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# RACIAL PROFILING OF AFRICAN-AMERICAN MALES: STOPPED, SEARCHED, AND STRIPPED OF CONSTITUTIONAL PROTECTION

FLOYD D. WEATHERSPOON\*

## I. INTRODUCTION

Every African-American male in this country who drives a vehicle, or has traveled by bus or plane, either knowingly or unknowingly has been the victim of racial profiling by law enforcement officials.<sup>1</sup> Indeed, African-American males are disproportionately targeted, stopped, and searched by law enforcement officials based on race and gender. Those responsible for enforcement of public laws view African-American males as criminals.<sup>2</sup> Unfortunately, the American justice system has

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1. A survey of approximately 1700 minorities revealed that fifty-four percent of the black men surveyed reported they had been victims of racial profiling. THE WASHINGTON POST, KAISER FAMILY FOUNDATION & HARVARD UNIVERSITY, RACE AND ETHNICITY IN 2001: ATTITUDES, PERCEPTIONS, AND EXPERIENCES 28, 38 (2001). See also Richard Morin & Michael H. Cottman, *Discrimination's Lingering Sting; Minorities Tell of Profiling Other Bias*, WASH. POST, June 22, 2001, at A01 (noting that a poll of 323 black men by The Washington Post, Harvard University, and the Kaiser Foundation determined that "[m]ore than half of all black men report that they have been the victims of racial profiling by police"). In proposing the End Racial Profiling Act of 2001 to Congress, Representative Conyers stated in part: "Nearly every young African-American male has been subjected to racial profiling or has a family member or close friend who has been a victim of this injustice." 145 CONG. REC. E1037 (2001) (statement of Rep. Conyers). See also Illinois v. Wardlow, 528 U.S. 119, 134 n.7 (2000) (Stevens, J., concurring in part and dissenting in part) (citing Leslie Casimir et al., *Minority Men: We Are Frisk Targets*, DAILY NEWS (New York), Mar. 26, 1999, at 34).

2. Erika L. Johnson, "A Menace to Society": *The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629, 649-51. See also United States v. Coleman, 450 F. Supp. 433 (E.D. Mich. 1978).

condoned, supported, and in some instances encouraged such actions by law enforcement officials to stop, arrest, prosecute, and incarcerate African-American males.<sup>3</sup> On the basis of race and gender, governmental officials have devised a profile of the typical criminal: black and male.<sup>4</sup>

The term “driving while black” has been used to describe the practice of law enforcement officials to stop African-American drivers without probable cause. The practice particularly targets African-American males.<sup>5</sup> African-American males are not only singled out while driving, but also while schooling,<sup>6</sup> eating,<sup>7</sup> running for political office,<sup>8</sup> walking,<sup>9</sup> banking,<sup>10</sup> serving as a

3. See Mary Maxwell Thomas, *The African-American Male: Common Gap Converts Justice Into Just Us System*, 13 HARV. BLACKLETTER L.J. 1, 28 (1997).

4. See generally *Lowery v. Commonwealth*, 388 S.E.2d 265, 266 (Va. Ct. App. 1990).

5. See generally DAVID A. HARRIS, AMERICAN CIVIL LIBERTIES UNION, RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999) [hereinafter HARRIS, RACIAL PROFILING]; KENNETH MEEKS, DRIVING WHILE BLACK (2000); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999) [hereinafter Harris, *Stories, Statistics, and Law*]; Katheryn K. Russell, “Driving While Black”: Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999); Katheryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature*, 3 RUTGERS RACE & L. REV. 61 (2001); Angela Anita Allen-Bell, Comment, *The Birth of The Crime: Driving While Black (DWB)*, 25 S.U. L. REV. 195 (1997).

6. See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 1999); *Brown v. City of Oneonta*, 195 F.3d 111, 111 (2d Cir. 1999); *Brown v. City of Oneonta*, 106 F.3d 1125, 1127 (2d Cir. 1997) (stating a school official “released a list of the names and addresses of . . . black male students to law enforcement officers who were looking for an armed young black male suspect”). The court held that the black male students’ rights were not violated under the Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1994). *Id.* at 1133. See also Carolyn Talbert-Johnson, *Continuing the Dialogue: The Overrepresentation of African-American Males in Special Education, in THE CRISIS OF THE YOUNG AFRICAN-AMERICAN MALE IN THE INNER CITY* 70-77 (1999); Judith A. Browne, *Racial Profiling in School?*, ESSENCE, Jan. 1, 2001, at 138. See generally TAMMY JOHNSON ET AL., RACIAL PROFILING AND PUNISHMENT IN U.S. SCHOOLS: HOW ZERO TOLERANCE POLICIES AND HIGH STAKES TESTING SUBVERT ACADEMIC EXCELLENCE AND RACIAL EQUITY (2000) (collecting essays that suggest that present school policies and procedures may result in children of color being racially profiled in schools).

7. See *McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp. 2d 1043, 1044 (N.D. Ill. 1998); *Bobbitt v. Rage Inc.*, 19 F. Supp. 2d 512, 522 (W.D.N.C. 1998); Jeff Leeds, *Denny’s Restaurants Settle Bias Suits for \$54 Million*, L.A. TIMES, May 25, 1994, at A1 (noting blacks complained of discrimination at the chain); *Golden Corral Vows to Probe Race Bias Charge*, NATION’S REST. NEWS, Aug. 9, 2004, at 52.

8. See Gregory Freeman, *Are Black Officials Being Unfairly Targeted?*, ST. LOUIS POST-DISPATCH, Oct. 7, 1994, at 13D; Jonathan P. Hicks, *Ethics Investigation Focuses on Minorities, Caucus Says*, N.Y. TIMES, Feb. 16, 2003, at 37; Norma Adams Wade, *Coverage of Black Officials Criticized; Group*

juror,<sup>11</sup> getting a taxi,<sup>12</sup> shopping,<sup>13</sup> and just being black and a male.<sup>14</sup> The mere fact of being black and male in America is sufficient cause for governmental and private law enforcement officials to abridge the rights of African-American males.<sup>15</sup> This is

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*Threatens Boycott of Local Media*, DALLAS MORNING NEWS, Aug. 4, 1993, at 30A.

9. *City of Chicago v. Morales*, 527 U.S. 41, 45-49 (1999); 147 CONG. REC. S2270 (daily ed. Mar. 14, 2001) (statement of Sen. Feingold). See Jill Nelson, *Racial Profiling Starts Early*, U.S.A. TODAY, Apr. 27, 2001, at 13A.

10. See *Lewis v. Commerce Bank & Trust*, No. 03-4218-RDR, 2004 U.S. Dist. LEXIS 6477, at \*1-2 (D. Kan. Mar. 15, 2004).

11. *McCormick v. State*, 803 N.E.2d 1108 (Ind. 2004); *Batson v. Kentucky*, 476 U.S. 79 (1986).

12. In 1999, movie star Danny Glover complained to the New York Taxi and Limousine Commission, which licenses taxi drivers, that he was discriminated against in hailing a cab in New York. William J. Gorta, *Court Slips off Glover Cabby Rule*, N.Y. POST, May 1, 2002, at 009. Subsequently, the Commissioner instituted a program called "Operation Refusal," which permitted a taxi driver's license to be suspended. *Id.* A District Court modified the program by requiring a hearing. *Id.* See also Dan Ackman, *Yellow Cab Drivers Get No Relief*, NEWSDAY, Mar. 21, 2001, at A38; *Lys v. N.Y. City Taxi & Limousine Comm'n*, No. SCNY7048/00, 2002 WL 338187, at \*1 (N.Y. Civ. Ct. Jan. 14, 2002).

13. See *Nevin v. Citibank*, 107 F. Supp. 2d 333 (S.D.N.Y. 2000). In *Nevin*, an African-American woman alleged that a credit card company, department store, and the town police engaged in racial profiling. *Id.* at 337. The court went on to discuss incidents of racial profiling in retail establishments. *Id.* at 339 n.4 (citing *ABC News 20/20: Under Suspicion, Security Guards Unfairly Target Black Shoppers* (ABC television broadcast, June 8, 1998), available at 1998 WL 5433617). The court also notes that racial profiling by retailers has been the subject of at least two other lawsuits in that circuit. *Id.* (citing *Brown v. Wal-Mart Stores, Inc.*, No. 96-CV-1500, 1998 U.S. Dist. LEXIS 5269, at \*1 (N.D.N.Y. Apr. 10, 1998); *Robinson v. Colonie*, 878 F. Supp. 387 (N.D.N.Y. 1995)). The court also notes an interesting article by James L. Fennessy. *Id.* (citing James L. Fennessy, Comment, *New Jersey Law and Police Response to the Exclusion of Minority Patrons from Retail Stores Based on the Mere Suspicion of Shoplifting*, 9 SETON HALL CONST. L.J. 549 (1999) (discussing New Jersey constitutional implications of racial profiling of shoppers)). See also Regina Austin, *A Nation of Thieves: Securing Black People's Right to Shop and to Sell White America*, 1994 UTAH L. REV. 147, 147 (1994); Amanda G. Main, Note, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 291 (2000).

14. For a discussion of how African-American males are negatively treated because of a combination of their race and gender, see Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23 (1996).

15. The Court in *Washington v. Lambert* expressed concerns of how general descriptions of an African-American male suspect can lead to a significant number of African-Americans being stopped and detained. 98 F.3d 1181, 1190-91 (9th Cir. 1996). The court stated that "a significant percentage of African-American males walking, eating, going to work or to a movie, ball game or concert, with a friend or relative, might well find themselves subjected to

not to suggest that law enforcement officers can never consider race when performing their job.<sup>16</sup> Just the opposite, where a witness identifies the race and gender of a suspect, it is relevant evidence to consider in an effort to apprehend a criminal.<sup>17</sup> Racial profiling, however, involves a pre-disposition held by law enforcement officers who are members of the majority, to believe that minorities, and particularly African-American males, are engaged in criminal activities; therefore, they are stopped and searched without probable cause or reasonable suspicion.<sup>18</sup>

Racial profiling has been institutionalized into our American justice system, as well as other systems that disproportionately exclude, punish, and ostracize African-American males.<sup>19</sup> For example, racial profiling on the part of governmental officials has encouraged and, to a certain extent, licensed individuals in the private sector to devise similar racial profiles based on stereotypical biases to selectively punish and exclude African-American males from employment opportunities.<sup>20</sup>

This Article focuses on how African-American males have fallen prey to law enforcement agencies, as they use racial profiling as a technique to selectively enforce laws and regulations.<sup>21</sup> There is a substantial amount of literature written

similar treatment, at least if they are in a predominately white neighborhood.” *Id.* at 1191.

