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Beyond Profiling: Race, Policing and the Drug War

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Publication Date
2002-10-18

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INTRODUCTION .............................................................. 572
I. THE CAMPAIGN AGAINST RACIAL PROFILING ................. 574
   A. Consensus and Data Collection ........................................ 574
   B. The Innocence Emphasis ................................................. 576
   C. The Irrationality Claim................................................... 577
      1. Self-fulfilling prophecy and survey data claims. ......... 577
      2. Hit rates argument..................................................... 578
II. THE AMBIGUITY OF THE EVIDENCE .............................. 580
   A. Limitations of Self-Fulfilling Prophecy and Survey Data Claims ................. 580
   B. The Hit Rates—Crime Rates Disjunction ............................. 582
   C. Problems of Proof.......................................................... 583
   D. Judgments of Racial Profiling ......................................... 586
III. THE ABANDONMENT OF THE RACIAL PROFILING INQUIRY .... 587
   A. Rational Racial Profiling ................................................ 587
   B. Problems Without Racial Profiling ................................... 590
   C. Racial Profiling Without Problems ................................... 592
   D. Beyond Profiling ............................................................ 593
IV. THE SOCIAL HARMs OF INCARCERATION ........................ 594
   A. The Magnitude of Incarceration ...................................... 594
   B. Neighborhood Effects .................................................... 596

* Associate Professor, Stanford Law School. More friends, colleagues, and workshop participants than I could possibly thank individually have aided in the completion of this Article. I am grateful to Pam Karlan and Duncan Kennedy for directing the argument away from dead ends. Mark Kelman, George Fisher, and Dick Craswell repeatedly offered incisive and constructive criticism. Susan Fiske, Kim Forde-Mazrui, Rich Ford, Barbara Fried, Tom Grey, Jill Hasday, Sheri Lynn Johnson, Pauline Kim, Ian Haney Lopez, Tracey Meares, Rachel Moran, Spencer Overton, Margo Schlanger, Carol Steiker, Lauren Willis, and Tobias Wolff provided extremely useful comments as well. Julie Lipscomb and Wendy Sheu provided superb research assistance, and Mary Ann Rundell helped enormously with editing. The staff of the Stanford Law School library, particularly Erika Wayne, have been extraordinarily helpful. I thank my son, Ebbie Banks, for exemplifying the willingness to pose difficult questions and my wife, Jennifer Eberhardt, for helping to find the answers.
INTRODUCTION

The political consensus in opposition to racial profiling in drug interdiction has fueled efforts to identify and eliminate the practice. Some commentators have asserted that racial profiling does not help to apprehend criminal wrongdoers more efficiently because its premise of racial group differences in criminality is erroneous. These commentators suggest that racial profiling accounts for the widespread investigation and mistreatment of innocent blacks and Latinos.

This Article aims to reorient debate about race, policing, and the drug war by critically examining the focus on racial profiling that burdens the innocent. I conclude that policymakers should abandon efforts to ferret out and eliminate racial profiling in drug interdiction. Instead, policy analyses should consider the race-related consequences of the drug war, without regard to whether officers engage in racial profiling. Given the high level of incarceration of disadvantaged racial minorities, those consequences would remain especially significant even if not one innocent person were investigated. Although seemingly at odds with the campaign against racial profiling, I hope to show that my position is not only normatively compelling but also consistent with the concerns that animate much antiracial profiling sentiment.

The view that pervasive, irrational racial profiling invariably accounts for the widespread investigation of blacks and Latinos reflects a misreading of the empirical studies of law enforcement officers’ stop-search practices. While the

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1. As the term is used in this Article, racial profiling occurs when a law enforcement officer decides to investigate an individual at least partly based on the belief that members of that individual’s racial group are more likely than members of other racial groups to engage in the specific criminal activity under investigation. See R. Richard Banks, Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse, 48 UCLA L. REV. 1075, 1081-82 (2001) [hereinafter Banks, Race-Based Suspect Selection].

2. My analysis focuses primarily, though not exclusively, on racial profiling in drug interdiction, a context in which racial profiling is likely to occur. See id. at 1082. Most of the pre-9/11 debate about racial profiling concerned drug interdiction efforts.

3. I will often use the term racial minorities to refer to blacks and Latinos.

4. For an overview of the nature, consequences, and causes of the drug war, see The New War on Drugs: Symbolic Politics and Criminal Justice Policy (Eric L. Jensen & Jurg Gerber eds., 1998) [hereinafter The New War on Drugs]; see also Steven B. Duke & Albert C. Gross, America’s Longest War: Rethinking Our Tragic Crusade Against Drugs (1993).
studies’ findings do not refute the existence of irrational profiling, they are also consistent with the possibility that the extensive investigation of racial minorities reflects their higher rates of criminal activity, along with officers’ rational use of racial profiling.\(^5\) The empirical evidence is more ambiguous than some commentators have suggested. One reason, then, to abandon the racial profiling inquiry is that efforts to prove racial profiling will founder on empirical findings that invite contrary interpretations.

There are two additional reasons that policy reform should center on the drug war and its consequences rather than racial profiling. First, if officers engage in racial profiling because it helps them to apprehend drug traffickers, then efforts to eliminate the practice without reducing the incentives to apprehend drug traffickers may be futile or counterproductive. Second, the problems most commonly associated with racial profiling—the widespread investigation and mistreatment of racial minorities and the tension between racial minority communities and law enforcement agencies—do not necessarily turn on whether officers engage in racial profiling. These problems could persist in the absence of racial profiling or be meaningfully addressed without actually eliminating racial profiling.

Analyses should instead consider the race-related outcomes of the drug war, particularly the high level of incarceration of racial minorities. I highlight the social harms of incarceration rather than its potential benefits because those harms may be underappreciated in a debate centered on the wrongful investigation of the innocent. The racial concentration of incarceration may (1) undermine neighborhoods’ stability, (2) impede effective law enforcement by bolstering minorities’ distrust of the criminal justice system, and (3) intertwine race and crime in a way that fortifies the racial divide. These outcomes not only pose issues of distributional fairness, they may also increase aggregate social costs.

The extraordinary success of the campaign against racial profiling attests to the cultural resonance of antidiscrimination claims inflected by tropes of irrationality and innocence. The campaign against racial profiling has converted varied bases of drug war opposition and concerns about police treatment of minorities into a morally compelling and politically potent constitutional claim of discrimination. The irrationality claim establishes the unconstitutionality of racial profiling without imperiling the race-based affirmative action policies supported by many opponents of profiling. The focus on innocent, middle class victims counters the stigmas of race and criminality that might otherwise have undercut the broad appeal of the campaign.

\(^5\) Racial profiling in drug interdiction is rational from the standpoint of law enforcement officers if it results in the seizure of more contraband than if the officers had not taken account of race. Of course, profiling that is rational for law enforcement might well be socially irrational, as law enforcement officers internalize more of the benefits than costs of racial profiling.
But the strategic usefulness of such an antidiscrimination claim should not blind us to its potential inadequacy as a policy framework. Efforts to eliminate discrimination often will fail to realize the goals that animate invocation of antidiscrimination rights. The assumption that most discrimination is irrational may understate the difficulty of identifying and eliminating discrimination and overstate the gains from doing so.

* * * *

This Article has five parts. Part I describes the campaign against racial profiling. Part II reexamines the claim that racial profiling in drug interdiction is usually irrational. Part III justifies the abandonment of the racial profiling inquiry in favor of a focus on the consequences of drug policy and policing practices. Part IV sketches the social harms of the racial concentration of incarceration. Part V discusses the political appeal of the campaign against racial profiling.

I. THE CAMPAIGN AGAINST RACIAL PROFILING

This Part recounts the success of the campaign against racial profiling, its focus on innocent, middle-class victims, and the claim that racial profiling is irrational because its premise of racial differences in criminality is erroneous.

A. Consensus and Data Collection

As a result of the campaign against racial profiling, law enforcement agencies and government officials now publicly disavow the practice. Numerous jurisdictions have prohibited it, as has the Bush Administration for federal law enforcement agencies.

6. Unless stated otherwise, references to discrimination or to the antidiscrimination approach refer to the disparate treatment conception of discrimination.


