

LITIGATING CIVIL RIGHTS CASES TO REFORM RACIALLY BIASED CRIMINAL JUSTICE PRACTICES

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I. INTRODUCTION

The roadblocks to reform of racially biased and other unfair and unconstitutional practices and policies in the criminal justice system that have emerged in the era following the Supreme Court's decision in *McCleskey v. Kemp* are daunting. The Supreme Court has placed significant obstacles to the pursuit of racial justice and equality in the criminal justice system.¹ These decisions have operated on two levels. First, as a procedural matter, the decisions have made it very difficult and, in some cases, impossible to obtain judicial review of challenged practices.² Substantive constitutional

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1. These obstacles were demonstrated clearly in the presentations at the symposium entitled "Pursuing Racial Fairness in the Administration of Justice: Twenty Years After *McCleskey v. Kemp*," held by the NAACP Legal Defense and Educational Fund and Columbia Law School on Mar. 2-3, 2007. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 458 (1996) (holding that for the defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of race, he must make a threshold showing that the government declined to prosecute similarly situated suspects of other races); *McCleskey v. Kemp*, 481 U.S. 279, 291, 306 (1987) (finding that statistical proof of systematic racial disparities in the administration of the death penalty implicates neither the Equal Protection Clause of the Fourteenth Amendment nor the Cruel and Unusual Punishment provision of the Eighth Amendment).

2. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (holding that to establish an actual controversy to satisfy standing, Lyons would have to show either that all police officers choked citizens or that the city authorized officers to act in such a manner).

provisions have been diluted or otherwise interpreted in a manner that has weakened protection of suspects and defendants,³ expanded judicial “door closing” doctrine,⁴ and limited remedial measures.⁵ Second, the Supreme Court’s decisions have established substantive constitutional standards that fail to address racial bias and other documented unfair practices in the criminal justice system. Congress has limited remedies as well.⁶ Moreover, the “politics of crime,” which

3. See, e.g., *United States v. Patane*, 542 U.S. 630, 634 (2004) (holding that failure to read a suspect *Miranda* warnings does not require suppression of unwarned but voluntary statements); *California v. Acevedo*, 500 U.S. 565, 580 (1991) (holding that police may search a container located within a car even without probable cause to search the vehicle as a whole); *California v. Greenwood*, 486 U.S. 35, 37 (1988) (“The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.”).

4. I use this term to describe the process by which access to the courts has been curtailed by court rulings, or legislation that strips the courts of the power to review certain practices or policies, or that limits the remedies that may be considered for proven violations; and by doctrinal developments such as limitations on standing, immunities, exceptions to the exclusionary rule, and federalism principles. See Erwin Chemerinsky, *Federal Jurisdiction* 880–938 (4th ed. 2003); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. Ill. L. Rev. 1199 (2005) (discussing how extensions of doctrines such as qualified immunity and the Eleventh Amendment’s sovereign immunity, in addition to limitations imposed by legislation, create a system where only egregious violations of rights may be subject to judicial remedial action).

5. See, e.g., *Hudson v. Michigan*, 126 S. Ct. 2159, 2170 (2006) (holding that a violation of the “knock and announce” rule does not require the suppression of evidence found during the search); *United States v. Leon*, 468 U.S. 897, 921–22, 926 (1984) (concluding that the Fourth Amendment exclusionary rule should not bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a magistrate and later found invalid); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (reversing the Ninth Circuit’s grant of injunctive relief for failure to state a case or controversy because plaintiff failed to establish the likelihood that a police officer would choke him again or proof of a pattern of police officers choking citizens they encounter); *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (finding no exception to the general rule of qualified immunity from civil liability in cases involving allegedly unlawful warrantless searches of innocent third parties’ homes for fugitives); *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 404 (1997) (holding that a plaintiff may recover damages for injuries sustained when police stopped her car only if she proves the municipality deliberately acted as a principal force behind the injury).

6. See Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 28 & 42 U.S.C. (2006)); Prison Litigation Reform Act (PLRA) of 1995, Pub.

encourages elected officials to expand the reach and the sanctions of criminal law, leads to regressive and racially biased practices across the system.⁷

McCleskey v. Kemp and *United States v. Armstrong* placed almost insurmountable barriers to race-based and other challenges to prosecutorial discretion and judicial decision making (particularly in the sentencing area).⁸ In *McCleskey*, the Court rejected an Eighth and Fourteenth Amendment challenge to the Georgia death penalty system that was based on a comprehensive statistical study by Professor David C. Baldus.⁹ The study found that among all of the factors that might influence a jury to impose the death penalty, the race of the victim was the central factor.¹⁰ The study considered 230 variables that could affect the sentencing decision and showed that where the victim was white, the odds were 4.3 times higher that the defendant would be sentenced to death.¹¹

The Supreme Court ruled that the Baldus study showed only a “correlation” between the victim’s race and the death penalty sentence.¹² The Court was simply unwilling to recognize the degree to which race influenced jurors in capital cases. Justice Powell asserted that accepting the argument that race played a significant role in the imposition of the death penalty would call into “serious question the principles that underlie our entire criminal justice system.”¹³ Thus, the Court accepted discrimination in the most serious decision-making aspect of the criminal justice system; in the words of Justice Brennan, the Court’s concern about the implications of the statistics was a “fear of too much justice.”¹⁴

L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28 & 42 U.S.C. (2006)).

7. See 28 U.S.C. § 2241; 18 U.S.C. § 3626; Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339, 339 (2006); David Cole, *No Equal Justice* 6 (1999).

8. *McCleskey v. Kemp*, 481 U.S. 279 (1987); *United States v. Armstrong*, 517 U.S. 456 (1996).

9. *McCleskey*, 481 U.S. at 287.

10. *Id.* at 286–87.

11. *Id.* at 287.

12. *Id.* at 308.

13. *Id.* at 314–15.

14. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

The Court took a similar hands-off approach in *Armstrong*, where it reversed a ruling that would have permitted discovery in support of a motion to dismiss federal crack cocaine prosecutions against African-American defendants on grounds of racially selective prosecution.¹⁵ The defendants sought to prove discriminatory intent by showing a racially disparate pattern of crack cocaine prosecutions.¹⁶ They supported this allegation with evidence that all twenty-four prosecutions in a single year for crack cocaine were of African-American defendants, and that there was equal abuse by race of crack cocaine.¹⁷ The Court denied discovery because the defendants “failed to satisfy the threshold showing . . . that the Government declined to prosecute similarly situated suspects of other races.”¹⁸ Yet such proof would only be available through the discovery process. The Court ruled that prosecutors were entitled to a presumption of proper performance.¹⁹ Ironically, the Court relied on a statistical study of drug-related convictions to justify racially disproportionate prosecutions, even though this study was far less comprehensive than the Baldus study rejected in *McCleskey*.²⁰

Notwithstanding these developments, and the prospects for an equally conservative Roberts Court,²¹ there have been some successful systemic challenges to racially biased criminal justice practices. The models that have been developed in this litigation may hold some promise for future action. As I will develop below, while *McCleskey* and *Armstrong* pose serious obstacles to racial profiling challenges, they have not fully precluded such litigation in the criminal justice system. In particular, litigation regarding police

15. United States v. Armstrong, 517 U.S. 456, 471 (1996).

16. *Id.* at 459–60.

