other nations).

enforcement efforts mostly or entirely on them. In this area, however, a classification based on Latino ethnicity would not have much legitimate power to exclude, and concentrating law enforcement efforts on Latinos would burden them at a rate considerably higher than their rate of offending. In this area, despite the probable efficiency gain, focusing exclusively on Latinos would be unjust.

Analysis of the differential burdens imposed on the members of an ethnic group requires specification of the relevant geographic area—a task vaguely resembling that of specifying the relevant market in antitrust litigation. Whether the federal government has unfairly burdened Latinos throughout the United States is a significant but difficult-to-resolve question. Under the Supreme Court's equal protection decisions, moreover, the answer to this question would be unlikely to bear on whether any individual offender could secure judicial relief.<sup>290</sup>

Shortly after September 11, 2001, the press reported that the Immigration and Naturalization Service had assigned about eight thousand agents to police the southern border of the United States while only about three hundred agents policed the nation's far lengthier northern border.<sup>291</sup> Did this allocation of resources reflect a judgment that illegal immigration across the Mexican border was twenty-seven times more frequent than illegal immigration across the Canadian border? Perhaps it did, but the INS's allocation of agents might have reflected a policy of "more bangs for the buck" or "piling on" as well as a judgment about the frequency of unlawful immigration. The agency's distribution of resources might even have reflected a greater concern about illegal immigration by dark-skinned people than by light-skinned people. Proving that the INS's allocation of agents reflected anything other than its best judgment about the frequency of illegal immigration probably would be impossible. As with the deployment of law enforcement resources in the war on drugs, administrative decisions beyond the prospect of effective judicial review might have imposed unfair burdens on minorities.

From the perspective of an individual INS agent, the percentage of Latinos among the illegal immigrant population of the United States as a whole is immaterial. Her allocation of law en-

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<sup>290</sup> See *McCleskey v Kemp*, 481 US 279 (1987) (discussed in text accompanying notes 304–13).

<sup>291</sup> See Sam Howe Verhovek, *A Nation Challenged: The Northern Border: Vast U.S.-Canada Border Suddenly Poses a Problem to Patrol Agents*, NY Times B1 (Oct 4, 2001).

forcement resources—the allocation of her attention, energy, and time—is much more likely to rest on her sense of the proportion of Latinos among the unlawful immigrants traveling on a single highway or harvesting crops in a single area. When this agent's decisions are challenged, the relevant geographic area is only the area before her.

Even on a highway near the southern border, all illegal immigrants are unlikely to be Latinos. Some non-Latinos do enter the United States illegally through Mexico.<sup>292</sup> Nevertheless, the Supreme Court's judgment in *Brignoni-Ponce* that the great majority of immigration offenders near the border are Latinos seems sound. An agent's focus on Latinos taxes the members of this group at a rate only slightly higher than their rate of offending. When reasonable suspicion or probable cause supports a stop or arrest, the efficiency gain resulting from the exclusion of non-Latinos seems great enough to justify the resulting ethnic tax.

The Ninth Circuit's ruling in *Montero-Camargo* that Border Patrol agents near the border could not consider Latino ethnicity in making stops and arrests made perjury by these agents almost inevitable. Directing agents not to think about ethnicity in investigating immigration violations near the border resembles instructing a child not to think about hippopotamuses. *Montero-Camargo* demanded the impossible and then encouraged agents to swear that they had done it.

A more plausible ruling would have been that, although officers could consider Latino ethnicity, they could not rely on this ethnicity, even in part, to provide affirmative justification for a stop or arrest.<sup>293</sup> By declaring the officers' thoughts irrelevant, this ruling would have emphasized that the standard for judging Fourth Amendment reasonableness is usually objective. This ruling not only would have declared the officers' mental processes off-limits, however; it also would have recognized that the officers could legitimately exclude non-Latinos from the suspect pool (or could focus less attention on them) and in that respect could treat Latinos and non-Latinos differently. At the same time, the revised ruling would have declared that the affirmative probative

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<sup>292</sup> See David W. Haines and Karen E. Rosenblum, *Introduction: Problematic Labels, Volatile Issues*, in David W. Haines and Karen E. Rosenblum, eds, *Illegal Immigration in America: A Reference Handbook* 1, 3 (Greenwood 1999).

<sup>293</sup> Most of the *Montero-Camargo* opinion appears to be consistent with this reformulation of the Ninth Circuit's holding. The court may not have considered the difference between a few of its statements and this reformulation.



value of Latino ethnicity was negligible—so small that it could not establish reasonable suspicion in any case in which an officer could not establish reasonable suspicion without it.

Envisioning a case in which the ethnicity of a vehicle's occupants would make lawful an otherwise unlawful stop of this vehicle is difficult. Assume that an agent cannot lawfully stop a battered station wagon simply because it is transporting a half-dozen Latino men in work clothes.<sup>294</sup> Something more—something like the evasive conduct of the driver in *Montero-Camargo* itself—is needed. The concurring judges in *Montero-Camargo* emphasized that the evasive conduct of the driver in that case would establish reasonable suspicion regardless of the ethnicity of the suspects.<sup>295</sup> A case in which ethnicity might tip the balance between a lawful and an unlawful vehicle stop does not readily come to mind—especially when the stop occurs in a county in which most of the residents are Latino.

Pedestrian stops differ, however, from vehicle stops. A pedestrian stop based on a suspect's physical appearance often may have a stronger basis than a vehicle stop based on an agent's view of the moving vehicle and its mostly concealed occupants. One INS agent claims that a Latino wearing shoes with wooden soles and socks made of lower grade cotton than is sold in the United States is highly likely to have entered the United States illegally.<sup>296</sup>

Assume that this agent's empirical judgment is sound and that an INS agent truly can discern the quality of a suspect's socks by observing him. Could Latino ethnicity, wooden-soled shoes, and low-grade cotton socks provide the suspicion needed to justify a brief investigative stop? If, after observing both a black man and a Latino man wearing wooden-soled shoes and low-grade cotton socks, an agent stopped the Latino, would the agent have deprived this suspect of the equal protection of the laws?

At first glance, the case of the Latino in the wooden-soled shoes may appear closer to that of the young man from Pothole than to the case of the black man in the green coat. Under almost every definition of the term, "wooden-soles plus cheap-socks plus ethnicity" qualifies as profiling. When an officer stops a suspect

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<sup>294</sup> See *Nicacio v INS*, 797 F2d 700, 704 (9th Cir 1985).

<sup>295</sup> 208 F3d at 1140 (Kozinski concurring).

<sup>296</sup> Interview with Robert Martin, Special Agent of the Immigration and Nationalization Service (Oct 22, 2001).

on the basis of his ethnicity and two other innocent characteristics, the officer is engaged in ethnic profiling.

The case of the Latino in the wooden-soled shoes differs from that of the young man from Pothole, however, in two respects. First, if one can fairly assume that nearly all of the illegal immigrants near the Mexican-United States border are Latino, the stop of the Latino in wooden-soled shoes does not tax Latinos at a significantly higher rate than their rate of offending. Unlike the police in Pothole, the INS agent does not allow many offenders of a race or ethnicity other than that of the suspect to proceed without interference. This agent has not focused on one ethnicity simply because, in his view, this group's higher rate of offending promises more bangs for the buck. He reasonably assumes that, in the area he has reason to consider, offenders of an ethnicity other than the suspect's are almost nonexistent.

Second, the suspect's socks and wooden-soled shoes differentiate him from the vast majority of lawful Latino residents of the area. Although some lawful visitors, temporary residents, and recent immigrants may own footwear bought in Mexico (and although other lawful residents may too), stopping Latinos with wooden-soled shoes imposes a far smaller tax on the innocent than stopping people simply for being young, black, male, and on the streets of Pothole after 10:00 p.m.

