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ARTICLES

BEYOND PROFILING: RACE, POLICING, AND THE DRUG WAR

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INTRODUCTION

The political consensus in opposition to racial profiling¹ in drug interdiction has fueled efforts to identify and eliminate the practice.² 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.³

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.⁴ 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

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).

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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 claim⁶ should not blind us to its potential inadequacy as a policy framework.⁷ 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.⁸ Numerous jurisdictions have prohibited it,⁹ as has the Bush Administration for federal law enforcement agencies.¹⁰

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

7. I consider the limits of the antidiscrimination approach in another context in R. Richard Banks, *Intimacy and Racial Equality: The Limits of Antidiscrimination*, 38 HARV. C.R.-C.L. L. REV. 455 (2003) [hereinafter Banks, *Intimacy and Racial Equality*].

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 indefensible”); 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.”).

9. More than 20 states have enacted legislation prohibiting racial profiling. See, e.g., CAL. PENAL CODE § 13519.4 (2001); CONN. GEN. STAT. § 54-11 (2001); N.J. STAT. ANN. § 31.1 (West 2003); OKLA. STAT. tit. 22, § 34.3 (2001); R.I. GEN. LAWS § 31-21.1-2 (2001).

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 Service¹¹ and against state troopers in Maryland¹² and New Jersey.¹³ Although opposed by some law enforcement agencies,¹⁴ data collection efforts are underway in a startling array of jurisdictions,¹⁵ including the federal government.¹⁶ Nearly all of the stop-search studies document the

RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003); *see also* Eric Lichtblau, *Bush Issues Racial Profiling Ban but Exempts Security Inquiries*, N.Y. TIMES, Jun. 18, 2003, at A1.

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].

12. The Maryland litigation was initiated by Robert L. Wilkins, a Harvard Law School graduate stopped by Maryland state troopers. *Wilkins v. Md. State Police*, No. CCB-93-468 (D. Md. 1993).

13. In 1990, defendant Pedro Soto alleged that state troopers stopped and searched his vehicle because of his race. Bolstered by statistical evidence as well as testimony by troopers that they had been trained to engage in racial profiling, the court ruled in favor of Soto. *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996). Subsequently the New Jersey Attorney General conducted an investigation of the state police. PETER VERNIERO & PAUL H. ZUBER, N. J. OFFICE OF THE ATT'Y GEN., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 26-28 (1999) [hereinafter N.J. INTERIM REPORT]. Ongoing data collection in New Jersey is mandated by the consent decree that settled a lawsuit filed by the U. S. Department of Justice. Joint Application for Entry of Consent Decree, *United States v. New Jersey*, Civil No. 99-5970 (MLC) (D. N.J. Dec. 30, 1999) [hereinafter N.J. CONSENT DECREE]; Eric Lichtblau, *N.J. Agrees to End Race Profiling by Troopers*, L.A. TIMES, Dec. 23, 1999, at A1.

14. *See, e.g.*, Elaine Goodman, *Reno Police Scrap Plans for Study into Racial Profiling*, RENO GAZETTE-JOURNAL, Apr. 26, 2003, at 1A (describing Nevada police groups' objection to data collection).

15. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-1m (West 2002); KAN. STAT. ANN. § 22-4604 (2001); R.I. GEN. LAWS § 31-21.1-4 (2001); An Act Providing for the Collection of Data Relative to Traffic Stops, 2000 Mass. Legis. Serv. 228 (West); MO. REV. STAT. § 590.650 (2000); *see also* Gregory Rodriguez, *The Nation: Who Are You?; When Perception Is Reality*, N.Y. TIMES, June 3, 2001, § 4, at 1 (reporting that approximately 400 law enforcement agencies are engaged in data collection).

16. Federal law enforcement agencies collect data pursuant to an executive memorandum issued by President Clinton. PRESIDENT WILLIAM J. CLINTON, FAIRNESS IN LAW ENFORCEMENT: INTERIOR COLLECTION OF DATA (1999). For discussion of a data collection bill considered but not passed by Congress, *see* Gregory M. Lipper, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551 (2001).

disproportionate¹⁷ investigation of blacks and Latinos,¹⁸ even in jurisdictions that have prohibited racial profiling.¹⁹ Search rate disparities are typically more pronounced than stop rate disparities.²⁰

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,²¹ but also respectable and middle class:²² the Harvard-educated lawyer driving home from a relative's funeral who was detained on the highway in the freezing rain,²³ 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.