17. *Id.* at 459.

18. *Id.* at 458.

19. *Id.* at 464.

20. *Id.* at 469.

21. In the 2006–07 Term of the Supreme Court, a new conservative majority of five justices has continued the process of limiting constitutional rights and closing the door to persons complaining of constitutional injuries. *See, e.g.*, *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (ruling that the district court’s erroneous statement as to time limits for criminal appeal does not extend the statutory time for filing an appeal); *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007) (denying taxpayer standing to challenge executive branch violations of the Establishment Clause); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (finding local school districts’ voluntary integration program to be unconstitutional).

practices, and specifically those practices that affect “point of entry” decisions for the criminal justice system, has seen some success. In this paper, I will focus on the theoretical and practical strategies that have informed this litigation. I will then examine how the best of these strategies may be used in the future. Finally, I will describe the “innocence” movement, which has created a new set of reform dynamics and legal doctrine in the criminal justice system.

II. RACE, POLICING, AND THE MASS INCARCERATION OF AFRICAN AMERICANS

The problem of racial discrimination in the criminal justice system is stark and seemingly impervious to change. Young African-American men bear the brunt of the system’s injustices during a period in which the nation has moved to a process of mass incarceration. From initial contacts with police, including stops, detentions, searches, and arrests, through prosecution at trial, and finally, at the sentencing phase, African Americans suffer from severe disproportional representation.²² In virtually every category of policing, prosecution, and sentencing, statistical studies demonstrate that the disproportionate number of African Americans is explained only in part by differences in criminal conduct. With challenges to prosecutorial discretion in charging and plea bargaining almost off limits,²³ and with racial disparities in sentencing shielded by inflexible legal doctrine, litigation efforts challenging such disparate

22. See Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs* (2000) (noting that aggressive law enforcement strategies aimed at curbing drug use have disproportionately affected African Americans); Neil J. Smelser et al., *America Becoming: Racial Trends and Their Consequences* (2001) (discussing discrimination on the part of law enforcement officials and racial disparities in arrest and incarceration rates); Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (Sentencing Project, July 2007), available at http://sentencingproject.org/admin/Documents/publications/rd_stateratesofinbyraceandethnicity.pdf (noting that African Americans are incarcerated at nearly six times the rate of whites); Marc Mauer, *Race to Incarcerate* 135 (2d ed. 1999) (describing persistence of racial disparities in the criminal justice system and incarceration rates).

23. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363–64 (1978) (reaffirming the prosecutor’s complete discretion, and holding that even though his threat to reindict the accused on a more serious offense may deter the accused from exercising his legal rights, due process has not been violated as long as he is free to accept or reject the prosecution’s plea bargain).

treatment should focus on individuals' point of entry into the legal system.

Racial discrimination in policing is often manifested in the use of racial profiling in common police practices such as car and pedestrian stops, detentions, and searches. Though legal challenges to these practices are difficult, they are not foreclosed by Supreme Court cases rejecting challenges to racial bias in the areas of sentencing and prosecutorial discretion. Cases challenging these practices have documented the extent of the problem. For example, in *State v. Soto*, one of the first comprehensive challenges to these practices on the New Jersey Turnpike, the court found that stops and searches on the Turnpike were disproportionately based on race.²⁴ Relying on traffic and violator surveys, the court determined that approximately 14% of all drivers on the Turnpike were black, that virtually all drivers violated the traffic laws (in particular for speeding), and that blacks and whites violated traffic laws at almost exactly the same rate.²⁵ Yet the court found that 46.2% of stops were of black motorists, representing a statistically significant disparity of 16.35 standard deviations.²⁶ Further, the court found that while radar stops made by the Radar Unit were relatively consistent with the percentage of black violators, discretionary stops made by the Patrol Unit, which is involved in drug interdiction, resulted in double the percentage of blacks stopped.²⁷ Of all stops resulting in the issuance of a traffic citation, 63% involved cars with a black driver or passenger.²⁸

A study conducted by the Attorney General of New Jersey confirmed and expanded upon these findings.²⁹ The Attorney General determined that searches of cars on the Turnpike were even more racially disparate than the initial stops: 77.2% of all "consent"

24. *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (noting that the statistical disparities between African-American and white motorists stopped for traffic offenses were "stark").

25. *Id.* at 352–53.

26. *Id.*

27. *Id.* at 354.

28. *Id.* at 356.

29. Peter Verniero, Attorney General of New Jersey, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling (Apr. 20, 1999), http://www.state.nj.us/lps/intm_419.pdf.

searches were of minorities and blacks.³⁰ The Attorney General concluded that the use of arrest statistics could not justify racially disparate stops and searches, as those arrests were the product of racially discriminatory law enforcement practices.³¹

Statistical studies conducted of car and pedestrian stops in Philadelphia also demonstrate patterns of racial profiling and stops without cause.³² Plaintiffs' counsel conducted several studies pursuant to a Settlement Agreement in a class action lawsuit against the Philadelphia Police Department that was filed in the wake of a federal criminal investigation that uncovered systemic corruption and misconduct in narcotics enforcement. In 1997, the first study considered stops of pedestrians and cars for selected periods and for selected police districts in Philadelphia.³³ For one week in March and one week in October 1997, four police districts in the city recorded in a computer database every police-reported stop of a car or a pedestrian.³⁴ The data were analyzed to determine whether there were racial patterns of enforcement and whether police were exercising their stop and frisk power with sufficient cause or suspicion.³⁵ The findings raised serious questions concerning racial profiling and suspicionless stops and frisks. For example, in the Eighteenth District, where African Americans constituted 70.3% of the population, for all pedestrian stops reported by the police for two different one-week periods in 1997, African Americans were 93% of those stopped; whites constituted 4.7% of the stops.³⁶ Of the 214 stops

30. *Id.* at 26–28. Seizures of contraband on the Turnpike were made at a rate of 10.5% from white drivers and 13.7% from African-American drivers. *Id.* at 28.

31. *Id.* at 67–68.

32. Plaintiffs' Fourth Monitoring Report, Pedestrian and Car Stop Audit at 1–2, NAACP v. City of Philadelphia, No. 96-CV-6045 (E.D. Pa. July 1998) (on file with author) [hereinafter Fourth Philadelphia Report]; Plaintiffs' Fifth Monitoring Report, Pedestrian and Car Stop Audit at 1, NAACP v. City of Philadelphia, No. 96-CV-6045 (E.D. Pa. Dec. 7, 2000) (on file with author) [hereinafter Fifth Philadelphia Report].

33. Fourth Philadelphia Report, *supra* note 32, at 1. It should be noted that there is even less reliable information made available by police departments concerning racial demographics and “cause” for pedestrian stops and frisks than for car stops and searches. Many departments require reports only when an arrest occurs and no department to my knowledge maintains a computer data base of this information.

