REMEDYING RACIAL PROFILING

by Brandon Garrett*

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The overnight successes of the movement to end racial profiling provide new hope in a time when civil rights victories come grudgingly. Litigation played a groundbreaking role in challenging police practices and in making racial profiling an issue of national concern. However, the same legal work that has helped to create an opportunity for change has distracted lawyers, advocates, commentators, and police from focusing on the creation of effective remedies for racial profiling. The goals of reform efforts remain vague. For

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1. For cases representing the nationwide groundswell of litigation, see infra notes 7, 85, 87, 98. The most dramatic example of a lawsuit drawing attention to the racial profiling problem came in State v. Soto, where efforts to suppress evidence obtained through race-based stops led to revelations that New Jersey State Police falsified information to hide pervasive racial profiling and to the admission by the State that police engaged in profiling. 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

2. Legal commentary on racial profiling has focused exclusively on defining liability, without discussion (much less criticism) of current efforts to design remedies or proposals for better approaches. One paper compares recent efforts to use statistics to monitor racial profiling, but admits there is no consensus on how to interpret such data and does not discuss other aspects of remedies aside from statistical monitoring. Deborah Ramirez et al., A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned 53–56 (2000) (prior, unpublished version, on file with author). Two commentators have suggested ways to bring in new groups to address the problem, but do not discuss remedies or how those groups might tackle the problem differently. See Myriam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 Colum. L. Rev. 1384, 1388 (2000) (proposing that a law be passed permitting the Justice Department to deputize private suits against police departments for unconstitutional patterns or practices); Sean Hecker, Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards, 28 Colum. Hum. Rts. L. Rev. 551, 592–604 (1997) (suggesting that civilian review boards might take on a role in preventing selective enforcement of traffic laws). An interesting new report by the Police Executive Research Forum (PERF) provides a comprehensive guide for departments attempting to address racially biased policing. Lorie Fridell et al., Police Executive Res. F., Racially Biased Policing: A Principled Response (2001), http://www.inca.net/perf/racial.html [hereinafter PERF Report]. The focus is on
example, lawyers emphasize using litigation to obtain police data on the race of people stopped, without a sense of what to do with data aside from trying to show an Equal Protection violation. This data takes on the feel of a litmus test where lawyers hope to show intentional discrimination, while police try to avoid being labeled as racist. Sidetracked by this framing of the problem, all sides fail to use the data to examine the roots of the underlying racial profiling. As one lawyer said, “Getting at the problem is just much more difficult than keeping data and putting out a piece of paper that says, ‘Don’t do it.’”

Despite this narrow approach, an historic shift has already occurred, with an explosion of information about race and police stops. For the first time, police across the country voluntarily collect data based on race. Several states now require police to collect data helping police departments formulate policy, and the report not only provides useful suggestions and model policies, but also provides an interesting window into the thinking of reformers within the law enforcement community. Id.


4. For recent cases raising Equal Protection claims, see infra notes 7, 85, 87, 98, and for discussion of police fears of being labeled as racist, see infra notes 143–45 and accompanying text.


6. In response to political pressure or to special commission investigations, departments have chosen to collect data voluntarily to show that they do not profile. See infra note 128.
In the courts, the Justice Department has secured consent decrees requiring data collection, and plaintiffs have sued to obtain such information. Not only are police talking about race, but in countless small towns and neighborhoods, these statistics create a new kind of conversation and struggle about the meaning of race in policing.

This wellspring of information has not been tapped. First, despite apparent consensus on information gathering as the remedy of choice, no one agrees on what data to collect. Second, there is no agreement on what to do with the information once it is collected. For example, none of the consent decrees or state laws indicate how data should be analyzed. As John Lamberth, a premier analyst of traffic stop statistics, explained, "A lot of places are reporting the data, and


8. See infra notes 143–45 and accompanying text.

9. For example, one commentator asks, "How do we tap the private resources, personal experiences, and community-based motivation that have engineered the great structural reform efforts of our time, given the constitutional barriers the Supreme Court has erected over the past two decades?" Gilles, supra note 2, at 1414.

10. See Ramirez et al., supra note 2, at 54 ("More research is needed to determine the most useful way to analyze data on stops and searches. By experimenting with various benchmark comparisons, practical methods can be designed.").
then the question becomes, "What does it mean?" And no one seems to know."
Many advocates are understandably concerned that because little thought has been directed towards data collection, these efforts may be used disingenuously, to give the impression that no racial profiling takes place, to pin the problem on a few problem officers, or to postpone real reform. Critics exploit this uncertainty, calling racial profiling a "myth," that is either based on "worthless" and incomplete data or the invention of race-baiting crusaders who lack any understanding of real police work.

Part of the difficulty in understanding racial profiling may be that all of this new information about police stops is being kept from the public. Few consent decrees, settlements, or state laws require public disclosure of the data. In addition, most last only a few years. Unless continuing partnerships with the community develop, any accountability created may vanish. Thus, critics portray these efforts as empty gestures. Worse, exclusion of outside groups destabilizes these remedies, as civil rights and community groups protest their exclusion, sue to challenge or intervene in consent decrees, and pass legislation to achieve their goals outside the courtroom. Where interpreting information about police practices involves making value judgments, shutting out the community threatens the legitimacy of the project.

Despite the limitations of the current approach to racial profiling, recent efforts to craft remedies already suggest the outlines of an innovative 'experimentalist' approach towards policing. Law-

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12. See infra note 153 and accompanying text for a discussion of these concerns.
14. The approach in this paper follows the work of Charles Sabel, Susan Sturm, Malcolm Sparrow, Archon Fung, and others who propose a regulatory regime based on new models of participatory governance. For the central piece describing how government can adopt flexible, team-based organization to deliver services emphasizing disclosure of data to the public and the use of rolling standards to measure progress, see Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267 (1998).

Susan Sturm's article, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458 (2001) provides a powerful framework for remedying informal patterns of discrimination that goes to the heart of the problem discussed in this Article. Professor Sturm's piece inspired this
suits, legislation, and settlements with the Department of Justice (DOJ) have begun to create such interactive forms of participation through information-sharing and partnership between police and outside actors. State laws have convened interdisciplinary groups to evaluate data from police departments. Informal efforts of police departments have also increasingly led to closer connections with civil rights groups and the community.  

Under the proposed approach, police and key actors—including community groups, advocates, or other organizations facing similar problems—would hold a series of meetings where they would discuss the nature of the problem, collaborate in the design of the data collection process and new traffic stop procedures, implement new training and supervision, jointly measure progress, and engage in problem solving using the data collected. This approach makes policing more flexible and responsive to outsiders and gives police access to solid information to prevent them from falling back on stereotypes. The usual defense of racial profiling has been that it helps detect likely criminals, but these remedies suggest that putting an end to

Article. Sturm shows how workplace problem-solving can reach patterns of informal bias and exclusion by fostering open, participatory decision-making and by inviting the expertise and participation of outside stakeholders. Further, the benefits of this kind of problem solving—because it makes the institution itself more open to change—extend far beyond remedying the legal violation to improving creativity and productivity more generally. Sturm shows how bringing together disparate actors that share a common interest in solving these problems results in new dynamics and new understandings of what discrimination is and how to remedy it.


15. PERF Report, supra note 2, at 99 (recommending minority community outreach for departments addressing racial bias, and stating that one-third of departments responding to its survey reported projects or programs aimed at strengthening relationships with minority communities).
racial profiling can also help police do their work better.\textsuperscript{16} In a departure from problem-oriented policing in the past, the approach also takes advantage of technological advances in information gathering and data analysis.\textsuperscript{17} While this approach takes the focus off litigation, its demonstration of the practicality of a remedy for racial profiling should assist courts in resolving disputes, thereby making voluntary compliance more palatable.

Part I of this article describes why the racial profiling problem seems intractable when viewed through the lens of current legal norms, and suggests a broader approach towards the problem. Part II evaluates litigation, state laws, and Justice Department consent decrees—methods that suggest possibilities for a more comprehensive remedy. Part III presents an approach that combines data collection

\textsuperscript{16} Randall Kennedy, though strongly opposing racial profiling and overreliance on such statistics, argues that, as a first step, one must concede that "blacks, particularly young black men, commit a percentage of the nation's street crime that is strikingly disproportionate to their percentage in the nation's population." Randall Kennedy, Race, Crime, and the Law 145 (1997). In fact, race is a poor proxy for crime, and overreliance on race likely indicates shoddy police work. See infra note 50.

\textsuperscript{17} For general discussion of problem-oriented policing, see Mark Harrison Moore, Problem-Solving and Community Policing, in Modern Policing 99, 123 (Michael Tonry & Norval Morris eds., 1992) ("Opening the department to community-nominated problems often affects the police understanding of their ends as well as their purposes . . . ."); Sarah E. Waldeck, Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?, 34 Ga. L. Rev. 1253, 1254 (2000) ("[P]roblem-oriented policing . . . encourages officers to identify relationships between individual events and develop solutions to underlying problems."). See generally Herman Goldstein, Problem-Oriented Policing (1990) (suggesting strategies that police can use to identify, analyze, and address effectively the problems that confront them, including community mobilization and publishing information); Ronald Goldstock, The Prosecutor as Problem-Solver (Ctr. for Res. in Crime & Just., Occasional Papers No. 10, 1991) (calling for a shift in the role of the prosecutor from mere presenter of evidence to the court to that of controller of crime and problem-solver); Malcolm K. Sparrow et. al., Beyond 911: A New Era for Policing (1990) (calling for innovation in organization, strategies, and approaches—including problem-solving—to make policing more effective); Dan M. Kahan & Tracey L. Meares, Foreword: The Coming Crisis of Criminal Procedure, 86 Geo. L.J. 1153 (1998) (discussing the criminal procedure doctrines used to evaluate the constitutionality of discretionary community policing techniques); Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551 (1997) (arguing for enhanced political administrative mechanisms to ensure that police discretion benefits the community).
with a form of problem-solving that involves several sets of actors, including advocates and the community. Looking to build on the strengths of existing models, this Article turns to two efforts, in Philadelphia and Chicago, that suggest the possibilities for involving outside participants in designing a system for data collection and in using that data to solve problems. These efforts show that data can be evaluated in partnership with key actors, such as community groups, advocates, or local organizations facing similar problems. Three features of the proposed approach stand out: 1) departments take the initial step of setting up a system for information gathering and data disclosure; 2) they begin an ongoing process of reflection and problem-solving based on that information; and 3) they open participation to outside groups that assist as partners in problem solving. Finally, this approach suggests ways that lawyers, police, the community, and other groups can all benefit from creating stronger ties as they work together to remedy racial profiling.