8. See, e.g., President George W. Bush, Remarks to National Organization of Black Law Enforcement Officials (July 30, 2001) (criticizing racial profiling and saying it must end); Jeffrey Goldberg, The Color of Suspicion, N.Y. TIMES MAG., June 20, 1999, § 6, at 51 (reporting that President Clinton declared racial profiling to be “morally indefensable”); Bob Kemper & Frank James, Defense, Police Issues Crop Up as Hopefuls Zero in on Schools, CHI. TRIB., Sept. 16, 2000, at 4 (reporting presidential candidate Albert Gore declaring that “racial profiling must come to an end”); Attorney General Ashcroft’s News Conference on Racial Profiling (International Information Programs, Mar. 2, 2001) (“racial profiling is not doing the job well because . . . [i]t injures the trust that communities need to have in order to participate in law enforcement, and it injures as well the individual.”).}


10. CIVIL RIGHTS DIV., U.S. DEPT. OF JUSTICE, GUIDANCE REGARDING THE USE OF
Numerous studies of law enforcement officers’ stop-search practices have been undertaken to document the extent of racial profiling. Extensive data collection efforts have resulted from lawsuits filed against the U. S. Customs Service\(^\text{11}\) and against state troopers in Maryland\(^\text{12}\) and New Jersey.\(^\text{13}\) Although opposed by some law enforcement agencies,\(^\text{14}\) data collection efforts are underway in a startling array of jurisdictions,\(^\text{15}\) including the federal government.\(^\text{16}\) Nearly all of the stop-search studies document the

11. The Customs Service controversy was prompted by the allegations of several black women that they had been subjected to invasive and humiliating body searches for discriminatory reasons. See Robert L. Jackson, *Customs Limiting Drug Searches of Airline Passengers; Travel: Screening Curbs Come on Heels of at Least 12 Lawsuits, Including a Class-Action Case on Behalf of 100 Black Women, Filed Against Federal Service*, L.A. TIMES, Aug. 12, 1999, at A19. The General Accounting Office and the Customs Service conducted studies of the Service’s drug interdiction efforts. PERSONAL SEARCH REVIEW COMM’N, REPORT ON PERSONAL SEARCHES BY THE UNITED STATES CUSTOMS SERVICE (2000); U.S. GEN. ACCOUNTING OFFICE, U.S. CUSTOMS SERV., BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 12-13 (2000) [hereinafter GAO CUSTOMS REPORT].


disproportionate investigation of blacks and Latinos, even in jurisdictions that have prohibited racial profiling. Search rate disparities are typically more pronounced than stop rate disparities.

B. The Innocence Emphasis

The media and civil rights groups have featured those victims of racial profiling and police mistreatment who are not only innocent, but also respectable and middle class: the Harvard-educated lawyer driving home from a relative’s funeral who was detained on the highway in the freezing rain, the military officer made to sit handcuffed in the police car while his

17. Throughout this Article, I define the terms racially disproportionate and racially disparate with respect to population percentages.


22. See Cannon, supra note 21, at 72.

young son watched, the four young men on their way to a college basketball tryout who were stopped by police officers and nearly fatally wounded, without any evidence of wrongdoing. Commentators have highlighted these sorts of sympathetic plaintiffs.

C. The Irrationality Claim

A central claim of the campaign against racial profiling is the empirical one that racial profiling is unjustified because blacks and Latinos are no more likely than whites to commit drug crimes. This argument takes three forms: the self-fulfilling prophecy claim, the survey data claim, and the hit rates argument.

1. Self-fulfilling prophecy and survey data claims.

Law enforcement officers sometimes claim that racial disparities in rates of arrest and conviction for drug crimes simply correspond to differences in rates of criminal behavior. As one commentator explains, “law enforcement

26. See, e.g., David Harris, The Stories, the Statistics, and the Law: Why “Driving While Black” Matters, 84 MINN. L. REV. 265, 270 n.18 (1999) (emphasizing that “driving while black” is not only an experience of the young black male, or those at the bottom of the socio-economic ladder. All blacks confront the issue directly, regardless of age, dress, occupation, or social station”).
27. The public campaign against racial profiling has emphasized the purported irrationality of the practice. The ACLU campaign typically refers to racial profiling as discrimination “solely on the basis of the color of one’s skin.” This impression is conveyed poignantly by the well-known ACLU ad that juxtaposes images of Martin Luther King and Charles Manson and states that “the man on the left [Martin Luther King] is 75 times more likely to be stopped . . . than the man on the right [Charles Manson].” Press Release, ACLU, Provocative New ACLU Advertising Series Uses American Icons in Message on Racial Profiling (June 2, 2000), available at http://archive.aclu.org/features/f060200a.html (last visited November 9, 2003).
29. See, e.g., Goldberg, supra note 8, at 51 (quoting a Los Angeles police chief, Bernard Parks: “It’s not the fault of the police when they stop minority males . . . . It’s the fault of the minority males for committing the crime.”); Katherine Shaver, On Patrol, Race Shadows Police: Montgomery Officers Say Experience Colors Perceptions, WASH. POST, Sept. 26, 1999, at A1 (quoting Montgomery County police officer Scott Feldman, who asserts, “The bottom line is my experience shows that the majority of robberies are committed by black males”); Ralph Siegel, Fired Head of State Police Stands by Minority
officers believe minorities [are more likely than whites to] transport drugs because blacks and Hispanics are disproportionately arrested and convicted for narcotics offenses." However, racial differences in rates of arrest and conviction do not necessarily imply racial differences in rates of offending. Because drug law enforcement is highly discretionary, rates of arrest and conviction reflect investigation and enforcement decisions as much as underlying rates of criminality. The self-fulfilling prophecy argument reminds us that the outcomes often offered as the justification for racial profiling may, in fact, be the consequence of racial profiling, which can create the appearance of racial differences in criminality even when there are none.

The survey data argument contends that drug use rates are comparable across racial groups. Numerous commentators have rejected the possibility of substantial racial differences in drug crime on the basis of survey findings regarding rates of illicit drug use among various racial groups.

2. Hit rates argument.

Often offered as confirmation of the survey data and self-fulfilling prophecy claims, the hit rates argument relies on the stop-search studies. Proponents of the hit rates argument contend that the findings of the stop-search studies demonstrate both comparable rates of drug crime across groups and pervasive, irrational racial profiling. The logic of this argument is expressed most clearly in a New York Times opinion article authored by Professor David Cole, a legal scholar, and Professor John Lamberth.

Remarks, BERGEN RECORD (New Jersey), Oct. 20, 1999, at A6 (recounting an interview in which former New Jersey state police superintendent Carl Williams defended the state troopers and asserted that “today with this drug problem, the problem is cocaine or marijuana. It is most likely a minority group that’s involved with that”).


32. Numerous commentators have relied on this argument. See, e.g., COLE, supra note 31, at 20-21; MAUER, supra note 31, at 143; Harris, supra note 26, at 297; Johnson, supra note 31.

33. See, e.g., COLE, supra note 31, at 144; DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 75 (2002); Harris, supra note 26, at 296.

34. See, e.g., HARRIS, supra note 33, at 13, 78-87. Harris states that “new data now offer an irrefutably statistical argument against the practice” of racial profiling. Id. at 13.


36. David Cole, a well-respected scholar and member of the faculty at Georgetown University Law Center, has written a number of probing critiques of the criminal justice
December 2003] BEYOND PROFILING 579

statistical expert:

[T]he racial profiling studies uniformly show that [the] widely shared assumption [of differential rates of criminal involvement] is false. Police stops yield no significant difference in so-called hit rates—percentages of searches that find evidence of lawbreaking—for minorities and whites. If blacks are carrying drugs more often than whites, police should find drugs on the blacks they stop more often than on the whites they stop. But they don’t.38

The article describes stop-search studies in which racial minorities were more likely than whites to be searched but not more likely than whites to be found with contraband. In concluding that such empirical findings suggest that “race and ethnicity are simply not useful criteria for suspicion,”39 professors Cole and Lamberth also assume that the findings confirm law enforcement officers’ use of racial profiling.

The hit rates argument has been relied on by numerous legal scholars40 and by some civil rights groups.41 It has appeared in the popular press42 and in a system. See, e.g., COLE, supra note 31; David Cole, Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship, 87 GEO. L.J. 1059 (1999); David Cole, Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction, 86 GEO. L.J. 2481 (1998); David Cole, The Paradox of Race and Crime: A Comment on Randall Kennedy’s “Politics of Distinction”, 83 GEO. L.J. 2547 (1995).


39. Id.


report produced for the Department of Justice. As stop-search data have accumulated, proponents of the hit rates argument have focused less on findings of equal hit rates across groups and instead have emphasized that hit rates for blacks and Latinos are often lower than hit rates for whites, a finding viewed as even stronger evidence of the flawed premise of racial profiling.

