Remedying Racial Profiling under the Fourteenth Amendment by Analogizing *Batson v. Kentucky* and *State v. Soto*

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Abstract

This article focuses on the legal remedy for racial profiling under the Fourteenth Amendment in the U.S. There have been numerous examples of disparate treatment of racial minorities in the very first stage of the criminal process. However, the *Whren* Court foreclosed relief against racial profiling under the Fourth Amendment by ignoring the effects of racial motivation and by declaring that the subject of racial motivation is irrelevant to Fourth Amendment analysis. Even though the *Whren* Court suggested that the Equal Protection Clause is a more appropriate avenue to challenge racial profiling, courts have rarely upheld claims against racial profiling supported by claimants' statistical evidence. Therefore, this Article proposes that the Court sustain the use of statistical evidence in proving discriminatory intent in racial profiling claims by analogizing the rationale in Soto where the New Jersey Superior Court supported statistical evidence in proving discriminatory intent of governmental entities. This Article additionally analyzes Batson and suggests that the Court should establish a three-part inquiry to prove discriminatory intent in racial profiling claims, as the Batson Court did in cases where a prosecutor was racially motivated to preempt jurors from a jury panel.

Keywords

Racial Profiling, Fourteenth Amendment, *Whren v. United States, Batson v. Kentucky, State v. Soto.*

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INTRODUCTION

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A Constitutional promise to treat all "similarly situated" individuals equally is one of the essential values of the United States since the adoption of the Fourteenth Amendment.[1] However, certain groups of people have been deprived of their rights, which were taken for granted by the rest of the society, due to their race.[2] Not surprisingly, some deprivations were justified by the legal system, which had created and enforced legal definitions of racial identities. Just because of their ethnic backgrounds, racial minorities were denied citizenship, the right to vote, and the right to hold property.[3] Minorities were also limited in their ability to testify against whites, as well as to be on juries.[4] Today, due to the hard-fought civil rights movement and some landmark Supreme Court decisions, such as *Brown v. Board of Education*, race is no longer considered a legitimate basis for legal discrimination.[5] However, as Justice O'Connor stated, in *Adarand Constructors v. Pena,* that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality,"[6] there have been still lingering effects of the past invidious discrimination, not just in our criminal justice system but also overall society.[7]

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1) See also Plyler v. Doe, 457 U.S. 202, 216 (1982) (holding that "[t]he Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike").

2) *See* Sylvia R. Lazos Vargas, *Deconstructing homogeneous Americanus: the white ethnic immigrant narrative and its exclusionary effect*, 72 Tul. L. Rev. 1493, 1495 (1998) (arguing that in our history, constitutional discourse excluded from the polity distinct groups that did not fit the homogeneity assumption) [hereinafter Vargas, *Deconstructing homogeneous*]; April L. Cherry, *Social Contract Theory, Welfare Reform, Race and the Male Sex-Right*, 75 Ore. L. Rev. 1037, 1040 (1996) (criticizing welfare reform because it targets African American women); Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination,* 86 Va. L. Rev. 727 (2000) (pointing out that the Philadelphia bar association required a mandatory photograph of applicants and bar examinees, and no nonwhites were admitted between 1933 and 1943).

3) *See* Vargas, *Deconstructing homogeneous, supra* note 2, at 1495.

4) *See id.*

5) See 347 U.S. 483, 495 (1954) (holding that separate educational facilities under the doctrine of 'separate but equal' are inherently unequal; therefore, "the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment").

6) 515 U.S. 200, 237 (1995); *see also Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2433 (2013) (stating that "government actors, including state universities, need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality'").

7) *See, e.g.,* William M. Carter, *A Thirteenth Amendment Framework for Combating Racial*

These lingering effects can be found in every stage of criminal justice system from law enforcement to sentencing in courts.[8] Particularly, the disparate treatment of racial minorities in the system begins at the very first stage when law enforcement officers exercise investigatory stops of suspects under *Terry v. Ohio*.[9] Although the Fourth Amendment requires law enforcement officers to have probable cause to arrest suspects, under *Terry,* they are allowed to stop, investigate, or question a suspect with the less stringent requirement of reasonable suspicion.[10] However, law enforcement officers sometimes abuse this less stringent requirement to disproportionately target racial minorities, and minorities are subsequently charged, convicted, and incarcerated disproportionate to their demographic makeup in our society.[11][12]

As a result, there have been numerous cases in which minority defendants claimed that police officers unjustifiably and illegitimately used race to stop, search, and arrest them with an impermissible assumption that minorities are prone to commit crimes.[13] For example, in *Chavez,* a group of African

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Profiling, 39 Harv. C.R.-C.L. L. Rev. 17, 20 (1999) [hereinafter Carter, *A Thirteenth Amendment*]. Professor William Carter has a more drastic view that "widespread stigmatization of African Americans as predisposed toward criminality is a lingering vestige of the slave system;" therefore, racial profiling should be subjected to and outlawed by the Thirteenth Amendment.

8) The Sentencing Project, *Reducing disparity in the criminal justice system: A manual for practitioners and policy makers* (2008), *available at* http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf [hereinafter The Sentencing, *Reducing disparity*].

9) *See* 392 U.S. 1, 30 (1968).

10) *See id.* at 30-31.

11) For example, considering New York City's demographic proportion, the number of people stopped by police disproportionately represents their racial group. African Americans are 23% of the City population, but represent 53.3% of all the police stop whereas whites make up 33% and Asian/Pacific Islander 15% of the City, but they, combined, represent only 15.7% of the total stops. *See* Delores Jones-Brown, Jaspreet Gill & Jennifer Trone, S*top, question, and frisk policing practices in New York City: A premier* (2003), *available at* http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf [hereinafter Brown, *New York City*].

12) However, law enforcement officers justify their use of racial profiling based on statistical grounds by citing particular racial groups commit disproportionate number of crimes. *See* Jim Cleary, *Racial Profiling Studies in Law Enforcement: Issues and Methodology* (2000), *available at* http://www.house.leg.state.mn.us/hrd/pubs/raceprof.pdf [hereinafter Cleary, *Issues and Methodology*]. *But see* David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection,* 66 L. & Contemp. Probs. 71, 81-82 (2003). Professor David Harris countered such law enforcement officer's arguments by pointing out that the use of race as one among many factors in arrests leads to an overall higher arrest rate for African Americans but a lower yield rate in terms of detecting wrongdoing.

13) *See also* The Sentencing, *Reducing disparity, supra* note 8, at 2. ("Thirty-eight percent of prison and jail inmates are African American, compared to their 13% percent share of the overall population. Latinos constitute 19% of the prison and jail population compared to their 15% share of the population. A black male born in 2001 has a 32% chance of spending time

American and Hispanic motorists claimed state police officers illegitimately targeted them for highway drug searches.[14] Also, in *Oneonta,* African American residents of Oneonta, a white-dominant town, claimed that their Equal Protection rights were violated when police officers attempted to locate and question all African American males based on the description of a crime suspect.[15] Critics argue that, despite these continuous claims of racial minorities, courts have "approached claims of police abuse with skepticism and occasionally flagrant disregard for the experience of minority victims."[16] Critics vehemently denounce that regardless of whether racial profiling is legally valid or not, racial minorities would rationally perceive that they are treated unfairly, and this adversely affects not only entire racial groups but also the criminal justice system itself.[17]

Nevertheless, the Supreme Court, in *Whren v. United States*, seems not to endorse racial minorities' claims that law enforcement officers unjustifiably and illegitimately used race to stop, search, and arrest minorities.[18] In *Whren,* the Court held that in determining whether a police stop is constitutional under the Fourth Amendment, a law enforcement officer's motivation for stopping a driver is irrelevant, even though the stop might have been based on the driver's race, as long as the officer has a probable cause to believe a traffic violation has occurred.[19] The Court reasoned that the temporary detention of a motorist whom a police officer have a probable cause to believe has committed a civil traffic violation is consistent with the Fourth Amendment's prohibition against unreasonable seizures, regardless of whether a reasonable officer would have

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in prison at some point in his life, a Hispanic male has a 17% chance, and a white male has a 6% chance.").

