

Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities

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INTRODUCTION

Bonnie Castro's Montana license plate read "PUREMEX" and was intended as an expression of pride in her family heritage.¹ "We didn't think it would make us a target," she later explained after having been detained for almost forty minutes in ninety-degree weather while holding her five-month-old son as police canines searched her car for illegal drugs.² The Billings Police Department later explained that their actions were justified since Ms. Castro circled the block six times as members of a special police unit were arresting suspected drug dealers nearby.³ However, given the time that elapsed between when she clocked out of work and when the officer radioed in the call, Ms. Castro would have had to complete a half dozen loops in less than one minute for the police department's explanation to make sense.⁴ Following a thorough inspection of her car, which failed to yield contraband, Ms. Castro was issued citations for driving without proof of insurance and having expired registration.⁵ The court dismissed both tickets the following day.⁶ Unfortunately, this incident was not Castro's first brush with local law enforcement. Just two weeks earlier, she had been stopped by the Billings Police Depart-

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¹ David Crisp, *City Settles Profiling Case*, BILLINGS OUTPOST, Dec. 19, 2001, at 1.

² *Id.*; AM. CIVIL LIBERTIES UNION OF MONT., LITIGATION DOCKET UPDATE 5 (2003), available at <http://www.aclumontana.org/inthecourts/dockets.html>.

³ Crisp, *supra* note 1.

⁴ *Id.*; AM. CIVIL LIBERTIES UNION OF MONT., *supra* note 2, at 5.

⁵ Crisp, *supra* note 1.

⁶ *Id.* Following this incident, Bonnie Castro brought suit against the Billings Police Department alleging that its members engaged in racial profiling. The case was eventually settled for \$50,000. Although the police department did not admit to pursuing a race-conscious profiling policy, they conceded that "any suspicion by the Department in regard to the actions of Bonnie . . . Castro . . . has been deemed to be unsubstantiated." *Id.*

ment for honking her horn and waving to a neighbor.⁷ The officer explained that car horns should be sounded only in an emergency or as a warning.⁸ Despite this explanation, Ms. Castro wondered whether she had been the victim of racial profiling, since the local police department rarely issued citations or warnings due to the improper use of a horn.⁹

The text of Bonnie Castro's license plate evinced a public choice to celebrate her ethnic roots. For many Latinos, however, the color of their skin alone is an equally visible—and immutable—marker of their ancestry. In this sense, color can serve as the equivalent of a license plate or bumper sticker which labels an individual and subjects him or her to racial and ethnic stereotypes. As Professor David Harris observed:

Police can use skin color as evidence of criminal involvement, even without any other evidence that points in that direction. This means, in clear and unequivocal terms, that *skin color itself has been criminalized*. This approach to law enforcement stigmatizes every African American, Latino, Asian, or member of any other minority group whose unchangeable personal characteristics, like black or brown skin, . . . become physical markers of criminality, more indelible than any scarlet letter.¹⁰

The criminalization of race takes on special meaning in the context of traffic stops. Statistics and studies overwhelmingly support the contention that racial profiling—commonly described as “the detention, interdiction or other disparate treatment of an individual [by police] solely on the basis of the racial or ethnic status of such individual”¹¹—has occurred for decades on our nation's streets and highways.¹² This has led commen-

⁷ Press Release, American Civil Liberties Union, ACLU of Montana Hails \$50,000 Settlement in First Racial Profiling Case Brought Under State Human Rights Law (Dec. 18, 2001), available at <http://www.aclu.org/news/NewsPrint.cfm?10065&c=133>.

⁸ *Id.*

⁹ *Id.*

¹⁰ DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 224 (2002).

¹¹ CONN. GEN. STAT. ANN. § 54-11(b) (West 2003).

¹² See, e.g., End Racial Profiling Act of 2004, H.R. 3847, 108th Cong. § 2(a)(7) (2004) (“Statistical evidence from across the country demonstrates that racial profiling is a real and measurable phenomenon.”); KENNETH MEEKS, DRIVING WHILE BLACK: HIGHWAYS, SHOPPING MALLS, TAXICABS, SIDEWALKS: HOW TO FIGHT BACK IF YOU ARE A VICTIM OF RACIAL PROFILING 5 (2000) (“Whether or not you believe that racial profiling actually exists, the practice has been proven over and over again.”); Letter from Laura W. Murphy & La Shawn Y. Warren, American Civil Liberties Union, to the United States Senate (Feb. 19, 2004), available at <http://www.aclu.org/news/NewsPrint.cfm?ID=15114&c=133> (“Data collected in New Jersey, Maryland, Texas, Pennsylvania, Florida, Illinois, Ohio, New York and Massachusetts show that African-Americans and Latinos are being stopped for routine traffic violations in excess of their representation in the population or even the rate at which such populations are accused of criminal conduct.”); Press Release, Nancy Pelosi, House Democratic Leader, U.S. House of Representatives, Pelosi: “Racial Profiling Is Fundamentally Un-American” (Feb. 26, 2004), available at <http://www.house.gov/pelosi/>

tators to assert that dark skin, by itself, effectively functions as probable cause to stop a vehicle and conduct a search.¹³ The notion that many officers pursue race-conscious policing policies has even made it into the popular lexicon in the form of the terms “driving while black” or “driving while brown”—which some facetiously describe as “unwritten violation[s] in the state’s traffic code.”¹⁴ This phenomenon has been referenced in newspapers,¹⁵ academic journals,¹⁶ and even popular culture. For instance, an animated cartoon series on cable television recently depicted a scene in which a police officer stopped an African American and asked, “Do you know how ‘black’ you were going?”¹⁷ The puzzled motorist responded, “Somewhere between Denzel Washington and Nelly?”¹⁸

However, racial profiling is no laughing matter. The situations faced by this fictional cartoon character and real victims such as Bonnie Castro are representative of those confronting a growing number of minorities, including many Latinos. Recent figures released by the U.S. Census Bureau indicate that Latinos are rapidly expanding well beyond the Southwest into “non-traditional” areas such as Billings, Montana, and Noel, Missouri.¹⁹ As a result, bustling cities and rural towns throughout middle

press/releases/Feb04/racialprofiling022604.html (“Numerous recent studies have demonstrated that African Americans and Hispanics are stopped in traffic and searched far in excess of their share of the population.”).

¹³ See, e.g., James T. Campbell, Opinion, *Racial Profiling Report Confirms Obvious*, HOUS. CHRON., Feb. 9, 2004, at 16 (“Minority motorists, particularly men, long have known that their color is probable cause to be pulled over and frisked by some police.”); James Ragland, *Dark Skin Isn’t Probable Cause to Be Stopped by Police*, DALLAS MORNING NEWS, Mar. 8, 2004, at B1 (“By this reasoning, police have every right to stop a black or Hispanic motorist without sufficient reason. Dark skin is probable cause.”).

¹⁴ Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 418 (2001).

¹⁵ See, e.g., Campbell, *supra* note 13 (“[D]riving while brown . . . in Texas will get you stopped and searched more than whites. Expecting to be stopped by police is a haunting and daily truth for browns It matters not whether we’re styling in a Mercedes or rolling in a rusty Ford that can barely pass inspection.”); Carl Chancellor, *Angry Drivers, Residents Await Fall of New Rome: New Law Will Eliminate Mayor’s Court in Village Known as Speed Trap*, AKRON BEACON J., June 16, 2003, at A1; Steve Lash, *Wanted: More Latino Police; Racial Profiling at Core of Groups’ Push to Recruit*, HOUS. CHRON., Dec. 15, 1999, at A11; Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17 (“‘Why were you stopped?’ asks the local joke. The answer: ‘Driving while Mexican.’”).

¹⁶ See, e.g., Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 343–44 (2003); Victor C. Romero, Essay, *Racial Profiling: “Driving While Mexican” and Affirmative Action*, 6 MICH. J. RACE & L. 195, 195–96 (2000); Skolnick & Caplovitz, *supra* note 14, at 418.

¹⁷ *This Just In* (Spike TV television broadcast, Mar. 14, 2004).

¹⁸ *Id.* I would add that the Latino analogue might be: “Somewhere between Ricky Martin and Erik Estrada?”

¹⁹ See Sylvia R. Lazos Vargas, “*Latina/o-ization*” of the Midwest: *Cambio de Colores* (Change of Colors) as *Agromaquilas* Expand Into the Heartland, 13 BERKELEY LA RAZA L.J. 343, 343–44 (2002); Press Release, Mexican American Legal Defense and Educational Fund, MALDEF Presents President Bush and Vice President Cheney with Policy Recommendations: Transitional Paper Details Pressing Latino Issues, Needs (Apr. 23, 2001),

America are experiencing Latino “hypergrowth.”²⁰ For instance, the Latino population in Tulsa, Oklahoma, increased by 303% between 1980 and 2000; Nashville, Tennessee, witnessed a growth in the Hispanic population of 630%; and the number of Latinos living in Raleigh, North Carolina, jumped by 1180%.²¹ Defying typical notions of where Latinos reside, the largest overall statewide increase in the Hispanic population did not occur in Texas or California, but rather in Arkansas, where there was a net growth of 170% over a ten-year period.²² These demographic trends are reshaping the traditional image of the Heartland: “The prototypical Midwestern farm town—almost all white, English-speaking, of European heritage, and mostly middle class—is becoming diverse culturally, racially, and class-wise. Virtually overnight, small rural towns gained a significant Latina/o presence.”²³

As Latinos move into communities in the Midwest and Southeast, however, they become more vulnerable to discriminatory practices such as racial profiling. Their increased susceptibility is due to a combination of factors: in the Midwest, the Latino population is more diffuse, there are fewer legal advocacy resources in rural areas, and little protective legislation is in place which either provides for the collection of data pertaining to traffic stops or bans racial profiling altogether.²⁴ Commentator Sylvia Lazos Vargas explained that many Latinos would have difficulty incorporating themselves into the Midwestern culture due to racial, ethnic, and language differences:

The influx of Latinas/os is felt immediately and visibly. There is no possibility of Latinas/os remaining “olvidados,” or unseen . . . Spaces in rural America are small and contained, neighbors know one another. These are communities where newcomers are immediately noticed and scrutinized. The sense of who is a newcomer spans generations, not years; counties, not countries.²⁵

Further, some studies indicate that racial profiling of Latinos occurs more frequently in “hyper-growth rural communities” in states like Missouri,

available at <http://www.maldef.org/news/press.cfm?ID=44> (“Although unified under one general ethnicity, Latinos are as diverse as the geographic locations where they live. No longer isolated in traditionally Hispanic enclaves like California, Texas, Florida or New York, Latinos are establishing themselves in such non-traditional states as North Dakota, Georgia, Nevada and Iowa.”).

²⁰ ROBERTO SURO & AUDREY SINGER, THE BROOKINGS INST., *LATINO GROWTH IN METROPOLITAN AMERICA: CHANGING PATTERNS, NEW LOCATIONS* 5 (2002), *available at* <http://www.brookings.edu/dybdocroot/es/urban/publications/surosinger.pdf>.

²¹ *Id.* at 6. The terms “Latino” and “Hispanic” are used interchangeably in this Article.