34. *Id.* at 1–4.

35. *Id.*

36. *Id.* at 21–22, 26–27.

of African-American pedestrians during these periods, 135 were conducted without a legally sufficient written explanation.³⁷

In the Eighth Police District of Philadelphia, where the population was 91.2% white and 6.5% African-American, African Americans constituted 26.8% of all pedestrians stopped.³⁸ Moreover, in this district, while a sufficient reason was provided by the police for approximately 40% of all whites stopped, only 15% of African Americans were stopped with properly stated cause.³⁹ In comparing the stops of African Americans in largely African-American police districts to stops made in largely white districts, the statistical data showed hugely disproportionate stops by race in the white areas of the City, while stops in African-American areas were roughly proportionate to the population in those areas.⁴⁰ In some areas, African Americans were stopped over ten times more than one would expect from the racial composition of the residential population.⁴¹

In 1999, a second study recorded the number of car and pedestrian stops made in predominantly white police districts in Philadelphia during a one-week period in July. During that week, the ratio of African Americans to whites who were stopped ranged up to ten times higher than one would expect from population data.⁴² Further, one-third of all pedestrian stops were made without sufficient written explanation.⁴³ In November 2003, a follow-up study regarding stops and searches in Philadelphia showed a continuing pattern of racial disparities in both car and pedestrian stops.⁴⁴

37. *Id.* at 26–27. The police reporting form requires the officer to provide a reason for any stop, frisk, or arrest. *Id.* at 1–7.

38. *Id.* at 28.

39. Fifth Philadelphia Report, *supra* note 32, at 14.

40. *Id.* at 20–25.

41. *Id.* at 26–27.

42. *Id.* at 22–26.

43. *Id.* at 13–14.

44. The data set forth in Appendix A is from the Philadelphia Police Department's analysis of its records regarding car and pedestrian stops. *See infra* app. A at 123. Plaintiffs' counsel reviewed the same documents and found higher rates of improper stops and frisks. Thus, while the Police Department found 96 improper stops, 72 improper frisks, and 27 improper searches, plaintiffs found 313 improper stops alone, or approximately 23% of all stops. Letter from author, Alan Yatvin & Jonathan Feinberg, plaintiffs' counsel, to Carlton Johnson, Chief Deputy City Solicitor, Law Department, Karen Simmons, Special Counsel to the Commissioner & Francis Healy, Police Department (Dec. 21, 2004) (on file with author) [hereinafter Letter from author].

In 1999, the Attorney General of New York State conducted a study of 175,000 pedestrian stops by the New York City Police Department over a fifteen-month period in 1998–99 and found a highly disproportionate rate of stops of minorities.⁴⁵ The Attorney General determined that (1) African Americans were stopped six times more frequently than whites;⁴⁶ (2) in precincts with a white population of 80% or more and where African Americans constituted 10% or less of the population, stops of African Americans constituted 30% of all stops, more than ten times their percentage of the population;⁴⁷ (3) stops of African Americans were less likely to result in arrests than stops of whites;⁴⁸ and (4) adjusting for crime rates by race, the differences in stops of minorities compared to stops of whites was statistically significant, with African Americans stopped more than twice as often as whites for suspected violent crimes and weapons charges.⁴⁹ The Attorney General also reported that where the police provided a full factual statement concerning the stop, 15.4% of the stops failed to comply with Fourth Amendment standards.⁵⁰ In addition, 23.5% of the stops failed to provide a sufficient factual basis, on their face, to determine whether the stop was constitutionally proper.⁵¹

Recent disclosures by the New York City Police Department show an enormous increase in the number of pedestrian stops (and frisks) in the years following the Attorney General's Report.⁵² Overall, the number of stops for 2006 was up more than 500% from 2002.⁵³ Of those stopped, 55.2% were African-American, 30.5% were Hispanic, and 11.1% were white.⁵⁴

Stops and searches by U.S. customs officials also disclose racial bias. From 1997–98, there were approximately 102,000 people

45. Civil Rights Bureau, Office of the Att'y Gen. of the State of N.Y., *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* 88–89 (Dec. 1, 1999), http://www.oag.state.ny.us/press/reports/stop_frisk/stp_frsk.pdf.

46. *Id.* at 95.

47. *Id.* at 105–06.

48. *Id.* at 111.

49. *Id.* at 121, 127.

50. *Id.* at 160–62.

51. *Id.* at 162–64.

52. Al Baker & Emily Vasquez, *Police Report Far More Stops And Searches*, N.Y. Times, Feb. 3, 2007, at A1.

53. *Id.*

54. *Id.*

selected for body searches (ranging from hand frisks to strip and cavity searches) by customs officials.⁵⁵ Almost half of all persons selected for these searches were African-American or Latino.⁵⁶ In 96% of all the searches, officials found no contraband.⁵⁷ Further, in 1998, African-American women were nine times more likely than white women to be subjected to x-rays after being frisked or patted down, yet on the basis of the x-ray results they were less than half as likely as their white counterparts to be found carrying contraband.⁵⁸

The fact that these practices with clear discriminatory effects are so difficult to challenge under our current constitutional framework reveals the distorting effects of *McCleskey* and *Armstrong*.⁵⁹ As the following discussion will demonstrate, the Fourth Amendment provides virtually no protection against racially discriminatory stops and searches. And while the Fourteenth Amendment does provide a doctrinal basis for challenge, the Equal Protection Clause requires a showing of intentional racial discrimination before a court may consider legal remedies.⁶⁰ In this framework, great care must be taken in structuring litigation that can successfully challenge these discriminatory practices. I first address the constitutional standards governing stops and searches of cars and pedestrians in the racial profiling context and then turn to the issue of remedial measures.

A. The Fourth Amendment and Racial Profiling⁶¹

While the Fourth Amendment places some limits on police power to conduct searches or seizures, as interpreted by the Supreme Court in *Whren v. United States*, these limits do not protect

55. U.S. Gen. Accounting Office, U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results 40 (2000), <http://www.gao.gov/archive/2000/gg00038.pdf>.

56. *Id.*

57. *Id.*

58. *Id.* at 2.

59. *McCleskey v. Kemp*, 481 U.S. 279 (1987); *United States v. Armstrong*, 517 U.S. 456 (1996).

60. *See Washington v. Davis*, 426 U.S. 229, 244–45 (1976).

61. This section draws on an earlier article in which I addressed these issues. *See David Rudovsky, Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. Pa. J. Const. L. 296 (2001).

individuals from racially discriminatory police practices.⁶² While the touchstone of the Fourth Amendment is “reasonableness,” the Court has interpreted that standard broadly, so even stops or searches infected by racial bias can be reasonable.⁶³

1. Car Stops

Police officers may stop a car if they have cause to believe that a crime has been committed, including any traffic violation.⁶⁴ Under the “automobile exception,” car stops may be made in almost all circumstances without a search or arrest warrant, though probable cause is required for any search of the car.⁶⁵ Since violations of the traffic laws are commonplace, police have enormous discretion to effectuate stops of a very high number of cars. This discretion provides the opportunity for pretextual stops and searches.