16. *United States v. DeClerck*, No. 02-40072-01/02-RDR, 2003 WL 22077666, at \*1 (D. Kan. Aug. 12, 2003). *See also* *Von Herbert v. City of St. Clair Shores*, No. 02-1063, 2003 U.S. App. LEXIS 4450, at \*1 (6th Cir. Mar. 11, 2003) (Krupansy, J. dissenting). In dissent, Judge Krupansy stated that “the selection of an African-American suspect for questioning ‘because his clothing, appearance, location, and race coincided with published descriptions’ patently does not comprise ‘illegal “racial targeting” or “racial profiling.”” *Id.* at \*42-43 (citing *United States v. Waldon*, 206 F.3d 597, 604 (6th Cir. 2000)).

17. *See* David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 *MISS. L.J.* 423, 435 (2003). *Cf.* Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 *AM. CRIM. L. REV.* 1195, 1205 (2003).

18. The United States Department of Justice defines racial profiling as a practice which

[A]t its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.

CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES* 1 (2003).

19. Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 *CAP. U. L. REV.* 23 (1994).

20. *See generally* Weatherspoon, *supra* note 14, at 26.

21. This Article focuses on the use of racial profiling against African-American males. This is not to suggest that racial profiling does not occur

on racial profiling,<sup>22</sup> however, few specifically address how African-American males, in particular, are disproportionately impacted by such discriminatory practices.

Part II of this Article describes and substantiates that racial profiling is used against African-American males to stop and search. Regardless of their economic status or education, African-American males are disproportionately stopped by law enforcement officials. Part III describes how stereotypical biases are the primary reasons law enforcement officials engage in racial profiling against African-American males. Lastly, the assumption being that all African-American males are engaged in unlawful activities, Part IV identifies how racial profiling of African-American males is used to sanction traffic and airport stops, in violation of their constitutional rights. Unfortunately, it appears that the Supreme Court has sanctioned such treatment.

## II. RACIAL PROFILING OF AFRICAN-AMERICAN MALES

African-American males are the primary victims of racial profiling in this country.<sup>23</sup> Moreover, African-American males

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against other racial groups, e.g., African-American women. For example, see *Anderson v. Cornejo*, No. 97 C 7556, 1999 WL 543196, at \*1 (N.D. Ill. July 22, 1999), where forty-six African-American women alleged that they were improperly targeted and searched by the United States Customs Service at an airport when reentering the country after foreign travel. See also *Martinez v. Vill. of Mount Prospect*, 92 F. Supp. 2d 780, 781 (N.D. Ill. 2000) (presenting evidence that police officers were ordered to target Hispanic drivers for traffic stops); Charu A. Chandrasekhar, *Flying While Brown: Federal Civil Rights Remedies to Post 9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L.J. 215 (2003) (suggesting that post-9/11 Arabs and others of Middle Eastern descent have become targets of racial profiling); David A. Harris, *New Approaches to Ensuring the Legitimacy of Police Conduct: Racial Profiling Redux*, ST. LOUIS U. PUB. L. REV. 73 (2003) (indicating that Arabs are also profiled as a result of terrorist attacks against America); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 680 (2000) (describing how racial profiling is used against the Latin-American community); Jennifer Loven, *Study Finds Black Women Singled out by Customs*, THE RECORD (Bergen County, NJ), Apr. 10, 2000, at A9; Phillip Morris, *Racial Profiling Has a New Target*, THE PLAIN DEALER (Cleveland, Ohio), Sept. 25, 2001, at B9 (concluding that Arab-American males have become targets of profiling as a result of the bombing of the World Trade Center by terrorists).

22. See generally Jerome H. Kolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 419 (2001); Gregory M. Lipper, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551 (2001); 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, 247 (2001); Roger Conner & Marvin E. Johnson, *Racial Profiling in America: The Problem and the Challenge*, ACR RESOL. MAG., Fall 2003, at 16.

23. See Suzanne Leone, *Massachusetts Addresses Racial Profiling Head On: The Advocacy of Chapter 228 of The Acts and Resolves of 2000*, 28 NEW ENG. J.

believe they are the primary victims of racial profiling in this country. For example, surveys conducted by the Washington Post<sup>24</sup> and the Black America's Political Action Committee ("BAMPAC") determined that almost fifty percent of African-American males surveyed believed they had been victims of racial profiling.<sup>25</sup> The practice of racial profiling is not limited to just urban areas. Indeed, it happens wherever African-American males live, work, or traverse; whether in cities, rural communities, East or West, North or South, they face closer scrutiny by law enforcement than white males.<sup>26</sup> Racial profiling of African-

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ON CRIM. & CIV. CONFINEMENT 335, 335 n.4 (2002) (citing a telephone interview on October 24, 2004 with Kristine Glynn, Legislative Director, Massachusetts Senate, Office of Senator Dianne Wilkerson: "This is something that needs to be talked about," said Kristine Glynn, Wilkerson's legislative aid. 'People have called in to report an abnormal amount of traffic stops for minorities, mostly young black men.');" Michael A. Fletcher, *Driven to Extremes; Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A01 (describing how African-American males are targeted for traffic stops based on stereotypical biases). See also a report entitled *Justice On Trial: Racial Disparities in the American Criminal Justice System*, conducted by the Leadership Conference on Civil Rights, which stated that:

In 1992, as part of a report by the ABC news program '20/20,' two cars, one filled with young black men, the other with young white men, navigated the same route, in the same car, at the same speed through Los Angeles streets on successive nights. The car filled with young black men was stopped by the police several times; the white group was not stopped once, despite observing police cars in their immediate area on no less than 16 separate occasions during the evening.

LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 2, available at <http://www.civilrights.org/publications/reports/cj/justice.pdf> (last visited Nov. 10, 2004). See also *Blacks Searched More*, TELEGRAPH HERALD (Dubuque, Iowa), May 23, 1996, at b4 (indicating that young minority men driving late-model cars and carrying pagers or wearing gold jewelry are typically targeted by police on Interstate 95 in Maryland).

24. See Morin & Cottman, *supra* note 1.

25. The study determined that approximately forty-six percent of African-American males registered to vote believe they had been stopped by law enforcement officers on the basis of their race. BLACK AM. POLITICAL ACTION COMM. ("BAMPAC"), 2002 NATIONAL POLL OF AFRICAN-AMERICAN REGISTERED VOTERS (2002), available at [http://www.bampac.org/opinion\\_polls2002.asp?index=16](http://www.bampac.org/opinion_polls2002.asp?index=16) (last visited Feb. 13, 2005). See, e.g., *Racial Profiling Still Major Problem Among African Americans; Poll Shows 47 Percent of African American Males Have Been Profiled*, U.S. NEWSWIRE, Aug. 6, 2002. Further, the survey by BAMPAC concluded that of African-American registered voters: "racial profiling affects college educated men (73%), young men (69% yes) and urban and suburban men (62%) the most." Memorandum from Black American's Political Action Committee 6 (July 10, 2002) (on file with author). See also Morin & Cottman, *supra* note 1.

26. Incidents of racial profiling of African-American men have been reported across the Nation. See, e.g., Ann Belser, *Suspect; Black Men Are Subject to Closer Scrutiny from Patrolling Police, and the Result Is Often More*

American males is not a new phenomenon but a re-packaging of a twentieth-century form of racial discrimination toward black males. Justice Marshall said it best when he faced racial profiling in the 1960s:

[a] white man came up beside me in plain clothes with a great big pistol on his hip. And he said, "Nigger boy, what are you doing here?" And I said, "Well I'm waiting for the train to Shreveport." And he said, "There's only one more train comes through here, and that's the 4 o'clock, and you'd better be on it because the sun is never going down on a live nigger in this town."<sup>27</sup>

At a different time and in a different place, African-American males were, and remain, singled out for harassment.<sup>28</sup> Interestingly, racial profiling is not isolated to just black male youths in urban areas with a "gangster" or "rapper" appearance or demeanor.<sup>29</sup> Racial profiling is applied in a non-discriminatory manner among African-American males, regardless of their economic status. African-American males who are lawyers,<sup>30</sup> educators,<sup>31</sup> sport figures,<sup>32</sup> legislators,<sup>33</sup> actors,<sup>34</sup> news reporters,<sup>35</sup>

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*Fear, Antagonism Between Them*, PITTSBURGH POST GAZETTE, May 5, 1996, at A-15; Casimir et al., *supra* note 1.

27. Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 723 (1992) (alteration in original).

28. Harris, *Stories, Statistics, and Law*, *supra* note 5, at 326.

29. In reviewing various definitions of racial profiling, a report by the Minnesota House of Representatives determined that a broad definition would include situations where the "police routinely use race as a factor that, along with an accumulation of other factors, causes an officer to react with suspicion and take action." MINN. HOUSE OF REPRESENTATIVES, RESEARCH DEPT., RACIAL PROFILING STUDIES IN LAW ENFORCEMENT: ISSUES AND METHODOLOGY 6 (2000). The broad definition would include young black males who wear baggy pants, hooded sweatshirts, and/or gold chains. *Id.*

30. Robert L. Wilkins, an attorney, sued the Maryland State Police for racial profiling. Larry Bingham, *Long and Winding Road: Robert Wilkins "Driving While Black" Case Began 10 Years Ago and has Hit Yet Another Snag*, BALTIMORE SUN, Feb. 6, 2003, at 1E. Mr. Wilkins and his family were driving from a funeral in Chicago and were stopped in Maryland. *Id.* After Mr. Wilkins refused to consent to a search of his car, a police dog was used to search. *Id.* The case was subsequently settled. *'Driving While Black' on 95 . . .*, WASH. POST, Nov. 16, 1996, at A24.

31. See Elizabeth Benjamin, *Traffic Stop Motivated by Race, Educator Says*, TIMES UNION (Albany, N.Y.), May 22, 2001, at A1 (reporting that police stopped a member of the state Board of Regents because his jeep and his appearance allegedly matched a suspected armed robber). See also *Lambert*, 98 F.3d at 1188 (citing examples of how professional African-American males are stopped and searched by police, including professors).