I. RETHINKING THE RACIAL PROFILING PROBLEM

Advocates and the media have settled upon the term 'racial profiling' to refer to the disparate treatment of minorities by the police. While the phrase provides powerful rhetoric and aptly expresses the underlying problem of racial injustice, it is a slippery concept that disguises the complex legal and factual issues that surround race's effect on policing.\(^8\) A debate rages not only over how to define racial profiling, but over the true meaning of statistics, motives, and police policy.\(^9\)

\(^18\) In an example of glossing over the complexity of the problem with great rhetorical effect, Democratic presidential candidate Bill Bradley openly called for the next president to issue an executive order banning racial profiling, stating, "We all know what, 'driving while black' is—it's breathing while black." Editorial, Profile Precautions, Courier-Journal (Louisville, Ky.), Feb. 10, 2000, at 12A (quoting Bill Bradley). In one sense, we do all know what the problem is—it is a pattern of unreasonable, race-based stops. But simply banning 'racial profiling,' even if such a pattern is present, will not provide police with better guidance. A ban will not root out the causes of profiling, nor will it provide any means to assure that police will obey the ban. For a discussion of proposals to ban racial profiling, see infra notes 154–55 and accompanying text.

\(^19\) See infra notes 46–49 and accompanying text. This debate continues to be shaped by current events, including recent international conflicts. Events following the attacks on September 11, 2001 have not changed the course of the racial profiling debate, but they have changed its focus for the time being. In so
Racial profiling traditionally referred to actual written profiles of suspects, primarily drug courier profiles. Police identified suspects using a set of factors describing behavior and appearance, including age, clothing, and often race. The Supreme Court ruled that under the Fourth Amendment, race could reasonably be included in a profile, as long as it was only one of several factors used. Thus, even where profiling is explicit, courts permit the use of doing, they have created new opportunities for reform. While the recent attacks have unleashed serious new fears of revived racial profiling, they have also changed perceptions of police in ways that could expand possibilities for police-community cooperation. Officers in New York, for example, say the improvement in relations has been particularly dramatic. Donna De La Cruz, NYC Police Relations Improving, Associated Press, Oct. 20, 2001.

Evidence suggests progress is being retarded by a new wave of profiling against Arab-Americans, and that national security is being used to justify a new erosion of rights. Indeed, for years Arab-Americans have complained of racial profiling by airlines, dubbing such practices, 'flying while Arab.' Sharon Cohen, Terror Attacks Revive Concerns About Profiling, Hous. Chron., Oct. 21, 2001, at 19. However, in a move lauded by the ACLU, the federal government has warned air carriers not to single out passengers. The system that airlines use relies most heavily on random checks and a focus on prior travel patterns of passengers. Id.

Even if categories like Arab, Middle Eastern, or Muslim could be identified, the suspects in the recent attack could have been more easily identified based on neutral criteria, such as inclusion on F.B.I. lists of known Al Qaeda collaborators, or as passengers paying for one-way tickets with cash. “The four hijackings that took place on Sept. 11 were not a failure to stop 'Middle Eastern-looking' passengers from boarding, but a failure to track down known associates of a terrorist organization; to properly search everyone boarding the planes for knives and other dangerous objects... the list goes on.” Editorial, Arab Appearance Isn’t a Crime, Chi. Trib., Oct. 13, 2001, at 24.

A more serious concern may be the use of profiling in prolonged, secret federal detentions. The ACLU has complained that the Department of Justice has refused to release information on hundreds of individuals indefinitely detained. While there are serious due process and racial profiling concerns, a “veil of secrecy” prevents the public from even knowing whether violations occur. Mae M. Cheng, Detentions Raise Legal Concerns; Some Immigrants Held for Long Periods, Newsday, Oct. 22, 2001, at A23.


21. United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (permitting discretion to use “apparent Mexican ancestry” as an indicia of suspicion); United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (“The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor . . . .”); United States v. Collins, 532 F.2d 79, 82 (8th Cir. 1976) (“[T]he color of a person’s skin . . . is an identifying factor
Recent racial profiling challenges do not involve the use of written profiles that include race in a list of factors. Instead, they allege patterns or practices of police stops that are based, at least in part, on the race or national origin of the subject. Yet to call such practices 'racial profiling' puts the cart before the horse. Because plaintiffs must show that race is a factor in the stops, thus enabling a court to infer that police actually used a racial 'profile.' In order to show constitutional violations, lawyers and advocates have tried to demonstrate patterns of racial profiling by obtaining data about stops. When these figures show stark racial disparity, their message may be so strong that they cause minorities to feel targeted. Yet, neither Fourth nor Fourteenth Amendment doctrine provides any guidance as to how much racial disparity is unlawful, nor have any courts addressed the issue. Perhaps trying to pin down these patterns using statistics is also difficult because of the power of race to distort basic relationships between people and institutions. Leaving legal liability aside, each of the major statistical studies of police stops has raised new questions about the nature of the problem.

which...assists the police in narrowing the scope of their identification procedure.

Even where race is not explicitly listed, police often rely on loose profiles to permit race-based stops in practice. The Supreme Court in Whren v. United States upheld the constitutionality of pretextual stops that could reasonably have been motivated by factors other than race. 517 U.S. 806, 813 (1996). See also David Cole, No Equal Justice 47–52 (1999) (giving examples of drug-courier profiles, discussing unstated reliance on race, and providing evidence that police often rely on race without referring to it in written profiles).

22. Perhaps an Equal Protection violation could be premised on the race-based message that patterns of police stops send. While creative, this approach would follow voting rights cases, in which it is the message that district lines send, and not any injury based on actual vote dilution, that constitutes the Equal Protection harm. For discussion of the expressive nature of the harm in voting rights cases, based on the statistical singling out of disparate numbers of minority residents, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483, 506–07 (1993).

23. *See infra* notes 77–103 and accompanying text.

New Jersey provides a case study of racial profiling, but only because the state issued a report actually admitting that its police engaged in racial profiling by stopping starkly disparate numbers of minority drivers on the New Jersey Turnpike. Most efforts to examine racial profiling stop at this stage, presenting a pattern of apparent discrimination and, based on these aggregate numbers, attempting to reach a conclusion as to whether police over-use race. Yet, upon examination, even where the state admits to profiling, the problem proves far more complex.

First, any definition of racial profiling is confounded by the motivations of individual actors. New Jersey initially explained the statistical disparity in its stops as the result of a few ‘problem cops’ who singled out minorities and were intentionally racist. Yet even in cases where officers admit to pulling over blacks, because these stops can be pretextual, officers can always disguise their motivations by basing stops on a traffic violation. Yet focusing on problem officers may pin the problem on a few racists to avoid looking at larger patterns. Problem cops do not explain systemic disparities that extend over thousands of stops in different precincts or patrols.


25. New Jersey Report, supra note 24, at 26–27 (stating that four of ten stops were of minorities and eight of ten searches, “the overwhelming majority,” were of minorities).

26. Id. at 7–8 (initially attributing the problem to the “willful misconduct by a small number of State Police members” and proposing that an early warning system be used to “ferret out” officers engaging in misconduct).

27. Then again, outright admissions of individual officers are not so rare. See Cole, supra note 21, at 36–37 (describing how the Maryland State Police distributed a memorandum encouraging officers to stop blacks, and recounting how an officer in Volusia County, Florida, when asking a white man how he was doing, and receiving an answer, “Not very good,” replied, in turn, “Could be worse—could be black.”).

28. New Jersey Report, supra note 24, at 7 (adding that larger de facto patterns must also be responsible for disparity). See also PERF Report, supra note 2, at 6–7 (“[T]he ‘bad apple’ analogy is no longer resonating as the only credible explanation. Increasingly, organizational culture is recognized as the
Indeed, New Jersey has admitted that a few officers could not be responsible for these larger patterns.  

Motivations of individual officers also prove important to understanding the data. New Jersey and other departments have noted large gaps in their data. Officers may not fill out forms or keep proper records of their stops for a host of reasons. Some may do so to avoid paperwork and save time, some to prevent the appearance of being racist, some to seem more successful by recording only those searches that result in arrests, and some to defend their actions against potential complaints by adjusting records. Indeed, perceptions may distort data where officers, relying on stereotypes, stop a driver they believe to be minority, but who is, in fact, white, or vice versa. Racial stereotypes may cut against reality in unpredictable directions, and biased policing might result in little disparity, just as neutral policies can significantly impact minorities.  

The racial profiling problem is also defined by the way that race filters perceptions of individual community members. Residents may be stopped with reasonable suspicion, but still perceive a racial profiling problem. The way stops are conducted, the manner in which police talk, the body language police use, cultural differences, the presence or absence of force, and the number of people watching may

most important factor influencing police behavior.