18. See, e.g., GAO CUSTOMS REPORT, *supra* note 11; INST. ON RACE AND POVERTY, REPORT ON THE TRAFFIC STOP DATA COLLECTED BY THE SAINT PAUL POLICE DEPARTMENT (2000); N.J. INTERIM REPORT, *supra* note 13; N.Y. ATT'Y GEN., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL (1999) [hereinafter N.Y. "STOP AND FRISK" STUDY]; MICHAEL SMITH, DEPT. OF CRIMINAL JUSTICE, THE TRAFFIC STOP PRACTICES OF THE RICHMOND, VIRGINIA POLICE DEPARTMENT (2000); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 664-65 (2002).

19. See, e.g., THOMAS V. MANAHAN, FIFTH SEMIANNUAL PUBLIC REPORT OF AGGREGATE DATA SUBMITTED PURSUANT TO THE CONSENT DECREE ENTERED INTO BY THE UNITED STATES OF AMERICA AND THE STATE OF NEW JERSEY REGARDING THE NEW JERSEY DIVISION OF STATE POLICE (2002) [hereinafter N.J. FIFTH PUBLIC REPORT]; THOMAS V. MANAHAN, SIXTH SEMIANNUAL PUBLIC REPORT OF AGGREGATE DATA SUBMITTED PURSUANT TO THE CONSENT DECREE ENTERED INTO BY THE UNITED STATES OF AMERICA AND THE STATE OF NEW JERSEY REGARDING THE NEW JERSEY DIVISION OF STATE POLICE (2002) [hereinafter N.J. SIXTH PUBLIC REPORT]; Robert F. Worth, *Blacks Are Searched by Police at a Higher Rate, Data Show*, N.Y. TIMES, June 18, 2003, at B4; Press Release, U.S. Customs, Customs Releases End-of-Year Personal Search Statistics, (Apr. 10, 2000), at <http://www.cbp.gov/hot-new/pressrel/2000/1019-02.htm> (last visited Nov. 21, 2003); cf. Gross & Barnes, *supra* note 18, at 715-17 (describing a decrease in the proportion of blacks searched by Maryland state troopers from more than 70% in 1996 to slightly over 50% from 1997-2000, a figure still greater than blacks' proportion of highway motorists).

20. See, e.g., N.J. INTERIM REPORT, *supra* note 13; Gross & Barnes, *supra* note 18, at 665; Erin McCormick & Jim H. Zamora, *Racial Bias in CHP Searches*, S.F. CHRON., July 15, 2001, at A1.

21. See, e.g., Angie Cannon, *DWB: Driving While Black; Motorists Are Fighting Back Against Unfair Stops and Searches*, U.S. NEWS & WORLD REP., Mar. 15, 1999, at 72; Ellen J. Silberman, *"Racial Profiling" by Police Rapped; Minority Drivers Tell of Frequent Traffic Stops*, BOSTON HERALD, Apr. 13, 1999, at 20. For an insightful discussion of this aspect of the campaign, see Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1031 (2002).

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

23. See Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 438-42 (1997); Paul W. Valentine, *Lawsuit Alleges Bias in Maryland Traffic Stops*, WASH. POST, Feb. 13, 1993, at B5.

young son watched,²⁴ 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.²⁵ Commentators have highlighted these sorts of sympathetic plaintiffs.²⁶

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.²⁷ This argument takes three forms: the self-fulfilling prophecy claim, the survey data claim, and the hit rates argument.²⁸

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.²⁹ As one commentator explains, “law enforcement

24. See Ziva Branstetter Credit, *Two-Hour Search Yielded Nothing*, *ACLU Suit Says*, *TULSA WORLD*, May 13, 2001, at 8.

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

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).