14) *See Chavez v. Ill. State Police*, 27 F.Supp.2d 1053, 1061-62 (N.D. Ill. 1998).

15) *See Brown v. City of Oneonta*, 221 F.3d 329, 334 (2d Cir. N.Y.2000).

16) *See* Peter A. Lyle, *Racial Profiling and the Fourth Amendment: Applying the Minority Victim Perspective to Ensure Equal Protection Under the Law,* 21 B.C. Third World L.J. 243, 246-47 (2001) [hereinafter Lyle, *Applying the Minority*].

17) *See* Kami Chavis Simmons, *Beginning to end racial profiling: definitive solution to an elusive problem,*18 Wash. & Lee J. Civil Rts. & Soc. Just. 25, 41-42 (2011); *see also* Randall L. Kennedy, Race, crime, and the law 159 (1st ed. 1997) [hereinafter Kennedy, *Race*]. Professor Randall Kennedy points out that racial profiling imposes "racial tax" on the targeted racial groups because racial minorities are more likely to be stopped and arrested for the war against drugs and illegal immigration whereas other racial groups, particularly whites, easily escape.

18) *See* 517 U.S. 806, 812-13 (1996) (stating that "a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search,' and that a lawful post arrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches").

19) *See id.* at 806.

been motivated to stop the vehicle by a desire to enforce the traffic law.[20] It ultimately held that "the constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved," and "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[21]

In *Whren*, even though the Court foreclosed relief under the Fourth Amendment, the Court suggested the Equal Protection Clause under the Fourteenth Amendment as a more appropriate avenue for challenges of racial profiling.[22] The *Whren* Court made clear that "the Constitution prohibits selective enforcement of the law based on considerations such as race," but "the constitutional basis for objecting to intentionally discriminatory application of law is the Equal Protection Clause, not the Fourth Amendment."[23] However, even under the Equal Protection analysis, the Court has never upheld any challenge against racial profiling, and it is not promising for the Court to uphold such challenge, due to the heavy burdens imposed on challengers under *Washington v. Davis*[24] and, particularly, *McCleskey v. Kemp*.[25] Under these cases, the Court requires an Equal Protection challenger to prove not only discriminatory impact but also discriminatory intent of governmental entities; however, the Court has set an almost insurmountable standard of proving discriminatory intent by not sustaining statistical evidence, which is one of a few practical and objective evidence to prove discriminatory intent.[26]

Therefore, this Article maintains that the Court should implement an alternative means of protecting racial minorities from illegitimate investigatory stops by sustaining statistical evidence in proving discriminatory intent in racial profiling claims and lowering or shifting the burden of challengers. In particular, this Article argues that the Court should analogize the rationale in *Batson* and the New Jersey Superior Court decision, *Soto,* when the Court to decide whether

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20) *See id.*

21) *See id.*

22) *See id.* at 813; *see also* Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. Rev 263, 280-82 (2008) [hereinafter Whitney, *The Statistical Evidence*].

23) *See Whren*, 517 U.S. at 813.

24) 426 U.S. 229, 270 (1976).

25) 481 U.S. 279, 367 (1987).

26) *See* Whitney, *The Statistical Evidence, supra* note 22, at 282.

a racial profiling challenger can demonstrate an equal protection violation due to the prosecutor's racially motivated actions because these two cases combined provide a guideline for the type of statistical evidence sufficient to demonstrate discriminatory intent and lowering burden of challengers in proving such an intent.[27][28]

Part I examines the constitutional origin, definition, and detrimental impact of racial profiling. Although powers authorized to law enforcement officers under *Terry* seems to be legitimate and racially neutral, the Court and law enforcement officers have expanded and interpreted the original meaning of *Terry*, as well as the definition of racial profiling, to their own advantage or for the purpose of crime control at the expense of detrimental impact on racial minorities. Part II analyzes the Supreme Court's current Equal Protection analysis for racial discrimination claims, including racial profiling, and its inadequacy to protect racial minorities from the illegitimate stop-and-frisk policy. Particularly, Part II addresses that Court imposes a heavy burden on minority claimants to prove discriminatory intent of law enforcement officers by not sustaining statistical evidence of supporting such intent under *McCleskey*. Part III suggests that the Court sustain the use of statistical evidence in proving discriminatory intent in racial profiling claims by analogizing the rationale in *Soto* where the New Jersey Superior Court supported statistical evidence in proving discriminatory intent. Also, Part III analyzes *Batson* and suggests that the Court should establish a three-part inquiry to prove discriminatory intent in racial profiling claims, as the *Batson* Court did in cases where a prosecutor was racially motivated to preempt jurors from a jury panel.

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27) See id.

28) *See Batson v. Kentucky*, 476 U.S. 79, 115 (1986); *State v. Soto*, 734 A. 2d 350, 360-61 (N.J. Super. Ct. Law Div. 1996).

BACKGROUND: CONSTITUTIONAL ORIGIN, DEFINITION, AND DETRIMENTAL IMPACT OF RACIAL PROFILING

Racial Profiling as an Illegitimate Exercise of *Terry* Stop[29)]

The fundamental purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials; therefore, "particularly describing the place to be searched, and the persons or things to be seized" is the requirement for reasonable searches and seizures.[30)] However, in *Terry*, the Court authorized a police officer to detain a person briefly, to investigate, and to question a person without probable cause.[31)] Even though a police officer is allowed to stop and frisk a person upon the less stringent requirement, a reasonable suspicion of criminal activity, the Court emphasized that a search for weapons in the absence of probable cause to arrest must "be strictly circumscribed by the exigencies which justify its initiation."[32)] The Court lowered the threshold for probable cause in a limited circumstance only where the law enforcement officer "has reason to believe that he [or she] is dealing with an armed and dangerous individual."[33)]

However, since *Terry,* the Court has expanded the original meaning of *Terry* standard, particularly with regard to the definition of reasonable suspicion of criminal activity and factors that may be considered in determining on the presence of such reasonableness.[34)] For example, in *Illinois v. Wardlow,* the Court found that a police officer is authorized to stop and frisk a person even

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29) This arguably illegitimate practice of investigatory police activity has been described as "driving while black." David, A. Harris, *"Driving while black" and all other traffic offenses: the Supreme Court and pretextual traffic stops,* 87 J. Crim. L. & Criminology 544, *546* (1997).