In *Whren v. United States*, Washington, D.C. police officers made a traffic stop and observed two bags of crack cocaine in the hands of a front-seat passenger.⁶⁶ The police testified that they stopped the car because the driver had violated several traffic laws.⁶⁷ The defendants claimed that the stop was pretextual: the police were suspicious because they observed two African-American men in a Nissan Pathfinder in Southeast Washington and, lacking any cause for a stop to investigate drugs, decided to stop on the basis of alleged traffic violations so they could conduct a drug investigation.⁶⁸ In fact, the officers involved were on a vice-detail, which prohibited them by departmental regulation from making routine traffic stops.⁶⁹

The Supreme Court ruled that from a Fourth Amendment perspective, the “constitutional reasonableness of traffic stops” does not depend “on the actual motivations of the individual officers.”⁷⁰ According to the Court, the only relevant question was whether, looking at the circumstances from an objective viewpoint, the officer

62. *Whren v. United States*, 517 U.S. 806, 816–19 (1996).

63. *Id.* at 811–13.

64. *Id.* at 816–19.

65. *Wyoming v. Houghten*, 526 U.S. 295, 309 (1999) (Stevens, J., dissenting) (citing *United States v. Di Re*, 332 U.S. 581 (1948)).

66. *Whren*, 517 U.S. at 809.

67. *Id.* at 808–09.

68. *Id.* at 808, 810.

69. *Id.* at 815.

70. *Id.* at 813.

had legal cause for the stop.⁷¹ The Court rejected the argument that the Fourth Amendment requires consideration of whether “the officer’s conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given.”⁷²

In response to the argument that pretextual stops could be racially motivated, the Court stated that the Equal Protection Clause of the Fourteenth Amendment would prohibit any intentional race discrimination in a car stop.⁷³ However, this perfunctory statement did not address the means by which an intentional race discrimination claim could be proven or what remedies might be available to either a criminal defendant or a civil litigant.⁷⁴

2. Pedestrian Stops

The law with respect to pedestrian stops is also governed by the Fourth Amendment, but there are significant doctrinal and practical differences between the legal standards developed in this context and those that have developed in connection with automobile stops and searches. The great majority of police-pedestrian encounters are governed by the stop and frisk principles of *Terry v.*

71. *Whren v. United States*, 517 U.S. 806, 810–13 (1996).

72. *Id.* at 814.

73. *Id.* at 813.

74. As the author of both *Whren* and the dissent in *Morrison v. Olson*, Justice Scalia has noted the potential dangers of selective law enforcement, especially in prosecution:

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting R. Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)); see Paul Butler, *Starr is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. Rev. 705, 709–10 (1999) (citing *Olson*).

Ohio.⁷⁵ In *Terry*, the Court ruled for the first time that the seizure of a person by the police could be justified by less than probable cause.⁷⁶ The Court held that where a police officer has “reasonable suspicion” of criminal activity, she may stop the person for investigation.⁷⁷ Further, if there is reasonable suspicion that the person is armed and dangerous, the officer may conduct a frisk of that suspect for the officer’s protection.⁷⁸ Over the past forty years, the *Terry* doctrine has been expanded to permit police to seize and frisk people in a wide array of circumstances, even where the person’s conduct is fully consistent with legal activity.⁷⁹ By virtue of these legal standards, the police are afforded enormous discretion with respect to whom they will subject to investigative procedures. This discretion operates on a number of levels, including police deployment, criminal activity targeted, and the numerous factors that may be considered in targeting possible suspects. Moreover, as in the car stop and search area, there is a critical intersection of police discretion and race, and the Fourth Amendment does not specifically protect individuals from racially biased policing.⁸⁰

B. The Equal Protection Remedial Framework

The Equal Protection Clause of the Fourteenth Amendment is the only other available constitutional vehicle that litigants may

75. *Terry v. Ohio*, 392 U.S. 1 (1968).

76. *Id.* at 27.

77. *Id.* at 30.

78. *Id.* at 24, 27, 30.

79. *See United States v. Arvizu*, 534 U.S. 266, 277 (2002) (holding that conduct that appears innocent may provide reasonable suspicion depending on the context and the “totality of the circumstances”); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (finding that the suspect’s headlong flight in a high crime area, without any other evidence of criminal conduct, was sufficient to justify stopping him); *Adams v. Williams*, 407 U.S. 143, 147–48 (1972) (stating that an unverified tip that the suspect possessed narcotics and a gun in a high crime area was sufficient to allow the officer to stop and frisk the suspect, even though possessing a concealed weapon was legal); 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.1(a), at 272 (4th ed. 2004).

80. *See Wardlow*, 528 U.S. at 134–35 (Stevens, J., concurring in part and dissenting in part) (suggesting that even evidence of innocence and racial profiling do not make a stop and search per se invalid, provided that other factors reasonably establish probable cause and provided that a local reviewing court would not expect the police officer to believe that the putative suspect was fleeing innocently due to fear of racial profiling, as where that fear is prevalent and known).

use to challenge racially biased stops and searches. Some litigants have successfully invoked equal protection principles in challenges to police misconduct.⁸¹ However, the strong consensus against racial profiling has unraveled after 9/11 and the debate has shifted, with a number of commentators supporting consideration of racial or ethnic factors in the war on terror.⁸² This political development complicates the task of challenging racial profiling in the courts.

On the doctrinal front, while *McCleskey* and *Armstrong* close the door to certain challenges based on racial disparities, they are not necessarily dispositive of all racial profiling claims. In *McCleskey*, the Court affirmed the unique discretion given to juries to decide between life and death by requiring proof beyond statistical patterns in the system as a whole to show that the judgment in an individual case was infected by intentional discrimination.⁸³ In *Armstrong*, the Court required the defendant to show that similarly situated white offenders were not subject to federal prosecution.⁸⁴

However, selective policing claims can survive the Supreme Court's decisions in *McCleskey* and *Armstrong*. Even those courts that will not allow discriminatory intent to be inferred from disparate jury findings or disparate prosecutions based on similar facts will find that statistical evidence that law enforcement officers repeatedly target racial minorities is sufficient to establish a

81. See *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1141 (N.D. Cal. 2000) (sustaining plaintiffs' equal protection claims over summary judgment on grounds that law enforcement is not accorded the same presumption of discretion as prosecutors, that conclusive evidence of similarly situated drivers' disparate treatment would be difficult to obtain, and that statistical evidence of traffic stops was probative of discriminatory intent); *Md. State Conference of NAACP Branches v. Md. Dep't of State Police*, 72 F. Supp. 2d 560, 565 (D. Md. 1999) (finding that statistical evidence of racially disparate traffic stops should have placed law enforcement superiors on notice of possibly unconstitutional policies); *Price v. Kramer*, 200 F.3d 1237, 1240 (9th Cir. 1999) (affirming a \$245,000 award for a racially motivated arrest and use of excessive force); *Hall v. Ochs*, 817 F.2d 920, 927 (1st Cir. 1987) (citing the "profound and lasting effect" of racially motivated conduct in upholding the jury's damage award).

