

# GUNS, DRUGS, AND PROFILING: WAYS TO TARGET GUNS AND MINIMIZE RACIAL PROFILING

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## I. INTRODUCTION

Minorities—people of color—are the main victims of crime in New York and other cities. If murder rates had held steady in 1999 at the 1993 level in New York City, 2229 more African Americans, 64 more Asians, and 1842 more Hispanics (a total of 4205 people of color) would have been murder victims, as compared to 308 whites.<sup>1</sup> And crime has plunged in all categories, not just murder.<sup>2</sup>

The police and Mayor Rudolph Giuliani claimed credit for the crime decline across the city but especially in minority neighborhoods, pointing to innovative strategies such as COMPSTAT and a renewed emphasis on “quality of

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1. Editorial, *The Crime Drop: A Boon to Minorities*, N.Y. POST, Feb. 17, 1999, at 22.

2. Michael Cooper, *Homicides Decline Below 1964 Level in New York City*, N.Y. TIMES, Dec. 24, 1998, at A6. Other, similar statistics are available at K.C. Baker & Corky Siemaszko, *Violent Crime Dips 7% in Apple and the U.S.*, N.Y. DAILY NEWS, May 17, 1999, at 20; Michael Grunwald, *Coursework in NY: Surviving the Police; Black Officers Teaching Worried Minorities*, WASH. POST, Mar. 16, 1999, at A3; John Marzulli, *Apple's a Safer Place*, N.Y. DAILY NEWS, Dec. 4, 1998, at 7. Early in 2000, crime in New York City rose slightly. Newspaper stories cited “sources” who suggested the rise is related to decreased police vigilance in the wake of the Diallo crisis. See Larry Celona, *City Homicide Rate Jumps 13%*, N.Y. POST, Apr. 4, 2000, at 2; Larry Celona & Andy Geller, *Rudy and Bronx Brass to Hold Powwow on Jump in Crime Stats*, N.Y. POST, Mar. 16, 2000, at 7.

life crimes.”<sup>3</sup> COMPSTAT, an abbreviation for computer statistics, provides real-time computer mapping of crime to reveal crime “hotspots,” which enables the police to better allocate resources. COMPSTAT was introduced by former commissioner William Bratton and has been imitated by many police departments.<sup>4</sup> Bratton also began the targeting of quality of life crimes, ostensibly embracing Wilson and Kelling’s Broken Windows theory.<sup>5</sup>

Police claims that they caused the crime decline are, however, controversial.<sup>6</sup> One critic, Professor Bernard Harcourt, analyzed New York crime data and questioned the role of the police. He pointed to a dip in crack popularity and use, a booming economy, the aging of baby boomers, and the rise in the prison population as alternative explanations.<sup>7</sup> He also argued that if police actions had any significant impact, it was through increased surveillance, not the “Broken Windows” theory.<sup>8</sup> No one has been able to pinpoint how much variance is accounted for by any correlative factors; nor does this Article. Researchers Eck and Maguire have carefully examined the literature and the explanations which link police tactics to crime reduction and concluded that historically, each crime surge and decline may be attributable to different causes at different times.<sup>9</sup>

There is no question, however, that the reduction, especially in New York City, correlates with the introduction of new policing tactics. And in the area of

3. See Jim Newton, *The NYPD: Bigger Bolder—Is It Better?*, L.A. TIMES, Dec. 24, 1995, at 1. Using data to target police efforts has received empirical and academic support. See Dan M. Kahan, *Privatizing Criminal Law: Strategies for Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1864–65 (1999); David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 480 (1997) (discussing Boston’s experience).

4. See generally WILLIAM BRATTON, *TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC* (1998). The LAPD’s version of COMPSTAT is called FASTRAC. See Terry McDermott, *Behind the Bunker Mentality: Professional, Aggressive Policing Made LAPD a Global Model. But With it Came Fierce Insularity and Periodic Excesses, Leaving the Force Out of Step With the Times*, L.A. TIMES, June 11, 2000, at A1. Boston has implemented Operation Ceasefire. See *Boston Police Department 1999 Annual Report*, (visited Jun. 25, 2001), available at <[www.ci.boston.ma.us/police/1999%20annual/toc.htm](http://www.ci.boston.ma.us/police/1999%20annual/toc.htm)>. San Diego uses SARA. See *San Diego Police Department* (visited Jun. 25, 2001) <<http://www.sannet.gov/police/crime-prevention/np.shtml>>.

5. See George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders’ Views of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217, 1218–21 (1998) (claiming that the NYPD embraced Broken Windows; targeted crimes included drinking in public and riding a bicycle on the sidewalk); Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. ON POVERTY L. & POL’Y 165, 167 (1999) (same). But see *infra* note 53.

6. See, e.g., Bernard Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

7. See *id.* at 331–39.

8. See *id.* at 339–43.

9. See John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA* 250–51 (Alfred Blumstein & Joel Wallman eds., 2000).

gun crime, the correlation may be causal. Professors Jeffrey Fagan, Frank Zimring, and June Kim, who generally question the police role in reducing crime, nonetheless found that police efforts to get guns off the street seemed to decrease gun homicide.<sup>10</sup>

Thus, whatever factors caused the overall crime decline, three conclusions seem incontrovertible. First, the NYPD carried out an aggressive "stop and frisk" policy in communities of color that focused on, but was not limited to, collecting guns.<sup>11</sup> Police confiscated guns and drugs using their authority to stop and frisk, and to search incident to arrests for minor misconduct, such as riding a bicycle on the sidewalk or drinking beer in public. Second, blacks and Hispanics, especially blacks, were disproportionately the target of these stops.<sup>12</sup> Third, the residents of these now safer neighborhoods are those who appear most fearful and critical of the New York City police.<sup>13</sup> Their discontent manifests itself in many forms.

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10. See Jeffery Fagan et al., *Declining Homicide in New York, A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1313-17 (1998) (analyzing homicide data and concluding that policing caused or helped cause the drop in gun-related homicides); see also Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175, 1196 (1998) (correlating increased gun possession with increased gun violence); David Garland, *Criminology, Crime Control, and "The American Difference"*, 69 U. COLO. L. REV. 1137, 1150 (1998) (claiming that stops and searches drive up costs of gun possession, discouraging it and lowering violent potential of incidents).

11. Whether enacted in response to James Q. Wilson's arguments or not, this policy mirrors Wilson's suggestions in James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAGAZINE, Mar. 20, 1994, § 6 at 1. Wilson predicted that such a policy would result in minorities being disproportionately targeted, and he accepted the disparate impact as a cost of reducing crime. See *id.*

12. See Eliot Spitzer, The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General, Civil Rights Bureau, Dec. 1, 1999 (New York, NY).

13. Polls of New Yorkers have consistently revealed that minorities are less happy with police than whites. The most recent Quinnipiac Poll, conducted April 23-30, 2001, found that 72% of white voters approve of the job the NYPD is doing. See *Police Practice Racial Profiling, New Yorkers Tell Quinnipiac University Poll 3-1; But Voters Feel Safe And Approve Of Police* (visited June 2, 2001) <<http://www.quinnipiac.edu/polls/nycpolls.html#NYC0501b>>. On the other hand, black voters disapprove of the NYPD's citywide performance by a margin of 57% to 29%. *Id.* Worse, 48% of black New York City voters personally feared being the victim of police brutality. *Id.* 78% of New York City voters surveyed believed police brutality was a very serious or somewhat serious problem. *Id.* An earlier Quinnipiac Poll of New York City voters, conducted from Jan. 23-29, 2001, found that 59% of black voters disapproved of policing citywide as compared to the 64% of white voters who approve of policing citywide. See Kevin Flynn, *Poll Reveals Higher Marks for the Police*, N.Y. TIMES, Feb. 3, 2001, at B1. The poll further found that 21% of whites, 64% of blacks, and 52% of Hispanics say police brutality is "very serious." See *Our City Is Safe, 79 Percent Of New Yorkers Tell Quinnipiac University Poll; Blacks, Hispanics Still Concerned About Brutality* (visited June 2, 2001) <<http://www.quinnipiac.edu/polls/nycpolls.html#NYC0101b>>. In fact, blacks and Hispanics rank police brutality as a larger problem than crime. *Id.* In the last year, the NYPD has gained a new commissioner

In New York, civilian complaints about police spiked sharply after the NYPD changed its tactics.<sup>14</sup> More than seventy-five percent of the complainants were black or Latino.<sup>15</sup> Officers were accused of improper force, abuse of authority, discourtesy, and racial slurs.<sup>16</sup> A total of 1778 use of force allegations alone were filed in six months in 1995, "a number," writes Jim Newton, a respected *Los Angeles Times* journalist, "that is as staggering in its own right as the NYPD's crime statistics are in theirs."<sup>17</sup> Complaints, however, are not the only indicator of civilian anger with the new tactics. Discontent was also reflected in rising jury awards and settlements in police brutality cases,<sup>18</sup> low poll approval ratings,<sup>19</sup> and anti-police protests.<sup>20</sup> Civilian anger with the police even may be

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who has prioritized improving race relations. See Diane Cardwell, *Surveys to Gauge Public's Perception of Police*, N.Y. TIMES, Feb. 13, 2001, at B7; Kevin Flynn, *For Kerik, There's One Way to Run the Police, at a Sprint*, N.Y. TIMES, Mar. 26, 2001, at A1.