30) *See* U.S. Const. amend. IV; *see generally* Haley Plourde-Cole, *Back to Katz: Reasonable Expectation of Privacy in the Facebook Age,* 38 Fordham Urb. L.J. 571, 626 (2010) ("the Fourth amendment essentially functions as a procedural requirement; rather than prohibiting searches and seizures all together, it requires that law enforcement obtain a warrant based on probable cause. The historical judgment encapsulated by the Fourth Amendment was that unlimited discretion among those with investigatory and prosecutorial duties would produce pressure to overlook potential invasions of privacy").

31) *See Terry*, 392 U.S. at 10.

32) *See id.* at 25-26.

33) *See id.* at 10. The *Terry* court also stated that "whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27.

34) *See also Illinois v. Wardlow* 528 U.S. 119, 121 (2000).

without reasonable fear for his own or others' safety when the person fled upon seeing the officer patrolling an area known for heavy narcotics trafficking.[35] The Court found that reasonable suspicion must be determined on commonsense judgments under the totality of circumstances, and the officer is justified in stopping and frisking based on the person's "presence in an area of heavy narcotics trafficking" and "his unprovoked flight upon noticing the police."[36] This tendency to expand the boundary of reasonable suspicion by additionally taking other factors into account seems to be a digression from the original rationale for lowering the threshold for probable cause, which is the protection of officers' safety. The Court has also acquiesced to such expansion of meaning of reasonable suspicion by overlooking the outcries of racial minorities at the expense of effective crime prevention and detection.[37]

Controversies over the Legality of Racial Profiling Based on Its Definitions

Considering that the constitutionality of a specific stop-and-frisk practice has been decided on whether the contested practice is within the boundary of reasonable suspicion, the constitutionality of racial profiling depends on whether race can be a legitimate stimulus for a law enforcement officer to have reasonable suspicion. Some scholars and courts have differentiated legitimate use of race from illegitimate use and supported the law enforcement to make a legitimate use of race in criminal investigation.[38] Then, the question would be to

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35) *See id.*

36) *See id. at 124, 128, 136.*

37) This was what Justice Douglas was concern in his dissenting opinion in Terry. He argued that "[t]here have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country." *Id.* at 39.

38) For example, Professor Bernard Harcourt argues that if "racial profiling reduces the profiled crime, then, as between different policing techniques, racial profiling is preferable only if it represents a more efficient allocation of resources." In this case, racial profiling would increase the efficiency of policing if it produces higher overall rates of detection of a certain type of crime, such as drug contraband. However, if racial profiling produce an adverse effect on the profiled population, law enforcement officers should not exercise racial profiling. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*,71 U. Chi. L. Rev. 1275, 1279-80 (2004) [hereinafter Harcourt, *Rethinking Racial Profiling*]; *see also* Kimani Paul-Emile, *The Regulation of Race in Science*, 80 Geo. Wash. L. Rev. 1115,1156 (2012) ("although racial profiling by law enforcement has been broadly condemned as illegitimate and constitutionally

what extent police officers are allowed to use race in their criminal investigations. The definition of racial profiling partially suggests the possible answer for legitimacy of use of race for reasonable suspicion.

Racial profiling is defined in more than a single meaning, depending on its scope or dominant purpose of it.[39] Under the narrow definition, racial profiling occurs when a police officer stops, questions, arrests, or searches a person "*solely* on the basis of the person's race or ethnicity."[40] Law enforcement officers maintain that it is extremely rare case that officers stop and subsequently investigate a person *solely* based on race and ethnicity; therefore, they can speak out that such a profiling no longer exists in their practice.[41] Critics, on the other hand, point out that racial discrimination, as the most invidious form of unreasonableness and unlawfulness, still exists in our criminal justice system.[42]

However, law enforcement officers argue that even if they might use race in their criminal investigations, their investigations are not *solely* based on race, but other racially neutral factors; thus, their use of race cannot be deemed racial profiling under the narrow definition of racial profiling.[43] The Supreme Court also assumingly endorses law enforcement officers' argument based on the narrow definition of racial profiling in *Whren* and other subsequent cases by not considering actual and subject motivations of individual officers as long as officers have racially neutral reasons to stop persons, such as civil traffic violations.[44]

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suspect, courts have uniformly accepted the practice of identifying criminal suspects based upon their race"); *see, e.g., United States v. Waldon*, 206 F.3d 597, 604 (6th Cir. 2000) (holding that police may consider race in stopping a person if a criminal suspect's description includes a racial identification); *Buffkins v. City of Omaha*, 922 F.2d 465, 467-68 (8th Cir. 1990) (holding that the detention of a black woman at an airport did not amount to tip, which was only that "a black person or persons arriving on a flight from Denver" would be carrying cocaine).

39) *See* Cleary, *Issues and Methodology, supra* note 12, at 5-6.

40) *See id.* at 5.

41) *See id.* at 9. *But see* Harcourt, *Rethinking Racial Profiling, supra* note 38, at 1340. Professor Bernard Harcourt argues that race alone should be used as a factor to satisfy reasonable suspicion if necessary. He also points out that "under some rare or unique circumstances, race may be such a strong predictor of criminality that it raises justifiable suspicion. If race alone predicts a form of criminality to the satisfaction of a Fourth Amendment level of suspicion, it should be evaluated like any other predictive factor rather than being per se impermissible."

42) *See* Cleary, *Issues and Methodology, supra* note 12, at 9.

43) *See id.* at 10.

44) *See Whren*, 517 U.S. at 810-11; *see also Ashcroft v. al-Kidd,* 131 S. Ct. 2074, 2082 (2011) (upholding Whren by indicating that "Our unanimous opinion held that we would not look behind an objectively reasonable traffic stop to determine whether racial profiling or a desire

Peter Lyle argues that the *Whren* Court seems to assume that racism and prejudice have been abolished, and police officers, criminals, and even victims are unbiased rational actors devoid of prejudice or racial stereotype.[45] Unfortunately, this ideal and theoretical world is not what our society looks like in the reality of life.[46] "Too often, courts turn a blind eye to the biased motivations of police officers and the mixed feelings of fear, anger, and powerlessness that innocent minorities experience when subjected to police searches."[47] Similarly, professor Anthony Thompson contends that "[i]f police officers target people of color for searches and seizures, this is precisely the kind of abuse of search and seizure powers that the Framers of the Fourth Amendment sought to prevent."[48]

On the other hand, under the broader definition, racial profiling occurs when police officers consider a person's race or ethnicity as one of factors in deciding how they should exercise the discretionary power under *Terry*.[49] Police officers rely on this broader definition to justify their controversial policy by demonstrating that race or ethnicity is just one factor rooted in *statistical reality*, not racism, like other factors, such as age, time, and location.[50] The Court has authorized the use of race as a factor for reasonable suspicion in several cases.[51]

However, this partial use of race cannot be always justified just because other racially neutral factors are considered. As it sounds, reasonableness itself is elusive and cannot be defined with clear boundaries; therefore, this malleable

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to investigate other potential crimes was the real motive").

45) *See* Lyle, *Applying the Minority, supra* note 16, at 257 (quoting Thompson, *Stopping the Usual Suspects, supra* note 51, at 991).

46) *See id.*

47) *See id.*

48) *See id.* at 257-58 (quoting Thompson, *Stopping the Usual Suspects, supra* note 51, at 998).

49) *See* Cleary, *Issues and Methodology, supra* note 12, at 6.