30. Id. at 31 (noting “missing data”); infra note 170 (indicating that officers in New York City often do not record stops). Similarly, Cincinnati has had persistent problems with inaccurate data collection, in its efforts that were ordered by the City Council in the wake of riots and a federal lawsuit alleging racial profiling. The suit is presently in mediation. Kristina Goetz, Profiling Forms Get Shaky Start, Many Erroneous or Incomplete, Cincinnati Enquirer, June 17, 2001, at A1 (finding that one quarter of the forms studied had mistakes or missing information, ranging from not reporting the time of the incident to the race of the driver).

31. David Kocieniewski, Trenton Charges 2 Troopers with Falsifying Race of Drivers, N.Y. Times, Apr. 20, 1999, at B1 (“Two state police supervisors said it was common practice for troopers on the turnpike to jot down the license plate number of white motorists who were not stopped and use them on the reports of blacks who were pulled over.”).

32. For discussion of this problem, see PERF Report, supra note 2, at 129–30. A study of this phenomenon would be extremely interesting, but would require police to state the race of the person stopped before, and then note corrections afterwards.
all affect the perception that a stop is unjust. The Supreme Court in *Terry v. Ohio* acknowledged the psychological harm that police stops cause:

> Even a limited search . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.  

Following an encounter with law enforcement that seems motivated by race, or even after hearing of a friend's encounter, residents may be likely to assume that future interactions will be race-based. In addition, residents' perceptions will be shaped by what happens to others in their community, based on conceptions of "linked fate," or sympathy with the injuries of relatives and friends. Statistics may not reflect the psychological effect of the manner in which stops are conducted or the larger repercussions of stops on the community.

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33. Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 Or. L. Rev. 391, 401 (2000) ("[S]ome research indicates that police who regularly treat arrestees with courtesy are more likely than those who do not to be viewed as legitimate. While police officers may not like to be told to be more polite to arrestees, this research suggests that law enforcement gains could be achieved more cheaply than through more instrumental means simply by telling officers to 'be nice.'"). Meares adds, "We should, therefore, expect greater compliance in communities where police treat arrestees with greater respect than communities where police do not, even if the former community does not hire any more police officers." *Id.*


To unravel the problem further, racial profiling cases are not just about individuals, but also concern institutions, beginning with police departments. In New Jersey, the State quickly realized that the actions of individual officers could not account for the disparity in traffic stops. Instead, that disparity was caused by policy failures that resulted in poor training; a breakdown in supervision, discipline, and rewards systems; and procedures that gave officers unguided discretion. Informal elements of police culture can also encourage targeting of minorities. For example, New Jersey noted that profiling resulted from "informal coaching, tempered by each trooper's own experiences and enforcement priorities, and [was] strongly influenced by an official policy to reward troopers who find major drug shipments." Additionally, the Soto court cited an "utter failure of the State Police hierarchy to monitor and control" officers. Indeed, training sessions emphasized that Blacks and Hispanics are "mainly involved in drug trafficking," and stressed that "ethnicity is something to keep in mind." The experience in New Jersey bears out that profiling may result from police being trained to look for suspects based on racially loaded factors, or from their becoming conditioned to do so by emulating colleagues. Proper training, supervision, and recruitment of minority officers can address these issues.


40. Id. at 358.

41. Racial profiling may also result from "unconscious racism" where officers do not realize that stereotypes affect decisions or that suspicionless stops convey a racist message to minority victims. See generally Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

42. An excellent series of articles in the New York Times investigated the connection between police policy and minority recruitment. New York has had great difficulty recruiting minority officers in part due to the distrust engendered by its policing strategies. C.J. Chivers, Alienation is a Partner for Black Officers, N.Y. Times, Apr. 3, 2001, at A1. Boston, on the other hand, has been able to surmount community distrust and has created a diverse police force. C.J.
Formal policies can also provide a cover for individual discrimination or tacit tolerance of stereotyping. Records indicate that New Jersey officials knew that vastly disparate numbers of minorities were being stopped, but did not respond because they thought that they were effectively interdicting drugs. The Turnpike is, after all, "widely believed to be a major drug corridor." A formal policy of conducting mass pretextual stops may thus play an integral role in creating an aggressive, 'quality of life' vision of law enforcement. Police policies that establish incentives to meet arrest quotas or intercept large drug shipments may also motivate officers. Courts are willing to ignore the racial dimensions of these policy choices, and are extremely deferential to police expertise and discretion in adopting law enforcement strategies.

Chivers, From Court Order to Reality: A Diverse Boston Police Force, N.Y. Times, Apr. 4, 2001, at A1 (explaining that Boston, with fourteen percent minority officers as compared with New York's five percent, hires only city residents, actively recruits minorities, and considers diversity and language skills in promotions).

43. New Jersey Report, supra note 24, at 2. New Jersey knew for over ten years that far too many minorities were being stopped, but state police officials were at a loss for what to do. David Kocieniewski & Robert Hanley, An Inside Story of Racial Bias and Denial, New Jersey Files Reveal Drama Behind Profiling, N.Y. Times, Dec. 3, 2000, at 53. They did not disclose this information because they were not sure if their conduct was illegal, or whether it was justified by better drug interdiction. Id. Records released since show that they were paralyzed, and preferred to simply ignore the problem amidst the conflict:

[T]he words written by the thousands of people involved—troopers, civilians, attorneys general and state officials—also tell an intensely emotional story: one of gung ho troopers who saw themselves as unappreciated as they risked their lives to protect New Jersey's minority members from drug violence, and who sought promotions based on high-visibility drug arrests; the anger and defensiveness of police commanders who believed their tactics were unjustly branded as racist; the outrage of minority troopers ordered to view their own neighbors as drug suspects; the bewilderment of black and Hispanic drivers who could not understand why they were detained by the police simply because of the color of their skin.

Id.

44. See infra note 283 (analyzing the costs and benefits of this 'quality of life' approach to law enforcement, most avidly adopted in New York City).

45. See infra notes 80–83 and accompanying text. On the other hand, the court in Soto found disparity in stops so "stark" as to question police policy and point to an "utter failure" in supervision. Soto, 734 A.2d at 360–61. It noted, "The
Some police and commentators openly defend policies targeting minorities as sound law enforcement, as a good way to catch drug offenders, and as an "unfortunate byproduct of sound policing." Indeed, a conservative reaction against the 'racial profiling crusade' is underway, with critics openly stating that racial profiling is a "myth" where police have made the policy choice to pursue aggressive strategies of enforcement. They argue that no data can disprove that police use race largely out of necessity, because more minorities commit crime. George Will writes:

Many individuals and groups specialize in hurling accusations of racism, and police become vulnerable to such accusations when they concentrate their efforts where crime is. If that accusation begins to control policing, public safety will suffer—especially the safety of minorities in violent and drug-infested neighborhoods.

Yet very few minorities commit crimes. Stigmatizing an entire race with a general propensity to commit crime, with no effort to specify the offenses involved, is discriminatory and poor police work.

eradication of illegal drugs from our State is an obviously worthy goal, but not at the expense of individual rights. Id. at 361.

46. Michael A. Fletcher, Driven to Extremes: Black Men Take Steps to Avoid Police Stops, Wash. Post, Mar. 29, 1996, at A1 (stating that the Maryland State Police characterize the disproportionate number of traffic stops of minorities as "an unfortunate byproduct of sound police policies"). See also Kennedy, supra note 16, at 138–63 (examining racially selective policing and its justifications).

47. Heather Mac Donald, The Myth of Racial Profiling, City Journal, Spring 2001, at 15. See also Will, supra note 13, at A19 (agreeing with Mac Donald about the 'myth' of racial profiling).

48. Mac Donald, supra note 47, passim. Mac Donald admits that highway stops should be "colorblind," but argues that street stops must be racially disparate in response to high crime in minority neighborhoods, and in response to demands for enforcement from law-abiding minority residents. Id. at 16, 27. She downplays substantial community outrage over racial profiling, attributing it to "anti-racial profiling activists," while ignoring substantial indications that aggressive, indiscriminate, quality-of-life policing does not reduce crime. Id at 27. Further, residents may really be asking for community policing, rather than blindly demanding 'more' policing.

49. Will, supra note 13, at A19.

50. Ira Glasser said, "Think about it for a minute. Most players in the NBA are black. But if you were trying to get a team together, you wouldn't go out in the street and round up random African Americans." Ira Glasser, ACLU Biennial Speech (June 1999), cited in David Rudovsky, Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause, 3 U.
Evaluating data also requires careful examination of whether these strategies, in fact, even prevent crime and justify harming innocent minorities. The contention that profiling is poor police work is reinforced by studies that consistently show that very few of these mass pretextual stops result in arrests. In New Jersey, for example, while vastly disproportionate numbers of minorities were stopped, fewer than one percent of stops resulted in arrests. Further, almost all motorists stopped had violated traffic laws, and both minority and white drivers violated traffic laws at the same rate.