14. Civilian complaints increased 46% in the first six months of 1994. See Peter Mancuso, *Currents*, N.Y. NEWSDAY, Nov. 20, 1994, at A43. In just the first six months of 1995, complaints against NYPD officers rose by 32%. See Ruben Castanada, *As D.C. Police Struggle On, Change Pays off in New York*, WASH. POST, Mar. 30, 1996, at A1. The meaning of the spike in complaints is unclear because the NYPD merged with the housing and transit police around that time, significantly increasing the pool of officers to be complained against. However, the increases certainly also reflect the increased contact the police were having with civilians as a result of the emphasis on quality of life crimes.

15. See Castanada, *supra* note 14.

16. See Jim Newton, *The NYPD: Bigger Bolder—Is It Better?*, L.A. TIMES, Dec. 24, 1995, at 1.

17. *Id.*

18. Payouts by the City in brutality cases totaled \$7 million in 1990 and \$32 million in 1996. From 1991–96, victims received over \$100 million. See David A. Love, *What's Going On? Rising Tide of Police Brutality*, N.Y. AMSTERDAM NEWS, Apr. 26, 1997, at 13. Court settlements alone went from \$20.6 million in 1995 to \$28.3 million in 1998. See *Currents & Books*, NEWSDAY, Aug. 29, 1999, at B1.

19. According to the Polling Institute at Quinnipiac College in Hamden, Conn., the degree of trust citizens had for New York City police declined in 1997, even as crime rates were falling. In a report released October 2, 1997, only 48% of New York City voters approved of the way in which NYPD officers were doing their jobs—down from 61% in February of 1996. In the survey, which was conducted shortly after the Abner Louima case, 80% of respondents described police brutality as a "very serious" or "somewhat serious" problem. See Vivian S. Toy, *Confidence in Police Has Fallen, a Poll Finds*, N.Y. TIMES, Oct. 3, 1997, at B7. Since dipping to 48%, the NYPD's overall approval rating has remained largely unchanged; Quinnipiac asked New York City voters about their approval of police on April 4, 1999, June 17, 1999, March 15, 2000, and April 20, 2000, and the approval ranged from 43%–49%. See *New York City Trends* (visited June 2, 2001) <<http://www.quinnipiac.edu/polls/archives.html#NYCtrends>>.

Across the United States, a national poll has revealed that blacks are twice as unhappy with the police as whites are, and although the rates varied across cities, the 2 to 1 ratio was fairly constant. The national rate of discontent was 24% for blacks, 10% for whites, and 15% over all. See Stephen K. Smith et al., *Criminal Victimization and Perceptions of Community Safety in 12 Cities, 1998*, BUREAU OF JUSTICE STATISTICS, May, 1999 (NJC 173940). A Gallup Poll conducted nationally from September 24 through November 16, 1999 asked people if they had a favorable or unfavorable opinion of their local police. See *The Gallup Organization* (visited June 2, 2001) <<http://www.gallup.com/poll/>>.

influencing jury verdicts in the Bronx, a heavily policed (and high crime) borough.<sup>21</sup>

The policing tactic generating this discontent has a name: racial profiling. Police often over identify people of color as "symbolic assailants," that is, "as persons who use gesture, language, and attire that police have come to recognize as a prelude to violence."<sup>22</sup> Racial profiling—police targeting people solely or primarily because their skin color—is nothing new in American history, nor has it been confined to the states of the Confederacy.<sup>23</sup> The 91,000 documents released in late November 2000 by New Jersey authorities show that prosecutors and police officials knew and approved of racial profiling for many years.<sup>24</sup> The documents clearly show that the popular "war on drugs" provided an acceptable justification for New Jersey state troopers to pull over and search blacks and Hispanics on the state's roadways.<sup>25</sup> It was on New Jersey roadways that black and Hispanic drivers

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indicators/indrace.asp>. Fifty-eight percent of blacks liked their police, while 36% did not. Whites were sharply more approving with 85% having a favorable opinion of their local police. *Id.* A poll taken of Los Angeles County residents in the wake of the O.J. Simpson acquittal revealed other distrust: 75% of blacks and 56% of Latinos believed that the police planted evidence against Simpson. Only 21% of whites believed so. See Cathleen Decker, *Trial & Error Focus Shifts to a Justice System and Its Flaws*, L.A. TIMES, Oct. 8, 1995, at S2.

20. One major recent protest against the police was triggered by the killing of Amadou Diallo. See Laura Italiano et al., *1,175 Busted in Protests Hoping DA Will OK Deal*, N.Y. POST, Mar. 30, 1999, at 16.

21. See Tara George, *Bronx Justice a Coin Toss*, DAILY NEWS, July 11, 2000, at 22.

22. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL*, LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 44–47 (3d ed. 1993); see also Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 NYU L. REV. 956, 983–91 (1999) (discussing how social science research of categorizing, schemas, and stereotyping explains police behavior).

23. See Randall Kennedy, *Race, Law and Suspicion: Using Color As a Proxy for Dangerousness*, in RACE, CRIME AND THE LAW 136–63 (1997); Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 234 (1998); David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 180–81 (1986); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1271–75 (1998); see generally GUNNER MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM IN MODERN DEMOCRACY* (1941) (examining Southern police participation in lynchings); JAMES RICHARDSON, *NEW YORK POLICE: COLONIAL TIMES TO 1901* (1970) (describing police participation in riots against blacks); Dorothy Roberts, *Foreward: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

24. See David Kocieniewski & Robert Hanley, *An Inside Story of Racial Bias and Denial*, N.Y. TIMES, Dec. 3, 2000, at 53.

25. See *id.* New Jersey's practices were heavily influenced by the Drug Enforcement Administration (DEA), which enlisted local police in the Federal War on Drugs. DEA officials praised New Jersey troopers for their contribution to "Operation Pipeline" and hailed the troopers as exemplary models for other states. See *id.*

were unjustifiably stopped and searched so often that they complained of an unwritten violation in the state's traffic code, "Driving While Black."<sup>26</sup> To conceal their targeting of blacks, some New Jersey troopers engaged in "ghosting."<sup>27</sup> Troopers would stop a black motorist and record the facts of the stop on a form. But instead of recording the black motorist's license plate number, the officers would record the plate number of a passing car driven by a white.

On February 2, 2001, *The New York Times* front page lead story reported that New Jersey Attorney General, John J. Farmer Jr., had settled the state's most notorious racial profiling incident. Four young black and Hispanic men were driving a van to a college basketball game when they were stopped by New Jersey state troopers. Three of the men were shot and wounded when the van (accidentally, according to the driver) began to back up toward the trooper. The case, which was settled for thirteen million dollars, cast a nationwide spotlight on racial profiling as a civil rights issue.<sup>28</sup>

In an effort to dampen the aftershocks of the case, the Attorney General dismissed criminal charges against 128 other defendants, some of whom were actually in possession of guns and drugs.<sup>29</sup> In a statement that reflected the frustration of a public official whose cases are tainted by unlawful police conduct, Mr. Farmer wrote: "The defendants in these cases may have prevailed in their motions to suppress, but they are criminals nevertheless."<sup>30</sup> Nor did the State, in the civil case settlement agreement, admit guilt in the shooting of the three men.<sup>31</sup> But attorney Peter Neufeld, one of the lawyers representing the men, said that the size of the settlement "speaks volumes about what happened that night."<sup>32</sup> New Jersey continues to face civil cases from motorists who were stopped and not charged.<sup>33</sup>

It is difficult to know whether and how much New Jersey state troopers have changed their practices. Whatever they choose to do reveals a core truth about the policing enterprise: although it is authorized by law, its operational strategies are powerfully influenced by socio-political factors. Extra-legal, idiosyncratic influences such as the personalities of elected officials, the nature of

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26. See *id.*; see also American Civil Liberties Union, *Arrest and Racism: Racial Profiling in America* (visited May 1, 2001) <<http://www.aclu.org/profiling/tales/index.html>> (providing anecdotes from 15 states); see generally Kathryn K. Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999) (citing cases to describe such corollary phenomena as walking, idling, standing, and shopping while black).

27. David Kocieniewski, *Trenton Charges 2 Troopers with Falsifying Drivers' Race*, N.Y. TIMES, Apr. 20, 1999, at B1.

28. Iver Peterson & David M. Halbfinger, *New Jersey Agrees to Pay \$13 Million in Profiling Suit*, N.Y. TIMES, Feb. 3, 2001, at A1.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Iver Peterson, *Profiling Disclosure May Prompt Dismissal of Cases and Review of Judge*, N.Y. TIMES, Nov. 29, 2000, at B6.

their political commitments, the values conveyed by police managers and prosecutors, and the culture of the police organization shape officer behavior more than judicial decisions do. This is notably true in the gun and drug context, where police may choose to ignore the Fourth Amendment search requirements and focus on confiscation rather than conviction.<sup>34</sup>

Defenders of profiling, as Part II of this Article discusses, argue that profiling is an effective police tactic soundly grounded in empirical data. Using data from several police departments and contexts this Article questions that claim. Part III takes on the more difficult question of how, given the unique socio-political context of policing, racial profiling can be minimized.

