

# U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle

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## Introduction

"There are more [B]lack people in prisons and jails than in colleges and universities. The term 'institutionalized racism' is not too harsh a term for this statistic."<sup>1</sup> Although provocative, Judge C. Victor Lander's comment accurately describes one of the United States' worst ills. Winston Churchill opined that one could judge a society by looking at its prisons.<sup>2</sup> By that reasoning, a society must address its criminal justice system as part of solving its problems. Currently, the U.S. criminal justice system is doing

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The writing of this article commenced prior to the tragic events of Sept. 11, 2001. The ultimate results of those events have yet to become clear, but I am certain that they will significantly influence the discussion of this topic in the future.

1. Hon. C. Victor Lander, *Racism in the Criminal Justice System*, 2 ANN. 2000 ATLA-CLE 1801 (2000).

2. Sir Leon Radzinowicz & Roger Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288, 1348-49 (1979) (quoting Winston Churchill, *Home Office Supply (Report)*, 19 PARL. DEB., H.C. (5th Ser.) (1910) 1343, 1354).

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.

*Id.*

more harm than good with respect to racism.

In 1970, the U.S. federal and state prison systems confined 200,000 prisoners.<sup>3</sup> Today, the U.S. prison population totals more than 2,000,000.<sup>4</sup> While sources assign various reasons for the prison increase, longer sentencing and a higher rate of recidivism are the main factors.<sup>5</sup> This increase has also been attributed to the United States' War on Drugs.<sup>6</sup> These reasons are not mutually exclusive. Along with other causes, they exist symbiotically, resulting in significant racial disparity in prisons.<sup>7</sup>

Instead of responding to the rising prison population by questioning the severity of criminal penalties, the political atmosphere has been dominated by an enforcement-hungry policy discourse that ignores the roots of the problem.<sup>8</sup> This strong political pressure affects all branches of government, encouraging executive, legislative, and judicial officials to fly the banner of tough law enforcement.<sup>9</sup>

While some segments of society may benefit from this prison boom,<sup>10</sup> its effect on African Americans is devastating: while making up only approximately 12% of the U.S. population, African Americans constitute 49% of its inmates.<sup>11</sup> The War on Drugs, in addition to contributing to the prison explosion, further

3. Noel C. Richardson, *Is There a Current Incarceration Crisis in the Black Community? An Analysis of the Link Between Confinement, Capital, and Racism in the United States*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 183, 211 (1997) (comparing the 200,000 U.S. prison population figure in 1970 to the 1,053,000 figure in 1994).

4. David Cole, *See No Evil, Hear No Evil*, THE NATION, Oct. 9, 2000, at 30.

5. *See id.*

6. *See id.*

7. *See infra* notes 236-243 and accompanying text.

8. *See* Lisa Walter, *Eradicating Racial Stereotyping From Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 258-59 (2000) ("[G]overnment officials have reaped political payoffs in the past two decades for being tough on crime.").

9. *See id.* at 258-59, 271 (explaining the political motivation for each branch to be tough on crime). For example, Judge Baer of the District Court for the Southern District of New York switched from finding that probable cause did not exist under the totality of the circumstances in a search and seizure case to finding that probable cause did exist apparently as a result of political pressure from the New York Mayor, Governor, and United States Congressmen. *See id.* at 271.

10. This boom may specifically benefit those employed by the prison industry and Whites afraid of racial minorities. *See id.* at 258-59.

11. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2000: EVENTS OF 1999, at 393 (2000); *see also* Chris Weaver & Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 350 (1998) (reporting that African-American men, while only 5% of the U.S. population, make up 50% of the prison inmates).

perpetuates this lopsided demographic.<sup>12</sup> Inextricably linked with the War on Drugs, racial profiling is a vehicle for propagating racial disparity in prisons.<sup>13</sup> In an effort to fight this War, our nation has focused its attack on inner cities, and consequently, a disproportionate number of African Americans.<sup>14</sup> Because African Americans constitute only thirteen percent of U.S. drug users,<sup>15</sup> this battle is in effect a War on Blacks. The result: drug use is just as prevalent as before,<sup>16</sup> drug-related incarcerations are up eleven-fold,<sup>17</sup> and African Americans constitute the overwhelming majority of these drug-related incarcerations.<sup>18</sup>

In spite of its prevalence throughout history, racial profiling has only recently come to the attention of the U.S. general public.<sup>19</sup> As a result of its newfound notoriety, racial profiling has become as important a political topic as strict law enforcement.<sup>20</sup> During the second of the three 2000 presidential debates, Vice President Al Gore promised that if elected, his first act as President would be to issue an executive order banning racial profiling.<sup>21</sup> Then-Governor George W. Bush responded that he did not want to "federalize" the local police, but he did agree that something needed to be done about racial profiling.<sup>22</sup>

That "something needs to be done" grossly understates the urgent need for drastic reform in this country's law enforcement, legislative, and judicial systems. Racial profiling and racial disparity in prisons are self-perpetuating problems that require practical solutions stronger than the present protections available

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12. See *infra* Part II.B.

13. See Kathryn Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717, 725 (1999).

14. See Walter, *supra* note 8, at 258; see also *infra* notes 66-75 and accompanying text (illustrating that African Americans are arrested and incarcerated for drug use disproportionately to drug use in their class).

15. See Ira Glasser, American Drug Laws: The New Jim Crow, 1999 Edward C. Sobota Lecture (Sept. 23, 1999), in 63 ALB. L. REV. 703, 719 (2000) (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 14 (1999)).

16. See Ralph Thomas, *Redrawing the Battle Lines in a 'Failed' War on Drugs*, SEATTLE TIMES, Feb. 15, 2001, at A1.

17. See *infra* note 69.

18. See *infra* note 70 and accompanying text.

19. See David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 276 (1999).

20. See Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1410 nn.1-4 (2000).

21. See Richard L. Berke, *This Time, More Accord Than Discord*, N.Y. TIMES, Oct. 12, 2000, at A1.

22. *Id.*

under the Constitution and civil rights legislation, which combat primarily manifest racism.<sup>23</sup> Legislation must be designed to attack the covert or "unconscious" racism that fuels and fosters racial profiling and racial disparity in prisons.

Recently, President George W. Bush once again addressed racial profiling: in describing his budget, President Bush asserted that Attorney General John Ashcroft would spearhead the effort to solve the problem.<sup>24</sup> Regardless of his pledge, Bush called racial profiling the "abuses of a few," and asserted that he would not "hinder the work of our nation's brave police officers."<sup>25</sup> President Bush, in focusing his blame on a discrete number of police officers, overlooked a number of systemic factors, such as racist drug law enforcement policies and misdirected sentencing guidelines, that must be addressed to remedy racial profiling.<sup>26</sup>

Part I of this Article introduces Gunnar Myrdal's description of cumulative causation, a phenomenon that provides an explanation for both the occurrence of racial disparity in prisons and its permanency in U.S. society.<sup>27</sup> Part II examines different definitions of racial profiling as well as its relation to sentencing guidelines and the War on Drugs.<sup>28</sup> Part III addresses the ineffectiveness of the Fourth Amendment, the Fourteenth Amendment, and the various Civil Rights Acts; isolates 42 U.S.C. § 14141, a recent act that has been relatively valuable; and discusses various state acts and pending bills designed to combat racial profiling.<sup>29</sup> Part IV examines the inefficiencies of the current solutions for racial profiling, while providing practical solutions for a problem that has become drowned in theory.<sup>30</sup>

This Article argues for a practical evolution of U.S. civil rights legislation, a stronger and more extensive version of modern data collection acts, and a radical reformation of sentencing guidelines. Civil rights legislation must become a practical tool and attack effectively racist policies that result in racial profiling. States need standardized federal data collection laws to be

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23. See *infra* notes 141-144, 153-161 and accompanying text (discussing the crippling effect that the "invidious intent" requirement has on proving racist law enforcement).

24. See *Transcript of President Bush's Message to Congress on His Budget Proposal*, N.Y. TIMES, Feb. 28, 2001, at A12.

25. *Id.*

26. See *infra* Part II.B-C.

27. See *infra* notes 31-46 and accompanying text.

28. See *infra* notes 47-105 and accompanying text.

29. See *infra* notes 106-233 and accompanying text.

30. See *infra* notes 234-291 and accompanying text.

implemented in order to use them as templates. Finally, sentencing guidelines—the back end of the incarceration problem that stems from racial profiling and the War on Drugs—should be altered to address the realities of law enforcement and society in general. These solutions share the common goal of isolating and attacking causes for the inequitable racial balance of our prison population.

### I. The Vicious Cycle of Cumulative Causation

Gunnar Myrdal developed the theory of Cumulative Causation, also called the “vicious circle,” in the 1940s.<sup>31</sup> Myrdal asserted that the harmful effects of White prejudice are actually contributing causes of White prejudice; that low standards of living, poor health, and insufficient education among African-American populations lend credibility to the concept of Black inferiority, thereby creating a vicious, self-reinforcing cycle.<sup>32</sup> Myrdal explained that if either factor in the vicious cycle would change—White prejudice or Black poverty—the cycle would reverse itself and slowly progress to an equilibrium in which African-American standards of living would rise while White prejudice would decrease.<sup>33</sup>

Many White Americans believe that the United States approached this equilibrium with the passage of the Civil Rights Act of 1964.<sup>34</sup> Currently, our country’s laws directly address active prejudice in areas ranging from education<sup>35</sup> to employment.<sup>36</sup>

Notwithstanding these laws, the shifting racial representation in prisons over the last few decades indicates that racism still thrives in the United States. Between 1970 and 1984, prisons had an incoming inmate population of 40% African Americans and 60% Caucasians.<sup>37</sup> By 1991, that figure had

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31. 1 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 75 (Transaction Publishers 1996) (1944).

32. *See id.*

33. *See id.* at 76. Myrdal also warned that this cycle could spin downward. *See id.*

34. *See* Maurice E. R. Munroe, *Unamerican Tail: Of Segregation and Multicultural Education*, 64 ALB. L. REV. 241, 256 (2000).

35. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994).

36. *See id.* § 2000e.

37. *Drug Mandatory Minimums: Are They Working?* Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the House Comm. on Gov’t Reform, 106th Cong. 150 (2000) (prepared testimony of Wade Henderson, Executive Director of the Leadership Conference on Civil Rights) [hereinafter *Hearing*].

almost completely reversed.<sup>38</sup> Assuming, as many do, that racism in the United States is on the decline,<sup>39</sup> this trend towards greater African-American representation in prisons collides with Myrdal's Cumulative Causation theory.