50) Law enforcement officers justify their use of racial profiling based on statistical grounds by citing particular racial groups commit disproportionate number of crimes. *See* Cleary, *Issues and Methodology, supra* note 12, at 10.

51) See e.g. *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (permitting discretion to use "apparent Mexican ancestry" as an indicia of suspicion); *United States v. Brignoni-Ponce,* 422 U.S. 873, 886-87 (1975) ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor … ."); *see also*, Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U.L. Rev. 956, 978 (1999) [hereinafter Thompson, *Stopping the Usual Suspects*] ("If, on the other hand, the police or prosecution sought to make express use of race as one of the considerations supporting a search or seizure, the Court would directly address the subject of race and, if the Court deemed it appropriate, approve the practice").

reasonableness standard gives enormous discretion to the police and results in expansion of police powers and diminishment of individual freedom.[52] The expansion of discretion is one thing, but the real issue is that the police abuse or misuse their discretion to target the disfavored group, racial minorities.[53] As Justice O'Connor argues, in her dissenting opinion in *Atwater v. City of Lago Vista,* that "as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual," more police officers exercise their discretion resting on inappropriate racial or ethnic factors to target racial minorities.[54]

Detrimental Impact of Racial Profiling on Society

Whatever the definition of racial profiling is, whether race is solely based or considered just as a factor in police investigation, the police use both definitions to justify their practice of stop-and-frisk policy. Even if the argument of the police that racial profiling, solely based on race, no longer exists in practice and, even if they use race, they consider race as a factor is found true, there have been substantial number of social and legal studies on the detrimental effect of stop-and-frisk policy on racial minorities.[55] Professor Randall Kennedy points out that even though some degree of racial discrimination by police may be rational,

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52) Tracey Maclin, *Terry and Race: Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 St. John's L. Rev. 1271, 1278 (1998).

53) For example, in *United States v. Harvey*, a police officer testified that if occupants of car he stopped had not been African-Americans, he would not have stopped the car. He also added that the basis for your stopping that car were age of the vehicle and the appearance of the occupants, but "Almost every time that we have arrested drug traffickers from Detroit, they're usually young black males driving old cars." His testimony shows how police officers have abused their discretions to target racial minorities. *See* 16 F.3d 109, 113-14 (1994); *see also* Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001, 2005-09 (1998) (arguing that traffic stops are often pretextual to investigate other crimes and are based on race); Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests,* 69 U. Colo. L. Rev. 693, 693-94 (1998) (denouncing pretextual traffic stops and criticizing judicial approach to the subject).

54) *See* 532 U.S. 318, 372 (2001). Justice O'Connor also added that even though "an officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop" under *Whren,* it must be vigilantly ensured "that officers' post stop actions -- which are properly within our reach -- comport with the Fourth Amendment's guarantee of reasonableness." *See id.* at 372; *see also* Milton Heumann and Lance Cassak, *Profiles in Justice? Police Discretion, Symbolic Assailants, and Stereotyping,* 53 Rutgers L. Rev. 911, 934 (2001) ("As we have seen regarding the latter with regard to profiling, there is a fine line between laudable exercise of discretion by experienced police affairs, and the exercise of discretion resting on inappropriate racial or ethnic factors").

55) *See* Kennedy, *Race, supra* note 17, at 145; *see also* Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War,* 56 Stan. L. Rev. 571, 594-98 (2003) [hereinafter Banks, *Beyond Profiling*].

permitting any form of discrimination sends the wrong message to law enforcement officers and the general public.[56]

First, racial profiling, as 'a badge or incident of slavery,' stigmatizes and dehumanize racial minorities, particularly African Americans, given their history of enduring legally enforced and officially sanctioned enslavement, apartheid and mistreatment.[57] The stigma, an association of blackness with criminality, remains one that "African Americans cannot escape, regardless of their individual circumstances," and racial profiling "denies the essential humanity and individuality of those subjected to it."[58] It is also critical to understand "the injuries caused by racial profiling are suffered regardless of whether the person singled out is actually engaged in criminal activity" because racial profiling carries feelings of victimization, powerlessness and being subjected to control.[59]

Moreover, disproportionate exercise of stop-and-frisk policy in the stage of law enforcement substantially affects the subsequent stages of criminal system, resulting in higher rates of arrest and incarceration rates.[60] The disproportionate incarceration imposes especially harmful social, economic, and political consequences on racial minority communities.[61] As a result of incarceration, the

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56) *See* Kennedy, *Race, supra* note 17, at 145.

57) The reason why Professor William Carter refers as racial profiling to "a badge or incident of slavery" is that "racial profiling is a modern manifestation of the historical presumption, still lingering from slavery, that African Americans are congenital criminals rightfully subject to constant suspicion because of their skin color." *See* Carter, *A Thirteenth Amendment, supra* note 7, at 56-57.

58) *See* Carter, *A Thirteenth Amendment, supra* note 7, at 24.

59) *See id.* at 26; *see also* Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 Law & Soc'y Rev. 129, 131-33 (2000). Ronald Weitzer conducted In-depth interviews were in the years 1996-1997 with 169 residents of two predominantly African American neighborhoods and a predominantly white neighborhood in Washington, D.C. He found that twice as many blacks (54%) as whites (27%) believed that race made a difference in how a person is treated by police. Of those who thought it made a difference, "blacks were more likely than whites to say that blacks were treated rudely or 'picked on more,' and three times more likely (45% and 15%, respectively) to believe that blacks were subjected to police brutality." *Id.*

60) *See* Brown, *New York City, supra* note 11, at 17 (They compared outcomes from Blacks and Hispanics stops with the outcomes of stops involving Whites. Proportionally, the outcomes for Whites. Whites who comprise the smallest number of persons stopped, are strikingly similar to those for Blacks and Hispanics (combined) who are stopped in much higher numbers. They also found that 5.50% of all Whites stopped in 2008 were arrested as compared to 6.07% of Blacks and Hispanics. While in 2008, the percentage of Whites arrested following stops was lower than the percentage of Blacks and Hispanics combined); *See also* Jeffrey Fagan & Garth Davies, *Street stops and broken windows: Terry, race, and disorder in New York City,* 28 Fordham Urb. L.J. 457, 457-504 (2000) ("The ratio of 9.5 stops of black citizens for each arrest made was 20% higher than the 7.9 ratio for whites. Such higher stop-arrest ratios suggest either that stops for blacks were pretextual and largely unfounded, or that police were less discriminating or skillful in assessing 'suspicion' for minority citizens").

families of inmates lose the social and economic support, and the racial minority community stability is impaired both "by the loss of so many adults and, paradoxically, by their reentry into the community after having endured the conditions of prison."[62] Also, widespread incarcerations reinforce a sense of racial injustice of racial minorities who are aware of the long history of invidious racial discrimination by governmental officers.[63] This perception of injustice among racial minorities "diminish[es] a group's respect for the law and willingness to obey it" and is "a cost that should be incorporated into the policy calculus," as well as court decision.[64]

INADEQUACY OF THE FOURTEENTH AMENDMENT TO REMEDY RACIAL PROFILING

Even though racial profiling is based on an impermissible abuse police's discretion and adversely affects not only an individual racial minority but also the minority community as a whole, the *Whren* Court foreclosed relief against racial profiling under the Fourth Amendment.[65] Instead, the Court suggested that the Equal Protection Clause is a more appropriate avenue to challenge racial profiling because it is an intentionally discriminatory application of laws by government officers.[66] However, even under the Equal Protection Clause, it is not promising for challengers against racial profiling to successfully convince the Court that their rights under the Clause are infringed by the illegitimate exercise of the stop-and-frisk practice.