²² HARRIS, *supra* note 10, at 133.

²³ Lazos Vargas, *supra* note 19, at 344.

²⁴ See discussion *infra* Part II.B.

²⁵ Lazos Vargas, *supra* note 19, at 345, 353–54.

where police stop Hispanics at rates 12% to 1250% higher than their proportion of the local population.²⁶

These factors, in tandem, suggest that individuals in emerging Latino communities will be repeatedly victimized by race-conscious policing until a comprehensive solution is adopted to eradicate such practices. Accordingly, I propose that the government undertake an expansive, sustained, and targeted effort to collect data with regard to the conditions under which federal, state, and local law enforcement officials stop and search individuals. Although certain states and localities collect related information pursuant to consent decrees, voluntary policies, or legislation, often such studies are performed in an incomplete manner.²⁷ Given that Latinos have settled throughout the country, nothing short of a nationwide data collection effort will determine where racial profiling occurs and pinpoint its underlying causes. This solution is based on a simple premise: to cure an affliction, one must first diagnose the disease. As a result of this nationwide study, federal and state legislators will be provided with the information necessary to form enlightened policies for dealing with racial profiling. This research may also help to build the political will necessary to pass such laws by definitively proving the existence of the phenomenon. As such, my proposal is not a panacea that will, by itself, eliminate race-conscious police practices. Rather, it is a necessary first step that will mark the beginning of the end of racial profiling.

Part I of this Article contrasts the permissible policy of criminal profiling with the discriminatory practice of racial profiling and discusses potential race-neutral sources of the phenomenon. Part II discusses the emergence of Latino communities in “non-traditional” areas, details the existence of virulent racial profiling practices in these regions, and documents the negative consequences resulting from such policies. Finally, Part III proposes the implementation of a nationwide data collection program which would gather information from federal, state, and local law enforcement agencies. The goal of this scheme is to uncover both race-

²⁶ See, e.g., Sylvia R. Lazos Vargas, *Missouri, The “War on Terrorism,” and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 813, 826 (2002).

²⁷ See discussion *infra* Part III. For example, the U.S. General Accounting Office analyzed available data collection efforts and concluded:

To date, little empirical information exists at the federal, state, or local levels to provide a clear picture of the existence and/or prevalence of racial profiling. Data collection efforts that are currently planned or under way should provide more data in the next few years to help shed light on the issue. These efforts are steps in the right direction. However, it remains to be seen whether these efforts will produce the type and quality of information needed for answering questions about racial profiling.

related and race-neutral causes of profiling so that targeted legislation can be enacted to systematically eliminate the practice altogether. In the interim, other strategies should be pursued to limit the damage caused by racial profiling, including engaging in legal advocacy, encouraging police forces to implement protective and training measures voluntarily, and passing legislation at state and local levels. Hopefully, this comprehensive approach will aid in eradicating a complex, cumbersome, and catastrophic problem.

I. REFRAMING THE RACIAL PROFILING ISSUE

A. *Criminal Profiling Versus Racial Profiling*

Although little consensus exists on a precise definition of racial profiling,²⁸ police conduct can be separated into two rough categories: criminal profiling and racial profiling. The first of these categories, criminal profiling, involves the use of racial or ethnic characteristics by police departments in stopping an individual because his or her description matches that of an actual suspect.²⁹ In this sense, race functions as the equivalent of hair color or height, which can then be used in combination with other factors to paint a more accurate portrait of a suspected criminal.³⁰ As a result, generalized notions of criminal propensity are not projected onto an individual because of that person's membership in a particular racial or ethnic group. For example, Department of Justice guidelines governing the conduct of federal law enforcement agents during traffic stops generally ban racial profiling, but permit the use of race and ethnicity in a "specific suspect description."³¹ In accordance with this policy, an officer patrolling the George Washington Parkway in Washington, D.C., would not be permitted to use race as a factor in deciding which motorists to pull over, assuming that most people traveling on the roadway were ex-

²⁸ See Jeremiah Wagner, *Racial (De)Profiling: Modeling a Remedy for Racial Profiling After the School Desegregation Cases*, 22 LAW & INEQ. 73, 75–76 (2004). Definitions of racial profiling have varied. See, e.g., DARIN D. FREDRICKSON & RAYMOND P. SILJANDER, RACIAL PROFILING: ELIMINATING THE CONFUSION BETWEEN RACIAL AND CRIMINAL PROFILING AND CLARIFYING WHAT CONSTITUTES UNFAIR DISCRIMINATION AND PERSECUTION 15 (2002) (explaining that racial profiling is "a term that is generally understood to mean enforcement action on the part of police officers that is motivated more by racial bias than by any reasonable suspicion or probable cause that may exist under the circumstances"); MEEKS, *supra* note 12, at 4–5 (describing racial profiling as "the tactic of stopping someone only because of the color of his or her skin and a fleeting suspicion that the person is engaging in criminal behavior"); U.S. GEN. ACCOUNTING OFFICE, *supra* note 27, at 1 ("Racial profiling of motorists by law enforcement . . . [consists of] using race as a key factor in deciding whether to make a traffic stop . . .").

²⁹ HARRIS, *supra* note 10, at 152.

³⁰ See *id.*

³¹ U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 3 (2003), available at <http://www.fletc.gov/legal/Racial%20Profiling%20Guidance%20June%202003.pdf>.

ceeding the speed limit.³² In contrast, a police officer who “receives an ‘All Points Bulletin’ to be on the look-out for a fleeing bank robbery suspect, a man of a particular race and particular hair color in his 30s driving a blue automobile” may stop members of a particular race, provided that they match this detailed description.³³ The officer’s conduct in this latter scenario would not qualify as racial profiling, since he or she received specific information regarding an actual suspect who had committed a crime in the vicinity. Common sense dictates that law enforcement agents should not disregard relevant information under these circumstances,³⁴ as a resultant traffic stop would not have been motivated by generalized notions about the criminal nature of certain groups.

In contrast, racial profiling often forms part of a “crime-fighting strategy” which operates under the assumption that individuals from particular racial or ethnic groups commit crimes at higher rates.³⁵ More frequent stops of these individuals, therefore, are supposedly justified solely because of their racial membership. The Department of Justice has sharply criticized this tactic:

It casts a pall of suspicion over every member of certain racial and ethnic groups without regard to the specific circumstances of a particular investigation or crime, and it offends the dignity of the individual improperly targeted. Whatever the motivation, it is patently unacceptable and thus prohibited under this guidance for Federal law enforcement officers to act on the belief that race or ethnicity signals a higher risk of criminality. This is the core of “racial profiling” and it must not occur.³⁶

The guidelines further stipulated that even if evidence existed which confirmed that minorities committed crimes at higher rates in certain areas, “the affirmative use of such generalized notions by federal law enforcement officers in routine, spontaneous law enforcement activities is tantamount to stereotyping.”³⁷ Legitimate criminal profiling is often confused with racial profiling, however, due to the fact that both can implicate race and ethnicity.³⁸ As the George Washington Parkway scenario discussed above illustrates, race can comprise one of the many components of a specific criminal profile. Yet this targeted use of information should not be mistaken for using racial appearance “to stop a particular person based

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.* at 5 (discussing information that should be considered in the context of law enforcement activities related to specific investigations).

³⁵ HARRIS, *supra* note 10, at 11.

³⁶ U.S. DEP’T OF JUSTICE, *supra* note 31, at 4.

³⁷ *Id.*

³⁸ *See* FREDRICKSON & SILJANDER, *supra* note 28, at 6.

on a *prediction* that he or she is more likely to be involved in crime.”³⁹ Such practices, even where legally permissible, should not be adopted by law enforcement agents due to their lack of effectiveness⁴⁰ and moral repugnance.⁴¹ Hence, the term “racial profiling” as used in this Article will refer to traffic stops conducted pursuant to generalized assumptions about individuals’ propensity to have engaged in criminal behavior due to their membership in a particular racial or ethnic category, as distinct from criminal profiling.

B. Reframing the Racial Profiling Debate: Moving Away from Discussing Only Race-Conscious Motives in Police Decisionmaking

In seeking to understand the various causes for the disparate rates at which minorities are stopped and searched, of which racial profiling is one, possible race-neutral sources of the phenomenon must be taken into account. For instance, disproportionate statistics could also be caused in part by police departments’ more frequent patrolling of “high-crime” areas, which at times correlate with minority neighborhoods.⁴² Instead, conversations regarding racial profiling tend to concentrate exclusively on either the presence or absence of racial animus in conducting traffic

³⁹ HARRIS, *supra* note 10, at 152.

⁴⁰ See, e.g., End Racial Profiling Act of 2004, H.R. 3847, 108th Cong. § 2(a)(4), (10) (2004); U.S. DEP’T OF JUSTICE, *supra* note 31, at 1 (“Racial profiling in law enforcement is not merely wrong, but also ineffective.”); Jon Corzine, *End Racial Profiling Speech by U.S. Senator Jon Corzine: Introducing S. 989, the “End Racial Profiling Act,”* 26 SETON HALL LEGIS. J. 55, 57 (2001) (“[N]ot only is racial profiling wrong, it is simply not an effective law enforcement tool.”). Further, the U.S. General Accounting Office stated that notwithstanding the limitations of available data:

[W]e believe that in order to account for the disproportion in the reported levels at which minorities and whites are stopped on the roadways, (1) police officers would have to be substantially more likely to record the race of a driver during motorist stops if the driver was a minority than if the driver was white, and (2) the rate and/or severity of traffic violations committed by minorities would have to be substantially greater than those committed by whites. We have no reason to expect that either of these circumstances is the case.

U.S. GEN. ACCOUNTING OFFICE, *supra* note 27, at 2.

⁴¹ See HARRIS, *supra* note 10, at 155 (“But just because police departments *can* legally use a particular tactic—that is, because the Supreme Court allows officers to use a particular method—does not mean that police departments *should* use it.”); see also U.S. DEP’T OF JUSTICE, *supra* note 31, at 2 (acknowledging that federal law enforcement policies on racial profiling apply “even where the use of race or ethnicity might otherwise be lawful”).