Racial profiling is also practiced in conjunction with other factors that police rely upon, including class, crime patterns, and neighborhoods. The pretexts used to defend against accusations of racial profiling often invoke context. For example, police maintain that class rather than race is involved in their stops of late-model cars or targeting of poor neighborhoods. In the same vein, police often defend their conduct by arguing that they merely stop people in high crime neighborhoods—protecting residents and responding to disruptive street activity—or simply respond to calls where suspects are described as ‘black.’ However, police are often accused of relying on “flimsy” evidence in deciding that certain neighborhoods are crime-prone. Regression analysis can be used to help isolate these factors,

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53. Scott Bowles, Bans on Racial Profiling Gain Steam, USA Today, June 2, 2000, at 3A (explaining that San Jose Police Captain Rob Davis believes that socioeconomic factors cause disparate stops—for example, where indigent people have out-of-repair cars or live in high crime neighborhoods—but that race may not be a major factor).
54. Johnson, supra note 20, at 222 n.42 (describing the “flimsy” and often contradictory bases used by police to support assertions that a neighborhood is “crime prone”). See also Fagan & Davies, supra note 35, at 457 (“Our empirical evidence suggests that policing is not about disorderly places, nor about improving the quality of life, but about policing poor people in poor places. This strategy contradicts the policy rationale derived from Broken Windows theory, and deviates from the original emphasis on communities by focusing on people.”).
given sufficient data and a willingness to unpack the problem.\footnote{55}

Finally, communities and neighborhoods define the problem. Understanding the racial profiling problem in New Jersey requires a knowledge of the demographics of the Turnpike driving population. Therefore, statistics of those stopped must be carefully compared with the typical driving population, or with that of the surrounding neighborhood. Many battles over the meaning of statistics erupt over faulty choices as to the baseline population affected by stops.\footnote{56} Neighborhood data proved important in New Jersey, where recent information shows particular disparities on the southern portion of the New Jersey Turnpike.\footnote{57}

The institutional landscape of the community, a critical dimension that is often overlooked, will also define the problem. Aside from the harm to the individuals stopped, racial profiling creates a perception that police act unjustly. Surveys indicate that most Americans consider racial profiling a serious problem, and that many people of color report that they have been stopped because of their race.\footnote{58} Thus, police departments may find that they need to address

\footnote{55. See Fagan & Davies, supra note 35, at 479 (describing analysis used in the study of New York City street stops to show that crime patterns could not account for racial disparity).}

\footnote{56. See Finn Bullers, Three Chiefs Criticize ACLU's Traffic Study; Race-Profiling Report Was Flawed, They Say, Kan. City Star, Jan. 13, 2001, at B1. See also Soto, 734 A.2d at 360 (Statistics may be used to make out a case of targeting minorities for prosecution of traffic offenses provided the comparison is between the racial composition of the motorist population violating the traffic laws and the racial composition of those arrested for traffic infractions on the relevant roadway patrolled by the police agency.).}

\footnote{57. Randy Diamond, Profiling Data Troubling in South Jersey; Study Finds Disparity at Bottom of Turnpike, Record (Trenton), Jan. 11, 2001, at A01 (study found troopers stopped minorities on the southern end of the New Jersey Turnpike at a percentage exceeding the percentage of minorities who actually used the Turnpike).}

\footnote{58. See Leslie Casimir et al., Minority Men: We Are Frisk Targets, N.Y. Daily News, Mar. 26, 1999, at 34 (reporting in a small survey that eighty-one out of 100 young minority men in New York City reported being stopped by police); Richard Morin & Michael H. Cottman, Discrimination's Lingering Sting, Wash. Post, June 22, 2001, at A1 (reporting that, in their survey, nearly four in ten blacks said they had been unfairly stopped by police because they were black, including fifty-two percent of black men); Poll Finds Most in U.S. Believe Police}
the perception that they act improperly. For example, in New York City, police found that community resentment of aggressive policing badly hurt the morale of officers and made recruitment difficult:

For patrol officers, much of the disenchantment grows from a painful irony: many of them believe the same aggressive crackdowns that drastically cut crime and earned them accolades were stretched too far, that the push to punish infractions of every variety undercut their discretion and made them feel unpopular, even despised, in neighborhoods they helped make safer.59

Courts now feel compelled, out of a sense of responsibility or in a nod to social reality, to lament the damaged public perception of the police. The Seventh Circuit, in a recent dismissal of a racial profiling case, was careful to add that "the oft-cited public perception that race and ethnicity play a role in law enforcement...will no doubt remain... How to change public perception and demonstrate compliance with constitutional requirements is a matter the State of Illinois may wish to consider."60 Similarly the Second Circuit, after dismissing claims in Brown v. City of Oneonta, stated, "[W]hile we disagree as a matter of constitutional law, we are not unmindful of the impact of this police action on community relations."61

In addition, attitudes and relationships between police and the community may determine how local groups will respond—whether they protest, sue, engage in dialogue, or support reform. If police are politically alienated from community institutions, or are racially or geographically divided, they may have a hard time understanding

Practice "Racial Profiling," Chi. Trib., Dec. 11, 1999, at 15 (describing results of a Gallup poll in which a majority of all Americans believed that racial profiling is widespread and three-fourths of young black men said they have been stopped by police because of their race).


60. Chavez v. Ill. State Police, 251 F.3d 612, 656 (7th Cir. 2001).

61. Brown v. City of Oneonta, 195 F.3d 111, 120 (2d Cir. 1999) (adding, "[L]aw enforcement officials should always be cognizant of the impressions they leave on a community, lest distrust of law enforcement undermine its effectiveness.").
why residents object to their behavior. It was for this reason that New Jersey recognized the need for 'outreach.'\textsuperscript{62} The police response—be it collecting statistics or instituting more structural reforms—will depend on how open their relationship is with the community.

The community is itself a protean entity, where institutions change with alliances. For example, community groups may help to bridge the gap for reform on one front, and yet, exacerbate mistrust and hostility on another front. Police have often reacted angrily to civil rights groups who they believe use race unfairly, with no interest in making common cause to benefit the community.\textsuperscript{63}

Thus, while remedial efforts often fail to move beyond the initial stages—where a troubling pattern of police stops is identified or problem cops are blamed—the roots of racial profiling run much deeper. Looking beneath the surface, racial profiling is linked to relationships between individuals, institutions, stereotypes, perceptions, shared attitudes, goals, approaches towards law enforcement, and the community context. While race may best define the problem, it cannot be isolated. Unfortunately, many police departments have tried to simply issue a policy barring officers from making stops "based solely on an individual's race."\textsuperscript{64} As racial profiling extends far beyond race, and as race distorts relationships beyond that of the officer and person stopped, the challenge is to design a remedy that takes account of the multiple dimensions of the racial profiling problem.

\section*{II. CURRENT APPROACHES AND AN EMERGING MODEL}

Racial profiling remedies have developed in three areas: 1) private litigation; 2) state legislation; and 3) Justice Department consent decrees. In each, recent remedial efforts have begun to broaden the focus beyond looking at numerical disparity, providing insights into a more comprehensive approach.

\begin{itemize}
\item \textsuperscript{62} \textit{See infra} note 189 and accompanying text (describing weak attempts to involve the community in consent decrees).
\item \textsuperscript{63} \textit{See infra} note 145.
\item \textsuperscript{64} PERF Report, \textit{supra} note 2, at 50 (finding that nineteen percent of departments that responded to their survey had adopted new policies on stops, arrests, and searches, but that the vast majority only prohibited stops solely based on race).
\end{itemize}
A. An Obstacle Course: Private Racial Profiling Suits and Equal Protection

A legal conclusion that police engage in racial profiling lies at the end of an obstacle course that litigants have, until recently, rarely completed. Plaintiffs must first allege a pattern or practice of police behavior that is sufficient to satisfy standing requirements for injunctive relief. Second, if the complaint alleges a Fourth Amendment violation, plaintiffs must show that race was, unreasonably, the only factor on which police relied. Third, to prove an Equal Protection violation requires a difficult showing of intentional discrimination, to which police may respond by demonstrating a compelling state interest.

Tensions in law and theory surrounding racial profiling drive the remedial strategies of institutions. Courts, unwilling to embrace more complex remedial goals, have been reluctant to impose structural remedies on police departments. Although racial profiling suits have enjoyed some success against all odds, they have not resulted in remedies. They have imposed discovery costs on defendants—which has forced disclosure about police practices—and imposed financial and political pressure to settle. This legal obstacle course has, in turn, affected the remedial strategies of civil rights lawyers, pushing them in the direction of open-ended remedies focusing on police data gathering.

1. Initial Obstacles and Opportunities

The initial work of banding together as a community, identifying a problem of racially-motivated stops, and then seeking legal assistance is a difficult, but potentially transformative, process. Community mobilization is necessary for successful litigation because individual suits will not obtain standing for injunctive relief against police departments. Following City of Los Angeles v. Lyons, plaintiffs must allege a policy or pattern of police behavior to obtain standing to pursue injunctive relief.65 Lyons also denies standing to plaintiffs

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65. 461 U.S. 95 (1983). For cases denying standing, see, for example, Daniels v. Southfort, 6 F.3d 482, 485 (7th Cir. 1993) (denying standing to plaintiff who was falsely arrested, whose rental car and dog were seized, and whose home was unreasonably searched, because even though "injunctive relief is appropriate in a § 1983 action where there is a persistent pattern of police misconduct," no pattern had been shown); Curtis v. City of New Haven, 726 F.2d 65, 68–69 (2d
whose illegal conduct precipitated the encounter, so groups must search for law-abiding plaintiffs. To demonstrate liability under § 1983, plaintiffs must then allege, following Monell v. Department of Social Services, that police engage in a policy, practice, or custom of stopping persons solely based on race. Next, plaintiff must obtain class certification, though recent decisions indicate that plaintiffs alleging racial profiling should satisfy Rule 23 certification requirements. Finally, plaintiffs face an uphill battle to prove that police follow a consistent policy of racial profiling. They must marshal evidence from spotty statistics, thousands of different encounters, and little pre-discovery access to information about the activities of police officers.

Because this kind of work requires considerable expertise,
lawsuits have usually been brought by larger, national civil rights groups—organizations that have been perceived as excluding local community groups. Finding plaintiffs willing to challenge an abusive, and perhaps retaliatory, police department may also raise sensitive ethical issues. Plaintiffs may also be concerned with more immediate needs, favoring cash settlement over a slim chance of obtaining injunctive relief. Yet, involvement in such efforts often energizes organizing efforts and creates the opportunity for links between civil rights and community groups—links that have not been fully explored.