As noted, even the practice of stopping suspects who match eyewitness descriptions is likely to tax innocent blacks at a higher rate than innocent whites. If the "wooden-sole, cheap-sock" profile identifies offenders with the same degree of accuracy as a witness's listing of a criminal's physical characteristics, the differential burden imposed on innocent Latinos by stopping people who meet this profile is no greater than that imposed on innocent blacks when the police stop black suspects who meet a witness's description. For reasons already explained, the case of the Latino in wooden-soled shoes cannot be distinguished from that of the black man in the green coat simply because, in one case, the police are investigating a large group of offenders and, in the other, only one. Nor can the cases be distinguished on the ground that the statement of a witness should be treated differently from other evidence of equal strength.

As suggested earlier in this article,<sup>297</sup> a stronger distinction is that the social meaning of the "shoe sole, sock fabric" profile dif-

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<sup>297</sup> See text accompanying notes 188–208.

fers from that of the “green coat” witness description. The profile declares that Latinos (or at least Latinos in a particular area) are more likely to be immigration offenders than other people. A witness’s description of a black robber does not declare that blacks are more likely to be robbers than anyone else.

Although officially declaring the members of an ethnic group more likely than the members of other groups to commit crimes (or to commit particular sorts of crime) can be harmful, I would not categorically prohibit actions that convey this troublesome message. Moreover, this message seems less troublesome when the crime associated with the group is illegal immigration than when it is a drug offense or a crime of violence.

Illegal immigration appears to be the ultimate *malum prohibitum* offense; a person who, without force, disobeys a law she had no voice in making so that she can work hard at low wages to provide subsistence for herself and her family hardly seems culpable. Some Americans nevertheless manage to view illegal immigrants harshly.<sup>298</sup> The association of Latino ethnicity with illegal immigration is indeed a harmful stereotype. When profiling implies that Latinos are more likely than others to have entered the United States illegally, however, it probably does less harm than when profiling suggests that either blacks or Latinos are more likely than others to have committed serious crimes.

If the “shoe sole, sock fabric” profile identifies illegal immigrants with the high degree of accuracy the INS agent claimed, I would permit the use of this profile. An officer who observes a Latino in the vicinity the border wearing wooden-soled shoes and low-grade cotton socks should be allowed to stop this suspect for further investigation. This stop would not be an unreasonable seizure and would not deny the suspect the equal protection of the laws. My position apparently differs from that of President George W. Bush, Attorney General Ashcroft, and Senator Hatch,

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<sup>298</sup> Particularly in areas near the border, the belief that predatory criminals from Mexico make short-term and long-term incursions into the United States contributes to this view, as does the belief that some people cross the border in the hope of collecting welfare. Many Americans, however, take a less harsh view of unlawful immigrants. Over the objection that doing so facilitates illegal immigration, several U.S. cities have approved the use of identification cards issued by Mexican consulates and employed primarily by undocumented aliens. The sponsor of the Chicago ordinance declared, “The ultimate benefit that occurs is the support that it gives to the hardworking Mexican citizens here in Chicago. Their labor . . . is a tremendous resource all across not only our city but our region.” Sabrina L. Miller and Oscar Avila, *City Gives its Blessing to Mexican Consulate IDs*, Chi Trib 1 (June 20, 2002).

all of whom have condemned racial profiling.<sup>299</sup> No one should call me a liberal.

This section has noted that the trade-off between justice and efficiency is especially thorny in some immigration cases. The Supreme Court's off-hand talk of rational relationship in *Martinez-Fuerte* exhibited a marked insensitivity to distributive concerns. Although using ethnic classifications in genuinely unobtrusive police investigations might be justified by something less than individualized suspicion, involuntary detention based in part on ethnicity should require reasonable suspicion or more. At the same time, some ethnic profiles (the "wooden-sole, cheap-sock" profile may be an example) would neither permit many offenders of an ethnicity other than the suspect's to escape nor subject many innocent people of the suspect's ethnicity to detention. In terms of tangible burdens (though not in terms of social meaning), the use of such a profile to establish the suspicion needed for a stop does not seem significantly different from the use of an eyewitness description. I believe that the use of this profile should be allowed. Contrary to the Ninth Circuit's ruling in *Montero-Camargo*, ethnicity can play a legitimate role both in excluding some people from the pool of immigration suspects and in determining the affirmative justification for a seizure.

## XI. STANDING AND REMEDIES

### A. Statistics and Standing

#### 1. Heartache by the numbers.

Police officers rarely confess to racial profiling, and litigants often rely on statistical evidence to establish this practice. The cost in time, energy, and resources of developing this evidence is great enough that the process serves as an effective barrier to litigation for most victims. Moreover, even when statistical evidence establishes unlawful profiling, drawing inferences about the circumstances of particular cases from this aggregate proof can be problematic.

Suppose, for example, that one hundred whites and one hundred blacks are distinguished from one another only by their color. All two hundred have engaged in the same conduct—exceeding the speed limit by precisely ten miles per hour. The

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<sup>299</sup> See notes 2 and 3 and accompanying text.

Kojack Sheriff's Department has stopped and searched thirty-five of the blacks but only twenty of the whites. The department has repeated this pattern day after day for years.

The department's action has had a discriminatory effect, and the inference that this disparity did not arise by chance is all but inescapable. In this situation, statistical evidence establishes discriminatory intent as well as discriminatory effect. Yet whether anyone has standing to challenge the constitutional violation (as either a civil rights plaintiff or a defendant seeking the suppression of evidence) is unclear.

The analysis that follows begins by taking the perspective of a decision maker who is not wary of statistical proof. It considers whether, in the case of the Kojack Sheriff's Department, the numerical evidence would establish anyone's standing by a preponderance of the evidence. Then I examine modifications and departures from the initial analysis, some of them affording standing to a greater number of people and some to fewer.

The evidence of profiling by the Kojack deputies does not reveal which blacks they would have searched and which they would not if they had respected the Fourteenth Amendment. In the absence of discrimination, the deputies probably would have searched the same number of blacks as whites. That is, they would have searched twenty blacks, a majority of the thirty-five they did search. Accordingly, none of the blacks searched can show a greater than 50 percent likelihood that she would not have been searched if the department had obeyed the Fourteenth Amendment. Although the department violated the Constitution, no one may have standing to challenge its unlawful action. Hofeldian logic to the contrary notwithstanding, a legal wrong may not imply a legal right. Although, more probably than not, the Kojack deputies wronged fifteen people, they did not wrong any identifiable individual more probably than not.

Suppose, however, that the Kojack department had searched forty-five blacks rather than thirty-five and that it still had searched only twenty whites. The best inference now would be that most of the blacks searched by the department would not have been searched if the deputies had obeyed the Constitution. Because blacks would have been searched more than twice as often as whites, every one of the forty-five blacks could demonstrate that, more probably than not, she would not have been searched if the deputies had obeyed the law. All forty-five therefore seem entitled to a remedy—damages, an injunction, the ex-

clusion of evidence the deputies obtained by violating the Constitution, or perhaps a dismissal of criminal charges.

The use of statistical proof to establish standing builds toward a tipping point. Until blacks are more than twice as likely as whites to be stopped or searched, no one seems to have standing to challenge the constitutional violation. A 51 percent chance that law enforcement officers infringed one's rights establishes standing, but a 49 percent chance does not. As long as the sheriff's department stops short of this two-to-one disparity, no individual can establish by a preponderance of the evidence that the department violated her rights.

When the department goes one search over the line, however, the seesaw tips. Every black the deputies have searched now can establish by a preponderance of the evidence that these officers did violate her rights. On the down side of the tipping point, conventional standing requirements leave much proven racial discrimination unremedied. On the up side, courts afford a remedy to some people who would have been treated no differently if the deputies had obeyed the law.

This analysis does not reflect the wariness of statistical proof that courts often exhibit. In a hypothetical case often discussed by the commentators, a negligently driven blue bus injured the plaintiff, and the plaintiff established that the defendant company operated 80 percent of the blue buses in the area at the time of the injury. After examining cases resembling this one in the reports, Charles Nessen concluded, "[T]he plaintiff will lose; in fact the case is unlikely even to reach the jury."<sup>300</sup> The skeptical view of numerical proof taken in the "blue bus" cases might leave even more discrimination by the police unremedied than the initial statistical analysis suggested. A 51 percent statistical probability that the police violated someone's rights might not establish her standing.