82. For a discussion of post-9/11 profiling issues, see Deborah Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 Am. Crim. L. Rev. 1195 (2003).

83. *McCleskey v. Kemp*, 481 U.S. 279, 289–90 (1987) (maintaining that because the Constitution requires a range of discretion in a jury's capital sentencing decision, some level of disparate results for the same facts must be constitutionally tolerable).

84. *United States v. Armstrong*, 517 U.S. 456, 457 (1996).

Fourteenth Amendment claim. Such a claim is possible due to some important distinguishing points.

First, evidence showing statistically significant disparities in the rates at which similarly situated black and white drivers are stopped and searched pursuant to alleged traffic violations can be sufficient to satisfy the factual predicate for selective enforcement demanded by *Armstrong*, i.e., that similarly situated white drivers have not been stopped and searched.⁸⁵

Second, *Armstrong* reaffirmed the ruling in *Batson v. Kentucky*⁸⁶ that statistical proof of a discriminatory policy or purpose is sufficient where a challenged practice is characterized by a highly discretionary selection procedure that is susceptible to abuse.⁸⁷ Other courts have acknowledged that where discrimination is sufficiently “clandestine and covert,” statistical evidence of a discriminatory pattern is the “only available avenue of proof.”⁸⁸ Several lower courts have in fact sustained equal protection claims of racial profiling based on this order of proof.⁸⁹ Where a racial profiling challenge is

85. See *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (relying on statistical evidence of racial disparities in finding that a facially neutral disenfranchisement statute violated the Equal Protection Clause of the Fourteenth Amendment).

86. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

87. *Armstrong*, 517 U.S. at 467–68.

88. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (quoting *United States v. Ironworkers Local 86* 443 F.2d 544, 551 (1971)). As the Court stated in *International Brotherhood*:

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Id.; see also *Castaneda v. Partida*, 430 U.S. 482, 494–95 (1977) (stating that a plaintiff can make out a prima facie case of discriminatory purpose by using statistics to show substantial underrepresentation of his group).

89. See, e.g., *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1141 (N.D. Cal. 2000) (sustaining plaintiffs' equal protection claims over summary judgment on grounds that law enforcement is not accorded the same presumption of regularity and non-arbitrary discretion as prosecutors, that conclusive evidence of similarly situated drivers' disparate treatment would be difficult to obtain, and that statistical evidence of traffic stops was probative of discriminatory intent); *Md. State Conference of NAACP Branches v. Md. Dep't of State Police*, 72 F. Supp. 2d 560, 565 (D. Md. 1999) (finding that statistical evidence of racially

based on the theory that law enforcement's official policy applies an express racial classification, there should be no need to plead or prove the existence of a similarly situated non-minority group or person who was not subject to the complained of practices.⁹⁰ As the Second Circuit recently explained:

[I]t is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification. These classifications are subject to strict judicial scrutiny, *see Albe v. United States*, 155 F.3d 628, 631–32 (2d Cir. 1998), and strict scrutiny analysis in effect addresses the question of whether people of different races are similarly situated with regard to the law or policy at issue.⁹¹

Third, *Armstrong* was a selective prosecution case challenging a prosecutor's discretion in deciding to charge particular defendants.⁹² Prosecutors are accorded a strong presumption in favor of the "regularity" of their decisions, rebuttable only by "clear evidence to the contrary."⁹³ Because of separation of powers concerns, "courts are 'properly hesitant to examine the decisions whether to prosecute.'"⁹⁴ However, police officers charged with racial discrimination or other violations of constitutional norms in law enforcement duties are not accorded the same presumption of correctness.⁹⁵

disparate traffic stops should have placed law enforcement superiors on notice of possibly unconstitutional policies); *Nat'l Cong. for Puerto Rican Rights v. City of New York*, 191 F.R.D. 52, 54 (S.D.N.Y. 1999) (finding that the allegation of a de facto policy of racial profiling supported by some statistical evidence was sufficient to claim an express discriminatory policy that would survive summary judgment).

90. *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000); *Nat'l Cong. for Puerto Rican Rights*, 191 F.R.D. at 54.

91. *Brown*, 221 F.3d at 337.

92. *Armstrong*, 517 U.S. at 463.

93. *Id.* at 464.

94. *Id.* at 465 (quoting *United States v. Wayte*, 470 U.S. 598, 608 (1995)).

95. *See City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (voiding as vague a city ordinance that allowed police to disperse loitering "criminal street gang members" from public places, partly on the ground that the ordinance encouraged discriminatory and arbitrary enforcement); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (finding a loitering statute void because it "vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest"); *Allee v. Medrano*, 416 U.S. 802, 813–14 (1974)

Moreover, damage actions based on racial profiling and equal protection principles can in some circumstances deter unconstitutional practices and compensate individual victims of misconduct where no remedy exists in a criminal case. While the usual remedy for discriminatory practices in the context of criminal prosecutions is suppression of evidence,⁹⁶ the Supreme Court has never recognized an exclusionary rule permitting such suppression of evidence in cases alleging Fourteenth Amendment violations.⁹⁷ Further, discovery in criminal cases is generally far more restricted than in civil litigation, and where drugs are found, trial judges usually find some way to avoid suppressing evidence.⁹⁸ Accordingly, civil litigation is more likely to provide systemic relief than defense of individual criminal cases.⁹⁹ Moreover, counsel should consider ways in which this remedy can be enhanced, for example through class actions or joinder of claims. Where large damage awards or settlements are obtained, civil actions may cause police administrators to reform their department and to change the impermissible practices.

Civil litigants may also seek federal injunctive relief against state or local officers upon a showing of a violation of federal constitutional or statutory rights. This remedy is potentially the most

(affirming an injunction prohibiting police from “using their authority as peace officers to arrest, stop, disperse or imprison [labor organizers] . . . without ‘adequate cause’” on the ground that the injunction only limited law enforcement’s discretion so that it would not exceed constitutional bounds).

96. See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (applying the exclusionary rule to suppress evidence obtained in violation of the Fourth Amendment). *But see United States v. Leon*, 468 U.S. 897, 926 (1984) (refusing to apply the exclusionary rule where the officer relied in good faith on a warrant later found to be invalid).

97. See Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 Chi.-Kent L. Rev. 559, 571 (1998).

98. Alan M. Dershowitz, *Controlling the Cops: Accomplices to Perjury*, N.Y. Times, May 2, 1994, at A17; Christopher Slobogin, *Testifying: Police Perjury and What to do About It*, 67 U. Colo. L. Rev. 1037, 1047 (1996).

