

THE REALITY OF RACIAL DISPARITY IN CRIMINAL JUSTICE: THE SIGNIFICANCE OF DATA COLLECTION

DAVID A. HARRIS*

I

INTRODUCTION

During the 1990s, arguments over racial disparity in the criminal justice system attained a renewed vigor. Of course, this debate is not new. Criminologists have long debated the presence of racial disparity at various places in the criminal justice system, from initial on-the-street encounters between citizens and police officers to the sentencing behavior of judges.¹ What is new is the use of statistics designed to persuade the public, and not just other academics and researchers, that grave racial disparities exist in the system, and that these disparities necessitate significant policy changes. For example, the Sentencing Project, a group that has advocated the use of an array of alternatives to incarceration even as our nation has imprisoned an increasing share of our citizens,² published a report in 1990 based on government data that showed that almost one-in-four black men in the United States aged twenty to twenty-nine were then under the control of the criminal justice system—in prison or jail, on probation, or on parole.³ This figure quickly became a widely used benchmark for measurement of the impact on inner city minority communities of our ever greater reliance on imprisonment. The Sentencing Project issued a follow-up report in 1995 that reported that the ratio had risen to one-in-three,⁴ and in

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* Balk Professor of Law and Values, University of Toledo College of Law, and Soros Senior Justice Fellow, Open Society Institute, New York.

1. *E.g.*, JOAN PETERSILIA, *RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* (1983); Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982).

2. According to the group's web site, "[t]he Sentencing Project is a 501(c)(3) non-profit organization which promotes decreased reliance on incarceration and increased use of more effective and humane alternatives." It is a nationally known source of criminal justice policy analysis, data, and program information. For this and other information about the Sentencing Project, see <http://www.sentencingproject.org> (last visited May 5, 2003).

3. MARC MAUER, *YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM*, THE SENTENCING PROJECT 3 (1990).

4. THE SENTENCING PROJECT, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE*

Washington, D.C. and Baltimore was actually even higher than one-in-two.⁵ The use of these statistics—numbers that came from publicly available data that had never been pulled together in this way before—was a stroke of genius. It captured the essence of one of the most significant, if usually unnoticed, aspects of our incarceration *über alles* approach to criminal justice: Reliance on imprisonment was having a hugely disproportionate impact on communities of color. Another example involves federal sentencing practices, race, and the so-called “War on Drugs.” Draconian sentences for drug crimes have been a feature of the federal penal system since the adoption of the federal sentencing guidelines in the 1980s.⁶ But one feature of the sentencing system seemed to stand out among all the others: sentencing for possession of “crack” cocaine versus cocaine in powder form. Possession of these two forms of the same illegal drug results in wildly differing consequences. Defendants convicted of possession of 500 grams of powder cocaine receive a mandatory minimum sentence of five years in prison; those caught with the “crack” form receive the same mandatory five-year sentence for just *five* grams.⁷ The “crack” form of cocaine was much more commonly possessed by black sellers than by sellers of other races; the powdered form was found much more commonly among whites.⁸ Some advocates charged that this led to the burgeoning racial disparities in federal prisons; these prisons are increasingly populated by blacks serving longer average sentences for drug crimes than whites.⁹

As persuasive and important as these arguments have been, one must also remember to exercise caution when using statistics in the debates on crime. While the numbers cited above can help to frame the debate on race and criminal justice, it is also possible to use statistics improperly and to use statistics to approach problems from too simplistic a perspective. For example, blacks are over-represented among those arrested and imprisoned in this country—practically everywhere, and for almost every type of crime.¹⁰ Does this mean that the criminal justice system, in the form of police making arrests and judges passing sentences, discriminates based on race? Not necessarily, as there may be many other explanations for these disparities. Thus, while statistics may indeed illuminate discussions of racial disparities in criminal justice, using an

SYSTEM: FIVE YEARS LATER 1 (1995).

5. *Id.*

6. U.S. DEP'T OF JUSTICE, FEDERAL PRISON TERMS INCREASING UNDER SENTENCING GUIDELINES (1992).

7. 21 U.S.C. §§ 841 (b)(1)(B)(ii)–(iii) (2000).

8. See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 205–06 (1991).

9. *Id.* But see Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 841 (1992) (pointing out various problems in statistics used by Judge Heaney, concluding that “[i]n sum, the statistics presented in the Heaney study do not establish that unwarranted disparities exist under the Guidelines or that they have increased relative to those of the pre-Guidelines era. . . . But I reiterate here the caveat I stressed at the outset. The absence of proof of disparity does not constitute a proof of uniformity.”).

10. See *infra* notes 45, 46 and accompanying text.

incorrect or incomplete statistic to prove a point may not only be unhelpful but misleading.

Scholarship and research on racial profiling illuminate a unique perspective on the use of data in addressing the disproportionate representation of minorities in the criminal justice system. In the early and mid-1990s, I wrote several articles that dealt with the impact of search and seizure law on minority communities.¹¹ In the wake of the U.S. Supreme Court's decision in *Whren v. United States*, which legitimized the use of traffic stops as pretexts for investigations of drugs and other crimes of which there was no evidence,¹² I argued that statistical evidence strongly suggested that police used these traffic stops in ways that appeared racially discriminatory.¹³ To establish whether this pattern held true elsewhere, I suggested that legislatures require police departments to collect and analyze ten points of data on each and every traffic stop—data that included the reason for the stop, the race of the driver, whether the police conducted a search, the legal basis for the search, and whether the search uncovered any contraband.¹⁴ This modest proposal seemed necessary because despite the fact that automobile stops and searches of vehicles and drivers were among the most common kinds of encounters between police and citizens,¹⁵ there was surprisingly little data on the use of these tactics, and almost none that could be broken down by race. The objective was to move from the anecdotal to the factual, from accusations and countercharges to substantive discussion. Real data on these practices would encourage the making of criminal justice policy based on what was actually happening on the street, instead of what people believed.¹⁶

That was approximately six years ago. Since then, considerable change has taken place around the issue of racial profiling. A number of state legislatures eventually heeded the call for data collection, enacting laws that require data collection.¹⁷ Now, many police departments even publish their stop and search data regularly on their web sites.¹⁸ But to say that the public debate on racial

11. E.g., David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1 (1994).

12. 517 U.S. 806 (1996).

13. David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 560-73 (1997). [hereinafter Harris, *Driving While Black*]

14. *Id.* at 579-82.

15. This fact was later confirmed by U.S. Department of Justice survey data of almost 90,000 Americans. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cppqq.pdf> (last visited Feb. 24, 2003).

16. Harris, *Driving While Black*, *supra* note 13, at 579-80.

17. For example, Missouri has the most far-reaching law in the nation, requiring data collection on all police stops, training, new policies and the like. See *infra* notes 73-80 and accompanying text.

18. For example, the web sites for the San Diego Police Department, at <http://www.sannet.gov/police/pdf/stoprpt.pdf> (last visited May 5, 2003), and the Michigan State Police, at <http://www.michigan.gov/msp/> (last visited May 5, 2003), contain periodic postings of their statistics. Neither department is required to collect (let alone post) these statistics by state law; rather, they have begun these efforts on their own.

profiling has gone smoothly, even on the relatively simple issue of data collection on police stops and searches, would overstate, and inadequately describe, what has happened. Indeed, events in the last few years show that it is not only important to have data to back up arguments about criminal justice, but to understand that what data we examine can make a big difference.

In fact, the questions raised by the racial profiling controversy about data collection and the correct use of statistics go even further. They show that any set of questions involving the simple gathering of data on social problems will in reality be quite complex. Public agencies may collect the wrong data; they may analyze the data improperly; the process may be politicized; or the data may be misused in egregious ways. Nevertheless, without using statistics to help understand either racial profiling or other related problems, any real progress on many thorny problems faced at the intersection of criminal justice and race will prove impossible. The collection of data is not an end in itself but a first step, an absolutely necessary one if Americans are to move toward real understanding and sound policy-making. The data we do have and can collect and analyze in the future will slowly guide us in the right directions, but the process will be long, and not easy. Nevertheless, it will allow us, slowly but surely, to gain real insights into disproportionate minority representation in the criminal justice system.

II

THE ORIGIN OF DATA: THE DATA COLLECTION ISSUE IN THE RACIAL PROFILING DEBATE

To properly set the stage for a discussion of the use of data in racial profiling, one must think back to the early and middle 1990s. At the time, the debate over what came to be known as racial profiling or “driving while black” was essentially nonexistent. African Americans, Latinos and other members of minority groups frequently complained that police singled them out by stopping their cars for the slightest (or even for nonexistent) traffic violations and would then ask for permission to search their cars. Sometimes, however, permission was not sought at all, and searches were conducted as a matter of course, regardless of what the Fourth Amendment may have required. When police departments or officials were confronted with these allegations, they almost automatically denied them. In two well-publicized lawsuits against state police in New Jersey¹⁹ and Maryland,²⁰ the police agencies themselves and the state government officials who defended them vigorously denied the allegations that state police officers targeted blacks or Latinos; indeed, they felt the very idea was insulting to officers. Any attempts I made to articulate the grievances of minority drivers were met by outraged denials. We don’t do that, police chiefs said, we have policies against racial discrimination and it is an insult to my offi-

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

20. *Wilkins v. Md. State Police*, Civ. No. MJG-93-468 (D. Md. 1996)

cers that you would even bring up these accusations. These allegations are nothing more than the excuses of criminals hoping to “play the race card” to escape the consequences of their law breaking, they said, even in the face of stories from upstanding black and Latino individuals who had never been charged with anything, but who had been treated at a roadside as if they were criminals.