32. In 1988, baseball hall-of-famer Joe Morgan was stopped and handcuffed at the Los Angeles airport because the police thought he was a drug dealer. *Morgan v. Woessner*, 997 F.2d 1244, 1249 (9th Cir. 1993). A federal judge later upheld a \$540,000 jury award in his favor. *Judge Upholds Award Given to Joe Morgan*, L.A. TIMES, Apr. 30, 1991, at B2. The court of appeals affirmed



and business executives<sup>36</sup> are stopped, questioned, and humiliated by law enforcement officers simply because they are black and male.<sup>37</sup> One-thousand dollar Armani suits do not shield them from being perceived as drug-dealing thugs.<sup>38</sup>

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the district court's granting of judgment notwithstanding the verdict to the plaintiff. *Morgan*, 997 F.2d at 1262. The Ninth Circuit, however, reversed the award of punitive damages and remanded the case to the district court to review its decision regarding punitive damages. *Id.* A similar event occurred in 1992 when Al Joyner, an Olympic gold medalist, was stopped by police in West Hollywood and handcuffed under gunpoint. Steve Ballard & Dick Patrick, *Al Joyner Goes to Court About L.A. Traffic Stop*, USA TODAY, Oct. 4, 1994, at 11C. The police had mistakenly thought he was driving a stolen car. *In L.A., a Case of Mistaken Identity*, CHI. TRIB., May 10, 1992, at 3. He was released, however minutes later he was again stopped by the police who mistakenly thought he was involved in a hit-and-run accident. *Id.* The case was subsequently settled for \$245,000. *Furthermore*, WASH. POST, Feb. 9, 1995, at D02. The following statement by Joyner characterizes the event: "I had just left the White House with the [P]resident. . . . No matter how far you go, I'm still a black man and not a human being." Ballard & Patrick, *supra*. Similarly, Shawn Lee, a defensive tackle for the San Diego Chargers was mistakenly stopped and handcuffed on I-15 for driving a stolen vehicle. Marisa Taylor, *Ex-Charger Lee, Actress Awarded \$249,000 by Jury*, SAN DIEGO UNION-TRIB., Mar. 14, 2001, at B-1. Interestingly, the vehicle reported stolen and the car he was driving were not similar; a jury awarded him \$249,000 in damages. *Id.*

33. See Hope Viner Samborn, *Profiled and Pulled over: Lawmakers Propose New Remedies to Stop Police Abuses*, A.B.A. J., October 1999, at 18 (recalling the story of an African-American male state legislator who was stopped while driving in a predominantly white neighborhood).

34. John L. Mitchell, *4 Actors Allege Abuse by Police*, L.A. TIMES, Apr. 13, 1991, at B3. See also Press Release, ACLU-NC, Civil Rights Groups, Minority Law Enforcement Join in Supporting AB 1264—California "Driving While Black or Brown" Law (July 24, 1998), at <http://www.aclunc.org/pressrel/1980724-dwb.html>.

35. In Cape Cod, an African-American male reporter for the *Cape Cod Times* was stopped and frisked while interviewing a white individual for a news story, after a white motorist mistakenly mistook a tape recorder for a gun at the mouth of a white man. *Agents to Investigate Racial Profiling on Cape Cod*, PORTSMOUTH HERALD, May 23, 2000, available at [http://www.seacoastonline.com/2000news/5\\_23\\_sb2.htm](http://www.seacoastonline.com/2000news/5_23_sb2.htm). See also Tatsha Robertson, *Editor Says Police Used Racial Profiling*, BOSTON GLOBE, May 23, 2000, at B2.

36. *White v. Williams*, 179 F. Supp. 2d 405, 410 (D.N.J. 2002). In *White*, two retired prison guards and a newspaper executive alleged racial profiling in a class action suit. *Id.*

37. U.S. Representative John Conyers, sponsor of the Traffic Stops Statistics Act, has stated: "there are virtually no African-American males, including Congressmen, actors, athletes, and officer workers, who have not been stopped at one time or another for an alleged traffic violation, then harassed with questions and searches." Roger Roy & Henry Pierson Curtis, *Turnpike Drug Squad*, ORLANDO SENTINEL, June 8, 1997, at A1.

38. For example, see *United States v. Jennings*, No. 91-5942, 1993 U.S. App. LEXIS 926, at \*1 (6th Cir. Jan. 13, 1993). In *Jennings*, an African-American male that "was dressed in conservative business attire—a grey

Negative stereotypical biases of African-American males overshadow any appearances that they are law-abiding citizens. Indeed, in the eyes of many law enforcement officers, an African-American male driving a Mercedes-Benz projects the presumption of illegal activity, not the presumption of a hard working citizen.<sup>39</sup>

### III. THE IMPACT OF STEREOTYPICAL BIASES TOWARD AFRICAN-AMERICAN MALES

Stereotypical biases directed at African-American males by law enforcement officials has resulted in a disproportionate number of African-American males being stopped and searched.<sup>40</sup> It is pre-supposed by many law enforcement officials that African-American males are engaged in criminal activities, especially drug dealing. This sentiment by many law enforcement officers became evident when the New Jersey Chief of Troopers defended racial profiling by stating that “mostly minorities” were engaged in the trafficking of marijuana and cocaine.<sup>41</sup> It should be obvious that if law enforcement agencies focus the enforcement of drug laws toward African-American males, and ignore whites based on stereotypical biases, African-American males will be disproportionately stopped and searched. Thus, it will appear they are the only segment of the country’s population engaged in criminal drug activities.<sup>42</sup> In turn, the data from one jurisdiction

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suit, light blue or grey shirt and black shoes”—was stopped and searched at the Cincinnati airport. *Id.* at \*2.

39. Christopher Darden, a well-known former prosecutor, states: “I always seem to get pulled over by some cop who is suspicious of a black man driving a Mercedes.” *Lambert*, 98 F.3d at 1188 (citing CHRISTOPHER A. DARDEN, IN CONTEMPT 110 (1996)). See also V. Dion Haynes, *ACLU, Lawmakers Want Police to Document Traffic Stops; Proposals Seen as a Way to Substantiate Minority Drivers’ Claims that They Are Routinely Pulled over Because of Their Race*, CHI. TRIB., Jan. 1, 1999, at 9N (quoting an executive director of the National Black Police Association, who indicated that a black person who drives a BMW, Navigator, or Mercedes may be viewed as selling drugs); Deval Patrick, *Perspective on Civil Rights; Have Americans Forgotten Who They Are?; We Debate Affirmative Action, but the Larger Issue Is Civil Rights—Affirming Our Basic Values as a Nation*, L.A. TIMES, Sept. 2, 1996, at B5 (“I still get stopped if I’m driving a nice car in the wrong neighborhood.”); Tracie Reddick, *Routine Stops Called Stereotyping*, TAMPA TRIB., Aug. 18, 1997, at Metro 1 (describing how black men who drive imported cars are viewed as being involved in selling drugs).

40. See *infra* notes 83-95 and accompanying text.

41. Debra Dickerson, *Policing; Racial Profiling: Are We All Really Equal in the Eyes of the Law? For the Record*, L.A. TIMES, July 16, 2000, at M1. In 1999, Governor Christine Todd dismissed Carl Williams, Chief of Troopers, for making such a discriminatory statement. *Id.*

42. See *Martinez*, 92 F. Supp. 2d at 783 (citing Dorothy E. Roberts, *Supreme Court Review: Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 818 (1999) (“Targeting Blacks for police surveillance results in higher rates of arrest,

will be relied on by another to justify the racial profiling of African-American males; thus, the discriminatory conduct is perpetuated.

The mere appearance, talk, walk, and dress of African-American males are viewed in a negative light by many white Americans.<sup>43</sup> Moreover, African-American males who travel through white neighborhoods may find themselves stopped and pulled over by law enforcement officials and investigated.<sup>44</sup> An African-American male who drives a foreign sports or luxury car is almost certain to be stopped by law enforcement for suspicion of drug trafficking or car theft.<sup>45</sup> As a result of discriminatory stops, African-American males are disproportionately arrested by law enforcement officers.<sup>46</sup> Negative images of this group and stereotypical biases directed at its members may automatically lead to them being stopped and arrested.<sup>47</sup> Due to such biases, law

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reinforcing the presumption of Black criminality. If police stopped and frisked whites as frequently as they do Blacks, white arrest rates would increase.”)).

43. See Nelson, *supra* note 9. See generally FLOYD D. WEATHERSPOON, AFRICAN-AMERICAN MALES AND THE LAW: CASES AND MATERIALS 1-25 (1998).

44. See *Kolender v. Lawson*, 461 U.S. 352, 354 n.2 (1983) (noting that an African-American male was stopped and arrested fifteen times in twenty-two months while walking near a high crime area); *Wilson v. Dep't of Pub. Safety*, No. 02-6236, 2003 WL 21081164, at \*1 (10th Cir. May 14, 2003) (stating that an African-American male alleged that he was stopped because he was “a black male in a predominately non-minority area during late night”). See also *Price v. Kramer*, 200 F.3d 1237, 1240-41 (9th Cir. 2000). In *Price*, two African-American males and a white male were stopped as they passed through the City of Torrance, a predominately white suburb of Los Angeles. *Id.* at 1241. The court, in upholding the jury award of \$245,000 in compensatory and punitive damages, stated:

The police officers in this case appear to have chosen the wrong young people. Two African American teens and a white teen were innocently driving through the City of Torrance, happily and quietly celebrating their graduation from prep school. For no good reason, two police officers stopped their car without probable cause or reasonable suspicion, conducted an illegal search of the vehicle, and used degrading and excessive force on the young boys. Such is not an isolated incident in the Greater Los Angeles area, or across the country. This time, however, the youngsters had the wherewithal and families with the legal knowledge and economic resources to seek justice for the wrongs committed. The defendants received a fair and impartial trial.

*Id.* at 1256 (citation omitted).

45. Arthur H. Garrison, *Disproportionate Minority Arrest: A Note on What Has Been Said and How It Fits Together*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29 (1997); Patrick, *supra* note 39. See *Lowery v. Commonwealth*, 388 S.E.2d 265, 266 (Va. Ct. App. 1990) (noting the state police stopped a rental car from Florida driven by black males). See also *United States v. Harvey*, 16 F.3d 109, 113 (6th Cir. 1993) (Delaware state police stopped a black male driving a late model car).

46. MISSOURI ATTORNEY GENERAL'S OFFICE, 2003 ANNUAL REPORT ON MISSOURI TRAFFIC STOPS 3, 4 (2003).

47. Richard Sutphen et al., *The Influence of Juveniles' Race on Police*

enforcement officials assume that every African-American male is a threat to them, and to society.<sup>48</sup>

Racial profiling due to stereotypical biases also has a direct correlation to the high incarceration rate of African-American males,<sup>49</sup> especially those between the ages of twenty and thirty nine.<sup>50</sup> Moreover targeting minorities for traffic stops, especially African-American and Hispanic males,<sup>51</sup> may enhance their sentence for other crimes, if the traffic violation is considered in determining their penalty.<sup>52</sup> Unfortunately, the killing of African-American males by law enforcement officials may have a direct correlation to the percentage of African-Americans being stopped.<sup>53</sup>

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*Decision-Making: An Exploratory Study*, 44 JUV. & FAM. CT. J. 69, 69-70 (1993). See also DARDEN, *supra* note 39, at 110 ("I always seem to get pulled over by some cop who is suspicious of a black man driving a Mercedes.").