⁴² See R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 583–84 (2003) (explaining that “racial disparities may result from the decision to target drug dealers in low status, and disproportionately minority, neighborhoods”); see also William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999) (“Fourth Amendment law makes wealthier suspects better off than they otherwise would be, and may make poorer suspects worse off. And Fourth Amendment law heightens the tendency of the police to target the kinds of drug markets that prevail in poor black neighborhoods.”).

stops.⁴³ This results in law enforcement agents being cast in one of two contrary roles: those opposed to the practice often depict officers as bigots motivated solely by racial stereotypes to pull over minorities,⁴⁴ whereas supporters of racial profiling counter that law enforcers are justified in closely scrutinizing minorities because they supposedly commit crimes at higher rates.⁴⁵ Consequently, debates regarding racial profiling frequently center around whether or not police officers are motivated by bias or hatred toward minorities. For example, the title of one book dedicated to discussing the racial profiling issue queries, “Are Cops Racist?”⁴⁶ Although

⁴³ See, e.g., Stephen B. Presser, *Have We Overreacted to the Fear of Racial Profiling?*, 29 LITIG. 29, 29 (2003) (“The term [racial profiling] conjures up images of insensitive, jack-booted, bullwhip-wielding police bent on carrying out bigoted oppression of innocent citizens merely because of the color of their skin or their ethnic affiliation.”); see also Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 89 (2001) (discussing certain data collection efforts which were assumed to be used for determining whether or not police are “racist”). One commentator wrote an especially vigorous defense of the position that racism is not implicated in traffic stops:

In the matter of race, I think the Anglo-Saxon world has taken leave of its senses. The campaign to ban racial profiling is, as I see it, a part of that large, broad-fronted assault on common sense that our over-educated, over-lawyered society has been enduring for some forty years now, and whose roots are in a fanatical egalitarianism, a grim determination not to face up to the realities of group differences, a theological attachment to the doctrine that the sole and sufficient explanation for all such differences is “racism”—which is to say, the malice and cruelty of white people—and a nursed and petted guilt towards the behavior of our ancestors.

John Derbyshire, *In Defense of Racial Profiling*, NAT’L REV., Feb. 19, 2001, at 40.

⁴⁴ See, e.g., Press Release, American Civil Liberties Union, ACLU and Coalition Groups File Suit Against CA Law Enforcement Agencies for Racial Profiling (Nov. 30, 1999), available at <http://www.aclu.org/new/NewsPrint.cfm?ID=8777&c=133> (calling for an end to “these racially biased police practices” and observing that “officers continue to rely on racial stereotypes when deciding who to stop, question and search”).

⁴⁵ See, e.g., Garrett, *supra* note 43, at 56 (“Indeed, a conservative reaction against the ‘racial profiling crusade’ is underway They argue that no data can disprove that police use race largely out of necessity, because more minorities commit crime.”); David A. Harris, “*Driving While Black*” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 571 (1997) (summarizing the position that “Stopping a disproportionate number of African-Americans is not racist; it is just plain good police work. After all, African-Americans make up a large share of those arrested, prosecuted and jailed in this country.”); see also David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 271 (1999) (illustrating a typical response from police officers accused of racial profiling who often respond, “I don’t care if you’re black, blue, beige, brown, whatever—if you’re violating the law, I’ll stop you”); Romero, *supra* note 16, at 199 (explaining the “conservative” position that “it is irrational for liberals to be offended” when federal agencies are “simply doing [their] job”); Tony Plohetski, *Race Disparity Seen in Traffic Stops; Study: In Texas, Minority Drivers Were Pulled Over More Often Than Whites*, AUSTIN AMERICAN-STATESMAN, Feb. 4, 2004, at A1 (interviewing a local assistant police chief who asserted that his police department did not engage in racial profiling despite statistics indicating the contrary).

⁴⁶ HEATHER MAC DONALD, ARE COPS RACIST? (2003). It should be pointed out that despite the existence of racial profiling, the vast majority of police officers perform their duties without bias or prejudice. See H.R. 3847, § 2(a)(1); FREDRICKSON & SILJANDER, *supra* note 28, at 61 (“Almost all police officers are honest citizens performing their job to the

exposing possible insensitivity and outright discriminatory animus on the part of law enforcement agents is important, the inquiry should embrace the more holistic and productive question of what constitute all of the potential underlying causes of racial profiling—including both race-conscious and race-neutral explanations. A truly comprehensive approach to solving the problem must begin by examining *all* of the reasons for the disproportionate number of minorities stopped by law enforcement. An expansive nationwide data collection program would aid in accomplishing this goal by gathering information from federal, state, and local agencies. Analysis of this data, in turn, will hopefully lay bare the causes of racial profiling so that measures can be taken to undercut the phenomenon at its roots.⁴⁷

II. RACIAL PROFILING IN EMERGING LATINO COMMUNITIES

In contrast to popular perceptions of Hispanic settlement patterns, “Latinas/os are no longer concentrated into the land geography that was Mexico prior to the Treaty of Guadalupe Hidalgo.”⁴⁸ Latinos are rapidly expanding into “non-traditional” areas beyond the Southwest, including Oklahoma, Missouri, Tennessee, and North Carolina.⁴⁹ Unfortunately, this “hypergrowth” has too often been accompanied by a hyperactivity in discriminatory practices such as racial profiling. Latinos’ relatively recent arrival to certain geographic areas makes them particularly susceptible to the practice for a variety of reasons, including the fact that the Hispanic population is often diffused in suburban and rural areas where access to legal advocacy resources is limited. Consequently, race-conscious police tactics have subjected Latinos to severe emotional stress, caused them to alter their behavior to avoid police scrutiny, perpetuated stereotypes regarding supposedly “Hispanic” characteristics, cast Latinos as foreigners, hampered relations between the community and law enforcement, and brought into question the legitimacy of the justice system.

A. *Amber Waves: Latinos in the Heartland*

“From Wilmington to West Palm Beach, from Little Rock to Las Vegas,” Latinos are settling into their new homes beyond the confines of the Southwest.⁵⁰ Hispanic population growth in these areas has taken place so rapidly that approximately one-half of all non-metro Latinos now reside outside of traditional states such as Texas and California.⁵¹ One recent study

best of their ability, and they are not governed by racial bias.”).

⁴⁷ See discussion *infra* Part III.A.

⁴⁸ Lazos Vargas, *supra* note 19, at 345.

⁴⁹ See SURO & SINGER, *supra* note 20, at 4–5; Lazos Vargas, *supra* note 19, at 343–44.

⁵⁰ SURO & SINGER, *supra* note 20, at 5.

⁵¹ William Kandel & John Cromartie, *Hispanics Find a Home in Rural America*, in

evaluated Latino population growth in fifty-one major cities across the United States and concluded that none of these “new Latino destinations” grew by less than forty-two percent during the 1990s.⁵² Further, while jurisdictions across the country have witnessed similar demographic trends, 18 metropolitan areas experienced Latino growth rates greater than 300% over a twenty-year period.⁵³ These so-called “hypergrowth” locations include Tulsa, Oklahoma (303%); Minneapolis-St. Paul, Minnesota (331%); Indianapolis, Indiana (338%); Nashville, Tennessee (753%); Charlotte, North Carolina (962%); Atlanta, Georgia (995%); and Raleigh, North Carolina (1180%).⁵⁴ Statewide populations have also increased dramatically. For instance, from 1990 to 2000, the Hispanic community in Kansas grew by 100%, Iowa’s Latino population expanded by 152%, and Arkansas experienced an increase of 337%.⁵⁵ As commentator Sylvia Lazos Vargas summarized, “The 2000 census confirmed what many already knew—the traditional image of what it means to be a heartland state is changing.”⁵⁶

The suburban landscape is also changing as the Latino population expands. The majority of Latinos in the United States, approximately fifty-four percent, now live in the suburbs.⁵⁷ This trend has been fueled by rapid growth in suburban regions relative to central city areas over a ten-year period.⁵⁸ For example, from 1990 to 2000, the Latino suburban community in Louisville, Kentucky, increased by 230%; Atlanta, Georgia, experienced a growth rate of 428%; and the Hispanic suburban population in Greensboro-Winston Salem, North Carolina, skyrocketed by 722%.⁵⁹ Corresponding demographic changes have taken place in the foreign-born population as well. Cities deemed “pre-emerging gateways”—which are metropolitan regions “that had very small immigrant populations in 1980 but experienced sudden, very rapid growth in the 1990s”—witnessed suburban immigrant growth rates of almost 250%.⁶⁰ In comparison, cities such as Houston, Los Angeles, San Diego, and Miami—

ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., AMBER WAVES 11, 11 (2003), available at <http://www.ers.usda.gov/AmberWaves/Feb03/pdf/findings-rural%20america.pdf>; see also *Latinos Rise Nationwide: America’s New Majority Minority*, NAT’L GEOGRAPHIC, Nov. 2003, at xvii–xviii (“Latino populations are booming in places both predictable and surprising . . . [M]any of the top 20 metro areas experiencing the most explosive Latino growth . . . are far from the traditional strongholds of Texas and southern California.”).

⁵² SURO & SINGER, *supra* note 20, at 5.

⁵³ *Id.*

⁵⁴ *Id.* at 6; see also Audrey Singer, The Brookings Institution, Presentation at the Funders Network on Population, Reproductive Health and Rights (Nov. 10, 2003), available at http://www.brook.edu/es/urban/speeches/20031110_singer.htm.

⁵⁵ Lazos Vargas, *supra* note 19, at 343.

⁵⁶ *Id.* The U.S. Department of Agriculture concurred that “[h]igh-growth Hispanic counties are mostly in the South and Midwest.” Kandel & Cromartie, *supra* note 51, at 11.

⁵⁷ SURO & SINGER, *supra* note 20, at 1.

⁵⁸ *Id.*

⁵⁹ *Id.* at 15.

⁶⁰ AUDREY SINGER, THE BROOKINGS INST., THE RISE OF NEW IMMIGRANT GATEWAYS 12 (2004), available at http://www.brook.edu/urban/publications/20040301_gateways.htm.

where foreign-born Latinos have traditionally resided—averaged immigrant population increases of forty-six percent over a ten-year period.⁶¹ The suburban relocation of the native-born and foreign-born Latino population has been driven by “families in search of the classic American suburban dream” who desire peaceful surroundings and cheap housing.⁶² As cities become more populous and overcrowded, this “move to the suburban fringes will surely continue.”⁶³

Although the Latino population across the country has ballooned, this trend is particularly visible in rural America. Hispanics alone accounted for twenty-five percent of non-metropolitan growth in the United States from 1990 to 2000.⁶⁴ This phenomenon has been described by some as the “‘Latina/o-ization’ of rural America,” and can be seen in small towns like Noel, Missouri, which is now forty percent Latino, and Postville, Iowa, where the Hispanic population doubled in ten years.⁶⁵ In fact, without the sizeable growth of rural Latino communities in the past decade, many counties throughout the Midwest would have experienced decreases in overall population.⁶⁶ Latino settlement in rural regions has been accelerated by the promise of affordable housing, a relatively high quality of life, and jobs—predominantly those in the meatpacking and food processing industries.⁶⁷ Given current demographic patterns, the “geometric expansion of the Latina/o population will continue” in rural areas.⁶⁸ As Latinos begin their new lives in the Heartland, however, they will likely confront new environs and new difficulties, including racial profiling.

B. Emerging Latino Communities: A Population Susceptible to Racial Profiling

Despite President George W. Bush’s declaration that racial profiling is “wrong and we will end it in America,”⁶⁹ available statistics suggest that there is no end in sight for the practice. Preliminary studies indicate that Latinos are both stopped and searched by police at higher rates than whites. In addition, some evidence suggests that Hispanics in emerging communities and rural areas are more vulnerable to the harms of racial profiling than their Southwestern counterparts. Although further studies should be performed to better determine the extent and causes of the problem, existing data firmly support the idea that racial profiling of La-

⁶¹ *Id.* at 5, 11.

⁶² SURO & SINGER, *supra* note 20, at 11.

