

Racial (De)Profiling: Modeling A Remedy For Racial Profiling After the School Desegregation Cases

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Introduction

Prior to 1954, Black students were not permitted to attend Central High School in Little Rock, Arkansas.¹ But, in 1954, the Supreme Court decided *Brown v. The Board of Education I (Brown I)*² and declared that schools could no longer deny admittance on the basis of race.³ A year later, the Supreme Court decided *Brown v. The Board of Education II (Brown II)*⁴ and required all school boards to desegregate their respective schools.⁵ In order to comply with the decisions of the Court, Central High's school board adopted a plan permitting Black students to attend the school beginning in the fall of 1957.⁶ However, the day before the plan's

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1. See *Cooper v. Aaron*, 358 U.S. 1, 7 (1958) (indicating that Black students were not admitted to Central High School as of May 20, 1954).

2. 347 U.S. 483 (1954).

3. See *id.* at 495 (holding that students who had been denied admittance on the basis of their race were "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment").

4. 349 U.S. 294 (1955).

5. See *id.* at 299 (holding that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving . . . problems" arising from unconstitutional school segregation).

6. See *Cooper*, 358 U.S. at 7-8.

On May 20, 1954 . . . the Little Rock District School Board adopted, and on May 23, 1954, made public, a statement of policy entitled "Supreme Court Decision—Segregation in Public Schools." In this statement the Board recognized that

"It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed."

Thereafter the Board undertook studies of the administrative problems confronting the transition to a desegregated public school system at Little

implementation, Governor Orval Faubus⁷ declared Little Rock Central High School off limits to Black students.⁸ To enforce his declaration, Faubus went so far as to order the Arkansas National Guard to block any Black students from entering Central High School.⁹ The federal government eventually intervened and, under the protection of the Little Rock Police Department, Black students entered Central High School on September 23, 1957.¹⁰

In 1992, Robert Wilkins, a Black male from Washington, D.C., drove to a family funeral in Ohio.¹¹ Following the funeral, Wilkins rented a Cadillac and, with his aunt, uncle, and cousin, began the return trip home to Washington, D.C.¹² While passing through Maryland, the group was pulled over for speeding while driving at sixty miles per hour on the interstate.¹³ Wilkins and his family were ordered out of the vehicle, and as they stood in the rain on the side of the interstate, several officers and drug-sniffing dogs searched their vehicle for drugs.¹⁴ In the end, no drugs were found.¹⁵ Wilkins and his family were victims of racial profiling.¹⁶

Rock. It instructed the Superintendent of Schools to prepare a plan for desegregation, and approved such a plan on May 24, 1955, seven days before the second *Brown* opinion. The plan provided for desegregation at the senior high school level (grades 10 through 12) as the first stage. Desegregation at the junior high and elementary levels was to follow. It was contemplated that desegregation at the high school level would commence in the fall of 1957, and the expectation was that complete desegregation of the school system would be accomplished by 1963.

Id.

7. See CRAIG RAINS/PUB. RELATIONS INC., LITTLE ROCK CENTRAL HIGH SCHOOL 40TH ANNIVERSARY, at <http://www.centralhigh57.org> (last visited Oct. 4, 2003) (indicating that Orval Faubus was the governor of Arkansas in 1957) [hereinafter LITTLE ROCK 40TH ANNIVERSARY].

8. See *Cooper*, 358 U.S. at 9 (indicating that “the Governor of Arkansas . . . placed the school ‘off limits’ to colored students”).

9. See *id.*

10. See *id.* at 12 (stating that on Monday, September 23, 1957, “[t]he Negro children entered the high school . . . under the protection of the Little Rock Police Department”); see also LITTLE ROCK 40TH ANNIVERSARY, *supra* note 7 (providing a detailed account of the events that transpired at Little Rock Central High School in 1957).

11. AMERICAN CIVIL LIBERTIES UNION FREEDOM NETWORK, “DRIVING WHILE BLACK” IS NOT A CRIME . . . SO WHY ARE INCIDENTS LIKE THESE OCCURRING ACROSS THE COUNTRY?, at <http://archive.aclu.org/profiling/tales> (last visited Nov. 3, 2003) [hereinafter DRIVING WHILE BLACK].

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. 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, 726 (2000) (indicating that pretext stops are the most common examples of racial profiling); see also Samuel R. Gross & Debra

At first glance, racial profiling and school segregation do not seem to have much in common. In fact, racial profiling and school segregation are consistently viewed as two very distinct issues, especially in the legal system. For example, the Supreme Court has declared school segregation unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, but no such ruling has been made for racial profiling.¹⁷

This Article argues, however, that racial profiling is a form of segregation that should be declared unconstitutional for the same reasons that school segregation was declared unconstitutional. This Article argues further that the remedial approach taken in the school desegregation cases following the Court's decision in *Brown I* provides an ideal model for remedying racial profiling. Part I of this Article provides a background of racial profiling—specifically, how it is defined, when it is applied, and the extent of its existence.¹⁸ Part II explains a private racial profiling Equal Protection claim brought under the guise of 42 U.S.C. § 1983.¹⁹ Part III discusses the Supreme Court's holding in *Brown I* that struck down school segregation, and the model the Court applied in latter cases to effectuate school desegregation.²⁰ Part IV compares racial profiling to school segregation and argues that racial profiling is a form of unconstitutional racial segregation.²¹ Part V then demonstrates how the courts can follow the methodology used in the school desegregation cases to create an effective model for racial (de)profiling.²²

I. The Background of Racial Profiling

A. Racial Profiling Defined

The first step in a discussion of racial profiling is to define racial profiling.²³ While this may seem an easy task, it is

Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 (2002) ("Police officers would stop, question, and search African American and Hispanic citizens disproportionately, because of their race or ethnicity, in order to try to catch common criminals."); DRIVING WHILE BLACK, *supra* note 11 (detailing several instances of racial profiling).

17. See *infra* notes 60-125 and accompanying text.

18. See *infra* notes 23-58 and accompanying text.

19. See *infra* notes 60-105 and accompanying text.

20. See *infra* notes 106-155 and accompanying text.

21. See *infra* notes 156-203 and accompanying text.

22. See *infra* notes 204-221 and accompanying text.

23. Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 106 (2001) (quoting Los Angeles Police Chief Bernard C. Parks as stating that

complicated by the fact that there is no social or legal consensus on a definition.²⁴ For example, consider that as recently as the 1970s and 1980s, the closest the courts came to using the term “racial profiling” was to use the term “racial profile” to describe the racial compositions of schools,²⁵ businesses,²⁶ and model neighborhoods.²⁷ To this date, the Supreme Court has yet to provide a definition of racial profiling; in fact, the term only appears in two Supreme Court cases.²⁸

Even though there is no consensus on the exact definition of racial profiling, the term’s origins and use in common parlance provide an effective definition. The actual term “racial profiling” is a relatively recent offshoot of the “drug courier profiles” created in the 1980s for use in the “war on drugs.”²⁹ The “drug courier profile” began as an element of Drug Enforcement Administration (DEA) training programs, such as Operation Pipeline, that are designed to inform federal, state, and local law enforcement agencies of the best practices for spotting drug traffickers on the highways, in the airports, and on the sidewalks.³⁰ Specifically, the

“[u]ntil they define [racial profiling], we can’t really discuss it . . . [because] [i]t means too many things to too many people”).

24. See JIM CLEARY, MINN. H.R., RACIAL PROFILING STUDIES IN LAW ENFORCEMENT: ISSUES AND METHODOLOGY (2000) (indicating that there is not yet a clear consensus on the definition of racial profiling); David Rudovsky, *Breaking the Pattern of Racial Profiling*, 38 TRIAL 29, 36 (2002) (indicating that there is an ongoing debate over the exact definition of racial profiling).

25. NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1046 (6th Cir. 1977) (using “racial profile” to reference the racial composition of particular schools).

26. Greer v. Gen. Motors Corp., 588 F. Supp. 1067, 1070 (N.D. Ga. 1984) (using “racial profile” to describe the racial composition of those employed at General Motors); NAACP v. Wilmington, 453 F. Supp. 330, 342 (D. Del. 1978) (using “racial profile” to describe the racial composition of those employed at the Wilmington Medical Center).

27. Bradley v. Sch. Bd., 317 F. Supp. 555, 562 (E.D. Va. 1970) (“The racial profile of the Model Neighborhood does not provide an ethnic mix which is representative of total city population” (quoting uncited Model Neighborhood Planning Grant application submitted by City of Richmond to Dep’t of Housing & Urban Development)).

28. See Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O’Connor, J., dissenting) (using the term “racial profiling” without providing its definition); see also Illinois v. Wardlow, 528 U.S. 119, 133 nn.9-10 (2000) (discussing racial profiling without providing its definition).

29. See Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 766 (2002) (“Racial profiling is inextricably intertwined with . . . the war on drugs giving birth to the ‘drug courier profile,’ the prototype for the more general racial profile.”); see also Garrett, *supra* note 23, at 49 (“Racial profiling traditionally referred to actual written profiles of suspects, primarily drug courier profiles.”).

30. U.S. GEN. ACCOUNTING OFFICE, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS, GAO/GGD-00-41, 4 (Mar. 2000) [hereinafter GAO RACIAL PROFILING] (detailing the use of the drug courier profile in DEA training programs).