Equal Protection Analysis Frame under Current Laws

In *Davis,* the Supreme Court established the Equal Protection analysis for racial discrimination.[67] The Court held that "our cases have not embraced the

61) *See* Banks, *Beyond Profiling supra* note 55, at 596.

62) *See id.* at 596-597 ("because imprisonment often results in loss of the right to vote even after release, a high rate of imprisonment will substantially diminish a group's political power, including its ability to influence the laws that disenfranchise so many of its members").

63) *See id.* at 597.

64) *See id.* at 598.

65) *See Whren*, 517 U.S. at 809-10.

66) *See id.* at 813.

67) *Washington. v. Davis*, 426 U.S. 229, 239 (1976).

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."[68] Thus, to succeed on a claim of racial discrimination, a claimant must prove not only discriminatory impact, but also discriminatory intent. In a claim against racial profiling, a claimant must show not only a law enforcement officer's stop-and-frisk practice has a disparate impact on the claimant's racial group but also such practice constitutes an intentional pattern of discrimination.[69]

Insurmountable Bar to Prove Discriminatory Intent under Current Laws

To prove discriminatory impact, racial profiling claimants are required to provide evidence that "they were treated differently than similarly situated persons of another race who were not stopped by law enforcement officers."[70] However, "[i]t is virtually impossible to identify a 'similarly situated' individual who was not stopped. The person cannot be identified at all, nor is there any recorded information from which one can compare whether the motorists presented similar factors to an observing officer, such that there has been disparate treatment or not."[71] Instead, claimants usually must resort statistical evidence designed to show that members of their racial group were stopped disproportionately to their percentage in the population, and courts typically found that such statistical evidence is sufficient to demonstrate the discriminatory

68) *See id.* at 239.

69) *See* Whitney, *The Statistical Evidence, supra* note 22, at 282.

70) *See* Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 Geo. Mason U. Civ. Rts. L.J. 219, 237-38 (2005); *see, e.g., United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("The claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.' To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted"); *Chavez*, 27 F.Supp.2d at 636 ("To prove discriminatory effect, the plaintiffs are required to show that they are members of a protected class, that they are otherwise similarly situated to members of the unprotected class, and that plaintiffs were treated differently from members of the unprotected class").

71) *See United States v. Mesa-Roche*, 288 F. Supp. 2d 1172, 1187 (D. Kan.2003). *But see* Whitney, *The Statistical Evidence, supra* note 22, at 275-76 (Several states enacted statutes, which require data collection on the characteristics of all drivers stopped for alleged traffic violations by state law enforcement officers. "The data recorded include the number of routine stops, the race and age of individual stopped, the alleged traffic infraction committed, whether a search was conducted, the rationale for a search, whether contraband was found, whether a warning or citation was issued as a result of the stop, and whether an arrest was made following the stop.").

impact.[72]

On the other hand, with respect to the discriminatory intent, courts generally conclude that "racial profiling does not raise equal protection problems unless a person's race was the *sole* reason she was singled out for suspicion."[73] Unlike the discriminatory impact, the "nearly insurmountable discriminatory intent requirement essentially operates a complete bar, making equal protection claims [against] racial profiling virtually illusory."[74] Generally, claimants attempt to prove a discriminatory intent by "rely[ing] 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."[75] However, courts rarely uphold claims against racial discrimination supported by claimants' statistical evidence because "[s]tatistical data, by itself, can support an inference of discrimination, but must be coupled with additional evidence to permit a finding of discriminatory intent."[76]

For instance, the Supreme Court ruling in *McCleskey* illustrated the stringent bar to using statistical evidence to prove discriminatory purpose.[77] In *McCleskey,* an African American defendant claimed that his death sentence was decided

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72) *See* Whitney, *The Statistical Evidence, supra* note 22, at 283; *see, e.g., United States v. Duque-Nava,* 315 F. Supp. 2d 1144, 1153-63 (D. Kan. 2004) (finding that statistical evidence of officers stopping Hispanic and black drivers more frequently than white drivers who committed similar traffic violations was sufficient to allege discriminatory effect but not intent); *United States v. Barlow*, 310 F.3d 1007, 1011 (7th Cir. 2002); *Chavez,* 251 F.3d at 640; *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1155-56 (D. Kan. 2004); *United States v. Alcaraz-Arellano,* 302 F. Supp. 2d 1217, 1226 (D. Kan. 2004); *United States v. Parada*, 289 F. Supp. 2d 1291, 1305 (D. Kan. 2003); *United States v. Mesa-Roche*, 288 F. Supp. 2d 1172, 1187-88 (D. Kan. 2003).

73) *See* Carter, *A Thirteenth Amendment, supra* note 7, at 37; *see, e.g., United States v. Travis,* 62 F.3d 170, 173-74 (6th Cir. 1995) ("We have no need to reach [the question of whether the exclusionary rule applies to Fourteenth Amendment violations] because the detectives in this case did not choose to interview the defendant solely because of her race."); *Ford v. Wilson*, 90 F.3d 245, 248-49 (7th Cir. 1996) (affirming grant of summary judgment in favor of the defendant officer because the plaintiff could not point to evidence showing that the officer's sole motivation in making the stop was the plaintiff's race). However, the Supreme Court held that, in a housing discrimination case, the Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes." *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

74) *See* Whitney, *The Statistical Evidence, supra* note 22, at 282.

75) *See* Jeremiah Wagner, *Racial (De)Profiling: Modeling A Remedy For Racial Profiling After the School Desegregation Cases*, 22 Law & Ineq. 73, 84-85 (2004).

76) *See* Hurn v. United States, 221 F. Supp. 2d 493, 501, (D.N.J.2002); *see also United States v. Duque-Nava,* 315 F. Supp. 2d 1144, 1156 (D. Kan.2004) ("While helpful, purely statistical evidence is rarely sufficient to support an equal protection claim, but can be sufficient to establish discriminatory effect").

77) *See* 481 U.S. 279, 299 (1987)

based on his race by offering statistical evidence which showed that in the aggregate, African American defendants who murdered white victims were more likely to receive a death sentence than other victim-offender racial combination.[78] The *McCleskey* Court, however, held that a statistically significant study was insufficient to demonstrate that decision makers had acted with discriminatory intent *in his specific case*.[79] In support of its conclusion, the Court distinguished a series of earlier decisions, usually in venire-selection challenges, that had accepted the use of statistics to prove discriminatory intent.[80]

First, the Court pointed out that, unlike to venire-selection process, imposition of death penalty in each case is based on a variety of factors, not just race of the defendant; thus, general statistical evidence is not strong enough to support that a specific defendant is sentenced due to the general tendency shown in the statistical evidence.[81] The Court reasoned that "the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection."[82] Each decision to impose the death penalty rests on innumerable factors that vary according to the characteristics of the individual defendant and the unique composition of each jury whereas an Equal Protection challenge for a specific venire-selection is usually based on a few factors, mainly race.[83]

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78) *See id*. at 286-87.