II. THE AMBIGUITY OF THE EVIDENCE

This Part describes the ambiguity of the empirical evidence regarding drug crime rates and racial profiling.

A. Limitations of Self-Fulfilling Prophecy and Survey Data Claims

Although the self-fulfilling prophecy and survey data claims unsettle any complacent assumption of racial group differences in criminality, neither actually disproves the empirical premise of racial profiling. Racial profiling is not inherently or necessarily self-fulfilling. If officers allocate investigative resources based not on the number of prior arrests among each group but

http://archive.aclu.org/profiling/report/index.htm (last visited Nov. 9, 2003);


33. DEBORAH RAMIREZ, JACK McDEVITT & AMY FARRELL, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 10 (2000) (reasoning that equal hit rates undermine the hypothesis of crime rate differences). After describing the hit rates findings in a variety of studies, the report states that “if the perception that drug couriers are more likely to be black or Latino were true, a widespread survey of . . . searches should reveal differing hit rates.” Id.

34. See, e.g., HARRIS, supra note 33, at 80; Harris, supra note 26, at 295-96; Maclin, supra note 30, at 123.

35. See HARRIS, supra note 33, at 13. Harris states:

Data emerging from studies done over the last few years demonstrate conclusively that hit rates—the rates at which police actually find contraband on people they stop—run contrary to long-held ‘commonsense’ beliefs about the effectiveness of racial profiling. The rate at which officers uncover contraband in stops and searches is not higher for blacks than for whites, as most people believe. Contrary to what the “rational” law enforcement justification for racial profiling would predict, the hit rate for drugs and weapons in police searches of African Americans is the same as or lower than the rate for whites. Comparing Latinos and whites yields even more surprising results. Police catch criminals among Latinos at far lower rates than among whites.

Id.

36. Id. Harris concludes that if “blacks and Latinos who are stopped as a result of racial profiling are no more likely or are even less likely to be in possession of drugs or other contraband than whites, it simply doesn’t make sense” to racially profile. Id. at 14.

37. Commentators typically assume that law enforcement agencies allocate resources
instead based on the groups’ relative hit rates, racial profiling is more likely to be self-correcting than self-fulfilling.

The survey data argument suffers from three fundamental flaws. First, the survey findings may underestimate drug use among racial minorities relative to whites. Second, most commentators emphasize the percentages of various racial groups who use any illicit drug. The survey evidence, however, does appear to indicate that black and Latino adults are more likely than whites to frequently use cocaine, which poses a much greater risk of a fatal overdose than marijuana (the most commonly used drug). Other indicators are among groups based on the number of arrests among each group. See, e.g., Bernard Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century*, 70 U. CHI. L. REV. 105 (2003).


49. The allocation of investigative resources on the basis of hit rates could be self-correcting because if search rates for a given group are high but crime rates are not, hit rates would likely decline. Alternatively, if officers focus exclusively on a particular group and exempt other groups from investigation entirely, then racial profiling would be self-fulfilling because officers would lack the necessary hit rate information. In addition, racial profiling may be self-fulfilling to the extent it creates racial differences in criminality. For example, irrational racial profiling could disproportionately apprehend racial minority offenders, resulting in minority overrepresentation among those on probation or parole. It would then be rational to engage in racial profiling to apprehend individuals who have violated a condition of probation or parole.

50. The major national surveys exclude individuals who are incarcerated and tend to undercount those individuals who do not have stable residences or who do not regularly attend school. If a greater proportion of blacks than of whites are not counted, and if those individuals who are not counted are more likely than those who are counted to use drugs, then the survey would underestimate drug use among blacks relative to whites. This possibility has been noted by other scholars and in government reports. See Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* 101-03 (1995); U.S. DEP’T OF HEALTH & HUMAN SERVS., NAT’L INST. OF HEALTH & NAT’L INST. ON DRUG ABUSE, *Drug Use Among Racial/Ethnic Minorities* 30-32, 36 (2003) [hereinafter Drug Use Among Racial/Ethnic Minorities] (the most comprehensive synthesis available of the varied efforts by the federal government to track drug use among various demographic groups). The most recent installment of the standard national survey of rates of drug use, including alcohol and tobacco, is DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF APPLIED STUDIES, *RESULTS FROM THE 2002 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS* 25 (2003) (formerly the National Household Survey on Drug Abuse). Recent refinements in data analysis may moderate the possibility that survey findings underestimate drug use among racial minorities relative to whites.

51. See e.g., Gross & Barnes *supra* note 18, at 691; Harris, *supra* note 26, at 296.

52. *Drug Use Among Racial/Ethnic Minorities, supra* note 50, at 42, 51 tbl.8. The survey findings indicate that blacks are nearly twice as likely as whites to have used cocaine during the month prior to the survey. One must be especially cautious in interpreting such results, however, because the numbers presented are only estimates based on a sample of the United States population. Actual differences may be either greater or less than the survey findings would suggest. *Id.* at 31.

53. *Id.* at 109.
consistent with a hypothesis of more severe cocaine use among blacks than whites. 54 Finally, even survey evidence that accurately indicated the same prevalence and severity of drug use across groups would reveal little about rates of drug trafficking, which is the likely focus of interdiction efforts. 55 Attempts to measure rates of drug trafficking do not resolve the uncertainty. 56

B. The Hit Rates—Crime Rates Disjunction

Hit rates signal the accuracy of the stop-search process, not underlying rates of criminal activity. 57 The permissibility of an inference about groups’ crime rates on the basis of their hit rates depends on officers’ criteria for selecting individuals for investigation and the similarity of stop-search rates across groups. If officers investigate people wholly on the basis of criteria that are statistically unrelated to criminality, then the hit rate would equal the crime rate. Those individuals who are stopped and searched would represent a random sample of the broader population. 58 Equal hit rates across groups would signify equal crime rates across the groups, and group differences in hit rates would indicate group differences in crime rates.

Alternatively, if officers investigate individuals based on criteria related to criminality and investigate individuals from each group at comparable rates, then each group’s hit rate would exceed its crime rate. However, the groups’ relative hit rates might provide a rough gauge of their relative crime rates. For example, the higher hit rate group might well be the higher crime rate group.

An inference about groups’ relative crime rates is least justifiable when officers investigate individuals based on criteria actually related to criminality and stop-search rates differ across groups. In such a circumstance, relative hit rates are not comparable across groups. If officers investigate individuals based on criteria related to criminality and stop-search rates differ across groups, then the groups’ relative hit rates might provide a rough gauge of their relative crime rates. For example, the higher hit rate group might well be the higher crime rate group.

54. According to federal statistics, blacks are more likely than whites to be admitted to a hospital emergency room for reasons related to drug use and in particular cocaine use. Id. at 104-10, 115 tbl.35, 117 tbl.36, 125 tbl.41. Federal data also show that among blacks and whites who are arrested and submit to drug testing, blacks are more likely than whites to test positive for drugs. Id. at 19-20, 132, 136 tbl.43. Such findings are not dispositive, but they do weaken the claim that drug use rates are comparable across groups.


56. One study has found that drug users tend to purchase drugs from members of their own racial or ethnic group. K. Jack Riley, U.S. Dep’t of Justice, Crack, Powder Cocaine and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities (1997). Some commentators have relied on this finding to conclude that rates of drug trafficking are comparable across racial groups. See, e.g., Leadership Conference Report, supra note 41, at 16. This conclusion is unwarranted. The same study found that users of crack cocaine (disproportionately racial minorities in this study) tend to purchase drugs more frequently, and from a larger array of suppliers, than do users of other drugs. Riley, supra, at 25.

57. This point may become more clear if one imagines a perfectly accurate investigative process. The hit rate would be 100% whatever the rate of criminality in the population as a whole or among different racial groups.

58. This reasoning obviously applies only if a sufficient number of people are stopped.
rates are not even rough indicators of relative crime rates because the hit rate for each group is also a function of its stop-search rate. When officers’ stop-search criteria are related to criminality, hit rates and stop-search rates are inversely related. So, for example, if groups’ stop-search rates differ substantially, equal hit rates would definitely not imply equal crime rates.

The stop-search studies often present the circumstance where a crime rates inference is least justifiable. Most studies have documented the disproportionate investigation of Blacks and Latinos relative to whites. The fact that reported hit rates typically exceed the range of plausible crime rates suggests that officers select individuals for investigation at least partly on the basis of criteria actually related to criminality. A study by the U.S. Customs Service, for example, found that the agency’s airport interdiction process ranged from 1.5 to nearly 15 times as accurate as random searches, depending on the airport.