69. Lawyers from several of the larger civil rights groups have reported to the author that given the demands of litigation, spending time meeting with community groups is far too burdensome. This is especially the case when they say the remedial concerns of the community are not relevant to the technical legal issues involved. Then again, they do not solicit community views on whether litigation itself is most desirable. Despite the difficulties, lines of communication with the community and mutual dialogue seem essential. For an excellent picture of lawyers who advocate police reform work, and a description of alternative approaches inspired by "rebellious lawyering" strategies, see Jessica A. Rose, Rebellious or Regnant: Police Brutality Lawyering in New York City, 28 Fordham Urb. L.J. 619, 637 (2000). In particular, Rose describes the attitudes of a civil rights lawyer pursuing a class action case as focused exclusively on litigation and reluctant to acknowledge the race, sex, and class issues involved in representing a minority community and in maintaining a traditional litigation model of lawyering. Id. at 638–39. Rose points out that the lawyers she interviewed "all maintain that they are client-centered and are primarily directed by the client in their strategic decisions. Despite this, the interviews did not reflect efforts on their part to engage in a dialogue with the clients to develop new, creative responses to police brutality." Id. at 655.

70. See id. at 622 n.16 (noting the degree to which victims become involved in community organizing efforts, though certainly not necessarily litigation:

The families of victims and survivors of police brutality who have become politicized through their experiences are often consumed with their organizing efforts. For them, this is not the time for an academic analysis of their experiences—it is a time for action. It is also difficult to locate or interview survivors of police brutality who have not been politicized.).

Compare the support that community-based groups provide versus civil rights groups. Rose interviewed Richie Perez, from the National Congress for Puerto Rican Rights (NCPRR):

[We] tell the families from the beginning that we cannot guarantee you justice, if we reach a working agreement together, what we can promise you is that you will never struggle alone. As long as you want to struggle, we will
Standing rules may provide a formal obstacle to developing such links. For example, the Center for Constitutional Rights included a community-based group, the National Center for Puerto-Rican Rights (NCPRR) as a plaintiff in its class action lawsuit in New York City. However, NCPRR was dismissed because it failed to meet organizational standing requirements.\(^{71}\) Despite this setback, non-litigation-centered collaboration between lawyers, organizers, and community groups is increasingly common.\(^{72}\) This collaboration should be fostered on all sides. As discussed later, the remedy can consist of the cooperation of these groups.

2. Fourth Amendment Treatment of Race

Fourth Amendment law exhibits a reluctance to address race outside cases of the most explicit and blatantly racist law enforcement. Investigatory street or traffic stops are governed by the Supreme Court's Fourth Amendment decision in *Terry v. Ohio*.\(^{73}\) While full arrest requires probable cause that the suspect has committed a crime, a 'stop and frisk'—in which the officer only asks a person to submit to a patdown—can be justified only by "reasonable suspicion."\(^{74}\) The Supreme Court defines reasonable suspicion expansively, with a level of deference that, according to commentators, may permit even arbitrary police conduct.\(^{75}\) A court


\(^{72}\) See *infra* notes 337–39 and accompanying text.

\(^{73}\) 392 U.S. 1, 24 (1968) (requiring reasonable suspicion that suspect is "armed and presently dangerous" in order to perform a 'stop and frisk').

\(^{74}\) *Id.* at 30.

asks only whether an officer reasonably "could have" made such a stop given "the totality of the circumstances" which is "measured in objective terms." Showing that race is the 'sole' factor justifying a stop may therefore be prohibitively difficult. As in traditional racial profiling cases, the stops are constitutional if officers relied upon other objective criteria supporting suspicion. For example, the Court's doctrine permits pretextual stops based on a range of traffic violations, and has allowed police to rely on other, non-race related pretexts, such as out-of-state license plates, "nervous" driving, and operation of late model automobiles.

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78. David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 309–10 (1999) (arguing that Supreme Court decisions allow and encourage racial profiling and suspicionless stops). Challenges under state law may be more successful where state constitutions have been interpreted to require more than 'reasonable suspicion' to justify a 'stop and frisk.' See, e.g., People v. De Bour, 40 N.Y.2d 210, 219 (N.Y. 1976) (establishing a four-tiered standard for police stops requiring reasonable suspicion that a person has committed, or is about to commit, a crime based on state common law and public policy considerations).

79. E.g., United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (holding that while Border Patrol officers could use apparent Mexican ancestry as the basis for inspection at checkpoint stops, where less than reasonable suspicion is required, they could not rely on appearance to support reasonable suspicion in roving-patrol stops); United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982) ("Race or color alone is not a sufficient basis for making an investigatory stop."); United States v. Garcia, 23 F.3d 1331, 1335 (8th Cir. 1994) (stopping individuals based on Hispanic appearance does not support reasonable suspicion).

80. E.g., United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (holding that relying on automobile size, type, and location supports reasonable suspicion); United States v. Lebrun, 261 F.3d 731, 734 (8th Cir. 2001) (finding that defendants' "nervous" appearance in conjunction with other factors gave rise to reasonable suspicion).

Street stop cases can be distinguished from other kinds of Terry stops, and no cases have yet explicitly held that street stops may be justified even partly on the basis of race. Stopping innocent people on the street seems different from stops at the border or stops of suspected drug couriers in airports in which the transnational setting itself may give police a legitimate suspicion of illegality. See, e.g., New York Report, supra note 24 ("A search of relevant case law revealed no holding that, in the context of a street encounter, the civilian's race could
Given the range of explanations that can support reasonable suspicion, it is extremely difficult to show that race is unreasonably a 'sole' factor. Courts have deferred to claims that disparity is due to the fact that disproportionately larger numbers of minorities reside in high crime neighborhoods.\textsuperscript{81} They have also permitted race to be used as a relevant factor in conducting searches where it forms part of the description of an individual suspect's identity.\textsuperscript{82} Some cases even support use of 'racial incongruity,' justifying police reliance upon race where a person does not 'fit in' with the predominant racial make-up of a largely segregated neighborhood.\textsuperscript{83} Since courts give police justifications considerable deference, plaintiffs will have a hard time countering them, especially as police have unique control over the information about stops that could be used to impeach their motivations.\textsuperscript{84}

3. Equal Protection Approaches

Equal Protection doctrine may enable plaintiffs to avoid obstacles that usually bar Fourth Amendment challenges, but the relationship between the Fourth and Fourteenth Amendments remains unclear. Several recent suits have survived dismissal and have resulted in certification of classes with Equal Protection claims in-

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81. \textit{E.g.}, United States v. Magda, 547 F.2d 756, 758 (2d Cir. 1976) (permitting reliance upon reputation of neighborhood for criminal activity); United States v. Davis, 458 F.2d 819, 822 (D.C. Cir. 1972) (permitting officer's suspicion based, in part, on his judgment that a neighborhood had the "highest crime rate there is"). \textit{But see Johnson, supra note 20, at 233–36.}

82. \textit{E.g.}, United States v. Ruiz, 961 F. Supp. 2d 1524, 1532 (D. Utah 1997) ("[R]ace may be a factor as to probable cause or reasonable suspicion if it matches a description of an offender or fits the facts relevant to a particular person, place, or circumstance of the offense.").

83. \textit{E.g.}, State v. Mallory, 337 N.W. 2d 391 (Minn. 1983) (permitting reliance on race where a black defendant had been stopped in a largely white neighborhood in which a burglary by a black man had recently been reported); State v. Dean, 112 Ariz. 437, 439 (1975) ("[T]he fact that the person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an officer . . . .").

84. On the other hand, statistical evidence may show Fourth Amendment violations independent of unreasonable reliance on race. For example, a study of traffic stops in New York City indicated that, in their own records, police did not state reasonable grounds in a high proportion of their stops, suggesting rampant Fourth Amendment violations. Fagan & Davies, \textit{supra} note 35, at 481–82, tbl. 3.
tact, so courts will soon have to consider complex issues raised under the Equal Protection Clause.\textsuperscript{85}

In \textit{Whren v. United States}, the leading, recent Fourth Amendment decision, the Supreme Court suggested in dicta that the “selective enforcement of the law based on considerations such as race” might violate the Equal Protection Clause of the Fourteenth Amendment, notwithstanding that reliance on race does not always violate the Fourth Amendment.\textsuperscript{86} Several commentators have concluded that racial profiling creates a racial classification deserving strict scrutiny, and the few courts that have addressed this argument have agreed.\textsuperscript{87}

\begin{quote}
Plaintiffs have stated an Equal Protection claim by alleging that Defendants acted with discriminatory intent and that Defendants knew about but refused to stop racially discriminatory practices on the part of their officers and by alleging the existence of statistical evidence and other facts which if proved would support an inference of discriminatory intent.
\end{quote}


Only one court has considered how plaintiffs could make a showing, as required by Equal Protection doctrine, that either: 1) police engage in intentional discrimination; or 2) a neutral police policy has been applied in such an egregiously disparate manner that an inference of intentional discrimination can be made. Chavez v. Ill. State Police, 251 F.3d 612 (7th Cir. 2001). The Seventh Circuit described in detail how statistical evidence could be used to show an Equal Protection violation. The court found the data before it unreliable because it was not compared against relevant population data on the highways involved, but rather against state-wide population data. \textit{Id.} at 637–45. Evidence of racist statements made during one stop also was not sufficient. \textit{Id.} at 646.

\begin{quote}
85. Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1141 (N.D. Cal. 2000) (dismissing defendant’s motion to sever plaintiffs and strike class allegations). In Rodriguez, the Court stated:

\begin{quote}
Plaintiffs have stated an Equal Protection claim by alleging that Defendants acted with discriminatory intent and that Defendants knew about but refused to stop racially discriminatory practices on the part of their officers and by alleging the existence of statistical evidence and other facts which if proved would support an inference of discriminatory intent.
\end{quote}


87. Johnson, \textit{supra} note 20, at 245 (arguing that racial profiling is a racial classification subject to strict scrutiny and that racial incongruity used as a factor
 Plaintiffs have tried to show intentional racial discrimination as required by the Supreme Court in *Washington v. Davis*. They cannot generally point to rules that "classify[ ] based explicitly on race," because unlike race-explicit drug courier profiles, police rules for stopping individuals and ordinances that police enforce are typically facially neutral. Holding police liable under the Fourteenth Amendment for an intentional violation creates an odd inconsistency with Fourth Amendment law. As discussed earlier, under the Fourth Amendment, police are permitted to use race as a factor, and the Court does not inquire into the subjective intent of individual officers. Under the Fourteenth Amendment, the Court has held that race cannot be a partially "motivating factor" in a state decision. Few courts have addressed, much less resolved, the tension between the Court's Fourth and Fourteenth Amendment doctrines, and efforts to remedy the problem are plagued by this fundamental conflict between treating the problem as a lack of reasonable suspicion or treating it as the use of race. Are police racist, unreasonable, or some combination of the two, and can police policies implicate both Fourth and Fourteenth Amendment norms?