79) *See id.* at 286, 292-94. However, "[t]he Court has accepted statistics as proof of intent to discriminate in certain limited contexts. First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district. Although statistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent under the Constitution, 'because of the nature of the jury-selection task, . . . we have permitted a finding of constitutional violation even when the statistical pattern does not approach [such] extremes.'" *See id.* at 293-94.

80) *McCleskey*, 481 U.S. at 294 (citing *Turner v. Fouche*, 396 U.S. 346, 359 (1970) (accepting statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district); *Castaneda v. Partida,* 430 U.S. 482, 495 (1977) (statistical disparity between Hispanic representation of those summoned to grand jury duty and Hispanic population in the county); *Bazemore* v. *Friday*, 478 U.S. 385, 400-401 (1986) ("accept[ing] statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964")).

81) *See McCleskey*, 481 U.S. at 294. *But see id.* at 325 (Brennan, J., dissenting) ("Close analysis of the Baldus study, however, in light of both statistical principles and human experience, reveals that the risk that race influenced McCleskey's sentence is intolerable by any imaginable standard. The Baldus study indicates that, after considering some 230 nonracial factors that might legitimately influence a sentencer, the jury more likely than not would have spared McCleskey's life had his victim been black").

82) *See McCleskey*, 481 U.S. at 294.

83) *See id.*

Second, the Court differentiated the imposition of a specific sentence form venire-selection challenges by pointing out whether the being challenged has an opportunity to rebut the challenger's supporting statistical evidence.[84] The Court stated that using statistics in venire-selection challenge imposes less burden on the being challenged than one in a specific sentencing cases because "the decision maker has an opportunity to explain the statistical disparity" in venire-selection cases whereas "the State has no practical opportunity to rebut [statistical] study" offered in a specific decision in a trial because jurors "'cannot be called . . . to testify to the motives and influences that led to their verdict.'"[85]

Thus, the Court generally rejects the use of aggregate population statistics to prove discriminatory intent towards a particular claimant in a specific case.[86] Unless law enforcement officers openly acknowledge that they stop and search suspects mainly based on race, claimants against racial profiling are left to argue that "any circumstantial or statistical evidence of the discriminatory effect they suffered is so strong that it is tantamount to proof of intent."[87] Courts widely reject this argument in all but the most extreme cases.[88]

Two Cases in which the Supreme Court Sustained Statistical Evidence to Support Discriminatory Intent

Even though the Supreme Court consistently has held that statistical evidence is not strong enough to prove discriminatory intent, in a few cases where the statistical evidence of discriminatory impact was so striking, the Court allowed an inference of discriminatory intent.[89] For instance, in *Yick Wo,* the Court held that statistical evidence of discrimination against a group of Chinese laundry business owners was strong enough to infer the discriminatory intent when two hundred Chinese were denied permits under a new ordinance whereas eighty

84) *See id.* at 296.

85) *See id.* at 286.

86) *See* Whitney, *The Statistical Evidence, supra* note 22, at 283.

87) *See id.* at 283. *But see Harvey*,16 F.3d 109, 110-12 (even though the police officer testified that if occupants of car he stopped had not been African-Americans, he would not have stopped the car, the Sixth Circuit held that the stop was reasonable as long as he had a probable cause to stop the car with a traffic violation).

88) *See* Whitney, *The Statistical Evidence, supra* note 22, at 283; *see, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

89) *See Yick Wo*, 118 U.S. at 374; *Gomillion*, 364 U.S. at 341.

others, not Chinese, were permitted to carry on the same business under similar conditions.[90] The Court reasoned that "whatever may have been the *intent* of the ordinances as adopted," application of the ordinance exclusively directed against a particular group of people that the court could infer "a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws."[91]

Moreover, in 1960, the *Gomillion* Court found that overwhelming statistical evidence of disparate impact was sufficient to infer discriminatory intent.[92] The Court found that the Alabama legislature's redrawing of the Tuskegee city boundaries in a manner that "removed from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident" was unconstitutional because "the legislation was solely concerned with segregating white and colored voters by fencing African American citizens out of town so as to deprive them of their pre-existing municipal vote."[93] However, *Gomillion v. Lightfoot* is the last U.S. Supreme Court decision to substantially expand the use of statistical evidence to infer the discriminatory intent under the Equal Protection claim.[94]

However, after thirty years, the *McCleskey* Court stated that statistical evidence is not strong enough to infer discriminatory intent when a discretionary decision rests on innumerable factors.[95] Also, the rationale behind admitting statistical evidence in *Yick Wo* and *Gomillion* might not be applicable to claims against racial profiling. In two cases, the disparity in the numbers between the allegedly being discriminated and not being discriminated was strikingly huge, such as almost 400 African Americans versus zero whites in *Gomillion;* however, in racial profiling claims, such disparity is generally not huge enough for the Court to infer the discriminatory intent.[96] Thus, these two old-established cases

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90) *See Yick Wo*, 118 U.S. at 373-74.

91) *See id.* at 373. The Court further reasoned that "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *See id.* at 373-74.

92) *Gomillion*, 364 U.S. at 341.

93) *See id.*

94) *See* Whitney, *The Statistical Evidence, supra* note 22, at 288.

95) *See McCleskey*, 481 U.S. at 289.

96) *See Gomillion*, 364 U.S. at 341.

might give a glimpse of the potentiality of statistical evidence being sustained by the court; however, they alone cannot be a substantial proof to sustain statistical evidence in proving discriminatory intent in racial profiling claims.

REMEDYING RACIAL PROFILING UNDER THE FOURTEENTH AMENDMENT ANALOGIZING PRIOR SUPREME COURT AND LOWER COURTS CASES

Several Previous Proposals to Remedy Racial Profiling

Facing with issues associated with the illegitimate practice of *Terry,* several scholars present diverse resolutions to deal with racial profiling.[97] For instance, Professor Randall Kennedy argues that the use of race even as a factor should be totally barred.[98] He explains that even though some degree of racial discrimination might be rational, the danger of permitting any form of discrimination sends a wrong message to law enforcement officers and the general public.[99] He points out that the nation's history of racism is so egregious that courts should bar the use of race in determining reasonable suspicion under *Terry.*[100] Even though this approach seems appealing and desirable, it would be onerous to discern whether law enforcement officers conceal their true motivation in exercising the stop-and-frisk policy, and, even worse, it is expedient for law enforcement officer to improvise post hoc facially neutral rationalization as a legitimate basis for their practice.[101] This apparently

97) Professor William Carter argues that racial profiling can be remedied under the Thirteenth Amendment because racial profiling subjects racial minorities to "a badge or incident of slavery" in violation of the Thirteenth Amendment. *See* Carter, *A Thirteenth Amendment, supra* note 7, at 92. *See also* Professor David Harris suggests that "overturning *Terry* represents the cleanest solution to the numerous problems the case has raised from the beginning." A return to pre-*Terry* law for all searches and seizures would not put courts in a quandary "to describe the perhaps inarticulable line between a 'mere' hunch and a reasonable suspicion." However, considering that *Terry* is fundamentally a decision originating in the context of civil unrest at the time of decision and gives the police added leverage in preventing street crimes, it is hard for the Court to overturn *Terry* because the crime control rationale seems more attractive today than it was decided in 1968. *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 682-84 (1994) [hereinafter Harris, *Factors for Reasonable*].

98) *See* Kennedy, *Race, supra* note 17, at 148.

99) *See id.* at 148.