28. Although the irrationality claim has been embraced by many, some commentators have forthrightly refuted it. See, e.g., Randall Kennedy, *Racial Profiling Usually Isn’t Racist*, *NEW REPUBLIC*, Sept. 13, 1999, at 30; Heather Macdonald, *The Myth of Racial Profiling*, 11 *CITY J.* 14 (2001), available at http://www.city-journal.org/html/11_2_the_myth.html (last visited Nov. 13, 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.”³⁰ 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.³¹ 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.³²

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.³³

2. *Hit rates argument.*

Often offered as confirmation of the survey data and self-fulfilling prophecy claims,³⁴ the hit rates argument relies on the stop-search studies.³⁵ 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,³⁶ a legal scholar, and Professor John Lamberth,³⁷ a

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”).

30. Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 121 (2001).

31. See DAVID COLE, NO EQUAL JUSTICE 20-21 (1999); MARC MAUER, RACE TO INCARCERATE 143 (1999); Scott L. Johnson, *The Self-Fulfilling Nature of Police Profiles, in THE SYSTEM IN BLACK AND WHITE* 93 (Michael W. Markowitz & Delores D. Jones-Brown eds., 2000); Maclin, *supra* note 30, at 122-24.

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 irrefutable statistical argument against the practice” of racial profiling. *Id.* at 13.

35. Not all studies collect the information necessary to calculate hit rates. See, e.g., STEPHEN M. COX, SUSAN E. PEASE, DANIEL S. MILLER & C. BENJAMIN TYSON, STATE OF CONNECTICUT INTERIM REPORT OF TRAFFIC STOPS STATISTICS (2001) (a report prepared for the Office of the Chief State’s Attorney) [hereinafter CONNECTICUT INTERIM REPORT].

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

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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).

37. A professor of social psychology at Temple University, Dr. Lamberth has addressed the empirical challenge of proving that law enforcement officers racially profile. Lamberth conducted among the first studies of racial profiling in New Jersey and Maryland and served as an expert witness in both of those cases. Report of John Lamberth, Ph.D. (plaintiff’s expert), *Wilkins v. Md. State Police*, No. CCB-93-468 (D. Md. 1993); JOHN LAMBERTH, REVISED STATISTICAL ANALYSIS OF THE INCIDENCE OF POLICE STOPS AND ARRESTS OF BLACK DRIVERS/TRAVELERS ON THE NEW JERSEY TURNPIKE BETWEEN INTERCHANGES 1 AND 3 FROM THE YEARS 1988 THROUGH 1991 (1994). Professor Lamberth has relied on the hit rates argument repeatedly. See, e.g., John Lamberth, *Driving While Black: A Statistician Proves that Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1.

38. David Cole & John Lamberth, *The Fallacy of Racial Profiling*, N.Y. TIMES, May 13, 2001, at A13.

39. *Id.*

40. See, e.g., Harris, *supra* note 26, at 295; Maclin, *supra* note 30, at 123; Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1211-14 (2003); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 311-12 (2001); Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 423 (2001). Other scholars have approvingly referred to the equal hit rates argument. See, e.g., James Forman, Jr., *Arrested Development: The Conservative Case Against Racial Profiling*, NEW REPUBLIC, Sept. 10, 2001, at 24.

41. See, e.g., LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, WRONG THEN, WRONG NOW: RACIAL PROFILING BEFORE AND AFTER SEPTEMBER 11, at 17 (2003) [hereinafter LEADERSHIP CONFERENCE REPORT]; Kary L. Moss & Daniel S. Korobkin, *Destination Justice*, 80 MICH. B.J. 36, 39 (2001); David A. Harris, ACLU, *Driving While Black: Racial Profiling on Our Nation’s Highways* (Special Report) (1999), available at

report produced for the Department of Justice.⁴³ As stop-search data have accumulated, proponents of the hit rates argument have focused less on findings of equal hit rates across groups⁴⁴ and instead have emphasized that hit rates for blacks and Latinos are often lower than hit rates for whites,⁴⁵ a finding viewed as even stronger evidence of the flawed premise of racial profiling.⁴⁶

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 group⁴⁷ but

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

42. See, e.g., Linda Hills & Randa Trapp, *African-Americans and Latinos, in a San Diego Study, Represent 28 Percent of the Driving Population, but Are 40 Percent of Those Stopped and 60 Percent of Those Searched: Some Common Misperceptions Surrounding Racial Profiling*, SAN DIEGO UNION-TRIB., Oct. 20, 2000, at B9; Ruben Navarrette, *Profiling Is a Failure as Well as an Affront*, DALLAS MORNING NEWS, Mar. 23, 2001, at 29A; Jeffrey Prescott, *New Facts on Racial Profiling*, CHRISTIAN SCI. MONITOR, May 10, 2000, at 8; Carl Rowan, *The Hidden Costs of Racial Profiling*, BUFFALO NEWS, June 4, 1999, at 3B.