“drug courier profile” was an accumulation of rather innocuous facts, such as age, clothing, and often race, that when combined, purported to describe the stereotypical drug trafficker.³¹

Law enforcement agencies across the United States aggressively employed the “drug courier profile,” and as the “war on drugs” progressed, racial minorities became noticeably over-represented in criminal and incarceration statistics.³² Such agencies rationalized this over-representation with the belief that race accurately predicts an individual’s or a group’s propensity to commit crime.³³ Eventually, the use of race in various criminal

31. See William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, 10 TEMP. POL. & CIV. RTS. L. REV. 387, 390 (2001) (“Profiles are not an accumulation of individualized facts upon which probable cause or reasonable suspicion attach to a suspect. Instead, profiles are an accumulation of often innocent facts which supposedly justify police detention, search, or both of suspects.”); see also *United States v. McKines*, 933 F.2d 1412, 1432 (8th Cir. 1991) (citing *United States v. Taylor*, 917 F.2d 1402, 1409 (6th Cir. 1990) (indicating that “the ‘war on drugs’ has resulted in the stopping and searching of individuals based exclusively upon race”).

32. See HUMAN RIGHTS WATCH, UNITED STATES PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (vol. 12, no. 2(G)) (2000) available at http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm#P307_63738 (last visited Oct. 5, 2003) [hereinafter HUMAN RIGHTS WATCH] (“The war on drugs precipitated soaring arrests of drug offenders and increasing racial disproportions among the arrestees.”). This report indicated that:

Blacks had long been arrested for drug offenses at higher rates than whites. Throughout the 1970s, for example, blacks were approximately twice as likely as whites to be arrested for drug-related offences. By 1988, however, with national anti-drug efforts in full force, blacks were arrested on drug charges at five times the rate of whites. Nationwide, blacks constituted 37 percent of all drug arrestees; in large urban areas, blacks constituted 53 percent of all drug arrestees.

Id. (citations omitted); see also Suzanne Leone, *Massachusetts Addresses Racial Profiling Head On: The Efficiency of Chapter 228 of the Acts and Resolves of 2000*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 335, 337 (2002) citing David A. Harris, *Driving While Black: Racial Profiling on our Nation’s Highways, An American Civil Liberties Union Special Report*, (June 1999) at <http://archive.aclu.org/profiling/report/index.html> (last visited Oct. 5, 2003) (“Even though ‘this stereotype [racial profiling] is factually untrue, it has nonetheless become a self-fulfilling prophecy. Because police look for drugs primarily among African Americans and Latinos, they find a disproportionate number of minorities in possession of contraband.’”).

33. See Gross & Livingston, *supra* note 16, at 14-15 (“As we use the term, ‘racial profiling’ occurs whenever a law enforcement officer . . . investigates a person because the officer believes that members of that person’s racial . . . group are more likely than the population at large to commit the sort of crime the officer is investigating.”); see also Benjamin D. Steiner & Victor Argoshy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 TEMP. POL. & CIV. RTS. L. REV. 443, 450 (2001) (“While the abuse of illegal substances is primarily a private health problem for middle and upper class, predominantly white, Americans, it is invariably a nationally fought, criminalized ‘war’ against a disproportionately poor African American and Latino/a American population.”); see also RANDALL KENNEDY, RACE, CRIME, AND THE LAW 138 (Vintage Books 1998)

profiles evolved into the term “racial profiling.”³⁴ Today, racial profiling is generally thought of as “the practice of a law enforcement agent relying, to any degree, on race . . . in selecting which individuals to subject to routine investigatory [activities],”³⁵ or more generally stated, the practice of using race as a proxy for criminality.³⁶

B. Law Enforcement Discretion

Beyond defining racial profiling, it is also necessary to recognize that racial profiling exists “on a continuum based on the degree to which an officer has the discretion to choose whether or not to make the stop.”³⁷ The continuum progresses from low-discretion decisions, in which facts compel an agent to investigate an individual, to high-discretion decisions, in which a decision is really only limited by personal opinion and experience.³⁸ For example, low-discretion decisions often involve an external description of a particular suspect, such as “a motorist running a

(1997) (detailing an early belief that race was a proxy for criminal propensity).

34. See Garrett, *supra* note 23, at 49 (indicating that racial profiling evolved from the “drug courier profile”); see also DEBORAH RAMIREZ ET AL., U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 4 (2000) (“In the late 1990s, the American news media exploded with coverage of the problem of racial profiling.”), available at <http://www.ncjrs.org/pdffiles1/bja/184768.pdf> (last visited Sept. 26, 2003).

35. See End Racial Profiling Act of 2001, S. 989, 107th Cong. §§ 101, 501(5) (2001) (purporting to define and prohibit racial profiling), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s989is.txt.pdf (last visited Oct. 12, 2003); see also *United States v. Coleman*, 162 F. Supp. 2d 582, 589 (N.D. Tex. 2001) (detailing a Texas statute that defined racial profiling as “law enforcement-initiated action based on an individual’s race, ethnicity, or national origin rather than on the individual’s behavior or on information identifying the individual as having engaged in criminal activity”); see also CLEARY, *supra* note 24, at 6 (“Racial profiling occurs when a law enforcement officer uses race or ethnicity as one of several factors in deciding to stop, question, arrest, and/or search someone.”).

36. See Luna, *supra* note 29, at 764.

[R]acial profiling can be defined as the use of race as a proxy for crime, allegedly justified by a propensity toward crime which, in turn, justifies the detention and search of individuals in public spaces—standing or walking on the streets, driving on highways, commuting on buses or trains, flying on airplanes and engaging in other activities of modern life.

Id.

37. See CLEARY, *supra* note 24, at 13.

38. GEORGE L. KELLING, U.S. DEP’T OF JUSTICE, “BROKEN WINDOWS” AND POLICE DISCRETION 38 (1999) (stating that police decisions “can be ranked along a continuum from the cut-and-dried to the problematic”) (quoting David H. Bayley & Egon Bittner, *Learning the Skills of Policing*, 47 LAW & CONTEMP. PROBS. NO. 4, 35, 36 (1984)), available at <http://www.ncjrs.org/pdffiles1/nij/178259.pdf> (last visited Oct. 3, 2003).

red light, or speeding by more than 8 to 10 miles per hour over the limit, or driving in a manner suggesting alcohol or chemical impairment.”³⁹ High-discretion decisions, on the other hand, involve minor offenses, such as “failure to signal a turn, or a vehicle with underinflated tires, an unlighted license plate . . . something hanging from the mirror,” or a pedestrian that “looks suspicious but is not engaged in any specific criminal behavior.”⁴⁰

The discretion continuum is important because low-discretion decisions are generally excluded from the definition of racial profiling. For example, in *Brown v. City of Oneonta*,⁴¹ the Second Circuit explicitly refused to extend the definition of racial profiling to include instances where a law enforcement agent possessed a description of a particular criminal suspect.⁴² The Second Circuit held that “where law enforcement officials possessed a description of a criminal suspect, even though that description consisted primarily of the suspect’s race . . . they could act on the basis of that description without violating the Equal Protection Clause.”⁴³ When an agent makes a low-discretion decision, such as the one described in *Brown v. City of Oneonta*, race is not being used as a proxy for criminality—rather, race is a specific component of actual criminal conduct. Therefore, racial profiling is irrelevant when the facts and circumstances compel a law enforcement agent to exercise discretion.⁴⁴

C. Racial Profiling: Reality or Myth?

Some law enforcement officials argue that racial profiling is simply a “myth” that is the unfortunate byproduct of sound

39. See CLEARY, *supra* note 24, at 13.

40. See *id.* at 14 (referencing Prof. Deborah Ramirez).

41. 221 F.3d 329 (2nd Cir. 2000).

42. See *id.* at 333-34.

43. See *id.*

44. See KELLING, *supra* note 38, at 38 (quoting David H. Bayley & Egon Bittner, *Learning the Skills of Policing*, 47 LAW & CONTEMP. PROBS. NO. 4, 35, 36 (1984)).

American officers have few doubts about what to do when a man is found drunk lying on the ground in the winter. He must be picked up and taken to a shelter. The choices are also fairly limited in serious traffic accidents, alleged housebreaking, and assault with a deadly weapon witnessed by a police officer. This is not to argue that some choices are not involved in such cases—officers can turn a blind eye or overreact—but rather that the appropriate responses are clearly recognized by everyone involved—patrolman, public, and command officers.

The appropriate action may not be easy to take, but it is obvious. When officers, regardless of their motivations, fail to do what they should, ‘discretion’ is no excuse.

Id. (citation omitted).

policing.⁴⁵ These officials deny the existence of racial profiling, and assert that disproportionate arrest and incarceration statistics exist because law enforcement agencies “have made the policy choice to pursue aggressive strategies of enforcement” that rely on factors other than race, such as “class, crime patterns, and neighborhoods.”⁴⁶

On the other hand, there is ample evidence that the practice of racial profiling is widespread. For example, Rep. John Conyers Jr., D-Mich., noted that while “African-Americans make up only 14 percent of the U.S. population, they account for 72 percent of all routine traffic stops.”⁴⁷ Also, a New Jersey study indicated that Black and Hispanic motorists represent 13.5 % of highway drivers in that state, but that they represent 73.2 % of those stopped and searched by the New Jersey State Patrol.⁴⁸ Similar statistics can be found for other states, such as Maryland,⁴⁹ Illinois,⁵⁰ and Minnesota.⁵¹ There is also evidence indicating that racial minorities are disproportionately stopped and searched in airports⁵² and on the streets.⁵³

45. Heather Mac Donald, *The Racial Profiling Myth Debunked*, 12 CITY JOURNAL No. 2, at 63 (Spring 2002) (arguing that racial profiling is a myth); see also Garrett, *supra* note 23, at 56 (indicating that many critics of racial profiling refer to it as a myth); see also Buckman & Lamberth, *supra* note 31, at 387 (“Despite overwhelming evidence of its vitality, law enforcement denies its existence, hides the evidence of its perpetration, and criticizes those who even dare to complain.”).