⁶³ *Id.*

⁶⁴ Kandel & Cromartie, *supra* note 51, at 11.

⁶⁵ Lazos Vargas, *supra* note 19, at 344.

⁶⁶ Kandel & Cromartie, *supra* note 51, at 11.

⁶⁷ See SURO & SINGER, *supra* note 20, at 11; Lazos Vargas, *supra* note 26, at 777.

⁶⁸ Lazos Vargas, *supra* note 19, at 351.

⁶⁹ U.S. DEP’T OF JUSTICE, *supra* note 31, at 1.

tininos exists and will continue in the foreseeable future without deliberate action.

Reports conducted nationwide indicate that Latinos have repeatedly been the victims of race-conscious police tactics. For instance, studies performed in New Jersey, Maryland, Texas, Pennsylvania, Florida, Illinois, Ohio, New York, and Massachusetts reveal that police officers stop Latinos more frequently for traffic violations relative to whites.⁷⁰ These stops occur at rates disproportionate to the local Hispanic population or the rate at which they engage in criminal conduct.⁷¹ Further, a report conducted by the Department of Justice in 1999 found that although Hispanics were more likely to be stopped and searched by police, on average “they were less likely to be in possession of contraband.”⁷² Nationwide, officers typically discovered evidence on ten percent of Latino drivers who were searched pursuant to traffic stops, whereas whites possessed illegal items seventeen percent of the time.⁷³ Data collected in Illinois revealed that Hispanics comprised approximately thirty percent of motorists stopped for particular discretionary traffic offenses, even though Latinos made up eight percent of the state population and represented three percent of those driving on Illinois streets.⁷⁴ In Texas, Latinos were 1.4 times more likely to be searched than whites, and three of every four law enforcement agencies conducted searches of Hispanic motorists at elevated rates.⁷⁵ The Iowa Division of Criminal and Juvenile Justice Planning reached similar results in finding that 10% of Latinos had their vehicles searched during traffic stops, whereas only 2.7% of whites received similar treatment.⁷⁶ In Missouri, statistics confirm that “Latinos are twice as likely to be searched as any other minority group.”⁷⁷ Hence, “[c]ontrary to what the ‘rational’ law enforcement justification for racial profiling would predict,” searches of Latinos yield evidence at rates far lower than those of whites despite the fact that Hispanics are stopped more frequently.⁷⁸ Existing data, thus, suggest that using race-conscious policing as a law enforcement tool has consistently failed.

As Latinos move into the American Heartland, they may become susceptible to a number of discriminatory practices, not limited solely to racial profiling. Many Hispanics entering communities in the Midwest

⁷⁰ Letter from Laura W. Murphy & La Shawn Y. Warren, American Civil Liberties Union, to the United States Senate, *supra* note 12.

⁷¹ *Id.*

⁷² End Racial Profiling Act of 2004, H.R. 3847, 108th Cong. § 2(a)(10) (2004).

⁷³ *Id.*

⁷⁴ David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 301 (2001).

⁷⁵ Campbell, *supra* note 13; *see also* Plohetski, *supra* note 45 (reporting statistics on traffic stops conducted in the vicinity of Austin).

⁷⁶ Blake Brianna, *Iowans Share Stories at Race Profiling Talks*, DES MOINES REG., Mar. 10, 2004, at B6.

⁷⁷ Lazos Vargas, *supra* note 26, at 822.

⁷⁸ HARRIS, *supra* note 10, at 13.

and South will reside in locations with less than stellar historical report cards on the subject of race relations. Some will confront legacies of “Jim Crow legal regimes toward Mexicans and Mexican Americans” in places like Kansas City, Missouri, and Topeka, Kansas, where Latinos were formerly placed in segregated schools.⁷⁹ In addition, the physical appearance and language skills of certain individuals may make them more vulnerable to stereotypes that depict all Latinos as foreigners.⁸⁰ Consequently, police may target Hispanics for traffic stops not only due to their supposed propensity to commit crimes at greater rates, but also because they may be seen as illegal immigrants, despite the fact that approximately ninety percent of Latinos in the United States are either citizens or legal residents.⁸¹ For instance, members of the Rogers Police Department in northwest Arkansas allegedly targeted Latinos for traffic stops because of their perceived immigrant status.⁸² The Mexican American Legal Defense and Educational Fund (MALDEF) argued that the lack of police guidelines in Rogers concerning traffic stops conducted for the purposes of enforcing immigration law “paved the way for police abuse and racial profiling of Latino residents.”⁸³ Similarly, members of the Ohio State Highway Patrol allegedly stopped Hispanics routinely and seized green cards from legal residents of the United States, returning them only after being threatened with legal action.⁸⁴ These situations are

⁷⁹ Lazos Vargas, *supra* note 19, at 353. In a recent survey, Latinos in Missouri ranked discrimination as the second largest barrier to “bettering their families.” *Id.* at 353–54.

⁸⁰ *See id.* at 358–62 (discussing language issues facing Latinos in the Midwest and observing that “[m]ost white Americans view speaking English as an essential attribute of what it means to belong within the polity of the United States”). *See generally* Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 118–29 (1997) (commenting at length on the “Latino-as-foreigner” phenomenon).

⁸¹ *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 677–78 (2000).

⁸² *See* Press Release, Mexican American Legal Defense and Educational Fund, Latinos to Bring Class Action Lawsuit Alleging Racial Profiling by Police in Rogers, Arkansas (Mar. 23, 2001), available at <http://www.maldef.org/news/press.cfm?ID=48>; Press Release, Mexican American Legal Defense and Educational Fund, MALDEF Settles Police Abuse Case in Rogers, Arkansas: City Agrees to Prohibit Racial Profiling Against Latinos and Others (Nov. 14, 2003), available at <http://www.maldef.org/news/press.cfm?ID=194>. The plaintiffs in this case settled with the city prior to a full adjudication of the merits. None of the terms in the settlement agreement should be construed to constitute an admission of wrongdoing on the part of the Rogers Police Department. Class Action Settlement Agreement at 4, *Lopez v. City of Rogers*, No. 01-5061 (W.D. Ark. filed Mar. 23, 2001).

⁸³ Press Release, Mexican American Legal Defense and Educational Fund, MALDEF Settles Police Abuse Case in Rogers, Arkansas, *supra* note 82. A MALDEF spokesperson elaborated, “Without appropriate guidelines, officers can all too easily proceed to stop, question, or detain individuals merely because of their perceived national origin or ‘foreign’ appearance.” Press Release, J. C. Flores, Mexican American Legal Defense and Educational Fund, MALDEF Applauds F.B.I. for Entering Sheriff Brutality Case; Renews Call for Police Conduct Guidelines (May 8, 2003), available at <http://www.maldef.org/news/press.cfm?ID=156>.

⁸⁴ *See* HARRIS, *supra* note 10, at 134; *see also* Farm Labor Org. Comm. v. Ohio State Highway Patrol, 991 F. Supp. 895 (N.D. Ohio 1997). Evidence suggests that police departments in Missouri and Laredo, Texas, have engaged in similar behavior. *See* Lazos

representative of those faced by many Latinos in emerging communities who “know from personal tough experience that law enforcement often uses racial profiling tactics to enforce immigration laws . . . [which] results in Latinos being harassed and profiled.”⁸⁵

Latinos in rural areas are particularly prone to being victimized by race-conscious police tactics. This is in part due to the fact that Hispanics in rural communities tend to have less access to legal advocacy resources⁸⁶—a particular problem given that they are frequently stopped and searched at disproportionate levels.⁸⁷ For example, a report conducted by the Missouri State Attorney General’s Office set forth that Latinos in “hyper-growth rural communities” are more likely than whites to be pulled over by police.⁸⁸ Officers in Noel, Missouri, reported stopping 352 Latino motorists in 2001, despite the fact that the small town had a total population of only 1,000 residents.⁸⁹ These statistics suggest that “almost every Latino over sixteen has been stopped . . . or that every Latino in Noel either has been stopped or likely knows someone who has.”⁹⁰ Further, Hispanics in rural areas of Missouri were searched more frequently than whites, as with one township in Jasper County where one in four Latino drivers had their vehicles searched for contraband.⁹¹ Although race-conscious policing affects the Hispanic community as a whole, rural Latinos may have difficulty forming cohesive bonds to address racial profiling in a unified manner because they are widely dispersed across pastoral landscapes.⁹² Additionally, many Latinos struggle with English-language fluency, which can complicate interactions with police officers during traffic stops and hamper efforts to speak out against racial profiling and influence popular opinion.⁹³ These factors, operating in tandem, result in “a high degree of law enforcement contact in the every day lives

Vargas, *supra* note 19, at 363.

⁸⁵ Press Release, Marie Watteau, Mexican American Legal Defense and Educational Fund, New Justice Department Racial Profiling Policy Does Not Go Far Enough to End the Practice Says MALDEF (June 18, 2003), *available at* <http://www.maldef.org/news/press.cfm?ID=165>.

⁸⁶ See Lazos Vargas, *supra* note 19, at 365.

⁸⁷ See Lazos Vargas, *supra* note 26, at 780, 826; *see also* Lazos Vargas, *supra* note 19, at 363.

⁸⁸ Lazos Vargas, *supra* note 26, at 780, 826.

⁸⁹ *Id.* at 814.

⁹⁰ *Id.*

⁹¹ *Id.* In addition, the city of Diamond “reported Latino stop disparity indices of 12.67 in 2001 and 14.6 in 2000, for a total of 131 stops [which] is twice the population of Latinos in this jurisdiction. Moreover, one out of six stops in Diamond resulted in a search of the vehicle, almost three times the state wide average for White drivers.” *Id.* at 816.

⁹² See discussion *supra* Part II.A regarding rural and suburban Latino population distribution; *see also* Lazos Vargas, *supra* note 19, at 343.

⁹³ See Lazos Vargas, *supra* note 19, at 360–62 (describing how language barriers are a significant obstacle facing Latinos in the Midwest); SINGER, *supra* note 60, at 1, 15 (noting that a sizeable portion of immigrants in emerging communities cannot speak English proficiently); *see also* Yardley, *supra* note 15 (observing that in Texas many newly arrived legal residents “were stopped regularly but were too fearful to complain”).

of Latinos”⁹⁴ which comes at a high price for Hispanics living in emerging communities.

C. *The Costs of Racial Profiling*

As the level of the police officer’s interest increases, the cost to the innocent citizen escalates rapidly. It’s one thing to get a speeding ticket and an annoying lecture from a state trooper; it’s quite another to be told to step out of the car and to be questioned: Where are you coming from? Where did you sleep last night? Where are you going to? Who do you plan to see? What is their address? What is your business? How long have you known your passengers? . . . The questions may seem intrusive and out of line, but you can hardly refuse to answer an armed cop. At some point you realize that you are not just another law-abiding citizen who’s being checked out for the sake of general security, like everybody else. You’ve been targeted.⁹⁵

Racial profiling exacts a toll on Latinos that statistics alone cannot fully convey. Those who have been stopped by police for reasons related to their race or ethnicity may face a barrage of questions, such as those detailed in the quotation above, designed to uncover some unspecified—and mostly non-existent⁹⁶—illicit behavior. Even if such encounters terminate without incident, the experience can leave motorists shaken, upset, and humiliated. Beyond these psychological harms, race-conscious police tactics can have the negative effect of perpetuating stereotypes of Latinos and tagging them as perpetual foreigners in their own land. With these experiences etched into their consciousness, some Hispanics may be less willing to interact with law enforcement agents in matters completely unrelated to traffic stops, thereby undermining police-community relations. In the end, the existence of racial profiling (or even its mere perception) may have the unintended effect of causing Latinos to become cynical about the justice system as a whole. These harms are not easily quantifiable, but their impact is incontrovertibly substantial.