But the most intriguing reply that I would get to my presentations was a little bit different: not *it doesn't happen*, but *you can't prove it*. Show me, I was asked by any number of police officials, any statistics that prove your case, any data or analysis anywhere that anyone has done to support the assertion that police target blacks, Hispanics or other minorities on the basis of race or ethnic appearance. Since, in the middle 1990s, neither I nor anyone else could prove anything statistically, that was often the end of the discussion. Simply put, there were no statistics collected in any jurisdiction that would allow people to move forward in the discussion in even the most modest way—to know, for example, the racial or ethnic breakdown of those who police stopped. It was a stalemate, an argument that could never be resolved, not even to the extent of determining whether the use of racial and ethnic targeting was real or not.

In at least one important way, this seemed baffling. Policing has long been, in many respects, a data-driven endeavor. For years, police departments have allocated resources and assets—officers, patrol cars, and the like—to different sectors of their cities based upon data concerning the numbers of calls for service. Putting this well-accepted theory into practice requires making very basic statistical judgments. The higher the demand for police services, the greater the resources devoted to that area. In the early 1990s, New York City's police department saw one of the most important innovations in policing in years with the advent of the Compstat system, under Commissioner William Bratton and his deputy Jack Maple.²¹ By recognizing the necessity for the freshest possible information on where and how crime happened in New York City and creating a system for the rapid dissemination and relentless use of this information, Bratton and Maple moved the NYPD into the forefront of national policing organizations. The department's considerable manpower could be targeted precisely and quickly where it was most needed, without the forty-five day wait for this information that had become routine.²² By way of contrast, even though the utilization of traffic stops and follow-up searches was one of the most common tactics used to make arrests, police collected no data on it. How could it be that police used this investigative tool constantly but with almost no measurement of how effective it was? The middle managers in police departments—the ser-

21. Both Bratton and Maple discuss (and take some credit for) the advent of Compstat in their respective books. WILLIAM BRATTON & PETER KNOBLER, *TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC* 31–33 (1998) (taking credit for designing the system, including sketching out its underlying principles on a cocktail napkin); JACK MAPLE & CHRIS MITCHELL, *THE CRIME FIGHTER: PUTTING THE BAD GUYS OUT OF BUSINESS* 233–284 (1999) (sharing credit for Compstat with Bratton).

22. Telephone interview with William Bratton, former NYPD Commissioner (Dec. 14, 2000).

geants and lieutenants—had virtually no information on the traffic stops and searches their officers performed, with the exception of arrest reports after something was found. How could this be correct?

Yet this was exactly the situation in almost every police department. None could supply data that could be broken down by race on whom their officers stopped or searched, unless there had been an arrest. If officers made an arrest report, the description usually included race in the physical description of the defendant. If a citation was given for a traffic offense, many (but by no means all) police agencies recorded a physical description of the driver that included the driver's race. If no citation was given and no arrest made—the result in a large portion of all traffic stops and searches—no information on the suspect would be recorded anywhere.²³ Thus police officials were, unfortunately, quite correct: No one could prove the existence of racial or ethnic targeting by police. The police departments, which were the best, and the only, organizations positioned to prove or disprove this, did not collect, keep, or analyze these data. So, there was no way for them to answer even the most basic questions, such as whether racial targeting of drivers truly happens, and if so, how common a practice it is—except to make an unsupported assertion that it was not happening.

Thus it seemed quite natural to propose that police departments be required to take the first step toward answering these questions by collecting data on all traffic stops, including the race of the driver.

Police departments could be required (or financially encouraged) to collect data on all traffic stops. This data should include the reason for the stop, the race, ethnicity, and other identifying information concerning the person stopped, whether the driver received a citation or warning and for what, whether a search followed the stop, the basis for the search (consent, observation of incriminating items, or the like), whether a dog was used as part of the procedure, whether contraband was found and if so what kind, and whether any property was seized The collection of this data would allow for large-scale study of traffic stops and the issues they raise²⁴

Who could object to collecting information to provide a more accurate picture of the world? Those in charge of supervising officers would surely welcome the much more complete picture of what those officers were doing during their time on the street. Collecting this data could result not only in some answers to questions about racial or ethnic targeting in policing, but in better policing overall if it allowed police to see clear and unequivocal evidence of their effectiveness. Any police supervisor, public official, or citizen would want to have a record of actual enforcement actions and their results, instead of just hearing what officers remembered or believed about those actions. And it would always be preferable to have solid, accurate information upon which to make sound public policy decisions, instead of just conjecture about what we thought we knew. Additionally, the modest call for data collection on traffic

23. E.g., David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 282 (1999) ("Ohio does not collect statewide data on traffic stops that can be correlated with race. In fact, no police department of any sizeable city in the state keeps any data on all of its traffic stops that could be broken down by race.").

24. Harris, *Driving While Black*, *supra* note 13, at 579.

stops held great promise of stimulating real public discussion about an issue on which there had formerly been none at all. After all, the proposal did not call for the criminal prosecution or other punishment of officers who used racial targeting. The proposal did not call for the banning of the practice; it made no assertion that all officers were racists or that all police officers used the tactic. It simply asked for what one might call an accurate, fact-based accounting.

At the beginning of the 105th Congress, Representative John Conyers, Jr. of Michigan seized on the idea and introduced a piece of legislation embodying the proposal's central element: data collection about all traffic stops, including the reason for the stop, the race of the driver, whether a search was conducted and on what basis, and whether the search uncovered any contraband. The legislation, called the Traffic Stops Statistics Act,²⁵ attracted virtually no notice at first, and therefore no opposition. But when an amended version of the bill emerged with a unanimous recommendation from the Republican-controlled U.S. House Judiciary Committee and then passed the House of Representatives without any opposition in March of 1998,²⁶ the public suddenly became aware of it. The passage of the bill was widely reported in the press, and police groups quickly mobilized in opposition to it. The belief that the modesty of "just" collecting data would make the bill safely acceptable proved incorrect; there was, suddenly, very considerable opposition. A fairly typical reaction came from the National Association of Police Organizations ("NAPO"), an umbrella group that represents approximately 4,000 police interest groups. There was "no pressing need or justification" for any action on the problem, a NAPO spokesman said, since there was no real problem.²⁷ Furthermore, officers would "resent" having to take any steps to address this nonexistent problem, even just the step of collecting data.²⁸ This opposition, combined with the impeachment fever that seized Congress and the nation in the fall of 1998, was enough to kill the bill's chances of passage by the Senate during the remainder of the 105th Congress.

But, even as the bill died at the end of the 105th Congress and was reintroduced during the 106th,²⁹ the debate shifted. This was no accident, but rather the direct result of the wide circulation of statistics from lawsuits in New Jersey and Maryland. These statistics showed clearly that police in both states used racial targeting extensively to decide whom to stop and search on the highways.³⁰ In Maryland, for example, where the driving population on the relevant highway was seventeen percent black, blacks made up *over seventy percent* of all

25. Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong.

26. 105 CONG. REC. H1385 (1998).

27. Robert L. Jackson, *Push Against Bias in Traffic Stops Arrested*, L.A. TIMES, June 1, 1998, at A5.

28. *Id.*

29. Traffic Stops Statistics Study Act of 1999, H.R. 1443, 106th Cong.

30. Harris, *Driving While Black*, *supra* note 13, at 577-81.

of those stopped and searched.³¹ The numbers in New Jersey were equally shocking.³²

With this information suddenly quite public and the media paying close attention, the argument shifted away from outright denial and the difficulty of proof. Supporters of police tactics agreed that officers might indeed stop and search minorities at rates vastly disproportionate to their presence in the driving population—with the statistics from Maryland and New Jersey circulating, they could hardly say otherwise. But, they argued, this wasn't about race—it was about crime fighting. Blacks and Latinos were simply much more likely to be criminals; therefore, it just made sense to focus law enforcement efforts on them and to target them for stops and searches. In other words, the disproportionate stops and searches of minorities had nothing to do with race as race; rather, these racially targeted attacks were just a smart way to fight crime. According to one report, the Maryland State Police characterized the disproportion of blacks stopped by the department's officers as “an unfortunate byproduct of sound police policies.”³³ In a 1999 *Miami Herald* article, Marshall Frank, a man who had been in law enforcement for thirty years before retiring as a captain, wrote candidly about how racially targeted policing worked.³⁴ Suppose that a police officer sees two young black men in a car driving through a white neighborhood.³⁵ They are committing no crime and show no outward sign of being up to no good.³⁶ Should the officer stop the car and investigate the men? Frank's answer was an unequivocal yes.³⁷ “Label me a racist if you wish,” he wrote, “but the cold fact of the matter is that African Americans comprise 12 percent of the nation's population, but occupy nearly half the state and federal prison cells. African Americans account for 2,165 inmates per 100,000 population, versus 307 for non-Hispanic whites and 823 for Hispanics.”³⁸ According to Frank this means African Americans and Latinos commit a disproportionate share of crimes, and police officers who target them are only doing the sensible thing from a law enforcement point of view.³⁹

Thus the public debate over profiling had come around 180 degrees—from a situation in which there were no statistics collected by the police to resolve the competing views, to one in which law enforcement itself began to rely on statistics about the disproportion of minorities among those arrested and incarcerated to justify the racial and ethnic targeting that some significant number of police officers were doing.