46. Garrett, *supra* note 23, at 56-57.

47. Elizabeth Rogers, *Fear of Driving*, 86 A.B.A. J. 94, 94 (2000).

48. CLEARY, *supra* note 24, at 7.

49. See *id.* (indicating that a Maryland report “revealed that, though black motorists made up only 17.5 percent of the drivers on certain roadways, they composed more than 72 percent of the motorists stopped and searched by the Maryland State Police”).

50. See *id.* (indicating that an Illinois study “showed that, although Hispanics make up less than 8 percent of the state’s population, they were 27 percent of those stopped and searched by a highway drug interdiction unit”).

51. See COUNCIL ON CRIME AND JUSTICE, MINNEAPOLIS POLICE AND TRAFFIC STOPS AND DRIVERS’ RACE ANALYSIS AND RECOMMENDATIONS 4 (Apr. 13, 2001) (indicating that racial minorities represent fifty-seven percent of the recorded traffic stops while accounting for just under thirty-five percent of the population), available at <http://www.ci.minneapolis.mn.us/citywork/police/stats/Mpls-Traffic-Stops.pdf> (last visited Sept. 27, 2003).

52. See CLEARY, *supra* note 24, at 7-8 (noting a General Accounting Office report indicating that “of the passengers returning to U.S. airports on international flights during 1997 and 1998 who were selected by customs officials for personal searches, a disproportionate number of African American women were subjected to more invasive searches . . .”).

53. ELIOT SPITZER, THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL vii (1999) (indicating that “minorities—and blacks in particular—were ‘stopped’ at a higher rate than whites, relative to their

Regardless of its prevalence, the public widely considers racial profiling to be a significant social problem.⁵⁴ As a result, three approaches are commonly taken to combat racial profiling: (1) private litigation,⁵⁵ (2) legislation,⁵⁶ and (3) Department of Justice consent decrees.⁵⁷ While each of the methods has its advantages and disadvantages, this Article will focus on private racial profiling claims brought against law enforcement agencies alleging racial profiling practices that violate the Equal Protection Clause of the Fourteenth Amendment.⁵⁸

respective percentages within the population of New York City”).

54. See GALLUP POLL ORGANIZATION, RACIAL PROFILING IS SEEN AS WIDESPREAD, PARTICULARLY AMONG YOUNG BLACK MEN (Dec. 9, 1999) (indicating that fifty-nine percent of Americans polled believed that racial profiling by the police is widespread and that eighty-one percent of the American public disapproved of the practice), available at http://www.gallup.com/subscription/?m=f&c_id=10343 (last visited Oct. 12, 2003).

55. Garrett, *supra* note 23, at 60. Racial profiling claims also arise in criminal litigation, but such claims are beyond the scope of this Article. One interesting question raised in criminal litigation of a racial profiling claim is whether the Equal Protection Clause of the Fourteenth Amendment should have an exclusionary rule similar to the one contained within the Fourth Amendment. See, e.g., Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107 (arguing that an exclusionary rule should exist under the Equal Protection Clause).

56. See UNIV. OF MINN. INST. ON RACE & POVERTY, COMPONENTS OF RACIAL PROFILING LEGISLATION (2001) [hereinafter INST. ON RACE & POVERTY] (indicating that as of 2000, eleven states had enacted legislation to combat racial profiling, and in 2001, another thirteen states introduced bills aimed at the same purpose), available at <http://www.instituteonraceandpoverty.org/publications/racialprofiling.html> (last visited Sept. 28, 2003); see also End Racial Profiling Act of 2001, S. 989, 107th Cong. §§ 101, 501(5) (2001) (purporting to define and prohibit racial profiling), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s989is.txt.pdf (last visited Oct. 12, 2003).

57. See *White v. Williams*, 179 F. Supp. 2d 405, 413-14 (D.N.J. 2002) (describing the provisions of a consent decree entered into between the Department of Justice and the State of New Jersey); see also *United States v. New Jersey & Div. of State Police of the N. J. Dep't of Law & Pub. Safety*, No. 99-5970 (D.N.J. Dec. 30, 1999), available at <http://www.state.nj.us/lps/jointapp.htm> (last visited Oct. 5, 2003).

58. See *infra* notes 60-107 and accompanying text. There is another common constitutional argument under the Fourth Amendment, which protects against “unreasonable searches and seizures.” U.S. CONST. amend. IV; see also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). This argument, however, is beyond the scope of this Article. Nevertheless, in 1996 the Supreme Court decided *Whren v. United States*, 517 U.S. 806 (1996), and in doing so severely limited, if not eliminated, the Fourth Amendment racial profiling argument. See *id.* at 813 (holding that “[s]ubjective intentions [of the investigating agent] play no role in ordinary, probable-cause Fourth Amendment analysis”). Thus, after *Whren*, the only relevant question under the Fourth Amendment is whether the officer had legal cause for the stop. *Id.* Therefore, race will not even be considered in a Fourth Amendment analysis as long as agents can indicate that other factors justified the stop, including even the most minor traffic violations. See *id.*

II. Private Racial Profiling Suits Under the Fourteenth Amendment

42 U.S.C. § 1983 allows individuals to bring private claims against the government alleging violations of their constitutional rights.⁵⁹ Specifically, § 1983 “imposes civil liability upon any person, who acting under the color of state law, deprives another individual of any rights, privileges or immunities secured by the Constitution.”⁶⁰ Section 1983 does not create a new substantive right—rather, it is a remedy for “violations of rights conferred in the Constitution.”⁶¹ Section 1983 liability attaches to a governmental entity or an individual governmental official.⁶² It is § 1983 that permits an individual to bring a private racial profiling claim alleging a violation of the Equal Protection Clause of the Fourteenth Amendment.⁶³

To bring a successful § 1983 claim, plaintiffs must navigate through the judicial obstacle course of an Equal Protection claim.⁶⁴ First, plaintiffs must show that actions of the government have had a discriminatory or harmful effect on them.⁶⁵ Second, they must show that the discriminatory effect was the intended or purposeful result of those actions.⁶⁶ However, even if the plaintiffs offer proof of a purposeful discriminatory effect, the government’s actions are not immediately invalidated. Instead, the burden merely shifts, and the government must show that its actions survive the Supreme Court’s strict scrutiny test.⁶⁷

59. 42 U.S.C. § 1983 (2002).

60. *Id.*

61. *See White*, 179 F. Supp. at 418 (D.N.J. 2002) (explaining a Section 1983 suit).

62. *Id.* at 418, *citing* *Sample v. Diecks*, 885 F.2d 1099, 1118 (3rd Cir. 1989) (explaining a § 1983 suit).

63. There are statutes beyond the scope of this Article that may provide additional relief for racial profiling, such as Title VI of the Civil Rights Act of 1964, which provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (2002).

64. U.S. CONST. amend. XIV § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

65. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

66. *See Arlington Heights*, 429 U.S. at 265 (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); *see also Davis*, 426 U.S. at 239-42 (“But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

67. *Hurn v. United States*, 221 F. Supp. 2d 493, 500 (D.N.J. 2002) (indicating

A. Discriminatory Effect

To show discriminatory effect in a private racial profiling suit, plaintiffs must demonstrate that they have been harmed by a government action. Specifically, plaintiffs must show that they have been treated differently than similarly situated persons who are not of the same race.⁶⁸ Differential treatment can generally be shown in one of two ways. First, a plaintiff can point to a specific similarly situated individual or group of individuals that were treated differently.⁶⁹ Second, plaintiffs can present statistical evidence indicating that they have been treated differently than other similarly situated individuals.⁷⁰

Most often in racial profiling suits, plaintiffs offer only statistical data as evidence because it is usually impossible to name a specific individual or group that was treated differently.⁷¹ Plaintiffs usually point to statistical data indicating that racial minorities are being disproportionately stopped, searched, arrested, and incarcerated.⁷² For example, plaintiffs in New Jersey used an independent study of the New Jersey Turnpike to show “that African-Americans were 4.85 times more likely to be

that if discriminatory effect motivated by discriminatory purpose is shown then “the burden shifts to the Government to articulate a legitimate, nondiscriminatory reason for treating Plaintiff differently than other similarly situated individuals”).

68. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.”); see also *Hurn*, 221 F. Supp. 2d at 500 (“To show discriminatory effect, Plaintiff must demonstrate that she is a member of a protected class and that similarly situated members of an unprotected class were treated dissimilarly.”).

69. See generally *Armstrong*, 517 U.S. at 467-68 (providing an example of a plaintiff being able to point to specific similarly situated persons in a jury selection case).

70. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (evaluating statistical data to determine purposeful discrimination); see also *Davis*, 426 U.S. at 242 (stating that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another”); *Arlington Heights*, 429 U.S. at 266 (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare.” (citations omitted)); *Chavez v. Ill. State Police*, 251 F.3d 612, 637-40 (7th Cir. 2001) (holding that statistical data can be used to show purposeful discrimination).

71. See *Chavez*, 251 F.3d at 639-40 (“In a civil racial profiling case, however, the similarly situated requirement might be impossible to prove [Because unlike] a meritorious selective prosecution claim . . . plaintiffs who allege that they were stopped due to racial profiling would not . . . be able to provide the names of other similarly situated motorists who were not stopped.”).