Victims of race-conscious police tactics often suffer psychological injuries that can be equally as painful and deep as physical wounds.

⁹⁴ Lazos Vargas, *supra* note 26, at 814.

⁹⁵ Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 745 (2002).

⁹⁶ See discussion *supra* Part II.B concerning the percentage of Latinos found in possession of contraband relative to whites; see also Press Release, American Civil Liberties Union, Racial Profiling in Texas: Report Shows Significant Disparities in Stops and Searches (Feb. 3, 2004), available at <http://www.aclu.org/news/NewsPrint.cfm?ID=14860&c=133> (describing statistics which revealed that in certain locations in Texas, “more than 95 percent of Latinos searched did not do anything wrong yet they suffered the humiliation and demoralization of a search that only wastes an officer’s time”).

Many who feel that they have been singled out for scrutiny because of their race or ethnicity are left with “psychological scar tissue” which can result in feelings of resentment, frustration, and outrage.⁹⁷ “Treat me with respect, that’s R-E-S-P-E-C-T,” exclaimed one resident of Des Moines, Iowa, during a meeting between state police officials and community members concerned about racial profiling.⁹⁸ As the group of around 100 minorities spoke with officers from the Iowa State Patrol, it became clear that these individuals were bewildered by the treatment they had received and were genuinely afraid of interacting with police.⁹⁹ After listening to the stories of local residents, police department officials responded with sympathy. Like the vast majority of law enforcement officers across the country, the members of the state police department acted not out of malice, but out of a lack of understanding of the everyday experiences of minorities.¹⁰⁰ As the chief of the Iowa State Patrol commented: “What I’m hearing tonight is that there are a lot of things we are not aware of. I’m from a small town in Iowa. It’s opened my eyes to different perspectives.”¹⁰¹

Traffic stops motivated by race-conscious approaches to law enforcement can also result in significant dignitary harms. One victim of racial profiling explained: “It’s almost like somebody pulls your pants down around your ankles. You’re standing there nude, but you’ve got to act like there’s nothing happening.”¹⁰² Feelings of humiliation can compound as stops occur consistently over time. For instance, police pulled over one Iowa resident five times during the course of a summer as she made her way between home and school, although she was never issued a citation.¹⁰³ Ninfa Ochoa-Krueger was stopped four times on a sixty-mile stretch of highway between McAllen and Brownsville, Texas, during a single trip.¹⁰⁴ Although these incidents do not necessarily represent the norm,

⁹⁷ Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 289.

⁹⁸ Brianna, *supra* note 76.

⁹⁹ *See id.* Consider, for example, a passage written by Professor Devon Carbado that captures the mental calculus that he engaged in upon glimpsing a view of a police car in the rear view mirror:

How will I be overpoliced this time? Do I have my driver’s license, insurance, etc.? How am I dressed? Is my ULA parking sticker visible? Will any of this even matter? . . . And what precisely will be my racial exit strategy this time? How will I make the officers comfortable? Should I? Will I have time—the racial opportunity—to demonstrate my respectability? Should I have to?

Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 952 (2002).

¹⁰⁰ *See* End Racial Profiling Act of 2004, H.R. 3847, 108th Cong. § 2(a)(1) (2004); FREDRICKSON & SILJANDER, *supra* note 28, at 61 (“Almost all police officers are honest citizens performing their job to the best of their ability, and they are not governed by racial bias.”).

¹⁰¹ Brianna, *supra* note 76.

¹⁰² Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 265.

¹⁰³ Brianna, *supra* note 76.

¹⁰⁴ Yardley, *supra* note 15.

they exemplify how minorities can be made to feel like second-class citizens. As they stand by the side of the road while being peppered with questions from police and having their vehicles searched, Latinos may wonder if those passing by in cars are speculating as to whether the detainees “had done something wrong, for why else would the police have them there?”¹⁰⁵ Even Peso Chavez, a private investigator who set up an elaborate “reverse sting” operation to attempt to catch police in the act of race-based profiling, found himself nervous and embarrassed as police officers interrogated him and called in a canine that was supposedly trained to detect drugs.¹⁰⁶ Despite the fact that Mr. Chavez knew he had not engaged in criminal wrongdoing and had a paralegal follow him in another car to corroborate that he had not disobeyed any traffic law, the encounter was nonetheless disconcerting.¹⁰⁷ Thus, stopping and searching Latinos at disparate rates due solely to their racial group membership can have lasting and severe emotional effects. Although these costs do not translate well into dollars and cents, racial profiling taxes the Hispanic community at a steep rate.

Consequently, many Latinos desire to avoid interaction with the police to such an extent that they modify their daily routines and behaviors. For example, a growing number of minorities are altering their driving routes so as to avoid all-white neighborhoods or places where they might “stand out,” even though this may add to their commuting time.¹⁰⁸ Others purchase plain-looking cars and avoid dressing flamboyantly so as to attract as little unwanted attention as possible.¹⁰⁹ Further, profound concern regarding race-conscious police policies has prompted many parents to warn their children about the practice. Professor David Harris describes this phenomenon as “the Talk,”¹¹⁰ which inducts a new generation of minorities into a culture of fear and mistrust. Deborah Ramirez has already considered what she will tell her son when he reaches the appropriate age: “Sit up straight. If you slouch to the right or the left, the police are gonna think you’re carrying a gun. Put both hands on the wheel so the police can see you don’t have a weapon in your hands.”¹¹¹ Although ob-

¹⁰⁵ Gross & Barnes, *supra* note 95, at 746.

¹⁰⁶ HARRIS, *supra* note 10, at 65–66.

¹⁰⁷ *Id.* at 66. As Mr. Chavez later explained, “I became very frightened at what was happening. I never had my mouth as dry as it was—it was like cotton.” *Id.* Following a thorough search of the car and Mr. Chavez’s personal items, the police left without finding contraband and issued him only a warning about remembering to signal when changing lanes. *Id.* at 65–66.

¹⁰⁸ See MEEKS, *supra* note 12, at 172; HARRIS, *supra* note 10, at 98–99; Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 273–74.

¹⁰⁹ See MEEKS, *supra* note 12, at 172; Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 305.

¹¹⁰ HARRIS, *supra* note 10, at 110.

¹¹¹ *Id.* at 112. David Harris observed that the need for “the Talk” spans across classes:

No matter who these parents may be in the larger community, and no matter how

taining a driver's license is a rite of passage that teenagers across the country enjoy, Latinos receiving "the Talk" will be reminded of the lifelong burden that they carry because of their skin color and appearance. Regardless of whether these fears are wholly reasonable,¹¹² the fact that crime-free citizens find it necessary to take extensive measures to minimize negative encounters with law enforcement signals that police-community relations are in a state of disrepair. Racial profiling has caused many Latinos to fear those same individuals who are duty bound to protect them.

Race-conscious policing also perpetuates negative stereotypes of Latinos. By selecting targets for traffic stops based solely on their racial or ethnic appearance, police officers endorse the notion that certain groups are more prone to engage in criminal behavior.¹¹³ This is reflective of media depictions of Latinos, where they are often portrayed as drug dealers or gang members who are "violent, foreign, criminal-minded, [and] disloyal."¹¹⁴ On the silver screen and on the streets, Hispanics are perennially criminalized. The very fact that some law enforcement agents even have a particular "Hispanic" profile in mind ignores the rich diversity and multiculturalism of the pan-Latino community. Even if targeting Hispanics disproportionately for traffic stops were a sound policing practice, this approach would fail to accomplish its goal since not all Latinos fit the "dark haired, brown skinned" profile.¹¹⁵ Hispanics have varying skin tones, assorted eye and hair colors, and radically different facial features.¹¹⁶ By projecting certain traits and characteristics onto Hispanics, those officers who use race-based approaches to law enforcement perpetuate preconceived notions regarding Latinos and "reinforce[] their suspect and subordinated status in the United States."¹¹⁷

clean-cut and well behaved their children may be, these parents understand that there is no escaping the reality of police stops for people of color. Class doesn't matter, wealth doesn't matter, driving behavior doesn't matter, the type of car doesn't matter. *Race and ethnicity matter*. Parents know this, even if their children don't.

Id. at 111.

¹¹² See FREDRICKSON & SILJANDER, *supra* note 28, at 52 ("Often, the perceived lack of recourse generates more frustration than the event underlying the grievance whether real or imagined. And, when discrimination is perceived to occur more than incidentally, it tends to generate fear of future discrimination.").

¹¹³ See U.S. DEP'T OF JUSTICE, *supra* note 31, at 1. The Department of Justice stipulated that even if there were a statistical correlation between crime rates and particular racial groups, then "the affirmative use of such generalized notions by federal law enforcement officers in routine, spontaneous law enforcement activities is tantamount to stereotyping." *Id.* at 4.

¹¹⁴ Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153, 1154–55, 1159, 1176 (2002).

¹¹⁵ See Johnson, *supra* note 81, at 714–15 (describing the typical "Mexican" stereotype).

¹¹⁶ See *id.* For example, the author of this Article would not fit the "conventional" image of a Latino, in that he has light skin, speaks without a Spanish accent, and has an Italian surname.

¹¹⁷ Johnson, *supra* note 81, at 723.

Race-conscious policing forces Latinos to bear a double burden since profiles depict them both as criminals and as illegal immigrants. Like African Americans and other minorities, Hispanics have been the victims of law enforcement policies which criminalize members of certain races.¹¹⁸ However, Latinos face a unique challenge in that their citizenship may be questioned as well.¹¹⁹ As discussed briefly above, Latinos are frequently cast as foreigners, “which cuts to the core of their belonging to the national community.”¹²⁰ Recent studies have shown that the practice of targeting legal residents and citizens for immigration enforcement due to their “Hispanic” appearance has spread beyond states that share a border with Mexico, such as Ohio, Nevada, and North Carolina.¹²¹ Members of the working class in emerging Latino communities are particularly prone to having their immigrant status questioned since their appearance more closely resembles a stereotypical image of what illegal immigrants supposedly look like.¹²² Given that the overwhelming majority of Hispanics living in the United States are either citizens or legal immigrants,¹²³ lawful residents bear the brunt of this policy.¹²⁴ Consequently, efforts to enforce immigration law by local and state police forces—that often have little or no training in this area and few, if any, formal procedural guidelines—can lead to the harassment and profiling of legal Latino residents.¹²⁵ As a result, Hispanics are “made to pay a type of racial tax for the campaign against illegal immigration that whites, blacks, and Asians escape.”¹²⁶ This proposition seems so unfair that even members of law enforcement, such as the sheriff of San Antonio, have

¹¹⁸ See HARRIS, *supra* note 10, at 130.