The theory of "unconscious racism" provides an explanation for this paradox.<sup>40</sup> Unconscious racism is the residual ingrained racism of a society that has, for the majority of its existence, been dominated by overt racism.<sup>41</sup> Since society has only recently broken free from the formal bonds of intentional racism, the notion that racial prejudice in the United States has actually been eradicated is absurd and potentially dangerous.<sup>42</sup> Unconscious racism has become the dominant form of racism in the United States.<sup>43</sup> It is particularly dangerous, not only because it has escaped the reach of the statutory and constitutional protections, such as Fourteenth Amendment,<sup>44</sup> but also because it is by definition unknown.<sup>45</sup> Although its effects may be blatant, unconscious racism's surreptitiousness makes it difficult to isolate.<sup>46</sup> Our drug laws and racial profiling reflect our unconscious racism.

## II. Racial Profiling

One manifestation of both overtly and covertly racist law enforcement is the disproportionate number of African Americans arrested and incarcerated in the United States.<sup>47</sup> Policy makers and government officials have all contributed to a long list of definitions of racial profiling.<sup>48</sup> While racial profiling primarily

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38. *Id.* The 1991 figures were 54% incoming African Americans and 42% incoming Caucasians. *Id.*

39. See, e.g., William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 868-69 (2001).

40. Another explanation is that Myrdal's theory is wrong. However, this article assumes that his theory, which explains that a higher standard of living leads to greater respect that in turn leads to a higher standard of living, is correct.

41. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

42. See *id.* at 363 (explaining that racism has not disappeared, but instead transformed with the advent of the civil rights legislation).

43. See generally *id.* at 339-44 (discussing the prevalence of unconscious racism in everyday life).

44. See *infra* Part III.B.

45. See Lawrence, *supra* note 41, at 322 (stating that people are unaware of their racism).

46. See *id.* at 356-58.

47. See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Model and Public Confidence*, 57 WASH. & LEE L. REV. 405, 426 (2000).

48. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (defining racial

implies police actions that disproportionately target African Americans,<sup>49</sup> the same effects are evident particularly in drug laws and sentencing guidelines.<sup>50</sup> Although most states have been slow in reacting to racial profiling within their borders,<sup>51</sup> its occurrence throughout the country is painfully obvious.<sup>52</sup>

### A. On the Road

An appropriate definition for racial profiling in law enforcement is not the frequently used "practice of stopping drivers strictly on the basis of race,"<sup>53</sup> but rather, the practice of "police routinely [using] race as a negative signal that, along with an accumulation of other signals, causes an officer to react with suspicion."<sup>54</sup> Racial profiling by law enforcement officials occurs not only in the typical "Driving While Black" scenario, but also when walking while Black, standing while Black, or doing practically anything while Black.<sup>55</sup>

Modern studies have unearthed data that exhibit barefaced racial profiling in traffic stops.<sup>56</sup> In the late 1980s and early 1990s, Dr. John Lamberth of Temple University conducted a study to record the proportion of African-American drivers and

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profiling as "selective enforcement of the law based on considerations such as race."); Oliver, *supra* note 20, at 1411 ("Racial profiling [is the] use of race as a factor in determining which offender to prosecute."); Eric Lacy, *Report Examines Racial Profiling*, THE STATE NEWS VIA U-WIRE, Aug. 7, 2000, at 1 ("Racial profiling is defined by the Michigan State Police as 'any action taken by a police officer prior to or during a traffic stop that is based upon racial or ethnic stereotypes and that has the effect of treating minority motorists differently than non-minority motorists.'").

49. See *supra* note 48, *infra* notes 54, 71-75 and accompanying text.

50. See *infra* Part I.B-C.

51. Even during a political campaign where both presidential candidates vowed to do something about the prevalent evil of racial profiling, see *supra* notes 20-22 and accompanying text, most states are unwilling to deal unequivocally with the problem. See *infra* notes 207-213 and accompanying text (explaining that only nine states have passed data collection acts to monitor racial profiling, and that most of these acts have serious drawbacks).

52. For example, African Americans constitute 13% of U.S. drug users while making up 37% of those arrested on drug charges. THE INSTITUTE ON RACE AND POVERTY, RACIAL PROFILING DATA COLLECTION STATUS REPORT 3 (2000) [hereinafter INST. ON RACE AND POVERTY].

53. David Shaffer & Heron Marquez Estrada, *St. Paul Police Search Black, Hispanic Drivers at Higher Rate*, STAR TRIB. (Minneapolis, Minn.), Jan. 10, 2001, at A1.

54. Sean P. Trendle, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 333 n.13 (2000) (citing Randal Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13-20, 1999, at 35).

55. See Russell, *supra* note 13, at 721-25.

56. See Harris, *supra* note 19, at 277-81.

passengers that were pulled over on the New Jersey Turnpike relative to their actual numerical representation on the road.<sup>57</sup> Dr. Lamberth used random patrol activity logs and police radio logs, in conjunction with his own direct-observation, turnpike-population census.<sup>58</sup> Thirty-five percent of the cars pulled over had a black driver or passenger, while only thirteen percent of cars on the highway contained either a Black passenger or driver.<sup>59</sup>

Similar data collection studies have emerged in various states throughout the country, with some producing results similar Lamberth's. For example, a report issued by the Michigan State Police observed that while African Americans make up only 14% of the Michigan population,<sup>60</sup> African Americans constitute 26% of drivers subject to probable cause searches.<sup>61</sup> Accompanied by evidence demonstrating that both African Americans and White Americans violate traffic laws at the same rate,<sup>62</sup> the above statistics represent clear proof of racial profiling.

### B. In U.S. Drug Laws and Enforcement

Closely linked with police enforcement, drug laws themselves represent another instance of racial profiling resulting in the prosecution of a disproportionate number of African Americans.<sup>63</sup> Severity of punishment generally correlates with severity of the crime committed; however, the punishments for cocaine-related crimes do not follow this paradigm. Both the federal sentencing guidelines and a growing minority of state sentencing guidelines dispense more severe punishments for use of crack cocaine, a drug used predominantly by African Americans, than for powder cocaine, a drug used predominantly by White Americans.<sup>64</sup>

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57. *See id.*

58. *See id.*

59. *Id.* Seventy-three percent of those stopped and arrested were African American. *Id.*

60. JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION: 2000, CENSUS 2000 BRIEF 4 (2000), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf> (last visited Nov. 28, 2001).

61. Lacy, *supra* note 48, at 1; *see also* Paul Hampel, *Profiling Study Bolsters Blacks' Charges*, ST. LOUIS POST-DISPATCH, June 2, 2001, at A1 (citing new study results, illustrating that Black drivers were involved in traffic stops 30% more than Whites and were searched 70% more often).

62. *See Harris, supra* note 19, at 278-79.

63. *See supra* note 48 (providing a range of definitions of racial profiling, most broadly allowing for the general targeting of African Americans in the criminal justice system).

64. *See Richardson, supra* note 3, at 212-13; *see also* Dan Haude, *Ohio's New Sentencing Guidelines: A "Middleground" Approach to Crack Sentencing*, 29 AKRON L. REV. 607, 617-20 (1996) (cataloging state sentencing provisions for powder and



The racial imbalance in prosecution resulting from the crack/powder disparity represents only one specific example of the racial profiling embedded in the War on Drugs. Drug law enforcement statistics illustrate the targeting of African Americans even more succinctly than inequity in prosecution. Since the United States declared its War on Drugs in the early 1980s, African Americans have been incarcerated for nonviolent drug crimes much more often than Caucasians.<sup>65</sup> Between 1976 and 1989 the total number of drug arrests of Caucasians grew by 70%, compared to a 450% increase among African Americans.<sup>66</sup> Furthermore, between 1986 and 1991, the number of Caucasians incarcerated for drug offenses increased by only 50%, whereas the number of African-American inmates incarcerated for drug offenses increased 350%.<sup>67</sup> These disproportionate increases are accompanied by a rapid rise in incarceration for nonviolent drug use. Notwithstanding the fact that violent criminals make up more than half of the nation's prison population,<sup>68</sup> the rate at which drug offenders fill prisons has risen more than ten times faster than that of violent offenders in the last two decades.<sup>69</sup>

African Americans constitute approximately 13% of the U.S. population and 13% of its drug users; however, African Americans constitute 35% of drug arrests, 55% of drug convictions, and 74% of drug imprisonments.<sup>70</sup> These results indicate that through the enforcement and prosecution of the drug laws, the United States is, in effect, waging a War on Blacks.

This occurs in part because law enforcement policies single out certain neighborhoods as "high-drug areas"<sup>71</sup> or "high-crime

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crack cocaine offenses).

65. See Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW & SOC. INQUIRY 823, 824-25 (1998). But see Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 34 (1993) (arguing that sentencing guidelines in Minnesota have successfully counteracted racial prejudice in the judicial system).

66. Provine, *supra* note 65, at 825.

67. *Id.*

68. See Fox Butterfield, *Number in Prison Grows Despite Crime Reduction*, N.Y. TIMES, Aug. 10, 2000, at A10.

69. See Crispin Hull, *Rough Justice for All*, THE CANBERRA TIMES, Aug. 26, 2000, at P3 ("Between 1980 and 1997 the number of people entering jail [in the United States] for violent offences less than doubled (up 82 per cent). The number jailed for non-violent offences [tripled] (up 207 per cent) and the number jailed for drug offences went up 11-fold (1040 per cent).").

70. Glasser, *supra* note 15, at 719 (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 14 (1999) (estimating the 1998 African-American population as 34,431,000 or, 12.7% of the general population)).

71. L. Darnell Weeden, *It Is Not Right Under the Constitution to Stop and Frisk Minority People Because They Don't Look Right*, 21 U. ARK. LITTLE ROCK L. REV

areas.”<sup>72</sup> These neighborhoods are typically poor, in the inner city, and contain large minority populations.<sup>73</sup> One reason that police officers focus on the inner city is that it is easier for them to make drug arrests there than in more stable and affluent neighborhoods.<sup>74</sup> Police officers in a number of departments across the country enforce a zero tolerance policy in these “high-crime areas,” becoming ultra-sensitive to the behavior of the inhabitants, stopping and arresting them for the slightest indication of suspicious activity.<sup>75</sup>

By this reasoning, people living in a “high-crime area” should benefit from enhanced police enforcement in their neighborhoods.<sup>76</sup> Indeed, many inner-city inhabitants do desire greater levels of law enforcement.<sup>77</sup> However, in addition to protecting innocent inner-city dwellers from violence, concentrated patrolling in “high-crime areas” also unfairly subjects these same people to police harassment, contributes to their overall distrust of the police, provides police officers an excuse for racially disparate arrest rates, and consequently contributes to existing racist stereotypes that African Americans are more apt to commit crimes.<sup>78</sup> As comedian-turned-organizer Randy Credico explains: “Everyone’s hurt by this war on drugs . . . . People get pulled over without probable cause on the highways. Cops go into their houses and check around. I’m more frightened by the police than the guy selling drugs on my block.”<sup>79</sup>

### C. In Sentencing Guidelines

The disproportionate number of African Americans in prisons is the result of racial targeting, but is as much the result of the

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829, 837 (1999).

72. *Id.* at 840.