88. 426 U.S. 229, 239 (1976) (holding that the Equal Protection Clause of the Fourteenth Amendment requires a showing of a racially discriminatory purpose).


90. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) ("Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. . . . When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.").

91. None of the decisions cited supra in note 85 discuss Equal Protection claims in any detail, since these claims only had to survive motions to dismiss.

92. Several decisions discussing class certification issues in the context of
Given the Court's reluctance to interfere with police decision-making, the Court may not find liability except where police conduct is explicitly motivated by race. The Supreme Court might follow the narrow approach taken by the Second Circuit in *Brown v. City of Oneonta*, which held that Fourteenth Amendment requirements mirror those of the Fourth Amendment. In other words, in order to show an Equal Protection violation, plaintiffs must prove that stops were made "solely on the basis of [the person's] race." Such a requirement is very likely to be a fatal obstacle as race is almost never the sole basis for stops. As noted above, police can justify their stops on a number of pretexts, arguing that they were motivated by a minor traffic violation, based on actual descriptions of criminal suspects, or rooted in 'legitimate' racial profiles of the traditional variety. On the other hand, the *Oneonta* court sought further evidence of discriminatory animus from which to infer intent, and cases involving more than one police sweep might fare better.

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racial profiling cases suggest that Fourth and Fourteenth Amendment claims are deeply consistent and pose the same sorts of issues. See, e.g., *Daniels v. City of New York*, 198 F.R.D. 409, 416 n.6 (S.D.N.Y. 2001) (stating that the proposed class was not overbroad because it included both Fourth and Fourteenth Amendment claims, and that both kinds of claims were consistent with a theory of a practice of unlawful police stops).


94. Most practices termed 'racial profiling' could avoid liability under a standard in which race must be the 'sole factor;' for example, 'young black men standing on corners in high crime neighborhoods.' The *Oneonta* court found that a police sweep was not based solely on race where police relied upon the "altogether legitimate basis of a physical description given by the victim of a crime... [which included] not only race, but also gender and age, as well as the possibility of a cut on the hand." *Oneonta*, 195 F.3d at 119 ("The description is not a suspect classification, but rather a legitimate classification of suspects.").

95. The court found disparate impact from the mere racial make-up of the town. Its minority population was so small that police could feasibly search the entire group. Given these facts, the court required "additional evidence of discriminatory animus... in order to sustain an Equal Protection claim." *Id.* at 120. Perhaps part of the problem was the unusual facts of the case. It concerned one incident—albeit a dramatically racialized police sweep—that did not demonstrate an ongoing pattern of targeting minority residents from which one might more easily infer animus.
Perhaps if courts choose to adopt a more flexible Equal Protection approach they could better accommodate the mixed motive nature of police discretion. Randall Kennedy argues that courts should resolve the tension between Fourth and Fourteenth Amendment requirements by intervening when race is \textit{routinely} used as a motivating factor.\(^9\) Kennedy’s ‘routine practice’ test is broader than the Second Circuit’s ‘sole factor’ approach, but still presents courts with the task of determining what incidence of the use of race would qualify as ‘routine.’\(^9\)

In egregious cases, plaintiffs may prove a racial disparity so dramatic that it permits, or requires, an \textit{inference} of intentional discrimination under either a ‘sole factor’ or a ‘routine practice’ test.\(^9\)

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\(^{96}\) Kennedy, \textit{supra} note 16, at 148–49 (1997) (criticizing courts that permit race to be used as one factor to determine suspiciousness: “Even if race is only one of several factors behind a decision, tolerating it at all means tolerating it as potentially the \textit{decisive} factor . . . . Taking race into account in a small, marginal, even infinitesimal amount still constitutes racial discrimination.”). In this view, “[t]he law should authorize police to engage in racially discriminatory investigative conduct only in atypical, indeed extraordinary, occasions.” \textit{Id.} at 161.

\(^{97}\) Even Kennedy acknowledges that strictly limiting racially discriminatory investigation is unrealistic where courts must determine intent to discriminate from the motivations of many officers over a pattern of stops. \textit{Id.} at 148–49. However, courts may reject a ‘routine use’ standard, because it may evade the intent requirement by focusing only on discriminatory impact.

\(^{98}\) At the outset, \textit{United States v. Armstrong} requires plaintiffs, in selective prosecution cases only, to identify some evidence that similarly situated persons of another race were treated differently. \textit{United States v. Armstrong}, 517 U.S. 456, 465 (1996). The \textit{Armstrong} approach has been rejected outside the selective prosecution context, although one court has applied \textit{Armstrong} in a racial profiling case. \textit{See Oneonta}, 195 F.3d at 119 (rejecting \textit{Armstrong}, though only narrowly, stating that “it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification”). \textit{See also} Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1140–41 (N.D. Cal. 2000) (upholding an Equal Protection claim while distinguishing \textit{Armstrong} because the case at hand was a civil, rather than a criminal, matter); Nat’l Cong. Puerto Rican Rts. v. City of New York, 191 F.R.D. 52 (S.D.N.Y. 1999) (rejecting application of selective prosecution doctrine).

The Seventh Circuit, in \textit{Chavez v. Ill. State Police}, rejected rote application of selective prosecution doctrine, but then confused the issue in a strange way. 251 F.3d 612, 637 (7th Cir. 2001). The court stated that plaintiffs need not show that no whites were treated the same, but that similarly situated whites were treated differently. The \textit{Armstrong} rationale “does not apply with equal force in the context of a civil racial profiling claim.” \textit{Id.} at 639. Plaintiffs need not show the impossible by naming individuals who were not stopped; instead they
Dramatic disparity established an Equal Protection violation in *Yick Wo v. Hopkins*, and, more recently, in jury selection and voting rights cases. Although the Court in *McCleskey v. Kemp* stated that "statistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent," such a showing may be possible. In *State v. Soto*, plaintiffs presented a New Jersey state court with "statistical disparities and standard deviations [that were] indeed stark." Police may deny that stops are racially disparate, or, need only present statistics showing disparate treatment. *Id.*

Thus, the *Armstrong* requirement shades into the Equal Protection requirements on the merits. This reasoning is faulty. Rather than confuse the doctrines, courts should discard *Armstrong* outside the selective prosecution context and reach sufficiency of statistical proof on the merits. Several commentators also argue that applying *Armstrong* is improper. See Schifferle, *supra* note 75, at 174–75 (arguing that a prima facie case of discrimination need not include information on similarly situated offenders). See also Christopher Hall, *supra* note 75, at 1086 (distinguishing prosecutorial discretion from violations by police officers that involve unconstitutional conduct).

In addition, other indicia may support a finding of intent, such as: evidence that disparate stops serve no legitimate law enforcement purpose as they result in few arrests or tickets; statements by officers admitting practices of profiling; training programs that do not discourage the improper use of race; or the absence of minority officers.

99. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding that the selective enforcement of a facially neutral law may allow the court to find an Equal Protection violation).


101. *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987). Despite this stated requirement of statistical proof, the Court held that showings of general patterns of discrimination may not demonstrate intentions behind decisions that “rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant.” *Id.* at 294.

102. *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (finding that plaintiffs made a prima facie case of an Equal Protection violation sufficient to justify suppression of evidence from traffic stops, inferring discriminatory intent from a stark pattern of stops, where defendants could not rebut this showing). Defendants may offer neutral explanations for statistical disparities that cast enough doubt on plaintiff's statistical evidence to dismiss a lawsuit. Defendants may contend that racial disparity 'naturally' follows from neutral enforcement of traffic laws or from unobjectionable assignment of more officers to 'high crime' minority neighborhoods, a practice courts have flexibly permitted. See *Whren v. United States*, 517 U.S. 806, 815 (1996) (“[P]olice enforcement practices, even if they could be practicably assessed by a judge, vary from place to
in the alternative, contend that any use of race is legitimately based on suspect profiles.\textsuperscript{103} Of course, when presented with a stark pattern, defendants should not be allowed to "rebut it merely by calling attention to possible flaws or unmeasured variables," but should instead be required to demonstrate specifically that other factors "eliminate or explain the disparity."\textsuperscript{104}

Police departments may also try to show a compelling state interest for their 'stop and frisk' practices. The compelling interest test has always been applied to use of explicit racial classifications, so perhaps even a compelling interest should not permit a department to surreptitiously rely on race. Furthermore, "an unsubstantiated and speculative interest in law enforcement cannot be counted as a compelling state interest."\textsuperscript{105} Any such justification for racial disparity presupposes that ending racial profiling will unduly constrain police discretion and unjustifiably undermine their ability to respond to crime. Yet, as we will see, police discretion and response may be \textit{enhanced} by remedies being considered.

Finally, though it is still probably too soon to tell whether Fourth Amendment and Equal Protection claims will provide a

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\textsuperscript{103} E.g., Jack Newfield, \textit{Race Report Is Indictment of Police Policy}, N.Y. Post, Dec. 1, 1999, at 8 (New York City Police Commissioner Howard Safir counters that racial disparity in street stops shown by New York State Attorney General Elliot Spitzer's report merely reflects "the descriptions of persons committing violent crime as identified by their victims.").