## II. RACIAL PROFILING AND THE MYTH OF EMPIRICISM

Few, if any, public or law enforcement officials endorse "racial" profiling. Former President William Jefferson Clinton called profiling "morally indefensible," charging that "[r]acial profiling is in fact the opposite of good police work where actions are based on hard facts, not stereotypes."<sup>35</sup>

And yet, "profiling" (without the discrediting adjective "racial")<sup>36</sup> has been justified as good policing, based on suspect descriptions and crime patterns.<sup>37</sup>

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34. See SKOLNICK, *supra* note 22, at 214 (describing this phenomenon); see also ARLENE SCHULMAN, 23RD PRECINCT THE JOB 195 (2001) (making this point more recently).

35. Clinton ordered federal law-enforcement agencies to compile race data on those they question, search, or arrest to facilitate detecting profiling. See Steven A. Holmes, *Clinton Orders Investigation on Possible Racial Profiling*, N.Y. TIMES, June 10, 1999, at A22. Even Congress is concerned; in recent years it has considered legislation to quantify the "driving while black" phenomenon. See *Traffic Stops Statistics Study Act of 2000*, H.R. 1443, 106th Cong. (2000); *Traffic Stops Statistics Study Act of 1999*, S. 821, 106th Cong. (1999).

36. Racial profiles have always been condemned, even from the first newspaper usage, although profiles not specifically so labeled have been consistently defended. A search of the "Newsgroup File-All" on LEXIS of "Racial w/1 profil! and police" uncovered the first usage in 1987, where highway troopers were denying they used "racial" profiles to effect pretextual stops. Nonetheless, the troopers looked for Hispanics and cars with out of state plates. See *Utah Troopers Seize Couriers in 'Cocaine Lane' Crackdown*, THE SAN DIEGO UNION-TRIB., Oct. 8, 1987, at A32.

Only one other use of racial profile showed up before 1990; between 1990 and the start of 1994, 8 uses; from 1994 until 1996, there were 31 hits; 1996 until 1998, there were 63; from 1998 until 1999, there were 187; and then an enormous spike occurred—from 1999 to 2000, over 1000 hits; and from January 2000 through October 1, 2000, over 1000 again.

37. New York Mayor Rudolph Giuliani asserted that the NYPD stopped and frisked people on the basis of suspect descriptions. Giuliani argued that 71% of crime victims in specific precincts had said their attackers were black, and that 63% of the stops in those precincts were of blacks. Giuliani's defense seems to equate "black" with a suspect description. See Kevin Flynn, *Two Polar Views of Police and Race at U.S. Hearing*, N.Y. TIMES, May 27, 1999, at B5. William J. Stuntz has defended police reliance on profiles this way:

Profiling has achieved such legitimacy within police forces that officers have been trained to do it.<sup>38</sup> In fact, most officers may believe in good faith that they are “playing the percentages” when they profile.<sup>39</sup> But if police reject racial profiling as wrong, what cues do they typically attend to when they profile? In practice, is there any significant kind of profiling other than racial?

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The problem is not, as some would have it, that the police are too quick to use “profiles” when identifying drug suspects. Given the nature of both street-level policing and downscale drug markets, they could hardly do otherwise: *How else is one to identify* plausible candidates for street stops *than by a set of readily observable visual cues?*

William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1824 (1998) (emphasis added). A more dismissible defender is Jared Taylor, a white separatist who defends using race in traffic stops on the basis of crime rates. Mr. Taylor was the guest of the National Association of Police Organizations, which invited him to debate profiling before the group. The executive director of the police group said he had been unaware of Taylor’s openly racist history when extending the invitation. Chillingly, he said that he invited Taylor after seeing him present his profiling views on C-Span. See Michael Janofsky, *Race Profiling Is Debated at a Meeting for Police*, N.Y. TIMES, Aug. 15, 1999, at 19. Even critics of racial profiling, like Professor Randall Kennedy, concede the “empiricism” of profiling. See Randall Kennedy, *Suspect Policy*, THE NEW REPUBLIC, Sept. 13 & 20, 1999, at 32. However, the evidence he offers of disproportionate criminality to support the empiricism—that blacks commit 25% of the violent crime despite being 12% of the nation’s population—is simply not sufficient support. First, the statistic means that 75% of violent crime is done by nonblacks. 75% of violent criminals thus will be missed by reliance on a black profile. Secondly, national statistics cannot have any relevance in any individual’s case.

38. The New Jersey documents revealed that officers, including minority officers, were trained to racially profile. See David Kocieniewski & Robert Hanley, *An Inside Story of Racial Bias and Denial*, N.Y. TIMES, Dec. 3, 2000, § 1 at 53. Police elsewhere received similar training. A police organization, Black Cops Against Police Brutality, revealed that a police training manual offered this advice for car stops:

Jamaicans/Rastafarians have been known to operate and transport narcotics in the following types of vehicles...Toyota Corollas and Celicas, a Datsun B210, BMWs, and Volvos...[cars suspected of drug trafficking] may display the Ethiopian flag or the colors of the flag...red, yellow and green, Jamaican paraphernalia, bumper stickers, or slogans.

*Police Training Manual Is Criticized*, N.Y. TIMES, Mar. 17, 1999, at B5. In 1993, a former New Hampshire state police officer, as part of a motion to dismiss charges against 26 blacks, reported that he had been instructed to use racial profiles. See Alabama Opelika, *Across the USA: News from Every State*, USA TODAY, July 20, 1993, at 8A. On paper at least, the NYPD stands in sharp contrast, counseling its officers:

Do not be a victim of the “SYMBOLIC OPPONENT SYNDROME,”...[the] preconceived notion that places suspects into a “BAD GUY” category because of race, nationality, grooming, or mode of dress....[Do not] reach any definite conclusions that may lead to irreversible police action because of a suspect’s appearance. Looks can be deceiving and should not form the basis for action.

Peter Noel, *I Thought He Had a Gun*, THE VILLAGE VOICE, Jan. 13, 1998, at 44.

39. Jeffrey Goldberg, *The Color of Suspicion*, THE N.Y. TIMES MAGAZINE, June 20, 1999, § 6 at 51.

It is worth considering the meaning of the term "profile." A *profile* differs fundamentally from a *description*. A *description* is witness generated and is used to guide police to an individual who committed a reported crime. A *profile* is a police conceptualization of a type of criminal person and is used as a screening device to sift through the public for persons committing unreported, victimless crimes.<sup>40</sup> Like a sociological model, the accuracy of a profile is contingent on the quality of the data supporting it.

In defense of profiling, Los Angeles Police Chief Bernard Parks offered the following illustration:

We have an issue of violent crime against jewelry salespeople...the predominant suspects are Colombians. We don't find Mexican Americans, or blacks, or other immigrants. It's a collection of several hundred Colombians who commit this crime. If you see six in a car in front of the Jewelry Mart, and they're waiting and watching people with briefcases, should we play the percentages and follow them? It's common sense.<sup>41</sup>

Indeed, this profile makes a good deal of sense because its specificity increases its accuracy. In this example, the profile:

1. Focuses on a limited type of criminality, presumably theft or robbery, against a single type of victim, jewelry salespeople.
2. Targets a distinctive pattern of ethnic offenders, Colombians.
3. Places the targeted offenders in a specific location, the Jewelry Mart, where victims can be found.
4. Describes actions that perpetrators of the crime, seeking a victim, could be expected to take—waiting and watching for people with briefcases.

Although such behavior could be innocent, the information suffices to meet a "reasonable suspicion" standard. Targeting men who fit the profile properly plays the percentages. Stopping and questioning them should detect a significantly higher proportion of violent jewelry thieves than would random stops on the street.<sup>42</sup>

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40. Because it describes a criminal "type," a profile shares the same risks and flaws that status crimes like vagrancy do: they punish being rather than doing. See generally *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (providing a discussion of status offenses); Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3. CRIM. L. BULL. 205 (1967) (same).

41. Goldberg, *supra* note 39.

42. If a policeman cannot visually distinguish between a Colombian and a Mexican American, using this profile will not increase the percentages of success. Similarly, if Colombians are not in fact responsible for most of the target crimes, the profile will also be ineffective.

Such *empirically based* profiles can legitimately include race and ethnicity. If factual support for such inclusion exists, listing race or ethnicity, along with other identifying factors, is and should be lawful.<sup>43</sup> By contrast, a *racial profile* generally identifies one prominent characteristic: black or brown skin, although “young” and “male” may also be included.<sup>44</sup> Unlike the Jewelry Mart example, the profile “young black male” is not sufficiently detailed to serve as an accurate screening device. Empirically grounded profiles should “work.” Police using profiles should find the same number of offenders while stopping fewer people—the ratio of false to true positives should decrease. Successful profiles “lower the cost of obtaining and processing information”<sup>45</sup> and make policing more efficient.