73. *See id.* at 837.

74. *See Hearing, supra* note 37, at 151.

75. *See Weeden, supra* note 71, at 837-38.

76. *See* Carl J. Schifferle, *After Whren v. United States: Applying the Equal Protection Clause to Racially Discriminatory Enforcement of the Law*, 2 MICH. L. & POL’Y REV. 159, 182 (1997).

77. *See* Richard R. W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1221-22 (2000).

78. *See* Schifferle, *supra* note 76, at 182-83; *see also* Brooks, *supra* note 77, at 1221-22 (describing the paradox involving African Americans in high-crime areas who desire more law enforcement yet distrust police officers).

79. Nancy Dunne, *Dope Wars: Finding an Alternative to Prison*, FINANCIAL TIMES (London), Apr. 11, 2000, at World News 8 (interviewing Credico).

sentencing guidelines as of police enforcement.<sup>80</sup> In 1984, Congress passed the United States Sentencing Reform Act,<sup>81</sup> allowing for the promulgation of sentencing guidelines created by the United States Sentencing Commission.<sup>82</sup> The Sentencing Reform Act was enacted to combat unpredictability, encourage honesty, and create proportionality in sentencing.<sup>83</sup> The guidelines were a response to an overall societal desire for harsher sentences<sup>84</sup> through which Congress hoped to attain greater parity in sentencing.<sup>85</sup> Notwithstanding its original purpose, states now use sentencing guidelines to handle more efficiently their ballooning prison populations.<sup>86</sup> Although sentencing guidelines are intended to neutralize the aspects of judicial discretion that are responsible for inequitable sentencing, the guidelines have arguably worsened the problem they purported to solve.<sup>87</sup>

In 1988, Congress passed the Anti-Drug Abuse Act,<sup>88</sup> which served as the basis for the oft-maligned 100:1 ratio. The Act provided the same punishment for possession of five kilograms of powder cocaine, a drug used predominantly by White Americans, and five grams of crack cocaine, a drug used predominantly by African Americans.<sup>89</sup> Bolstered mostly by a media campaign unreasonably vilifying crack cocaine while ignoring powder cocaine,<sup>90</sup> crack's stigma has led most states to uphold these

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80. See Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781, 781-82 (1994) (linking racial disparities in punishment to conflicting objectives of efficiency and fairness in sentencing and imprisonment).

81. Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3656 (1994 & Supp. V 1999).

82. See Todd E. Witten, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 697 (1996).

83. See 18 U.S.S.G. Ch. 1, Pt.A, intro. comment. (1996).

84. See Witten, *supra* note 82, at 697.

85. See Letter from William W. Wilkins, Jr., Chair, Committee on Criminal Law, to Judge Diana E. Murphy, Chair, United States Sentencing Commission (Mar. 10, 2000), 12 FED. SENT. R. 144 (1999) (citing S. REP. NO. 98-225, at 52 (1983)).

86. See Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 430 (1997).

87. See Provine, *supra* note 65, at 824-25. But see Frase, *supra* note 65, at 34 (arguing that sentencing guidelines in Minnesota have successfully counteracted racial prejudice in the judicial system).

88. 21 U.S.C. § 844 (1994).

89. See Richardson, *supra* note 3, at 213-14.

90. See *United States v. Clary*, 846 F.Supp. 768, 784 (E.D. Mo. 1994) (referring to the media hysteria over crack as irrational and arbitrary); see also Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 553 (1997) (citing *The Federal Drugstore: Interview with Michael S. Gazzaniga*, NAT'L

effectively racist guidelines.<sup>91</sup> The disproportionate number of African Americans sentenced to long prison terms because of the Act's crack/powder discrepancy provides a glaring example of inequitable sentencing guidelines;<sup>92</sup> however, the experience in Minnesota generates doubt that this law substantially contributes to racial disparity in prisons.

In 1991, the Minnesota Supreme Court ruled in *State v. Russell*<sup>93</sup> that legislation promulgating unequal sentencing for disproportionate possession of crack and powder cocaine violated the state's Equal Protection Clause.<sup>94</sup> At that time, the total incarceration rate of African Americans in Minnesota was nineteen times greater than that of White Americans.<sup>95</sup> Today, more than ten years after the legislation was struck down and subsequently corrected to offer equal punishment for possession of equal amounts of crack and powder cocaine, the total incarceration rate of African Americans is now twenty-seven times greater than that of White Americans.<sup>96</sup> In the case of Minnesota, curing the most obviously racist component of the sentencing guidelines made no visible impact in solving the glaring racial disparity in the state's prisons.

Although the above statistics suggest that the crack/powder disparity in sentencing may not necessarily substantially contribute to racial disparity in prisons, the law's shameless targeting of African Americans should not be brushed aside. The endurance of such disparities in state and federal legislation serves as a distasteful beacon of our indifference to covertly racist

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REV., Feb. 5, 1990, at 34 (illustrating that crack and powder cocaine are equally harmful)).

91. See *State v. Russell*, 477 N.W.2d 886 (Minn. 1991); see also *United States v. King*, 972 F.2d 1259, 1260 (1992) ("The fact that crack cocaine is more addictive, more dangerous, and can be sold in smaller quantities than powder cocaine is sufficient reason for Congress to provide harsher penalties for its possession.").

92. These were high profile enough to induce twenty-seven United States district and circuit court judges to sign a letter addressed to Senator Orrin Hatch, decrying the ratio. See Judge John S. Martin et al., *Rethinking the Crack/Cocaine Ratio: 1997 Statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees*, 10 FED. SENT. R. 194 (1997).

93. 477 N.W.2d 886, 889 (Minn. 1991).

94. See *id.* The ratio of ten grams of power cocaine to three grams of crack cocaine at issue in *Russell* was not nearly as disproportionate as the 100:1 ratio of the Anti-Drug Abuse Act.

95. Debra L. Dailey, *Prison and Race in Minnesota*, 64 U. COLO. L. REV. 761, 761 n.4 (1993) (citing *Black, White Incarceration Rates*, OVERCROWDED TIMES, May 1991, at 6).

96. See JAMIE FELLNER, HUM. RTS. WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS 9 (May 2000), available at <http://www.hrw.org/reports/2000/usa/> (last visited Nov. 28, 2000).

laws.

By focusing on recidivism, sentencing guidelines play a more active role in creating racial disparity in prisons. The guidelines require judges to include a defendant's prior convictions when calculating the likelihood of recidivism, resulting in more severe penalties for longer criminal records.<sup>97</sup> Due to racial profiling, African Americans are arrested and jailed more frequently than White Americans.<sup>98</sup> As prisons become more violent, prisoners are more likely to commit crimes after release, making it more likely that they return to prison.<sup>99</sup> The consequence is that African Americans are caught in a debilitating cycle, yielding incarceration rates more than ten percentage points greater than those of White Americans.<sup>100</sup>

This vicious cycle affects not only the persons incarcerated, but also their families and communities. When hardened criminals return to their inner-city homes, they further add to the "high-crime area" stigma that offers police officers rationalization for targeting African Americans, which inevitably leads to higher African-American arrest and prosecution rates.<sup>101</sup> By relying on the length of criminal history as a factor in determining the length of sentencing, the judicial system targets African Americans analogously to the way in which law enforcement agencies consider race when deciding which vehicles to pull over.

In her opinion for the District Court for the District of Massachusetts, Judge Nancy Gertner combated the inequity inherent in the sentencing guidelines by refusing to follow them in a case involving a defendant with a long criminal history composed mostly of drug trafficking and minor drug violations.<sup>102</sup> Judge

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97. See Harris, *supra* note 19, at 304.

98. See *supra* notes 65-75 and accompanying text.

99. See Frase, *supra* note 65, at 37. Christopher Davey observes:

By caging men up like animals and treating them as less than human, you create rage, and helplessness, and unless there's a death sentence, or a life sentence, they're going to come out some day, and they're going to live in the community. They will be a worse menace to all of us when they come out than when they went in.

Justin Brooks, *How Can We Sleep While the Beds Are Burning? The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-Five Years Later*, 47 SYRACUSE L. REV. 159, 163 (1996) (quoting Christopher Davey, *Prison Solution Argued; Corrections Group Meeting in City*, CINCINNATI ENQUIRER, Aug. 6, 1995, at B1).

100. See Dailey, *supra* note 95, at 766.

101. See *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996); *supra* notes 71-78 and accompanying text.

102. See *United States v. Leviner*, 31 F.Supp.2d 23, 24 (D. Mass. 1998).

Gertner departed from the guidelines not only because the guidelines did not accurately reflect the minor nature of the crimes in the defendant's record, but also because their result "mirrors disparities in the state sentencing, and in particular, racial disparities."<sup>103</sup> Not surprisingly, few judges have followed Gertner's heroics; however, in a few cases, judges have resigned in protest of the guidelines' inequitable results.<sup>104</sup>

By acting on their disapproval of inequitable sentencing guidelines, these judges illustrate the need for a change in the law. Police officers have also voiced similar displeasure with inequitable enforcement.<sup>105</sup> Presently, the United States has solutions that in theory should adequately combat racial profiling; however, these solutions are not succeeding in this mission.

### III. Ineffective Solutions

At first glance, the United States appears replete with laws that speak directly to racial profiling: the Fourth Amendment<sup>106</sup> protects citizens against "unreasonable searches and seizures," the Fifth<sup>107</sup> and Fourteenth<sup>108</sup> Amendments protect citizens from deprivation of liberty and promise equal protection of the laws, and the Civil Rights Act of 1964<sup>109</sup> provides various remedies for discrimination. However, Supreme Court rulings have limited, and in some cases eradicated, these remedies for victims of racial profiling.<sup>110</sup>

#### A. *The Fourth Amendment*

Until recently, criminal defendants relied primarily on Fourth Amendment<sup>111</sup> protection when alleging racist law

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103. *Id.* at 33.

104. See Russell, *supra* note 13, at 728.

105. See Heron Marquez Estrada, *Focus of Profiling Shifts from St. Paul; Minneapolis Officials Say They'll Soon Reveal New Plans For Traffic Stops and Searches*, STAR TRIB. (Minneapolis, Minn.), June 22, 2001, at B1.

106. U.S. CONST. amend. IV.

107. U.S. CONST. amend. V.

108. U.S. CONST. amend. XIV.

109. See 42 U.S.C. §§ 1983-2000 (1994).

110. See Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMPLE L. REV. 597, 615 (1999) ("[T]he Court has declined to state just what remedy, if any, a criminal defendant is entitled to if he establishes that he is the victim of racial profiling.")