48. See Johnson, *supra* note 2, at 639; Plessy v. Ferguson, 163 U.S. 537 (1896).

49. D.J. Silton, Article, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 55 (2002).

50. See ALLEN J. BECK ET AL., U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS AND JAIL INMATES AT MIDYEAR 2001 1, 12 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim01.pdf> (last visited Nov. 10, 2004). The Bureau of Justice Statistics reports that in 2001 among the 1.9 million or more sentenced inmates approximately 601,800 were black males between the ages of 20 and 39. Thus, at year end 2001, 13.4% of black males age 25 to 29 were imprisoned compared with only 4.1% of Hispanic males and 1.8% of white males in the same age group. *Id.* at 12 & tbl.14.

51. Even though this Article focuses on African-American males, the Latino community, especially Latino men, are also victims of racial profiling. See Kevin R. Johnson, *The Case for African-American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341 (2003).

52. See *Martinez*, 92 F. Supp. 2d at 783. The court stated that "targeting minority civilians for traffic stops distorts the sentences that they receive for other crimes because many traffic violations 'count' when determining a convicted defendant's criminal history points." *Id.* The court then cites, for example, where a traffic violation may impact future sentences. *Id.* (citing *United States v. Hernandez*, 160 F.3d 661, 669 (11th Cir. 1998); *United States v. Burke*, 148 F.3d 832, 839 (7th Cir. 1998); *United States v. Boyd*, 146 F.3d 499, 502 (7th Cir. 1998)). However, the court, in *Martinez*, also notes that in *United States v. Leviner*, the court decreased the defendant's sentence because there was evidence that his criminal history points were caused, in part, to racial disparity in how the police enforced traffic violations. *Id.* at 783 (citing *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998)). See also Elizabeth Mehren, *Judge Cites Man's Record of "Driving While Black," Eases His Sentence; Courts: Boston Jurist Says Past Offenses Can Be Traced to Officers' Habit of Making Traffic Stops Based on Race*, L.A. TIMES, Dec. 17, 1998, at A34.

53. See Kristina Goetz, *Racial Tension in Cincinnati*, THE ENQUIRER (Cincinnati, Ohio), May 19, 2001, available at [http://www.enquirer.com/editions/2001/05/19/loc\\_racial\\_tension\\_in.html](http://www.enquirer.com/editions/2001/05/19/loc_racial_tension_in.html); *Funeral Followed by Protests*, [http://www.abcnews.go.com/sections/us/DailyNews/shooting\\_protest\\_010415.html](http://www.abcnews.go.com/sections/us/DailyNews/shooting_protest_010415.html) (Apr. 14, 2001); *Cincinnati Mayor Declares State of Emergency*,

## IV. SELECTIVE ENFORCEMENT

A. *Traffic Stops: Driving While Black and Male*

More than thirty years ago, the U.S. Supreme Court in *Terry v. Ohio*<sup>54</sup> placed limitations on the ability of enforcement officers to stop and search individuals without reasonable suspicion that they were engaged in criminal activity.<sup>55</sup> Reasonable suspicion must be based on something more than an “inchoate and unparticularized suspicion or ‘hunch.’”<sup>56</sup> In addition, the Supreme Court held in *United States v. Sokolow*<sup>57</sup> that “police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irreverent personal characteristics such as race” violates the Fourth Amendment.<sup>58</sup> Law enforcement officers are required to have “specific and articulable facts.”<sup>59</sup>

Even though these limitations are part of the criminal justice jurisprudence and have been tested repeatedly in court, law enforcement officers use racial profiling as a means to routinely stop and search African-American males.<sup>60</sup> African-American males who are stopped and searched will often allege that the search and seizure violated their Fourth Amendment rights, thus,

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[http://www.foxnews.com/printer\\_friendly\\_story/0,3566,6235,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,6235,00.html) (Apr. 13, 2001); *15 Black Males Killed During Arrests Since 1995*, [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,7216,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,7216,00.html) (Apr. 12, 2001).

54. 392 U.S. 1 (1968). The Supreme Court has also held that an investigatory stop of automobiles constitute seizures within the meaning of the Fourth Amendment. See, e.g., *United States v. Cortez*, 449 U.S. 411 *passim* (1981); *Delaware v. Prouse*, 440 U.S. 648 *passim* (1979).

55. *Terry*, 392 U.S. 1 (1968). But see Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 400 (2001) (describing how the decision in *Terry v. Ohio* “is the foundation upon which the Supreme Court has built its racially biased Fourth Amendment jurisprudence”).

56. *Terry*, 392 U.S. at 27. See also *United States v. Ferguson*, 130 F. Supp. 2d 560, 561 (S.D.N.Y. 2001) (describing how an African-American male’s car was stopped and searched). *Ferguson* filed a motion to suppress the evidence collected during the search. *Id.* In granting the motion, the court held that stopping the defendant’s car based on instincts did not meet the standard outlined in *Terry*. *Id.* at 567-68.

57. 490 U.S. 1 (1989).

58. *Id.* at 12 (citing *Terry*, 392 U.S. at 14-15). But see Jodi Sax, *Drug Courier Profiles, Airport Stops and the Inherent Unreasonableness of the Reasonable Suspicion Standard After United States v. Sokolow*, 25 LOY. L. REV. 321 (1991).

59. *Terry*, 392 U.S. at 21; See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975).

60. The Court held in *United States v. Laymon*, 730 F. Supp. 332 (D. Colo. 1990), that “profile stops may not be predicated on unconstitutional discrimination based on race, ethnicity or state of residence.” *Id.* at 339.

the evidence seized must be suppressed at trial.<sup>61</sup> Because the standard for an investigatory stop does not require probable cause, but only reasonable suspicion, courts have consistently denied the suppression of such evidence.<sup>62</sup>

The use of racial profiling in the selective enforcement of public laws is most evident in traffic stops by law enforcement officers.<sup>63</sup> It can also be a most humiliating and frightening experience for anyone, especially African-American males who may fear imminent harm from police officers.<sup>64</sup> For example, in *Flowers v. Fiore*,<sup>65</sup> an African-American male motorist alleged that law enforcement officers engaged in racial profiling when he was stopped, handcuffed, forced to his knees, and had his car searched.<sup>66</sup> According to the police officers, they stopped Flowers because a resident called the police and stated that he received a

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61. See *United States v. Bridges*, No. 00 CR 210(HB), 2000 WL 1170137, at \*1 (S.D.N.Y. Aug. 16, 2000) (discussing how two African-American males argued that they were unlawfully stopped because they were black males and denying their request that the evidence seized should be suppressed). See also *Harvey*, 16 F.3d at 110-12 (though the officer testified that he stopped the car because three young black males were occupants in an old vehicle, the court nevertheless denied the defendant's motions to suppress evidence); *Ferguson*, 130 F. Supp. 2d at 562-68 (stating why the court granted the motions to suppress evidence where police officers had stopped an African-American male who was driving a car with "excessively tinted windows"); *State v. Harden*, C.A. Case. No. 19880, 2004 Ohio App. LEXIS 647, at \*1 (Ohio Ct. App. Feb. 13, 2004) (denying the defendant's motion to suppress which was based on the grounds that the officers did not have specific articulable suspicion that the defendant was involved in criminal activity, that the traffic stop was merely pretextual, and that he had been stopped based on racial profiling). See generally Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567 (1991).

62. See *Sokolow*, 490 U.S. at 7; *Cortez*, 449 U.S. at 417; *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000).

63. For an extensive study of the use of racial profiling in the enforcement of highway laws see HARRIS, RACIAL PROFILING, *supra*, note 5. The study also cites a number of incidents of racial profiling around the country. Most of these incidents were reported by African-American males.

64. See *Wilson v. Tinicum Township*, where the plaintiffs, four African-American males describe how they were stopped on I-95 by a Tinicum Township Police Officer, lined up along the shoulder of the road and searched by a police dog. No. 92-6617, 1993 U.S. Dist. LEXIS 9971, at \*4 (E.D. Pa. July 22, 1993).

65. 239 F. Supp. 2d 173 (D.R.I. 2003). Recently, the First Circuit Court of Appeals affirmed the lower court's grant of summary judgment in favor of the defendants. *Flowers v. Fiore*, 359 F.3d 24 (1st Cir. 2004). The appellate court found that the officers in the case acted reasonably and that their conduct did not constitute an actual arrest requiring probable cause. *Id.* at 30. Furthermore, the court found that the circumstances, including a threat of violence, justified the officers' conduct in drawing their weapons and restraining the defendant before proceeding with their investigation. *Id.* at 30-32.

66. *Flowers*, 239 F. Supp. 2d at 176.

call from someone who purported to be sending over “two black guys with a gun.”<sup>67</sup> Shortly thereafter, the police observed Flowers driving past the caller’s house.<sup>68</sup> The police stopped him, searched his car, and then released him because there was no evidence that he was sent to harm the resident.<sup>69</sup>

Flowers sued under various federal and state laws, alleging in part that the police engaged in racial profiling, stopping him in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment.<sup>70</sup> The court granted the defendants’ motion for summary judgment because in the eyes of the court the search was reasonable.<sup>71</sup> The court stated that innocent victims will be at times subjected to such stops by police officers<sup>72</sup> and suggested that Flowers was entitled to a “good explanation and an apology.”<sup>73</sup> The court failed to recognize that too often the “innocent victims,” who were being stopped and humiliated by law enforcement officers were African-American males.

The court in *Washington v. Lambert*<sup>74</sup> acknowledged the following: “In this nation, all people have a right to be free from the terrifying and humiliating experience of being pulled from their cars at gunpoint, handcuffed, or made to lie face down on the pavement when insufficient reason for such intrusive police conduct exists.”<sup>75</sup> However, too often African-American males are treated in this manner by law enforcement officials, without conscious of, or concerns about their constitutional rights.

One of the most egregious examples of racial profiling of African-American males occurred in 1998 when two New Jersey Troopers stopped and fired eleven times at a van traveling on the New Jersey Turnpike, wounding three of the passengers.<sup>76</sup> The van was occupied by three African-American males and a Hispanic male, all from New York, who were en route to North Carolina to try out for a baseball team.<sup>77</sup> The shooting brought national attention to the practice of stopping African-Americans, particularly African-American males, without probable cause or reasonable suspicion that they were engaged in a criminal activity.

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 177.

72. *Id.* at 179.

73. *Id.*

74. 98 F.3d 1181 (9th Cir. 1996).