100) *See* Thompson, *Stopping the Usual Suspects, supra* note 51, at 1000 ("In essence, Kennedy embraces a form of race neutrality in police decision making and urges that public officials declare the use of race in those decisions illegal").

expected outcome is not different from what actually happens today because the Court consistently held that the police officers' reasonableness for traffic stops is not related to the actual motivations officers involved.[102] Under the current law, law enforcement officers have provided race-neutral explanations for their arguably illegitimate exercise of the stop-and-frisk policy "to camouflage any cognizant reliance on race."[103] Therefore, prohibiting any reliance on race might actually "encourage law enforcement officers to conceal the degree to which racial dynamics" motivated them to stop and frisk racial minorities.[104]

Moreover, some scholars criticize the actual intent requirement in the racial profiling challenges.[105] For example, Professor Albert Alschuler suggests that a more socially acceptable meaning of intent should substitute actual intent required by courts because even though an arguable stop-and-frisk is upheld by the court just because of lack of discriminatory intent of a law enforcement officer, any "racial classifications have an impermissible effect simply because they are not colorblind."[106] He points out that law enforcement officers may not always intend the harm their racial profiling produces, but "the purpose of their classifications may be only to apprehend as many criminals as they can."[107] Courts might have assumed that an impermissible effect sensed by the objects of racial profiling arise only if law enforcement officers target them with actual discriminatory intent.[108] However, racial minorities perceives to be discriminated regardless of whether the law enforcement officers have actual discriminatory intent to stop them. Therefore, Professor Albert Alschuler argues that courts should adopt contextual and social meaning of intent that perceived by the objects of racial profiling, not by officers or courts.[109] However, even though adopting the social meaning of discriminatory intent seems to be appealing in certain respects, "the turn to social meaning may not necessarily clarify or

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101) *See* Thompson, *Stopping the Usual Suspects, supra* note 51, at 1001.

102) *See Whren*, 517 U.S. at 813.

103) *See* Thompson, *Stopping the Usual Suspects, supra* note 51, at 1002.

104) *See id.* at 1002.

105) *See* Harcourt, *Rethinking Racial Profiling, supra* note 38, at 1346.

106) *See* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U Chi Legal F 163, 212 (2002) [hereinafter Alschuler, *Racial Profiling*].

107) *See id.*

108) *See id.*

109) *See id.*

simplify this area of the law."[110] The social meaning of governmental action is often in the eye of the beholder; thus, it would be more difficult for courts to set up the clear standard of meaning of intent.[111] Therefore, these two previously suggested measures against racial profiling do not seem to be practical and workable.

Remedy Racial Profiling by Analogizing Lower Court Case, *State v. Soto*

In contrast to the Supreme Court, even after *McCleskey,* a few of lower courts have expanded the line of cases in which discriminatory intents in racial profiling cases are inferred from statistical evidence.[112] For instance, in *State v. Soto*, the New Jersey Superior Court established a guideline for the type of statistical evidence sufficient to demonstrate discriminatory intent.[113] The court held that "[s]tatistics may be used to make out a case of targeting minorities for prosecution of traffic offenses provided the comparison is between the racial composition of the motorist population violating the traffic laws and the racial composition of those arrested for traffic infractions on the relevant roadway patrolled by the police agency."[114] Thus, the court suggested that if reliable stop data is available and violator data can be obtained to establish a standard against which to compare the stop data, this evidence may be sufficient to demonstrate discriminatory intent.[115] To find out whether the statistical evidence was reliable enough to infer the discriminatory intent, the court examined whether the data were based on adequate sample size and representativeness of the general population and whether data were collected in an independent study for the criminal defendant alleging racial profiling.[116]

Using these data, the New Jersey Superior Court concluded that there was such stark evidence of discrimination, and 32.7% absolute difference in percentage of black motorists stopped versus percentage of those on the

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110) *See* Harcourt, *Rethinking Racial Profiling, supra* note 38, at 1340.
111) *See id.*
112) *See* Whitney, *The Statistical Evidence, supra* note 22, at 288; *see, e.g., Soto,* 734 A. 2d at 360-61.
113) *See Soto,* 734 A. 2d at 360.
114) *See id.* at 360.
115) *See id.* at 350; *see also* Whitney, *The Statistical Evidence, supra* note 22, at 290.
116) *See Soto,* 734 A. 2d at 352.

roadways was enough to infer discriminatory intent.[117] The court reasoned that the court has not inquired into "the motivation of a police officer whose stop of a vehicle was based upon a traffic violation committed in his presence." [118] Instead, the court found that "where objective evidence establishes 'that a police agency has embarked upon an officially sanctioned or *de facto* policy of targeting minorities for investigation and arrest,' any evidence seized will be suppressed to deter future insolence in office by those charged with enforcement of the law and to maintain judicial integrity."[119] This lower court case can guide not only the U.S. Supreme Court but also future challengers in subsequent racial profiling claims.

Some scholars argue that the New Jersey Superior Court carved an *exception* to the *McCleskey* requirement by authorizing the use of statistical evidence in proving discriminatory intent.[120] However, it seems that the New Jersey Superior Court's accepting statistical evidence in Equal Protection claim is not an exception to the *McCleskey*, but a corollary of reasonable interpretation of *McCleskey*. As mentioned in Part II, the *McCleskey* Court did not totally ban on use of statistical evidence in proving discriminatory intent but mentioned a series of earlier decisions, usually in venire-selection challenges, that had accepted the use of statistics to prove discriminatory intent.[121] The *McCleskey* Court pointed out the claimant there did not have a valid and persuasive reason to use general statistical evidence to support his specific death penalty sentence because unlike to venire-selection process, imposition of death penalty in the defendant's specific case was based on several factors, not just race of the defendant and because "the State has no practical opportunity to rebut [statistical] study"[122]

However, unlike the imposition of death penalty where substantial factors of mitigating and aggravating circumstances are comprehensively considered, the decision to stop and search a suspect in *a specific case* involves fewer variables, such as appearance or evasive behavior of a suspect. The reduction in variables narrows and simplifies the claim of racial profiling, like claims in venire-selection

117) *See id.* at 353.
118) *See id.*
119) *See id.*
120) *See* Harcourt, *Rethinking Racial Profiling, supra* note 38, at 1346-47.
121) *McCleskey*, 481 U.S. at 294.
122) *See id.* at 286.

where the Court sustains the statistical evidence to infer discriminatory intent; therefore, the Court should suggest that statistical evidence might be sufficient to prove intentional discrimination in the racial profiling context.[123]

Moreover, the decision to stop and search involves not only fewer variables than the decision to sentence to death, but also fewer decision makers, usually one or two police officers. Fewer decision makers' involvement in racial profiling renders racial profiling cases more like cases including venire-selection issue, rather than the imposition of death penalty in *McCleskey* where prosecutors, grand jurors, petit jurors, judges, and defense attorneys were involved.[124] Also, because, like the decision makers in venire-selection process, police officers have an opportunity to explain and rebut the statistical evidence presented by the challenger of racial profiling by testifying in courts, it does not seem to impose any extremely heavy burden on the law enforcement officers. Giving the police officer an opportunity to rebut the statistical evidence is substantially less burden than calling jurors in a specific decision in a trial "to testify to the motives and influences that led to their verdict."[125]

Remedy Racial Profiling by Analogizing *Batson v. Kentucky*

With similar reasons of *Soto* court, some scholars argue that racial profiling as a potential form of discrimination is more analogous to the *Batson* situation involving the prosecutor's use of peremptory challenges than it is to the *McCleskey* problem of racial discrimination in the death penalty.[126] In both racial profiling and the *Batson* context, the decision maker is one or more members of a criminal justice entity, such as a state patrol unit or a district attorney's office.[127] The decision "to search and the decision to strike a juror peremptorily are based on a limited set of factors that identify suspects or biased jurors," and the decision makers have the ability to explain exactly why they

123) Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway,* 101 Mich L Rev 651, 738 (2002).