111. The Fourth Amendment states in pertinent part: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV.

enforcement.<sup>112</sup> In so doing, they occasionally succeeded in suppressing evidence obtained as the result of racial profiling.<sup>113</sup> Suppression of evidence often leads to acquittal,<sup>114</sup> making this Fourth Amendment defense an extremely powerful one. Evidence suppression is one of the few substantive checks that the Fourth Amendment places on the infamous "Terry searches."<sup>115</sup>

Nonetheless, in *Whren v. United States*,<sup>116</sup> the Supreme Court effectively declared the Fourth Amendment dead with respect to protecting citizens against racial profiling. In its decision, the Court held it reasonable for police officers to pull cars over for nominal traffic violations<sup>117</sup> with the specific intent to discover illicit drug use.<sup>118</sup> The result of this decision is that police officers have the unfettered discretion to stop any car for any reason, since it is virtually impossible to drive without violating at least one traffic law.<sup>119</sup>

After a police officer stops a vehicle, she is relatively free to perform a search.<sup>120</sup> Police officers often search vehicles with the owner's consent.<sup>121</sup> Either out of intimidation, a desire to be helpful, or ignorance of their right to deny a search, most drivers

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112. See Schifferle, *supra* note 76, at 163.

113. See Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 729 (2000) ("Until 1996 the means of [evidence suppression] was clear: to request a hearing at which counsel could inquire of the arresting officer as to whether his stop was based on particularized reasonable suspicion or was conducted on a mere pretext.").

114. See Walter, *supra* note 8, at 292.

115. See Rachel Karen Laser, *Unreasonable Suspicion: Relying on Refusals to Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1164 (1995). "Terry searches" allow police officers to stop and frisk individuals even if they lack consent and probable cause, as long as they have "articulable suspicion" of possible criminal activity and the person they are dealing with appears to be armed and dangerous. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968). It is not necessary that the police officer witness a criminal act. See Laser, *supra*, at 1168.

116. 517 U.S. 806 (1996).

117. See *id.* at 810.

118. In such cases, a police officer requires only probable cause that a traffic violation occurred. See Schifferle, *supra* note 76, at 167.

119. See David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273. Sklansky notes:

Since virtually everyone violates traffic laws at least occasionally, the upshot of these decisions is that police officers, if they are patient, can eventually pull over almost anyone they choose, order the driver and all passengers out of the car, and then ask for permission to search the vehicle without first making clear the detention is over.

*Id.*

120. See Harris, *supra* note 19, at 312-17.

121. See *id.* at 316.

consent to police searches;<sup>122</sup> however, courts occasionally find a search illegal on the grounds that consent was not freely given.<sup>123</sup>

In the cases where consent is not given or an officer does not ask for consent, the officer must prove that she had probable cause to perform the search.<sup>124</sup> To successfully establish probable cause, the police officer need only show "facts and circumstances" adequate to allow a "reasonable" police officer to believe that a suspect has committed or is in the process of committing a crime.<sup>125</sup> By using a "totality-of-the-circumstances" test, police officers may find probable cause from a suspicious combination of innocuous activities.<sup>126</sup> Application of a subjective reasonableness standard and a totality of the circumstances test create unpredictable probable cause adjudications, subject to the whim of the sitting judge.<sup>127</sup>

By refusing to consider the subjective intention of the arresting police officer, the *Whren* Court severely undercut a defendant's ability to challenge a pretextual stop under the Fourth Amendment.<sup>128</sup> However, not all courts have written off the Fourth Amendment as a viable protection against evidence obtained by officers during traffic stops based on racial pretexts. In *People v. Dickson*,<sup>129</sup> a New York trial court held that "[i]t has never been, and should not now be, the law of our State that we cannot reject offensive, albeit subjective reasons for police action."<sup>130</sup> In *Dickson*, the court suppressed evidence after a police

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122. See *id.*; see also *State v. Harris*, 590 N.W.2d 90, 95 (Minn. 1999) (citing a police officer's statement that ninety-nine percent of passengers consented to his searches).

123. See, e.g., *State v. Dezso*, 512 N.W.2d 877, 880-81 (Minn. 1994). In *Dezso*, the police officer, upon giving the violator a warning and verifying his license, found LSD in the violator's wallet. *Id.* at 879. The Minnesota Supreme Court held that the suspicious behavior of a traffic violator did not provide probable cause for a search of the violator's wallet, and since consent was never given, the search violated the Fourth Amendment. See *id.* at 880-81. The Minnesota Supreme Court declared that "[c]onsent must be received, not extracted," and that "[f]ailure to object [to a request for consent] is not the same as consent." *Id.* at 880.

124. See Catherine Twitero, *The Future of Vehicle Consent Searches in Minnesota: State v. George*, 557 N.W.2d 575, (Minn. 1997), 24 WM. MITCHELL L. REV. 1155, 1158 (1997) (citing *Dezso*, 512 N.W.2d at 880).

125. Sklansky, *supra* note 119, at 274 n.11 (citing *United States v. Watson*, 423 U.S. 411 (1976)).

126. *Illinois v. Gates*, 462 U.S. 213, 234, 238 (1983).

127. See *Walter*, *supra* note 8, at 270.

128. *Whren*, 517 U.S. at 813.

129. 690 N.Y.S.2d 390 (N.Y. Sup. Ct. 1998).

130. *Abramovsky & Edelstein*, *supra* note 113, at 742-43 (quoting *Dickson*, 690 N.Y.S.2d at 396).



officer admitted to a "pretextual motivation" for a traffic stop.<sup>131</sup> In a similar case, the Superior Court of New Jersey suppressed evidence taken from seventeen African Americans because of data collected by Dr. Lamberth,<sup>132</sup> illustrating disproportionate arrests of African Americans by the New Jersey state police.<sup>133</sup> Despite the success of these few cases, the Court's decision in *Whren* significantly relaxed scrutiny against arresting officers in all states, even in New York and New Jersey.<sup>134</sup>

In his infinite compassion, Justice Scalia explained that while the Fourth Amendment is not an appropriate protection against racial profiling, the Fourteenth Amendment offers a means for handling such claims.<sup>135</sup> But the Fourteenth Amendment is not without its own problems: not only does it fail to provide for evidence suppression,<sup>136</sup> but it has its own discouraging procedural hoops through which plaintiffs must jump.

### B. The Fourteenth Amendment

On its face, Fourteenth Amendment<sup>137</sup> protection appears strong and on point: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>138</sup> Its purpose is "at the very least . . . directed at governmental racial discrimination against Blacks."<sup>139</sup> Racial profiling is facially

131. *Id.* at 743.

132. *See State v. Pedro Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996); *see also Harris*, *supra* note 19, at 277-80 (describing Lamberth's data collection techniques).

133. *See Abramovsky & Edelstein*, *supra* note 113, at 744.

134. *See id.* at 733-46; *see also supra* note 119 and accompanying text (explaining that police have almost unlimited discretion to stop any car for any reason).

135. *See Whren v. United States*, 517 U.S. 806, 813 (1996). Scalia explained: "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause not the Fourth Amendment." *Id.*; *see also United States v. Pipes*, 125 F.3d 638, 640 (1997) ("[O]fficers must not selectively enforce the law based on unconstitutional considerations, but such claims fall under the Equal Protection Clause, not the Fourth Amendment.").

136. *See infra* note 162 and accompanying text.

137. U.S. CONST. amend. XIV.

138. *Id.* at § 1. Although there is overlap between Fourteenth and Fifth Amendment jurisprudence, the Fifth Amendment offers no additional protections in the context of challenges to racial profiling. Consequently, this Article focuses exclusively on the Fourteenth amendment. *Compare* U.S. CONST. amend. XIV *with* U.S. CONST. amend. V.

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discriminatory, and thus violates the spirit and the language of the Fourteenth Amendment.<sup>140</sup>

Yet the Fourteenth Amendment makes it difficult for a victim of racial profiling to challenge either the law or law enforcement. With respect to challenges to legislation, the judiciary need not consider any discriminatory effects in determining the constitutionality of a statute; it need only illustrate that the statute serves a legitimate purpose and that the legislature did not enact it with racist intent.<sup>141</sup> With respect to challenges to law enforcement, the plaintiff has the burden of proving a racist motivation behind traffic stops and searches, despite the fact that she is in the position with the "least access to the information necessary to establish a possible invidious purpose."<sup>142</sup> Plaintiffs claiming that individual police officers violated their rights under the Equal Protection Clause must prove "purposeful and intentional acts of discrimination based on their membership in a class, as opposed to discrimination on an individual basis."<sup>143</sup> Accomplishing this is often difficult when police officers, in searching "high-crime" areas, have available the excuse that the disproportionate number of African-American arrests are due to the fact that their search was legitimately limited to areas populated predominantly by African Americans.<sup>144</sup> Moreover, qualified immunity protects police officers in the reasonable performance of their discretionary duties.<sup>145</sup>

In confronting racial disparity resulting from the crack/powder distinction, the Fourteenth Amendment once again proves lifeless. Although the Minnesota Supreme Court in *State v. Russell*<sup>146</sup> declared the crack/powder distinction in sentencing guidelines unconstitutional, it attributed its decision to the additional protection provided by its state constitution.<sup>147</sup> Unfortunately, most courts have not followed suit, but instead

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(13th ed. 1997).

140. Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling Is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 375 (1999).

141. See *State v. Russell*, 477 N.W.2d 886, 888 n.2 (Minn. 1991) (criticizing the Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987), that a statute will only be held to violate the Equal Protection Clause if it was enacted "because" of an anticipated discriminatory effect, not merely "in spite" of such an effect).

142. *Id.*

143. *Chavez v. Ill. State Police*, 27 F. Supp. 2d 1053, 1066 (N.D. Ill. 1998).

144. See *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996).

145. See *Chavez*, 27 F. Supp. 2d at 1070.

146. 477 N.W.2d 886 (Minn. 1991).

147. See *id.* at 888.

offer only the minimal protection required by the Fourteenth Amendment and have consequently upheld the crack/powder disparity in sentencing.<sup>148</sup>

In holding the disparate crack/powder ratio unconstitutional, the Minnesota Supreme Court studied the realistic application of the provision, and not simply its theoretical purpose.<sup>149</sup> The provision lacked the "genuine," "substantial," and "evident" connection required by Minnesota's Equal Protection Clause to uphold laws with disparate effects on different social or racial groups.<sup>150</sup> Virtually all other state and federal courts take the theoretical approach to analyzing Equal Protection claims.<sup>151</sup> If a law's purpose can be supported by an unsubstantiated theoretical argument, such as that crack cocaine is one hundred times more threatening than powder cocaine, then the Equal Protection Clause has no power to combat the resulting disparity.<sup>152</sup>

Even in *United States v. Clary*,<sup>153</sup> the only reported federal court decision holding that the 100:1 ratio violated the Equal Protection Clause,<sup>154</sup> the district court focused on the theoretical nature of the provision instead of its actual results by attempting to prove that its purpose was subconsciously discriminatory.<sup>155</sup> Not surprisingly, the Eighth Circuit Court of Appeals overturned this decision.<sup>156</sup> In his opinion, Senior Circuit Judge John R. Gibson asserted that the theory of protection against "unconscious racism" is untenable because "the Equal Protection Clause is violated 'only if that impact can be traced to a discriminatory purpose.'"<sup>157</sup>

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148. See, e.g., *United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994) ("In reaching this conclusion, we join six other circuits that have similarly held that the Guidelines' 100 to 1 ratio of powder cocaine to crack cocaine has a rational basis and does not violate equal protection principles."). Referring to the other four circuits, the court explained that they "have also rejected equal protection challenges to the enhanced penalty structure for crack offenses," although not directly referring to the 100:1 ratio. *Id.*

149. See *Russell*, 477 N.W.2d at 889 ("[W]e have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.").

150. *Id.* at 888.