31. Report of Dr. John Lamberth at 5, *Wilkins v. Md. State Police*, Civ. No. MJG-93-468 (D. Md. 1996)(on file with author).

32. *Id.* at 24.

33. Michael A. Fletcher, *Driven To Extremes: Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1.

34. Marshall Frank, *Racial Profiling: Better Safe Than Sorry*, MIAMI HERALD, Oct. 19, 1999, at 7B.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

III

MEASURING THE RIGHT THING:
WHY HAVING THE RIGHT NUMBERS MATTERS

Marshall Frank's argument was really quite startling, viewed from the point of view of those who had been opposed to the collection of data on police stops and searches. "We don't need data on who police stop and search; the data we already have tells us that we are doing the right thing," the argument seemed to go. No matter how contradictory this might seem, it was (and still is) a widely shared view. Arrest and imprisonment figures show that minorities engage in criminal activity at disproportionate levels, the argument goes; therefore, police officers should—they must—concentrate on these populations to get the greatest number of bad guys when they do traffic stops and searches. James Savage, then acting president of the New York Patrolman's Benevolent Association, made this point by drawing an analogy between racially targeted use of traffic stops and the old story about Willie Sutton, the legendary bank robber.⁴⁰ Once he had been caught, someone asked Sutton why he robbed banks.⁴¹ Sutton is supposed to have given the questioner a simple answer: He robbed banks because that was where the money was kept.⁴² The same reasoning, Savage said, applied to the actions of New York police officers.⁴³ Officers stop and search disproportionate numbers of members of minority groups not because of racial animus, but, to paraphrase Willie Sutton, because that's where the criminals are.⁴⁴

But this thinking is seriously misguided. The question is not whether a particular argument can in some way be supported by statistics, or whether an advocate for a particular position offers statistics to support an argument. And it is not whether the actual numbers or statistics are accurate. Rather, assuming they are accurate, what is important is *what the particular statistics actually say and can support*—in short, whether the statistics illuminate critical aspects of the particular problem. Applying this important idea to the arguments of Marshall Frank and other like-minded thinkers on racial profiling, assume for purposes of this discussion that Frank's numbers on the racial breakdown of the United States' prison populations are correct.⁴⁵ The real question is not whether Frank's statistics are right, but whether he is using the right statistics.

I will make this point using a two-step process. First, I will explain why Marshall Frank and those who agree with him have used the wrong numbers. Second, I will suggest what the right numbers should be to obtain some real

40. Jodi Wilgoren, *Police Profiling Hinges on Issue of Experience vs. Bias*, N.Y. TIMES, Apr. 9, 1999, at B1 (following re-telling Sutton story by saying, "Why do you send people into minority or high-crime neighborhoods to look for guns? Because that's where the guns are.").

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. In fact, Frank's numbers accurately reflect the racial disproportion in the prison populations in the United States, and no one has ever argued otherwise. *E.g.*, *supra* notes 2–5 and accompanying text.

insight into what Marshall Frank and many others believe to be the core assumption: that using race or ethnic appearance as a proxy for a greater or lesser propensity to commit crime is a sensible way to enforce the law.

A. Marshall Frank Uses the Wrong Numbers

When Marshall Frank and others point to disproportionate incarceration and arrest levels among minority populations, they are not wrong about those facts. Blacks, Latinos, and other minorities are, in fact, disproportionately arrested and incarcerated.⁴⁶ Those may be difficult facts for some to admit, but that does not make them less true. The real question is what those facts actually mean. Frank uses these numbers as a kind of substitute crime rate—the rate of criminal perpetration among blacks and other minorities—and that is where he errs. Arrest rates are not, as many seem to believe, measurements of crime. Arrest rates are measurements of a particular type of law enforcement behavior—arresting suspects. The same goes for statistics on incarceration. These numbers do not measure crime; rather, they measure what one might call incarceration behavior by relevant actors: judges who pronounce sentences, legislators who pass laws governing sentences, members of sentencing commissions, and the like.

Arrest rates and imprisonment rates may have some relationship to actual rates of offending, but how close a relationship, whether it varies by type of crime, and how greatly it varies are all questions that at best remain unanswered by simply citing arrest and imprisonment statistics. This point was made four decades ago by two social scientists, John Kitsuse and Aaron Cicourel.⁴⁷ Kitsuse and Cicourel showed that while records of arrest and court activity give us reasonably useful information regarding the activities of institutions like police departments and courts, they present real problems when used to depict patterns of criminal behavior or characteristics of offenders.⁴⁸ In his 1995 Southerland Prize lecture to the American Society of Criminology, the esteemed criminologist Delbert Elliot of the Center for the Study and Prevention of Violence at the University of Colorado asserted that we had failed to heed Kitsuse and Cicourel and “had fallen into bad habits” by continuing to use arrest data to support conclusions about the characteristic behavior of offenders.⁴⁹ Using statistics this way, he said, will “lead to incorrect conclusions, ineffective policies and practices and ultimately undermine our efforts to understand, prevent, and control criminal behavior.”⁵⁰

There is nothing wrong with using arrest and imprisonment numbers. On the contrary, this data can provide more useful information, as long as we

46. *Id.*

47. See John Kitsuse & Aaron Cicourel, *A Note on the Use of Official Statistics*, 11 SOC. PROBS. 131 (1963).

48. See *id.* at 131.

49. Delbert Elliot, *Lies, Damn Lies, and Arrest Statistics*, Southerland Award Presentation to the American Society of Criminology (Nov. 1995).

50. *Id.*

understand it for what it is, instead of using it to support conclusions for which it is completely inappropriate. Drawing further conclusions that these numbers do not support, such as using them to justify racial profiling as Marshall Frank and others have done, will create serious misunderstanding and obscure important facts, putting at risk the accuracy and integrity of the important criminal justice policy decisions we must make.

B. The Right Numbers

If arrest and incarceration statistics tell us little that helps us in the racial profiling debate, what numbers would help? The right answer depends, as in so many other things, on focusing on the right question. There are, of course, many important issues in the racial profiling debate. Is it morally acceptable to use an unchangeable physical characteristic received by accident of birth as a proxy marker for criminal activity, and to impose costs on all who, through no fault of their own, carry that characteristic? Is racial profiling legal? What social and political costs do using this tactic entail? In *Profiles in Injustice: Why Racial Profiling Cannot Work*, I tried to answer these questions.⁵¹ But it also seemed critically important to answer the question that is central to the debate with people like Marshall Frank: Does using racial profiling in fact help us catch criminals? Does it actually “up the odds” of police finding bad guys, guns, or drugs when they make traffic stops and conduct searches, as Frank and others believe? This is, after all, the core claim of racial profiling “proponents.” How might we test this assumption? It is important to remember that, as tightly as profiling supporters hold to the idea that racial profiling is “just good policing,” this is an assumption, not a fact. Like all assumptions upon which we might be tempted to base important policy decisions, it should be tested and not simply accepted on faith.

The answer comes in the form of something called the hit rate: the rate at which police actually find criminals, uncover guns, and confiscate drugs when they perform stops and searches. The hit rate is the rate at which police succeed in their stop and search efforts.⁵² In just the past couple of years, data have become available in a growing number of jurisdictions that allow us to calculate the hit rate, and to do so separately for blacks, whites, and Latinos.⁵³ In all of these studies, police stop and search whites not because of race, but because they have observed suspicious behavior. Blacks and Latinos, on the other hand, were stopped not only because of suspicious behavior, but also because of race or ethnic appearance. Looking at the hit rate for each group allows us to see the effect of introducing race or ethnic appearance as a factor—not as the only factor, but as one factor among others—in police decisions concerning whether someone seems suspicious enough to merit a stop and search. If Marshall

51. See generally DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002) [hereinafter HARRIS, *PROFILES*].

52. *Id.* at 73–90.

53. *Id.* at 79–84.