99. *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996). This case broke open the practice of racial profiling on the New Jersey Turnpike and is an example of a successful use of the criminal defense process. There, liberal discovery rules, consolidation of several cases from the Turnpike, and use of experts led to a significant release of a police agency’s documentation and suppression orders for evidence seized during discriminatory traffic stops, based on state constitutional law.

effective and far-reaching remedial mechanism for preventing future violations of rights. The injunctive action is not encumbered by the officers' ministerial immunities, since they are immune only as agents of the state rather than in their personal capacities, and the Eleventh Amendment, which confers sovereign immunity on states, is avoided under the *Ex Parte Young* doctrine.¹⁰⁰

However, the federal courts' equitable powers are circumscribed by federalism, comity, and standing doctrine, which may limit the effectiveness of civil litigation in combating racial profiling. To have standing to establish a claim for equitable relief, a plaintiff first must show a likelihood of future injury.¹⁰¹ In *City of Los Angeles v. Lyons*, the plaintiff was stopped by Los Angeles police officers for a traffic violation and placed in a chokehold causing damage to his larynx.¹⁰² The Supreme Court denied Lyons' request for an injunction, ruling that he had not made out a case or controversy based on a sufficient likelihood that he would again be subjected to a police chokehold. The Court stated:

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or, (2) that the City ordered or authorized police officers to act in such manner.¹⁰³

The second ground for standing is that the conduct sought to be enjoined is officially authorized.¹⁰⁴ This element may be established more easily in racial profiling cases where a pattern and

100. *Ex parte Young*, 209 U.S. 123, 159 (1908) (permitting suit against state officials in their individual capacities on the theory that they do not act on behalf of the state when they act in an unconstitutional manner). *See also* *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (holding that an act performed under color of law or in some official capacity is not accorded sovereign immunity from liability under 42 U.S.C. § 1983, if the act was an abuse of the official's position that deprived some person of her constitutional rights, privileges, and immunities).

101. *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974) (concluding that past exposure to illegal conduct does not satisfy the case and controversy requirement for injunctive relief if unaccompanied by continuing adverse effects).

102. *City of Los Angeles v. Lyons*, 461 U.S. 95, 97–98 (1983).

103. *Id.* at 105–06.

104. *Id.* at 106.

practice of illegal stops of large numbers of persons is proven.¹⁰⁵ Where the police officers' conduct is the product of official policy or practice, it is far more likely that they will repeat such conduct. In addition, it increases the likelihood that a plaintiff who engages in activities that bring him into the purview of this conduct will suffer future injury, thereby satisfying *Lyons*. Therefore, the existence of a policy that will directly affect the plaintiff or members of the plaintiff's class may be sufficient to establish standing.¹⁰⁶

The Supreme Court distinguished *Lyons* in *Friends of the Earth v. Laidlaw Environmental Services*,¹⁰⁷ where it granted Article III standing to plaintiffs in an environmental lawsuit challenging the pollution of a river. The plaintiffs alleged that they had suffered "injury in fact," because the pollution deterred them from using the river for recreational purposes.¹⁰⁸ The Court ruled in *Friends of the Earth* that there was "nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other

105. See *id.*, 461 U.S. at 113–37 (1983) (Marshall, J., dissenting) (combining statistical evidence of disparate impact with official statements of a policy of broad police discretion to infer an official policy of discrimination); *Allee v. Medrano*, 416 U.S. 802, 815 (1974) (holding that where there is a pattern of police misconduct in suppressing organized labor activities, injunctive relief is appropriate).

106. See, e.g., *Deshawn E. v. Safir*, 156 F.3d 340 (2d Cir. 1998) (noting that the police interrogation practices are subject to equitable relief, yet dismissing the claim based on failure of proof); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486 (9th Cir. 1996) (finding that the fourteen named plaintiffs had standing to obtain statewide injunctive relief against the state police where illegal citation practices were the result of official practice and policy); *Thomas v. County of Los Angeles*, 978 F.2d 504 (9th Cir. 1993) (finding that plaintiffs had standing where "numerous instances of police misconduct have occurred in a small six by seven block area, [and] some minority residents of the area have been mistreated by deputies more than once"); *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1135–36 (N.D. Cal. 2000) (finding that NAACP and LULAC had standing in a racial profiling suit); *Md. State Conference of NAACP Branches v. Md. Dep't of State Police*, 72 F. Supp. 2d 560, 565 (D. Md. 1999) (finding that a minority motorist's showing of a pattern of racially discriminatory stops, detentions, and searches by Maryland state police, along with allegations of past injury and likely future travel on the same highway, was sufficient to satisfy a risk-of-injury requirement for standing).

107. *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 184 (2000).

108. *Id.* at 168.

economic and aesthetic harms.”¹⁰⁹ Under this standard, *Lyons* did not bar the action since the unlawful conduct was occurring at the time the complaint was filed. If a polluted river can affect everyone using that water source, racial profiling on highways is equally offensive as it randomly affects thousands of drivers.

Beyond the “official policy” argument, there are several grounds for distinguishing *Lyons*. First, the Court stressed that the past encounter would repeat itself only if *Lyons* again violated the law.¹¹⁰ In racial profiling cases, where the stop is based on an immutable characteristic and the plaintiff has not engaged in unlawful activity, there is a greater likelihood that the misconduct will affect the targeted class and these factors may be sufficient to provide standing.¹¹¹

Second, *Lyons* was subjected to the chokehold on only one occasion and the record in the case demonstrated that this type of force, while serious and at times deadly, was infrequently employed by the Department.¹¹² By contrast, racial profiling plaintiffs may have been subjected to numerous stops.¹¹³

There have been a number of successful civil rights challenges to racial profiling practices. For example, in June 1999, litigants, represented by the ACLU of Northern California, filed a class action lawsuit against the California Highway Patrol (“CHP”), which ultimately resulted in a temporary moratorium on consent

109. *Id.* at 184. *See also* Friends of the Earth, Inc. v. Gatzon Copper Recycling Corp., 204 F.3d 149, 156–61 (4th Cir. 2000) (en banc) (finding that the plaintiff had standing where his use of the waterway was reduced by the defendant’s actions).

110. *Lyons*, 461 U.S. at 102–03.

111. *See, e.g.*, Anderson v. Cornejo, 199 F.R.D. 228, 244 (N.D. Ill. Jan. 2000) (holding that a class of African-American women strip-searched at O’Hare Airport by customs agents could be certified for the purpose of injunctive relief); Nat’l Cong. for Puerto Rican Rights v. City of New York, 191 F.R.D. 52, 55 (S.D.N.Y. 1999) (holding that the allegation that police stopped and frisked black and Latino men without reasonable suspicion based on their race was sufficient to state an equal protection claim, even though the complaint failed to identify similarly situated individuals who were not stopped).

112. *Lyons*, 461 U.S. at 108–09.