C. Problems of Proof

Racial disparities in stop-search rates cannot be taken as prima facie evidence of racial profiling because racial profiling is only one of many causes of such disparities. For example, racial disparities may result from the decision to target drug dealers in low status, and disproportionately minority, neighborhoods, either because it is easier to apprehend drug dealers there or because drug dealing is especially socially harmful in those neighborhoods. Not even all uses of race count as racial profiling. For example, law

59. See GAO CUSTOMS REPORT, supra note 11, at 2; N.Y. “STOP AND FRISK” STUDY, supra note 18, at 126; Gross & Barnes, supra note 18, at 667.

60. See, e.g., N.J. INTERIM REPORT, supra note 13, at 28; N.Y. “STOP AND FRISK” STUDY, supra note 18, at 117; Gross & Barnes, supra note 18, at 668.

61. GAO CUSTOMS REPORT, supra note 11, at 28 tbl.7.


63. See COPS STUDY, supra note 62, at 36 (noting that “[a]ssignment of a high proportion of officers to minority neighborhoods can generate disparate numbers of traffic stops for racial minorities even if officers are acting in a completely equitable manner”).

64. See William J. Stuntz, The Distribution of Fourth Amendment Privacy, 67 GEO. WASH. L. REV. 1265, 1266 (1999) (arguing that the Fourth Amendment’s protection of privacy inclines police to target poor neighborhoods rather than middle-class neighborhoods); William J. Stuntz, Race, Class, and Drugs, 98 COLUM. L. REV. 1795, 1799 (1998) (arguing that police are able to externalize the costs of drug law enforcement in low-status neighborhoods more readily than in upper-class neighborhoods).

enforcement officers may limit their investigation to a particular racial group if they seek a specific criminal suspect of that race, based either on an eyewitness account or trustworthy intelligence information. Depending on the context, such suspect description stops may constitute a significant proportion of overall stops. Identifying racial profiling then requires one to discount the extent to which gross racial disparities reflect the use of nonracial characteristics closely linked to race or the use of race in a way that does not count as racial profiling.

One approach to proving racial profiling would be to examine directly the bases of law enforcement officers’ decisionmaking. However, if law enforcement officers deny that they engage in racial profiling or attempt to conceal it, the identification of the practice becomes much more difficult. The primacy of discretion weighs against any simple criterion on the basis of which an officer’s behavior may be evaluated. The greater the number of permissible decisionmaking considerations, the more difficult it will be to determine when discretion has been turned to discriminatory ends. This difficulty is compounded if race is related to criminality.

Another approach to identifying racial profiling is to examine hit rates.

66. See Banks, Race-Based Suspect Selection, supra note 1, at 1077. These examples also raise interesting conceptual questions about the sorts of considerations that should count as racial profiling. I consider these conceptual issues in a forthcoming article. See R. Richard Banks, Racial Profiling and Anti-Terrorism Efforts, 89 CORNELL L. REV. (forthcoming 2004).

67. For example, if a member of a drug trafficking ring tells officers the race of his confederates and the color of the vehicle they will use to transport drugs, the officers’ decision to stop drivers consistent with that information may well not constitute racial profiling. Cf. Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. REV. 956, 1005-06 (1999) (discussing law enforcement officers’ use of race as an indicator of membership in a particular racially identified gang).

68. N.Y. “STOP AND FRISK” STUDY, supra note 18, app. I, tbl.II.B.3 (showing that 30% of street stops by New York City police officers were reported to be associated with a suspect description).

69. Id. at 118-34.

70. If an officer stops only black motorists, for example, then the racial profiling determination is simple. It should not take long, however, for officers to engage in more subtle racial profiling. One way to identify individual officers who are racially profiling may be to compare them to colleagues performing similar functions in the same area. See, e.g., Brandon Garrett, Remedying Racial Profiling, 33 COLUM. HUM. RTS. L. REV. 41 (2001). The irony of such an approach is that it would also immunize racial profiling practices broadly shared by officers within the jurisdiction.

71. See Maclin, supra note 30, at 127-30.


73. Although not without flaws, such outcome tests are frequently used to assess discrimination. See Ian Ayres, Pervasive Prejudice?: Unconventional Evidence of Race and Gender Discrimination 410-11 (2001). For discussion of the use of outcome
Hit rates, however, are more useful in identifying irrational profiling than rational profiling.⁷⁴ Whereas lower hit rates for minorities than for whites would suggest irrational discrimination,⁷⁵ equal hit rates are equally consistent with either no discrimination or rational discrimination.⁷⁶

While many commentators have emphasized that hit rates for blacks and Latinos are often lower than for whites, that characterization may partly depend on the definition of hit rate. For example, because search rate disparities typically exceed stop rate disparities,⁷⁷ the recalculation of hit rates based on stops rather than searches (as is typical) would tend to increase hit rates for blacks and Latinos relative to whites.⁷⁸ Such a recalculation would weaken an inference of irrational profiling in stops, which is the point at which one would most expect racial profiling to occur.⁷⁹ Similarly, redefining “hit” to better reflect law enforcement officers’ preference for apprehending traffickers of large amounts of drugs⁸⁰ may increase hit rates for blacks and Latinos relative to whites. In the only study that includes information on the quantity of drugs seized, redefining hit in that manner dramatically increases hit rates for blacks and Latinos relative to whites.⁸¹

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⁷⁴. See Ayres, supra note 73, at 408.
⁷⁵. Irrational discrimination would tend to produce a lower hit rate for the group facing discrimination, because officers would stop and search group members based on a lesser threshold of suspicion. Id. at 410-12. Although, more precisely, one should focus on marginal, rather than average, hit rates, I do not see any particular reason for, or practical means of, distinguishing between average and marginal hit rates.
⁷⁶. Id. at 408-15.
⁷⁷. See supra note 20 and accompanying text.
⁷⁹. To the extent that officers racially profile because they believe race conveys useful information, one would expect more racial profiling in the decision to stop (when officers have less information) than in the decision to search (when officers have substantial nonracial information). See Macdonald, supra note 28.
⁸⁰. See Thomas, supra note 55, at 41-42.
⁸¹. See Knowles et al., supra note 48, at 226-27 (2001). In the Maryland study, if a hit is defined as any amount and type of illicit drug, then hit rates are roughly equal for whites and blacks and substantially lower for Latinos. Under the more restrictive definition of a hit, however, the hit rate for blacks would substantially exceed the hit rate for whites (though of course absolute hit rates decline for all groups). This change in relative hit rates indicates that drug-carrying blacks were more likely to have a large quantity of drugs than were drug-carrying whites. See also Gross & Barnes, supra note 18, at 703-04; Thomas, supra note 55, at 41-42.
D. Judgments of Racial Profiling

In all but the most extreme cases, judgments of discrimination on the basis of statistical evidence represent interpretations, not declarations of incontrovertible fact. Putting aside the methodological problems that plague existing studies, one should expect that even better designed empirical studies often will fail to conclusively substantiate or refute allegations of racial profiling. Interpretation of ambiguous findings will turn partly on considerations extrinsic to the evidence itself. In interpreting statistical evidence of discrimination one might consider, for example, the nature and importance of the outcomes alleged to result from discrimination. If one believes that those outcomes are objectionable, then one should be more likely to declare them the result of discrimination. Alternatively, if one believes that the relevant outcomes are innocuous, desirable, or trivial, then one should be less inclined to equate them with discrimination.

The parties most intensely involved in the racial profiling controversy—law enforcement agencies and civil rights groups—would seem especially likely to offer contrary interpretations of ambiguous evidence. Commentators sometimes draw a conclusion of racial profiling even when the researchers who


83. See, e.g., COPS STUDY, supra note 62, at 3 (emphasizing that there is not an accepted, official definition of racial profiling, much less an operational definition that describes . . . what type of analytical results would definitively identify racial profiling”); cf. COLE, supra note 31, at 151 (concluding that in the sentencing context “statistical studies can rarely prove intentional discrimination”).

84. One might also appropriately consider the remedial implications of a finding of discrimination. In McCleskey v. Kemp, 481 U.S. 279 (1987), for example, concern about remedial difficulties contributed to the Supreme Court’s decision not to recognize racial discrimination. While remedial concerns might have legitimately counseled against a judgment of discrimination, that the case concerned the death penalty might have constituted a more compelling reason to find discrimination.