72. See *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (providing an example of a case in which statistical evidence of disproportionate stops on the New Jersey Turnpike was used to show discriminatory effect).

stopped on the Turnpike than non-African-Americans.”⁷³

The discriminatory effects of racial profiling extend beyond intrusive searches and seizures. For instance, studies indicate that victims of racial profiling “experience fear, anxiety, humiliation, anger, resentment, and cynicism.”⁷⁴ There is also evidence that the pervasive nature of racial profiling has caused considerable strain in the relations between communities of color and law enforcement agencies.⁷⁵

B. Purposeful Discriminatory Effect

The Supreme Court will not invalidate a law solely upon a plaintiff’s showing of a discriminatory effect.⁷⁶ The plaintiff must show that the discriminatory effect was somehow the purpose of a particular government action.⁷⁷ The Supreme Court’s usual practice is to only invalidate government actions that purposefully discriminate against persons.⁷⁸

Generally, plaintiffs attempt to show that a discriminatory effect was purposeful in one of three ways.⁷⁹ First, plaintiffs may

73. See *id.* at 360; see also *White v. Williams*, 179 F. Supp. 2d 405, 411 (D.N.J. 2002) (detailing the evidence presented in *Soto*, 734 A.2d 350).

74. End Racial Profiling Act of 2001, S. 989, 107th Cong. § 2(a)(8) (2001) (finding that racial profiling is harmful to individuals who are “subjected to it”), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s989is.txt.pdf (last visited Oct. 12, 2003). See *Rogers*, *supra* note 47, at 94 (quoting Rep. John Conyers Jr., D-Mich., as stating that “[r]aced-based traffic stops turn driving, one of our most ordinary and fundamentally American activities, into an experience fraught with danger and risk for people of color”).

75. See *RAMIREZ ET AL.*, *supra* note 34, at 4 (“Recent survey data . . . confirm[s] a strong connection between perceptions of race-based stops by police and animosity toward local and state law enforcement.”). The report also highlighted a 1999 Gallup Poll which indicated that:

Eighty-five percent of White respondents had a favorable response toward local police and 87 percent of White respondents had a favorable response toward state police. Black respondents, overall, had a less favorable opinion of both state and local police, with just 58 percent having a favorable opinion of local police and 64 percent having a favorable response to the state police. Fifty-three percent of Black men between ages 18 and 34 said they had been treated unfairly by local police.

Id. See also S. 989, § 2(a)(9) (“Racial profiling damages law enforcement and the criminal justice system as a whole by undermining public confidence and trust in the police, the courts and the criminal law.”).

76. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act . . . is unconstitutional solely because it has a racially disproportionate impact.”).

77. See *id.*

78. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 229, 265 (1977); *Davis*, 426 U.S. at 239.

79. *Barnhill v. City of Chicago, Police Dep’t.*, 142 F. Supp. 2d 948, 964 (N.D. Ill.

point to a law or policy that “expressly classifies persons on the basis of race.”⁸⁰ Second, when a law or policy is facially neutral, a plaintiff may show that it was “applied in a discriminatory fashion.”⁸¹ Third, a plaintiff may try to show that a facially neutral law or policy was motivated by a discriminatory purpose.⁸²

In private racial profiling suits, plaintiffs generally attempt to show purposeful discrimination under the second method—unequal application of facially neutral laws.⁸³ Specifically, plaintiffs will rely on statistics to show patterns of unequal application of facially neutral laws, because when statistical data presents a stark pattern of dissimilar treatment, the courts may infer purposeful discrimination.⁸⁴

For the most part, courts are rarely persuaded that the plaintiff’s evidence is strong enough to show “a clear pattern, unexplainable on grounds other than race.”⁸⁵ As a result, courts will dismiss racial profiling suits unless plaintiffs produce additional evidence indicating that the discriminatory effect was purposeful.⁸⁶

As additional evidence, plaintiffs will offer testimony of

2001).

80. *See id.* (“First, a law or policy is discriminatory on its face if it expressly classifies persons on the basis of race.” (citing *Hayden v. County of Nassau*, 180 F.3d 42, 47 (2nd Cir. 1999) (citing *Adarand Constructors, Inc. v. Peña* 515 U.S. 200, 213, 227-29 (1995))).

81. *See Barnhill*, 142 F. Supp. 2d at 964 (“Second, a law or policy which is facially neutral violates equal protection if it is applied in a discriminatory fashion.” (citing *Hayden*, 180 F.3d at 47 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886))); *see also Davis*, 426 U.S. at 241-42.

82. *See Barnhill*, 142 F. Supp. 2d at 964 (“Third, and lastly, a facially neutral law or policy violates equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect.” (citing *Hayden*, 180 F.3d at 47 (citing *Arlington Heights*, 429 U.S. at 252, 264-65))).

83. *See, e.g., Garrett, supra* note 23, at 61 (indicating that plaintiffs in private racial profiling claims “must first allege a pattern or practice of police behavior that is sufficient to satisfy requirements for injunctive relief”).

84. *See Yick Wo*, 118 U.S. 356, at 369-70 (evaluating statistical data to determine purposeful discrimination); *see also Davis*, 426 U.S. at 242 (“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”); *Arlington Heights*, 429 U.S. at 266 (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare.” (citations omitted)); *Chavez v. Ill. State Police*, 251 F.3d 612, 637-40 (7th Cir. 2001), (holding that statistical data can be used to show purposeful discrimination).

85. *See Hurn v. United States*, 221 F. Supp. 2d 493, 501 (D.N.J. 2002) (“Statistical data, by itself, can support an inference of discrimination, but must be coupled with additional evidence to permit a finding a [sic] discriminatory intent.”).

86. *See id.*

government agents⁸⁷ that demonstrates an implied policy, training program, or overall department attitude that encourages the use of racial profiling tactics.⁸⁸ However, in the face of such evidence, law enforcement agencies typically deny the existence of any racial profiling policies for fear of being labeled racist.⁸⁹ In fact, it is often the case that law enforcement agencies claim that they prohibit the use of racial profiling.⁹⁰

To avoid the "he said, she said" problems of testimonial evidence, plaintiffs almost exclusively rely on statistics to prove an implied policy of racial profiling.⁹¹ But, as noted above, courts generally find that the statistical data presented is insufficient to make an inference of discriminatory purpose.⁹² On the whole, statistical data is insufficient because law enforcement agencies usually keep limited statistics or none at all.⁹³ In response, several states have created legislation requiring law enforcement agencies to compile racial profiling statistics.⁹⁴ However, even the new statistical data often fails to persuade the court to find a

87. See, e.g., *State v. Soto*, 734 A.2d 350, 356 (N.J. Super. Ct. Law Div. 1996) ("After hearing the testimony of Kenneth Ruff and Kenneth Wilson, two former troopers called by the defense . . . who said they were trained and coached to make race based 'profile' stops.").

88. See Harold A. McDougall, *For Critical Race Practitioners: Race, Racism and American Law (4th ed.)* by Derrick A. Bell, 46 HOW. L.J. 1, 11 n.40 (2002) ("Christie Todd Whitman, Governor of New Jersey, conceded that New Jersey State troopers had been given instructions to target black and Hispanic motorists on the New Jersey Turnpike, as possible drug couriers." (citing Matthew Purdy, *Amnesia Runs Rampant in Testimony*, N.Y. TIMES, Mar. 29, 2001, at B1)); see also Alberto B. Lopez, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads*, 90 KY. L.J. 75, 107 (2001-2002) ("For example, one New Jersey trooper testified that he had been taught about racial profiling during various DEA seminars. The New Jersey officer testified that he 'was directed and urged to stop and search persons who fit the profile if [he] wanted to make 'good arrests.'"⁹⁰ (alteration in original) (citation omitted)).

89. See Garrett, *supra* note 23, at 43 ("Lawyers hope to show intentional discrimination, while police try to avoid being labeled racist.").

90. See CLEARY, *supra* note 24, at 9.

91. See *supra* notes 68-82 and accompanying text.

92. See *supra* notes 84, 85 and accompanying text.

93. See GAO RACIAL PROFILING, *supra* note 30, at 5-6 ("Lack of empirical information on the existence and prevalence of racial profiling has led to calls for local law enforcement to collect data on which motorists are stopped, and why.").

94. For example, as of 2000, eleven states had enacted legislation to combat racial profiling, and in 2001, another thirteen states introduced bills aimed at the same purpose. See INST. ON RACE & POVERTY, *supra* note 56. Additionally, it has been argued that federal legislation is also needed. See D.J. Siltan, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 83-86 (2002). In 2001, such a bill was introduced. See End Racial Profiling Act of 2001, S. 989, 107th Cong. (2001).

purposeful discriminatory effect.⁹⁵

C. *Strict Scrutiny*

If a plaintiff is able to demonstrate a purposeful discriminatory effect, the burden shifts to the law enforcement agency and its actions are examined under the Supreme Court's strict scrutiny test.⁹⁶ The strict scrutiny test constitutionally invalidates any government action that is not "necessary" to promote a "compelling" governmental interest.⁹⁷

Many law enforcement agencies and commentators defend racial profiling as a tool that promotes the governmental interest of eradicating drugs and crime.⁹⁸ Proponents of racial profiling argue that racial profiling is a rational and efficient conclusion drawn from law enforcement statistics that indicate that particular racial groups disproportionately commit certain crimes.⁹⁹ Most commonly, they point to arrest and incarceration rates showing overrepresentation by particular racial groups.¹⁰⁰ Proponents of racial profiling also believe that it may prove to deter crime, because when certain races know they are more likely to be investigated they will be more likely to fear apprehension

95. See, e.g., *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) (holding that the New Jersey State Patrol had engaged in de facto practices of racial profiling). In *Soto*, there was a great deal of empirical evidence that the State Patrol had engaged in practices of racial profiling. *Id.* at 352-57. However, the court's finding of de facto racial profiling was based only partly on the statistical data, since the state admitted that its police engaged in racial profiling. See *White v. Williams*, 179 F. Supp. 2d 405, 410-12 (D.N.J. 2002) (discussing *Soto*, 734 A.2d 350).

96. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.")

97. See *Saenz v. Roe*, 526 U.S. 489, 499 (1999) ("We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause 'unless shown to be necessary to promote a compelling governmental interest.'"); *Burnson v. Freeman*, 504 U.S. 191, 221 *citing* *Dunn v. Blumstein*, 405 U.S. 330, 342 (indicating that under strict scrutiny, state actions are "unconstitutional unless the State can demonstrate that such . . . [actions] are 'necessary to promote a compelling governmental interest'").

98. See *Garrett*, *supra* note 23, at 56 ("Some police and commentators openly defend policies targeting minorities as sound law enforcement . . .").

99. See *CLEARY*, *supra* note 24, at 10 (indicating that some authorities defend racial profiling "as appropriate given the different patterns of crime involvement by different racial groups").

100. See *id.* (showing that in 1996, federal data indicated that "blacks, who made up approximately 12.8 percent of the nation's population, represented 43.2 percent of the persons arrested for . . . violent crimes, and 32.4 percent of persons arrested for . . . property crimes").

and therefore will refrain from illegal action.¹⁰¹

Opponents of racial profiling, on the other hand, argue that proponents employ flawed logic because as law enforcement agencies disproportionately target racial minorities for routine investigations, the arrest and incarceration rates of racial minorities will naturally and undoubtedly increase.¹⁰² Racial profiling becomes “a self-fulfilling prophecy where law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources and targeted drug enforcement efforts.”¹⁰³ Opponents of racial profiling also argue that even if one believes that racial profiling has some reasonable practical applications, mere reasonableness is an insufficient justification when analyzed under the strict scrutiny test.¹⁰⁴ The use of arrest statistics as a justification for racial profiling fails to recognize the fact that “very few minorities commit crimes.”¹⁰⁵

101. See *id.* at 10-11 (“A related rationale for racial profiling is that it may help to deter some crimes.”).

102. See *Martinez v. Village of Mount Prospect*, 92 F. Supp. 2d 780, 783 (N.D. Ill. 2000) (“[R]acial profiling is a self-fulfilling prophecy.”); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 310 (2001) (“To a large extent, these statistics have been used to grease the wheels of a vicious cycle—a self-fulfilling prophecy where law enforcement agencies rely on arrest data that they themselves generated”) (quoting PETER VERNIERO, ATTY GEN. OF N.J., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 68 (Apr. 20, 1999), available at http://www.state.nj.us/lps/intm_419.pdf).

103. David Rudovsky, *Breaking the Pattern of Racial Profiling*, 38 TRIAL 29, 30 (2002); see also Buckman & Lamberth, *supra* note 31, at 388 (characterizing the current drug laws as new Jim Crow laws). “A hue and cry of politicians to get tough on or ‘declare war’ on drugs from the early 80s well into the 90s produced a corresponding effort by police departments to show results. Using simplistic and circular logic, police focused on minorities” *Id.*

104. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 32 (1973) (indicating that the strict scrutiny test is a more stringent test than the mere rationality test). Compare *Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating that under the mere rationality test a governmental action will be upheld “so long as it bears a rational relation to some legitimate end”) with *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 207 (1999) (stating that a state action challenged under the strict scrutiny test is required to “be narrowly tailored to serve a compelling governmental interest”).

105. See Garrett, *supra* note 23, at 56-57. Garrett indicates that:

The contention that profiling is poor police work is reinforced by studies that consistently show that very few of these mass pretextual stops result in arrests. In New Jersey, for example, while vastly disproportionate numbers of minorities were stopped, fewer than one percent of stops resulted in arrests. Further, almost all motorists stopped had violated traffic laws, and both minority and White drivers violated traffic laws at the same rate.

Id. at 57.

III. The School Desegregation Cases

The purposeful discriminatory effect requirement of an Equal Protection claim has made it very difficult for plaintiffs to shift the burden of proof to the government in racial profiling claims.¹⁰⁶ However, the Supreme Court's treatment of school segregation and desegregation represents a string of decisions that were primarily concerned with the practice's discriminatory effects, and not whether the discriminatory effects were presently purposeful.¹⁰⁷

A. *The Unconstitutionality of Segregation*

In 1896, the Supreme Court decided *Plessy v. Ferguson*¹⁰⁸ and judicially validated the Segregation Era.¹⁰⁹ *Plessy's* infamous "separate but equal"¹¹⁰ standard legitimized the use of segregation laws, more commonly known as "Jim Crow"¹¹¹ laws, that purported to treat members of different races "equally, albeit separately."¹¹²

School segregation was the standard throughout the Segregation Era. In *Brown I*,¹¹³ however, the Supreme Court declared school segregation unconstitutional under the Equal Protection Clause.¹¹⁴ The decision officially rejected the "separate but equal" doctrine of *Plessy*,¹¹⁵ and held that "in the field of public

106. See Andrew D. Leipold, *Objective Test and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 559 (1998) ("[M]ost of the judicial efforts to eliminate racism have focused on a particularly ugly strain of the problem: intentional discrimination by state actors." (citation omitted)); see also *Bradley v. United States*, 299 F.3d 197, 205-07 (3rd Cir. 2002); see also *Chavez v. Ill. State Police*, 251 F.3d 612, 634-42 (7th Cir. 2001) (dismissing equal protection claim because plaintiff did not satisfy burden of showing purposeful discrimination). See generally David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 324 (1999) (discussing the difficulties of bringing a private equal protection claim, specifically the need for an "attractive plaintiff").

107. See *infra* notes 108-155 and accompanying text.

108. 163 U.S. 537 (1896).

109. See *id.* at 550-52 (holding that a statute requiring railroads carrying passengers to provide equal but separate accommodations for White and "colored" persons was not unconstitutional).

110. *Id.* at 552 (Harlan, J., dissenting).

111. See, e.g., KENNEDY, *supra* note 33, at 87.

112. See *id.*

113. 347 U.S. 483 (1954).

114. See *id.* at 494-95.

115. See *id.* ("Any language in *Plessy v. Ferguson* contrary to this finding is rejected."). *Brown I* did not officially hold segregation unconstitutional, but in a series of brief *per curiam* orders following *Brown I*, the Court held segregation in other public facilities unconstitutional. See, e.g., *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (holding state required segregation at public beaches

education the doctrine of 'separate but equal' has no place."¹¹⁶ In *Bolling v. Sharpe*,¹¹⁷ decided the same day as *Brown I*, the Court extended the ruling of *Brown I* to schools under federal jurisdiction, such as those in the District of Columbia, on the basis that "[s]egregation in public education is not reasonably related to any proper governmental objective"¹¹⁸ In both cases, the Court found "[s]eparate educational facilities . . . [to be] inherently unequal,"¹¹⁹ and therefore, unconstitutional.¹²⁰

When the Court decided *Brown I* and *Bolling*, it was primarily concerned with the discriminatory effects that segregation had on African-American students and "the effect of segregation itself on public education."¹²¹ Specifically, in *Brown I*, the Court examined social scientific evidence and concluded that the discriminatory effect of school segregation was threefold.¹²² First, the Court was concerned that school segregation created a "sense of inferiority" among African-American students.¹²³ Second, the Court determined that "[s]egregation . . . has a tendency to [retard] the educational and mental development of Negro children."¹²⁴ Finally, the Court felt that segregation deprived all children of "the benefits they would receive in a [racially] integrated school system."¹²⁵

unconstitutional); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (holding state required segregation at public golf courses unconstitutional); *Gayle v. Browder*, 352 U.S. 903 (1956) (holding state required segregation on public buses unconstitutional); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (holding state required segregation in public parks unconstitutional); *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (stating that it "is no longer open to question that a State may not constitutionally require segregation of public facilities").

116. *See Brown I*, 347 U.S. at 495.

117. 347 U.S. 497 (1954).

118. *Id.* at 500. Justice Thomas, in a concurring opinion in *Missouri v. Jenkins*, 515 U.S. 70 (1995) suggested that "[s]egregation was not unconstitutional because it might have caused psychological feelings of inferiority . . . [such] injury . . . is irrelevant to the question whether [states] have engaged in intentional discrimination—the critical inquiry for ascertaining violations of [equal protection]." *Id.* at 121. However, this ignores the fact that at the time of *Brown I*, segregation was an official policy that was considered constitutional. Also, such a reading of *Brown I* would have to dismiss almost all of the Court's language regarding the harm caused by school segregation. *See infra* notes 121-126 and accompanying text.

119. *Brown I*, 347 U.S. at 495; *Bolling*, 347 U.S. at 498-500.

120. *See Brown I*, 347 U.S. at 495.

121. *See id.* at 492.

122. *Id.* at 492-95.

123. *Id.* at 494.

124. *Id.*

125. *Id.*

B. Remedying Unconstitutional Segregation: The Desegregation Model

One year after the Court declared school segregation unconstitutional in *Brown I*, the Court decided *Brown II*,¹²⁶ and laid out the basic design of the desegregation model. The desegregation model consists of two principle duties.¹²⁷ First, *Brown II* vested in all federal, state, and local public school authorities the duty to desegregate.¹²⁸ Second, *Brown II* delegated to the local courts the duty to enforce desegregation.¹²⁹

The duty to desegregate conferred upon all school authorities “the primary responsibility for elucidating, assessing, and solving” their localized problems of segregation.¹³⁰ This duty required school authorities to implement desegregation plans in their schools, but no plan, no matter how neutral, could have “the effect of maintaining or increasing the degree of racial separation in the schools.”¹³¹ The desegregation plans were to be implemented “promptly” and in “good faith.”¹³² If additional time was needed, the burden was on the authorities to show why more time should be allowed.¹³³

The duty to enforce desegregation required the local courts to evaluate whether school authorities had, in good faith, complied with the duty to desegregate.¹³⁴ In considering the adequacy of

126. 349 U.S. 294 (1955).