Rather than “work,” racial profiles *increase* the rate of false to true positives, disproportionately raising the social cost of policing to innocent non-whites.<sup>46</sup> The inefficiency of racial profiles results from the basis of their information: overbroad or false assumptions, rather than Jewelry Mart-style data analysis. One assumption used to justify race-triggered searching is the belief that non-whites are more likely to be involved in the drug trade. But several sets of data challenge this assumption.

First, rates of reported marijuana use (and thus possession) are higher for whites than nonwhites.<sup>47</sup> Similarly for cocaine, whites use more than blacks and until recently, Hispanics used more than either whites or blacks.<sup>48</sup> Hispanic usage rates in 1997 and 1998 were virtually equal to those of whites, though still more

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43. Race or national origin legally can be considered as one factor. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563–64 n.16 & 17 (1976); *United States v. Brigioni-Ponce*, 422 U.S. 873, 886–87 (1975); Randall Kennedy, *Race, Law and Suspicion: Using Color as a Proxy for Dangerousness*, in *RACE, CRIME AND THE LAW* 136 (1997).

44. Recently, the Second Circuit validated police actions based on a profile of “a young black man with a cut on his hand,” a profile the majority present this way, “this description included not only race, but also gender and age, as well as the possibility of a cut on his hand.” See *Brown v. City of Oneonta*, 221 F.3d 329, 337–38 (2d Cir. 1999) (as amended Aug. 8, 2000). Searching for the attacker of an elderly white woman, the police asked over 200 black people in or passing through the town to show their hands. *Id.* at 334. The “description’s” use as a profile is clear when considering what percentage this 200+ represents: fewer than 300 black people live in town, and some 78 live on the adjacent SUNY campus. *Id.* These short inquiries—excuse me sir, we’re the police, show us your hands—in almost all cases, did not rise to the level of a *Terry* stop, held the court, and thus the actions based on the young black male “description” were legal. *Id.* at 340. The “description” did not create the reasonable suspicion necessary to justify such a stop. *Id.* at 340. For an explanation of *Terry* stops, see *infra* notes 57–67 and accompanying text.

45. See Kennedy, *supra* note 37.

46. See *infra* notes 52, 60–67 and accompanying text.

47. See National Center for Health Statistics of the Centers for Disease Control and Prevention, *Table 62, Use of Selected Substances in the Past Month by Persons 12 Years of Age and Over, According to Age, Sex, Race, and Hispanic Origin: United States, Selected Years 1979–98*, (visited May 4, 2001), available at <<http://www.cdc.gov/nchs/products/pubs/pubd/hus/tables/2000/00hus062.pdf>>.

48. See *id.*

than that of blacks.<sup>49</sup> Second, the famed disproportionate rates of offending, at least in the area of drug crimes, are likely an artifact of police tactics, not underlying offending rates.<sup>50</sup> Third, the U.S. Customs Service's seizure data demonstrate that blacks and Hispanics are less likely than whites to be possessing drugs.<sup>51</sup> Finally, data from the Maryland State Police show that black and white motorists driving through Maryland on Interstate 95 are discovered with drugs at statistically indistinguishable rates, despite vastly greater numbers of searches of black motorists.<sup>52</sup> Unfortunately, such data are difficult to obtain, since police do not routinely publicize their search success rates, much less break down search results by crime or race.

The Maryland statistic is based on data turned over to the ACLU by the Maryland State Police. This data sharing was required as part of a settlement of a racial profiling suit.<sup>53</sup> If the changes mandated by the settlement were effective, this data should have revealed an improvement in police tactics. Rather than document an end to profiling, however, these data are being used in a new ACLU suit to allege that profiling has remained in force.<sup>54</sup> The new complaint also cites a 1992 Confidential Criminal Intelligence Report issued for Maryland law enforcement personnel that urged police in Allegheny County to target African Americans because crack dealers and couriers "are predominantly black males and females."<sup>55</sup>

The Maryland State Police may have learned racial profiling from the DEA.<sup>56</sup> David Cole reviewed profiles ostensibly relied upon by DEA officers in identifying drug couriers.<sup>57</sup> Examining the testimony of the officers in various cases, Cole found that all of the following factors were part of the DEA drug courier profile:

[A]rrived late at night; arrived early in the morning; arrived in the afternoon; one of the first to deplane; one of the last to deplane; deplaned in the middle; purchased ticket at the airport; made reservation on short notice; bought coach ticket; bought first-class ticket; used one-way ticket; used round-trip ticket; paid for ticket with cash; paid for ticket with small denomination currency; paid for ticket with large denomination currency; made local telephone

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49. See *id.*

50. See David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 294-297 (1999); William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1819-24 (1998).

51. See Harris, *supra* at 295-96 & n.129.

52. See *id.*

53. See *id.* at 280 & nn.83-86.

54. See Complaint, Northern Division Maryland State Conference of NAACP Branches et al., v. Department of Maryland State Police et al., Civil Action No. CCB-98-1098, ¶¶ 29-34, available at <<http://www.court tv.com/legaldocs/rights/raceprofiling.html>>.

55. See *id.* at ¶ 25.

56. See *supra* notes 24-25.

57. See generally David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999).

calls after deplaning; made long distance telephone calls after deplaning; pretended to make telephone call; traveled from New York to Los Angeles; traveled to Houston; carried no luggage; carried brand-new luggage; carried a small bag; carried a medium-sized bag; carried two bulky garment bags; carried two heavy suitcases; carried four pieces of luggage; overly protective of luggage; disassociated self from luggage; traveled alone; traveled with a companion; acted too nervous; acted too calm; made eye contact with officer; avoided making eye contact with officer; wore expensive clothing and jewelry; dressed casually; went to restroom after deplaning; walked rapidly through airport; walked slowly through airport; walked aimlessly through airport; left airport by taxi; left airport by limousine; left airport by private car; left airport by hotel courtesy van; suspect was Hispanic; suspect was black female.<sup>58</sup>

The self-contradictory nature of the profile "factors" defeats any claim that they were empirically based. Part of the problem for police is that rational drug carriers will try not to bring attention to themselves. Consequently, police may come to rely on racial stereotypes.

The reliance on an allegedly *empirical*, but actually *racial*, profile is easiest to prove in the area of pretextual car stops since drivers often violate some traffic law, such as exceeding the posted speed limit.<sup>59</sup> Indeed, if drivers drove under the speed limit, they might bring attention to themselves by violating the widely accepted norm that it is permissible to drive several miles over the limit.

Though more difficult to prove, racial profiling also affects pedestrian stops and enforcement. Street policing affords officers two very different opportunities to search large numbers of people: a *Terry*<sup>60</sup> stop and frisk, and a search incident to pretextual misdemeanor arrest.<sup>61</sup> These two search opportunities

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58. *Id.* at 1077-78 n.109.

59. Pretextual car stops have been upheld by the U.S. Supreme Court. *See Whren v. United States*, 517 U.S. 806 (1996); *see also* Abraham Abramovsky & Johnathan I. Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725 (2000) (providing a detailed analysis of how *Whren* changed courts' analyses of traffic stops). Currently, all jurisdictions except Washington state and two appellate districts in New York state have adopted *Whren*. *See id.* at 738 n.98. The Court recently announced an outer limit to *Whren*; pretextual roadblocks are not constitutional. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

60. *Terry v. Ohio*, 392 U.S. 1 (1968). The *Terry* decision drew a line between an arrest and an investigatory stop and between a "frisk of the outer clothing for weapons and a full-blown search for evidence of a crime." *Id.* at 8. The court said, "This scheme is justified in part upon the notion that a 'stop' and a 'frisk' amount to a mere 'minor inconvenience and petty indignity,' which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion." *Id.* at 10-11 (noting the justification offered by law enforcement officials).

61. The targeted misdemeanors are quality of life crimes. Broken Windows theory, ostensibly embraced by the NYPD, postulates that focusing on such crimes indirectly reduces serious crime by changing the street environment. However, the NYPD has used the misdemeanors to *directly* target serious crime by legitimating the identification

have important differences, and this Article discusses them separately. However, both facilitate race-centered policing.