85. For example, a police official and civil rights activist offered completely contrary characterizations of the findings contained in a report released by the New York City Council in 2003 concerning stop-and-frisk practices in 2002. The police official stated that “the composition of those people stopped by the police is consistent with the racial background of violent crime suspects as identified by victims.” Worth, supra note 19. The civil rights activist asserted that the “figures . . . suggest that race may continue to play an inappropriate role in decisions to stop and frisk New Yorkers.” Id. A similar controversy exists in New Jersey. Compare Jim Edwards, Settlement in Hand, Plaintiffs Say Racial Profiling Is Still ‘Alive and Well,’ N.J. L.J., Jan. 20, 2003, with David Kocieniewski, Amid Pomp: McGreevey Signs Racial Profiling Bill, N.Y. TIMES, Mar. 15, 2003, at B5 (“[S]tatistics released by monitor indicate little evidence” of racial profiling).
conducted the study decline to do so.\(^{86}\) Even in New Jersey, where evidence of racial profiling seemed most conclusive, controversy has been renewed by a study finding that blacks tend to drive at the very highest rates of speed more frequently than whites.\(^{87}\) Continuing disagreement about racial profiling on the highway is significant because it would seem infinitely easier to prove there than in city policing.\(^{88}\)

The ambiguity of the stop-search studies also explains why law enforcement officers decline to defend racial profiling by refuting the irrationality claim. They need not defend the practice so long as the ambiguity of the empirical findings permits them to deny it.\(^{89}\)

### III. The Abandonment of the Racial Profiling Inquiry

This Part delineates the reasons for abandonment of the racial profiling inquiry in favor of a focus on the consequences of drug policy and policing practices.

#### A. Rational Racial Profiling

As other scholars have noted, no simple prohibition of racial profiling will suffice.\(^{90}\) If racial profiling helps officers to apprehend drug traffickers, then...
officers will have a powerful incentive to use racial profiling, no matter what the rules say. Professor William Stuntz has described racial profiling as “a fact of life that the legal system probably cannot change.” Indeed, recent findings from New Jersey and Maryland, jurisdictions that have sought to end racial profiling, are consistent with its continued use by state troopers.

In any event, the absence of proof of racial profiling by individual officers or against individual citizens precludes individualized remedies. Remedies must take the form of broad prophylactic measures, such as monitoring, or the elimination of discretionary actions, such as consent searches. Although such reforms will narrow the opportunities for racial profiling, they may also prompt officers to conceal their racial profiling. Moreover, limitations on officer discretion might influence the behavior of other actors within the criminal


92. William J. Stuntz, Local Policing After the Terror, 111 YALE L.J. 2137, 2179 (2002). Contrary to Stuntz’s claim, one could imagine, at least in the traffic enforcement context, reforms that would dramatically lessen the opportunity for racial profiling. See Sherry F. Colb, Stopping a Moving Target, 3 RUTGERS RACE & L. REV. 191 (2001). The prospect of eliminating racial profiling partly turns on one’s definition of racial profiling. A narrow prohibition that would only preclude investigation solely on the basis of race would be easier to enforce than one that would prohibit any reliance on race. See Thomas, supra note 55, at 53.


95. Although not my focus here, scholars’ preference for the Fourth Amendment as opposed to the Equal Protection clause as a means of regulating racial profiling is consistent with my analysis. See, e.g., Karlan, supra note 90.

96. See, e.g., N.J. CONSENT DEGREE, supra note 13. Professor Sherry Colb has proposed the potentially more restrictive rule that highway traffic stops should only be permitted when there is reason to believe a vehicle occupant has committed a serious crime or the operation of the vehicle poses a safety hazard. See Colb, supra note 92, at 207-11.

97. See Thomas, supra note 55, at 51. Awareness that they are being monitored might prompt officers to attempt to obscure their discriminatory decisions by stopping more white people so that the numbers “look right.” See DARIN D. FREDRICKSON & RAYMOND P. SFLJANDER, RACIAL PROFILING 55 (2002); Alschuler, supra note 65, at 262. Or, if officers can no longer conduct consent searches, they may detain people for longer amounts of time in order to develop probable cause.
justice system. Because the discretion that enables racial profiling is also integral to effective law enforcement, remedies that constrain discretion should be evaluated based on the full scope of their consequences, not simply whether they would diminish racial profiling.

Consistent with this approach, scholars who view racial profiling as plausibly rational tend to consider the consequences of drug interdiction in analyzing racial profiling. Professors Samuel Gross and Deborah Livingston, for example, oppose racial profiling on the highway, even if rational, because it “produces no discernible benefits.” They observe that the “entire war on drugs is fraught with ambiguity and ambivalence, and many commentators have concluded that the effort to reduce drug consumption by limiting supply is doomed to failure.” More specifically, they reason that interdiction is “ineffective by any standard [because fishing for drug couriers in the immense stream of cars on interstate highways is a hopeless strategy for eliminating drug trafficking [that] probably has no impact whatsoever on drug markets.”

Evaluations of rational racial profiling also tend to focus on the burden the practice imposes on innocent racial minorities. Professor Randall Kennedy has described this burden as a “racial tax.” He states that “a young black man selected for questioning by police . . . is being made to pay a type of racial tax for the war against drugs that whites and other groups escape. That tax is the cost of being subjected to greater scrutiny than others.”

98. The prohibition of consent searches, for example, might prompt an implicit reduction in the probable cause standard as judges consider whether to find probable cause for searches that they would have previously justified as consent searches. A similar sort of process has arguably occurred with the reasonable suspicion standard of Terry v. Ohio, 392 U.S. 1 (1968). See David A. Harris, Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio, 72 ST. JOHN’S L. REV. 975 (1998).


101. Gross & Livingston, supra note 100, at 1431.

102. Id.

103. See, e.g., Gross & Barnes, supra note 18, at 745-47; see also id. at 661 (describing the costs of racial profiling as “depend[ing] primarily on the number of innocent people the police target because of their race, and on the treatment they receive after they are selected”).


105. KENNEDY, supra note 104, at 159. The tax might plausibly be described either as a greater likelihood of investigation compared to innocent people of other races, or as a greater
concludes, in essence, that the racial tax of policing should be repealed, and the costs of policing “allocated on a nonracial basis.”

The arguments put forth by Gross and Livingston and by Kennedy exhibit a common concern with outcomes and consequences. Having characterized racial profiling as plausibly rational, they offer additional justification for its prohibition, something beyond the simple fact that it is discrimination. Whereas Gross and Livingston judge racial profiling ineffective because it is a component of a broader policy that they view as ineffective, Kennedy highlights the burden that racial profiling imposes on innocent racial minorities.

B. Problems Without Racial Profiling

As the ambiguity of the stop-search studies indicates, however, the extent of the tax borne by innocent racial minorities does not depend on whether it is levied by the practice of racial profiling. However imposed, the tax might be criticized as violating a substantive conception of the antidiscrimination principle if innocent racial minorities are investigated disproportionate to their group’s representation among wrongdoers. Stated in more familiar doctrinal terms, the tax on the innocent would disparately impact racial minorities.

likelihood of investigation that exceeds racial group differences in rates of criminality. Kennedy does not specify which formulation he has in mind.

106. Id. at 161. He writes that:

[i]nstead of placing a racial tax on blacks, Mexican-Americans, and other colored people, governments should, if necessary, increase taxes across the board. More specifically, rather than authorizing police to count Mexican ancestry or apparent blackness as negative proxies, states and the federal government should be forced either to hire more officers or to inconvenience everyone at checkpoints by subjecting all motorists and passengers to questioning (or to the same chance of random questioning).

Id.

107. Id. Moreover, Kennedy opposes even rational racial profiling because it “nourishes powerful feelings of racial grievance against law enforcement authorities that are prevalent in every strata of black communities.” Id. at 151; see infra Part IV.

108. An unstated premise of the Gross-Livingston argument is that the prohibition of racial profiling would result in the stopping of fewer black people rather than more white people. Critics of racial disparities in capital punishment often rely on a similar assumption. See, e.g., Charles Ogletree, Black Man’s Burden: Race and the Death Penalty in America, 81 OR. L. REV. 15, 33 (2002).

109. Other scholars have also noted that innocent racial minorities are taxed as a result of racial differences in criminality. See, e.g., Alschuler, supra note 65, at 213-18.

110. For example, if 20% of drug traffickers are black, and innocent blacks are more than 20% of the innocent people searched, the search process would violate this substantive conception of antidiscrimination. This approach draws upon Mark Kelman, Concepts of Discrimination in “General Ability” Job Testing, 104 HARV. L. REV. 1158 (1991).