Frank is right, the hit rate data will prove it: We will get higher rates of successful stops and searches among blacks and other targeted minorities.

I have discussed the hit rate data in detail elsewhere,⁵⁴ so the explanation here goes directly to the bottom line. All of the studies in which the data collected allow for the calculation of hit rates have generated strikingly similar results. All of these studies show higher hit rates not for blacks and Latinos, but for whites.⁵⁵ In other words, officers “hit” less often when they use race or ethnic appearance to decide which persons seem suspicious enough to merit stops and searches than they do when they use suspicious behavior and not race as their way of selecting suspects. When stops and searches are not racialized, they are more productive. Officers find more drugs, guns and other contraband, and make more arrests when focusing on suspicious behavior alone than when race or ethnic appearance is a factor. Undoubtedly, these findings will seem counterintuitive to those who have never questioned Marshall Frank’s assumptions. But the statistics—from New York City, North Carolina, Maryland, and other places—tell a consistent story that goes to the heart of the proponents’ argument for profiling.⁵⁶ By examining statistics that answer a heretofore-unasked question, in this case the effectiveness of racial targeting at catching criminals and uncovering evidence, we can potentially advance the debate over racial profiling. If racial profiling does not work, if in fact it does not help police catch more criminals by giving them a statistical boost, then the argument that the many moral, legal, political, and social costs that profiling entails are worth bearing in order to fight crime simply evaporates.

IV

IT’S NOT SO SIMPLE: THE GOOD, THE FAIR, AND THE UGLY

However one looks at the debate over racial profiling, one thing stands out as both unexpected and, to those who have complained about racially-targeted policing for many years, welcome: There is now real government action in many places that is designed, at least in some small way, to address the issue. More than fifteen states have passed legislation mandating some kind of data collection, in addition to requiring other actions and changes, such as written policies against profiling and new training programs.⁵⁷ Perhaps more significant, hun-

54. *Id.* at 73–90.

55. *Id.* at 79–84.

56. *Id.*

57. States with laws that take some action on profiling include: (1) Colorado, COLO. REV. STAT. § 42–4–115 (2001) (required data collection on traffic stops to include race among other characteristics; annual report required), and COLO. REV. STAT. § 24–31–309 (2001) (defines “profiling” and bans peace officers from doing it, and addresses officer identification and training); (2) Connecticut, CONN. GEN. STAT. § 54–11 (2001) (prohibits racial profiling by police departments and mandates data collection on traffic stops); (3) Kansas, KAN. STAT. ANN. § 22–4604 (2001) (mandating collection of information on law enforcement arrests and stops, and report on data collected); (4) Maryland, MD. CODE ANN., [Transportation] § 25–113 (2001) (Race data must be collected by officers at traffic stops; profiling not to be used by officers making traffic stops); (5) Missouri, MO. REV. STAT. § 590.650 (2001) (prohibits the practice of routinely stopping members of minority groups for violations of vehicle laws as a pretext for investigating other violations of criminal law, requires gathering of

dreds of police agencies around the country that are not under any legislative obligation to do so have taken similar action on their own.⁵⁸ In fact, this has become common enough that an announcement that a city will begin collecting data no longer makes national headlines as it did just a short time ago. It is easy to forget that the first sizeable agencies to begin collecting data on their own—San Diego and San Jose, California—began their efforts only in 1999. While data collection is hardly the norm everywhere, it no longer stands out as something that all police agencies resist.

But the experiences of data collection on traffic stops and searches by police have not ended the public discussion of racial profiling. In fact, in many instances, it seems fair to say that the collection of data has proven to be only a first step in a broader dialogue not only on racial profiling but also on the larger issues of race, criminal justice, and relationships between police and minority communities. This is not surprising; the move toward data collection has always been a necessary first step in the effort to tackle the problem.⁵⁹ But even taking this first step has proven to be far more difficult than many imagined, and less helpful and satisfying to those engaged in the discussion—police officers and

data on all traffic stops including race, annual report by attorney general); (6) Nebraska, NEB. REV. STAT. § 20–501–505 (2002) (defines and prohibits racial profiling, requires written anti-profiling policies, and requires collection of data on stops); (7) North Carolina, N.C. GEN. STAT. § 114–10 (2002) (requiring data collection on race by state police officers making stop); (8) Rhode Island, R.I. GEN. LAWS § 31–21.1–2, –4, –5 (2001) (prohibits use of racial profiling in traffic stops and requires data collection on traffic stops and study of data by attorney general); (9) Tennessee, TENN. CODE ANN. § 38–1–402 (2001) (police must record info on traffic stops, including race); (10) Texas, TEX. CRIM. PROC. CODE ANN. § art. 2.131, 2.132, 2.135 (Vernon 2002) (prohibiting racial profiling, requiring data collection on traffic stops that includes race, and requiring audio visual records); (11) Utah, UTAH CODE ANN. § 53–1–106 (2002) (requires database including the race of the person stopped and checked and the race of the law enforcement officer who made the stop); (12) Washington, WASH. REV. CODE ANN. § 43.43.490 (West 2002) (requiring training for police officers on racial profiling).

Other states have much weaker statutes that do not require any real action, for example, (1) California, CAL. PENAL CODE § 13519.4 (Deering 2002) (mandating “racial and cultural diversity training,” but data collection on traffic stops voluntary for each jurisdiction; officers to hand out business cards at conclusion of traffic stops); (2) Minnesota, MINN. STAT. § 626.8471, 626.951, 626.9513, 626.9514 (2001). “Avoiding racial profiling; policies and learning objectives required.” (racial profiling defined, officers to receive training, collection of traffic stop data for study to be voluntary, advisory committee and toll-free number for complaints established); (3) West Virginia, W. VA. CODE § 30–29–10 (2001) (racial profiling by law enforcement agencies prohibited). There are a few additional states that have passed legislation, the provisions of which do not require data collection of any kind, often simply settling for half-hearted measures such as handing out business cards.

58. Among the city police department and agencies collecting data without any state law requirement that they do so are: (1) San Diego, see, e.g., Jean Alliece Colston, *Ignorance Will Not Bring Equality*, SAN DIEGO UNION-TRIB., April 28, 2002, at G–3; (2) San Jose; see, e.g., Lisa O’Neill Hill, *Delving into Disparities: Issue Under Study, Scrutiny Locally and Nationwide*, PRESS-ENTERPRISE, February 24, 2002 at A01; (3) The Ohio State Highway Patrol, see, e.g., Jennine Zeleznik, *State Sen. Roberts’ Bill Would Require Demographic Data From Traffic Stops; Legislation Would Show if Agencies Asing Racial Profiling*, DAYTON DAILY NEWS, April 18, 2002; (4) Portland, Ore. Police Department and the Oregon Highway Patrol, see, e.g., Maxine Bernstein, *State Police Post Findings On Stops By Driver’s Race*, OREGONIAN, May 9, 2002 at pg A01; (5) The Michigan State Police, see, e.g., *Survey Doesn’t Reveal Profiling*, CHI. TRIB., January 25, 2001, News at pg 3; (6) The Pennsylvania Highway Patrol, see, e.g., Keith Herbert, *Forms Arrive Late for Penn State Study of Racial Patterns in Police Traffic Stops; State Troopers Will Take Information to Look for Evidence of Profiling*, MORNING CALL (ALLENTOWN), April 2, 2002 at pg B4; and (7) the South Carolina Highway Patrol, see, e.g., Greg Rickabaugh, *Study Hints Police Ticket More Blacks; Survey Suggests South Carolina Troopers are Pulling Over, Citing Higher Percentage of Minorities*, AUGUSTA CHRON., July 1, 2001 Metro at pg. C01.

59. Harris, *Driving While Black*, *supra* note 13, at 579–80.

agencies and members of minority communities, as well as those studying the problem—than many had hoped.

The chief difficulty has not been either the cost or the time it takes to record data, as was often argued by opponents of data collection. According to almost everyone involved in setting up data collection systems, they have proven less burdensome to administer than anyone thought they would be.⁶⁰ Rather, the problems have largely arisen because of improper benchmarks.⁶¹ The idea is that collecting statistics on stops and searches tells you something important (on whom are police focusing their discretionary power to make traffic stops?), but not enough. Even if we know how the stops and searches police perform are distributed by race, the question is, compared to what? In other words, to know whether police stop or search any particular group in numbers greater than what we would expect, we need to have a benchmark to which to compare the stops and searches figure. If the study looks at who gets stopped while driving, the relevant comparison population is the driving population of the jurisdiction under study. If that population is ten percent black, but blacks are thirty percent of all drivers stopped and searched, we might legitimately wonder whether racial targeting was taking place. But without the benchmark of the racial composition of the driving population, the numbers on the stops and searches alone would not have much meaning. At least three different approaches have been taken to this issue. One researcher has led the way on this question by devising a method to create benchmarks through solid scientific and statistical techniques. Many police agencies have taken a second, less useful tack. The problem has been that they have not understood the benchmarking problem, and have forged ahead anyway. While most have realized they must have some basis for comparison to their stop and search figures, they have used improper benchmarks, typically census data. Third, at the far end of the spectrum are a number of commentators—mostly pundits and ideologues, not researchers or scholars—who have deliberately sought to undermine any movement toward real progress. With apologies to a certain Western, it seems fair to call these three approaches the good, the fair, and the ugly.