¹¹⁹ See *id.*

¹²⁰ Johnson, *supra* note 81, at 677.

¹²¹ See HARRIS, *supra* note 10, at 133–34; Lazos Vargas, *supra* note 26, at 781; see also Press Release, J. C. Flores, *supra* note 83 (alleging that incidents have taken place in California involving local police officers asking for immigration documents in violation of state law).

¹²² See Johnson, *supra* note 81, at 700.

¹²³ Johnson, *supra* note 16, at 348.

¹²⁴ Johnson, *supra* note 81, at 677.

¹²⁵ Press Release, Marie Watteau, *supra* note 85; Press Release, J. C. Flores, *supra* note 83; see also MICHELE WASLIN, NAT’L COUNCIL OF LA RAZA, COUNTERTERRORISM AND THE LATINO COMMUNITY SINCE SEPTEMBER 11 8 (2003) (“Racial profiling is of particular concern to the Latino community because of an increasingly well-documented history of profiling tactics by local, state, and federal law enforcement. Efforts . . . have served to undermine the physical safety and constitutional and civil rights of Latino communities throughout the United States.”). There also exists a danger that local and state officials may enforce immigration law too harshly, which could affect police-community relations. See Lazos Vargas, *supra* note 26, at 796.

¹²⁶ Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 213 (2002) (quoting Harvard Law School Professor Randall Kennedy). For a thoughtful discussion of how society generally accepts the “tax” placed upon Latinos in the context of racial profiling, but not affirmative action, see Romero, *supra* note 16, at 207 (“While the majority culture is willing to tolerate the continued burden on many Latinos of ‘looking Mexican’ in the context of automobile stops at the border, it is unwilling to risk its members being burdened by the use of race as a factor in university admissions.”).

spoken out against the practice: “What are we saying? ‘Hey, you’ve got an accent. Let me see your passport.’”¹²⁷ Conducting traffic stops of Latinos due to officers’ preconceived notions about the immigrant status of motorists and passengers sends a strong message to legal Hispanic residents that they do not belong in this country. A Latino judge from south Texas summed up his frustration regarding the repeated scrutinization of his citizenship: “It feels like an occupied territory It does not feel like we’re in the United States of America.”¹²⁸

Refraining from using racial stereotypes in policing is in the best interests of both Latinos and law enforcement agents, since racial profiling practices can erode the trust between officers and citizens of the community. “Pretextual traffic stops aggravate years of accumulated feelings of injustice,” which may make Hispanics more reluctant to report crimes, cooperate with police, and serve as witnesses at trial.¹²⁹ Further, legal and illegal immigrants may refrain from interacting with police since they fear being detained, interrogated, or deported.¹³⁰ Given that these individuals generally live in “tightly knit communities,” news of race-conscious police enforcement may spread fast and help foster a culture of fear and cynicism toward officers.¹³¹ These practices also hamper community policing efforts, which are premised on officers and residents establishing close ties.¹³² As a result, racial profiling on the highways may have lasting repercussions in Latino neighborhoods. With weakened relations between Hispanics and law enforcement agents, public safety may be further undermined.

Popular perceptions that government officials are engaging in racially biased conduct can cause many to question the very legitimacy of the criminal justice system. Although this cost has often been overlooked, law enforcement agents and decisionmakers should incorporate this fac-

¹²⁷ Lazos Vargas, *supra* note 19, at 364.

¹²⁸ Yardley, *supra* note 15. Comedian Johnny Sanchez expressed his resentment of being depicted as a foreigner in a different manner: “I feel like apple pie and baseball, but I look like nachos and cockfighting.” *Comedy Central Presents: Johnny Sanchez* (Comedy Central television broadcast, Mar. 28, 2004).

¹²⁹ Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 268. Even those who were not racially profiled may be skeptical of interacting with police. See Garrett, *supra* note 43, at 53 (explaining the theory of “linked fate” which stipulates that one’s own perceptions of law enforcement may be influenced by the injuries suffered by relatives and friends).

¹³⁰ See Press Release, Mexican American Legal Defense and Educational Fund, MALDEF Settles Police Abuse Case in Rogers, Arkansas, *supra* note 82; Press Release, J.C. Flores, *supra* note 83.

¹³¹ See Lazos Vargas, *supra* note 26, at 795–96.

¹³² See AM. CIVIL LIBERTIES UNION, RACIAL PROFILING: UN-AMERICAN AND DANGEROUS 2 (2004), available at <http://www.aclu.org/Files/OpenFile.cfm?id=15156> (“Racial profiling is corrosive to the community trust required to prevent and solve crime. Focusing on African-Americans, Latinos, Asians, Muslims, Arabs and Native Americans as the primary perpetrators of crimes permits people of other backgrounds to break the law with impunity”).

tor into their policy calculus.¹³³ Commentator Kevin Johnson explained that racial profiling forms “part of a long history of discriminatory law enforcement [that] fosters a deep cynicism among racial minorities.”¹³⁴ These feelings of discontent and frustration may manifest themselves in places far from the roadside. In the courtroom, for example, minority victims and witnesses may be less willing to testify, and jurors may engage in nullification when they perceive that charges were unjustly brought against a minority defendant, regardless of the weight of the evidence.¹³⁵ Racial profiling, thus, can contribute to an entire subsection of the population doubting the criminal justice system’s ability to function fairly. This would, in essence, destroy “the ideal that holds us together as a nation: equal justice under the law. And when that goes, we are all in trouble.”¹³⁶

III. DISMANTLING THE RACIAL PROFILING REGIME

Race-conscious policing will continue to take a heavy toll on Latinos in the absence of concerted action to abolish the practice. Such an effort, however, requires gathering detailed information about the underlying causes, determining precisely who engages in such tactics, and locating where racial profiling takes place. Since the Latino population has spread well beyond the confines of traditional areas like the Southwest, nothing short of a nationwide data collection program will suffice to accomplish this goal. The knowledge gained from this survey can then be used to formulate an enlightened, targeted approach to dismantling the racial profiling regime. In addition, definitively proving the widespread existence of racial profiling may aid in building the political will necessary to pass comprehensive legislative reforms. In the meantime, measures should be taken to cabin the negative effects of race-conscious policing. This could include litigating cases to halt abusive practices, encouraging the voluntary implementation of policies and procedures by law enforcement agencies, and enacting state legislation and city ordinances to address this issue. Together, these actions could help bring an end to the disproportionate rates at which Latinos are stopped and searched.¹³⁷

¹³³ See Banks, *supra* note 42, at 598.

¹³⁴ Johnson, *supra* note 16, at 345.

¹³⁵ See Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 268–69; see also HARRIS, *supra* note 10, at 117–21.

¹³⁶ Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 326.

¹³⁷ Although my proposal is discussed in the context of combating racial profiling in emerging Latino communities, the information gained through this data collection scheme will likely benefit all racial and ethnic groups victimized by such practices.

A. Data Collection: A Forward-Looking Solution

Although limited studies have been performed which indicate that racial profiling exists, no expansive survey has been conducted that incorporates information from federal, state, and local law enforcement agencies across the nation.¹³⁸ Much of the data collected so far has been acquired pursuant to litigation or independent academic research, providing an incomplete picture of the racial profiling phenomenon.¹³⁹ Even when studies are conducted, information pertaining to Latinos may be overlooked. For instance, North Carolina State University released a report on traffic stops in Charlotte, yet “the study pa[id] little attention to Latino drivers”¹⁴⁰ despite the fact that over 77,000 Hispanics live in the region and the Latino population has grown 932% in the past 20 years.¹⁴¹ Slowly, some state law enforcement agencies have started to require that officers document traffic stop statistics in certain instances, although the precise information gathered can vary widely.¹⁴² In 1999, for example, only nine of forty-nine state law enforcement agencies whose duties included the patrolling of highways mandated that racial or ethnic data be recorded for every stop.¹⁴³ By 2001, the number of participating agencies increased to sixteen, but only eleven of these organizations disclosed the information to the public.¹⁴⁴ Although thirty-nine state law enforcement groups now collect some racial data, they do so “under more limited circumstances, such as if an arrest occurred, or if force was used.”¹⁴⁵ This information, although useful, does not provide insight into the everyday experiences of individuals who have neither engaged in criminal wrongdoing nor been physically subdued by police when they were pulled over. These are the interactions which would allow for a greater understanding of the “driving while brown” phenomenon. Since the majority of racial profiling victims are innocent individuals, information focused on arrests or use of force contributes relatively little to comprehending race-conscious policing.¹⁴⁶ Further, since state and local police departments perform the

¹³⁸ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 27, at 7, 34.

¹³⁹ See Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 276.

¹⁴⁰ Robert F. Moore, *Study Examines Racial Profiling: No Evidence of Widespread Bias Found, but Some Areas See More Traffic Stops*, CHARLOTTE OBSERVER, Mar. 1, 2004, at B1.

¹⁴¹ SURO & SINGER, *supra* note 20, at 6.

¹⁴² See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, TRAFFIC STOP DATA COLLECTION POLICIES FOR STATE POLICE, 2001 1–3 (2001).

¹⁴³ See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, TRAFFIC STOP DATA COLLECTION POLICIES FOR STATE POLICE, 1999 1 (2000).

¹⁴⁴ BUREAU OF JUSTICE STATISTICS, *supra* note 142, at 1, 3.

¹⁴⁵ *Id.* at 1.

¹⁴⁶ See, e.g., MEEKS, *supra* note 12, at 173 (“The issue with racial profiling is that innocent people are the victims.”); Elisabeth R. Calcaterra & Natalie G. Mitchell, Casenote, *Subtracting Race from the “Reasonable Calculus”: An End to Racial Profiling?* United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000) *Cert. Denied Sub Nom.*, 6 MICH. J. RACE & L. 339, 340 (noting that there are a “disproportionate number of innocent African

majority of traffic stops, their participation is vital to obtaining a clear picture of how racial profiling functions.¹⁴⁷ Unfortunately, states such as Idaho, Montana, North Dakota, Oklahoma, and Utah do not require the collection of racial or ethnic information pursuant to traffic stops.¹⁴⁸ As a result, policymakers have little data to show whether and how Latinos in these emerging communities are being profiled on the basis of race.

To avoid this problem, any nationwide information collection scheme must include certain key data points, such as the rates at which Latinos are searched. As already explored in Part II.B, Hispanics are stopped at rates disproportionate to whites.¹⁴⁹ Yet the disparate impact on Latinos of race-conscious policing becomes further magnified, since within the universe of people *stopped*—in which Latinos are already overrepresented—Hispanics are then *searched* more frequently than whites.¹⁵⁰ Even when police pull aside Latinos and other racial groups in proportions equal to their makeup of the total relevant geographic population—such that it appears, at first glance, that race-conscious policing has not occurred—data points on search rates may reveal that Latinos are being subjected to more invasive interactions with law enforcement. For example, preliminary data collected in an Iowa study indicated that “minority drivers are no more likely than white motorists to be pulled over,” yet additional evidence showed that Latino drivers were almost four times as likely to be searched than whites.¹⁵¹ Since less than half of state law enforcement agencies provide for the collection of racial data incident to searches of drivers, this information is generally unavailable.¹⁵² Accordingly, a comprehensive data collection program should monitor the rates at which Latinos are both stopped and searched.