\textsuperscript{104} Soto, 734 A.2d at 360.

\textsuperscript{105} Johnson, supra note 20, at 248. Such interests hardly rise to the level of war-time emergency as in \textit{Korematsu v. United States}, 323 U.S. 214, 217-18 (1944). Interests of local law enforcement already weigh heavily in a court's analysis—for example in Fourth Amendment doctrine—where the court is concerned with preserving police discretion. Since courts also will use police justifications to defeat strict scrutiny by showing a neutral policy, these courts would be 'double counting' if they allowed those same justifications to support a compelling interest when the justifications were insufficient to show a neutral policy.
strong basis for bringing racial profiling cases, alternative legal approaches have also shown some promise. One recent suit—a challenge to the LAPD under the Racketeer Influenced and Corrupt Organizations Act (RICO)—survived a motion to dismiss. If civil RICO suits become common, police departments may be faced with treble damages for practices of misconduct.  

The movement to end racial profiling is strong enough that additional causes of action may be forthcoming if existing causes of action prove inadequate. Thus, future liability remains likely for discriminatory policing, and police

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106. Guerrero v. Gates, 110 F. Supp. 2d 1287, 1292–93 (C.D. Cal. 2000) (stating that plaintiffs, victims of alleged false narcotics arrests, have standing to pursue RICO claim where they alleged economic injury as a proximate result of a pattern of racketeering activities, including witness tampering, attempted murder, narcotics dealing, and extortion).

107. For example, legislation introduced by Senator Russell Feingold would permit individual suits against police and would condition federal funds to local police on eliminating disparity in policing. Jennifer Whitson, Feingold Bill Attacks Racial Profiling, Capital Times (Madison, Wis.), June 7, 2001, at 3A. The bill would bring back to life what amounts to a Title VI private cause of action. Racial profiling suits had included Title VI claims based on the ‘disparate impact’ of police policy, but the Supreme Court recently ruled that there is no private cause of action in Title VI cases. Alexander v. Sandoval, 532 U.S. 1049 (2001) (finding no implied private right of action to enforce disparate impact regulations promulgated through Title VI).

In addition, as Justice Stevens correctly points out in his dissent in Sandoval, Title VI suits can still be maintained, not through a private right of action, but through § 1983. He writes that “to the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief.” Id. at 1526 (Stevens, J., dissenting). One district court has already upheld Title VI claims under this theory. See S. Camden Citizens in Action v. N.J. Dept’t Envtl. Prot., 145 F. Supp. 2d 505 (D.N.J. 2001). This approach is proper. Section 1983 permits claims alleging deprivation, under color of state law, of “any rights, privileges, or immunities secured by the Constitution and laws.” The Supreme Court has held that federal regulations can create “rights” within the meaning of § 1983. See, e.g., Wright v. City of Roanoke, 479 U.S. 418, 429 (1987) (permitting tenants to sue housing authority for violating rent ceilings imposed by implanting regulations promulgated by the Department of Housing and Urban Development).

Critics have also called for laws deputizing private attorneys general to combat racial profiling. See Gilles, supra note 2, at 1388 (proposing a law permitting the Justice Department to deputize private suits against police departments for unconstitutional patterns or practices).
are right to be concerned that their practices will face future legal scrutiny.

4. Obtaining an Effective Remedy

Plaintiffs still must convince a court to impose and enforce an effective remedy, and remedial issues pose critical obstacles and opportunities. Obstacles surface in the guise of deference and restraint. Federal courts often simply displace onto the remedial stage the deference to law enforcement interests that causes courts to deny injunctive relief at the outset. In this event, deference causes courts to resist the imposition of structural relief that limits police discretion, citing doctrines of federalism, comity, and equitable restraint. As such, federal courts provide mixed rationales, and emphasize the need for law enforcement discretion and their special expertise, as well as the fear of interfering with local politics. Federal courts "have no control over police work," and "it is exceedingly unlikely that they will claim such powers in the foreseeable future."

Abstention based on federalism has extended far beyond the original unwillingness to interfere with ongoing prosecutions in state courts. Equitable restraint concerns are now increasingly invoked in cases involving state and local law enforcement. For example, in a case regarding racial profiling in a suburb outside Los Angeles, a Ninth Circuit panel reversed a preliminary injunction that required a police department to follow its own rules on 'reasonable suspicion.' More recently, the Ninth Circuit sitting en banc denied

111. Thomas v. County of Los Angeles, 978 F.2d 504, 506 (9th Cir. 1992) (rejecting as overly broad in geographic and substantive scope a requirement that police:
injunctive relief in a racial profiling case. Its decision was based not on a lack of standing, but on the dictates of federalism and deference to local law enforcement—an unusual ground in a case seeking relief against the federal border patrol.\footnote{112}{Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1042 (9th Cir. 1999) (denying injunctive relief based on equitable restraint and emphasizing “the delicate balance between ‘federal equitable power and State administration of its own law’” (quoting O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951))), and finding an insufficient likelihood of future harm where plaintiffs had only been stopped once in ten years). \textit{But see id.} (Reinhardt, J., concurring) (stating that discussion of federalism is dicta or improper and that dismissal was based only on \textit{Lyons} standing doctrine).}

Part of this deference by federal courts may be due to an outdated fear that remedying racial profiling requires intrusive structural remedies that would interfere with law enforcement decision-making. Federal courts have a responsibility to provide an effective remedy—even if structural injunctions are required for relief—so necessity of institutional reform does not excuse the court from its remedial duty.\footnote{113}{Susan P. Sturm, \textit{A Normative Theory of Public Law Remedies}, 79 Geo. L.J. 1355, 1378-79 (1991).} Federal courts may also hesitate to intervene for

\begin{itemize}
\item[1.] Follow the Department's own stated policies and guidelines regarding the use of force and procedures for conducting searches; and
\item[2.] Submit to the Court \textit{in camera} and under seal, copies of reports alleging the use of excessive force that are in the possession of the Department on the first of every month.).
\end{itemize}

\footnote{112}{Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1042 (9th Cir. 1999) (denying injunctive relief based on equitable restraint and emphasizing “the delicate balance between ‘federal equitable power and State administration of its own law’” (quoting O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951))), and finding an insufficient likelihood of future harm where plaintiffs had only been stopped once in ten years). \textit{But see id.} (Reinhardt, J., concurring) (stating that discussion of federalism is dicta or improper and that dismissal was based only on \textit{Lyons} standing doctrine).}


Damage awards and negative injunctions do not provide adequate relief in the context of much public law litigation. In the absence of affirmative judicial intervention, the wrongful conduct is likely to continue; and the injuries caused by ongoing public law violations—intangible, dignitary harms and deprivation of public norms—cannot adequately be redressed through monetary compensation. Thus, the need to fulfill the court's remedial duty justifies the use of structural injunctions to remedy public law violations.

reasons of judicial efficiency. Judges rightly fear that even when court orders are imposed, injunctions may prove ineffective where individual officers engage in racial profiling despite their own departmental rules.\(^{114}\) When misconduct is difficult for a police department to detect, misconduct is far more difficult for a court monitor to detect.\(^{115}\) Uncertainty about detection and design of remedies is increased by the lack of clarity as to what degree of reliance on race violates the Fourteenth or Fourth Amendments. The tangled legal doctrine and complex nature of racial profiling described earlier creates difficulty in tailoring a remedy to legal liability. When it is unclear how much use of race violates the law, then compliance is equally unclear.

Because of judicial resistance to intrusive remedies, plaintiffs have developed creative approaches to racial profiling that seek to avoid obstacles in substantive and remedial law.\(^{116}\) Plaintiffs have

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116. For example, the settlement in *Ledford v. City of Highland Park* avoided mentioning the Fourth or Fourteenth Amendment at all, defining the class as including:

All persons who (a) have in the past and are likely in the future to be and (b) all persons who will in the future be, subjected to any policy, practice, or custom which has the result of or requires Highland Park Police Department officers to target persons for surveillance, stops, detentions, interrogations, requests for consent to search, and searches on the basis of race or ethnicity.


While this class definition is narrow, the terms of the settlement instead provide expansive relief, prohibiting officers from considering race or ethnicity, in any fashion or to any degree, in deciding whether to surveil, stop, detain, interrogate, request consent to search, or search any civilian; except when officers are seeking to detain, apprehend or otherwise be on the lookout for a specific suspect sought in connection with a specific crime who has been identified or described, in part, by
sought remedies that have not required intrusive court monitoring.\textsuperscript{117}

\begin{quote}

race or ethnicity in determining whether reasonable suspicion exists that a given individual is the person being sought.

\textit{Id.} at *4 (delineating the first point of the proposed Consent Decree).

117. For example, in the lawsuit against the New York City Police Department Street Crimes Unit (SCU), plaintiffs sought to enjoin the practice of racial profiling by requiring, among other things, documentation of street stops and better training and supervision. The court stated:

Plaintiffs seek to either enjoin the continued operation of the SCU or, in the alternative, an order:

(1) enjoining the SCU from continuing its policy, practice and/or custom of suspicionless stops and frisks;

(2) enjoining the SCU from continuing its policy, practice and/or custom of conducting stops and frisks based on racial and/or national origin profiling;

(3) enjoining the use of formal or informal productivity standards or other de facto quotas for arrests and/or stops and frisks by SCU officers;

(4) requiring the City, NYPD, Safir and Mayor Giuliani to institute and implement improved policies and programs with respect to training, discipline, and promotion designed to eliminate the SCU's policy, practice and/or custom of suspicionless stops and frisks;

(5) requiring the City, NYPD, Safir and Giuliani to institute and implement more effective methods to screen applicants to the SCU, including the use of psychological testing and evaluations;

(6) requiring the City, NYPD, Safir and Giuliani to deploy SCU teams with appropriate and adequate supervision;

(7) requiring the City, NYPD, Safir and Giuliani to institute and implement appropriate measures to ensure compliance with departmental directives that SCU officers complete UF-250's on each and every stop and frisk they conduct;

(8) requiring the City, NYPD, Safir and Giuliani to institute and implement appropriate measures to mandate that UF-250's or other documentation be prepared and maintained in a computerized database for each stop conducted by an SCU officer, regardless of whether the stop is followed by the use of force, a frisk, a search or an arrest; and
Most have been open-ended, requiring police to gather statistics on race and respond to disparities on their own.\textsuperscript{118} Data analysis of traffic stops began with the settlement of a private lawsuit brought in Montgomery County, Maryland.\textsuperscript{119} Subsequent lawsuits and

\begin{quote}
(9) requiring the City, NYPD, Safir and Giuliani to monitor stop and frisk practices of the SCU, including periodically and regularly reviewing form UF-250's to determine whether reported stops and frisks have comported with constitutional requirements.