The case of the Kojack Sheriff's Department, however, seems distinguishable from the case of the mystery bus. The sheriff's department did wrong someone, but the bus company might not have wronged anyone. A court might be more tolerant of the use of numerical proof to establish one person's standing than to establish a defendant's fault. Forcing a wrongdoer to provide a remedy to someone he might not have injured seems less objec-

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<sup>300</sup> Charles Nessen, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv L Rev 1357, 1379 (1985).

tionable than erroneously declaring an innocent person (or entity) a wrongdoer.

## 2. The standing of blacks.

Courts have been especially skeptical of numerical proof of discrimination against blacks in the criminal justice system. In Portsmouth, Virginia, for example, where one third of the population was black, 84 percent of the people arrested for selling liquor illegally were black.<sup>301</sup> A 50-year-old widow, arrested for selling two cans of beer in her home, resisted great pressure to plead guilty, was convicted at trial, and was sentenced to sixty days' imprisonment. She later filed a federal civil rights action pro se, alleging among other things that undercover police officers often infiltrated black social clubs to discover liquor violations but never infiltrated comparable white social clubs. Judge Butzner, in dissent, argued that the plaintiff had alleged enough to obtain discovery,<sup>302</sup> but the Fourth Circuit affirmed a grant of summary judgment in favor of the Portsmouth Chief of Police and other defendants. The court endorsed the district court's conclusions that the plaintiff's allegations were "vague and conclusory" and "unsupported by factual allegations."<sup>303</sup>

Thirty-one years before the United States Supreme Court decided *McCleskey v Kemp*,<sup>304</sup> a black man who had been sentenced to death for raping a white woman challenged Florida's discriminatory use of the death penalty. He alleged in a state habeas corpus petition that during the previous twenty years at least twenty-three blacks and only one white had been executed for rape. Although juries consistently had recommended capital punishment for black men convicted of raping white women, black men convicted of raping black women and white men convicted of raping anyone almost invariably escaped the death penalty. The Florida Supreme Court said of the petitioner's allegations, "To a sociologist or a psychologist in some fields of research they would no doubt have value, but in a court of law as presented they are devoid of force or effect."<sup>305</sup>

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<sup>301</sup> *Butler v Cooper*, 554 F2d 645, 648-49 (4th Cir 1977) (Butzner dissenting).

<sup>302</sup> *Id* at 648.

<sup>303</sup> 554 F2d at 646.

<sup>304</sup> 481 US 279 (1987).

<sup>305</sup> *Copeland v Mayo*, 87 So 2d 501, 503 (Fla 1956). See *Maxwell v Bishop*, 398 F2d 138, 147 (8th Cir 1968) (Blackmun) ("We are not yet ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of

*McCleskey* was another habeas corpus action in which the petitioner alleged racial discrimination in the administration of the death penalty.<sup>306</sup> The Supreme Court accepted for purposes of decision a statistical demonstration by David Baldus and others that people who killed whites in Georgia were several times more likely to be sentenced to death than people who killed blacks.<sup>307</sup> This disparity could not be explained by nonracial differences among the cases. The Court assumed, moreover, that it should treat discrimination among defendants on the basis of the races of their victims no differently from discrimination on the basis of their own races.<sup>308</sup> Although the empirical evidence in *McCleskey* seemed at first glance to go far beyond the “tipping point,” the Court held that the petitioner had not established a violation of his rights.<sup>309</sup>

Just as aggregate proof cannot identify which people the government would have treated differently if it had obeyed the Constitution, it cannot identify which governmental officials violated the law. When the Kojack Sheriff’s Department has searched blacks far more often than whites, one cannot know which officers within the department were responsible for the discrimination. Perhaps all of the Kojack officers engaged in racial profiling, but perhaps the actions of only a few officers accounted for the entire racial disparity.

In *McCleskey*, the Supreme Court emphasized this weakness of statistical evidence. Noting that “[e]ach jury is unique in its composition,” it refused to infer from the statewide pattern that the petitioner’s jury had engaged in purposeful discrimination.<sup>310</sup> Similarly, “The District Attorney is elected by the voters in a particular county. . . . Thus, any inference from statewide statistics to a prosecutorial ‘policy’ is of doubtful relevance.”<sup>311</sup>

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broad theories of social and statistical justice.”), vacated, 398 US 262 (1970). But see *Callins v Collins*, 510 US 1141, 1145 (1994) (Blackmun dissenting) (“From this day forward, I no longer shall tinker with the machinery of death.”).

<sup>306</sup> *McCleskey*, 481 US at 285–86, 291.

<sup>307</sup> See *id.* at 287, 281 n7.

<sup>308</sup> It is not obvious that classifying defendants on the basis of the races of their victims classifies the defendants themselves by race, nor is it obvious that blacks who have killed whites should have standing to challenge discrimination against black victims. Murderers are odd surrogate champions of victims’ rights. Nevertheless, the Supreme Court did not mention this issue, perhaps because classifying offenders on the basis of the races of their victims would violate the Equal Protection Clause under any standard.

<sup>309</sup> *Id.* at 313.

<sup>310</sup> 481 US at 294.

<sup>311</sup> *Id.* at 295 n 15.



If the Supreme Court had been presented with the same evidence of discrimination in rape sentencing that the Florida Supreme Court considered three decades earlier, the Court apparently would have reached the same result. The proof that only black men were sentenced to death for rape in Florida consisted of statewide statistics. Presumably the Court would have refused to draw an inference from this evidence that any particular jury or prosecutor's office had taken account of a defendant's race in deciding that he should die.

The Court recognized that collective entities can discriminate. Discrimination by one or more decision makers within a corporate employer or a jury commission is discrimination by the corporate employer or the commission itself.<sup>312</sup> In *McCleskey*, however, the Court refused to anthropomorphize the State of Georgia and to attribute a discriminatory purpose to the state. The relevant entities were individual juries and particular prosecutors' offices.

How the Court determines which non-breathing entities can harbor a discriminatory purpose is something of a mystery. It may use the Goldilocks method. A litigant need not identify a particular individual who has acted with a discriminatory purpose, yet aggregated proof of discrimination by all agencies of the state acting together is too crude. The individual is too small, and the State of Georgia is too big. The Fulton County District Attorney's office is just right. Proof of a pattern of discrimination by a prosecutor's office might entitle a capital defendant to a remedy even if, because of a recent change in personnel, no act or decision of any current employee or of anyone who prosecuted the defendant's case contributed to the statistical proof.<sup>313</sup>

However strongly statewide statistics encompassing more than one agency established racial profiling, this evidence apparently would not entitle anyone to a remedy. If proof of profiling by

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<sup>312</sup> See *id.* at 293–94.

<sup>313</sup> Perhaps courts do not consider statistical evidence of discrimination by a particular agency because they regard the agency itself as the relevant actor. They may instead conclude that birds of a feather are flocked together and may infer from the statistical evidence that an individual responsible for the challenged decision herself discriminated. On either hypothesis, an agency can properly respond to statistical evidence by showing that changes of personnel and policy prior to the challenged decision made the proposed inference from this evidence improper. Similarly, when a litigant seeks injunctive relief, the agency may show that changes of personnel and policy have eliminated the threat of repeated wrongdoing.

a particular agency passed the “tipping point,” however, *McCleskey* indicates that judicial relief would be appropriate.

### 3. The standing of whites.

In *McCleskey*, although the statistical evidence seemed at first glance to go beyond the “tipping point,” the Supreme Court found a way to deny relief. In affirmative action cases, the Court has found a way to afford relief even when the evidence appears at first glance to fall short of the “tipping point.” A litigant seeking an injunction against unlawful affirmative action need not demonstrate by a preponderance of the evidence that, absent the alleged discrimination, she would have obtained the benefit sought (admission to a public university, a government job, or a government contract).