A. The Good

If what data collection to measure racial bias in traffic stops really concerns is a comparison of police behavior with the driving population of the applicable area, little could serve this purpose better than actual measurement of the racial and ethnic makeup of the driving population. That is what lies at the heart of the statistical techniques and analyses pioneered by John Lamberth of Temple University.

60. See, e.g., Letter from Marc Thompson, village manager of Ottawa Hills, Ohio, to Rep. Peter Lawson Jones, Ohio House of Representatives (Jan. 12, 2001) (copy on file with the author).

61. See, e.g., LORIE FRIDELL ET AL., RACIALLY BIASED POLICING: A PRINCIPLED RESPONSE 117–18, 136–37 (2001).

In the 1990s, Lamberth was the first social scientist to attempt to measure the racial distribution of driving populations in the context of police traffic stops.⁶² He did this work while serving as an expert witness in the New Jersey and Maryland cases mentioned earlier, *State v. Soto*,⁶³ and *Wilkins v. Maryland State Police*.⁶⁴ In both of these cases, litigants challenged state police use of traffic stops as racially biased on particular limited access highways: the New Jersey Turnpike in the former case and Interstate 95 in Maryland in the latter. Understanding from the beginning that he needed a measurement not of the residential population but of the population of those on the highway, Lamberth took the most direct approach possible.⁶⁵ He put teams of observers on the highways—both at the side of the road and in cars moving in traffic at exactly sixty miles per hour—to record the race of the drivers.⁶⁶ These teams performed their observations during various one- and two-hour periods randomized over the day, and on all of the different days of the week.⁶⁷ The teams that drove in traffic, observing the drivers in the cars around them, were able not only to measure the racial composition of the driving population they saw, but also to observe what percentage of these drivers were breaking a traffic law—sometimes just exceeding the speed limit, and sometimes other traffic laws, too.⁶⁸ The net result was the collection of tens of thousands of observations of the actual population of the drivers on the highway, broken down by race, and a similar counting of “violators,” also broken down by race.⁶⁹ The violator data in both states showed that no differences existed between races or ethnic groups; that is, all racial and ethnic groups violated the traffic laws at the same (very high) rate.⁷⁰ With all of these data, Lamberth was able to perform the first fully informed analysis of the racial context of traffic stops. One could say with a reasonable degree of statistical probability, according to Lamberth, that these two state police agencies were indeed stopping blacks at rates higher than their population of drivers on the road would have predicted, and that differences in driving behavior simply did not account for this.⁷¹ Rather, the data showed that police seemed to have targeted African Americans and Hispanics.⁷²

62. HARRIS, PROFILES, *supra* note 51, at 53–57.

63. 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996). Lamberth’s report in *Soto* was entitled Report of Dr. John Lamberth (Defendant’s Expert), Revised Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers/Travelers on the New Jersey Turnpike Between Interchanges 1 and 3 from the Years 1988 Through 1991. [hereinafter Revised Statistical Analysis Report]

64. Civ. No. MJG–93–468 (D. Md. 1996). Lamberth’s report in *Wilkins* was entitled “Report of Dr. John Lamberth (Plaintiff’s Expert), *Wilkins v. Maryland State Police Profiles, et al.*, Civil No. MJG–93–468.”

65. See HARRIS, PROFILES, *supra* note 51, at 53–57.

66. *Id.* at 54.

67. *Id.* at 54–55.

68. *Id.*

69. *Id.*

70. *Id.*

71. HARRIS, PROFILES, *supra* note 51, at 56, quoting Report of Dr. John Lamberth (Defendant’s Expert), Revised Statistical Analysis Report, *supra* note 63, at 26, 28.

72. *Id.*

As solid and well thought out as Lamberth's methods in the New Jersey and Maryland cases appear to be, one might raise legitimate questions about their wider use and applicability. After all, he did the New Jersey and Maryland work in what could be viewed as the easiest possible setting: limited access highways. Unlike on typical surface streets, vehicles on limited access highways all move along the roadway with an easy predictability, with no "opting out" except for well-defined and well-spaced exits. There are no cross streets, turns, or other changes in pattern with which the observer must deal. Thus, while well-adapted for highway use, Lamberth's technique might pose problems in more mixed traffic situations typical of an urban or suburban area. Lamberth himself has given considerable thought to these issues, and at this writing has moved into a new phase of research in which he has adapted his tactics to other kinds of areas with more mixed traffic uses typical of surface streets.⁷³ He has done this by using a kind of statistical sampling. In the cities, towns, or counties he studies, Lamberth uses police data to find the "hot spots" of traffic enforcement—the areas in which the police department does most of its traffic enforcement work and gives the bulk of its citations.⁷⁴ Once he has identified these hot spots, he uses the same kind of direct-observation techniques in those areas as he used on the highways.⁷⁵ For example, the hot spots might be a particular strip of a busy city street, or an intersection and the two blocks surrounding it. Lamberth stations observation teams at points with a good view of the traffic in these areas and has them count the drivers of all the passing vehicles by race or ethnicity.⁷⁶ This generates benchmarks both for the particular hot spots under observation and for the great bulk of all traffic enforcement activity in the entire area. Lamberth then compares these benchmarks with the police's actual stopping activity, just as he did with the highway studies.⁷⁷ As of this writing, Lamberth has used this method successfully in a mixed urban–suburban–rural county in southern Michigan, in ten cities of various sizes in Kansas, and in numerous other locations around the country.⁷⁸

B. The Fair

A second category includes those efforts that, while perhaps well intentioned, are flawed. For most of the examples in this category, it would not be correct to describe them as "bad"; thus the clumsy paraphrase of the movie's title. The efforts discussed here are designed to move the issue of racial profiling into the realm of fact. All of the agencies that have tried this deserve applause; their executives have taken this step knowing that they may suffer criticism at the hands of the press and the public. What they have done there-

73. Conversation with Dr. John Lamberth (July 17, 2002) (on file with author).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

fore represents a risk, but, as these leaders have come to understand, a necessary one. Nevertheless, I wish to point out two ways in which some of these efforts could be improved.

First, many studies of traffic stops do not include any benchmark for comparison based on anything like observation of drivers, *à la* Lamberth. Rather, they make comparisons to census figures. In other words, traffic stop rates by race and ethnicity are compared to the census population numbers for the minority group in question in the particular city, town, or county. If the percentage of stops of a particular ethnic group exceed the percentage of the area's population that that group makes up, it might be considered evidence of the existence of racial profiling. On the other hand, if the percentage of stops of a particular group is roughly the same or less than the population of that group in that jurisdiction, it might be considered evidence that there is in fact no profiling.

However, census population statistics simply cannot do the job in this instance. They cannot support either conclusion. To understand why, think about what census population is and what it actually measures. When one looks at the population of a city, town, or area as measured in the census, one sees a snapshot of the area's residential population. It is static—not just in the sense that it is a snapshot, but in the sense that it depicts who lives in an area at a particular time. What it does not show is *who drives* in that area, which is exactly the information that anyone studying police stops and searches needs to know, because only those who drive in the area are at risk of experiencing a stop and search. Many residents of any particular area may not drive. Those under legal age for licensing and many of the elderly would not be of any concern in such a study, since, not being out on the road, they cannot be stopped for traffic violations. Perhaps even more important, the racial and ethnic residential populations of particular cities, towns, suburbs, or neighborhoods may be considerably different from the racial and ethnic populations of drivers on the area's roads.

For example, a suburb may be almost completely white, but if a major traffic artery flows through it, it is almost certain that the population of drivers within its borders is much more diverse. Ottawa Hills, Ohio, a small (population approximately 4,500) suburb near Toledo, has a negligible minority population; almost all of its residents are white.⁷⁹ Nevertheless, approximately twenty-five percent of the drivers its police officers stop are black.⁸⁰ Comparing the two figures—twenty-five percent black stops versus a black population near zero—might lead one to think that officers in Ottawa Hills were engaged in racial profiling. But when Ottawa Hills did a Lamberth-style observation-based study by posting observers on its five busy through streets where officers gave the

79. U.S. CENSUS, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, GEOGRAPHIC AREA: OTTAWA HILLS VILLAGE, OHIO, *available at* <http://censtats.census.gov/data/OH/1603959010.pdf> (last visited May 5, 2003).

80. Annual Driver Counts, Village of Ottawa Hills, document generated August, 2002 (on file with author).

greatest numbers of tickets and warnings, they found that the minority driving population of the town is not zero at all. In fact, it has averaged approximately twenty-one percent over the past four years⁸¹—a relatively small variation from the stopping behavior police officers exhibited.