127. *Id.* at 298-99.

128. *See id.* Referring to *Brown I*'s declaration that school segregation is unconstitutional, the Court stated that “[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle.” *Id.* at 298.

129. *See id.* at 300-01.

130. *See id.* at 299 (“Full implementation of these constitutional principles may require solution of varied local school problems.”).

131. James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1477 (1990). *See, e.g.*, N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) (“However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.”).

132. *See Brown II*, 349 U.S. at 300 (“[T]he courts will require that . . . [school authorities] make a prompt and reasonable start toward full compliance.”).

133. *See id.* at 299-300 (“The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.”).

134. *See Brown II*, 349 U.S. at 299. The Court stated that:

[C]ourts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases

the desegregation plans, the local courts were to "be guided by equitable principles," and thus act as courts of equity.¹³⁵ As courts of equity, the local courts could "properly take into account the public interest" and eliminate any obstacles standing in the way of desegregation.¹³⁶ Also, as courts of equity, the local courts were to consider the complications inherent in segregation when judging the "good faith compliance" of desegregation plans.¹³⁷ The local courts were to retain jurisdiction over the desegregation of the local schools for whatever time was necessary.¹³⁸

After the Court laid out the design for desegregation in *Brown II*, it remained silent on desegregation for several years.¹³⁹ During the Court's silence, the lower courts could not put teeth into *Brown II* due to tremendous resistance in the South.¹⁴⁰ In 1958, the Court decided *Cooper v. Aaron*,¹⁴¹ and ruled that the Supremacy Clause of the Constitution¹⁴² obligated the States to comply with *Brown I* and *II*.¹⁴³

In 1968 the Court decided *Green v. County School Board*,¹⁴⁴ and shifted its focus from the "good faith" implementation of desegregation plans to the "effects" of such plans.¹⁴⁵ In *Green*, the Court examined whether a "School Board's adoption of a 'freedom of choice' plan which allows a pupil to choose his own public school

can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

Id. at 299 (citation omitted).

135. *See id.* at 300.

136. *See id.*

137. *See id.* at 300-01. The Court stated that:

[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

Id.

138. *See id.* at 301 ("[T]he courts will retain jurisdiction of . . . [the desegregation] cases.").

139. *See Liebman, supra* note 131, at 1476 (stating that the Court returned to "the desegregation issue only intermittently and inconclusively during the next thirteen years").

140. *See generally* *Cooper v. Aaron*, 358 U.S. 1 (1958) (detailing the Governor of Arkansas' attempt to deny the entrance of Black students to Central High School in Little Rock, Arkansas).

141. *Id.* at 1.

142. U.S. CONST. art. VI, § 1, cl. 2. ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .").

143. *See Cooper*, 358 U.S. at 18.

144. 391 U.S. 430 (1968).

145. *See id.* at 439.

constitutes adequate compliance with the Board's responsibility" to effectively desegregate its public schools.¹⁴⁶ The Court focused on the effects of the plan and not on whether it was a product of purposeful racial discrimination.¹⁴⁷ The "freedom of choice" plan was tremendously ineffective and, while racially neutral, the Court found the plan inadequate when measured against desegregation requirements.¹⁴⁸ The Court acknowledged that a "freedom of choice" plan may be acceptable at some times, but not when there are "reasonably available other ways . . . promising speedier and more effective [desegregation]."¹⁴⁹

Following *Green*, the Court continued to certify challenges to desegregation plans adopted after *Brown II*, and demanded a showing of effective results regardless of the school board's intentions at the time.¹⁵⁰ The Court continually affirmed the duty to desegregate even when there was no evidence of current or past official segregation.¹⁵¹

The course of judicial enforcement of desegregation turned in the early 1990s when a majority of the Supreme Court expressed an unwillingness to continue judicial involvement in school desegregation.¹⁵² The Majority more readily found "good faith

146. *See id.* at 431-32. The Court stated:

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a 'freedom-of-choice' plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility to achieve a system of determining admission to the public schools on a non-racial basis . . ."

Id.

147. *Id.* at 439 ("The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.").

148. *See id.* at 441 ("The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system.").

149. *Id.*

150. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 12 (1971) (holding that a court-approved desegregation was ineffective). The Court stated that Black students and others similarly situated were "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* (citing *Brown I*, 347 U.S. at 495).

151. In 1973, the Court ran into some difficulty when it started examining cases in states where segregation was not a widespread policy. *See Keyes v. Sch. Dist.*, 413 U.S. 189, 198-205 (1973). However, the Court was able to find intentional segregation in a few school districts. *Id.* The Court assumed that such discrimination must have affected the rest of the state, and therefore intent was, in a sense, transferred. *See id.* at 203-04.

152. *See Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991). In *Dowell*, the Court held that the desegregation decrees "are not intended to operate in perpetuity." *Id.* The Court also held that in determining whether to dissolve a desegregation decree, courts should consider whether a school district has complied in good faith with a desegregation decree since it was entered, and whether vestiges of past

compliance” and thus freed school authorities of the duty to desegregate, even in the face of past intentional segregation.¹⁵³ On the other hand, the Court’s Minority criticized the Majority for “suggesting that after 65 years of official segregation, thirteen years of desegregation was enough.”¹⁵⁴ In 1992, the Minority’s position prevailed and the Court extended the principle of an affirmative duty to desegregate, as applied to public elementary and high schools, to public colleges.¹⁵⁵

IV. Racial Profiling is Unconstitutional Segregation

A. *Thinking of Racial Profiling as Racial Segregation*

“Racial profiling is nothing but a 20th century version of racial segregation.”

- Rev. Al Sharpton¹⁵⁶

Earlier, this Article defined racial profiling as the practice of using race as a proxy for criminality,¹⁵⁷ but it is also possible to maintain that definition and think of racial profiling as segregation. Segregation is defined as “the policy or practice of separating people of different races, classes, or ethnic groups, as in schools, housing, and public or commercial facilities,”¹⁵⁸ and while it may not be immediately obvious, racial profiling is exactly that.

Racial profiling may not seem an obvious form of segregation because the word “separating,” as used in the definition of segregation, is generally defined as “to set or put apart,”¹⁵⁹ and

discrimination have been eliminated to the extent practicable. *See id.* at 249-50; *see also Freeman v. Pitts*, 503 U.S. 467 (1992) (holding that a district court has the power to relinquish control over a school district’s desegregation policy even before it has achieved full compliance).

153. *See Dowell*, 498 U.S. at 237; *Freeman*, 503 U.S. at 467.

154. *See Dowell*, 498 U.S. at 251 (Marshall, J., dissenting).

155. *See United States v. Fordice*, 505 U.S. 717, 730-32 (1992) (holding that the duties of desegregation apply to public colleges as well as public elementary and high schools).

156. Tiffany Arnold, *Summit Identifies Racial Profiling as Worst Civil Rights Problem*, THE DAILY ILLINI (April 23, 2001), available at <http://www.dailyillini.com/apr01/apr23/news/stories/news05.shtml> (last visited Sept. 30, 2003); *see also Steiner*, *supra* note 33, at 443 (characterizing the drug laws as the new Jim Crow Laws).

157. *See supra* notes 23-36 and accompanying text.

158. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1577 (4th ed. 2000).

159. WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 1328 (College ed. 1968).

racial profiling is rarely referred to as such.¹⁶⁰ On the other hand, “separating” is also defined as “to . . . distinguish . . . between,”¹⁶¹ and this alternative definition can easily be equated with racial profiling because racial profiling most certainly involves making a distinction between people of different races based on the propensity to commit crime.

Like segregation, racial profiling involves making a distinction between people in public or commercial facilities.¹⁶² Racial profiling most frequently occurs in public facilities, such as airports, train stations, highways, and sidewalks,¹⁶³ and they are very similar to, if not the same, public facilities that once permitted segregation.¹⁶⁴ Racial profiling can thus be thought of as a policy or practice that *separates* by making a distinction between people of different races in public and commercial facilities. In other words, racial profiling is segregation.

B. Racial Profiling Equal Protection Analysis Compared to School Segregation

Racial profiling is segregation, but is it the type of segregation that the Supreme Court was concerned about in *Brown I* and the subsequent line of cases? When the Court declared school segregation unconstitutional in *Brown I*, it was quite evident that the Court was rejecting the practice of setting or keeping apart people of different races.¹⁶⁵ The record also shows that the Court was just as concerned with the type of segregation which involves “making a distinction.”¹⁶⁶ The Court stated that “as to their status in the community[,] ‘the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group.’”¹⁶⁷ It is as if the Court was stating that segregation “uses race as a proxy for status in the community.” Consequently, another way to think of school segregation is as the practice of making a distinction between people of different races as to their status in the community.

160. See *supra* note 36 and accompanying text (defining racial profiling as the practice of using race as a proxy for criminality).

161. WEBSTER'S NEW WORLD DICTIONARY, *supra* note 159, at 1328.

162. See, e.g., DRIVING WHILE BLACK, *supra* note 11.

163. See generally *supra* note 30 and accompanying text.

164. See *supra* note 115.

165. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (indicating that the state laws of the time had the effect of keeping White children apart from Black children in the public school system).