In the Court’s view, the constitutional wrong in affirmative action cases does not consist of granting a governmental benefit on a discriminatory basis. The Court explained in *Northeastern Florida Chapter of the Associated General Contractors of America v Jacksonville*<sup>314</sup>:

The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit . . . [It] is the inability to compete on an equal footing in the bidding process, not the loss of a contract.<sup>315</sup>

The Court’s reasoning suggests that a litigant challenging racial profiling by the police should not be required to show that, in the absence of this profiling, the police would not have stopped and searched her. It should be sufficient for her to show that she was unable to compete on an equal footing for the benefit of not being stopped and searched by the police. Perhaps every black motorist stopped and searched by the Kojack deputies should have standing without regard to whether she would have been stopped in the absence of discrimination.<sup>316</sup>

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<sup>314</sup> 508 US 656 (1993). See also *Regents of the University of California v Bakke*, 438 US 265, 280 n 14 (1978); *Adarand Constructors v Pena*, 515 US 200, 211 (1995).

<sup>315</sup> 508 US at 666.

<sup>316</sup> Perhaps black motorists who were not stopped should have standing as well. They too were unable to compete on an equal footing. Under *Associated General Contractors*, it may be enough that officials looked at them differently. Like everyone who applies for admission to a state university, everyone who drives down the highway may be entitled to

A court might also treat a clear and substantial risk that a person had been stopped on the basis of her race as an injury warranting a judicial remedy. In a mass tort case in which the plaintiffs established a significant but smaller than 50 percent chance that each defendant's wrong caused their injuries, the California Supreme Court required each defendant to pay a proportionate share of the plaintiffs' damages.<sup>317</sup> At least one scholar has maintained that a demonstrated likelihood of developing a disease in the future should be compensable.<sup>318</sup> Neither approving proportionate compensation nor recognizing risk itself as an injury seems to justify granting an indivisible remedy like the suppression of evidence or dismissal of charges. Nevertheless, a recent *Harvard Law Review* note supported treating a risk that a litigant had been the victim of unconstitutional discrimination as a justiciable harm. It contended that proof of this harm should lead to a limited remedy—a requirement that the offending agency establish guidelines and procedures to correct its discrimination and to the collection of data to determine whether the guidelines and procedures had worked.<sup>319</sup>

#### 4. Different rules for different remedies.

In 1999, in a per curiam opinion, the Supreme Court retreated a bit from the logic of its earlier affirmative action decisions. In *Texas v Lesage*,<sup>320</sup> the Court distinguished between injunctive and damage actions and held that a litigant challenging an affirmative action plan cannot recover damages unless, in the absence of discrimination, she would have qualified for the benefit sought.<sup>321</sup> Perhaps the use of improper standards alone does not result in economic injury, but as Ashutosh Bhagwat has observed, when the Supreme Court refused to allow even nominal

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the use of colorblind standards. If, however, a court would not allow a successful white applicant to a state university to challenge color-conscious admission standards, it should not allow a black motorist whom the police did not stop to challenge their color-conscious law enforcement standards.

<sup>317</sup> See *Sindell v Abbott Laboratories*, 607 P2d 924, 936–38 (Cal 1980); but see *Skipworth v Lead Industries Association*, 690 A2d 169, 172–73 (Pa 1997).

<sup>318</sup> See Glen Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J Legal Stud 779, 782–83 (1985); but see *Board of Education v A, C & S, Inc*, 546 NE2d 580, 587 (Ill 1989) (“The dangerousness which creates a risk of harm is insufficient standing alone to award damages in either strict products liability or negligence.”).

<sup>319</sup> Note, *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 Harv L Rev 2098, 2118 (2001).

<sup>320</sup> 528 US 18 (1999).

<sup>321</sup> *Id* at 21.

damages in *Lesage*, it failed to treat on an equal footing the right “to compete on an equal footing.”<sup>322</sup>

A black motorist stopped by the Kojack Sheriff’s Department might be able to secure an injunction against racial profiling even if she probably would have been stopped in the absence of this profiling. To secure this relief, however, she would be required to show not only a past denial of her right to colorblind consideration but also “a real and immediate threat of repeated injury.”<sup>323</sup> When a plaintiff could avoid repetition of the constitutional violation by obeying the criminal law, the Court has hesitated to find a sufficient threat.<sup>324</sup> It has not exhibited the same reluctance, however when repetition of the constitutional violation depended on a second arrest for a traffic offense.<sup>325</sup> The Court also has been reluctant to find a sufficient threat when only a small minority of a police department’s officers might have engaged in an unconstitutional practice.<sup>326</sup> Nevertheless, a victim of racial profiling who regularly travels the highway where the violation occurred, walks in the neighborhood where it occurred, or passes the checkpoint where it occurred probably faces a sufficient threat of repeated injury.

As noted above, a litigant who sought an injunction against racial profiling might obtain relief even if the police probably would have searched her in the absence of this practice. A litigant seeking damages, a dismissal of charges, or the suppression of evidence, however, apparently must pass the “tipping point” and show that she probably would not have been searched or prosecuted absent the constitutional violation. This requirement seems appropriate at least for a defendant seeking the suppression of evidence or dismissal. Unlike damages, an adjustable remedy that can be scaled down to “nominal” relief, suppression and dismissal are all-or-nothing remedies. They should be available only when the government would not have seized the challenged evidence or filed charges against the defendant if the police had obeyed the Constitution. Incriminating evidence and criminal charges cannot be the “fruit” of a constitutional violation—not even of a denial of the right to compete on an equal footing—

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<sup>322</sup> Ashutosh Bhagwat, *Injury Without Harm: Texas v. Lesage and the Strange World of Article III Injuries*, 28 *Hastings Const L Q* 445, 452–53 (2001).

<sup>323</sup> *City of Los Angeles v Lyons*, 461 US 95, 102 (1983), quoting *O’Shea v Littleton*, 414 US 488, 496 (1974).

<sup>324</sup> See *O’Shea*, 414 US at 496–97.

<sup>325</sup> See *Lyons*, 461 US at 105–06, 107–08.

<sup>326</sup> See *id* at 105–07.

when the government probably would have obtained the evidence and filed the charges regardless of its violation of the right.

## B. Remedies

A litigant challenging racial profiling who crosses the standing minefield is unlikely to find the Emerald City on the other side. Although the retrospective remedies available for racial profiling (suppression of evidence, dismissal of charges, and monetary damages) may match those available for other constitutional violations, devising an effective prospective remedy for racial profiling challenges the capacities of the courts.

### 1. The suppression of unlawfully obtained evidence.

A victim of racial profiling who passes the “tipping point” should be entitled to the suppression of whatever evidence the police have obtained by violating the Constitution. If the Supreme Court were to reconsider *Whren* and recognize that racial discrimination can make a search or seizure unreasonable,<sup>327</sup> the Fourth Amendment exclusionary rule would itself supply this remedy in many situations. Requiring a victim of discrimination to invoke another constitutional provision would not make the exclusionary remedy less appropriate. Police violations of the Equal Protection Clause warrant an effective remedy no less than police violations of the Fourth Amendment.<sup>328</sup> To say that the Supreme Court would have no principled basis for refusing to exclude evidence obtained in violation of the Equal Protection Clause, however, is not to predict that the Court would exclude it.

### 2. The dismissal of charges.

A criminal defendant who establishes that purposeful discrimination produced his arrest and prosecution often should be entitled, not simply to the suppression of evidence, but to dismissal of the charges against him. Selective prosecution on the basis of race is a generally recognized, if rarely successful, de-

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<sup>327</sup> See text accompanying notes 116–23.