113. In *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (en banc) the court ruled that two individuals who had each been stopped once over a several-year period and who regularly drove in the area in which they claimed illegal “border” stops were being made, lacked standing to challenge the actions of the Border Patrol.

searches conducted by the CHP.¹¹⁴ The plaintiffs argued that CHP troopers, consistent with Operation Pipeline training, were determining in a racially discriminatory manner who to stop, detain, interrogate, and/or search.¹¹⁵ CHP's statistical data showed that between 80% and 90% of all motorists arrested by Pipeline units were members of minority groups, despite the fact that studies of Operation Pipeline programs in other states reveal that people of color are not more likely than whites to be carrying drugs in their cars.¹¹⁶ Approximately one year later, after data obtained during discovery showed that Latinos were three times more likely than whites to be searched, and African Americans were twice as likely as whites to be searched in the Central and Coastal CHP Divisions, the CHP Commissioner issued a moratorium on consent searches.¹¹⁷ In February 2003, the parties reached a settlement whereby the CHP paid \$875,000 to the plaintiffs, and the CHP agreed to extend the moratorium on consent searches until 2006.¹¹⁸ The Agreement also requires that the CHP continue to collect data on traffic stops and that it create an auditor position within the CHP to review such data.¹¹⁹

Federal injunctive relief is also available under The Violent Crime Control and Law Enforcement Act of 1994 which authorizes

114. See *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000).

115. *Id.* at 1143.

116. Fifth Amended Class Action Complaint for Declaratory Relief, Injunctive Relief & Damages at para. 40, *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (No. C-99-20895-JF/EAI).

117. Am. Civil Liberties Union of Northern Cal., *Rodriguez v. CHP*, Feb. 23, 2003, http://www.aclunc.org/cases/landmark_cases/rodriguez_v.shtml.

118. Terms & Conditions of Settlement Agreement at 11, *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131 (N. D. Cal. 2000) (No. C-99-20895-JF/HRL).

119. *Id.* at 7–9. There have also been significant damage awards in other racial profiling cases. See, e.g., *Price v. Kramer*, 200 F.3d 1237 (9th Cir. 1999) (affirming an award of \$240,000 for a racially motivated arrest and use of force); *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993) (remanding to the trial court to review for excessiveness an award of \$450,000 in punitive damages, and affirming appellate review of damages under abuse of discretion or “grossly disproportionate” standard); *Whitfield v. Bd. of County Comm’rs*, 837 F. Supp. 338 (D. Colo. 1993) (affirming a settlement for class damages of \$800,000 for highway racial profiling); *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987) (affirming a \$435,000 award for racially motivated misconduct); *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996) (affirming a \$10,000 award for each plaintiff plus costs and attorney fees).

the United States, through the Attorney General, to bring civil actions for declaratory or equitable relief against police departments engaged in a pattern or practice of deprivation of constitutional or statutory rights.¹²⁰ The statute provides potentially broad grounds for intervention and relief, but practical political realities have seriously limited the law's potential reach.¹²¹ From 1994–2000, the U.S. Department of Justice took legal action against a number of state and local law enforcement agencies.¹²² But during the Bush Administration, almost all efforts have ended.

A number of state courts, applying state constitutional principles, have been more amenable to providing remedies for racially disparate practices. Both criminal and civil litigation in these jurisdictions have yielded results not possible in federal court: some state courts have found pretextual arrests to be unconstitutional under state law;¹²³ the New Jersey Supreme Court has required a showing of reasonable suspicion before an officer may seek consent to search a car;¹²⁴ Pennsylvania has rejected the United States Supreme Court's decisions permitting broad searches of cars without warrants;¹²⁵ and state courts have suppressed evidence seized as a

120. 42 U.S.C. § 14141 (1995). For a discussion of the implementation of the Act by the Department of Justice, see Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 Colum. L. Rev. 1384 (2000); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 Buff. Crim. L. Rev. 815 (1999).

121. Livingston, *supra* note 120, at 841–50.

122. *Id.* at 815–16.

123. *See, e.g.*, *State v. Ladson*, 979 P.2d 833 (Wash. 1999) (holding pretextual traffic stops illegal under the state constitution); *State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002) (holding pretextual arrests unconstitutional). *But see* *State v. Harmon*, 113 S.W.3d 75 (Ark. 2003) (holding that pretextual stops are legitimate).

124. *See* *State v. Carty*, 790 A.2d 903, 905 (N.J. 2002).

125. *See, e.g.*, *Commonwealth v. White*, 669 A.2d 896 (Pa. 1996) (affirming suppression of evidence retrieved during a warrantless automobile search. The court found the warrantless automobile search was not permissible under “automobile exception,” nor was it justifiable as an inventory search or incident to arrest); *Commonwealth v. Timko*, 417 A.2d 620 (Pa. 1980) (holding Commonwealth failed to establish search of zippered valise without a warrant was incident to defendant's arrest. Since the valise could not be searched without a warrant simply because it was found in an automobile, nor was it justifiable as an inventory search); *Commonwealth v. Freeman*, 757 A.2d 903 (Pa. 2000) (holding searches invalid if driver consented while illegally detained); *Commonwealth v. Phinn*, 761 A.2d 176 (Pa. 2000) (holding that suppression of

result of racial profiling.¹²⁶ Unfortunately, even success on individual criminal cases, by suppression or otherwise, is not likely to have a lasting impact on racially biased practices.

III. LESSONS FROM THE INNOCENCE MOVEMENT

Over the last fifteen years, we have witnessed the exoneration of over 200 persons based on DNA and other post-trial proof of innocence.¹²⁷ Many of these exonerations have been the result of work by the Innocence Project, a public interest organization affiliated with the Benjamin N. Cardozo School of Law at Yeshiva University, and the Innocence Network, a group of law schools, journalism schools, and public defender offices, whose shared mission is to help inmates prove their innocence and to work with researchers and lawmakers to reform the criminal justice system to prevent future wrongful convictions.¹²⁸ These exonerations provide a critical window into the fault lines of the criminal justice system, including unreliable eyewitness identifications, police and prosecutorial misconduct, false or coerced confessions, faulty forensic practices and evidence, racial bias, and ineffective defense counsel.¹²⁹ A recent in-depth study of these DNA exonerations found that disproportionate numbers of those convicted and later found to be

evidence was proper where search of the vehicle was illegal on account of illegal detention of driver since consent was requested after the driver was told he was free to go).

126. See, e.g., *State v. Donahue*, 742 A.2d 775, 782 (Conn. 1999) (discussing the “insidious specter of ‘profiling’”); *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) (equal protection and due process are violated where there is evidence that blacks are targeted for investigation and arrest, indicating selective enforcement of traffic laws); *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 115–16 (Mass. 1999) (Ireland, J., concurring) (finding that police may not order people out of their cars without justification, such as reasonable belief that officer’s safety, or safety of others, is in danger).

127. The Innocence Project, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Sept. 27, 2007); The Innocence Project, 200 Exonerated: Too Many Wrongfully Convicted, http://www.innocenceproject.org/Images/751/ip_200.pdf (last visited Oct. 2, 2007) (providing details of the first 200 people the Innocence Project helped to exonerate using DNA evidence).

128. The Innocence Project, About the Innocence Project, <http://www.innocenceproject.org/about/> (last visited Oct. 2, 2007).