151. See *Stevens*, 19 F.3d at 97.

152. See Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 621 (2000).

153. 846 F. Supp. 768 (E.D. Mo. 1994).

154. See *id.* at 796.

155. See *id.* at 773-83.

156. See *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994).

157. *Id.* at 713 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979)).

Unconscious racism is dangerous because of both its pervasiveness<sup>158</sup> and its ability to escape the grasp of the Fourteenth Amendment.<sup>159</sup> The Fourteenth Amendment's invidious intent requirement for both lawmakers and police is impracticable.<sup>160</sup> As a result, this apocryphal requirement leaves without remedy those who suffer from disparate impact due to the unconscious racism of federal laws.<sup>161</sup>

Not only does the Fourteenth Amendment suffer from the inability to attack the racist effect of a facially neutral statute, but it also fails to provide criminal defendants with the ability to have evidence suppressed.<sup>162</sup> This same weakness affects Title VI of the 1964 Civil Rights Act.<sup>163</sup> Nevertheless, Title VI provides a stronger basis than the Fourteenth Amendment for combating racial profiling.

### C. Title VI

Title VI of the 1964 Civil Rights Act prohibits "discrimination under federally assisted programs on the ground of race."<sup>164</sup> Since both state and federal police receive federal funds,<sup>165</sup> racial profiling by either entity is forbidden.<sup>166</sup> The Supreme Court gave Title VI a more effective bite than the Fourteenth Amendment by allowing declaratory and injunctive relief to plaintiffs who illustrate the existence of a racially disproportionate impact.<sup>167</sup>

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158. See Sklansky, *supra* note 119, at 308.

159. See Dvorak, *supra* note 152, at 615 (asserting that although racism has not necessarily decreased in the United States, its manifestations have changed in such a way as to avoid the Fourteenth Amendment's reach).

160. See *id.* at 621-22.

161. See *id.* at 618-22.

162. See Walter, *supra* note 8, at 279-80. In New York and New Jersey, lower court decisions broke from precedent using an Equal Protection challenge to suppress evidence collected by a police officer using invalid pretexts. See *supra* notes 129-133 and accompanying text; Walter, *supra* note 8, at 282-83.

163. 42 U.S.C. § 2000d (1994).

164. *Id.*

165. See Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289, 324 (1984).

166. See INST. ON RACE AND POVERTY, *supra* note 52, at 14.

167. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2 (1983). Title VI disparate impact analysis requires the plaintiff first to prove that the facially neutral act in question has a disproportionate effect on a Title VI protected group. See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (1993). If the plaintiff succeeds in this and the defendant subsequently illustrates a substantial legitimate justification for the challenged practice, the plaintiff must then show a "comparably effective alternative practice which would result in less disproportionality or that the defendant's proffered justification is a pretext for discrimination." *Id.* at 1407.

Although Title VI comes with its own set of limitations, they are not as substantively difficult to overcome as those of the Fourth and Fourteenth Amendments. One limitation is that Title VI claims can only be brought against entities, not against individuals.<sup>168</sup> Additionally, the federal government must consistently fund the program for it to be considered a "federally funded program."<sup>169</sup>

Despite these limitations, in cases where plaintiffs have illustrated extreme racial disparity in a police program with strong evidentiary support, Title VI has been successfully argued in racial profiling cases.<sup>170</sup> Courts for both the District of Maryland and the Northern District of California declared that statistical and other evidence indicating racial profiling supports a Title VI claim for the plaintiffs.<sup>171</sup> These cases, however, merely recognize the validity of racial profiling claims.<sup>172</sup> Without adequate evidentiary support, plaintiffs face tough odds against facially neutral policies.<sup>173</sup> However, in our vast and mostly impotent arsenal against racial profiling, we have yet more statutes that address unlawful enforcement activities and patterns of activities.

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168. See *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 743 n.13 (2000).

169. See *id.* at 742-43. An occasional federal grant or conditional federal support for overtime work does not make a program federally funded. See *id.*

170. See Brandon Garrett, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1832 n.66 (2000) (citing *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1139 (N.D. Cal. 2000) and *Md. State Conference of NAACP Branches v. Md. Dep't of State Police*, 72 F. Supp. 2d 560, 566-67 (D. Md. 1999)).

171. See *Rodriguez*, 89 F. Supp. 2d at 1139; *Md. State Conference of NAACP Branches*, 72 F. Supp. 2d at 566-67 (D. Md. 1999). In *Rodriguez*, the Court recognized the validity of an Equal Protection claim; however, this was because the plaintiffs alleged discriminatory intent. See *Rodriguez*, 89 F. Supp. 2d at 1140. It remains to be seen whether plaintiffs could prove this.

172. See *Rodriguez*, 89 F. Supp. 2d at 1134-35; *Md. State Conference of NAACP Branches*, 72 F. Supp. 2d at 563.

173. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-266 (1977) (stating that absent a clear pattern indicating discriminatory racial impact, judicial inquiry must be more stringent); see also Garrett, *supra* note 170, at 1829-31 (comparing Fourth Amendment Equal Protection Clause and Title VI claims and explaining that plaintiffs in racial profiling cases generally cannot point to facially discriminatory statutes).

*D. The Violent Crime Control and Law Enforcement Act of 1994 and § 1983*

1. The Violent Crime Control and Law Enforcement Act of 1994

Also used sparingly, the Violent Crime Control and Law Enforcement Act of 1994 (§ 14141),<sup>174</sup> considered an injunctive counterpart<sup>175</sup> to 42 U.S.C. § 1983,<sup>176</sup> is Congress's most recent attempt at providing a legislative solution to various abhorrent police practices.<sup>177</sup> Ironically, the Act's main objective is to place 100,000 additional police officers on the streets.<sup>178</sup> The Act also authorizes the Attorney General to investigate and bring suit for injunctive relief against police departments that employ unconstitutional practices.<sup>179</sup>

The language of § 14141, prohibiting "pattern[s] or practice[s] of conduct by law enforcement officers" that deprive people of their rights as "secured or protected by the Constitution or laws of the United States,"<sup>180</sup> more specifically addresses racial profiling than the language in Title VI.<sup>181</sup> This language allows for claims not just against individual officers, but against police departments to compel them to "correct the underlying policy."<sup>182</sup>

To date, the Department of Justice has used § 14141 only a few times, successfully resulting in consent decrees entered into by the defendant police departments.<sup>183</sup> Due to political pressure, the

174. 42 U.S.C. § 14141 (1994).

175. See *United States v. City of Columbus*, No. CIV.A.2;99CV1097, 2000 WL 1133166, at \*3 (S.D. Ohio Aug. 3, 2000).

176. 42 U.S.C. § 1983 (1994). Section 1983 makes liable any state actor, including police officers, who "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Id.*

177. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1385-87 (2000) (attributing the passage of § 14141 to, among other things, the Los Angeles Police Department's practice of performing occasionally fatal chokeholds).

178. See Paul Gottbrath, *Feds Have Pursued Cops on Racial Bias Charges*, CINCINNATI POST, Feb. 27, 2001, at 3A.

179. See Gilles, *supra* note 177, at 1386.

180. 42 U.S.C. § 14141(a).

181. Title VI generally prohibits "discrimination under federally assisted programs on the ground of race." *Id.* § 2000d.

182. *United States v. City of Columbus*, No. CIV.A.2;99CV1097, 2000 WL 1133166, at \*3 (S.D. Ohio Aug. 3, 2000) (quoting H.R. REP. NO. 102-242, at 404 (1991) and explaining that before § 14141, no statute gave authority to sue police departments for injunctive relief).

183. The Omnibus Crime Control and Safe Streets Act of 1968 also contributed

Act's original citizen lawsuit provision was omitted, thus thrusting the responsibility of monitoring police practices solely on the shoulders of the Department of Justice.<sup>184</sup> A large barrier to § 14141's effectiveness lies in its vesting exclusive authority to bring suit in the Attorney General.<sup>185</sup> While apparently investigating a number of police departments, the Department of Justice has brought only three suits since 1995, and many community leaders have criticized the Department for its ineffectiveness.<sup>186</sup> Former Attorney General Janet Reno promised a more rigorous application of the statute by her department,<sup>187</sup> and current Attorney General John Ashcroft has promised to make racial profiling cases a priority in his administration.<sup>188</sup> It remains to be seen whether he will keep his promise.<sup>189</sup>

## 2. § 1983

While § 14141 emerges as the government's primary tool for prosecuting racial profiling, § 1983<sup>190</sup> provides one of the most common methods for citizens to challenge improper police misconduct.<sup>191</sup>

Although the District Court for the Southern District of Ohio concluded that § 14141 was essentially the injunctive counterpart of § 1983, and consequently required the same level of proof,<sup>192</sup> the two statutes diverge on several important points. First, any

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to the settlements of these cases. 42 U.S.C. § 3789d(c) (1994). See *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa. Apr. 16, 1997) (consent decree entered), <http://www.aclu.org/community/pennsyl/pittcd.html> (last visited Nov. 28, 2001); *United States v. City of Steubenville*, No. C2-97-966 (S.D. Ohio Sept. 3, 1997) (consent decree entered), <http://www.usdoj.gov/crt/split/documents/steubensa.htm> (last visited Nov. 28, 2001). The third allegation of a § 14141 violation by the Department of Justice has not yet reached a conclusion, due to an intervening question over § 14141's constitutionality. See *City of Columbus*, 2000 WL 1133166, at \*9 (concluding that § 14141 is constitutional).

184. See Gilles, *supra* note 177, at 1403.

185. See *id.* at 1408.

186. See *id.* at 1407-08.

187. See *id.* at 1408.

188. See Gottbrath, *supra* note 178.

189. See John W. Fountain, *300 Rally in St. Louis in Opposition to Ashcroft*, N.Y. TIMES, Jan. 15, 2001, at A13 (examining John Ashcroft's suspect record involving civil rights).

190. 42 U.S.C. § 1983 (1994).

191. See Kathryn E. Scarborough & Craig Hemmens, *Section 1983 Suits Against Law Enforcement in the Circuit Courts of Appeal*, 20 T. JEFFERSON L. REV. 1, 6 (1998).