<sup>328</sup> See *State v Soto*, 734 A2d 350, 360 (NJ Super 1996) (suppressing evidence when statistical evidence established “an officially sanctioned or de facto policy of targeting minorities for investigation and arrest”), quoting *State v Kennedy*, 558 A2d 834 (NJ Super 1991).

fense to criminal prosecution,<sup>329</sup> and courts should treat discrimination by officials other than prosecutors no more favorably than discrimination by prosecutors themselves. Indeed, courts generally afford much less deference to law enforcement officers than to prosecutors.<sup>330</sup> Discrimination by law enforcement officers, like discrimination by prosecutors, results in the prosecution of one group and exemption of another. This evil warrants the same remedy regardless of who produces it.<sup>331</sup>

A footnote to the Supreme Court's decision in *Armstrong* declared that the Court had "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."<sup>332</sup> In 1886, however, in *Yick Wo v Hopkins*,<sup>333</sup> the Court did determine that release from custody was appropriate when governmental discrimination had led to a prisoner's prosecution and conviction. In *Yick Wo* as in cases of racial profiling by law enforcement officers, the government's discrimi-

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<sup>329</sup> See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 Chi-Kent L Rev 605 (1998).

<sup>330</sup> For example, prosecutors, unlike police officers, are absolutely immune from actions to recover civil damages for their violations of the Constitution, see *Imbler v Pachtman*, 424 US 409, 427 (1976), and the Fourth Amendment exclusionary rule reaches only constitutional violations by the police. See *United States v Leon*, 468 US 897, 922–25 (1984); *Illinois v Krull*, 480 US 340, 347–49 (1987); *Arizona v Evans*, 514 US 1, 15 (1995).

<sup>331</sup> Without declaring that the constitutional obligation to disclose exculpatory evidence extends to police officers, the Supreme Court has held prosecutors responsible for the failure of the police to disclose this evidence. See *Kyles v Whitley*, 514 US 419, 437 (1995) (imposing on prosecutors "a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police" and—very strangely—declaring it beyond "serious doubt that procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it."). Similarly, when unlawful police discrimination causes prosecutors to file charges on an unequal basis, courts might hold the prosecutors responsible for the resulting discrimination. Rather than recognize "selective targeting" by the police as a distinct defense, they might use the more familiar term, selective prosecution. Implying that the defense is one of discrimination by prosecutors rather than police officers, however, would be unfortunate. Focusing responsibility for police discrimination on the people who did it seems preferable to imposing a vicarious responsibility for police actions that prosecutors might have been unable to control.

<sup>332</sup> 517 US at 461 n 2. The Court did not indicate what "other sanction" it thought might be appropriate. Perhaps the Court could jettison its customary view of separation of powers, permit a judge to enjoin discrimination by a prosecutor's office, and authorize the judge to monitor the frequency and vigor of the office's prosecution of people of races other than the defendant's. Or perhaps a court could convict a defendant despite the fact that he had been "prosecut[ed] on the basis of his race" and then award damages for him to spend in the prison commissary. Approving this second remedy apparently would require the Supreme Court to abrogate the absolute immunity from civil liability it has afforded prosecutors.

<sup>333</sup> 118 US 356 (1886).

nation had occurred before the prisoner's case reached the prosecutor's office.

A San Francisco ordinance forbade the operation of a laundry in a wooden building without the consent of the Board of Supervisors. Two citizens of China, convicted and imprisoned for violating this ordinance, sought release on habeas corpus, one in a state and the other in a federal court. The prisoners alleged that the Board of Supervisors had denied their requests and those of two hundred of their countrymen to operate laundries. The Board had granted the requests of all non-Chinese applicants but one.<sup>334</sup> In *Yick Wo*, the Supreme Court determined that the Board had administered the ordinance "with a mind so unequal and oppressive as to amount to a practical denial by the State" of the equal protection of the laws,<sup>335</sup> and it also determined the appropriate remedy for this violation of the Fourteenth Amendment. The Court wrote, "The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is . . . illegal, and they must be discharged."<sup>336</sup>

When police officers, administering facially neutral laws, effectively "license" the members of one race and not another to pass a checkpoint, drive above the speed limit, or walk the streets of Pothole without interference, their licensing decisions violate the Equal Protection Clause no less than those of the San Francisco Board of Supervisors. This police discrimination is illegal, and so is "the public administration which enforces it." At least in some situations, the victims of this discrimination are entitled to

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<sup>334</sup> This applicant was a woman—and probably an Irish Catholic too. See *id.* at 359.

<sup>335</sup> 118 US at 373.

<sup>336</sup> *Id.* at 374. The only issue before the Supreme Court in the case appealed from the California Supreme Court might have been whether the state court had resolved correctly the petitioner's substantive constitutional claim. The scope of California's habeas corpus remedy was presumably for the state to decide. The case on appeal from the federal court, however, did present the question of remedy. The Supreme Court decided not only that the San Francisco Board of Supervisors had denied the prisoner the equal protection of the laws but also that his conviction and confinement were unconstitutional. He was entitled to be released from custody. In the strained (indeed fictitious) habeas corpus terminology of the time, a state criminal court lacked "jurisdiction" to give effect to the Board of Supervisors' unconstitutional discrimination. If either the Supreme Court's decision in *Teague v Lane*, 489 US 288 (1989), or the Antiterrorism and Effective Death Penalty Act of 1996 had preceded *Yick Wo*, it would have precluded a court from affording relief to the federal petitioner in this case. See *Teague*, 489 US at 316; 28 U.S.C. § 2254 (d) & (e) (2002).

dismissal of the charges against them and to release from their confinement.

### 3. The limits of dismissal as a remedy.

In principle, an equal protection violation always can be remedied either by exempting the people unequally burdened or by burdening the people unequally exempted. Prosecuting white criminals who have escaped prosecution usually would be preferable to exempting minority defendants who might be guilty, but a court has no effective way to provide the affirmative remedy. It cannot mandate the prosecution of uncharged and probably undetected white offenders. A court's choice is usually between exempting some possibly guilty defendants and providing no remedy at all. In *Armstrong*, the Supreme Court's hesitation to recognize selective prosecution as defense may have stemmed from its reluctance to free the guilty.

In some situations, this concern probably should be decisive. Following Duke Klan's election as President in 2008, he followed the example of the President he most admired, Richard Nixon, and prepared a list of his political enemies. At the top of the list was Milly Militant, a black civil rights leader. Secret Oval Office tapes revealed that President Klan had three reasons for listing Militant—her race, her criticism of him, and her financial contribution to Klan's electoral opponent, Bush W. Gore. Upon receiving the President's list, federal law enforcement agents began an intense investigation of Militant.

One day, as the agents trailed Militant down an alley, they saw her commit a murder. Following her indictment, Militant sought dismissal of the murder charge on the ground that it was the product of unlawful discrimination by the President and federal law enforcement agents. These officials' violation of the equal protection principle was clear; her prosecution was a "fruit" of the constitutional violation<sup>337</sup>; and no other effective remedy was available. Despite the force of her argument, a court should deny Militant's motion. Equal treatment is a crucial value but not the only one.

Justice Burke, dissenting from a decision of the New York Court of Appeals in 1964, proposed restricting the defense of se-

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<sup>337</sup> Assume that Militant committed the murder so skillfully that law enforcement officers probably would have been unable to apprehend her through ordinary investigative procedures.



lective prosecution to cases in which defendants were charged with violating generally unenforced laws.<sup>338</sup> Cases in which prosecutors have invoked essentially dead-letter laws to punish people for invidious reasons are indeed the strongest cases for recognizing the defense.

A better dividing line than the one proposed by Justice Burke, however, would distinguish situations in which police investigation is ordinarily proactive from those in which investigation generally is prompted by harm to an identifiable person. Crimes whose investigation is usually proactive include traffic offenses, immigration offenses, other regulatory crimes, crimes of possession, and crimes of unlawful sale to a willing purchaser (drug, weapons, prostitution, pornography, and gambling offenses in particular). This category also includes such serious and uncontroversial offenses as selling stolen property and bribery. Crimes whose investigation usually is prompted by harm to an identifiable victim include crimes of personal violence and almost all property crimes.