166. See *supra* note 159 and accompanying text.

167. See *id.* at 494.

Thus, *Brown I* indicates that the Court was concerned with segregation that involved "making a distinction between" people. As a result, the constitutionality of racial profiling is suspect under an Equal Protection Clause analysis. In fact, when racial profiling segregation is compared to school segregation under the structure of the Equal Protection Clause, it is clear that racial profiling possesses the same unconstitutional characteristics of school segregation.

1. Similar Discriminatory Effects

The discriminatory effects found in racial profiling are almost identical to those in school segregation. First, like school segregation, racial profiling may cause "feelings of inferiority as to . . . status in the community."¹⁶⁸ Specifically, racial profiling could cause feelings of inferiority among certain people in the "law-abiding" community. The law of the United States presumes that every person is innocent until proven guilty,¹⁶⁹ and this presumption should have the effect of classifying all persons in the United States as law-abiding until proven otherwise. However, racial profiling nullifies this presumption by stereotyping certain races as non-law-abiding.¹⁷⁰ By using racial profiling, government agencies imply that certain races are basically a step up from the lowest status one can have in the United States—that of a criminal, or that they are inferior among the "law-abiding community."

Second, the *Brown I* Court believed that school segregation had the "tendency to [retard] the education and mental

168. See *Brown I*, 347 U.S. at 494.

169. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 531 (1979) (acknowledging the "premise that an individual is to be treated as innocent until proven guilty"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 616 (1976) (stating that "an accused is presumed innocent until proven guilty") (appendix to the opinion of Brennan, J., concurring); see also U.S. CONST. Amend. V ("No person shall . . . be deprived of life, liberty, or property, without the due process of law.")

170. See Steiner, *supra* note 33, at 450. The article discussed the implications of inferiority that racial profiling places upon racial minorities and stated:

[M]ore germane to our argument here, racially targeted criminal justice policies have made critical investments in whiteness. Racial targeting on the part of the criminal justice system, more specifically, erroneously reinforces racial and ethnic minority identities as "criminal" and "dangerous" at the same time that it erroneously reinforces white identity as "law-abiding" and "innocent." That is to say, although race and ethnicity are social and cultural constructions—as opposed to being biological determinants—they speciously become proxies for who is "criminal" and who is not, for who abuses illegal substances and who does not.

Id.

development of Negro children.”¹⁷¹ The exact meaning of the Court’s comment is unclear, but it seems the Court believed that a sense of inferiority affected “the motivation of a child to learn,” and that lack of motivation decelerated a child’s mental development.¹⁷² By this, the Court implied that the lack of motivation caused by segregation led to a child’s failure within the educational system.

Racial profiling may have a similar effect. For example, if certain races are separated into categories based on criminal likelihood, then the motivation of members of those races to avoid engaging in crime most likely diminishes.¹⁷³ If an individual is assumed to be a criminal on no other indicia than race, that individual’s motivation to defeat the notion may vanish, and the individual may feel there is no other viable option but to fall into the stereotype.

Finally, the *Brown I* Court felt that school segregation deprived Black students of several benefits they would otherwise receive in a racially desegregated school system.¹⁷⁴ Racial profiling also deprives affected persons of several benefits that they would otherwise receive in a racially (de)profiled criminal justice system. One such benefit is liberty. Racial profiling causes members of racial minorities to be disproportionately stopped and searched. Like the population as a whole, most members of racial minorities are law-abiding citizens, but because of racial profiling, many such individuals are being deprived of their liberty for no reason other than the color of their skin.¹⁷⁵

Another benefit eroded by racial profiling is the relationship between affected persons and law enforcement agencies. The use

171. See *Brown I*, 347 U.S. at 494.

172. *Id.* (citation omitted).

173. See, e.g., Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1358 (2001) (explaining the labeling theory as “the idea that the label of one as a deviant furthers one’s self-identification as a deviant”); Berit Winge, *Mandatory Sentencing Laws and Their Effect on Australia’s Indigenous Population*, 33 COLUM. HUM. RTS. L. REV. 693, 710-11 (2002) (describing some scholars’ concept of the “labeling theory,” which assumes that “[i]ndividuals stigmatized as delinquent become what they are said to be”) (quoting W. WILBANKS, *THE INSERTION/DIVERSION DECISION AT THE JUVENILE POLICE LEVEL 6-7* (1975)).

174. See *Brown I*, 347 U.S. at 494 (“Segregation with the sanction of law . . . has a tendency to deprive [Black children] of some of the benefits they would receive in a [racially] integrated school system.”).

175. See Rogers, *supra* note 47, at 94 (quoting Rep. John Conyers, Jr., D-Mich., as stating that “[r]ace-based traffic stops turn driving, one of our most ordinary and fundamentally American activities, into an experience fraught with danger and risk for people of color”).

of racial profiling has strained relationships with and confidence in law enforcement.¹⁷⁶ This strained relationship ostensibly deprives affected persons of resources that can increase their personal safety and deprives law enforcement agencies of important crime-preventing information. If individuals have a bad relationship with their law enforcement agencies, it is doubtful that they will go to those agencies with helpful information. Affected persons may at times even avoid law enforcement agencies when their own personal safety is in question.

However, just because racial profiling and school segregation have similar discriminatory effects does not mean that a court will find racial profiling unconstitutional. As previously indicated, discriminatory effect alone will not subject a claim of racial profiling to the strict scrutiny test. It must also be shown that the discriminatory effect was purposeful.¹⁷⁷

2. Dealing with Purposeful Discriminatory Effect in Racial Profiling Cases as it was Dealt with in the School Desegregation Cases

When the Court decided *Brown I* and *II*, school segregation was a publicly recognized, state-sanctioned practice.¹⁷⁸ There was no question of whether the segregation was purposeful.¹⁷⁹ In contrast, purposeful segregation was, at the time, absent in many of the desegregation cases following *Brown I* and *II*.¹⁸⁰ Regardless, the Court inferred a purposeful discriminatory effect from the historical background of school segregation.¹⁸¹ The Court was primarily concerned with the discriminatory effects of school segregation and how such harm could be remedied.¹⁸²

Today, most law enforcement agencies deny the existence of racial profiling policies.¹⁸³ Courts are reluctant to infer such policies from statistical evidence of discriminatory effect.¹⁸⁴

176. See *supra* note 75.

177. See *supra* notes 76-95 and accompanying text.

178. See generally *Brown I*, 347 U.S. at 486 n.1 (discussing segregated school cases arising in Kansas, South Carolina, Virginia, and Delaware).

179. See *id.*

180. See *supra* notes 126-155 and accompanying text (discussing the Court's focus on remedying school segregation with seemingly little emphasis on whether the segregated conditions were purposely maintained by the schools).

181. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

182. See *supra* notes 121-125 and accompanying text.

183. See *supra* note 89 and accompanying text.

184. See *supra* notes 85-95 and accompanying text.

Plaintiffs are unable to gather adequate statistical evidence because law enforcement agencies compile sub-par data or none at all.¹⁸⁵ Each of these factors has made a showing of purposeful discriminatory effect in racial profiling cases very difficult, if not impossible.

However, like school segregation, racial profiling has a historical background of purposeful discriminatory effect. The concept of racial profiling descended directly from the DEA “drug courier profile.”¹⁸⁶ It was the federally endorsed Operation Pipeline that aggressively championed the use of the “drug courier profile.”¹⁸⁷ It was the states’ participation in Operation Pipeline and other similar drug enforcement operations that employed racially biased enforcement techniques.¹⁸⁸ These techniques caused the arrest and incarceration rates for racial minorities to skyrocket.¹⁸⁹

Statistics indicate that racial minorities are disproportionately targeted for investigation of criminal conduct.¹⁹⁰ Confessions of law enforcement agents around the country have established the existence of racial profiling policies.¹⁹¹ Yet even in the face of such evidence, the courts remain reluctant to find purposeful discrimination unless it is shown that a law enforcement agency employs a policy of racial profiling.¹⁹²

The historical use of racial profiling has created lasting effects on individuals and communities.¹⁹³ The Court must view

185. See *supra* notes 93-95 and accompanying text.

186. See *supra* notes 29-34 and accompanying text (describing the evolution of racial profiling from the “drug courier profile”).

187. See *supra* notes 29-31 and accompanying text.

188. See *supra* note 30 and accompanying text.

189. See *supra* note 32 and accompanying text (evidencing the increase in the number of minorities incarcerated after implementation of the “drug courier profile”).

190. See *infra* notes 199-202 and accompanying text.

191. See Garrett, *supra* note 23, at 51 (noting the admission by New Jersey state police of the use of racial profiling).

192. See *supra* notes 85-95 and accompanying text.

193. See *Cross v. Baxter*, 604 F.2d 875, 881-82 (5th Cir. 1979). The court stated:

Since until the past decade there had been [purposeful] discrimination in many facets of Moultrie government, including voting for public office, the inference is strong that the disproportions in voter registration and elected officials are at least in part a result of the past pervasive discrimination in Moultrie. The district court found that there was no evidence supporting such an inference and concluded instead that it is equally likely that the reason for the disproportion in voter registration is that the “leaders in the black community” have failed “to ignite the patriotic fervor of their brothers.” This misallocated the burden of proof on the issue of present

the purposeful discrimination requirement in racial profiling cases as it did in the school desegregation cases. In the school desegregation cases, the plaintiffs presented no evidence of present purposeful discrimination, but the Court did not ignore the fact that school segregation was unremedied past discrimination.¹⁹⁴ The Court recognized the past intent and used it to satisfy the requisite showing of purposeful discriminatory effect. Like segregation, racial profiling has a long history of discrimination that should not be ignored by the Court, but should be used to satisfy the Court's requirement of purposeful discriminatory effect.