192. See *United States v. City of Columbus*, No. CIV.A.2;99CV1097, 2000 WL 1133166, at \*3, \*8 (S.D. Ohio Aug. 3, 2000).

citizen can raise a § 1983 claim,<sup>193</sup> whereas only the Attorney General can raise a § 14141 claim.<sup>194</sup> Second, § 1983 is preferable because it provides for monetary, as opposed to only injunctive, relief.<sup>195</sup> Compared to § 14141, one disadvantage of § 1983 is that it requires plaintiffs to illustrate racist motivation in proving discriminatory enforcement.<sup>196</sup>

The racist intent requirement of § 1983 mirrors the crippling specific intent requirement of the Fourteenth Amendment.<sup>197</sup> The District Court for the Eastern District of New York amplified this flaw by holding that racial animus was not provable without evidence of a "similarly situated non-minority group who has been treated differently" when it considered a case against a police officer who arbitrarily pulled over the African-American plaintiff and used racial slurs.<sup>198</sup> Consequently, although § 1983 supplies an adequate forum for victims of tangible offenses, such as excessive force, false arrest, and illegal search and seizure,<sup>199</sup> its application has been mostly unsuccessful in attacking less obvious patterns of offensive police activity.<sup>200</sup> Nevertheless, successful § 1983 suits have proved an important way to ensure that police departments maintain adequate training, hiring, and promoting practices, while encouraging them to monitor their officers' practices in order to insure against expensive civil remedies.<sup>201</sup>

### 3. Resulting Settlements

Recently, § 14141 claims have resulted in settlements which, at the very least, have placed individual police departments on a course towards reformation.<sup>202</sup> In 1997, the Department of Justice

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193. 42 U.S.C. § 1983.

194. *Id.* § 14141(b).

195. *Id.* § 1983.

196. *See Koch v. Rugg*, 221 F.3d 1283, 1297-98 (11th Cir. 2000).

197. *See supra* notes 141-161.

198. *Oliver v. Cuttler*, 968 F. Supp. 83, 88 (E.D.N.Y. 1997). The same discriminatory intent requirement is so burdensome that it effectively prevents the Equal Rights Under the Law Act, 42 U.S.C. § 1981, from being a strong weapon against racial profiling. *See, e.g., Ferrill v. Parker Group, Inc.*, 168 F.3d 468 (8th Cir. 1999); *Melendez v. Ill. Bell Tel. Co.*, 79 F.3d 661 (7th Cir. 1996) (affirming the requirement of proof of discriminatory intent to prevail on § 1981 claims).

199. *See Scarborough & Hemmens, supra* note 191, at 15-16 (explaining that the majority of § 1983 cases alleged excessive force, false arrest, or illegal search and seizure, but adding that police policy issues are sometimes litigated).

200. *See id.* at 13, 18 (stating that approximately twenty-two percent of the plaintiffs prevail in § 1983 cases).

201. *See id.*

202. *See United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa. Apr. 16, 1997) (consent decree entered), <http://www.aclu.org/community/pennsyl/pitted.html>



entered into a settlement decree with the City of Pittsburgh, the Pittsburgh Bureau of Police, and the Pittsburgh Department of Public Safety. The decree ordered the installation of an "early warning system" database, which would contain "relevant information about its officers, as well as a statistical model to identify and modify the behavior of problem officers."<sup>203</sup> This early warning system requires officers to record, among other things: the officers' names and badge numbers; citizen complaints against the officers; details on shootings involving officers; officer transfers; disciplinary actions against officers; and various civil and criminal claims against individual officers or against the police department as a whole.<sup>204</sup>

In addition, the Pittsburgh consent decree requires the city to develop a recording system that requires an officer, upon every traffic stop, to record the officer's name and badge number, the race and gender of the individual stopped, whether the stop led to a search, what was found in the search, and whether the individual was arrested.<sup>205</sup> This requirement closes a loophole that previously protected officers when making pretextual stops: in cases where officers use minor traffic violations to stop vehicles that fit certain pretextual descriptions, they often issued warnings, which rarely involve any record keeping.<sup>206</sup>

#### *E. Data Collection*

The most notable settlements with the Department of Justice include the implementation of programs mandating documentation of all traffic stops.<sup>207</sup> Recently, several states have introduced bills purporting to implement similar programs. Nine states have passed acts directly addressing racial profiling, most mandating information collection from law enforcement agencies at every traffic stop.<sup>208</sup> Additionally, a number of scattered localities have initiated research into their own police

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(last visited Nov. 28, 2001).

203. *Id.*

204. *See id.*

205. *See id.*

206. *See* Schifferle, *supra* note 76, at 178. However, some officers record incorrect information of the driver's race in order to avoid suspicion of racial profiling. *See* Chavez v. Ill. State Police, 27 F. Supp. 2d 1053, 1062 (N.D. Ill. 1998) (showing defendant police officer recorded "White" instead of "Hispanic" on incident report).

207. *See, e.g., supra* notes 202-206 and accompanying text.

208. *See* INST. ON RACE AND POVERTY, *supra* note 52, at 9-16. The states are Connecticut, Kansas, Missouri, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, and Washington. *Id.*

departments.<sup>209</sup>

A few acts, such as those promulgated by Oregon, Oklahoma, and Kansas,<sup>210</sup> are considered "unspecific and largely ineffective."<sup>211</sup> The other states' acts, which contain enforcement provisions to deter racial profiling and provide useful information in order to address racial profiling, have their own drawbacks. For example, the Connecticut and Tennessee acts provide for only a temporary period in which data is collected.<sup>212</sup> None of these acts mandate the analysis of the collected data to ensure consistency of recording.<sup>213</sup>

Most of these states have yet to publish their results; consequently, their effectiveness is not yet determined. In response to racial profiling concerns, Michigan's police department issued a Traffic Enforcement Summary Report on July 20, 2000 covering three months of traffic stops.<sup>214</sup> The report illustrated a significant disparity between the percentage of African Americans in Michigan (13.8%) and the percentage of African Americans involved in probable cause searches (23%);<sup>215</sup> however, the police described the report as "inconclusive."<sup>216</sup> St. Paul, Minnesota also recently released the initial results of its data collection project, illustrating that of 41,000 drivers stopped, almost 26% were African American and 56% were White.<sup>217</sup> Considering that only 11.7% of the total population of St. Paul is African American, African Americans are stopped at more than double the rate one might expect.<sup>218</sup> Although St. Paul Police Chief William Finney denied the existence of racial profiling in his department, he

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209. See Shaffer & Estrada, *supra* note 53, at A1 (citing the data collection done in Minneapolis and St. Paul, Minnesota).

210. Kansas's act is the only one to expand data collection to pedestrian stops. See INST. ON RACE AND POVERTY, *supra* note 52, at 9.

211. *Id.* at 14.

212. See *id.* at 14-15.

213. See *id.* at 9-16. Such analysis of the collected data is not impractical. A voluntary police policy that commenced in Sacramento, California on July 1, 2001, initiated a random telephone survey of two to four percent of the drivers stopped "to confirm that the information about the stops is correctly recorded on the forms." *Id.* at 36.

214. See Lacy, *supra* note 48, at 2.

215. *Id.*

216. *Id.*

217. Shaffer & Estrada, *supra* note 53, at A1. The data also indicated that minority vehicles are searched about twice as often as vehicles driven by Caucasians. *Id.*

218. See UNITED STATES CENSUS BUREAU, UNITED STATES DEPT OF COMMERCE, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS 2000: 2000 CENSUS OF POPULATION AND HOUSING, MINNESOTA 2588 (2000), available at <http://www.census.gov/prod/cen2000/dp1/2kh27.pdf> (last visited Nov. 28, 2001).

admitted that six of the city's officers pulled over minorities almost exclusively.<sup>219</sup> All six officers were approached about this disparity, but only three actually received (minor) punishment.<sup>220</sup>

Data collection efforts not only potentially result in the punishment of racist police officers, but also provide a catalyst for important policy changes in police departments. The St. Paul Police Department, subsequent to its newly released data, has changed its policies to include a *Miranda*-type warning that educates citizens of their right to refuse to grant consent to a search of their car.<sup>221</sup> In addition, pursuant to an agreement with community and civil rights groups, the police department will set up centers for citizens to file complaints in order to make the complaint process more efficient and accessible.<sup>222</sup>

Inconsistencies in data collection acts and programs, as well as recent studies exhibiting racial disproportion in traffic searches, suggest the need for a federal law establishing a uniform framework for each state to build upon in developing their own mandatory data collection acts. The proposed Traffic Stops Statistics Act of 1997<sup>223</sup> would have done just this.<sup>224</sup> However, this Act was never passed, because of political pressure and police outcry.<sup>225</sup> Aside from the reasons barring its passage, the Act would not necessarily have been effective: it does not provide an effective enforcement method to ensure honest data collection; it would not disclose the race of the police officer or the location of the stop; and the evidence collected could not be used at trial.<sup>226</sup>

#### *F. Drug Treatment*

Proposed and enacted legislation to reduce drug crime sentences and shift the emphasis of the War on Drugs from incarceration to treatment also exists in some states.<sup>227</sup> Such legislation essentially supplies a back-end solution to racial profiling, from which a high proportion of African-American drug

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219. See Shaffer & Estrada, *supra* note 53, at A1.

220. Their punishment was reassignment. See *id.*

221. See Estrada, *supra* note 105, at B1.

222. See *id.*

223. H.R. 118, 105th Cong. (1997).

224. See Trende, *supra* note 54, at 341.

225. See *id.*

226. See *id.* at 377-78.

227. See Thomas, *supra* note 16, at A1 (listing Washington, California, and Arizona as states with strong citizen endorsement for treatment over incarceration).

convicts benefit.<sup>228</sup> A forerunner to these laws, the ten-year-old Brooklyn Drug Treatment Alternatives-to-Prison (D-TAP) program allows nonviolent drug offenders to enter a treatment program instead of incarceration.<sup>229</sup> Although some of D-TAP's facilities list a one-third drop-out rate, ninety-two percent of its graduates go on to find jobs and lead productive lives.<sup>230</sup> The program's progressiveness and success are clouded by its selectiveness,<sup>231</sup> a malady to which the facilitators of the program attribute most of its success.<sup>232</sup> Nonetheless, studies from the Rand Corporation and the National Institute of Drug Abuse have concluded that treatment is generally a more efficient and effective way to handle the drug use problem than incarceration.<sup>233</sup> It follows that D-TAP's success can be repeated in more expansive drug treatment programs around the country.

Although solutions to racial profiling are slowly emerging, they lack the necessary range to adequately address racial disparity in prisons. Programs, such as data collection, that scrutinize disproportionate arrest rates to combat racial profiling at the front end are certainly necessary to sufficiently reduce racial disparity in prisons. However, legislation creating programs such as diversionary drug treatment programs must be enacted as a remedy at the back end of racial profiling, after the victims' arrests, in order to address the vicious cycle of incarceration that results from living in a community constantly targeted by the police.