75. *Id.* at 1187.

76. Martin Mbugua & Owen Moritz, *N.J. Pays \$12.9M Settlement for 4 in Racial Profiling Case*, DAILY NEWS (New York), Feb. 3, 2001, News at 5.

77. See *White v. Williams*, 179 F. Supp. 2d 405, 412 (D.N.J. 2002) (describing the turnpike shooting).

Similarly, in *State v. Soto*,<sup>78</sup> a superior court judge in Gloucester County, New Jersey, granted the defendant's motion to suppress evidence seized after being stopped on the New Jersey Turnpike.<sup>79</sup> The court held that the seventeen minority defendants who were African-Americans, the majority of whom were males, established a case of selective enforcement based on race.<sup>80</sup> In *Soto*, the defense conducted a study to determine if law enforcement officers were engaged in racial profiling.<sup>81</sup> The study revealed that "an adult black male was present in 88% of the cases where the gender of all occupants could be determined and that where gender and age could be determined, a black male 30 or younger was present in 63 of the cases."<sup>82</sup>

Other examples of racial profiling include an incident involving the Maryland State Police, which settled a lawsuit following the discovery of an internal memo that encouraged state troopers to target African-American males driving east on I-68.<sup>83</sup> The profile of the Maryland State Police suggested that being black plus male and driving on I-68 equaled criminal activity.<sup>84</sup>

During the past five years, a number of studies support the conclusion that the race and color of drivers has been the basis for state law enforcement officers to stop and search cars driven by African-Americans, particularly African-American males.<sup>85</sup> One of the most comprehensive and widely circulated studies on racial profiling was conducted in 1999 to determine whether the state police in New Jersey engaged in racial profiling on the New Jersey Turnpike.<sup>86</sup> The study concluded that minorities were disproportionately stopped and treated differently than white motorists.<sup>87</sup> Officials of the United States Department of Justice

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78. 734 A.2d 350 (N.J. Super. Ct. 1996).

79. *Id.* at 352, 361.

80. *Id.* at 352.

81. *Id.* at 356.

82. *Id.*

83. Haynes, *supra* note 39. See also Lori Montgomery, *Racial Profiling in Maryland Defies Definition—or Solution*, WASH. POST, May 16, 2001, at A01.

84. Robert D. McFadden, *Police Singled Out Black Drivers in Drug Crackdown, Judge Says*, N.Y. TIMES, Mar. 10, 1996, § 1, at 33.

85. See Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551, 559 (1997). See also Lambert, 98 F.3d at 1187-88 (listing a number of studies which conclude that "the experience of being stopped by the police is a much more common one for black men than it is for white men"). For a comprehensive collection of studies and reports on racial profiling, see the website of the Racial Profiling Data Collection Resource Center at Northeastern University at <http://www.racialprofilinganalysis.neu.edu> (last visited Feb. 14, 2005).

86. NEW JERSEY ATTORNEY GENERAL, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 5 (1999), available at [http://www.racialprofilinganalysis.neu.edu/litigation\\_display.php?state=NJ](http://www.racialprofilinganalysis.neu.edu/litigation_display.php?state=NJ) (last visited Nov. 11, 2004).

87. See *White*, 179 F. Supp. 2d at 412-13, for a summary of the study and



and the State of New Jersey ultimately signed a consent decree to prohibit and prevent racial profiling by New Jersey State Police.<sup>88</sup>

Further, a study in Maryland revealed that during a three-year review of motorists stopped on I-95, African-Americans represented seventy percent of individuals stopped by the police, even though African-Americans make up only about seventeen percent of motorists.<sup>89</sup> A similar study of traffic stops in Missouri also revealed that African-Americans were disproportionately stopped and searched.<sup>90</sup> Additionally, a study by the *Orlando Sentinel* concluded that African-Americans and Hispanics represented a small percentage of motorists on a particular Florida highway, however they represented almost seventy percent of individuals stopped and eighty percent of those whose cars were actually searched.<sup>91</sup> Lastly, in parts of Oklahoma, African-Americans are disproportionately stopped<sup>92</sup> and convicted of traffic violations.<sup>93</sup>

Similar studies of city law enforcement officials find that minorities are also disproportionately stopped.<sup>94</sup> For example, the *Salt Lake Tribune* conducted a study of traffic tickets issued by the Salt Lake City Police Department.<sup>95</sup> The survey revealed that

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recommendations.

88. Michael Booth, *A Report to a Federal Judge, Required by a Consent Decree Between the State and the Department of Justice, Says New Jersey State Police are Making Strides in Eliminating Race as a Factor in Traffic Stops*, N.J. L.J., Nov. 6, 2000; Caren Chesler, *Whitman Urged to Fight Profiling*, ASHBURY PARK PRESS (New Jersey), Dec. 29, 2000, at 3A.

89. Harris, *Stories, Statistics, and Law*, *supra*, note 5, at 267.

90. MISSOURI ATTORNEY GENERAL'S OFFICE, ANNUAL REPORT ON 2001 MISSOURI TRAFFIC STOPS (2001), available at <http://www.ago.state.mo.us/racialprofiling/2001/racialprofiling2001.htm> (last visited Feb. 14, 2005).

91. Jeff Brazil & Steve Berry, *Color of Driver Is Key to Stops in I-95 Videos; The Tapes Show that Most Stops and Searches by Volusia County's Drug Squad Involve Minorities*, ORLANDO SENTINEL, Aug. 23, 1992, at A1.

92. See Ziva Branstetter, *Minority Stops Show Disparity More Blacks Hispanics Pulled over in Overwhelmingly White Counties*, TULSA WORLD, May 20, 2001, at 1 ("More than one-third of those stopped in 11 counties heavily patrolled by an . . . [Oklahoma Highway Patrol's] drug interdiction unit were Black or Hispanic, despite the fact that populations in those areas are overwhelmingly white. . . .")

93. Chuck Ervin, *Driving While Black Arrests*, TULSA WORLD, Feb. 21, 2000, available at 2000 WL 6777223.

In northwestern Oklahoma's Major County, where only three black people live out of a total population of 7,772, according to the U.S.

Census Bureau, Department of Public Safety records show that blacks received 37 traffic convictions from mid-1996 to mid-1998—a rate of more than 34 times their proportion of the population.

*Id.*

94. See *supra* note 93 and accompanying text. See also *infra* note 95 and accompanying text.

95. Shawn Foster, *Stats Show Latinos, Blacks More Likely to be Ticketed*, SALT LAKE TRIB., May 10, 1998, at A6. See also a study of traffic stops in

African-Americans were twice as likely as white drivers to receive a traffic ticket.<sup>96</sup> Another study, conducted by the San Diego Police Department, revealed that between January and December 2000, African- and Hispanic-Americans were more likely than whites, and Asian-Americans to be stopped.<sup>97</sup>

These incidents support the suspicions held by African-American males, that their rendezvous with the police have not occurred by chance, but instead because of the darkness of their skin and their gender.<sup>98</sup> Police officers may allege there is a

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Coconino County, Arizona finding "African[-]American motorists are 2.9 times *more likely* to be stopped by DPS officers relative to their representation within the violator population." Frederic I. Solop, Statistical Analysis of I-40 Stop Data and I-40 Violator Study Data From Coconino County, Ariz. 10 (Aug. 19, 2002), available at [http://www.racialprofilinganalysis.neu.edu/IRJ\\_docs/CoconinoStatisticalAnalysis.pdf](http://www.racialprofilinganalysis.neu.edu/IRJ_docs/CoconinoStatisticalAnalysis.pdf).

96. Shawn Foster, *S.L. Cops Targeting Minority Drivers?; Police Department Says No, but Analysis of Tickets Says Otherwise; Study Raises Questions About S.L. Police*, SALT LAKE TRIB., May 10, 1998, at A1.

97. See SAN DIEGO POLICE DEP'T, VEHICLE STOP STUDY YEAR END REPORT: 2000 1 (2001), available at <http://www.sannet.gov/police/pdf/stoprpt.pdf>.

This report presents analysis of the first year of data, January through December 2000, representing over 168,000 vehicle stops. The analysis indicates that both Hispanic and Black/African American drivers are overrepresented in vehicle stops in comparison to the characteristics of San Diego's driving-age resident population. Hispanics represent 20.2% of the city's driving-age population but 29.0% of vehicle stops; the comparable numbers for Black/African Americans are 8.0% and 11.7%, respectively. The vehicle stop data also indicate that, once stopped, Hispanic and Black/African American drivers are substantially more likely to experience searches and arrests than Asian or White drivers. While the analysis demonstrates that Hispanic and Black/African American drivers are overrepresented in vehicle stops in San Diego in comparison to the driving-age population, and also overrepresented in subsequent vehicle searches, it does not explain why.

*Id.*

98. One of the most egregious selective enforcement cases involved George Murphy, an African-American male, who made the mistake of traveling to Reynoldsburg, Ohio to meet a friend. See *Murphy v. City of Reynoldsburg*, No. 90-AP-1296, 1991 Ohio App. LEXIS 3748, at \*1 (Ohio Ct. App. Aug. 8, 1991). He was followed by a Reynoldsburg police officer who pulled him over a short distance from his hotel. *Id.* at \*2. After Murphy was arrested and charged with driving under a suspended license, cocaine was found in the car. *Id.* at \*2-3. Felony charges were brought against him, but a jury failed to convict him. *Id.* at \*3. Murphy subsequently brought suit against the city after learning of an internal investigation of some officers for racial prejudice. *Id.* at \*3. The internal investigation discovered that within the police department, there were groups of white police officers that called themselves members of SNAT ("Special Nigger Arrest Team"). *Id.* at \*3. Murphy alleged that the team engaged in selective enforcement against blacks. *Id.* at \*4-5. After the case was dismissed by a lower court, the Ohio Supreme Court ordered the lower court to rehear Murphy's case. *Murphy v. City of Reynoldsburg*, 604 N.E.2d 138 (Ohio 1992). The case was subsequently settled. Fletcher, *supra* note 23.

legitimate reason for stopping African-American males, which in reality is a pretext to discrimination.<sup>99</sup> An officer, for example, may use a state car seat belt law as a pretext to stop African-American males who may not use seat belts to the extent of white motorists.<sup>100</sup> Officers also cite the failure to signal when changing lanes, or following too closely, as a basis for a stop, and ultimately a search.<sup>101</sup>

Incidents of racial profiling of African-American men continue to be reported, as law enforcement officials exercise their authority to stop and search law-abiding African-American male motorists in a discriminatory manner.<sup>102</sup> This was illustrated in testimony given by Rossano Gerald, a decorated sergeant of the Gulf War. Sergeant Gerald testified before a subcommittee of Congress on

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99. In *Wilson v. Tinicum Township*, No. 92-6617, 1993 U.S. Dist. LEXIS 9971, at \*1 (E.D. Pa. July 22, 1993), the African-American plaintiffs alleged that after their car was searched by police dogs and no drugs were found, the officer stated "in order to make this a legitimate stop, I'm going to give you a warning for obstruction of your car's rear-view mirror." *Id.* at \* 4. On the rear-view mirror there was a thin piece of string on which an air fresher had previously been attached. *Id.* at \*5. One of the plaintiffs asked why they had been stopped, and according to the plaintiff, the other stated "because you are young, black and in a high drug-trafficking area, driving a nice car." *Id.*

100. See Oralandar Brand Williams, *Black Motorists Fear More Racial Profiling; Michigan's New Seat Belt Law, They Believe New Law Will Lead to Increased Number of Stops*, DETROIT NEWS, Mar. 9, 2000, at 3A. See also *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that the Fourth Amendment does not forbid "a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine"); Sarah Oliver, Note & Comment, *Atwater v. City of Lago Vista: The Disappearing Fourth Amendment and Its Impact on Racial Profiling*, 23 WHITTIER L. REV. 1099 (2002) (suggesting that the *Atwater* decision will lead to racial profiling by police officers who stop and arrest minorities for minor offenses).