43. 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.*

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

45. 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.

46. *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.

47. Commentators typically assume that law enforcement agencies allocate resources

instead based on the groups' relative hit rates,⁴⁸ racial profiling is more likely to be self-correcting than self-fulfilling.⁴⁹

The survey data argument suffers from three fundamental flaws. First, the survey findings may underestimate drug use among racial minorities relative to whites.⁵⁰ Second, most commentators emphasize the percentages of various racial groups who use *any* illicit drug.⁵¹ The survey evidence, however, does appear to indicate that black and Latino adults are more likely than whites to frequently use cocaine,⁵² which poses a much greater risk of a fatal overdose than marijuana (the most commonly used drug).⁵³ 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).

48. More precisely, a drug interdiction unit might rationally seek to equalize groups' marginal hit rates. *See* John Knowles, Nicola Persico & Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203, 208-15 (2001).

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 understate 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

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.

55. See George C. Thomas, III, *Blinded by the Light: How to Deter Racial Profiling—Thinking About Remedies*, 3 RUTGERS RACE & L. REV. 39, 41-42 (2001).

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.⁵⁹ 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.⁶⁰ 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.⁶¹

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.⁶² For example, racial disparities may result from the decision to target drug dealers in low status, and disproportionately minority, neighborhoods,⁶³ either because it is easier to apprehend drug dealers there⁶⁴ or because drug dealing is especially socially harmful in those neighborhoods.⁶⁵ 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.

62. The most useful summary of the empirical difficulties in proving racial profiling is JOYCE MCMAHON, JOEL GARNER, CAPTAIN RONALD DAVIS & AMANDA KRAUS, U.S. DEP'T OF JUSTICE, HOW TO CORRECTLY COLLECT AND ANALYZE RACIAL PROFILING DATA: YOUR REPUTATION DEPENDS ON IT (2002) [hereinafter COPS STUDY]. For a discussion of the difficulties in interpreting stop-search data, see Expert Report of John J. Donohue, *Chavez v. Illinois State Police*, No. 94 C 5307 (N.D. Ill. 2000).

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).

65. See Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 234-35.

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 account⁶⁶ or trustworthy intelligence information.⁶⁷ Depending on the context, such suspect description stops may constitute a significant proportion of overall stops.⁶⁸ 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.⁶⁹ 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.⁷⁰ The primacy of discretion weighs against any simple criterion on the basis of which an officer's behavior may be evaluated.⁷¹ The greater the number of permissible decisionmaking considerations, the more difficult it will be to determine when discretion has been turned to discriminatory ends.⁷² This difficulty is compounded if race is related to criminality.

Another approach to identifying racial profiling is to examine hit rates.⁷³

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.

72. Analogous issues arise elsewhere in the criminal justice system, most notably with respect to capital punishment. See, e.g., David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359 (1994).

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

tests in the mortgage lending context, see Helen F. Ladd, *Evidence on Discrimination in Mortgage Lending*, 12 J. ECON. PERSP. 41 (1998). For a criticism of the use of outcome tests, see John Yinger, *Why Default Rates Cannot Shed Light on Mortgage Discrimination*, 2 CITYSCAPE: J. POL. DEV. & RES. 25 (1996).

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.

78. See, e.g., N.J. FIFTH PUBLIC REPORT, *supra* note 19; N.J. SIXTH PUBLIC REPORT, *supra* note 19.

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,⁸² one should expect that even better designed empirical studies often will fail to conclusively substantiate or refute allegations of racial profiling.⁸³ 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.⁸⁴ 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.⁸⁵ Commentators sometimes draw a conclusion of racial profiling even when the researchers who

82. See, e.g., Robin Shepard Engel, Jennifer M. Calnon & Thomas J. Bernard, *Theory and Racial Profiling: Shortcomings and Future Directions in Research*, 19 JUST. Q. 249, 250 (2002) (criticizing existing racial profiling studies as plagued by methodological weaknesses that preclude any policy conclusions); see also Michael R. Smith & Geoffrey P. Alpert, *Searching for Direction: Courts, Social Science, and the Adjudication of Racial Profiling Claims*, 19 JUST. Q. 673 (2002).