#### IV. Fighting the Vicious Cycle

By passing an assortment of civil rights legislation designed to attack laws and actions which evince overt racism, the United States has attempted to combat Gunnar Myrdal's "vicious circle."<sup>234</sup> Yet the vicious cycle of cumulative causation still exists, as evidenced by the disparate representation of African Americans

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228. Because most inmates incarcerated for drug use are African American, they as a group stand to benefit the most from drug treatment legislation. See *supra* note 15-18 and accompanying text.

229. See Dunne, *supra* note 79, at World News 8.

230. See *id.*

231. See *id.* (stating that after a decade of the program's existence, it has accepted only 1174 people, while 11,000 people were arrested for drug crimes in 1999 alone).

232. See *id.*

233. See Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 588 (1995).

234. See MYRDAL, *supra* note 31, at 75.

in our prison system. This suggests that the passage of the Civil Rights Act of 1964, while partially succeeding in addressing overt racism, has done little, if anything, to combat the covert prejudice that exists in law enforcement procedures and the War on Drugs.<sup>235</sup>

The vicious cycle also manifests itself in the microcosm of our prisons. Today, nearly one-fourth of the prison population consists of nonviolent drug offenders.<sup>236</sup> Notwithstanding the fact that violent criminals make up over fifty percent of the nation's prison population,<sup>237</sup> the imprisonment rate of new, nonviolent drug offenders is continually rising.<sup>238</sup> Many of the offenders are drug addicts or minor actors in the drug trade who, because of sentencing guidelines, must serve a minimum incarceration time.<sup>239</sup> Instead of receiving the necessary treatment, these addicts remain exposed to drugs, are subjected to deleterious prison conditions, and consequently become even more violent.<sup>240</sup> The increasing prison population gives rise to violence in prisons, resulting in increasingly violent prisoners who commit more violent crimes upon release.<sup>241</sup> Moreover, upon release many inmates return to the inner city, giving apparent justification to the negative stereotypes of such communities. Police officers thus have a rationale for targeting minorities in "high-crime areas," thereby victimizing an innocent, threatened minority population.<sup>242</sup> The end result is an increased prison population, resulting substantially from drug laws and law enforcement policies that target African Americans, made more violent through adverse prison conditions.<sup>243</sup> The drug laws, law enforcement policies, and sentencing guidelines target African Americans and thereby contribute not only to the rising prison population, but also to the increased racial imbalance within that population.

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235. See *supra* Part II.B-C.

236. See Bill Kaufmann, *Stop Fabricating War*, THE CALGARY SUN, Aug. 21, 2000, at 11. These figures are supported by Fellner's report, *supra* note 96, at 2.

237. See Butterfield, *supra* note 68, at A14.

238. See *supra* note 69 and accompanying text.

239. See *Hearing*, *supra* note 37, at 149.

240. See Andrew H. Malcolm, *Explosive Drug Use Creating New Underworld in Prisons*, N.Y. TIMES, Dec. 30, 1989, at A1; see also *supra* note 99 and accompanying text (describing the debilitating nature of prisons). An estimated 75% of state prison inmates are in need of drug treatment, while only an estimated 20% receive it. Steven Belenko, *The Challenges of Integrating Drug Treatment Into the Criminal Justice Process*, 63 ALB. L. REV. 833, 838 (2000).

241. See *supra* note 99 and accompanying text.

242. See *supra* notes 71-79 and accompanying text.

243. See *supra* notes 97-100 and accompanying text.

In order to reverse the cycle and combat racial disparity in prisons, the United States must address many factors that support and result in unconscious racism. As blatant racism faded with the advent of civil rights legislation, unconscious racism will similarly diminish with the revamping of legislation, its enforcement, and the criminal justice system in general.

*A. Current Remedies for Racial Profiling Are Insufficient*

Racial profiling is not a new phenomenon,<sup>244</sup> but it has only recently gained notoriety in the United States.<sup>245</sup> This newly exposed problem has escaped the outdated protections of the Fourth and Fourteenth Amendments.<sup>246</sup> By holding that Fourth Amendment analysis shall not include the officer's subjective intentions,<sup>247</sup> the Supreme Court made it possible for a racist officer to justify pulling over only African Americans by showing that he had the modicum of reasonableness necessary for probable cause<sup>248</sup> or, in cases of a *Terry* search, mere "articulable suspicion."<sup>249</sup> As the political tide continues to ebb away from strong constitutional protections and towards harsher law enforcement, probable cause and articulable suspicion become easier for defendant police officers to prove,<sup>250</sup> leaving the Fourth Amendment virtually useless to address racial profiling.

Unlike the Fourth Amendment, the Fourteenth Amendment provides protection for victims of racial profiling if such victims can prove that the arresting officer was motivated by racial animus when stopping the vehicle.<sup>251</sup> However, without the officer's (extremely uncommon) confession that the proffered reason for the stop was a mere pretext,<sup>252</sup> the Fourteenth Amendment requires too high a burden of proof for plaintiffs to overcome. Furthermore, even if a plaintiff has a strong *prima facie* case for racial profiling, the majority of courts in the United

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244. See Mark Rosenbaum & Daniel P. Tokaji, *Healing the Blind Goddess: Race and Criminal Justice*, 98 MICH. L. REV. 1941, 1950 n.39 (2000) (citing Yancey Roy, *Recent Cases Put Racial Profiling in Spotlight*, GANNETT NEWS SERV., Feb. 28, 2000, at ARC).

245. See *supra* notes 19-22 and accompanying text.

246. See *supra* Part III.A-B.

247. See *Whren v. United States*, 517 U.S. 806, 813 (1996).

248. See *supra* notes 124-125 and accompanying text.

249. See *supra* note 115.

250. See *Walter, supra* note 8, at 270.

251. See *supra* notes 142-145 and accompanying text; see also *supra* notes 158-161 and accompanying text (criticizing the intent requirement).

252. See *supra* note 142 and accompanying text.

States do not allow evidence suppression on account of discriminatory law enforcement.<sup>253</sup>

Title VI's language provides a potential avenue for reform of enforcement practice: even if a police department can show a legitimate justification for the challenged practice, the plaintiffs can still succeed by illustrating a viable alternative practice.<sup>254</sup> Such an alternative practice could be a program that closely monitors the defendant police officers in order to reform their practices, thus achieving the original goal of the lawsuit.<sup>255</sup>

Additionally, the Violent Crime Control and Law Enforcement Act of 1994 (§ 14141) has resulted in a few settlements,<sup>256</sup> but those settlements are infrequent due to citizens' lack of access to § 14141 and the Department of Justice's lackadaisical investigations.<sup>257</sup> As evidenced by the lack of successful challenges to racial profiling, Title VI and § 14141 have also proven insufficient to address the problem of racial profiling.

### *B. Solutions*

The laws and policies currently in place are no match for the pestilence that is racial profiling. To further a favorable course in combating racial profiling and the consequent racial disparity in prisons, legislators must go beyond what has already been proposed. To properly address this epidemic, a federal data collection law that bans racial profiling must be enacted, as must reforms in sentencing policy.

#### 1. A Federal Data Collection Act Must Be Enacted

Some of the most important provisions contained in the Department of Justice settlements are those mandating data collection by police agencies.<sup>258</sup> Compulsory data collection accomplishes a number of things. It serves as a useful tool in deterring officers from using race as a pretext in traffic stops. Especially in cases of officers with propensities to arrest mostly

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253. See *supra* note 162 and accompanying text.

254. See cases cited *supra* note 167 and accompanying text.

255. See, e.g., *supra* notes 202-206 and accompanying text (describing the Pittsburgh consent decree, which, although centered around the Violent Crime Control Act of 1994, also included Title VI claims, resulting in police department policy change); see also *supra* notes 221-222 and accompanying text (describing a significant change in the St. Paul Police Department's policy, resulting not from Title VI litigation, but from a panel discussing Title VI issues).

256. See *supra* note 183 and accompanying text.

257. See *supra* notes 185-186 and accompanying text.

258. See *supra* Part III.E.

minorities, compulsory data collection can isolate an officer for proper disciplinary procedures and additional training.<sup>259</sup> Data collection also aids plaintiffs in future litigation.<sup>260</sup> With strong statistical proof provided by the law enforcement agencies themselves, victims of racial profiling have *prima facie* proof of civil rights violations.

However, compulsory data collection is vulnerable to inaccurate collection by the police officers.<sup>261</sup> Regardless of the new data collection acts, bills, and consent decrees, inconsistencies are inevitable because police departments oversee their own collection. Consequently, police departments will have the incentive to provide skewed reports to avoid incriminating themselves.<sup>262</sup> Data collection acts can avoid this pitfall if the Department of Justice scrutinizes random parcels of the collected data for inconsistencies, imposing harsh penalties on officers who record incorrect data.

The Lamberth studies are significant not only because they shed light on the seriousness of the problem of racial profiling, but also because they present a report that is not tainted by governmental bias.<sup>263</sup> The results were staggering enough to convince a judge to suppress evidence that would have convicted seventeen African-American men.<sup>264</sup> While significant because they demonstrate at least some formidability of civil rights legislation, the Department of Justice settlements have thus far resulted only in anti-racist protocol and compulsory data collection that should be firmly in place in all municipalities. The data collection, while essential, only exposes poor department training. The resulting police department reforms are more important and more difficult to judge than the data.

In addition, not all of the data collection attempts are effective. Connecticut and Tennessee's data collection acts mandate only temporary programs.<sup>265</sup> Not only does a temporary

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259. See, e.g., *supra* notes 219-220 and accompanying text.

260. See *supra* notes 132-133 and accompanying text.

261. See *supra* note 206.

262. See Harris, *supra* note 19, at 276 ("It may also be because records concerning police conduct are either irregular or nonexistent. But it may also be because there is active hostility in the law enforcement community to the idea of keeping comprehensive records of traffic stops.").

263. Of course, not all police departments have a desire to hide potential practices of racial profiling. In fact, some departments have conducted their own data collection in order to isolate and address the potential problem of racial profiling. See Harris, *supra* note 19, at 322.

264. See *supra* note 132 and accompanying text.

265. See *supra* note 212 and accompanying text.



program undermine the accuracy of the data, but it also undermines the whole point of the program, which is to isolate and permanently reform racist police programs. Data collection should be a first step in combating racial profiling,<sup>266</sup> not a lone, temporary stab.

Due to these flaws in state data collection acts as well as the sluggish pace that some states have taken in setting up adequate data collection programs,<sup>267</sup> the federal government needs to pass a law establishing a standardized base from which each state must develop its own data collection act. The proposed Traffic Stops Act of 1997<sup>268</sup> provides a strong framework for such a law. In order to properly describe an arrest, the statute ideally would mandate the recording of all relevant elements.<sup>269</sup> In addition, the collected data must be strictly screened for inconsistencies,<sup>270</sup> and the evidence acquired must be admissible in court. Furthermore, this data must be analyzed by uninterested parties for patterns indicating racial bias in law enforcement.