101. See *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001) (indicating that Chavez was given a warning ticket because of an alleged failure to signal); *United States v. Stanley*, No. 02-40122-02-SAC, 2003 U.S. Dist. LEXIS 17973, at \*1 (D. Kan. Sept. 18, 2003) (citing factors which collectively can support reasonable suspicion of drug trafficking); *United States v. Brigham*, 382 F.3d 500, 504 (5th Cir. 2004) (a Texas State Trooper pulled the car over for allegedly following too closely behind another vehicle). In dissent in *Brigham*, Judge DeMoss stated that:

I predict that the holding in this case will lead to further infringement on the privacy of the traveling public. The majority opinion permits a law officer to make a traffic stop for a minor and innocuous traffic violation and then expand that stop into a full-blown investigation of the driver and all occupants of the vehicle as to where they are going, where they have been, where they stayed, what they did, whom they talked to, and what events they attended.

*Id.* at 520 (DeMoss, J., dissenting).

102. In *White*, three African-American males describe how they were stopped and humiliated on the New Jersey Turnpike by white troopers. 179 F. Supp. 2d at 411.

the End of Racial Profiling Act of 2001.<sup>103</sup> Sergeant Gerald testified how he was handcuffed and humiliated by a State Trooper while driving with his son in Oklahoma.<sup>104</sup> Sergeant Gerald filed suit against the Oklahoma Highway Patrol after he was stopped twice in the same day.<sup>105</sup> During the second stop he was detained for almost two hours while officers searched his car for drugs.<sup>106</sup> Finding no drugs, he was given a warning ticket for failure to signal when changing a lane.<sup>107</sup> The case subsequently settled for \$75,000.<sup>108</sup>

Ironically, there is evidence that the use of racial profiling is also used by white police officers to stop African-American male police officers who are off-duty.<sup>109</sup> There is also evidence that African-American male officers who refuse to engage in racial profiling may also face reprisal, including termination.<sup>110</sup> Even more troubling is that there is evidence that the white officers "pretend" they don't know the African-American male officer, even though they may have worked together as partners.<sup>111</sup>

The United States Supreme Court decision in *Whren v. United States*<sup>112</sup> practically legitimizes the use of racial profiling by police officers.<sup>113</sup> In *Whren*, two African-American males, driving a

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103. *Prepared Testimony of Master Sergeant Rossano Gerald Before the Senate Judiciary Comm. Subcomm. on the Constitution, FEDERAL NEWS SERVICE*, Mar. 30, 2000 [hereinafter *Master Sergeant Rossano Gerald Statement*]. See also 147 CONG. REC. S5891-92 (2001) (statement of Sen. Feingold) (describing Sergeant Gerald's testimony given the year before).

104. *Master Sergeant Rossano Gerald Statement, supra* note 103.

105. *Id.*

106. *Id.*

107. *Id.*

108. Branstetter, *supra*, note 92, at 1.

109. In a survey conducted by two professors at the University of Wisconsin-Milwaukee, of 400 African-American police officers of the Milwaukee Police Department, in which 158 of those officers responded, the officers indicated that approximately one in three African-American male officers stated that they had been victims of racial profiling during the past year. Leonard Sykes Jr. & James H. Burnett, III, *The Long Arm of Racial Profiling; Black Milwaukee Officers Say They Too, Were Victims*, MILWAUKEE J. SENTINEL, Mar. 24, 2001, at 01B.

110. *Bell v. Clackamas County*, 341 F.3d 858 (9th Cir. 2003). An incident in Providence, Rhode Island exemplifies the ultimate negative result of a law enforcement officer engaging in racial profiling. An off-duty African-American male police officer witnessed a confrontation with an armed man, and went to assist two white police officers. Tina Kelley, *Call for Calm After Shooting of Policeman by Colleagues*, N.Y. TIMES, Jan. 30, 2000, § 1, at 14. The off-duty African-American male officer was shot and killed by the two white officers. *Id.* The two officers stated that they did not recognize the officer who approached them with his gun drawn. *Id.*

111. Harris, *Stories, Statistics, and Law, supra* note 5, at 265-66.

112. 517 U.S. 806 (1996).

113. Local enforcement agencies have also developed other indicators for identifying drug couriers. In Eagle County, Colorado the High County Drug

dark Pathfinder truck with temporary license plates, were pursued by plainclothes vice-squad officers after the driver failed to give a turning signal and sped off at an “unreasonable” speed.<sup>114</sup> When the driver stopped at a red light, the officer approached the driver’s door, and observed two large plastic bags of what appeared to be crack cocaine in the driver’s hand.<sup>115</sup> Both individuals were arrested and subsequently charged with violating various federal drug laws.<sup>116</sup>

The petitioners challenged the legality of the stop and the seizure of the drugs. The district court denied the suppression motion and they were convicted.<sup>117</sup> The court of appeals affirmed the convictions.<sup>118</sup>

After reviewing a series of Fourth Amendment cases,<sup>119</sup> the Supreme Court stated:

[W]e think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.<sup>120</sup>

The *Whren* decision sanctions law enforcement officers to stop

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Task Force developed the following characteristics common to drug couriers: rental vehicles, vehicles owned by persons not in the vehicle, vehicles with out-of-state license plates, darkened windows or curtains, temporary CB antennas, radar detectors, structural modifications, welding burns, absence of luggage, air fresheners, fast food wrappers on the floor and loose screws in the trim or lying on the floor.

Whitfield v. Bd. of County Comm’rs, 837 F. Supp. 338, 340 (D. Colo. 1993).

114. *Whren*, 517 U.S. at 808.

115. *Id.* at 809.

116. *Id.*

117. *Id.*

118. *United States v. Whren*, 53 F.3d 371, 374-75 (D.C. Cir. 1995). The court of appeals stated that “regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation.” *Id.* at 375 (citing *United States v. Scopo*, 19 F.3d 777, 784 (2d Cir. 1994)).

119. See *Whren*, 517 U.S. at 811, where the court discussed: *New York v. Burger*, 482 U.S. 691 (1987), which upheld the constitutionality of a warrantless administrative inspection; *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Colorado v. Bannister*, 449 U.S. 101 (1980); and *United States v. Robinson*, 414 U.S. 218 (1973), which held that a traffic violation arrest would not be rendered invalid by the fact that it was a “mere pretext for a narcotics search.”

120. *Whren*, 517 U.S. at 812.

and question any motorist, ostensibly for an insignificant traffic violation, and subsequently charge them with other serious crimes, even though they have no reasonable cause to suspect the individual was engaged in a felony.<sup>121</sup> It is irrelevant that the officer may have an "ulterior motive" or had "subjective intention" when making the stop.<sup>122</sup> Even though it is difficult to prove, often the real reason for the stop is based on stereotypical biases that an African-American male is engaged in illegal drug activities. In *Kearse v. State*,<sup>123</sup> Judge Griffen, in a concurring opinion denying the motions to suppress evidence seized at the stop, stated in part:

For countless African-American and Hispanic drivers, the prospect of being stopped for a traffic offense and asked to consent to a search of their vehicles has become part of the preparation for driving. . . . I hope that police agencies will voluntarily discontinue the "highly disturbing" practice of suspecting that African-American and Hispanic motorists are more likely to be drug dealers and couriers so as to warrant being stopped for traffic offenses[,] so that their vehicles can be searched and their cash seized.<sup>124</sup>

Often, African-American males who are stopped based on a "reasonable suspicion" of a traffic violation are lined up along the highway, humiliated, and searched without probable cause.<sup>125</sup> Such actions should undoubtedly be considered a violation of their Fourth Amendment rights.<sup>126</sup> Furthermore, if the law enforcement

121. See *id. passim*. In *United States v. Arvizu*, the Supreme Court of the United States recently held that "the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity 'may be afoot.'" 534 U.S. 266, 273 (2002) (citing *Sokolow*, 490 U.S. at 7). The *Arvizu* Court stated "when discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Id.* (citing *Cortez*, 449 U.S. at 417-18). This standard opens the door for police officers who engage in racial profiling to easily point to an objective factor for the stop, e.g., not wearing a seat belt.

122. *Whren*, 517 U.S. at 812-14, 818. In *Whren*, the Court indicated that the issue of an officer's motivation would be relevant to an Equal Protection Claim. *Id.* at 813. See also Hon. Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597 (1999).

123. 986 S.W.2d 423 (Ark. Ct. App. 1999) (noting an African-American male motorist alleged he was stopped because of his race).

124. *Id.* at 428.

125. See End Racial Profiling Act of 2001, S. 989, 107th Cong. (2001). In proposing the End Racial Profiling Act of 2001, Congress made the following finding regarding racial profiling: "Racial profiling harms individuals subjected to it because they experience fear, anxiety, humiliation, anger, resentment, and cynicism when they are unjustifiably treated as criminal suspects." *Id.*

126. Cf. *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1140 (N.D. Cal. 2000). In *Rodriguez*, the plaintiffs, African-Americans and Latinos,

officer detains the motorist longer than necessary to determine whether a traffic violation has occurred, or searches the car without consent or probable cause, the Fourth Amendment may be violated.<sup>127</sup>

Unfortunately, the *Whren* decision can be compared with the Supreme Court's decision in *Dred Scott v. Sanford*.<sup>128</sup> The *Dred Scott* decision resulted in African-Americans being denied their constitutional rights as citizens. Even though the cases are more than a hundred years apart, the impact of *Whren* on African-American males may be the same as *Dred Scott*. In *Dred Scott*, Judge Taney stated that a "[black man] had no rights which the white man was bound to respect."<sup>129</sup> The United States Supreme Court decision in *Whren* raises questions of whether African-American men have certain constitutional rights.