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).

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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

86. For example, neither the GAO nor the U.S. Customs Service concluded that the Customs Service had engaged in racial profiling, yet both reports are frequently cited as though they did. *See, e.g.,* NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND ALL FORMS OF DISCRIMINATION (2003) (stating that a report for the U. N. Commission on Human Rights maintained that the GAO study "revealed racial profiling by the U.S. Customs Service"); Rod Watson, *Report on Racial Profiling; Reveals It Just Doesn't Work*, BUFFALO NEWS, Apr. 13, 2000, at 2B (reporting that "the General Accounting Office analysis of U.S. Customs Service searches attaches hard numbers to the suspicions of those on the wrong end of law enforcement stops made for no apparent reason other than the color of their skin"). Of course, researchers may sometimes for political reasons decline to announce that a law enforcement agency has engaged in racial profiling. This possibility is consistent with, and indeed bolsters, my argument.

87. *See* OFFICE OF THE ATT'Y GEN., SPEED VIOLATION SURVEY OF THE NEW JERSEY TURNPIKE: FINAL REPORT (2001); David Kocieniewski, *Study Suggests Racial Gap in Speeding in New Jersey*, N.Y. TIMES, Mar. 21, 2002, at B1.

88. In the urban context, there are many explanations for why an officer decides to stop a particular individual. *See* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983). In highway traffic enforcement, in contrast, officers stop motorists on the basis of a limited set of cues, one of which is race. *See* Gross & Barnes, *supra* note 18, at 749.

89. Of course law enforcement officials also decline to refute the irrationality claim because acknowledgement of racial differences in criminality seems to endorse racial profiling. *See* Jerry Seper, *Whitman: Fired Top Cop Not Racist, but Insensitive*, WASH. TIMES, Mar. 4, 1999, at A12 (recounting the firing of a law enforcement official for expressing his view regarding racial patterns of criminality).

90. *See, e.g.,* Garrett, *supra* note 70, at 60; Pamela S. Karlan, *Race, Rights, and*

officers will have a powerful incentive to use racial profiling, no matter what the rules say.⁹¹ Professor William Stuntz has described racial profiling as “a fact of life that the legal system probably cannot change.”⁹² Indeed, recent findings from New Jersey and Maryland, jurisdictions that have sought to end racial profiling,⁹³ are consistent with its continued use by state troopers.⁹⁴

In any event, the absence of proof of racial profiling by individual officers or against individual citizens precludes individualized remedies.⁹⁵ Remedies must take the form of broad prophylactic measures, such as monitoring, or the elimination of discretionary actions, such as consent searches.⁹⁶ Although such reforms will narrow the opportunities for racial profiling, they may also prompt officers to conceal their racial profiling.⁹⁷ Moreover, limitations on officer discretion might influence the behavior of other actors within the criminal

Remedies in Criminal Adjudication, 96 MICH. L. REV. 2001 (1998).

91. Forfeiture laws provide a powerful economic incentive for law enforcement agencies to vigorously pursue drug interdiction. Drug-related asset forfeitures may substantially augment an agency's budget. See Eric Blumenson & Eva Nilson, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 64 (1998).

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.

93. See, e.g., Paul H. Zoubek & Ronald Susswein, *On the Toll Road to Reform: One State's Efforts to Put the Brakes on Racial Profiling*, 3 RUTGERS RACE & L. REV. 223 (2001).

94. See Gross & Barnes, *supra* note 18, at 661 (concluding that “racial profiling [by Maryland state troopers] did not stop after 1996,” after the enactment of a prohibition, although it did become “less pronounced”); Press Release, ACLU, ACLU Takes Battle to End Racial Profiling to the Turnpike, (Oct. 4, 2001), available at <http://archive.aclu.org/news/2001/n100401a.html> (last visited Nov. 9, 2003) (asserting that two years after New Jersey had agreed to remedy racial profiling, “the practice still continues”).