Such an act, however, faces the same mountain of political obstacles that kept the Traffic Stops Act from being passed.<sup>271</sup> Opponents clamor that a federal data collection act will deter police officers from adequately doing their jobs if they feel that they are being scrutinized.<sup>272</sup> However, it hardly seems just to become tougher on crime, yet remain complacent with those who enforce the laws. Added scrutiny will lead to a more lawful police force, just as stricter law enforcement should lead to more lawful citizens. Moreover, having better-educated and more thoroughly scrutinized police officers helps assuage the distrust that many

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266. See Harris, *supra* note 19, at 320.

267. See *supra* notes 208-209 and accompanying text.

268. H.R. 118, 105th Cong. (1997).

269. The record should include the race of the arresting officer and the location of the arrest. See *supra* note 226 and accompanying text.

270. See, e.g., Chavez v. Ill. State Police, 27 F. Supp. 2d 1053, 1062 (1998). Plaintiff Chavez, a Mexican private investigator, drove down Interstate 80, not violating any traffic laws, but presenting a suspicious profile by driving a rental car with out-of-state license plates, open maps, fast food wrappers in the front seat, and a gym bag in the back seat. See *id.* The defendant police officer recorded "White" instead of "Hispanic" on incident report. See *id.* See also *supra* note 213 and accompanying text (describing a police program involving telephone follow-ups to stopped drivers to ensure that the officer involved recorded the racial information accurately).

271. See *supra* note 225 and accompanying text.

272. See Steve Miller, 'Profile' Directive Rallies Two Sides; Bush Seeks Data on Police Stops, WASH. TIMES, Mar. 12, 2001, at A1 (citing Robert Scully, executive director of the National Association of Police Organizations, who claimed that not only would the mandatory data collection lead to more administrative work and less police work).

inner-city inhabitants have towards law enforcement.<sup>273</sup> A Federal Traffic Stops Act may one day be a reality. As dialogue opens between the community and the police department, solutions in the form of data collection seem a logical first step.

A major value of data collection is its use in lawsuits. Thus far, most courts have been unwilling to allow statistical evidence without additional evidence indicative of invidious intent;<sup>274</sup> however, statistical evidence is slowly gaining acceptance in Title VI adjudication.<sup>275</sup> After taking steps to ensure the accuracy of data collection methods, a federal act mandating data collection must be passed. The data collected, however, must be useful pursuant to federal law.

## 2. Federal Law Banning Racial Profiling Must Be Enacted

Lawsuits are important in combating racial profiling because they point out the weaknesses in police programs.<sup>276</sup> In turn, identification of these weaknesses can help facilitate police training programs, recruiting programs, and use of policy manuals. In order to maintain adequate and productive lawsuits attacking racial profiling, a federal law specific to racial profiling needs to be passed. Section 14141 falls short of providing an adequate remedy for racial profiling because it does not allow for citizen suits.<sup>277</sup> A federal law banning racial profiling is important and necessary, not only as a remedy for racial profiling victims, but also as official recognition of this national problem. Possibly one reason for the dearth of successful suits is the historical obscurity of racial profiling. By affirmatively addressing the issue with a law that is specific to racial profiling, litigation will be more effective, thereby preventing the issue from sinking back into obscurity.

This act would best work in conjunction with a compulsory data collection act. Observing the totality of the circumstances through the collected data, citizen groups could effectively

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273. See *supra* notes 78-79 and accompanying text.

274. See Schifferle, *supra* note 76, at 171. But see *United States v. Jennings*, No. 91-5942, 1993 U.S. App. LEXIS 926, at \*12 (6th Cir. Jan 13, 1993) (allowing statistical evidence to show that an Equal Protection violation has occurred).

275. See Md. State Conference of NAACP Branches v. Md. Dep't of State Police, 72 F. Supp. 2d 560, 566 (D. Md. 1999) ("While [statistical evidence] is not dispositive on the issue of discrimination, it is relevant evidence that minority motorists were treated differently from [W]hites, at least for a period of time on a portion of I-95.").

276. See Scarborough & Hemmens, *supra* note 191, at 4.

277. See *supra* notes 184-185 and accompanying text.

scrutinize the practices and procedures of entire police departments and individual police officers alike.

One concern of such legislation may be that it would open the floodgates to civil rights litigation;<sup>278</sup> however, the paltry three consent decrees secured by the Department of Justice in the past five years illustrate the need for citizens to be involved in raising racial profiling suits. The Senate proposed such an act, which focused on "enforcing the racial profiling ban," but disallowed recovery of monetary damages.<sup>279</sup> Disallowing monetary damages provides barriers against frivolous lawsuits. However, in order for the act to be successful, it needs to permit evidence suppression and disciplinary actions against police officers and/or police departments. At present, there are not enough sticks to prod police departments into sufficient introspection. A statute that holds police departments accountable will ultimately improve the relationship between the officers and citizens by improving the integrity of the department.<sup>280</sup>

Nonetheless, the advent of a law specific to racial profiling will be interpreted by the same legal system that provides officers with the tools to stop and search any vehicle they choose. Although preventing the criminal justice system from targeting African Americans as an initial step is necessary, it is also necessary to address this problem from the back end, after arrest.

### 3. Sentencing Guidelines Must Be Reformed

Sentencing guidelines were offered as a back-end solution to prejudice in the criminal justice system.<sup>281</sup> However, in practice, they have served more as a mechanism that clandestinely adds to racial prejudice.<sup>282</sup> Because African Americans are arrested disproportionately more than White Americans, they have a higher rate of recidivism, for which they are forced to serve longer sentences.<sup>283</sup> This contributes to a vicious cycle, further stigmatizing minority neighborhoods as "high-crime areas" and resulting in the prosecution of a disproportionate number of African Americans.

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278. This was Congress's reason for not allowing citizen suits in § 14141. See Gilles, *supra* note 177, at 1403.

279. Tom Brune, *Profiling Proposal Attacked; Senate Bill Called 'Wrong Approach'*, NEWSDAY (Long Island, N.Y.), Aug. 2, 2001, at News A16.

280. See *id.*

281. See 18 U.S.S.G. Ch. 1, Pt.A, intro. comment. (1996).

282. See *supra* notes 97-100 and accompanying text.

283. See *supra* notes 97-100 and accompanying text.

Yet, the system is based on an equitable theory.<sup>284</sup> One of the founding purposes of sentencing guidelines is to combat unfair judicial discretion.<sup>285</sup> Sentencing guidelines allow judges to dole out sentences efficiently, while limiting the scope of potentially racist judges' discretionary decisions.<sup>286</sup> In an ideal criminal justice system that does not disproportionately punish minorities, sentencing guidelines as they presently stand might succeed. However, given the existence of discriminatory drug laws and law enforcement, reforming the guidelines is necessary to attack both the rising prison population and its accompanying racial disparity.<sup>287</sup>

Sentencing guidelines, in theory, offer a practical solution to inequities stemming from judicial discretion. The problem lies in some of the elements on which they focus. The courts should use the fact that a police officer was patrolling a "high-crime" area as an element to mitigate a criminal's sentence, and they should discontinue their strict application of harsher sentencing for repeat offenders of nonviolent crime. Judge Gertner's departure from the sentencing guidelines is a lone ship sailing on a judicial sea that churns with intense political pressure to be harsh on crime. Her heroics should not have to be considered so heroic.

In addition, sentencing guidelines should mandate alternative sentencing, such as drug treatment in cases of nonviolent drug offenses. The combined effect of the War on Drugs, law enforcement's patrolling "high-crime" areas, and sentencing guidelines that focus on recidivism is turning petty drug offenders into violent criminals. Moreover, the War on Drugs has substantially contributed to the unnecessarily dramatic increase in our country's prison population.<sup>288</sup> The fact that the Sentencing Reform Act was passed in the midst of the prison boom fostered partly by the War on Drugs lends support to the conclusion that the guidelines were enacted as a response to the increasing number of prisoners.<sup>289</sup> Accordingly, the sentencing

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284. See Frase, *supra* note 65, at 3.

285. See Letter from William W. Wilkins, Jr., Chair, Committee on Criminal Law, to Judge Diana E. Murphy, Chair, United States Sentencing Commission (Mar. 10, 2000), 12 FED. SENT. R. 144 (1999) (citing S. REP. NO. 98-225, at 52 (1983)).

286. See Frase, *supra* note 65, at 3.

287. See Hearing, *supra* note 37, at 148 (promoting drug crime sentencing reform as the priority in combating racial disparity in prisons).

288. See *supra* notes 6, 69 and accompanying text. In addition, the money spent on incarceration could be more efficiently spent on drug treatment. See *supra* note 233 and accompanying text.

289. See *supra* note 86 and accompanying text.

guidelines are a reaction to the War on Drugs both in the necessity to judiciously handle the huge number of drug convicts and the public's desire to "lay the smack down" on drug crime.<sup>290</sup> People living in "high-crime areas" may benefit from increased patrolling,<sup>291</sup> but they do not benefit from this vicious cycle, which seizes its citizens and, instead of reforming them, turns them into more dangerous criminals.

By providing alternative sentencing for nonviolent drug offenders, the public can wage its War on Drugs, but remove the people from the carnage. Our country must end its War on Blacks. In general, judges should be allowed to depart from prescribed sentences if any evidence demonstrates that the conviction was the result of racial profiling. Enforcement policies need to be overhauled, but this cannot happen without a struggle, not only within the police departments, but throughout our unconsciously racist society. This unconscious racism buoys racial profiling and provides police departments with the impossible task of being hard on crime without being hard on minorities. By pushing enforcement out of the inner cities, innocent people will lose protection. Consequently, the United States needs laws that isolate racial profiling and treat, instead of incarcerate, drug criminals. If lawmakers respond to this unconscious racism by providing sentencing departures for nonviolent drug criminals and victims of racial profiling, racial disparity in prisons will receive necessary back-end help to reverse the cycle.

## Conclusion

The election of President George W. Bush reflects an ongoing desire among U.S. citizens to be hard on crime.<sup>292</sup> We see the prison population increasing, and instead of questioning the validity of the process, we ask for harsher laws and more prisons. As our crime enforcement intensifies, the issues of racial profiling and racial disparity in prisons bubble to the surface of political discourse. At long last, laws are creeping into this country that purport to address the realistic, instead of theoretical, aspects of these problems. However, present solutions fall short. As the prison population becomes more racially unbalanced, laws must lead to drastic reformation of our criminal justice system, both on the front end—in police enforcement—and on the back end—in

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290. See *supra* notes 84, 86 and accompanying text.

291. See *supra* note 76 and accompanying text.

292. Under Bush's reign as governor, Texas led the nation in prison expansion. See Butterfield, *supra* note 68, at A10.

sentencing—in order to help reverse the cycle. Our enormous prison population not only serves as a testament to our country's intolerance of crime; it also provides painful proof that we are still a racist nation.