### B. Airport Stops: Drug Courier Profile

The use of drug courier profiling is also used at airports, bus stations, and with other modes of transportation to stop and search African-American males.<sup>130</sup> As an African-American male who travels by plane on a frequent basis, I am normally one of three or four African-Americans on the plane. My personal observation is that the percentage of airplane travelers that are African-American is extremely small.<sup>131</sup> However, a review of statistics on African-Americans who are stopped and searched by the United States Drug Enforcement Administration ("DEA")

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alleged that Patrol Troops had engaged in a pattern and practice of stopping and ticketing them in violation of their Fourth Amendment Rights. *Id.* The court permitted the plaintiff to proceed with a Fourth Amendment claim because there were allegations that the duration of the search was prolonged beyond a reasonable time frame. *Id.*

127. See *Florida v. Royer*, 460 U.S. 491 (1983).

128. 60 U.S. (19 How.) 393 (1857).

129. *Id.* at 407.

130. See *United States v. Barlow*, 310 F.3d 1007 (7th Cir. 2002) (noting that an African-American male alleged racial profiling when stopped by the DEA when he purchased two one-way tickets on Amtrak); *United States v. Bell*, 86 F.3d 820 (8th Cir. 1996) (stating how an African-American male was stopped and searched while riding his bicycle at night without a headlight); *State v. Williams*, 525 N.W.2d 538, 548 (Minn. 1994) (describing the characteristics of drug couriers on Amtrak trains); Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 AM. U. L. REV. 747 (1997). Cf. Ronald Sullivan, *Judge Finds Bias in Bus Terminal Search*, N.Y. TIMES, Apr. 25, 1990, at B3.

131. See *United States v. Avery*, where the court referred to *Travis I*, an earlier case before the court, where it was noted "that airplane passengers nationwide are estimated at 88% White, 5% African American, and 1% Hispanic." 137 F.3d 343, 357 n.7 (6th Cir. 1997) (citing *United States v. Travis*, 837 F. Supp. 1386, 1390 (E.D. Ky. 1993), *aff'd*, 62 F.3d 170 (6th Cir. 1995)). See also *Jones v. United States Drug Enforcement Admin.*, 819 F. Supp. 698, 714 (M.D. Tenn. 1993).

reveals that African-Americans are disproportionately stopped.<sup>132</sup> The DEA has developed what is known as “drug courier profiles.”<sup>133</sup> In *United States v. Elmore*,<sup>134</sup> a DEA agent provided the following characteristics of a drug courier profile:

The seven primary characteristics are: (1) arrival from or departure to an identified source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as rapid turnaround time for a very lengthy airplane trip; (4) use of an alias; (5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person, in briefcases or bags; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) unusual nervousness beyond that ordinarily exhibited by passengers. The secondary characteristics are (1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and (4) excessively frequent travel to source or distribution cities.<sup>135</sup>

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132. *United States v. Jennings*, No. 91-5942, 1993 U.S. App. LEXIS 926, at \*1 (6th Cir. Jan. 13, 1993). In *Jennings*, the officer acknowledged that half of his airport stops involved African-Americans or Hispanic passengers. *Id.* at \*13. However, the defendant points out that African-Americans and Hispanics “comprise far less than fifty percent of the airline passengers.” *Id.* See also *id.* at \*14 n.3.

133. For a review of the development of the origin of the drug courier profile see Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 847 (1985). See also *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976) (exemplifying one of the first federal cases involving the drug courier profile); Stephen E. Hall, *A Balancing Approach to the Constitutionality of Drug Courier Profiles*, 1993 U. ILL. L. REV. 1007, 1009-12 (1993).

134. 595 F.2d 1036 (5th Cir. 1979).

135. *Id.* at 1039. It appears from previous federal cases that this list is ever-expanding. Justice Marshall expressed concern in *United States v. Sokolow* that reliance on a profile of drug courier characteristics may subject innocent individuals to unwarranted police harassment and detention, especially since the profile has a “chameleon-like way of adapting to any particular set of observations.” 490 U.S. at 8-9 (Marshall, J., dissenting). Justice Marshall cited the following cases to illustrate how the profile is forever changing:

*United States v. Moore*, 675 F.2d 802, 803 (6th Cir. 1982) (suspect was first to deplane), *cert. denied*, 460 U.S. 1068 (1983), with *United States v. Mendenhall*, 446 U.S. 544, 564 (1980) (last to deplane), [with] *United States v. Buenventura-Ariza*, 615 F.2d 29, 29-31 (2d Cir. 1980) (deplaned from middle); *United States v. Sullivan*, 625 F.2d 9, 12 (4th Cir. 1980) (one-way tickets) [,] with *United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977) (round-trip tickets)[,] with *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977) (nonstop flight)[,] with *United States v. Sokolow*, 808 F.2d 1366, 1370 (9th Cir.) (changed planes); *Craemer*, . . . [555 F.2d at 595] (no luggage), with *United States v. Sanford*, 658 F.2d 342, 343 (5th Cir. 1981) (gym bag) *cert. denied*, 455 U.S. 991 (1982), with *Sullivan*, . . . [625 F.2d at 12] (new suitcases); *United States v. Smith*, 574 F.2d 882, 883 (6th Cir. 1978) (traveling



These characteristics appear to be race-neutral and had race been listed, it would have raised constitutional concerns (e.g., a violation of the Equal Protection Clause of the Constitution).<sup>136</sup> Courts have consistently held that “the discriminatory investigation of citizens on the basis of race certainly violates [the Constitution], engenders distrust of law enforcement officials, and perpetuates the perception among minority citizens that they are second-class citizens, and are likely to be suspected of wrongdoing solely because of their race or ancestry.”<sup>137</sup> African-American males, in particular, view law enforcement officials with suspicion and distrust. The practice of drug courier profiling of African-American men further perpetuates the conflict between African-American males and law enforcement officials.

Even though the profile appears to be neutral on its face, the question still remains whether there are code words within these “neutral” terms that law enforcement officers interpret and manipulate to reach African-American travelers,<sup>138</sup> particularly African-American males.<sup>139</sup>

The enforcement of the “drug courier profile” by law enforcement officers has resulted in African-American males being detained, searched, humiliated, and embarrassed while exercising their constitutional right to travel.<sup>140</sup> Based on the disproportionate number of African-American males stopped, it appears that the government’s profile of a drug courier has become in practice the black male drug courier profile.<sup>141</sup>

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alone), with *United States v. Fry*, 622 F.2d 1218, 1219 (5th Cir. 1980) (traveling with companion); *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979) (acted nervously), *cert. denied sub nom. Brooks v. United States*, 444 U.S. 878, (1979), with *United States v. Himmelwright*, 551 F.2d 991, 992 (5th Cir.) (acted too calmly), *cert. denied*, 434 U.S. 902 (1977).

*Id.* at 13-14 (Marshall, J., dissenting).

136. See Allen-Bell, *supra* note 5 (arguing that the use of drug profiles violates the Fourth Amendment, the Fifth Amendment, and the Civil Rights Act of 1965). Even though the numbers clearly suggest that African-Americans are singled out and stopped based on race in violation of the Equal Protection Clause, proving such allegations is almost impossible as a result of the United States Supreme Court decision in *United States v. Armstrong*, 517 U.S. 456 (1996). In *Armstrong*, the Court established an insurmountable evidentiary standard for proving selective enforcement of laws on the basis of race. See *id.*

137. *Jones*, 819 F. Supp. at 723.

138. Local enforcement agencies have also developed other indicators for identifying drug couriers. See *supra* note 113.

139. See Johnson, *supra* note 2, at 629 (finding that black males are the target of racial profiling).

140. *Id.* Erika Johnson also finds that the “War on Drugs” has resulted in black males being disproportionately imprisoned based on the drug courier profile. *Id.* See generally Hall, *supra* note 133.

141. For example, in 1996, it was reported that the North Carolina Highway

Courts have become suspicious of the use of the drug courier profile, however, the Court has failed to address the disparity in a manner to ensure equity in the enforcement of drug laws. For example, in *Jones v. United States Drug Enforcement Administration*, the court stated “[i]t is clear from the testimony that [the] officers approached [the travelers because of their race].”<sup>142</sup> Moreover, Jones presented evidence of other incidents where African-Americans were stopped without probable cause; however, the court refused to grant Jones’s request for injunctive relief against the DEA.<sup>143</sup>

In *United States v. Travis*, the evidence clearly supported the conclusion that airport detectives targeted African-American travelers by using a race-based profile.<sup>144</sup> The evidence presented by defendants indicated that in 1992, twenty of the twenty-one individuals arrested at the Kentucky airport were of African-American or Hispanic descent.<sup>145</sup> Even though the court expressed concerns that African-Americans may be targeted for searches at the airport, it nevertheless upheld the search as being lawful.<sup>146</sup>

Further, in *United States v. Weaver*,<sup>147</sup> a DEA agent stopped an African-American male at the Kansas City International Airport, because “he was a roughly dressed young black male who might be a member of a Los Angeles street gang that had been bringing narcotics into the Kansas City area.”<sup>148</sup> Even with this evidence, the Eighth Circuit Court of Appeals, nevertheless, affirmed the district court’s decision denying Weaver’s motion to suppress evidence obtained by the government when he was stopped.<sup>149</sup> In affirming the lower court’s decision, the court of appeals acknowledged that had the decision to stop the African-American male been based solely on his race, the Constitution

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Patrol’s Drug Interdiction Program “stopped and charged black male drivers at nearly twice the rate of other troopers patrolling those same roads.” DEBORAH RAMIREZ ET AL., NORTHEASTERN UNIVERSITY, A RESOURCE GUIDE TO RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 28 (2000), available at <http://www.ncjrs.org/pdffiles1/bja/184768.pdf> (citing Joseph Neff & Pat Stith, *Highway Drug Unit Focuses on Blacks*, RALEIGH NEWS & OBSERVER, July 28, 1996, at A1).

142. 819 F. Supp. at 723.

143. *Id.* at 724. See also Gregory L. Young, *The Role of Stereotyping in the Development and Implementation of the D.E.A. Drug Courier Profiles*, 15 LAW & PSYCH. REV. 331, 335-49 (1991).

144. 837 F. Supp. 1386 *passim*.

145. *Id.* at 1391.