To legitimate a *Terry* frisk, an officer needs "reasonable suspicion" to believe that "crime is afoot" and that the suspect is dangerous, because armed.<sup>62</sup> Theoretically, if "reasonable suspicion" is a strictly enforced, high standard, *Terry* frisks should be infrequent. Nevertheless, working cops may choose to discount the judicial standard even if strictly enforced.<sup>63</sup> If New York City is an appropriate

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and searching of suspects. Kelling and Bratton first applied Broken Windows to the New York subway, and despite the postulated social dynamic of crime reduction, Kelling himself made clear that the "dividends" of arresting turnstile jumpers (discovering outstanding warrants and concealed weapons through the search legitimized by the farebeating arrest) were critical for both decreasing the crime rate and increasing officer acceptance. Officers were pleased to use quality of life violations as a stepping stone to arrest serious criminals. See George L. Kelling & Catherine M. Coles, *Fixing Broken Windows*, in TOUCHSTONE 134, 108–56 (1996); see also Jim Newton, *The NYPD: Bigger Bolder—Is It Better?* L.A. TIMES, Dec. 24, 1995, at 1 (reporting on Jack Maple, former NYPD Commissioner and advisor to then-Commissioner Bratton, who spoke about the impact of searching for and seizing guns and discussed how misdemeanants are identified, searched and interrogated as part of strategy); James Rutenberg & John Marzulli, *Crime Drop in Subway, Down 24% This Year, NYPD Says*, N.Y. DAILY NEWS, Dec. 16, 1998, at 6 (quoting police and attributing crime decline both to discovery of criminals pretextually through order enforcement and to increased ridership's reduction of criminal opportunities). From 1995 to 1996, as N.Y.'s quality of life campaign intensified, arrests surged 21%, primarily for misdemeanors. See Michael Cooper, *You're Under Arrest*, N.Y. TIMES, Dec. 1, 1996, at §13 at 1. The increased misdemeanor enforcement has overwhelmed NY's criminal justice system. See *New York's Understaffed Courts*, N.Y. TIMES, Feb. 23, 1999, at A22; David Rohde, *Critical Shortage of Lawyers for Poor Seen*, N.Y. TIMES, Dec. 12, 1999, at 59. New York's experience is relevant elsewhere, as quality of life movements are popular throughout the country. See Christine L. Bella & David L. Lopez, Note, *Quality of Life—At What Price: Constitutional Challenges to Laws Adversely Affecting the Homeless*, 10 ST. JOHN'S J. L. COMM. 89, 90–92, nn.7–12 (1994).

62. See *Terry*, 392 U.S. at 30.

63. There is evidence that the judicial standard is in fact very low, rendering *Terry* stops discretionary even if police obey the standard. See David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S J. L. REV. 975 (1998); Cole, *supra* note 57, at 1071–74. Two Supreme Court cases that treat the *Terry* threshold as a minimal one are *Illinois v. Wardlow*, 528 U.S. 119 (2000) and *United States v. Sokolow*, 490 U.S. 1 (1989). In *Wardlow*, the Court held "unprovoked flight" at sight of police officer, combined with "high crime area" equals reasonable suspicion. *Wardlow*, 528 U.S. at 676. The facts of *Wardlow* reveal the weakness of the standard; Justice Stevens notes in dissent that *Wardlow*'s "unprovoked flight" may not have had anything to do with perceiving police. *Id.* at 678–84 (Stevens, J. dissenting). For example, the arresting officer could not remember if the car he was in, which *Wardlow* ostensibly ran from, was marked or unmarked. *Id.* at 183–84; see also Terry L. Goddard, Jr., *Current Event: Illinois v. Wardlow No. 98-1036*, 2000 WL 16315 (U.S. Jan. 12, 2000), 8 AM. U.J. GENDER SOC. POL'Y & L. 217 (2000) (providing a more detailed look at the impact of *Wardlow* on *Terry* stops). In *Sokolow*, the Court noted that a *Terry* stop requires some minimal level of objective justification. See *Sokolow*, 490 U.S. at 6–8.

example, *Terry* stops and frisks are common, concentrated in minority urban neighborhoods, and effected with slight regard for the legal standards.<sup>64</sup>

A recent and comprehensive study by the New York Office of Attorney General Elliot Spitzer, in conjunction with Columbia University's Center for Violence Research and Prevention, showed that racial disparities in the NYPD's stops and frisks could not be fully accounted for by demographics and crime rates.<sup>65</sup> Blacks, who comprise about a quarter of the City's population, account for about half of those stopped by the police and more than 60 percent of those stopped by the NYPD's elite Street Crimes Unit ("SCU").<sup>66</sup> Interestingly, the largest "Suspected Charge Category" justifying the stops, 34%, was for "Weapons."<sup>67</sup> 58.6 % of those stopped were black, 32.3% were Hispanic, and the remainder, fewer than 10%, were white or other.<sup>68</sup>

It could be argued, as it was by Commissioner Howard Safir, that the stops were made in high crime areas, which was true.<sup>69</sup> The highest rate of stop-and-frisk activity took place in precincts with high crime and majority black and Hispanic residents.<sup>70</sup> Nevertheless, in precincts where blacks and Hispanics were less than ten percent of the population, they were more than half the persons "stopped."<sup>71</sup>

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64. Only 57.5–61% of NYPD stops and frisks were clearly constitutional. *See* Spitzer, *supra* note 12, at 167.

65. *See id.* at ix. The report acknowledged that not all frisks are recorded on forms, but statistical analysis of the data verified that the sample was sound. *See id.* at 91–92. While the study may not have been compromised by the absent forms, their absence suggests the absolute number of people suffering false positives may be much greater than the recorded data show. *See id.* New York Attorney General Eliot Spitzer claimed that officers had told him they fill out forms as rarely as "one in five, or one in ten." *See* Richard Perez-Pena, *Police May Have Understated Street Searches, Spitzer Says*, N.Y. TIMES, Mar. 23, 1999, at B5. Spitzer's off-the-cuff remark may have been an overstatement; N.Y.'s Civilian Complaint Review Board (CCRB) found that, in the non-arrest cases it fully investigated, the forms were filled out about 52% of the time they were required. *See* William K. Rashbaum, *Review Board Staff Faults Police on Stop-and-Frisk Reports*, N.Y. TIMES, Apr. 28, 2000, at B1. Unsurprisingly, the NYPD through Commissioner Safir challenged the validity of the Attorney General's report, critiquing the data and the methodology. *See* Kit R. Roane, *Safir Attacks State Finding of Racial Inequity in Searches*, N.Y. TIMES, Dec. 2, 1999, at B3. Professor Jeffery Fagan, of Columbia's Center for Violence Research and Prevention, did the empirical research underlying the Spitzer report. Fagan has just published a very detailed follow-up analysis of the data, which documents how the NYPD stops and searches are racially disparate, amount to "policing poor people in poor places," and have little to do with urban quality of life or crime. *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 (2000).

66. Spitzer, *supra* note 12, at 109.

67. *Id.* at 110.

68. *Id.*

69. *Id.* at 93 n.7 and accompanying text.

70. *Id.* at 117–22.

71. *Id.* at 102 tbl.IA.2.

Not only did the NYPD stop non-whites more often (relative to crime rates and demographics), they also stopped them less efficiently. The study broke down the false-to-true positive rates by race and revealed that city-wide, blacks were stopped 9.5 times per arrest, Hispanics 8.8 times, whites 7.9 times, and others 9.0 times.<sup>72</sup> The NYPD's SCU was even more discriminatory: it frisked 16.3 African Americans for every one that they arrested, 14.5 Latinos per arrest, 9.6 whites per arrest, and 15.9 people of other ethnicities per arrest.<sup>73</sup> The stops by the SCU are significant because the unit made fully 11% of the 174,919 stops analyzed by the report, despite being only 1% of the overall force.<sup>74</sup> In sum, we might conclude that the SCU was nearly twice as good at assessing the dangerousness of whites than of blacks, or that the SCU police were twice as likely to frisk a black as a white, given comparable perceptions of criminality.

Race was not the only factor correlating with the efficiency of stops. The constitutionality of the stops<sup>75</sup> strongly correlated with the success of the attendant searches. Citywide, when police officers (SCU and non-SCU) lacked constitutional justification, they stopped 29.3 people in order to make an arrest; but when they did have constitutional justification, they stopped 7.3 persons per arrest.<sup>76</sup> Such a correlation makes sense since the constitutional standard—*reasonable suspicion*—is designed to ensure that suspects are more likely than not to be guilty of a crime. Thus, it seems sensible to infer that in stops where *reasonable suspicion* was lacking, the decision to frisk was influenced by some other factor—likely the race of the suspect.<sup>77</sup>

A less comprehensive study was conducted of pedestrian stops by the Philadelphia police.<sup>78</sup> Unfortunately, the study did not calculate false positive rates, and thus does not as clearly demonstrate non-empirical profiling. However, the results suggest that racial bias influences police decisions to stop and frisk, and it suggests a pattern of widespread unconstitutional frisking.<sup>79</sup> If the police in

72. See *id.* at 112 tbl.I.B.1.

73. *Id.*

74. *Id.* at 111.

75. See *id.* at 145–60 (explaining the methodology in detail).

76. *Id.* at 165 tbl.II.B.2.

77. Unfortunately, unconstitutional stops were not rare: only approximately 60% of the NYPD's and the SCU's stops were clearly constitutional. See *id.* at 167 tbl.II.B.3.

78. *Plaintiffs' Fourth Monitoring Report, Pedestrian and Car Stop Audit*, July 1998 (prepared for the Eastern District of Pennsylvania as part of the consent decree in Civil Action 96-CV-6045).