When law enforcement is proactive, large numbers of offenders usually go undetected. The prospect of freeing a possibly (or certainly) guilty defendant is likely to appear less alarming when one contemplates the vast number of other offenders who escape detection and arrest. Adding to the army of the un-prosecuted is a tolerable price to pay to remedy unlawful racial discrimination. At the same time, discrimination is most likely when the police select their targets and lack the focus that knowledge of a specific past offense can provide. The danger of unlawful profiling appears to be most acute when its remedy is least worrisome. Affording a defense of discriminatory prosecution in immigration, drug, and wooden laundry cases would not commit the courts to providing this defense in cases of murder, rape, and armed robbery.<sup>339</sup>

Although the defense of discriminatory prosecution should lead to a dismissal of criminal charges, it should not supply a license for continuing violation of the law. An illegal immigrant

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<sup>338</sup> *People v Walker*, 200 NE2d 779, 780–81 (NY 1964) (Burke dissenting).

<sup>339</sup> The proposed restriction of the defense of discriminatory prosecution to crimes whose detection is usually the result of proactive law enforcement resembles in some respects John Kaplan's proposed restriction of the exclusionary rule. See John Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan L Rev 1027, 1048 (1974). Although no judge has formally approved Kaplan's proposal, nearly all judges reportedly recognize a de facto exception to the exclusionary rule when the evidence a defendant seeks to suppress is a body.

should not be allowed to raise this defense in a deportation proceeding, and a court or administrative tribunal could properly order a defendant to cease and desist a regulatory violation even if discrimination by law enforcement officers led to discovery of the violation. Permitting the government to profit from racial discrimination is disturbing, but some cures are even worse than the disease.

#### 4. Damages.

A victim of racial profiling who comes to court as a civil rights plaintiff rather than a criminal defendant should be able to recover damages on the same terms as other plaintiffs. To do so, she must demonstrate not only that the police violated her rights but also that a reasonably well-trained officer would have recognized the unconstitutionality of the challenged police conduct.<sup>340</sup>

#### 5. Injunctions.

A civil rights plaintiff may be entitled to an injunctive remedy as well, but framing a useful decree is difficult. The decree can enjoin racial profiling by restating the equal protection principle in general terms, by offering a rough (and potentially harmful) definition of the term profiling (for example, by declaring that this practice consists of every use of a racial classification not based on a victim or witness description<sup>341</sup>), or by forbidding the use of race as a basis for making particular law enforcement decisions (for example, determining which traffic offenders to stop). The decree also may specify “prophylactic” measures to make unlawful police discrimination less likely.

A 1999 consent decree between the United States Justice Department and the State of New Jersey forbade troopers from requesting a motorist’s consent to search when the troopers lacked a reasonable basis for suspecting that the search would uncover evidence of a crime.<sup>342</sup> In a commendable bow to realism, the New Jersey Supreme Court later held that the state’s constitutional analogue of the Fourth Amendment also precluded police officers from seeking a motorist’s consent to search in the absence “rea-

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<sup>340</sup> See *Harlow v Fitzgerald*, 457 US 800, 819 (1982).

<sup>341</sup> For a discussion of why this definition is inappropriate, see text accompanying notes 134–53.

<sup>342</sup> *New Jersey Enters into Consent Decree on Racial Issues in Highway Stops*, 66 Crim L Rptr 251 (2000).

sonable and articulable suspicion of criminal wrongdoing.”<sup>343</sup> The court spoke of “the widespread abuse of our existing law that allows law enforcement officers to obtain consent searches of every motor vehicle stopped for even the most minor traffic violation” and of the need “to restore some semblance of reasonableness to the type of consent searches involved in the present case.”<sup>344</sup>

The New Jersey decision, although an advance over prior doctrine, seemed unsound in one respect. By making the standard for requesting consent reasonable suspicion rather than probable cause, the court continued to give effect to expressions of consent it apparently regarded as involuntary.<sup>345</sup>

A bolder prophylactic remedy for profiling on the highway—but one probably beyond the competency of the courts—would forbid the police from stopping speeders and possibly other traffic offenders unless these motorists posed an immediate danger. Even if framed in negative or prohibitory terms, this remedy would effectively require the use of photographs and mailed citations as the primary means of enforcing speed limits.<sup>346</sup> Diminishing the incentive for profiling might not itself justify the cost of this innovation, but the virtues of replacing traffic stops with mailed citations go further. They include increasing police productivity, improving police safety, and avoiding the inconvenience, distraction, and danger posed by stops along the highway. The benefits also include more effective law enforcement. The use of cameras to detect speeders and traffic-light violators in west

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<sup>343</sup> *State v Carty*, 790 A2d 903, 905 (NJ 2002).

<sup>344</sup> *Id.* at 911.

<sup>345</sup> The court wrote, “In the context of motor vehicle stops, where the individual is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent.” 790 A2d at 910. An expression of consent in coercive circumstances cannot justify any departure from the usual requirement of probable cause for a vehicle search.

Neither the 1999 consent decree nor the 2002 New Jersey Supreme Court decision limits the ability of the police to conduct searches incident to arrest, but the New Jersey Supreme Court has held that the state’s Motor Vehicle Code does not authorize custodial arrests for minor traffic offenses. *State v Dangerfield*, 795 A2d 250, 259 (NJ 2002); compare *Atwater v City of Lago Vista*, 532 US 318, 354 (2001) (upholding the constitutionality of a custodial arrest for a seat-belt violation although there was no reason to doubt that the alleged violator would respond to a citation). In addition, the New Jersey court, rejecting the view of the United States Supreme Court in *New York v Belton*, 453 US 454 (1981), has held that the New Jersey Constitution does not permit vehicle searches as an incident of every custodial traffic arrest. *State v Pierce*, 642 A2d 947, 959–63 (NJ 1994).

<sup>346</sup> See Sherry F. Colb, *Stopping A Moving Target*, 3 Rutgers Race & L Rev 191, 207–19 (2001).

London, England, led to a 26 percent reduction in fatal accidents and serious injuries within one year.<sup>347</sup>

Apart from forbidding racial profiling and a few police practices that facilitate it, lawyers and judges have devised only one prospective remedy for discrimination by the police—monitoring. A judicial decree can require a law enforcement agency to collect statistics on stops, searches, and arrests—more information than the victims of profiling presented to obtain the decree. Partly because law enforcement officers sometimes have falsified records of the races of stopped suspects,<sup>348</sup> a decree also can require the use of sound and video equipment to record exchanges between patrol officers and motorists and pedestrians.

Like the rest of us, police officers may behave better when they are watched, and bringing racial profiling to light provides potentially useful information to police administrators, other local officials, legislators, the public, and (possibly) the courts that ordered the police to gather this information.<sup>349</sup> Sufficiently de-

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<sup>347</sup> Id at 215, citing Julie Kirkbride, *MP Calls for More Traffic Cameras*, Daily Telegraph 19 (Nov 24, 1995).

<sup>348</sup> Two New Jersey troopers pleaded guilty to charges of official misconduct and making false statements after they shot and seriously wounded three unarmed black men they stopped on the highway. Their shooting led to a civil settlement of \$12.95 million, the largest in New Jersey history. The officers admitted lying about the circumstances of the shooting and the traffic stop that preceded it. Although they reported that other troopers had coached and encouraged them to lie, the plea agreement they entered did not require them to name any of their co-conspirators. The agreement did require them to pay fines of \$280 each and to resign.

According to the *Newark Star Ledger*:

The two admitted they routinely targeted minority motorists for illegal car searches in hopes of finding drugs. Hogan [one of the defendants] said troopers often engaged in “rip and strip”—dismantling car doors in search of drugs—primarily with minorities.

Hogan said that covering up racial profiling was commonplace and condoned. “No one at the station, including supervisors, seemed to be concerned when a minority arrestee was brought to the station after the radio call had identified that driver as white,” Hogan said. “From the time when I first came to the Turnpike I was aware this was occurring. It was so common I just assumed it was how it was done.”