111. This approach would view disparate impact as a substantive entitlement, rather than simply indirect proof of discrimination. Not all commentators agree that disparate impact does or should embody such a substantive entitlement. See, e.g., George Rutherglen, Disparate Impact Under Title VII: An Objective Theory of Discrimination, 73 VA. L. REV. 1297 (1987).
An obvious rationale for according importance to whether that tax stems from racial profiling is that racial discrimination is itself harmful. Racial profiling, for example, may inflict psychic or stigmatic injury, exacerbate tension between racial minorities and law enforcement agencies, and reinforce officers’ tendency to base investigative decisionmaking on potential suspects’ racial group membership. This argument is undermined, however, by the difficulty of discerning racial profiling. Just as the ambiguity of the stop-search studies complicates the identification of racial profiling in the aggregate, the opacity of an officer’s intent means that individuals will often not know whether they were investigated as a result of racial profiling.

Researchers have found that in the absence of information about an actor’s intent, individuals are more likely to believe that they are being discriminated against when they experience the encounter as harmful, when their group identity is salient, and when they expect to experience discrimination. To the extent these conditions are met in blacks’ and Latinos’ interactions with law enforcement officers, it is unlikely that elimination of racial profiling alone would be sufficient to diminish its perception, especially if those groups remain subject to high levels of investigation. Just as police officers may stereotype blacks and Latinos as criminal wrongdoers, so too may those groups stereotype police officers as racially biased.

If innocent racial minorities may be as taxed by a process without racial profiling as by a process that relies on racial profiling, and if the perception of racial profiling can thrive in the absence of the practice, why should normative assessment of drug interdiction efforts or policing practices turn on

113. See Forman, supra note 40.
114. KENNEDY, supra note 104, at 157.
120. The perception of racial profiling may both reflect and promote a variety of other problems associated with racial profiling. See Erik Luna, Race, Crime, and Institutional Design, 66 LAW & CONTEMP. PROBS. 183, 185 (2003).
elusive proof of racial profiling?\textsuperscript{121}

C. Racial Profiling Without Problems

The problems associated with racial profiling may be addressed without eliminating the practice.\textsuperscript{122} The racially disparate stop-search rates typically viewed as indicators of racial profiling need not be accompanied by a high level of stops or searches. Whereas racial profiling would increase a minority’s likelihood of being stopped compared to a white, the overall likelihood that the minority would be stopped would also depend on the base rate of stops.\textsuperscript{123} The two are analytically, and practically, distinct.\textsuperscript{124} A law enforcement agency might reduce stops of racial minorities by decreasing the base rate rather than eliminating racial disparities.

Consider the case of the Customs Service. In response to allegations of racial profiling,\textsuperscript{125} in late 1999 the Service revamped its procedures and dramatically reduced its searches of airline passengers.\textsuperscript{126} The new search process produced racial disparities in search rates that far exceeded the disparities produced by the prior search policy.\textsuperscript{127} If dramatic racial disparities in stop-search rates are indicative of racial profiling, as many commentators suggest, then the current interdiction process might be described as racially discriminatory. Yet, commentators have praised the Service’s reconfigured interdiction process.\textsuperscript{128} The reduction in the overall likelihood of being searched seems obviously worth the increased racial disparity. Racial disparities become most objectionable when coupled with a high base rate and low accuracy. A discriminatory process that investigates fewer innocent

\textsuperscript{121} Of course, proof of racial profiling may be required to demonstrate a violation of the Equal Protection Clause. But, in my view, there is no reason that the policymaking bodies that will respond to claims of racial profiling should be bound by the same proof requirement.

\textsuperscript{122} One might be the subject of racial profiling without realizing it. See Stuntz, supra note 92, at 2142 (observing that the problems associated with racial profiling may be solved without confronting racial profiling directly).

\textsuperscript{123} See COPS STUDY, supra note 62, at 33. The base rate refers to the number of law enforcement stops relative to the size of the relevant population.

\textsuperscript{124} To say that these factors are distinct is not to say that they are unrelated. Racial profiling may influence both the likelihood of a minority being stopped and the base rate of stops. Conversely, the base rate may influence the likelihood of racial profiling.

\textsuperscript{125} See supra note 11.

\textsuperscript{126} See HARRIS, supra note 33; Gross & Barnes, supra note 18, at 750 n.330. The revamped process also resulted in an increase in the seizure of contraband.


\textsuperscript{128} See, e.g., HARRIS, supra note 33, at 218-22.
minorities is preferable to a nondiscriminatory process that investigates more innocent minorities.

Another reason that the Customs Service’s new search policy has been so well received is that the Service not only modified its procedures for selecting passengers, it improved its treatment of passengers.\textsuperscript{129} There is reason to think such an approach may be useful in other contexts as well.\textsuperscript{130} One implication of the disjunction between the perception and the fact of racial profiling is that officers may engage in racial profiling without their targets being concerned about their having done so.\textsuperscript{131} The belief that one has been racially profiled often reflects the feeling that one has been mistreated by a law enforcement officer.\textsuperscript{132} That feeling, however, might be lessened, and perceptions of racial profiling abated, if the officer treats the individual with respect, acts in a courteous manner, and explains why the stop has occurred.\textsuperscript{133} If those individuals who are investigated feel that they have been treated fairly and with respect, relations between racial minorities and law enforcement agencies would likely improve,\textsuperscript{134} perhaps even if the level of investigation of racial minorities does not diminish.\textsuperscript{135}

D. Beyond Profiling

According analytical primacy to the question of racial profiling thus misdirects policy analysis in two distinct ways. First, it frames the inquiry in terms of procedure rather than substantive drug policy.\textsuperscript{136} It directs attention to

\textsuperscript{129} The Customs Service embarked upon what can only be described as an aggressive public relations campaign. The agency created simpler forms, better signage explaining its function, brochures explaining the search process, and even a document entitled “Why Did This Happen to Me?” to be given to every air passenger subjected to a search. The Service even distributed comment cards, so that passengers could easily register complaints or compliment agents for their professionalism. See Hearing Before Senate Judiciary Comm., Subcomm. on the Constitution, Federalism, and Property Rights, 107th Cong. (2001) (statement of Raymond Kelly).

\textsuperscript{130} Changing the way that officers treat suspects can probably be brought about more effectively through training and agency policy, rather than judicial regulation.

\textsuperscript{131} See \textit{Tyler & Huo, supra} note 115, at 62.

\textsuperscript{132} See \textit{Harris, supra} note 33, at 99-100.

\textsuperscript{133} See \textit{Stuntz, supra} note 92, at 2173 (noting that “the manner, and manners, of street stops probably have a larger effect on suspects’ views of the police than does their selection as suspects”); Tom R. Tyler & E. Allan Lind, \textit{Procedural Justice, in HANDBOOK OF JUSTICE RESEARCH IN LAW} 65, 80 (Joseph Sanders & V. Lee Hamilton, eds., 2000) (noting that “[h]owever irrational it might seem, at first glance, to use judgments of an authority’s politeness or of a procedure’s dignity to arrive at judgments of whether one is being treated fairly, these are social signs and symbols that people are comfortable interpreting.”)

\textsuperscript{134} See \textit{Tyler & Huo, supra} note 115, at 75; Tyler & Lind, \textit{supra} note 133.

\textsuperscript{135} See \textit{Stuntz, supra} note 92, at 2174.

\textsuperscript{136} For a discussion of the ways in which scholarly and judicial analyses of racial issues in criminal law have focused on procedural matters rather than matters of substantive law, see Gary Peller, \textit{Criminal Law, Race, and the Ideology of Bias: Transcending the
racial profiling rather than to outcomes. The problems that animate the campaign against racial profiling—law enforcement officers’ mistreatment of racial minorities and their widespread investigation and incarceration, and the troubled relationship between racial minority communities and law enforcement agencies—need not be equated with racial profiling. Not only should these issues not be reduced to the question of racial profiling, they may be analyzed without regard to racial profiling. Second, even if objectionable outcomes are the result of racial profiling, attempting to eliminate racial profiling may not be the best way to improve the situation. The relation between a cause of a problem and its remedy is not one of logical consistency. The effort to solve a problem should not fixate on any single understanding of its cause or remedy.

Policy reform instead should consider the magnitude and distribution of the benefits and burdens of policing practices and of the drug war, both within and across racial groups. Such analysis is complicated, both as a descriptive and normative matter, because criminal law enforcement simultaneously burdens and benefits. Drug enforcement efforts that burden some racial minorities may also disproportionately benefit those racial minorities whose neighborhoods are most plagued by drug dealing and its associated problems.137 Racial proportionality in policing, investigation, or incarceration is not a goal toward which we should strive. The patterns and consequences of crime are nonuniform, and enforcement efforts should be as well.