Federal, state, and local police forces should also record whether officers performed searches with the consent of the driver. Current Fourth Amendment doctrine stipulates that law enforcement agents must generally have either probable cause or consent in order to search a vehicle following a traffic stop.¹⁵³ Although officers employ both of these methods, many data collection programs do not require the reporting of con-

American and Latino drivers being stopped pretextually”); Gross & Barnes, *supra* note 95, at 753 (observing that “[r]acial profiling on interstate highways inflicts heavy costs on thousands of innocent minority motorists”).

¹⁴⁷ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 27, at 2–3, 14.

¹⁴⁸ See BUREAU OF JUSTICE STATISTICS, *supra* note 142, at 2, 3.

¹⁴⁹ See discussion *supra* Part II.B.

¹⁵⁰ See *id.*

¹⁵¹ Brianna, *supra* note 76. For similar reasons, police departments should be required to report the race of motorists regardless of whether or not a citation was issued. In the Fort Worth area, for instance, Hispanic drivers were stopped and searched by officers more often, even though whites received more tickets. Anthony Spangler, *Data on Stops by Police Suggest Racial Disparity*, FORT-WORTH STAR-TELEGRAM, Mar. 3, 2004, at A1.

¹⁵² See BUREAU OF JUSTICE STATISTICS, *supra* note 142, at 2.

¹⁵³ See 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1 (3d ed. 1996); Gross & Barnes, *supra* note 95, at 672.

sent searches.¹⁵⁴ One study of four California police departments revealed that only one agency mandated that its officers record the legal basis of a search.¹⁵⁵ Accordingly, innocent Hispanic motorists could be subjected to searches at elevated rates because they feel compelled to allow inspections and are not fully aware of their legal rights or the appropriate limits of police activity. As Professor Albert Alschuler explained, law enforcement agents understand “that few Americans believe that they are free to reply, ‘Sorry, Officer, not today.’”¹⁵⁶ In fact, many minorities believe that providing consent is the only way to prove their innocence.¹⁵⁷ Hence, studies should compile statistics on probable cause and consent searches in order to form an accurate picture of how motorists are being searched. Otherwise, policymakers cannot accurately determine whether law enforcement agents are requesting, and receiving, consent from Latinos to conduct searches.

Finally, a data collection scheme should survey whether drivers or passengers were questioned about their immigration status during traffic stops. These statistics will help determine the extent to which Latinos endure immigration enforcement attempts by state and local police departments. Such practices have allegedly occurred in a number of emerging communities, including Rogers, Arkansas, where attorneys for MALDEF asserted that members of the local police force “carr[ied] out investigations into the immigration status of Latinos which are the sole jurisdiction of federal authorities.”¹⁵⁸ Compiling information of this nature may assist lawmakers in formulating policies concerning racial profiling and the “stereotype that all Latinos are ‘foreigners’ of suspicious immigration status.”¹⁵⁹

In order to address the complicated problem of racial profiling in emerging Latino communities, I propose that the federal government enact a bill which provides for the collection of traffic stop information nationwide. This model draws heavily upon legislation which has been introduced in Congress but not adopted,¹⁶⁰ as well as existing state laws

¹⁵⁴ See, e.g., U.S. GEN. ACCOUNTING OFFICE, *supra* note 27, at 16.

¹⁵⁵ *Id.*

¹⁵⁶ Alschuler, *supra* note 126, at 172. Some studies have indicated that Latinos are more prone than whites to give consent to search. See, e.g., Ragland, *supra* note 13.

¹⁵⁷ Carbado, *supra* note 99, at 1017. Professor Carbado refers to this phenomenon in a portion of his article *Performing Consent to Establish Innocence*. *Id.* at 1014.

¹⁵⁸ *Lopez v. City of Rogers*, No. 01-5061, 2003 U.S. Dist. LEXIS 14570, at *3 (W.D. Ark. Aug. 8, 2003). This case was settled without an admission of wrongdoing by the Rogers Police Department. Class Action Settlement Agreement at 4, *Lopez v. City of Rogers*, No. 01-5061 (W.D. Ark. filed Mar. 23, 2001); see also HARRIS, *supra* note 10, at 133 (observing that “[l]aw enforcement targeting illegal immigration has already popped up in places with no border to Mexico and no new influx of immigrants”).

¹⁵⁹ Johnson, *supra* note 81, at 707; see also Kevin R. Johnson, *Race Profiling in Immigration Enforcement*, 28 HUM. RTS. 23, 23 (2001).

¹⁶⁰ See End Racial Profiling Act of 2004, H.R. 3847, 108th Cong. (2004); End Racial Profiling Act of 2004, S. 2132, 108th Cong. (2004); Traffic Stops Along the Border Statistics Study Act of 2003, H.R. 86, 108th Cong. (2003); End Racial Profiling Act of 2001, S. 989, 107th Cong. (2001); Racial Profiling Prohibition Act of 2001, H.R. 965, 107th Cong.

providing for data collection.¹⁶¹ For the reasons discussed above, the following data points should be included in the proposed bill:

- location of the stop
- duration of the stop
- nature of the alleged traffic violation which led to the stop
- number of individuals in the vehicle
- identifying characteristics of the occupants including, but not limited to, race and ethnicity
- whether an officer conducted a search of any occupant, as well as the race of the individual/s searched
- basis for conducting a search, whether consent or probable cause, including the basis for the request of consent or the circumstances establishing probable cause
- whether an officer issued a citation or warning to any occupant, and the violation charged or warning provided
- whether any occupant of the vehicle was arrested, along with the basis for such action and the race of the arrestee
- any contraband or property seized
- whether the immigration status of any occupant was questioned
- whether an officer requested immigration documents from any occupant and, if so, whether any records were retained

As this information is collected, it should be disclosed periodically so that it can be scrutinized by academics, experts, statisticians, and policymakers. Currently, only sixteen state law enforcement agencies that collect racial information under some circumstances make this information publicly available.¹⁶² Likewise, data gathered pursuant to settlements or consent decrees are often kept confidential.¹⁶³ This proposal would overcome such obstacles to full comprehension of the racial profiling

(2001); Traffic Stops Statistics Study Act of 2000, H.R. 1443, 106th Cong. (1999); Traffic Stops Statistics Study Act of 1999, S. 821, 106th Cong. (1999). Special thanks to Michael J. Muchetti, Chief of Staff for Congressman Lloyd Doggett (D-Tex.), for his help in assembling these materials.

¹⁶¹ See CONN. GEN. STAT. ANN. § 54-1m (West 2003); MO. ANN. STAT. § 304.670 (West 2003); MO. ANN. STAT. § 590.650 (West 2003); N.C. GEN. STAT. § 114-10.01 (2003); TEX. CRIM. PROC. CODE ANN. Art. 2.132 (Vernon 2003).

¹⁶² BUREAU OF JUSTICE STATISTICS, *supra* note 142, at 3.

¹⁶³ Garrett, *supra* note 43, at 45.

phenomenon by openly publishing traffic stop statistics and allowing for public comment.

Although critics of data collection efforts assert that such programs “will strain the limited resources of police departments,”¹⁶⁴ most law enforcement agencies should be able to adequately cope with only minimal changes to their routine. Many police cruisers are already equipped with computer terminals which can be used to input information and check the status of motorists’ licenses.¹⁶⁵ With this infrastructure in place, officers need only enter a few additional keystrokes after each stop, using an agreed-upon code, to record the necessary data.¹⁶⁶ To the extent that particular police departments have not yet adopted computerized information systems, Congress could provide subsidies for agencies participating in the collection program to establish such systems. This way, information can be gathered more efficiently and law enforcement agencies can reap the public safety benefits associated with having modernized computer systems. Those police departments that choose not to upgrade can utilize traditional paper forms which can be filled out quickly by an officer using a pre-coded sheet.¹⁶⁷ These documents would then be processed either manually or by a machine at a central location, so as to expedite officers’ return to patrol. Thirty-four state law enforcement agencies should already be familiar with this system, since they currently use similar paper-based formats to collect limited information pertaining to race or ethnicity.¹⁶⁸ Accordingly, data collection schemes need not impose significant administrative burdens on police officers, and participation could be encouraged through generous monetary incentives that would offset costs and entice robust compliance.

A nationwide statistical survey would substantially increase the information available to decisionmakers, while placing minimal burdens on officers’ time and accruing various public safety benefits through incentives to modernize equipment. There are further advantages to this approach. In contrast to collection schemes implemented pursuant to court orders or settlements, a countrywide program poses less risk of stigma-

¹⁶⁴ Gregory M. Lipper, Recent Development, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551, 562 (2001).

¹⁶⁵ Harris, “*Driving While Black*” and All Other Traffic Offenses, *supra* note 45, at 581.

¹⁶⁶ *See id.* Similar data collection programs estimate that officers may spend only an extra twenty to thirty seconds per stop to complete a report. *See* Garrett, *supra* note 43, at 90.

¹⁶⁷ Using a form similar to those utilized by emergency medical technicians to collect patient information, police officers can fill in bubbles to indicate the race of the driver, number of individuals in the vehicle, and other relevant information. *See* MARYLAND INSTITUTE FOR EMERGENCY MEDICAL SERVICES SYSTEMS, MARYLAND AMBULANCE INFORMATION SYSTEM: USER’S MANUAL 2 (2001), available at <http://www.miemss.org/Mais2003.pdf>. Some of the suggestions detailed above regarding paper collection systems have been inspired by the author’s years of service as an emergency medical technician.

¹⁶⁸ *See* BUREAU OF JUSTICE STATISTICS, *supra* note 142, at 2.

tizing police departments because no particular agency has been singled out for suspicion of engaging in “racist” conduct. This could result in greater cooperation between law enforcement personnel and study administrators. Although statistics gathered will assist lawmakers in pinpointing the locations and causes of racial profiling so that they can effectively combat the problem through legislation, the program would also serve an independent purpose. As one commentator observed: “[D]ata collection itself sends a strong message of concern and accountability to the community, indicating that racial disparity is being watched and is not tolerated.”¹⁶⁹

B. *Interim Measures*

While information is being collected, measures should be taken to limit the harms of race-conscious policing as policymakers begin to analyze the data with a view toward forming a comprehensive solution. Such interim steps could include compelling action through litigation, encouraging police departments to voluntarily implement policies and procedures governing the conduct of officers during traffic stops, and enacting state and local laws. Although these measures, by themselves, are insufficient to eradicate racial profiling, they play an integral role in curbing the negative effects of the practice.