The same idea might work in reverse, too. Many sizable American cities, certainly older ones like Chicago, St. Louis and Cleveland, have a core downtown commercial and business district that is heavily populated by workers during the day, surrounded by urban neighborhoods heavily populated by minorities. These areas are in turn ringed by racially mixed (closer in) or nearly all white (further out) suburbs. Census figures would probably give a completely misleading picture of the population of the downtown area during business hours; with a small residential population but a large commuter presence, the resident and driver populations might look nothing alike. For largely minority residential areas between the downtown and the suburbs through which run highways or major surface roads that commuters use, the same would be true: Their driving populations would likely be considerably different than their residential populations. Thus, using census population statistics as a benchmark might either overestimate or underestimate the minority population, depending on the particular circumstances. For this reason, the comparisons made would almost surely be inaccurate, and there would be no pattern—for example, always overestimating minority population, or always underestimating it—in the direction of the error.

A couple of examples will illustrate. In St. Louis, Missouri, the police department has been collecting data for more than a year pursuant to Missouri's statutory requirements.⁸² Missouri's law, easily the best state legislation in the nation on the subject, requires the collection of this data, as well as the setting of new policies against profiling, the incorporation of new training, and other similar practices, all on an ongoing basis.⁸³ Failure to fulfill any of these obligations may result in the governor withholding state funds from the defaulting jurisdiction.⁸⁴ Unfortunately, Missouri's law also mandates the use of the incorrect benchmark to which to compare the stop data: population percentages.⁸⁵ In the case of St. Louis, this produces a fairly interesting result. Traffic stops in St. Louis are almost distributed evenly by race: forty-nine percent for blacks to forty-seven percent for whites.⁸⁶ The population of the city of St. Louis over age sixteen (the age at which individuals can receive driver's licenses) is divided almost as evenly: forty-eight percent white, forty-seven per-

81. *Id.*

82. MO. REV. STAT. §590.650 (2001).

83. *Id.*

84. *Id.* at § 590.650.6.

85. *Id.* at § 590.650.4(2)(c).

86. MO. ATTORNEY GEN.'S OFFICE, ANNUAL REPORT ON 2001 MISSOURI TRAFFIC STOPS, AGENCY: ST. LOUIS CITY POLICE DEPT., available at <http://moago.org/2001rp/stlouis.pdf> (last visited May 5, 2003) [hereinafter MISSOURI, TRAFFIC STOPS].

cent black.⁸⁷ The comparison of the stops to population numbers thus yields a picture in which police might say that their stops are just about where they should be; that is, they are even with the population of each group. In fact this is exactly what police in St. Louis did say when these numbers were released. Reacting to the numbers showing rates of stops fairly close to population rates, Police Chief Joseph Mokwa was pleased: “This is not an alarming or discrediting thing for the City of St. Louis. It actually looked very positive.”⁸⁸ The problem is that comparison of the stop numbers to driving population instead of residential population could actually yield results that are quite different. Like most American cities, St. Louis has numerous surface streets and expressways that traverse the city, bringing populations of drivers into many city areas that may be much more racially mixed than the residential populations of those areas. All of the drivers in these mixed driving populations would be eligible to be stopped by the police, not just those who live there. Thus the conclusion that the St. Louis police department’s analysts drew—that the stop data showed they did not have a problem with racial profiling—may be right or it may be wrong, but certainly it is not supported by the evidence, since that evidence does not include a valid benchmark.

Erie, Pennsylvania, provides a similar example. In the Spring of 2001, an alliance of organizations that included Erie’s Office of the Mayor, the local branch of the NAACP, the Erie Police Department, and a coalition of concerned African-American clergy came together to discuss the issue of racial profiling.⁸⁹ When the Mayor decided that data collection was required to take the issue forward, he approached the Mercyhurst Civic Institute of Mercyhurst College, and the Institute became Erie’s partner for purposes of designing and implementing the data collection effort and analyzing the data.⁹⁰ The Institute’s report on the analysis of six months of data on traffic and pedestrian stops by the police shows a careful and sophisticated approach to an important problem in the Erie community. The report also includes critical evaluation of the methodology of existing studies.⁹¹ The methodology of Erie’s own study is described, in an effort to show how it will not repeat the mistakes of others.⁹² Unfortunately, however, the Erie study makes the most basic mistake of all: use of census data as a benchmark. Dividing Erie into twelve zones, the report uses census data, adjusted for driving age, instead of observation of driving population, to calculate its denominator figure.

87. *Id.*

88. Tim O’Neil, *Missouri Study on Traffic Stops Mirrors Others*, ST. LOUIS POST-DISPATCH, June 3, 2001, at A1.

89. THOMAS GAMBLE ET AL., ANALYSIS OF POLICE STOPS AND SEARCHES, CITY OF ERIE, PA 5–6 (2002), available at http://civicinstitute.mercyhurst.edu/pages/All_index.html (last visited May 5, 2003).

90. *Id.* at 6–7.

91. *Id.* at 13–18. The methodologies criticized include those used in the author’s own earlier work.

92. *Id.* at 18.

Using the 2000 *United States Census Tract Data*, the Institute calculated the racial and ethnic populations for each geographic zone. For the vehicle stop analysis, Census data for individuals aged 16 years and older were calculated for each zone, then separated by race and ethnicity; this was the *expected proportion* of vehicle stops in a given zone for each racial and ethnic group. For example in a zone in which blacks make up 30% of the driving age population, the expected percent of vehicle stops for blacks would be 30%. In order for racial disparity to be indicated, the actual percent of blacks stopped in that zone would have to be significantly higher than the 30% expected level.

For pedestrian stop analysis, Census data for individuals aged 10 years and older were calculated for each zone, then separated by race and ethnicity; similarly, this was the *expected* proportion of pedestrian stops by race for each zone. For most analyses in the study, observed proportions of stops and searches were compared to expected values and statistical tests were performed to determine the statistical significance of the findings.⁹³

In other words, while the analysts at Mercyhurst did many things right, they did a very basic thing wrong. They did not generate a valid benchmark, for this reason any conclusions they drew about the presence or absence of disproportion in stops and searches are, at the very least, open to question. But because they did not see this as an issue, the error did not prevent them from coming to a conclusion based on a relatively short period of data collection (a flaw that they decry in the work of others⁹⁴). “[W]e feel that the evidence presented herein is sufficient to warrant concern over the issue. The data presented in this report indicate statistically significant racial and ethnic disparity . . . in stops citywide, as well as in 9 of the 12 geographic zones established prior to data collection.”⁹⁵

It is important to applaud the effort of the citizens and the leadership of Erie. They undertook the examination of these difficult questions, brought in an outside, independent partner (the Mercyhurst Institute) to help construct the study and analyze the data, and treated the subject and everything they did with the seriousness that it deserves. Still, without a viable benchmark of the racial breakdown of the population of drivers, the study’s conclusions in this regard are simply not supported.

Having said this, it is worth noting that the Mercyhurst study of Erie and some other studies have included important pieces of data. In addition to data on stops, they have also included data on searches that happen after the stops.⁹⁶ These data are important because, if properly collected, numbers on searches can give us a fairly clear indication of how police choose to exercise their discretion—that is, whom officers think is suspicious enough to warrant a search. The reasons for this require some understanding of the law governing searches of vehicles stopped by police.

93. *Id.* at 8–9 (emphasis in original).

94. *Id.* at 17–18 (attacking Richmond, Virginia, study as flawed because, among other things, it used “a limited data collection period of only six weeks”).

95. GAMBLE ET AL., *supra* note 89, at 33.

96. *Id.* at 27–28.

According to the U.S. Supreme Court, observation of any traffic offense by a police officer constitutes full and sufficient probable cause for the officer to stop and detain the driver long enough to perform the actions necessary to issue a citation.⁹⁷ Whether traffic enforcement is the “real” reason for the stop, or just a pretext for investigation of something else, is irrelevant to any Fourth Amendment analysis.⁹⁸ However, seeing a traffic offense alone does not give the officer any legal authority to search the driver or the vehicle. Before a search can be performed, one of several things must happen. First, the officer must observe some evidence of a crime taking place—the smell of burning marijuana coming from the interior of the car, the butt of a gun sticking out from under the seat, an open alcohol container in plain view. Any such observation would give the officer probable cause to arrest the driver,⁹⁹ along with the right to search both the driver¹⁰⁰ and the passenger compartment of the vehicle, as well as any closed containers in the passenger compartment.¹⁰¹ Second, even if the officer does not see any evidence indicating the commission of a crime, he or she may discover outstanding warrants for the driver when the officer “calls in” identifying information on the driver and the vehicle during a routine record check. An existing warrant would give the officer immediate authority to arrest the driver,¹⁰² and to search both the driver and the car.¹⁰³ If neither of these two circumstances obtain, there is only one way that an officer can search the driver or the vehicle under the law: a consent search. In a consent search, the police officer simply asks for permission to search the vehicle or driver. The officer needs no probable cause, reasonable suspicion, or any evidence at all to make this request;¹⁰⁴ the citizen need not be told that he has a right to refuse the request.¹⁰⁵ As long as the driver gives consent voluntarily and the police do not act coercively, the officer may conduct a search.¹⁰⁶

Given these circumstances, consent searches give us an invaluable measure of how police use discretion that is for all practical purposes legally unbounded. Perhaps more important for our purposes, the denominator problem that bedevils studies of traffic stops disappears from search data because the stop data themselves serve as the denominator for search rates. That is, expected search rates can be calculated based on who was stopped. In other words, only those drivers police stop are eligible to be searched, so the denominator used to calculate expected search rates is readily available and does not depend on any observation of the general motoring population. Thus racial disparities in

97. *Whren v. United States*, 517 U.S. 806, 811–12 (1996).