The judge who approved the defendants’ plea agreement declared that they had acted “out of misguided zeal and misguided loyalty born of an indoctrination into an approach to law enforcement that can generally be described as Machiavellian.” The Executive Director of the Black Ministers Council of New Jersey compared the officers’ plea agreement to a hit and run, and the President of the Garden State Bar Association (whose members are black lawyers) said that this agreement told the whole story of race in America. Kathy Barrett Carter, *Two Troopers Admit Profiling and Cover-Up of Shooting: Plea Deal Enables Pair to Avoid Prison for '98 Turnpike Incident*, *The Newark Star-Ledger* § 1 at 1 & 8 (Jan 15, 2002).

<sup>349</sup> See Eric Luna, *Transparent Policing*, 85 *Iowa L Rev* 1107 (2000).

tailed information can remedy the aggregation of most statistical studies by identifying particular officers and particular groups whose practices appear to be unlawful.

Judicially mandated data collection, however, poses an obvious question to which no one seems to have offered an answer—what next? If the data continue to reveal unlawful profiling, can a court do more than order the monitoring to continue? Holding a law enforcement agency in contempt and fining it for failing to produce satisfactory numbers might lead it to employ express or implicit quotas for stopping and searching whites. The remedy for racial profiling might be racial profiling in reverse. The difficulty of remedying racial profiling may be one reason why courts have strained fact and doctrine to avoid finding violations of the Equal Protection Clause by the police.

## 6. Legislation.

Scholars recently have re-emphasized that constitutional issues are not for the courts alone. The people and their elected representatives must be concerned with these issues too.<sup>350</sup> The obstacles to proving profiling even when it happens, to establishing a litigant's standing to challenge this practice, and to remedying this practice through the courts accentuate the importance of a legislative response. Legislatures, however, confront some of the same difficulties as courts in devising effective remedies. After offering an official denunciation of profiling, recent proposed and enacted legislation has provided only a familiar remedy for this practice—monitoring.

The federal government's incentives for drug interdiction<sup>351</sup> distort local politics and make legislative responses to profiling less likely. For example, federal financial incentives discourage local governments from taking steps to make the enforcement of the traffic laws the principal objective of traffic-law enforcement (through such measures as substituting mailed citations for traffic stops). In addition, local majorities and local governments may not always disapprove of discriminatory police practices. The police "sweep" of hundreds of blacks in Oneonta, New York pro-

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<sup>350</sup> See, for example, Larry D. Kramer, *We the Court*, 115 Harv L Rev 4 (2001); Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* 8 (Yale 2001). Mark Tushnet argues in fact that the popular resolution of constitutional issues should replace judicial review altogether. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton 1999).

<sup>351</sup> See note 25.

duced neither a change in police department personnel nor a revision of police department policy. Ten years after this sweep, the Oneonta Police Department still has no black officers.<sup>352</sup>

### CONCLUSION

I usually write articles because I believe I have something to say, but my reason for writing this article was different. I had not adequately considered the constitutionality of using racial classifications to identify and apprehend criminals, and I hoped to resolve the issues in this area to my own satisfaction.

I realized that others were better qualified for the task. The law of racial discrimination is vast, and I am far from a master of this subject. Many of America's most notable constitutional law scholars, however, seem uninterested in doctrinal issues of the sort discussed in this article except, perhaps, as they bear on larger questions. Their scholarship focuses on such matters as original intent, original meaning, constitutional moments, voting paradoxes, the uses and dangers of legislative history, the counter-majoritarian difficulty, judicial minimalism, incompletely theorized agreements, hermeneutics, representation reinforcement, fidelity in translation, and reconsidering judicial review.<sup>353</sup> Profiling issues have been left primarily to pedestrian laborers in the field of criminal procedure like me, and the commitments of many criminal procedure scholars apparently preclude them from acknowledging that any of the issues are debatable.

I have succeeded less well than I hoped. I thought that even if questions of racial classification in law enforcement would not yield to bright-line rules, they would yield to statements of general principle. As I struggled to conceptualize the issues, however, broad generalizations flowed from my word processor and then, a few minutes later, into the trash bin where they belonged.

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<sup>352</sup> Telephone conversation with Cary Brunswick, Managing Editor of the *Oneonta Daily Star* (Apr 24, 2002). The *Oneonta Daily Star*, however, lamented the Supreme Court's refusal to review the Second Circuit decision upholding this sweep. The newspaper called the sweep "clearly a case of racial profiling" and "a lingering embarrassment to most area residents." It observed, "One leading investigator at the time commented that police were going to look at every black hand in Oneonta. You can't get much more blatant than that." *"Black List" Case Ought to be Settled*, *Oneonta Daily Star* (Oct 3, 2001), available online at <<http://www.thedailystar.com/opinion/edits/2001/10/ed1003.html>> (visited Nov 15, 2002) [on file with U Chi Legal F].

<sup>353</sup> Richard Posner writes, "Increasingly judges believe that legal academics are not on the same wavelength with them, that the academics are not interacting with judges and other legal practitioners but instead are chasing their own and each other's tails." Richard A. Posner, *The Problematics of Moral and Legal Theory* 156 (Harvard 1999).

In the end, I have proposed only vague standards. What is worse, these standards often turn on facts that can be estimated only crudely (if at all), such as the rate at which the members of different racial groups commit crimes. To apply the proposed standards, one must be willing to tolerate possible injustice when facts are unavailable and to judge circumstances without awaiting scientific "proof."<sup>354</sup> When, for example, law enforcement agencies target black gangs or focus on black neighborhoods to a far greater extent than white gangs or white neighborhoods, the agencies' practices burden blacks at a higher rate than their rate of offending. No one could contend with a straight face that the rate of criminality of other groups might be zero. The suggested standards are rough conceptual guides at best; they offer no escape from particularized judgment.

First, a judge or other decision maker should consider the extent to which a racial classification burdens the innocent members of one race more than the innocent members of another. A classification that systematically "taxes" a race at a higher rate than its share of the population requires justification. When a classification that leads to a search or seizure imposes no further racial burden, however, customary Fourth Amendment standards provide the appropriate measure of justification. Stops supported by reasonable suspicion and arrests supported by probable cause do not violate the Constitution simply because they burden minorities at a higher rate than their share of the population. Many stops and arrests in this category are based on physical descriptions provided by victims and witnesses, but some are not. Courts should not draw a categorical line between racial classifications based on witness descriptions and other racial classifications.

Except perhaps in life-threatening emergencies, however, every seizure based on a racial classification should rest on individualized suspicion at least. Administrative detention based in whole or part on ethnicity (for example, the brief detention the Supreme Court approved in *United States v Martinez-Fuerte*,<sup>355</sup>

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<sup>354</sup> One reason why the influence of professional social scientists on law may have been more pernicious than productive is that some judges have accepted the social scientists' standards of proof as the only appropriate basis for drawing empirical conclusions. For example, these judges have learned to sneer at "anecdotal" evidence. See, for example, *United States v Armstrong*, 517 US 456, 470 (1996) (discussed in text accompanying notes 159–87). For a brief discussion of the defective worldview of many quantitative social scientists, see Albert W. Alschuler, *Explaining the Public Wariness of Juries*, 48 DePaul L Rev 407, 414–17 (1998).

<sup>355</sup> 428 US 543, 563 (1976).

the prolonged detention it approved in *Korematsu v United States*,<sup>366</sup> and the special screening of people of Arab ethnicity at airports that most Americans favored after September 11) should be impermissible.

Second, a judge or other decision maker should consider the extent to which a classification burdens the members of a race, not merely at a higher rate than their share of the population, but also at a higher rate than their rate of offending. “Piling on” or systematically burdening the members of a race at a higher rate than the rate at which the members of this race commit crimes requires stronger justification, and generating a greater law enforcement return may not provide this justification.