124) *See* Harcourt, *Rethinking Racial Profiling, supra* note 38, at 1347.

125) *See also McCleskey*, 481 U.S. at 286.

126) *See* Harcourt, *Rethinking Racial Profiling, supra* note 38, at 1347; *see also* Lisa Walter, *Eradicating Racial Stereotyping From Terry Stops: the Case for an Equal Protection Exclusionary Rule,* 71 U. Colo. L. Rev. 255 (2000) [hereinafter Walter, *Eradicating Racial*]; *Batson*, 476 U.S. at 139.

127) *See* Harcourt, *Rethinking Racial Profiling, supra* note 38, at 1347.

decided to stop and search a member of a certain racial group.[128] With these reasons, the constitutional analysis of alleged racial profiling under an equal protection challenge would follow the three-step model of *Batson*.[129] These steps under *Batson* would not eliminate the intent requirement or reverse *Washington v. Davis*; instead, "it would merely extend the *Batson* method of inferring intent to the racial profiling context."[130]

The *Batson* test establishes a three-part inquiry to determine whether the defendant could demonstrate an equal protection violation due to the prosecutor's racially motivated actions.[131] "[T]he defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race" from the jury panel.[132] Second, "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permit 'those to discriminate who are of a mind to discriminate.'"[133] Finally, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that [peremptory challenge] to exclude [jurors] from the petit jury on account of their race."[134] Once the defendant establishes the prima facie case, "the burden shifts to the [prosecutor] to come forward with a neutral explanation for challenging black jurors."[135] However, the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that the prosecutor had an assumption that the jurors of the defendant's race would be partial to the defendant due to their shared race.[136]

In the case where a law enforcement officer stops and frisks a racial minority because of his or her race, courts should hold such an illegitimate police action is unconstitutional if the defendant can establish a prima facie case and the police officer has no compelling race-neutral justification.[137] Also, the

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128) *See id.*
129) *See id.*
130) *See id.*
131) *See Batson*, 476 U.S. at 96.
132) *See id.*
133) *See id*. (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
134) *See id*.
135) *See id*. at 97.
136) *See id*.

defendant must show that a police officer in fact conducted an investigatory stop of the defendant, and the police officer stopped him or her because of race.[138] Then, the burden would shift to the law enforcement officer to show racially neutral reasons to justify stopping and frisking a particular defendant.[139] As under *Batson*, the law enforcement officers cannot meet this burden by stating merely that they do not discriminate racial minorities or racial minorities are considered to be more likely to commit a crime based on their past experience, not on objective and empirical data.[140] A claim that the defendant engaged in a minor traffic violation, which was upheld in *Whren,* would not overcome a police officer's burden of establishing a race-neutral justification for the stop.[141] This is especially true if the defendant presents statistical evidence to the contrary, and law enforcement officers must show that "they would have pulled over a white defendant under the same circumstances"[142] or present evidence that "race is a statistically significant predictor of crime and that racial profiling satisfies the limited conditions that make it constitutionally acceptable."[143]

The *McCleskey* requirement of proof of actual intent fails to recognize that the police are intentionally using race, and this failure is recognized by the not only by several scholars but also a few lower courts.[144] The question should be whether the police have a constitutionally satisfactory reason for using race that justifies the disproportionality because as mentioned in Part I, the constitutionality of a specific stop-and-frisk practice has been decided on whether the contested practice is within the boundary of reasonable suspicion; thus, the constitutionality of racial profiling depends on whether race can be a legitimate stimulus for a law enforcement officer to have reasonable suspicion. However, requiring proof of actual intentional discrimination by a law enforcement officer from the challenger places the burden on the wrong party.[145] If the law enforcement officer engages in discrimination by stopping and frisking a disproportionate

137) *See* Walter, *Eradicating Racial, supra* note 126, at 290.
138) *See id.* at 291.
139) *See also Batson*, 476 U.S. at 97.
140) *See id.*
141) *See* Walter, *Eradicating Racial, supra* note 126, at 291.
142) *See id.*
143) *See* Harcourt, *Rethinking Racial Profiling, supra* note 38, at 1347-48.
144) *See id.* at 1348; *see, e.g., Soto,* 734 A. 2d at 359-61.
145) *See* Harcourt, *Rethinking Racial Profiling, supra* note 38, at 1348.

number of racial minorities, then the officer should have the burden of proving that his action is supposed to promote a compelling state interest.[146] Barring that proof, the disproportionate stop-and-frisk practices are intentionally discriminatory and should be held to violate the Equal Protection Clause.[147]

CONCLUSION

In *Whren,* the Supreme Court foreclosed relief against racial profiling under the Fourth Amendment by ignoring the effects of racial motivation and declaring that the subject of racial motivation is irrelevant to Fourth Amendment analysis.[148] The Court has "underestimated the extent to which racial factors affect an individual officer's perceptions, memory, and reporting, transforming what may be innocent behavior into indicia of criminality and the basis for a search or seizure."[149] The Court also has seriously "underestimated the propriety of treating racial targeting as a type of harm the amendment was intended to avert."[150] Even though the *Whren* Court suggested that the Equal Protection Clause is a more appropriate avenue to challenge racial profiling, courts have rarely upheld claims against racial profiling supported by claimants' statistical evidence because statistical data has been deemed not to be strong enough to permit a finding of discriminatory intent.

However, as the New Jersey Superior Court established a guideline for the type of statistical evidence sufficient to demonstrate discriminatory intent, and as the *Batson* Court shifted burden of proof to the state when a challenger presents a statistical discrepancies in the race of persons preempted from a jury panel, a challenger against racial profiling should be allowed to statistical evidence to prove discriminatory intent of a law enforcement officer. Also, "given the recent proliferation of databases and the development of sound statistical methodologies to detect racial profiling, courts should reconsider their stance on the use of statistical evidence to prove discriminatory intent."[151] Strong statistical associations

146) *See id.*
147) *See* id. at 1348.
148) *See Whren*, 517 U.S. at 806.
149) *See* Thompson, *Stopping the Usual Suspects, supra* note 51, at 1012.
150) *See* id.

between suspects' race and frequency of stops in the racial group should support an inference of discriminatory intent.[152] By analogizing the rationale in *Soto* and the three steps established by the *Batson* Court, the Court would protect racial minorities from being impermissibly targeted by law enforcement officers by giving more strong and clear message to the law enforcement officers. To effectively signal their rejection of racially biased law enforcement practices, it is essential that courts stand behind an absolute and bright-line prohibition of the use of race in stopping and frisking a person.[153]

151) *See* Whitney, *The Statistical Evidence, supra* note 22, at 299.
152) *See id.*
153) *See* Walter, *Eradicating Racial, supra* note 126, at 293.