146. *Id.* at 1396. The Sixth Circuit Court of Appeals subsequently affirmed the judgment of the district court. *United States v. Travis*, 62 F.3d 170 (6th Cir. 1995).

147. 955 F.2d 391 (8th Cir. 1992).

148. *Id.* at 394.

149. *Id.* at 396.

would have been violated.<sup>150</sup> The court, however, focused on the fact that the DEA agent also relied on race-neutral evidence to stop and question Weaver.<sup>151</sup> Based on this analysis, law enforcement officers can easily circumvent the constitutional rights of African-American males by connecting racial factors with race-neutral factors in their decision to stop any individual. At the same time the Eighth Circuit stated that it agreed with the dissent, "that large groups of our citizens should not be regarded by law enforcement officers as presumptively criminal based on race."<sup>152</sup> Nevertheless, African-American males who travel by plane or other modes of transportation may automatically be suspected of engaging in illegal activities solely based on the color of their skin. Proving that the DEA or other law enforcement officials are engaged in racial profiling in the enforcement of drug laws is almost impossible.

The Supreme Court decision in *Whren* gave law enforcement officers the authority to stop African-American males, and other minorities, on the basis of their race, and the Supreme Court decision in *United States v. Armstrong*<sup>153</sup> made it virtually impossible to prove that law enforcement officers were intentionally engaged in stopping African-American males.<sup>154</sup> For

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150. *Id.* at 394 n.2.

151. *Id.* at 394 n.2, 395-96.

152. *Id.* at 394 n.2. The dissent stated, in part that "[o]ne of the most disturbing aspects of this case is the agents' reference to Weaver as 'a roughly dressed young black male.'" *Id.* at 397 (Arnold, J., dissenting). The dissent also expressed concern that the "[u]se of race as a factor simply reinforces the kind of stereotyping that lies behind drug courier profiles. When public officials begin to regard large groups of citizens as presumptively criminal, this country is in a perilous situation indeed." *Id.* (Arnold J., dissenting).

153. 517 U.S. 456 (1996).

154. See *United States v. Duque-Nava*, 315 F. Supp. 2d 1144 (D. Kan. 2004). In *Duque-Nava*, the court outlined how the *Armstrong* decision created an "insurmountable" standard for presenting a selective prosecution claim, specifically the court stated in part:

In the context of a challenged traffic stop, however, imposing the similarly situated requirement makes the selective enforcement claim impossible to prove. It would require the defendant to make a credible showing that a similarly situated individual was *not stopped* by the law enforcement. How could a defendant, *without discovery*, ever make such a showing? Would a defendant have to hire an investigator to patrol the same stretch of highway patrolled by the arresting officer, and then observe and record other motorists who present probable cause or reasonable suspicion of violating the same traffic law that was the basis for stopping the defendant? Even if a defendant accomplished that, how could a defendant show the other motorist was in fact similarly situated to the defendant; that the officer had the same opportunity to perceive and evaluate that motorist's driving as the officer had to perceive and evaluate the defendant's driving; and that all of the facts and circumstances that the officer relied on in exercising discretion and selecting the defendant to stop, were the same facts and circumstances

all practical purposes, *Armstrong* gave law enforcement officials unfettered authority to profile, stop, search, and prosecute African-Americans, particularly black males during the "war on drugs." If there was ever a case where the statistical data clearly supported a pattern and practice of selective enforcement on the basis of race, it would have been *Armstrong*.

In *Armstrong*, "the Federal Bureau of Alcohol, Tobacco, and Firearms and the Narcotics Division of Inglewood, California, Police Department had infiltrated a suspected crack distribution ring by using three confidential informants."<sup>155</sup> As a result of the drug sting, *Armstrong* and other African-American males were indicted.<sup>156</sup> Defendants filed a motion for discovery or for dismissal of the indictment alleging that the government had engaged in selective prosecution on the basis of race.<sup>157</sup> To support their claim, they submitted an affidavit of an employee of the office of the Federal Public Defender described as stating:

... in every one of the 24 § 841 or § 846 [drug] cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a "study" listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.<sup>158</sup>

Over objections by the Government the district court granted the motion for discovery.<sup>159</sup> It ordered the Government:

(1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses.<sup>160</sup>

After appeals to the Ninth Circuit, the Supreme Court granted certiorari to establish the standard for discovery for a selective prosecution claim.<sup>161</sup>

The Supreme Court acknowledged that the government is prohibited from using race as a basis to prosecute.<sup>162</sup> From there,

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presented with the motorist that the officer did not stop?  
*Id.* at 1154-55.

155. *Armstrong*, 517 U.S. at 458.

156. *See id.* at 459.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 461.

162. *Id.* at 464-65. *See also* *Bolling v. Sharpe*, 347 U.S. 497 (holding the decision to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

the Court established a heightened standard which ties the hands of defendants from discovering evidence to support their claim of selective enforcement. The Supreme Court held that to establish a selective prosecution claim 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.<sup>163</sup>

The Supreme Court also held that this standard even applies when defendants are seeking discovery to prove their claim.<sup>164</sup> The difficulty in selection cases is identifying whites who are treated more favorably by the prosecutor in the enforcement of drug laws.<sup>165</sup> The Court incorrectly hypothesized that the “similarly situated” standard will not make selective prosecution claims impossible to prove.<sup>166</sup> Subsequent selective enforcement cases, where a discovery motion to discover evidence to support “similarly situated” whites were treated more favorably, have been denied based on the Court’s decision in *Armstrong*, thus leaving defendants, especially African-American male defendants, without sufficient evidence to support their claim.<sup>167</sup>

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163. *Armstrong*, 517 U.S. at 465.

164. *See id.* at 468. The Court found the time, efforts, and costs that would be imposed on the government to provide the type of discovery necessary to support a claim of selective prosecution, justified imposing on that motion for discovery, the same rigorous standard that is applied to prove a selective prosecution claim. *Id.* at 468-69.

165. *But see id.* at 480 (Stevens, J., dissenting). Justice Stevens notes in dissent that evidence showing that “black defendants charged with distribution of crack in the Central District of California are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court. . . .” *Id.* There are differences between the federal scheme as opposed to state schemes, including the “absence of mandatory minimums, the existence of parole, . . . lower baseline penalties, [and that] terms of imprisonment for drug offenses tend to be substantially lower in state systems than in the federal system.” *Id.* at 479. If a prosecutor chooses to prosecute a defendant in state court as opposed to federal court, this could be viewed as more favorable treatment of that defendant. *See id.* at 478-80.

166. *Id.* at 466.

167. *See United States v. Alcaraz-Arellano*, 302 F. Supp. 2d 1217 (D. Kan. 2004); *State v. Valencia-Alvarez*, No. 02CA0593, 2004 Colo. App. LEXIS 1257 (Colo. Ct. App. July 15, 2004) (holding the defendant could not meet the burden); *Hardy v. Commonwealth*, No. 2003-CA-000584-MR, 2004 Ky. App. LEXIS 145 (Ky. Ct. App. May 21, 2004) (failed to meet standard). *But see People v. Hester*, 992 P.2d 569 (Cal. Ct. App. 2004) (suppressing evidence only because there was direct evidence that race was a factor in the officers’ stopping the occupants of a car, particularly when one of the officers stated that he stopped the car “based on the occupants of the vehicle being all black males”).

The difficulty in meeting the *Armstrong* standard is illustrated in *United States v. Barlow*.<sup>168</sup> Barlow, an African-American male, was stopped by DEA agents at Chicago's Union Station after he purchased two one-way tickets to Topeka, Kansas.<sup>169</sup> The DEA agents indicated that Barlow and his companion were stopped because they "kept glancing over their shoulders at the agents and whispering to one another."<sup>170</sup> After receiving consent to search their bags, the DEA agents found drugs and weapons.<sup>171</sup> Barlow and his companion were arrested.<sup>172</sup>

In Barlow's motion for discovery under the *Armstrong* standard, he alleged that he had been "pursued, stopped, interviewed, and investigated by Drug Enforcement Administration agents based on his race."<sup>173</sup> Barlow presented preliminary statistical evidence which indicated that African-American males were singled out for stops, whereas white males were not.<sup>174</sup> He requested the names and races of all individuals stopped by the agents during a five year period.<sup>175</sup> In rejecting his motion, the court held that allegations of racial profiling are analyzed under the same standard of complaints of selective prosecution.<sup>176</sup> The court stated that "Barlow needed to demonstrate that the agents' actions had a discriminatory effect and that the agents had a discriminatory purpose when they approached him. . . ."<sup>177</sup> Without this evidence, Barlow could not meet the standard in *Armstrong* to obtain discovery on a claim of racial profiling.<sup>178</sup>

## V. CONCLUSION

African-American males continue to be victims of racial profiling, even with new safeguards developed by state<sup>179</sup> and

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168. 310 F.3d 1007 (7th Cir. 2002).

169. *Id.* at 1008.

170. *Id.*

171. *Id.* at 1009.

172. *Id.*

173. *Id.*

174. *Id.* at 1009-10.

175. *Id.* at 1009.

176. *Id.* at 1010.

177. *Id.*

178. *Id.* at 1012.

179. For a review of racial profiling legislation see Memorandum from the Institute on Race & Poverty, University of Minnesota Law School, to Senator Linda Berglin (Minn. Legislature), Senator Jane Ranum (Minn. Legislature), and Representative Greg Gray (Minn. Legislature), Components of Racial Profiling Legislation (Mar. 5, 2001), available at <http://www.umn.edu/irp/publications/racialprofiling.html>. See also Northeastern University, *supra* note 85. For a state by state review of racial profiling legislation, see Northeastern University, *Racial Profiling: The State of the Law*, at <http://www.policefoundation.org/pdf/racialprofiling.pdf> (last visited Feb. 14,

federal<sup>180</sup> law enforcement organizations. The selective enforcement is based on stereotypical biases directed at African-Americans by law enforcement officials. Further remedies are needed to prohibit and punish law enforcement officers engaging in such discriminatory conduct.<sup>181</sup> Unfortunately, African-American males lack the political clout to force Congress and other governmental officials to respond in a meaningful manner to prohibit the racial profiling of African-American males and other minorities. Moreover, the courts have failed to safeguard their constitutional rights to travel without fear of being stopped, searched, and arrested by law enforcement officials on the basis of their race and gender.

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180. Press Release, U.S. Dep't of Justice, Justice Department Issues Policy Guidance to Ban Racial Profiling: Action Fulfills President Bush's Promise (June 17, 2003), [http://www.usdoj.gov/opa/pr/2003/June/03\\_crt\\_355.htm](http://www.usdoj.gov/opa/pr/2003/June/03_crt_355.htm).

181. Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721 (2004). See also Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001); Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 357-79 (2000).