79. The limited study examined the stated justifications for the stops and the racial distributions of the stops, as well as the demographics of the precincts in which the stops were recorded. *Id.* at 2–18. The data analyzed included one week of stops in two precincts, two weeks of data from a third, and a month of stops recorded by the city-wide narcotics task force. Only stops with race information were included. Of the 425 stops recorded by the precincts, 337 were of non-whites. The three precincts had these demographics: 70.3% African American and 22.6% Caucasian (230 stops); 6.5% African American and 91.2% Caucasian (56 stops); and 14.3% African American and 79.4% Caucasian (139 stops). See *id.* at 16, 26–29. Only half the stops occurred in a majority African American precinct, and yet 75% of the stops were of African Americans. 259 of the

Philadelphia are anything like their New York brethren, the data may suggest that high rates of false positives are suffered by all races (from the high rate of unjustified searches) and that non-whites suffer exceptionally high false positive rates.

The potential for race-based enforcement in the context of a *Terry* stop is obvious, given that the stop is triggered solely by an officer's perception of suspiciousness. At first glance, misdemeanor enforcement seems insulated from the problem because the arresting officer can point to the misdemeanor as the motive for his action. However, the wide violation of minor misdemeanors like "jaywalking" or "riding a bicycle on the sidewalk" means these crimes offer police discretionary authority not unlike earlier statutes that have been voided for vagueness.<sup>80</sup> The NYPD has explicitly embraced pretextual misdemeanor arrests as a strategy to search for guns.<sup>81</sup> Given its tendency toward racially influenced behavior in *Terry* stops, it is likely that misdemeanor enforcement is similarly slanted.

Unfortunately, no easy statistic, such as a false-to-true positive ratio, can be calculated to demonstrate the influence of race in pretextual enforcement decisions. In the highway context, the problem can be identified by stop and search rates because traffic studies can identify how many violators drive a specific stretch of road and what percentage are non-white. In the street misdemeanor context, no baseline data (such as the number and race of speeding drivers) are calculable.

The baseline data problem is compounded by the nature of some of the offenses targeted, such as drinking in public. Summertime heat can turn the sidewalks of poor neighborhoods into dens of "criminality" in a way that does not happen in wealthier areas. Neighbors in poor areas will leave their crowded, uncooled apartments to gather in front of their buildings to socialize over beers the way more affluent people gather in their air-conditioned living rooms. Because poverty still correlates with race in America,<sup>82</sup> more of these urban "offenders" will likely be non-white. Difficult as it is to quantify, however, police behavior in the pretextual car stop and *Terry* stop areas suggests that pretextual misdemeanor enforcement is likely racially biased as well.

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stops lacked any explanation whatsoever. Of these, 210 were stops of non-whites (202 African Americans, 6 Latinos, and 2 Asian Americans), and 49 were of whites. 63% of the total stops of African Americans were without stated justification; 46% of the stops of Latinos; 50% of the stops of Asian Americans; and 56% of the stops of whites. *See id.*

80. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 COLUM. L. REV. 551, 615-18 (1997); *see, e.g.,* Papachristou v. Jacksonville, 405 U.S. 156 (1972).

81. *See supra* note 51.

82. U.S. Census Bureau, *Standardized and Unstandardized Experimental Poverty Rates: 1990 to 1999* (visited May 1, 2001) <<http://www.census.gov/hhes/poverty/povmeas/expov/suexpov.html>> (containing the most recent census data). As of 1999, nationwide, blacks and Hispanics were 2.5 times as likely to be poor as whites. *See id.*

In sum, countless millions of police searches and frisks are premised on race, and the overwhelming majority of those searches target innocents, a category that might be called, "Walking While Black." The cost of such inefficient enforcement is high to taxpayers. The cost to the individual being frisked is incalculable in dollars but nonetheless real.

Professor William Stuntz describes the fourfold harm that flows from a false positive search as follows:

The first is a harm to the victim's privacy—the injury suffered if some agent of the state rummages around in the victim's briefcase, or examines the contents of his jacket pockets. The second is... "targeting harm," the injury suffered by one who is singled out by the police and publicly treated like a criminal suspect. Third is the injury that flows from discrimination, the harm a black suspect feels when he believes he is treated the way he is treated because he is black. Fourth is the harm that flows from police violence, the physical injury and associated fear of physical injury that attends the improper police use of force.<sup>83</sup>

The damage to society is similarly high but difficult to quantify. Professor David Harris details several harms in addition to the impact on the innocent: the criminalization of blackness, the tolerance of "rational" discrimination; the distortion of the legal system, the distortion of the social world and the undermining of community-based policing.<sup>84</sup> More concretely, such interactions generate tremendous tension between non-white communities and police. Most dangerously, poor citizen-police relations have led to incendiary violence.<sup>85</sup>

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83. William J. Stuntz, *Terry and Legal Theory: Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1218 (1998) (internal citations omitted). Professor Stuntz is not the only academic who supports police practice that acknowledges harm from them. Michael Tonry, who has argued that racial disparities in arrests and prison populations are not the result of bias in the criminal justice system, nonetheless conceded that black men of all ages have suffered as a result of race-based police suspicion. See MICHAEL TONRY, *MALIGN NEGLECT* 50–51 (1995).

84. See Harris, *supra* note 50, at 269–275, 288–310 (relating personal harms through interviews of three DWB victims and discussing broader social harms of profiling); Joseph F. Sullivan, *New Jersey Police Are Accused of Minority Arrest Campaigns*, N.Y. TIMES, Feb. 19, 1990, at B3 (containing the interview of a couple who were stopped and upset).

85. Police practices were identified as the precipitating cause of the 1960s race riots. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 161 (1968) (discussing under-enforcement of law in minority communities and raising three issues: the toleration of higher levels of criminality, particularly vice; differential response to emergency calls from whites and blacks; and a relative lack of police personnel assigned to minority areas); *id.* at 302 (discussing perception by blacks that police are more brutal to blacks). More recently, the NYPD was so frightened by threat of riots after the brutalization of Abner Louima that it transferred minority officers into that precinct to calm tensions. See *Patrolmen's Benevolent Ass'n of the City of New York v. The City of New York*, 2000 Dist. LEXIS 15179 (S.D.N.Y. Oct. 13, 2000). However, minority officers filed suit in

All of these costs, while enormous and traceable to police tactics targeting gun and drug possessors, are nonetheless rather unhelpfully distant from the actual search or frisk and are difficult to quantify. More usefully, the problem of racial profiling in the gun confiscation context can be defined as the distortion of the distribution of false positives that results from race (or otherwise unconstitutionally) based decisions to stop, frisk or search.

Two types of distortion result: first, the *Terry* problem exemplified by the SCU data, is an increase in the rate of false positives suffered by non-whites relative to whites. Given a crowd that contains 100 whites, 100 blacks, and 10 gun possessors of each race, profiling officers will search more blacks than whites to find the same number of guns. The second type of distortion, the problem with pretextual enforcement of quality of life crimes or of highway speed limits, as exemplified by the Maryland data, is a vastly disproportionate and larger absolute number of false positives. Given the same degree of accuracy when searching people of any race, for example 30%, the targeting of non-whites means that perhaps 100 whites will be searched, generating 70 false positives, while 1000 non-whites will be searched, generating 700 false positives.

### III. SEARCHING FOR TOMORROW

In his influential 1994 article on gun searching, James Q. Wilson hoped for a device that would enable police "to detect the presence of a large lump of metal in someone's pocket from a distance of 10 to 15 feet."<sup>86</sup> However, even if such a device were to be developed, it would have to distinguish a gun from a cell phone or a pager. Moreover, use of such a device would raise serious privacy issues, as have other forms of surveillance that have been developed to monitor public places, such as video cameras trained on parks as well as buildings in housing projects.<sup>87</sup>

How to assess such surveillance devices is a complex issue. Like us, most of the public seems inclined, with some reservations, to support such measures in high crime public settings, and certainly in places of limited access, such as

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November 1998 in Federal District Court in Manhattan claiming that they suffered "emotional distress and embarrassment after their involuntary transfer to the 70th precinct in Flatbush in August 1997." See Kit R. Roane, *Black Sergeants Sent to Troubled Precinct Sue*, N.Y. TIMES, Nov. 19, 1998, at B13.