Third, a decision maker should focus on the social meaning of the racial classification employed by the police. A classification that declares one race more dangerous than another harms the members of this race. Like imposing tangible burdens at a higher rate than a racial group’s rate of offending, sending this message requires justification beyond that demanded by ordinary Fourth Amendment standards. Once more, the fact that a racial classification has an empirical foundation or “rational basis” is not enough to justify it. Not all racial classifications, however, convey this damaging social message. Taking account of race while seeking an offender whose race is apparently known, for example, does not brand other members of his race as crime-prone.

Finally, a decision maker should consider what justification beyond the probable cause and reasonable suspicion supporting individual seizures may exist for the distributive injustice the second and third inquiries have identified. The greater the distributive unfairness, the greater the efficiency gain must be. This efficiency gain depends on both the predictive accuracy of the classification employed by the police and the seriousness of the harm they seek to prevent. Some trade-off between distributive justice and efficiency seems inescapable.

In retrospect, my failure to bring very much order to issues of racial classification by the police may be understandable. Race can be an indicator of physical characteristics, a predictor of conduct, and a mark of social status. A diagram of the relationships among these uses of the concept would have lines in almost every direction. Almost no one seeks to prevent the police from using race as a partial description of physical appearance, but the iden-

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<sup>366</sup> 323 US 214, 216–17 (1944).



tification of a group of offenders by race tends to transform the physical description into a negative predictor and then into a mark of social status. The lines between and among the various uses of race cannot readily be untangled.

The use of race as a predictor has special dangers in an era of mass production criminal justice. Scholars declare that America has embraced a new penology.<sup>367</sup> Where the old penology emphasized moral responsibility and the reintegration of offenders into society, the new penology emphasizes risk management and the control of dangerous groups. Americans appear to have accepted poverty as permanent and the crime associated with poverty as permanent.<sup>368</sup> They see the criminal justice system as an ever-more prominent component—indeed the dominant component—of society's response to an enduring "underclass." When the principal purpose of criminal justice is to identify and control dangerous people at minimal cost, using race as a predictor can be frightening.

Although this article has not gone far toward unraveling the issues of racial classification in criminal investigation, it has drawn clearer conclusions about the current state of equal protection doctrine. The Supreme Court's current interpretation of the Equal Protection Clause should be declared a federal disaster area. The central features of this interpretation—three tiers of formulaic justification and an unwavering requirement of proof of both discriminatory purpose and discriminatory effect—block the fair consideration of issues of distributive justice.

Almost everyone realizes that the formulas "compelling governmental interest" and "narrowly tailored measure" are clumsy, but they are worse than that. More than other issues, the use of racial classifications by law enforcement officers reveals how sterile these concepts are. When a law enforcement officer engages in

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<sup>367</sup> See Malcolm Feeley and Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *Criminology* 449, 449–50 (1992); Malcolm Feeley and Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in David Nelkin, ed., *The Futures of Criminology* 173 (Sage 1994).

<sup>368</sup> Richard Posner notes that although inequality in the distribution of wealth has increased in recent decades, "public interest in the issue has diminished to nearly the vanishing point." Posner, *The Problematics of Moral and Legal Theory* at 48 n 73 (cited in note 353). He claims that "the focus of egalitarians has shifted" to inequalities between middle-class groups—middle-class women and middle-class men, middle-class homosexuals and middle-class heterosexuals, middle-class blacks and Latinos (the usual beneficiaries of affirmative action) and middle-class whites, middle-class people with disabilities and middle-class people without them, and middle-class workers over forty and middle-class workers under forty.

closer surveillance of the members of one ethnic group than of another (for example, by watching people of apparent Arab ethnicity more closely than other people in an area near a synagogue), he classifies people by ethnicity. Proclaiming the officer's differential surveillance unjustifiable unless it qualifies as a narrowly tailored measure furthering a compelling governmental interest, however, seems extravagant. When the consequence of recognizing an obvious truth—this officer's use of an ethnic classification—is an excessive standard of justification, one can understand why many courts hesitate to recognize the truth. As the various opinions in *Brown v City of Oneonta*<sup>359</sup> illustrate, however, these courts typically exempt the use of racial classifications by law enforcement officers from even the scrutiny they deserve. The alternative to "strict" scrutiny appears to be no scrutiny at all.

Treating a compelling governmental interest and a tight means-end fit as necessary to validate every racial classification is misguided, but treating these things as sufficient to justify every racial classification is worse. Proclaiming the government's interest in fighting crime compelling should not justify every racial classification that promises a victory in the fight. Frisking all the young black men in Pothole should not be constitutional simply because apprehending weapons offenders is a compelling interest and the frisks are likely to uncover a great many knives.

The Supreme Court's judgment that neither a discriminatory purpose nor a discriminatory effect should itself violate the Equal Protection Clause (or require strong governmental justification) is undoubtedly correct. When a biased police officer treats blacks and white alike, he may enjoy arresting blacks more without violating the Constitution. Moreover, it would be astonishing if every distribution of burdens and benefits came out evenly for every group. The judgment that neither a discriminatory purpose nor a discriminatory effect is always sufficient, however, does not warrant the conclusion that both always should be required. On the "mental culpability" or "mens rea" side of the formula, the alternatives to purpose include knowledge and objective foreseeability (neither of which would make discriminatory impact alone impermissible). On the "effects" or "actus reus" side, an alternative to an undifferentiated focus on discriminatory effect is the

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<sup>359</sup> 221 F3d 329 (2d Cir 2000), petition for reh'g en banc denied, 239 F3d 769 (2000), cert denied, 122 S Ct 44 (2001).

identification of particular effects that should trigger a requirement of justification.

In its decisions on racial discrimination in jury selection, for example, the Supreme Court has held that the systematic exclusion of a distinctive group violates the Sixth Amendment unless this exclusion is appropriately tailored to advance a significant state interest. This article has contended that, in light of America's long and continuing history of police discrimination against minorities in making stops and arrests, the Court should interpret the Fourth Amendment in much the same way. It should recognize that racial discrimination by the police can make a seizure unreasonable, and it should depart from the requirement of discriminatory purpose in judging the reasonableness of police seizures under the Fourth Amendment.

The proposal advanced by this article is not that every systematic and foreseeable discriminatory effect should violate the Fourth Amendment or require strong justification. When the members of different races commit crimes at different rates, a decision to arrest every offender the police can discover will have a foreseeable discriminatory impact on the races whose crime rates are highest. The proposal proceeds from a different baseline. When a police practice systematically subjects the members of a race to searches or seizures at a higher rate than their rate of offending, this practice should violate the Fourth Amendment unless it is appropriately tailored to advance a significant state interest. In addition, this article has contended that when a police practice stigmatizes a race in the eyes of objective observers, no proof of discriminatory purpose should be necessary.

Although this article has proposed a substantial revision of current doctrine, I end it with a reminder that simply applying this doctrine would be a major step forward. When the final volume of America's history of race relations is written, one chapter will report that governmental discrimination against blacks persisted into the twenty-first century and some judges turned a blind eye to it. These judges seemed more concerned about discrimination against whites in the award of government contracts than about discrimination against blacks and Latinos in the administration of criminal justice. Courts invalidated affirmative action plans because these plans took account of race and other factors. They sustained police actions that burdened minorities because these actions took account of other factors and race. Courts struck down classifications that disadvantaged white

businesspeople on the ground that these classifications were not narrowly tailored to serve compelling governmental interests.<sup>360</sup> They sustained classifications that targeted minorities for investigation and detention on the ground that race was “relevant to the law enforcement need to be served.”<sup>361</sup> The courts required the government to be colorblind in distributing its financial largesse but not in distributing police harassment, jail time, and capital punishment. Back in the twenty-first century, the book is likely to say, the courts got it backwards.

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<sup>360</sup> See, for example, *Adarand Constructors, Inc v Pena*, 515 US 200, 227 (1995).

<sup>361</sup> *Martinez-Fuerte*, 428 US at 564 n 17.