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 DECREE, *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. SILJANDER, 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.⁹⁸ Because the discretion that enables racial profiling is also integral to effective law enforcement,⁹⁹ 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.”¹⁰⁰ 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.”¹⁰¹ More specifically, they reason that interdiction is “ineffective by any standard [because f]ishing 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.”¹⁰²

Evaluations of rational racial profiling also tend to focus on the burden the practice imposes on innocent racial minorities.¹⁰³ Professor Randall Kennedy has described this burden as a “racial tax.”¹⁰⁴ 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.”¹⁰⁵ Kennedy

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).

99. Officers exercise substantial discretion. They do not enforce all the laws, all the time, against everyone. Nor would we want them to. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 560 (1997); Joan McGregor, *From the State of Nature to Mayberry: The Nature of Police Discretion*, in *HANDLED WITH DISCRETION, ETHICAL ISSUES IN POLICE DECISION MAKING* 47 (John Kleinig ed., 1996).

100. Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1431 (2002); see also Gross & Barnes, *supra* note 18, at 744-53.

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”).

104. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159 (1997); see also JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA*, 13-14 (1997) (describing the “Black Tax” that results from racial stereotypes).

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,¹⁰⁶ and the costs of policing “allocated on a nonracial basis.”¹⁰⁷

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,¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ Stated in more familiar doctrinal terms, the tax on the innocent would disparately impact racial minorities.¹¹¹

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,¹¹² exacerbate tension between racial minorities and law enforcement agencies,¹¹³ and reinforce officers' tendency to base investigative decisionmaking on potential suspects' racial group membership.¹¹⁴ 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.¹¹⁵

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,¹¹⁶ when their group identity is salient,¹¹⁷ and when they expect to experience discrimination.¹¹⁸ 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.¹¹⁹

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,¹²⁰ why should normative assessment of drug interdiction efforts or policing practices turn on

112. See Paul Brest, *The Supreme Court, 1975—In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 9-10 (1976).

113. See Forman, *supra* note 40.

114. KENNEDY, *supra* note 104, at 157.

115. See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 62-63 (2002); Thomas, *supra* note 55.

116. See, e.g., Janet K. Swim, Elizabeth D. Scott, Gretchen B. Sechrist, Bernadette Campbell & Charles Stangor, *The Role of Intent and Harm in Judgments of Prejudice and Discrimination*, 84 J. PERSONALITY & SOC. PSYCHOL. 944, 956 (2003).

117. See, e.g., Brenda Major, Wendy J. Quinton & Shannon K. McCoy, *Antecedents and Consequences of Attributions to Discrimination: Theoretical and Empirical Advances*, 34 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 251, 279 (2002).

118. See, e.g., Lisa Feldman Barrett & Janet K. Swim, *Appraisals of Prejudice and Discrimination*, in PREJUDICE: THE TARGET'S PERSPECTIVE 11, 30 (Janet K. Swim & Charles Stangor eds., 1998); Mary L. Inman & Robert S. Baron, *Influence of Prototypes on Perceptions of Prejudice*, 70 J. PERSONALITY & SOC. PSYCHOL. 727 (1996); Mary L. Inman, Jennifer Huerta & Sie Oh, *Perceiving Discrimination: The Role of Prototypes and Norm Violation*, 16 SOC. COGNITION 418 (1998).

119. See, e.g., Barrett & Swim, *supra* note 118, at 30.

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?¹²¹

C. Racial Profiling Without Problems

The problems associated with racial profiling may be addressed without eliminating the practice.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.¹²³ The two are analytically, and practically, distinct.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,¹²⁵ in late 1999 the Service revamped its procedures and dramatically reduced its searches of airline passengers.¹²⁶ The new search process produced racial disparities in search rates that far exceeded the disparities produced by the prior search policy.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.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

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.

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).

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.

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.

125. *See supra* note 11.

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.