86. Wilson, *supra* note 11.

87. Surveillance has become a widespread, if controversial, phenomenon. Photos were taken of everyone entering the stadium to watch the Super Bowl, see *Super Bowl Snooping*, N.Y. TIMES, Feb. 4, 2001, § 4 at 16, and cameras are increasingly used in public spaces throughout New York City (and elsewhere). See David Halbfinger, *As Surveillance Cameras Peer, Some Wonder if They Also Pry*, N.Y. TIMES, Feb. 22, 1998, § 1 at 1 (discussing use of cameras in housing projects throughout the city and nationally); Bruce Lambert, *Secret Surveillance Cameras Growing in City, Report Says*, N.Y. TIMES, Dec. 13, 1998, § 1 at 61 (reporting results of block by block voluntary survey that found over 2300 cameras watching public spaces); Richard Weir, *Neighborhood Report: Greenwich Village: Candid Camera, Some Smile, Some Frown*, N.Y. TIMES, Feb. 28, 1999, at § 14 at 6 (describing cameras in Washington Square Park).

subways, buses, apartment and office buildings, banks, and ATM's. People may find the post-bombing security procedures in the World Trade Center office buildings annoying, but accept them as necessary to deter terrorism, as they accept airport security.<sup>88</sup> The public also seems to accept that heightened street surveillance by patrol officers and undercover detectives is appropriate in areas of high crime. Nevertheless, the level of privacy invasion by such a gun detector would be unprecedented. Not confined to an airport gate entrance or other building checkpoint, a barrier people voluntarily cross, such a detector could be aimed across oblivious, non-consenting crowds. Such a detector would give new meaning to a "sweep" for criminals.<sup>89</sup>

Privacy issues aside, such a sophisticated technological fix is unlikely in the near future despite Wilson's confidence that "underemployed nuclear physicists and electronic engineers in the post-cold-war era surely have the talents for designing a better gun detector."<sup>90</sup> By 2001, there is no such fix. What then, should be done to minimize racial profiling and the false positive distortion that results?

The short, unhelpfully simple answer is—improve police accuracy. As we discuss, accuracy can be improved in three basic ways: sophisticated data collection, analysis, and management; management-driven training and cultural shifts; and civilian efforts to raise profiling costs. None of these is a panacea, nor are they mutually exclusive. Rather they are an attempt to identify how police organizations can use, and outsiders can generate, incentives for police action. Since racial profiling usually occurs on the beat, away from direct supervision, no one strategy will work everywhere. Change will require the dedication of police managers, and, where possible, the cooperation of police unions.

#### *A. Collecting and Managing Data*

By tracking false positive rates, police departments or outside monitors can quantify the profiling problem. The more detailed the data, the more useful it will be. An idealized data set would contain, for each officer: (1) stops, frisks, and the "reasonable suspicion" triggering them; (2) arrests and the crime triggering the arrest (or at least whether or not it was a street misdemeanor); (3) the results of all frisks and searches (incident to arrest or otherwise); and (4) the race, age, and gender of the person stopped/frisked/arrested. Such a data set should assist in identifying "problem" officers or clusters of officers and should facilitate tracking

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88. Author Jerome Skolnick was forced to wait in line, show a government issued I.D., and wait while his appointment was confirmed by phone before he was allowed to enter the elevator of the office tower. Prior to the bombing, such security probably would have been controversial, just as metal detectors in airports once were.

89. A similar, highly controversial technology is devices that enable police to remotely detect if someone farms marijuana by analyzing the heat patterns of the house. The Supreme Court recently rejected, on privacy grounds, the warrantless use of an analogous technology to search residences for the heat signature of marijuana cultivation. See *Kyllo v. United States*, No. 99-8508, 2001 U.S. LEXIS 4487, \*14-25 (June 11, 2001).

90. Wilson, *supra* note 11.

problems over time. In the era of COMPSTAT and its copies, police departments are developing the technical resources to track officer behavior. Whether they have the institutional inclination to do so is another question.<sup>91</sup> Acquiring such data means that every officer should be required to complete paperwork in an accurate and timely fashion. Given that most frisks and searches occur far from the purview of police management, ensuring such compliance will be formidable.<sup>92</sup> Nevertheless, police management should be able improve the data set if it commits to doing so, especially with the cooperation of mid-level supervisors, such as sergeants and lieutenants.

### *B. Police Management*

The potential of police managers to affect police behavior cannot be overstated. Two recent studies make the point clear. The Vera Institute of Justice ("Vera") completed a study of two South Bronx high crime precincts and found an unusually high level of community satisfaction with the police.<sup>93</sup> Vera found that both precincts targeted crime just as aggressively as other New York precincts, and with similar success. But strong leadership in each precinct made reducing civilian complaints a priority, and their officers behaved accordingly.

The U.S. Customs Service ("Customs"), now headed by former NYPD commissioner Ray Kelly, was the focus of a comprehensive General Accounting Office ("GAO") report titled, *Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results*.<sup>94</sup> This remarkable report summarized the search training, policies, standards, and success rates of airport searches for contraband and analyzed the results by race and gender. Based on its findings, which showed that race and gender correlated with search selection differently

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91. Indeed, at least one police department—Dallas, Texas—is actively resisting this type of data collection. See Dave Michaels, *Chief Opposes Gathering Race Data: He Says Profiling Minimal in Dallas*, DALLAS MORNING NEWS, Jan. 24, 2001, at 15A.

92. Indeed, one of the big problems for police managers can be getting police to take action. In fact, officers avoid action so much while on duty that it has a name: *cooping*. See BRIAN McDONALD, *MY FATHER'S GUN, ONE FAMILY, THREE BADGES, ONE HUNDRED YEARS IN THE NYPD* 213 (1999). Chicago's police were apparently very unresponsive to citizen calls about gangs before the passage of the anti-loitering statute, according to testimony by residents before the City Council considering the statute. See Dorothy Roberts, *Foreword: Race, Vagueness and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 823 (1999); Brief of Respondents at \*2, *City of Chicago v. Jesus Morales*, 527 U.S. 41 (1999) (No. 97-1121). Recently the NYPD was heavily criticized for its inaction in the "Central Park Wilding." See Andy Geller et al., *Ax Hangs Over Cops Who Ignored Wilding*, THE N.Y. POST, June 17, 2000, at 4.

93. See Robert Davis & Pedro Mateu-Gelabert, *Respectful and Effective Policing, Two Examples from the South Bronx* (visited May 1, 2001) <<http://vera.org/publications/bronx-precinct.pdf>>.

94. UNITED STATES GENERAL ACCOUNTING OFFICE, *BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS* GAO/GGD-00-38, 87 (2000).

than with search success, Customs overhauled its practices.<sup>95</sup> While airport searches and street policing may seem so dissimilar that the lessons from the Customs report can be disregarded, the Customs experience powerfully illustrates the depth of change that committed management can achieve.

Responding to the documented racial disparities in its search targeting, Customs changed the way it taught inspectors to identify suspicious people. The 1999 Personal Search Handbook eliminated the forty-three factor list—the notoriously contradictory profile list—and replaced it with six categories of information that could generate reasonable suspicion for an intrusive search.<sup>96</sup> The categories are: (1) behavioral analysis, which means looking for physiological signs of nervousness such as cold sweats, flushed face, and eye contact avoidance; (2) observational techniques, which focus on physical discrepancies in appearance, such as an unnatural gait; (3) inconsistencies identified in the interview or documentation; (4) intelligence developed by another officer; (5) signals from K-9 units; and (6) evidence gathered incident to a seizure or arrest.<sup>97</sup>

Using these categories instead of a factor list reduces racial profiling in a few ways. First, the factors are racially neutral and must be generated and articulated by an officer each time. Second, the conceptual groupings encourage officers to notice unlisted but similarly significant behaviors. Thus, the categories encourage inspectors to really *look* at each person's behavior, not just their race. Moreover, the categories are not static. The forty-three-factor list had been in existence for more than ten years, despite major changes in travel and the drug trade during that time.<sup>98</sup> Now, Customs has committed to reviewing data periodically from contraband seizures to refresh its categories of suspicious behavior.<sup>99</sup>

Customs also made several policy changes. One of the major goals of the search policy revision was the standardization of search procedures throughout airports.<sup>100</sup> Training practices are being substantially modified,<sup>101</sup> and supervision

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95. For the search data, see *id.* at 10 tbl.2, 12–15 tbls.3–6 and accompanying text. White men and women and black women were targeted for intrusive strip/x-ray/body cavity searches out of proportion to the rate of contraband discovery for them. Black women by far faced the worst treatment; they were nine times as likely to be intrusively searched as white women were, but only half as likely to be carrying contraband as the white women.

96. The Supreme Court has held that customs need not have any suspicion to do a routine border search; it has not ruled on what suspicion, if any, is necessary for a more thorough search. Some courts have suggested the *Terry* reasonable suspicion standard is appropriate. See *id.* at 3, 4–5. By policy, Customs uses mere suspicion for frisks and the *Terry* reasonable suspicion standard for more intrusive searches. See *id.* at 3–5; see also *id.* at 5–6, 16 (detailing the changes to the handbook).