3. The Strict Scrutiny Test

If the Court were to adopt the approach taken in the school desegregation cases, it could then address the all-important question of whether racial profiling is "necessary to promote a compelling government interest."¹⁹⁵ The government interest in fighting crime and drugs will almost surely be considered compelling, so the issue rests solely on the question of the necessity of racial profiling.¹⁹⁶

Even though most law enforcement agencies currently deny practicing of racial profiling, it still receives considerable support for being an efficient and practical law enforcement technique.¹⁹⁷ If race accurately predicts an individual's propensity to commit crime, then the use of racial profiling in law enforcement would seem necessary. If, on the other hand, race does not accurately predict an individual's propensity to commit crime, racial profiling would seem to be an impractical and unnecessary crime prevention technique.¹⁹⁸

effects of past discrimination. Once plaintiffs have demonstrated a history of pervasive discrimination and a present disproportion in voting registration and election of minority representatives, they have carried their burden of proving that the past discrimination has present effects.

See id. at 881.

194. *See supra* note 107 and accompanying text.

195. *See Gross & Livingston, supra* note 16, at 1414 (discussing the new issues of racial profiling raised after the events of September 11, 2001, and questioning whether post-September 11 Department of Justice practices are nonetheless justified).

196. *See State v. Soto*, 734 A.2d 350, 361 (N.J. Super. Ct. Law Div. 1996) (stating that "[t]he eradication of illegal drugs from our State is an obviously worthy goal").

197. *See supra* notes 98-101 and accompanying text.

198. End Racial Profiling Act of 2001, S. 989, 107th Cong. § 2(a)(4) (2001) (finding that "racial profiling is not an effective means to uncover criminal activity"), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s989is.txt.pdf (last visited Oct. 12,

To the dismay of racial profiling supporters, race is not an accurate predictor of criminal likelihood. It is true that racial minorities are disproportionately represented in arrest and incarceration statistics,¹⁹⁹ but studies consistently indicate that race is not an accurate predictor of criminality. For example, a 2001 Department of Justice report found that members of minorities were more commonly stopped and searched than Whites, but less likely to be in possession of contraband.²⁰⁰ A 1999 study of the New Jersey Turnpike indicated that people of color constituted 40.6 percent of all stops made and 77.2 percent of all searches conducted.²⁰¹ The results of the searches produced contraband on 10.5 percent of White motorists and 13.5 percent of Black motorists.²⁰²

Since race fails to accurately predict an individual's criminality, it must follow that racial profiling is not necessary to promote the government's compelling interest of eradicating crime and illegal drugs. "The eradication of [crime and] illegal drugs . . . is an obviously worthy goal, but not at the expense of individual rights."²⁰³ Racial profiling violates the individual rights of racial minorities but fails to advance the war on crime and drugs. Racial profiling must be declared unconstitutional under the strict scrutiny test.

V. The Racial (De)Profiling Model

Once a court determines, through the previous analysis or on other grounds, that racial profiling is unconstitutional, its equitable powers to remedy the wrong are broad.²⁰⁴ While the courts are free to award anything from injunctive relief to damages, one approach is to replicate the design utilized in the

2003).

199. See *supra* note 100 and accompanying text.

200. See S. 989 at § 2(a)(5) (summarizing a 2001 Department of Justice report's findings that "although African-Americans and Hispanics were more likely to be stopped and searched, they were less likely to be in possession of contraband"). The Department of Justice's findings further indicated that "[o]n average, searches and seizures of African-American drivers yielded evidence only eight percent of the time, searches and seizures of Hispanic drivers yielded evidence only 10 percent of the time, and searches and seizures of White drivers yielded evidence 17 percent of the time." *Id.*

201. See RAMIREZ ET AL., *supra* note 34, at 7.

202. *Id.* at 7-8.

203. *State v. Soto*, 734 A.2d 350, 361 (N.J. Super. Ct. Law Div. 1996).

204. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad.").

desegregation cases. Specifically, courts should (1) confer upon federal, state, and local law enforcement agencies the affirmative duty to (de)profile, and (2) confer upon local courts the duty to enforce and evaluate the (de)profiling efforts of local law enforcement agencies.²⁰⁵

A. Duty to (De)Profile

As with the desegregation cases and the duty to desegregate, the Court should vest in all law enforcement agencies the duty to (de)profile. The duty to (de)profile would require these agencies to elucidate, assess, and solve the localized problems of racial profiling.²⁰⁶ It would also require agencies to develop and implement plans to ensure that race is not equated with criminality. Such plans should consist of race-neutral training, increased community involvement and cooperation, accurate data collection, status reports to the court, and appropriate statistical analysis.²⁰⁷ Finally, the duty to (de)profile would require law enforcement agencies to refrain from any action that unnecessarily endorses or increases the degree of racial disparity caused by racial profiling.²⁰⁸ Law enforcement agencies could then no longer justify law enforcement practices with arrest statistics that perpetuate circular justification for discriminatory law enforcement tactics.

Vesting law enforcement agencies with the duty to remedy racial profiling encourages law enforcement accountability. First, the plaintiff's burden of showing purposeful discriminatory effect would be absolved in subsequent litigation. Plaintiffs would only need to present evidence of discriminatory effect and the courts would infer purpose.²⁰⁹ The law enforcement agency would be left to account for the disproportionate statistics.²¹⁰ Second, in order to avoid litigation costs, law enforcement agencies would be forced to work with the communities. Third, law enforcement agencies would have to bear, or at least equitably spread, the costs of keeping adequate statistics. And, finally, law enforcement agencies would be forced to implement checks and balances on the

205. See *supra* notes 126-129 and accompanying text.

206. See *supra* notes 130-133 and accompanying text.

207. See Silton, *supra* note 94, at 83-86 (indicating various remedial actions that should be taken to eradicate racial profiling).

208. See *supra* note 131 and accompanying text.

209. See *supra* notes 147-151 and accompanying text (detailing how the Court's attention to discriminatory effects in the desegregation cases shifted the burden of proof to the defendant school board).

210. See *supra* notes 147-151 and accompanying text.

discretion of their agents.

B. Duty to Enforce Racial (De)Profiling

1. Judicial Oversight

In the desegregation cases, the courts maintained jurisdiction to monitor the “good faith implementation” of desegregation plans.²¹¹ Similarly, the courts should maintain jurisdiction and a watchful eye over the good faith implementation of racial (de)profiling plans. The courts should act as courts of equity, taking “into account the public interest”²¹² and eliminating any obstacles standing in the way of racial (de)profiling.²¹³ The goal of the judiciary should be to ensure the speedy implementation of (de)profiling plans while taking into account the complications inherent in racial (de)profiling.²¹⁴

In future racial profiling claims, the courts should be primarily concerned with evidence indicating discriminatory effect.²¹⁵ The courts should not be satisfied with facially neutral practices that do not achieve adequate results, as with the “freedom of choice” plans implemented in many of the school districts following *Brown I* and *II*.²¹⁶ Finally, the courts must ensure that it is the law enforcement agencies’ burden to show that a racial (de)profiling plan is effective once the plaintiff has shown discriminatory effect.²¹⁷

2. Determining Effectiveness

The Court does not need to require perfect symmetry between stop and arrest statistics and actual racial representation in society, but it is appropriate to use such parity as a starting point to determine effectiveness. As Justice Burger stated, “[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.”²¹⁸ But “[a]wareness

211. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (*Brown II*); see also *supra* notes 129-138 and accompanying text.

212. *Brown II*, 349 U.S. at 300.

213. See *supra* notes 134-138 and accompanying text.

214. See *Brown II*, 349 U.S. at 299; see also *supra* notes 130-138 and accompanying text (detailing the Supreme Court’s progressive displeasure with the progress of school desegregation).

215. See *supra* note 131 and accompanying text.

216. See *supra* notes 144-149 and accompanying text.

217. See *supra* notes 126-138, 145, 147, 150 and accompanying text.

218. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."²¹⁹ Therefore, courts should not expect to see perfect symmetry between criminal and population statistics, but rather adequate advancement toward such a result.

Courts should also look to the testimony of members of racial minorities within their respective jurisdictions when reviewing racial (de)profiling plans. Testimony, after all, was one of the most prominent methods of establishing the existence and severity of racial profiling.²²⁰ Additionally, attitude surveys are proper evaluation tools for measuring the effects of racial (de)profiling plans.²²¹ Finally, the courts should retain jurisdiction over racial (de)profiling plans for whatever time is necessary.

Conclusion

Racial profiling is another form of segregation that, when compared to school segregation, must be declared unconstitutional and remedied. No longer should courts turn a blind eye to the fact that racial profiling is a state-sanctioned policy that has continued to perpetuate inequality in the United States criminal justice system. Other remedies, such as legislation and consent decrees, have been slow to remedy racial profiling, but judicial involvement could be a catalyst for racially neutral law enforcement. Racial profiling has existed much too long, resulting in serious detrimental effects to communities and to individual liberty. The time has come to impose upon law enforcement agencies the requirement of non-discrimination in suspicion of criminality. The school desegregation cases waged a steadfast campaign against segregation in public schools, and now the Court must combat racial profiling with a similar strategy: racial (de)profiling.

219. *Id.*

220. See *supra* note 95 and accompanying text (indicating the importance of law enforcement agent testimony).

221. See RAMIREZ ET AL., *supra* note 34, at 4 (providing an example of an attitude survey providing data on the attitudes of members of racial minorities and its correlation with racial profiling).