IV. THE SOCIAL HARMs OF INCARCERATION

This Part describes the social harms of incarceration that are likely to be underappreciated in the racial profiling debate.138

A. The Magnitude of Incarceration

During the past quarter century, aggregate increases in incarceration,139 coupled with growing racial disparities, have resulted in staggering and unprecedented levels of incarceration for black men in particular.140 A recent

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137. See, e.g., Macdonald, supra note 28.


140. In 12 states, between 10% and 15% of the black male population is in prison. See
study by the Bureau of Justice Statistics found that in 2001 nearly seventeen percent of black men were currently or previously imprisoned.141 Black men are more than five times as likely as white men to enter prison.142 Black women are six times as likely as white women to enter prison,143 and nearly as likely as white men to do so.144 These disparities have grown dramatically in recent years.145 While a variety of factors account for these developments,146 the importance of the drug war is beyond dispute.147 From 1990 to 2000, drug offenders accounted for a greater proportion of prison population growth among black inmates than among any other racial group.148

These racially disparate outcomes may violate a substantive conception of the antidiscrimination principle if guilty racial minorities are incarcerated at a higher rate than white wrongdoers.149 Such distributive injustice is reinforced to the extent that, as the following discussion suggests, the incarceration of the guilty also indirectly burdens the innocent. Moreover, the racial concentration of incarceration may produce greater aggregate social costs than would a more

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142. Id. at 8 tbl.9. Latino men were nearly three times as likely as whites to enter prison. Id.
143. Id.
144. Id.
145. For example, according to the Bureau of Justice Statistics, between 1974 and 2001 the chance of entering prison increased more for black males than for any other group. Id. at 5.
146. Tougher sentencing policies for other types of crimes have also contributed to increased rates of incarceration. See Mauer, supra note 31, at 32-37.
149. Racial disparities in incarceration almost certainly exceed actual differences in rates of offending. Thus, just as innocent racial minorities are investigated disproportionately to group differences in rates of criminality, so too are guilty minorities more likely to be imprisoned than their white counterparts, an outcome that violates a substantive conception of the antidiscrimination principle. See Alschuler, supra note 65, at 223 (noting the distributive unfairness of punishing a higher percentage of guilty racial minorities than of guilty whites). See generally Kelman, supra note 110. Of course, the potential distributive unfairness may be moderated by any benefits that accrue to innocent blacks as a result of the incarceration of black wrongdoers.
racially diffuse distribution of incarceration. 150

B. Neighborhood Effects

Incarceration may impose especially harmful social, economic, and political consequences on racial minority communities because drug offenders tend to be drawn predominantly from the same racially isolated and socioeconomically disadvantaged neighborhoods. 151 As a result of the race and class segregation of most American cities, 152 the racial concentration of incarceration reflects a spatial concentration as well. 153 The families of inmates lose the social and economic support that the person might otherwise have provided. 154 Community stability may be impaired both by the loss of so many adults 155 and, paradoxically, by their reentry into the community after having endured the conditions of prison. 156 The organization and stability of families may be undermined. 157 Oddly enough, increased incarceration may even

150. The incarceration of a given number of individuals may be more socially costly if concentrated among an already disadvantaged racial group than if those individuals were more evenly drawn from the broader population.


153. It is the spatial concentration of incarceration that produces the neighborhood effects that I discuss. See Mauer, supra note 147, at 206.

154. Approximately two-thirds of incarcerated women have young children. See Mauer, supra note 31, at 185-86. Many of the young men incarcerated for drug crimes had previously provided financial support to a family member. See Mears, supra note 147, at 207-08; see also Donald Braman, Families and Incarceration, in Invisible Punishment, supra note 151, at 117.


157. Stable marriages would be less likely to form, for example. See Darryl K. Brown, Cost-Benefit Analysis in Criminal Law, 92 Cal. L. Rev. (forthcoming 2004).
increase crime rates.\textsuperscript{158} Also, because imprisonment often results in loss of the right to vote even after release,\textsuperscript{159} a high rate of imprisonment will substantially diminish a group’s political power, including its ability to influence the laws that disenfranchise so many of its members.\textsuperscript{160}

C. Perceived Injustice

The incarceration of so many black Americans as a result of the drug war has prompted many to view the drug war and the criminal justice system more generally as racially unjust.\textsuperscript{161} Such widespread incarceration reinforces a sense of racial injustice because it results from the enforcement of a malum prohibitum crime about which many are ambivalent.\textsuperscript{162} Awareness of the history of invidious racial discrimination by police, prosecutors, judges, and policymakers augments the appeal of that interpretation. Perceived injustice is further reinforced by the fact that racially disparate incarceration rates partly reflect the decision to punish the type of crime associated with blacks (crack cocaine use) more harshly than the type of crime associated with whites (powdered cocaine use).\textsuperscript{163} In contrast, other criminal prohibitions that contribute to racially disparate incarceration rates may not produce a similar sense of injustice if the prohibited act seems inherently wrong and appropriately subject to severe punishment.\textsuperscript{164}


\textsuperscript{159} See Gabriel J. Chin, Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. Gender Race & Just. 255 (2002).


\textsuperscript{161} See, e.g., Gary L. Webb & Michael P. Brown, United States Drug Law and Institutionalized Discrimination, in The New War on Drugs, supra note 4, at 45; John A. Powell & Eileen B. Hershenov, Hostage to the Drug War: The National Purse, the Constitution, and the Black Community, 24 U.C. Davis L. Rev. 557 (1991); see also Alschuler, supra note 65, at 234-35.

\textsuperscript{162} Ambivalence about the drug war is reflected in any of the number of drug policy symposia that have appeared in law reviews. See, e.g., Special Issue: The Drug Policy Debate, 28 Fordham Urb. L.J. 9 (2000); Symposium on Drug Crimes: Penal Jurisprudence in Punishment and Treatment, 63 Ala. L. Rev. 679 (2000).

\textsuperscript{163} Although crack cocaine is made from powdered cocaine, federal law imposes much harsher penalties for possession of crack cocaine. Blacks tend to be disproportionately convicted for possession of crack cocaine, whereas whites are more likely to be convicted for possession of powdered cocaine. For discussion of the controversy regarding the crack cocaine-powdered cocaine punishment disparity, see Cole, supra note 31, at 141-43; Kennedy, supra note 104, at 364-386.

\textsuperscript{164} No one could contend, for example, that the illegality of murder reflects a racist
Whether the drug war is motivated by unconscious bias or racially selective indifference is ultimately unknowable and, in my view, less important than widespread perceptions of injustice. Because such perceptions may diminish a group’s respect for the law and willingness to obey it, they are a cost that should be incorporated into the policy calculus.

D. The Meaning of Race

Finally, incarceration plays a role in constructing the meaning of race in American society by defining race and crime in terms of each other. The incarceration outcomes of the drug war have made the image of black criminality less an ungrounded stereotype and more a social reality. Put simply, black men are more than six times as likely as white men to have been incarcerated, and an astonishingly high number and percentage of black men will, at some point in their lives, bear that stigma. The criminal justice system has become an important institution in the socialization of many young black men, and, by extension, in the development of contemporary black popular culture. The sociological coupling of race and crime reinforces their political conflation, as attitudes and beliefs about one inflect debates about the other. The association of blacks with criminality may even contribute to the tendency to associate other negative characteristics with blacks as well.

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165. Just as it is difficult to rebut suspicions of racial profiling, it is difficult to dispel the view that the drug war is racially biased. See David A. Sklansky, Cocaine, Race, and Equal Protection, 47 STAN. L. REV. 1283 (1995).

166. See generally Tom R. Tyler, Why People Obey the Law (1990); see also Tyler & Lind, supra note 133.

167. See Kennedy, supra note 104, at 383 (noting that the “appearance of justice is a proper and important consideration in policymaking”).

168. See Cole, supra note 31, at 177; see also Wacquant, supra note 151, at 115-16 (discussing the social implications of the interlock between prisons and ghettos).


170. Bonczar, supra note 141, at 5.

171. If current rates of incarceration remain unchanged, nearly one-third of black men will be incarcerated at some point during their lifetimes. Id. at 8.

172. See Wacquant, supra note 151, at 116.


V. THE APPEAL OF THE ANTIDISCRIMINATION CLAIM

The salience of racial profiling in public and scholarly debate reflects the political, moral, and rhetorical potency of the image of irrational racial discrimination against people who are respectable, middle class, and innocent.