129. See Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. (forthcoming 2008).

factually innocent of the charges were racial minorities.¹³⁰ In some areas, such as cross-racial eyewitness identifications, there is strong evidence of direct racial bias.¹³¹

Given the substantial racially disparate impact of virtually all aspects of the criminal justice system, corrective measures on any front will help to reduce the pernicious effects of racial bias. In some jurisdictions, reform movements have seized upon these findings to work changes in these problematic areas.¹³² A leading example is the Illinois Governor's Commission on Capital Punishment, which made specific recommendations regarding video-taping of police interrogations, procedures for photospreads and other eyewitness identification processes, use of jailhouse informants, and disclosure of exculpatory evidence to defendants.¹³³ A number of jurisdictions have made changes in identification and interrogation practices, and

130. *Id.* (manuscript at 9, on file with *The Columbia Law Review*).

131. *See, e.g.*, *Commonwealth v. Zimmerman*, 804 N.E.2d 336, 344 (Mass. 2004) (Cordy, J., concurring) (the unreliability of cross-racial identification is a subject "beyond the ordinary experience and knowledge of the average juror" (quoting *Commonwealth v. Middleton*, 378 N.E.2d 450 (Mass. 1978)); *State v. Cromedy*, 158 N.J. 112, 128 (1999) (requiring jury instruction on possible unreliability of cross-racial identifications); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 *Ann. Rev. Psychol.* 277 (2003) (reviewing developments in experimental literature regarding how various factors relate to the accuracy of eyewitness identifications).

132. *See* Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (2000); Am. Bar Ass'n Crim. Justice Section Ad Hoc Innocence Comm. to Ensure the Integrity of the Crim. Process, *Achieving Justice: Freeing the Innocent and Convicting the Guilty* (2006); Innocence Comm'n for Virginia, *A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia* (2005); Cal. Comm'n on the Fair Admin. of Justice, *Official Recommendations to Improve Eyewitness Identifications* (2006), *available at* <http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf>; Cal. Comm'n on the Fair Admin. of Justice, *Report and Recommendations regarding Informant Testimony* (2006), *available at* <http://www.ccfaj.org/documents/reports/jailhouse/official/Official%20Report.pdf>; Cal. Comm'n on the Fair Admin. of Justice, *Report and Recommendations regarding False Confessions* (2006), *available at* <http://www.ccfaj.org/documents/reports/false/official/falconfrep.pdf>.

133. State of Ill. Comm'n on Capital Punishment, *Report of the Governor's Commission on Capital Punishment 19-22* (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf.

others have started to reform their criminal defense services and their forensic laboratories and protocols.¹³⁴

From a litigation perspective, the insights that have been gained as a result of the numerous exonerations and related studies on how criminal justice has failed can be used to support arguments for changes in the constitutional standards for identification procedures, disclosure of exculpatory evidence, and effectiveness of defense counsel.¹³⁵ The time is ripe to re-conceptualize the functioning of the criminal justice system, and eliminating the insidious influence of race should be high on the reform list.

IV. CONCLUSION

Twenty years after the Supreme Court's unfortunate decision in *McCleskey v. Kemp*, the struggle to redress racial discrimination in the criminal justice system continues in the courts and other venues. While some litigation challenges have been effectively precluded by the Supreme Court's refusal to provide adequate remedies or procedures to challenge race discrimination, litigation that focuses on police practices has provided some systemic relief. In this article, I have focused on the most effective remedies and the types of cases that can be brought to achieve racial equality.

The Supreme Court recently ruled that consideration of race in a city's attempt to integrate its public schools violated the Fourteenth Amendment's Equal Protection Clause.¹³⁶ The Court held that the school districts failed to show a compelling state interest in such practices and failed to show that their programs were narrowly tailored to promote diversity and avoid racial isolation.¹³⁷ There is much to be said for Justice Breyer's dissent in the case, in which he accuses the Court of turning its back on *Brown v. Board of*

134. See Jules Epstein, *Tri-State Vagaries: The Varying Responses of Delaware, New Jersey, and Pennsylvania to the Phenomenon of Mistaken Identifications*, 12 *Widener L. Rev.* 327 (2006) (examining various state responses to the problem of unreliable eyewitness identification and the extent to which these jurisdictions have acknowledged scientific findings regarding perception, memory, and recall).

135. See Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 *Wis. L. Rev.* 35, 103-06 (2005).

136. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767-68 (2007).

137. *Id.* at 2749.

*Education.*¹³⁸ Nevertheless, whatever the merits of that debate, if a state must be colorblind with respect to school placements, and integration is not a sufficiently compelling state interest to justify the use of race, it is difficult indeed to see how racial profiling in law enforcement can serve any legitimate state interest. Of course, without significant litigation efforts, police reform, and judicial willingness to hear claims of racial profiling, these practices will continue to stain our constitutional fabric.

138. *Id.* at 2800 (Breyer, J., dissenting) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

V. APPENDIX A

Table 1 Car and Pedestrian Stops in Philadelphia in 2003¹³⁹

Activity	African-American	Latino	White
Total Car stops ¹⁴⁰	2155 (47.6% of all stops)	545 (12.0% of all stops)	1600 (35.3% of all stops)
Car stops without reasonable suspicion ¹⁴¹	58.8% (0.9% within racial category)	14.7% (0.9% within racial category)	23.5% (0.5% within racial category)
Car stops with frisks of driver or passenger	60% (7.2% within racial category)	13% (6.2% within racial category)	25% (4.1% within racial category)
Total pedestrian stops	873 (64.9% of all stops)	118 (8.8% of all stops)	322 (23.9% of all stops)
Pedestrian stops without reasonable suspicion	72 (75% of all stops)	9 (9.4% of all stops)	11 (11.5% of all stops)
Pedestrian stops with frisks	351 (75.8% of all stops)	42 (9.1% of all stops)	62 (13.4% of all stops)
Pedestrian frisks without reasonable suspicion	58 (80.6% of all stops)	6 (8.3% of all stops)	8 (11.1% of all stops)
Pedestrian stops with searches	135 (73.0% of all stops)	12 (6.5% of all stops)	35 (18.9% of all stops)
Pedestrian searches without cause	21 (77.8% of all stops)	2 (7.4% of all stops)	4 (14.8% of all stops)

139. See Letter from author, *supra* note 44. The population of Philadelphia as of the 2000 census was approximately 45% white, 43% African-American, and 8% Latino. U.S. Census Bureau, Philadelphia County, PA Quick Facts, <http://quickfacts.census.gov/qfd/states/42/42101.html> (last visited Oct. 9, 2007).

140. The data show that minorities were stopped at almost a two-to-one ratio compared to white drivers, while the actual minority driving population in Philadelphia is roughly 50%, and there is no evidence of higher rates of moving violations or other traffic violations by minority drivers. Fifth Philadelphia Report, *supra* note 32, at 17.

141. The data show that close to 75% of all stops made without reasonable suspicion were of minorities.