Pursuing remedies in the courts could significantly aid Latinos in combating the most egregious instances of racial profiling. By bringing cases against law enforcement agencies that practice race-based policing, plaintiffs may receive injunctive relief from courts; negotiate settlements with police departments; or, at the very least, exert informal pressure on agents to modify their behavior. The settlement agreement reached between the Rogers Police Department in Arkansas and a class of Hispanic plaintiffs provides useful insight into the remedies potentially available to litigants.¹⁷⁰ The arrangement first calls for the agency to promulgate procedures which support the “prohibition and prevention of racial/bias profiling” and requires that the policies be given full force “within a reasonable time following their adoption.”¹⁷¹ Any employee who violates the established rules is subject to disciplinary measures set forth by the police department.¹⁷² This helps ensure that the provisions of the settlement

¹⁶⁹ Garrett, *supra* note 43, at 122.

¹⁷⁰ Class Action Settlement Agreement, *Lopez v. City of Rogers*, No. 01-5061 (W.D. Ark. filed Mar. 23, 2001). Prior to the settlement agreement, the court certified the class as: “All Latino persons who, since March 23, 1998, have been subjected by officers of the Rogers Police Department to a stop, detention, investigation, search, or seizure because they are Latinos and in the absence of a reasonable, articulable suspicion that they are involved in criminal activity.” *Lopez v. City of Rogers*, No. 01-5061, 2003 U.S. Dist. LEXIS 14570, at *24–*25 (W.D. Ark. Aug. 8, 2003)

¹⁷¹ Class Action Settlement Agreement, *supra* note 170, at 2.

¹⁷² *Id.* at 10.

agreement have “bite” and that supervisors take an active part in curbing discriminatory practices. Members of the local police force must also undergo training designed to “emphasize the need to respect the rights of all Rogers community members to be free from unreasonable government intrusion or law enforcement-initiated action.”¹⁷³ In developing its annual curriculum, the agency must receive input from Latinos previously affected by local policing practices.¹⁷⁴ This helps ensure that the voice of the Hispanic community will be heard when officials decide how to structure the cultural sensitivity training. Furthermore, the Rogers Police Department must institute a public relations campaign which includes distributing pamphlets, broadcasting public service announcements, and issuing press releases to inform residents about the new practices.¹⁷⁵ Officials are also required to implement revised procedures to, *inter alia*, make complaint forms available online and at community centers, publish these forms in both English and Spanish, and investigate anonymous and third party complaints.¹⁷⁶ In addition, the settlement decree provides for the establishment of an ad hoc committee whose purpose is to advise the police department in its efforts to comply with the agreement’s terms.¹⁷⁷ The committee consists of the director of the local community support center, a police liaison officer, and community representatives named by the plaintiffs and defendants.¹⁷⁸ Finally, the agreement provides for the collection of traffic stop data, similar to the plan proposed in this Article, to monitor the department’s compliance in ceasing race-conscious police practices.¹⁷⁹ Although this list does not exhaust the remedies that a plaintiff could potentially seek, these items illustrate what can be achieved through litigation or settlement.

There are, however, limits upon the effectiveness of litigation as a tool for combating racial profiling. First, these suits often require considerable expertise and significant financial resources, such that they are generally handled by national civil rights organizations like MALDEF or the American Civil Liberties Union (ACLU).¹⁸⁰ As with all trials, successful cases also require finding “attractive” plaintiffs who appeal to the sensibilities of juries and judges and are not likely to be impeachable.¹⁸¹ In addition, these individuals must be willing to endure criticism from the community and have the “guts to stand up and publicly sue a police

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 10–11.

¹⁷⁶ *Id.* at 9.

¹⁷⁷ *Id.* at 3, 13–14.

¹⁷⁸ *Id.* at 13.

¹⁷⁹ *Id.* at 8–9.

¹⁸⁰ Garrett, *supra* note 43, at 62–63; Gross & Barnes, *supra* note 95, at 727; Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 324.

¹⁸¹ Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 324.

department in a racially-charged case.”¹⁸² This combination of factors makes it difficult for most victims of racial profiling to sustain a suit and ultimately prevail in court.¹⁸³ The successful litigation of such cases is made even more challenging as a result of the high bar that the Supreme Court has set in civil rights matters pertaining to racial profiling. For example, plaintiffs suing on the basis of the Equal Protection Clause must prove that the police intentionally treated them differently because of their race.¹⁸⁴ Professor William Stuntz clarified why this standard is difficult to meet:

The source of the difficulty is, at least in part, substantive. Police always have a race-neutral justification for traffic stops: the suspect violated the traffic laws. This justification is always available, because everyone violates the traffic laws. As anyone who drives on American highways knows, speed limits are not limits at all: they ordinarily represent the minimum speed for reasonable drivers, not the maximum. The real prohibition, the true ceiling, is set by local custom and police enforcement patterns.¹⁸⁵

Other constitutional protections, such as the Fourth Amendment doctrine governing the admissibility of contraband in court proceedings, are of little value to victims of racial profiling since “most stops do not result in the discovery of contraband, [hence] there is . . . no evidence to suppress.”¹⁸⁶ Taken as a whole, the constitutional common law promulgated by the Supreme Court has resulted in decisions which are, at best, unpredictable¹⁸⁷ and, at worst, have “turned a blind eye to the use of race” in traffic stops.¹⁸⁸ These legal obstacles, in addition to the financial and practical difficulties involved in bringing racial profiling cases, limit the ability of Latino plaintiffs to seek relief in courts. Nevertheless, Hispanics and concerned organizations should consider the use of litigation as one weapon in their civil rights arsenal.

¹⁸² *Id.*

¹⁸³ See Alschuler, *supra* note 126, at 245.

¹⁸⁴ William J. Stuntz, *O. J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 871–72 (2001).

¹⁸⁵ *Id.* at 872.

¹⁸⁶ End Racial Profiling Act of 2004, H.R. 3847, 108th Cong. § 2(a)(17) (2004).

¹⁸⁷ See FREDRICKSON & SILJANDER, *supra* note 28, at 47–50.

¹⁸⁸ HARRIS, *supra* note 10, at 224; see also Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 291. Even if the parties to a suit reach a settlement agreement, this may pose unique challenges, in that it “avoids the creation of precedents, leaving behind a still meager body of law against racial profiling.” Scott Moriarity, Student Article, *Responding to the Issue of “Driving While Black”: A Plan for Community Action Through Litigation and Legislation*, 27 WM. MITCHELL L. REV. 2031, 2060 (2001). Also, settlements are by their very nature compromises, so plaintiffs may not receive the full scope of relief for which they had hoped.

Even without the pressure of possible litigation, police departments could be persuaded to voluntarily adopt measures responsive to the issue of racial profiling. Criminal law experts have observed that officers are more likely to follow procedures which have been established by law enforcement agencies themselves, rather than by external actors.¹⁸⁹ Hence, non-compulsory measures may result in greater levels of compliance than compelled action. Voluntary steps are also beneficial because they “focus the department on policy making and on the implications to the community of the police practices being regulated.”¹⁹⁰ In this sense, the act of developing procedures fosters a greater awareness within the agency regarding the concerns of local minority residents. Although not all police departments may be inclined to implement remedial measures of their own accord, those that do could realize considerable efficiency gains and societal benefits.

Finally, state legislators and local governing bodies can pass laws designed to measure and reduce the use of race-conscious police tactics. States such as Connecticut, Missouri, North Carolina, and Texas have enacted statutes that provide for the collection of traffic stop data in an effort to learn more about the nature of racial profiling.¹⁹¹ Hundreds of smaller jurisdictions and police departments scattered across the country have followed suit.¹⁹² States and localities could also create protocols for police to follow during traffic stops or stipulate that law enforcement agencies create their own procedures. Some states have even banned racial profiling outright, so as to put the brakes on the practice.¹⁹³ These actions by states, counties, and principalities send the message that non-federal policymakers are serious about putting an end to the use of race as a sole basis for stopping minorities. In addition, they signal to federal legislators that racial profiling is an issue worthy of congressional attention.

CONCLUSION

[T]he practice of racial profiling is the antithesis of America’s belief in fairness and equal protection under the law. Stopping people on our highways, our streets, and at our borders because

¹⁸⁹ See, e.g., Harris, “*Driving While Black*” and *All Other Traffic Offenses*, *supra* note 45, at 577; Harris, *The Stories, the Statistics, and the Law*, *supra* note 45, at 323.

¹⁹⁰ Harris, “*Driving While Black*” and *All Other Traffic Offenses*, *supra* note 45, at 577; see also Calcaterra & Mitchell, *supra* note 146, at 351.

¹⁹¹ See, e.g., MO. ANN. STAT. § 304.670 (West 2003); MO. ANN. STAT. § 590.650 (West 2003); N.C. GEN. STAT. § 114-10.01 (2003); TEX. CRIM. PROC. CODE ANN. Art. 2.132 (Vernon 2003).

¹⁹² Press Release, American Civil Liberties Union, ACLU Applauds Louisville’s New Racial Profiling Policy, Urges Additional Measures (Dec. 5, 2000), available at <http://www.aclu.org/news/NewsPrint.cfm?ID=8202&c=133>.

¹⁹³ See, e.g., CAL. PENAL CODE § 13519.4 (West 2004); CONN. GEN. STAT. ANN. § 54-11 (West 2003); KY. REV. STAT. ANN. § 15A.195 (Banks-Baldwin 2003).

of the color of their skin tears at the very fabric of American society. We are a nation of laws and everyone should receive equal protection under the law. Our constitution tolerates nothing less. We should demand nothing less.¹⁹⁴

The use of race and ethnicity as indicia of potential for wrongdoing evokes images from earlier periods in American history, such as the internment of citizens of Japanese heritage on the race-based theory that they were more prone to engage in acts of sabotage or espionage.¹⁹⁵ Although more than sixty years have elapsed since then, vestiges of race-based criminalization still linger. Studies performed nationwide have consistently shown that Latinos are being stopped and searched by police officers at levels well beyond their proportion to the local population.¹⁹⁶ These incidents impose significant costs on the individuals stopped, the Hispanic population at large, and even law enforcement agents by damaging police-community relations.¹⁹⁷ In order to determine the extent and the causes of racial profiling and to build the political will necessary to pass a comprehensive legislative reform package, Congress should undertake a nationwide data collection program. Gathering statistics from federal, state, and local agencies will permit policymakers to get a more full and accurate picture of the racial profiling landscape. Absent such a scheme, victims, civil rights organizations, and other concerned citizens and entities will be forced to grapple with this complex issue in a haphazard manner, using incomplete information. Although this data-gathering effort, by itself, is not sufficient to eradicate the thorny problem of racial profiling, it will aid significantly in forming an enlightened policy for addressing race-conscious policing. As such, this proposal offers a glimmer of hope, not for the end, but for a beginning to the end of “driving while brown.”

¹⁹⁴ Corzine, *supra* note 40, at 56–57.

¹⁹⁵ See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); Ira Glasser, *Introduction to KENNETH MEEKS, DRIVING WHILE BLACK: HIGHWAYS, SHOPPING MALLS, TAXI-CABS, SIDEWALKS: HOW TO FIGHT BACK IF YOU ARE A VICTIM OF RACIAL PROFILING* xi, xi–xii (2000).

¹⁹⁶ See discussion *supra* Part II.B.

¹⁹⁷ See discussion *supra* Part II.C.