A. Discrimination

While some people oppose racial profiling simply because it is discrimination, much of the opposition to the practice reflects an underlying opposition to some aspect of the drug war. Some oppose the criminalization of drugs. Others view interdiction as a failed policy that disproportionately burdens innocent racial minorities. Still others emphasize the incarceration outcomes of the drug war. The unifying theme of these positions is that the drug war does more harm than good, especially in light of its effect on disadvantaged racial groups. Others oppose racial profiling because they are concerned about the distrust that racial minorities harbor toward law enforcement agencies or about the mistreatment of racial minorities by law enforcement officers.

The campaign against racial profiling folds these various sentiments into a politically and rhetorically potent antidiscrimination claim. It defines a morally compelling and easily understood problem, whose remedy is the conceptually straightforward one of categorical prohibition. This formulation of the problem is especially appealing to middle-class racial minorities, who are more likely than lower-class minorities to view racial profiling as a problem.

B. Irrationality and Innocence

The irrationality claim enhances the political potency of the antidiscrimination claim in three distinct ways. First, it attracts as opponents of


176. See, e.g., DOUGLAS HUSAK, LEGALIZE THIS!: THE CASE FOR DECRIMINALIZING DRUGS (2002).

177. See, e.g., Gross & Livingston, supra note 100, at 1431.

178. See, e.g., Gross & Barnes, supra note 18, at 753.

179. See, e.g., Cole, supra note 31; Mauer, supra note 31; Mauer & Huling, supra note 140; Tonry, supra note 50, at 82; Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677 (1995).

180. See Forman, supra note 40.

181. See Luna, supra note 120.

182. See, e.g., Ronald Weitzer & Steven A. Tuch, Perceptions of Racial Profiling: Race, Class, and Personal Experience, 40 CRIMINOLOGY 435 (2002); see also Ronald Weitzer & Steven A. Tuch, Race, Class, and Perceptions of Discrimination by the Police, 45 CRIME & DELINQUENCY 494 (1999).
racial profiling those drug war supporters who would, in fact, condone the practice if it helped to apprehend drug traffickers.183 Second, in implying that racially disparate stop-search patterns result from racial profiling, the irrationality claim prompts those opposed to the racial outcomes of drug interdiction to equate those outcomes with racial profiling. Finally, and most importantly, the irrationality claim depicts racial profiling as unconstitutional without undermining affirmative action, which is ardently supported by many of the same civil rights groups that vigorously oppose racial profiling.184

Both Fourth Amendment and Equal Protection standards are uncertain enough so that racial profiling is clearly unconstitutional only if irrational.185 In two Fourth Amendment decisions from the mid-1970s,186 (which the Supreme Court recently declined to revisit)187 the Court permitted border patrol agents to use Mexican appearance as one factor among many in selecting individuals for investigation because illegal aliens in that border area were more likely to be Mexican nationals than not.188 Additionally, some of the Court’s equal protection decisions permitting the government’s limited use of race to further a nonracial goal could be read to allow rational racial profiling.189 In attempting to discredit the empirical basis of racial profiling the irrationality claim depicts racial profiling as the sort of discrimination that Supreme Court precedent unquestionably prohibits.190

183. I suspect that politicians welcome the opportunity the irrationality claim provides to oppose racial profiling, yet appear to favor the drug war. See supra note 8.
185. In Whren v. United States, 517 U.S. 806 (1996), the Court suggested that the constitutionality of racial profiling should be evaluated under the Equal Protection Clause rather than the Fourth Amendment. The Court’s decision in Whren has been widely criticized. See, e.g., David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 SUP. CT. REV. 271; Thompson, supra note 67.
187. See United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000).
188. Martinez-Fuerte, 428 U.S. at 563; Brignoni-Ponce, 422 U.S. at 885. These decisions have been subject to sustained scholarly criticism. See, e.g., Kevin R. Johnson, The Case against Race Profiling in Immigration Enforcement, 78 WASH. U. L. Q. 675 (2000).
190. Supreme Court precedent does not establish that rational racial profiling in drug interdiction is necessarily permissible. After all, drug interdiction in inland areas might be distinguished from efforts to find illegal immigrants in border areas. And the permissibility of the use of race in the legislative redistricting process need not be extended to the enforcement or prosecution of the drug war. Nonetheless, existing precedent does put into question whether rational racial profiling in drug interdiction would violate the constitution.
By contrast, an argument that faulted racial profiling simply for treating individuals on the basis of their race would implicitly undermine affirmative action, which also accords weight to group status. In both cases, attention to group status is in tension with the notion of liberal individualism that the antidiscrimination principle might be thought to vindicate. The irrationality claim permits the argument that race should be considered by admissions officers because race matters in education, yet ignored by police officers because race is unrelated to criminality.

The focus on innocent, middle-class victims further bolsters the political viability of the antidiscrimination claim by eliding the stigmas of criminality and of race. Such victims provide an image around which whites and blacks alike can mobilize in opposition to racial profiling. Whites who may not sympathize with the plight either of criminals or of law-abiding, lower-class blacks may well relate to the predicament of innocent, middle-class people who are mistreated by law enforcement officers. The focus on innocent, middle-class victims also increases the likelihood that blacks would organize in opposition to racial profiling. A disadvantaged group is less likely to mobilize politically around an image that highlights its stigmatized status.

In sum, the focus on irrational discrimination that burdens even the most affluent and educated racial minorities situates racial profiling as Jim Crow, a continuation of a pernicious system of racial oppression.

192. See Brest, supra note 112, at 6-7.
193. See ACLU AFFIRMATIVE ACTION, supra note 184.
196. The stigma of race, in contrast, Goffman termed a tribal stigma, which inheres in one’s group status. Id.
197. Researchers have found that one way to dampen the impact of racial stereotypes on whites’ policy preferences is to focus on individual blacks who deviate sharply from the group stereotypes that would otherwise incline some whites to support punitive policies. See, e.g., Hurwitz & Peffley, supra note 173; Peffley et al., supra note 173.
198. See Hurwitz & Peffley, supra note 173; Peffley et al., supra note 173.
CONCLUSION

The strategic brilliance of the campaign against racial profiling is that it reduces complex issues of race, policing, and the drug war to the simple and arresting image of the irrational and racially discriminatory investigation of innocent, middle-class people. But the appeal of the means should not seduce us into mistaking it for the end.

I have offered a variety of reasons for ceasing to envision that end as the identification and elimination of racial profiling. Partisans will often put forth divergent interpretations of genuinely ambiguous empirical evidence. Remedial efforts to address racial profiling may be futile or counterproductive. Even if one could surgically excise racial profiling from law enforcement officers’ decisionmaking, doing so might not resolve the problems that are commonly associated with the practice. Such problems may persist in the absence of racial profiling or be remedied without eliminating racial profiling.

Although seemingly antithetical to the campaign against racial profiling, my analysis is consistent with the sensibilities that animate some of the opposition to racial profiling. The fact that debate has centered on racial profiling reflects the primacy of rights-based claims and the wide appeal of constitutional arguments in furtherance of racial justice. Racial profiling is usefully understood not simply as a law enforcement practice, or even as a social problem, but as a language within which grievances are articulated. The grievances that have prompted the campaign against racial profiling undeniably extend far beyond the practice of racial profiling.

The skeptical reader might wonder, even now, whether I really believe that we should jettison the racial profiling inquiry. I do. But let me be clear about that recommendation. I do not advocate that racial profiling be made legal, much less that public officials proclaim their support for the practice. We should treat racial profiling as we treat racial discrimination in other contexts; we formally prohibit it but do not fully commit ourselves to eradicating it. Such a disjunction between stated principle and actual practice is often justifiable and need not be viewed as a barrier to racial justice.²⁰¹

Rather than offer a concrete policy proposal, I have instead described an orientation to policy. Analyses should fully assess the consequences of the drug war, prominent among them the astoundingly high level of incarceration of disadvantaged racial minorities. Analyses of policing practices more generally should confront law enforcement officers’ mistreatment of racial minorities and minorities’ distrust of the criminal justice system and their perception of injustice. Reform should aim to generate effective and practical solutions. In such a process, empirical studies of law enforcement officers’ stop-search practices may prove especially useful. Data collection should continue, though not as a means of proving racial profiling.

²⁰¹. See Banks, Intimacy and Racial Equality, supra note 7.
My primary purpose, however, has been to counter the tendency to reduce questions of race, policing, and the drug war to questions of racial profiling. However politically appealing that approach, it may obscure rather than clarify potential remedies for urgent problems that deserve immediate attention.