97. See *id.* at 5–6, 16.

98. See *id.* at 16.

99. See *id.* at 29.

100. See *id.* at 6.

101. See *id.* at 20–23. Courses are being revised, training of each inspector is being tracked and, a new training office has been created to oversee and standardize all training. See *id.*

of searches has increased.<sup>102</sup> Further, passenger complaints are being addressed systematically through a new Customer Satisfaction Unit.<sup>103</sup>

Lastly, Customs has made its practices data-driven, and uses data to measure its success. Customs enjoys an advantage over local police. Since Customs officers can search without articulated reasonable suspicion, Customs management can experiment by comparing profiled passengers against a control group of those randomly searched. Using this power, Customs has instituted a program called COMPEX (for Compliance Examination), which requires a port to randomly examine a sample of non-targeted passengers to determine what percentage of contraband-carrying passengers are passing through undetected. Customs has set a system-wide goal (to be reached by 2002) of a targeted search success rate ten times higher than the random COMPEX rate. The report showed interim rates for Los Angeles, Kennedy, O'Hare, and Miami airports. Their 1998 targeted success rates varied from 3.3x random (Kennedy) to 14.8x random (Los Angeles). O'Hare too, at 13.12x random, had already exceeded the 2002 target.<sup>104</sup>

While police departments cannot carry out the same study, one lesson of the study is transferable: strong management can improve the accuracy of officers' searches. Customs's COMPEX results raise an interesting question relevant to street policing. Assuming that racial disparities in false positives were to be reduced, how good is good enough?<sup>105</sup> What would be an acceptable false positive rate?

Customs has shown how comprehensively management can address racial profiling when it chooses. In local police departments, as in Customs, management needs to influence the values embedded in police culture. A department's subculture, like that in most work environments, dictates the level of acceptable paperwork completion, of honesty in testifying, and of civility during police-citizen interactions. Management's philosophy and its capacity to manipulate assignments, promotions, and other reward structures can have a

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102. See *id.* at 23–25. Supervisor approval is now needed for all searches except a weapons frisk. Supervisors must also complete and sign a check sheet for each false positive, certifying that the search criteria had been reviewed and approved, and that the supervisor had reviewed the process with the inspector for lessons learned. See *id.*

103. See *id.* at 25–27. A document review revealed that complaints had been handled inadequately, and the standardization and systematization of complaints handling attempted to solve this problem. See *id.*

104. See *id.* at 28 tbl.7.

105. In the thousands of pages of profiling data that New Jersey recently released was the statistic that searches of minority drivers discovered contraband 30% of the time, a rate touted as quite good. However, as the New Jersey Attorney General noted, seven of every ten searched motorists were in fact innocent. Consequently, over a long period of time, an enormous number of black motorists were subjected to the humiliation of an unsuccessful search. See David Kocieniewski & Robert Hanley, *Racial Profiling Was the Routine, New Jersey Finds*, N.Y. TIMES, Nov. 28, 2000, at A1.

significant impact.<sup>106</sup> And of course, management can require and continuously update training to reinforce its philosophy.

### C. Raising the Cost

Raising the costs of racial profiling can energize management's commitment to fair police practices. Prosecutors can fulfill their quasi-magisterial oversight obligations by refusing to accept cases or by seeking to vacate convictions based on racial profiling stops, as has happened in New Jersey.<sup>107</sup> Judicial oversight, through voiding cases, excluding evidence,<sup>108</sup> and ordering

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106. See generally JEROME H. SKOLNICK & DAVID H. BAYLEY, *THE NEW BLUE LINE* (1986) (discussing Santa Ana's Ray Davis); JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993) (discussing Philadelphia's notorious Frank Rizzo and Milwaukee's Harold Brier.)

107. See *supra* note 18. Defense attorneys are also appealing profiling based convictions. See David M. Halbfinger, *Defendants May Appeal Convictions Based on New Profiling Data*, N.Y. TIMES, Dec. 7, 2000, at B5.

108. See generally Lisa Walter, *Comment: Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255 (2000) (arguing that judges should exclude evidence to combat racial profiling). Some judges have shown a willingness to critically examine police testimony when applying the standard. The Sixth Circuit recently reversed a trial court decision and suppressed drugs seized from a truck, because the court did not find the officer's justification for the stop to be more than a hunch. See *United States v. Goodwin*, No. 98-6415, 2000 U.S. App. LEXIS 570, \*7-9 (6th Cir. Jan 12, 2000). Two years earlier, the Sixth Circuit upheld a suppression motion because the defendant had been targeted solely or primarily because he was a Hell's Angel. See *United States v. Robinson*, No. 97-3142, 1998 U.S. App. LEXIS 10730 (6th Cir. May 22, 1998). Over a sharp dissent, the Seventh Circuit suppressed evidence seized from a person frisked upon exiting a suspected drug location because they did not believe an officer's testimony. See *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999). An Ohio state court also recently discredited an officer's testimony when it reversed the trial court and suppressed evidence. See *Ohio v. Clark*, 743 N.E.2d 451 (Ohio Ct. App. 2000). In another case, Eric Gray was walking down a St. Louis street at 9:45 at night in an area where drug trafficking and prostitution were common. He saw a police car cruise by, hurriedly crossed the street, and continued walking in the direction he had been headed in. The police car circled the block and found Mr. Gray standing on the corner. They got out of the car, asked him to identify himself and explain his presence. He did, telling them he was waiting for a friend. The officer then frisked him and found a gun. The trial court denied Mr. Gray's suppression motion, finding that the officer's explanation—that Mr. Gray's name was the same as a gang member killed a few months earlier, and thus this much older Mr. Gray might be related, and that it was suspicious to meet a friend outside in cold weather when Mr. Gray lived nearby—constituted reasonable suspicion. Note, for the trial court to uphold this frisk, it must have found that his name and stated reason for being outside created a reasonable suspicion that: 1) crime was afoot and 2) Mr. Gray was armed. Luckily for Mr. Gray, the Eighth Circuit disagreed his name and explanation were so suspicious, and reversed, freeing him from a 15-year prison sentence imposed for being a felon in possession of a gun. See *United States v. Gray*, 213 F.3d 998 (8th Cir. 2000); see also Hon. Jack B. Weinstein & Mae C. Quinn, Terry, Race, and Judicial Integrity: The Court and Suppression During the War on Drugs, 72 ST. JOHN'S L. REV. 1323 (1998) (providing a judge's perspective on Terry).

discovery,<sup>109</sup> can provide a significant positive incentive to change police behavior.

Financial penalties or incentives offer a second path to reform. These can be imposed by lawsuits seeking damages or by city councils/legislatures based on profiling data. However difficult they are to bring and win, lawsuits do open police practices to public scrutiny, as they have in New Jersey and Maryland. Pattern and practice/Monell-type suits, whether brought privately as damage awards or by the federal government through consent decrees, could strongly influence departments to comprehensively revise how searches are conducted.<sup>110</sup>

#### IV. CONCLUSION

Racial profiling is a policy choice. It is made by elected officials, judges, prosecutors, police managers and police rank-and-file. Consequently, it is difficult to reshape racially influenced frisk and search practices without the engaged commitment of those who, at every level of politics and management, control the reins of police policies and practices.

Community leaders may influence police strategies through community give-and-take with governors, mayors, city managers, and police managers, who could reduce or eliminate pretextual searching.

Accountability could surely be heightened through collection and analysis of stop, frisk, and arrest data. Prosecutors—who are supposed to perform a quasi-magisterial role in the system of criminal justice—could teach and insist upon a meaningful reasonable suspicion standard, as well as a standard of truthfulness in describing and offering evidence.

Taking guns off the streets necessarily involves stopping and frisking citizens, but officers do not need to abuse their authority to accomplish crime control. Indeed, such abuse may be markedly counter productive. Regarding the broader issue of the impact of policing on violent crime, Eck and Maguire conclude:

If police became less effective in the 1960s and 1970s, it may have been in response to public perceptions that police leaders and

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109. A New Jersey judge's discovery order forcing production of policing records enabled the plaintiffs to prove selective prosecution on the basis of race and may have been the key to revealing racial profiling there. The judge found profiling existed. The case was *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996). After documenting profiling, the New Jersey Attorney General's office dropped its appeal of the *Soto* case. See Peter Verniero, *Interim Report of the State Police Review Team on Allegations of Racial Profiling* (Apr. 20, 1999), available at <[http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf)>. Similarly, U.S. District Court Justice Scheindlin ordered discovery for defendants in a lawsuit against the NYPD's Street Crimes Unit that included statistical analyses of personnel information and arrests by SCU officers. See *Analysis of Personnel Information and Arrests By Street Crime Unit Is Not Privileged*; National Congress for Puerto Rican Rights v. The City of New York, N.Y. L.J., May 12, 2000, at 25.

110. See generally Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. R. 815 (1999).

elected officials encouraged officers to abuse their authority, particularly against racial minorities. If this is true, then whatever contribution the police have made to reductions in crime over the last few years may be in jeopardy.<sup>111</sup>

When the burden of stop and frisk searches is born equally by citizens of whatever color or ethnicity, the privacy-security trade-off can be set to a socially acceptable level. When race motivates police stop, frisk, and search decisions—as it often does—significantly more innocent non-whites will be searched than innocent whites. Police managers who seriously confront the issue of how to target illegal gun and drug possessors without myopically focusing on race can—and should—guide street police in achieving an appropriate and positive balance and a safer community.

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111. Eck & Maguire, *supra* note 9, at 251.

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