98. *Id.* at 811–12.

99. *See United States v. Watson*, 423 U.S. 411, 417 (1976).

100. *See Robinson v. United States*, 414 U.S. 218, 226 (1973).

101. *New York v. Belton*, 453 U.S. 454, 460–61 (1981).

102. *Whitely v. Warden*, 401 U.S. 560, 568 (1971) (holding that police may rely on radio report of arrest warrant to supply probable cause).

103. *Belton*, 453 U.S. at 460–61.

104. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

105. *United States v. Drayton*, 122 S. Ct. 2105, 2113–14 (2002).

106. *Id.* at 2110.

search rates can tell us whether police generally regard blacks (or any other particular group) as more suspicious than others.

The Mercyhurst data and analysis are quite interesting concerning the issue of searches. While they fail to separate consent searches from other kinds of searches (searches based on probable cause when police observe evidence of a crime or based on the finding of an existing warrant), they do show a strong racial disparity. Blacks (and minorities generally) are more likely to be searched after a traffic stop. Nonminorities in Erie were sixty-seven percent of all of those stopped, but only thirty-four percent of those searched; minorities were thirty-three percent of those stopped, but sixty-six percent of those searched—a statistically significant disparity.¹⁰⁷ The St. Louis data show a similar disparity. Blacks in St. Louis are more likely to be searched than whites, relative to their presence among all those stopped; that is, blacks are searched at a higher than expected rate.¹⁰⁸ Search statistics from New Jersey in 2000 also illustrate the point. These data show that fully seventy-eight percent of all those searched during police stops at the southern end of the New Jersey Turnpike were blacks and Latinos. This in the area where the first allegations of racial profiling arose in the state, well after a settlement agreement with the federal government that banned racial profiling and put all officers on notice that profiling would not be tolerated.¹⁰⁹

Given the special usefulness of data on searches, jurisdictions that study traffic and pedestrian stops and try to understand whether profiling exists should be encouraged to gather such data. These data will help fill out the full picture of what happens during a traffic stop; further, they can even help compensate for the lack of benchmarks needed to make valid comparisons with stop data. Put another way, if a jurisdiction has no valid benchmark numbers to compare to its data on stops, a study can still be quite useful if it thoroughly collects data on consent searches.

C. The Ugly

In the spring of 2002, a new controversy erupted over racial profiling in New Jersey. Faced with persistent numbers that showed that, even after implementing a settlement with the federal government, blacks were still being stopped in numbers disproportionate to their presence on the highway, the New Jersey Attorney General's Office commissioned a study of speeding behavior on the New Jersey Turnpike.¹¹⁰ Using high-speed photography and radar guns, researchers monitored the speed of vehicles traveling on the road and

107. GAMBLE ET AL., *supra* note 89, at 28.

108. MISSOURI, TRAFFIC STOPS, *supra* note 86, at 2.

109. Summary of Troop D Consent Searches for 2000, document released by New Jersey State Police in April 2001 hearings. [hereinafter Troop D Searches].

110. Wendy Ruderman, *Survey Rekindles Profiling Debate, Finds Higher Rate of Black Speeders*, BERGEN RECORD, Mar. 23, 2001, at A1 (reporting that the state's former attorney general commissioned a study to answer this question).

attempted to identify the race of the drivers.¹¹¹ An independent panel of evaluators examined the photos to arrive at the best possible judgment about the driver's race.¹¹² The study concluded that black drivers on the Turnpike were more likely to be speeding than others. Black motorists "are twice as likely to speed as white drivers, and are even more dominant among drivers breaking 90 miles per hour."¹¹³ Blacks were twenty-five percent of all violators of the speed limit, and were twenty-three percent of all of those stopped during the study period.¹¹⁴

When the study was completed, the U.S. Department of Justice raised objections to its methodology and its conclusions.¹¹⁵ But when the study was described in the *Bergen Record*, one of the state's largest circulation newspapers,¹¹⁶ the genie was out of the bottle and public discussion on the study began. But the content of that discussion was truly unfortunate—a crass distortion of the power of statistics and their meanings in the service of ideology.

Almost as soon as the study hit the press, it was immediately hailed as conclusive evidence that there was not—indeed, that there never had been—any such thing as racial profiling. This was hardly surprising coming from the New Jersey State Police themselves. According to Kenneth J. McClelland, president of the State Troopers Fraternal Association, the study "proves what we said, that the vast majority of troopers were stopping people because of the way they drove, not because of their race. . . . We feel vindicated by this."¹¹⁷ But the ironic thing was the way that the study was seized upon by critics who'd said that past statistical studies of racial profiling were flawed and proved nothing. Chief among them was Heather Mac Donald of the Manhattan Institute. In an earlier article, published before the New Jersey speeding study, Mac Donald had declared that all the research that purported to show some evidence of racial profiling was too defective to carry any weight.¹¹⁸ She even publicly labeled the highly sophisticated study performed by Columbia University researchers for the New York Office of the Attorney General—one of the most comprehensive studies of police stops ever done—"junk science."¹¹⁹ According to Mac Donald, racial profiling was nothing more than a "myth" created and perpetuated by anti-police forces bent on turning back the clock to the bad old

111. *Id.*

112. *Id.*

113. James Lange et al., Speed Violation Survey for the New Jersey Turnpike, Final Report, Public Service Research Institute, 2002 (on file with author).

114. *Id.*

115. *E.g.*, Letter from Mark Posner, Attorney, U.S. Department of Justice, to Martin Cronin, Director of State Police Affairs (Nov. 1, 2001); Letter from Mark Posner, Attorney, U.S. Department of Justice, to Anthony Cowell, Acting Director of State Police Affairs (Jan. 8, 2002) (on file with author).

116. *See* Ruderman, *supra* note 110, at A1; *see also* Tom Greenwood, *Study: Blacks Speed the Most*, DETROIT NEWS, Apr. 10, 2002, at 86 (noting that *Bergen Record* broke the story).

117. David Kocieniewski, *Troopers Seek Release of Race-Based Study*, N.Y. TIMES, Mar. 22, 2002, at B5.

118. Heather Mac Donald, *The Myth of Racial Profiling*, CITY J. 14 [hereinafter Mac Donald, *Myth*] (Spring 2001).

119. *Extension 720* (WGN AM Radio, Mar. 18, 2002) (on file with author).

days when crime was out of control.¹²⁰ She argued that these misguided souls had not the foggiest idea how to use statistics and data, and that the data did not, and would never, prove that there was such a thing as racial profiling.¹²¹

How odd, then, that Mac Donald was the most prominent voice to use the New Jersey speeding study to declare “The Racial Profiling Myth Debunked.”¹²² The speeding study’s finding that blacks speed more than whites, Mac Donald declared, “demolishes the myth of racial profiling. . . . The devastation wrought by this study to the anti-police agenda is catastrophic. The medieval Vatican could not have been more threatened had Galileo offered photographic proof of the solar system.”¹²³ Not one to hesitate to draw a sweeping conclusion, Mac Donald pronounced the public discussion of racial profiling finished. “While racist cops undoubtedly do exist . . . the evidence shows that systematic racial profiling by police does not exist.”¹²⁴

Mac Donald clearly has a gift for hyperbole and overwrought rhetoric. But the flaw in her argument cannot be explained away by overstatement, zealotry in the service of her chosen cause, or anything else. It is something much simpler. She has repeated the error of Marshall Frank and others who have tried to defend profiling statistically: She has used data and statistics to support conclusions about which these statistics have nothing to say.

Let us, for the moment, assume the correctness of both the methodology and the conclusions of the New Jersey speeding study.¹²⁵ Even if we do this, we cannot get from the data in the study (blacks speed more often, and more often at higher speeds) to Mac Donald’s dubious conclusion because the study simply does not mean what she says it does. At least as important, the speeding study fails to explain a considerable amount of evidence that directly contradicts her argument.