127. *See OFFICE OF THE INSPECTOR GENERAL, OFFICE OF THE TREASURY, TRADE AND PASSENGER PROCESSING: CUSTOMS PERSONAL SEARCH POLICIES, PROCEDURES, AND TRAINING APPEAR REASONABLE* (2002); Press Release, U.S. Customs, *supra* note 19; Press Release, U.S. Customs, Customs Releases New Personal Search Statistics (Apr. 10, 2000), at <http://www.cbp.gov/hot-new/pressrel/2000/0410-01.htm> (last visited November 9, 2003).

128. *See, e.g., HARRIS, supra* note 33, at 218-22.

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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.¹²⁹ There is reason to think such an approach may be useful in other contexts as well.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.¹³¹ The belief that one has been racially profiled often reflects the feeling that one has been mistreated by a law enforcement officer.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.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,¹³⁴ perhaps even if the level of investigation of racial minorities does not diminish.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.¹³⁶ It directs attention to

129. The Customs Service embarked upon what can only be described as an aggressive public relations campaign. The agency created simpler forms, better signage describing 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).

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

131. See TYLER & HUO, *supra* note 115, at 62.

132. See HARRIS, *supra* note 33, at 99-100.

133. See 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, *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.")

134. See TYLER & HUO, *supra* note 115, at 75; Tyler & Lind, *supra* note 133.

135. See Stuntz, *supra* note 92, at 2174.

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, *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

Critical Tools of the Sixties, 67 TUL. L. REV. 2231 (1993). See also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

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

138. Cf. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (making an analogous argument with respect to domestic violence).

139. In 2002, the prison and jail population in the United States exceeded two million for the first time. See PAIGE HARRISON & JENNIFER KARBURG, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2002, at 2 tbl.1 (2003).

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

Ogletree, *supra* note 108, at 28. Further, it has been reported that in 1995 1-in-3 black men in America between the ages of 20 and 29 years old was under correctional supervision or control. MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (1995).

141. THOMAS P. BONCZAR, U.S. DEPT. OF JUSTICE, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001*, at 5 tbl.5 (2003).

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.

147. See MARC MAUER, U.S. COMMISSION ON CIVIL RIGHTS, *THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE AND THE CRIMINAL JUSTICE SYSTEM* 9 (1999); TONRY, *supra* note 50, at 111-15; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 192 (1998); Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25.

148. Twenty-seven percent of the prison population growth among black inmates, 7% of the total growth among Hispanic inmates, and 15% of the growth among white inmates stemmed from increases in the numbers of prosecutions for drug offenses. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2001*, at 13 tbl.19 (2002).

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 adults¹⁵⁵ 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.

151. See JEFFREY FAGAN, VALERIE WEST & JAN HOLLAND, *RECIPROCAL EFFECTS OF CRIME AND INCARCERATION IN NEW YORK CITY NEIGHBORHOODS* (Columbia Law Sch. Public Law & Legal Theory, Working Paper No. 03-54, 2003). One study found, for example, that in New York City, 80% of the inmates at Rikers Island come from 7 neighborhoods in the city. VERA INST. OF JUSTICE, *THE UNINTENDED CONSEQUENCES OF INCARCERATION* (1996); see also Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 *PUNISHMENT & SOC'Y* 95, 114-15 (2000). An excellent overview of the numerous harmful consequences of incarceration can be found in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter *INVISIBLE PUNISHMENT*].

152. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

153. It is the spatial concentration of incarceration that produces the neighborhood effects that I discuss. See Meares, *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 Meares, *supra* note 147, at 207-08; see also Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT*, *supra* note 151, at 117.

155. For a discussion of the community effects of massive incarceration, see MAUER, *supra* note 31, at 181-86; William J. Chambliss, *Crime Control and Ethnic Minorities: Legitimizing Racial Oppression by Creating Moral Panics*, in *ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE* 235, 253 (Darnell F. Hawkins ed., 1995); see also Fagan et al., *supra* note 151.

156. See Todd R. Clear, Dina R. Rose & Judith A. Ryder, *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 *CRIME & DELINQUENCY* 335 (2001); Meares, *supra* note 147, at 209-11.

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.¹⁵⁸ Also, because imprisonment often results in loss of the right to vote even after release,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.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.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.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).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.¹⁶⁴

158. See FAGAN ET AL., *supra* note 151; Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441 (1998); Todd R. Clear, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT, *supra* note 151, at 181.