First, data on speeding present only one small piece of information in the context of a much larger picture, the rest of which has yet to be filled in. It is a useful piece of information, but only to answer one small, discrete question. Presented alone, it is not useless, but it can be misleading. In stark contrast to Mac Donald’s overstatement, the speeding study’s lead author has said, “It’s a piece of the puzzle of how the troopers are acting. There are certainly a lot of other pieces that this study is completely silent on, but it does provide a bit of useful information.”¹²⁶ Breaking speed limits may be the first thing that most think of when they think of traffic offenses, and it is surely an offense many

120. Mac Donald, *Myth*, *supra* note 118.

121. *Id.*

122. Heather Mac Donald, *The Racial Profiling Myth Debunked*, CITY J. 63 [hereinafter Mac Donald, *Debunked*](Spring 2002).

123. *Id.*

124. *Id.*

125. Even though the U.S. Department of Justice has raised substantial objections to its methodology. Posner, *supra* note 115.

126. James Taranto, *Profiles Encouraged?*, OPINIONJOURNAL, WALL STREET JOURNAL ONLINE, Mar. 28, 2002, at <http://www.opinionjournal.com/best/?id=105001836>.

have been pulled over for in the past. But it is far from the only offense that police officers observe when they watch traffic. Even the most cursory glance at any state's vehicle code would reveal an almost endless variety of possible moving violations.¹²⁷ If those many offenses do not give an officer at least one reason to pull the average driver over, the vehicle code also contains a limitless number of offenses based not on driving itself but on the condition and equipment in the vehicle.¹²⁸ Any veteran police officer will gladly attest that there is no such thing as a perfect driver. Everyone violates *some* aspect of the traffic code in *some* way during *any* short drive, and any one of these moving or equipment violations constitutes full probable cause for a stop. Since everyone violates some aspect of the incredibly detailed traffic code during even the shortest drive, police must therefore decide whom they will stop. Police in New Jersey (and everywhere else) must use discretion when they make this decision. The fact that some groups may be over-represented among people who violate one particular kind of traffic law hardly means that they are the only ones who could (or do) get stopped. Speeding is only one possible violation among many. The bottom line is simple. Police officers have always known that the traffic code is law enforcement's friend. It allows an officer to pull over virtually any driver, almost any time, because everyone breaks the traffic laws. The flawless driver has not been born, and never will be.

Further, there is reason to think that stops based on racial targeting are actually less likely than others to be due to speeding and more likely to be due to other offenses for which stops would be highly discretionary. In one study of 1,084 stops on Interstate 95 in Florida, only 155, or close to fifteen percent, were for speeding.¹²⁹ Most were for a variety of other offenses, such as following too closely (237, or about twenty-two percent), swerving (253, or twenty-three percent), burned-out license tag illumination bulbs (71, or about seven percent), improper license tags (46, or about four percent), failure to signal lane change or unsafe lane change (67, or six percent), or other unknown or miscellaneous violations (255, or twenty-three percent).¹³⁰ In other words, speeding was not the largest category of stops, or even the second or third largest; it represented less than one seventh of all of the stops.

Moreover, regardless of whether racial profiling plays a role in police stops, stronger evidence shows that race and ethnic appearance play a role in police officers' deciding which of those stopped drivers are searched. Recall that a traffic offense alone does not give a police officer the right to search a car.¹³¹ To do that, the officer must observe something that gives him probable cause to believe a crime is afoot. Failing that, an officer may simply ask for the driver's

127. See, e.g., David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 559-60 (1998).

128. *Id.* at 560.

129. Jeff Brazil & Steve Berry, *Color of Driver Is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A1.

130. *Id.*

131. See text accompanying *supra* notes 95-107.

consent for a search.¹³² According to the U.S. Supreme Court, police need no probable cause, fact-based suspicion, or any evidence at all to ask.¹³³ (New Jersey's own highest court restricted the use of consent searches in the state within 2002, finding that they had played a key role in racial profiling.¹³⁴) So, it is no surprise that consent searches have been the primary means by which police have been allowed to search the drivers they stop. Since no evidence is needed for consent searches, patterns in these searches, more than in traffic stops themselves, represent the clearest possible picture of how officers exercise their discretion. Whether a driver was speeding, of course, has nothing to do with this.

Thus, the evidence cited above concerning the way some members of the New Jersey State Police exercise their discretion to perform consent searches remains powerfully damning. For example, in 2000, searches by troopers at the Moorestown station—a center of much of the profiling activity in prior years—showed a clear racial pattern.¹³⁵ Blacks made up fifty-three percent of all those drivers subjected to consent searches; Latinos were twenty-five percent, while whites were only nineteen percent.¹³⁶ For blacks and Latinos, these percentages were far higher than their representation among drivers on the road or even among drivers stopped.¹³⁷ Who was speeding has nothing at all to say about this.

Just as troubling, this exercise of discretion continues despite evidence that the use of race or ethnicity to decide who is suspicious and therefore worth stopping and searching is not an effective police tactic. The same statistics from the Moorestown station indicated that when troopers stopped and searched blacks, they got a lower rate of return—that is, they found drugs, guns, or evidence of other crime, much less often—than they did for whites.¹³⁸ In other words, the hit rates—the rates at which the searches succeed in finding contraband or criminals—do not support profiling. The hit rate for searches of whites, twenty-five percent, was nearly twice as high as the hit rate for searches of blacks, thirteen percent.¹³⁹ And the white hit rate was five times higher than the hit rate for Latinos, which was just five percent.¹⁴⁰

Perhaps most curious of all, Mac Donald and others who want to dismiss the existence of racial profiling apparently do not see that the speeding study does nothing to explain other evidence that comes straight from the source: state officials and troopers themselves. In a 1999 report released by New Jersey's Attorney General, the state publicly admitted that the accusations it had fought so bitterly for so many years were in fact true: Racial profiling was “real, not

132. See text accompanying *supra* notes 105–07.

133. *Id.*

134. *State v. Carty*, 790 A.2d 903 (N.J. 2002).

135. See Troop D Searches, *supra* note 109.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

imagined.”¹⁴¹ The report went on to detail significant statistical evidence that showed that racial profiling by the New Jersey State Police was indeed something that happened, not something made up.¹⁴² Mac Donald dismissed these admissions as politically inspired poppycock wrapped in political correctness.¹⁴³ But when the state released 90,000 pages of documents in late 2000 about the subject, these documents showed in black and white that the admission in the Attorney General’s report had not only been accurate, but actually reflected exactly the same damning conclusion that many state officials had harbored for years, even as they publicly disputed it and vehemently fought it in the courts: The data showed profiling was indeed occurring.¹⁴⁴ As if that were not enough, in court proceedings in January of 2002, the two troopers involved in the most notorious profiling incident on the Turnpike (the shooting of four young black men in a van who were pulled over on their way to a basketball camp) freely admitted that they had used racial profiling.¹⁴⁵ Indeed, they said that they had been trained to focus on blacks and Latinos and ordered to use these techniques by their superiors.¹⁴⁶ As reported by the *New York Times*, the New Jersey troopers “publicly acknowledged today for the first time that they had stopped the vehicle because its occupants were black and Latino. The troopers said their supervisors had trained them to focus on black and brown-skinned drivers because, they were told, they were more likely to be drug traffickers.”¹⁴⁷

The upshot is hard to miss. Even if blacks speed more often than whites, it does not mean profiling is either acceptable or effective. And it certainly does not mean, as Mac Donald says, that profiling is a myth, a tactic that never existed. Her conclusion represents a leap from the data on which she bases it—a leap without any justification or support.

V

CONCLUSION

More than sixty years ago, Attorney General Robert Jackson, who would later serve as a prosecutor at Nuremberg and as a Justice on the Supreme Court, told a nationwide gathering of lawyers that “Law enforcement is not automatic. It isn’t blind We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any

141. PETER VERNIERO & PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 4 (1999).

142. *Id.*

143. Mac Donald, *Debunked*, *supra* note 122.

144. David Kocienlewski, *Racial Profiling Was the Routine, New Jersey Finds*, N.Y. TIMES, Nov. 28, 2000, at A1 (release of documents shows that officials know of profiling well back into 1990s), available at http://www.njpublicsafety.com/add_2_01_sp_docs.htm.

145. David Kocieniewski, *New Jersey Troopers Avoid Jail in Case that Highlighted Profiling*, N.Y. TIMES, Jan. 15, 2002, at A1.

146. *Id.*

147. *Id.*

given morning.”¹⁴⁸ Jackson was wrong, but only by half; the police would have to arrest not half the population but almost everyone. Racial differentials in one particular type of driving behavior do nothing to explain a problem like racial profiling.

It is vital that those examining difficult social problems use statistics and data that show how the world really works to support their arguments. Simple theorizing will solve few problems. But what statistics we use, and how we use them, often has everything to do with whether our discussions and debates will help us make any real headway. Hopefully, this discussion has helped illustrate this in a concrete way, by showing how important statistics have been to the debate on racial profiling—and by showing how they have been misused as well.

148. *Morrison v. Olson*, 487 U.S. 364, 727 (1988) (quoting Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940).