159. See Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 255 (2002).

160. See JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT & HUM. RTS. WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAW IN THE UNITED STATES (1998).

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.

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).

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.

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.¹⁶⁵ Because such perceptions may diminish a group's respect for the law and willingness to obey it,¹⁶⁶ they are a cost that should be incorporated into the policy calculus.¹⁶⁷

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.¹⁶⁸ The incarceration outcomes of the drug war have made the image of black criminality less an ungrounded stereotype and more a social reality.¹⁶⁹ Put simply, black men are more than six times as likely as white men to have been incarcerated,¹⁷⁰ and an astonishingly high number and percentage of black men will, at some point in their lives, bear that stigma.¹⁷¹ 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.¹⁷² The sociological coupling of race and crime reinforces their political conflation, as attitudes and beliefs about one inflect debates about the other.¹⁷³ The association of blacks with criminality may even contribute to the tendency to associate other negative characteristics with blacks as well.¹⁷⁴

desire to punish racial minorities.

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).

169. The assumption that whites' perceptions of black criminality are wildly overstated may itself be unwarranted. See Randall A. Gordon, Jennifer L. Michels & Caroline L. Nelson, *Majority Group Perceptions of Criminal Behavior: The Accuracy of Race-Related Crime Stereotypes*, 26 J. APPLIED SOC. PSYCHOL. 148 (1996).

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.

173. See Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375 (1997); Mark Peffley, John Hurwitz & Paul Sniderman, *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL. SCI. 30 (1997).

174. See, e.g., Jeffrey Levine, Edward Carmines & Paul Sniderman, *The Empirical Dimensionality of Racial Stereotypes*, 63 PUB. OPINION Q. 371 (1999).

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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.¹⁷⁵ Some oppose the criminalization of drugs.¹⁷⁶ Others view interdiction as a failed policy¹⁷⁷ that disproportionately burdens innocent racial minorities.¹⁷⁸ Still others emphasize the incarceration outcomes of the drug war.¹⁷⁹ 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 agencies¹⁸⁰ or about the mistreatment of racial minorities by law enforcement officers.¹⁸¹

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.¹⁸²

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

175. See, e.g., Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALA. L. REV. 703 (2000).

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.

184. For example, both the ACLU and the Leadership Conference on Civil Rights have condemned racial profiling and defended affirmative action. *See* ACLU, ACLU POSITION PAPER, AFFIRMATIVE ACTION (Fall 2000) [hereinafter ACLU AFFIRMATIVE ACTION]; LEADERSHIP CONFERENCE REPORT, *supra* note 41; LEADERSHIP CONFERENCE ON CIVIL RIGHTS, AFFIRMATIVE ACTION WORKS (June 25, 2003), available at http://ga3.org/campaign/fairchance_affirmative_action_works/explanation (last visited Nov. 9, 2003).

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.

186. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

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).

189. *See Easley v. Cromartie*, 532 U.S. 234 (2001); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

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.¹⁹¹ 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.¹⁹² The irrationality claim permits the argument that race should be considered by admissions officers because race matters in education,¹⁹³ yet ignored by police officers because race is unrelated to criminality.¹⁹⁴

The focus on innocent, middle-class victims further bolsters the political viability of the antidiscrimination claim by eliding the stigmas of criminality¹⁹⁵ and of race.¹⁹⁶ Such victims provide an image around which whites and blacks alike can mobilize in opposition to racial profiling.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹

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.²⁰⁰

191. See, e.g., *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029 (2001).

192. See Brest, *supra* note 112, at 6-7.

193. See ACLU AFFIRMATIVE ACTION, *supra* note 184.

194. See Victor C. Romero, *Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 ALA. L. REV. 325 (2002); Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000).

195. The stigma of criminality is what Goffman, in his classic treatment of stigma, described as a blemish of individual character. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 4 (1963).

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.

199. See CATHY J. COHEN, *THE BOUNDARIES OF BLACKNESS* 33-77 (2000).

200. Sometimes these connections are less than subtle. See, e.g., Glasser, *supra* note 175; William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, 3 RUTGERS RACE & L. REV. 83 (2001). The campaign against racial profiling may also have reinforced the view that the essence of Jim Crow was discrimination.

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.

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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.