118. Another typical example of relief requested in a private suit is the consent decree entered in \textit{Ledford}. In addition to the prohibition listed in supra note 116, the Decree noted:

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The parties have negotiated a proposed settlement ("Consent Decree") of all disputed claims in the case. Under the settlement, the City of Highland Park will:

\begin{itemize}
  \item Document every incident involving a stop, detention, interrogation, and/or search of a civilian, including the race of the civilian involved, and facilitate the analysis of this data by recording and storing it on a computerized data system.
  \item Install audio and video equipment in certain HPPD [Highland Park Police Department] vehicles.
  \item Use the materials in paragraphs (2) and (3) above to supervise HPPD officers.
  \item Maintain a system of investigating and resolving civilian complaints regarding HPPD officers.
  \item Provide specific training for HPPD officers.
  \item Allow plaintiffs' counsel to inspect materials in paragraphs (2), (4), and (5) above.
\end{itemize}

The court will retain jurisdiction for three to five years to enforce the terms of this Consent Decree.


Justice Department decrees have followed this model, requiring police to keep data and then address disparities through improved training, supervision, and procedures.\textsuperscript{120}

The remedial goal of statistical monitoring may also be achieved through discovery. For example, the New York City Police have been in litigation for several years over racial profiling allegations against its elite Street Crimes Unit. The court ordered that data from stop and frisk forms be compiled to assess these allegations.\textsuperscript{121} The Department, to avoid substantial costs of compiling written forms,\textsuperscript{122} claimed that it will create a permanent computer da-

\textsuperscript{120} Laura Little argues that since the Supreme Court, in \textit{Rufo v. Inmates of Suffolk County Jail}, 502 U.S. 367, 384 (1992), relaxed the standard for modifying consent decrees, requiring only a "significant change," courts should be less reluctant to exercise equitable discretion. Laura L. Little, \textit{It's About Time: Unravelling Standing and Equitable Ripeness}, 41 Buff. L. Rev. 933, 990 (1993) ("Indeed, the new standard reflects an attitude of allowing courts to alter decrees where the defendant can show unintended or deleterious consequences of the injunction. This allows courts to avoid long-term effects of prediction errors in framing injunctive orders and should therefore diminish courts' reluctance to issue injunctions.").

\textsuperscript{121} A study of initial data collected in response to a Justice Department inquiry and a study conducted by New York State Attorney General Elliot Spitzer showed substantial racial disparity. However, as the lawsuit progressed, this data was over a year out of date, and the court requested updated data.

\textsuperscript{122} The cost of the space, equipment, and labor needed to compile data on stop and frisks was estimated at $1.5 million, because police officers were required to understand the forms and enter them properly. Hearing, In the


\textsuperscript{122} The cost of the space, equipment, and labor needed to compile data on stop and frisks was estimated at $1.5 million, because police officers were required to understand the forms and enter them properly. Hearing, In the
tabase for stop and frisk data.\textsuperscript{123} While it is far from clear that the NYPD will make a good faith effort to self-monitor,\textsuperscript{124} burdens of discovery may be pushing the Department in the direction of the relief requested, even though no legal resolution of the dispute has been reached.\textsuperscript{125}

These remedial schemes suggest the effect of empowering local law enforcement. They allow police to take on the project of monitoring and to respond to the information they gather. And if these remedies become accepted as practicable and non-intrusive,

\begin{quote}
We have, at a cost of a half million dollars, designed a computer program that will be used now precinct-wide and, eventually when this is done, the 250 cards will be basically inputted when they're filled out. It will be an online system similar to how link data is tracked. That is several months away, but it's well under way, and that will be the future of how stop and frisk cards are handled.
\end{quote}

\textit{Id.} at 7 (Daniel S. Connolly, Corporation Counsel of the City of New York speaking). Over eighteen months later, no such system is in place.


"This refusal to cooperate and to provide the documentation is simply an enlargement of the same pattern that has gone on with one individual case after another," said the lawyer, William Goodman, the legal director of the Center for Constitutional Rights. "It's part of the clamping up and the stonewalling and the refusing to open up their operations to outside scrutiny."

courts may be less reluctant to impose them. While these remedies came in response to obstacles in Fourth and Fourteenth Amendment doctrine, the remedies may in turn shape parameters of the underlying law. As compiling data about the race of those stopped becomes the norm, failure to monitor stops may become prima facie evidence of racial profiling, a sign of deliberate indifference to unconstitutional practices.126

B. Legislative Solutions: Efforts to Gather Police Data

1. Recent Legislation

Across the country, from the largest cities to the smallest towns, few have been untouched by efforts to collect police statistics. Legislative reform efforts have focused on requiring local law enforcement to maintain racial data on police stops. The existence of racial profiling was dismissed by law enforcement authorities in many states, most notably, in New Jersey, until the scope of the problem was meticulously documented. For this reason, state legislators in ten states—Colorado, Connecticut, Kansas, Maryland, Massachusetts, Missouri, North Carolina, Rhode Island, Tennessee, and Washington—have passed laws requiring police to keep data, and similar legislation is being considered in twenty-one other states.127

126. This simple documentation requirement eliminates difficulties in determining liability. Failure to document stops may estop police from claiming no practice, since their own insufficient documentation makes it hard to show a pattern. Perhaps such failure should constitute deliberate indifference under Monell.

An increasing number of police departments nationwide now voluntarily collect statistics, including city police in Houston, Oakland, San Diego, and San Jose, and state police in Florida, Michigan, New Jersey, Ohio, Rhode Island, and Washington. Representative John Conyers, Jr. (D-MI) proposed similar federal legislation, the National Traffic Stops Statistics Study Act of 1998, which passed unanimously in the House but was rejected in committee by the Senate. President Clinton also required federal law enforcement to collect racial data on all stops.

All of this focus on data marks a sea change in attitudes towards policing. Police were never before required to attend to race or expected to defend their patterns and practices to the public. If nothing else, collection of these statistics, whether mandated by law or performed voluntarily, create a new discussion about race in policing focused at the local level. Data can be a critical way to inform the public about the pervasiveness of racial profiling; otherwise "the departments who expressed interest in collecting data on stops); Montgomery, supra note 5 (describing enactment of the Maryland law requiring data collection).

128. Harris, supra note 3, at 322–23. More than thirty California police agencies have recently begun to collect statistics on traffic stops, requiring police to record: race, ethnicity, and age of motorists; why driver was pulled over; whether a search was conducted; and whether citation, arrest, or warning resulted. See Armando Acuna, More Police Agencies Keeping Racial Data, L.A. Times, Sept. 30, 1999, at A3. Michigan and Ohio state police collect basic information on race and sex of individuals stopped. See David Shepardson, Cops Will Log Race of Drivers: Program Seeks to Dispel Fears that Troopers Show Bias When They Make Traffic Stops, Detroit News, Dec. 10, 1999, at A1.


130. William J. Clinton, Memorandum on Fairness in Law Enforcement (June 9, 1999), available at http://www.aele.org/fedprof.html. See also Edwin Chen, 'Corrosive' Racial Profiling Must End, Clinton Insists Justice, L.A. Times, June 10, 1999, at A18 (relating how Clinton ordered federal law enforcement to collect race and gender data on all people stopped or arrested; the Treasury, Justice, and Interior Departments were required to present a plan for collecting data in 120 days).

131. For an example of the drama being played out in debates over the meaning of traffic stop statistics in small towns and cities, see supra notes 48–57 and accompanying text.
public is left with the impression that the abuses are more aberrational than systemic.\textsuperscript{132} Indeed, the broader diffusion of data on racial profiling appears to be having an effect; majorities of black and white Americans now believe racial profiling is a problem.\textsuperscript{133} Beyond consciousness raising, increased information can help translate these vague public concerns into concrete proposals for reforms, just as New Jersey used a comprehensive study of traffic stops to focus its reform program.\textsuperscript{134} Data also helps a community assess whether police justifications for persistent disparity hold water. For example, the New York Attorney General’s report showed that race based stops did not correlate with ‘high crime’ neighborhoods, forcing the discussion to move to other possible reasons for the disparity.\textsuperscript{135} Just as importantly, statistics may enable police departments to assess the success of their own law enforcement strategies, convincing them that a particular strategy causes too much racial disparity to justify meager results. Requirements also place officers on notice that they are being watched and will be held accountable for their decisions.

2. Criticism of Legislation

All of the state laws passed to date have been remarkably incomplete and vague, focusing only on the thinnest notion of racial profiling as statistical disparity.\textsuperscript{136} Few laws list what kinds of factors


\textsuperscript{133} \textit{Poll Finds Most in U.S. Believe Police Practice “Racial Profiling,”} supra note 58, at 15 (describing results of a Gallup poll in which a majority of Americans believed that racial profiling is widespread and three fourths of black men said they have been stopped by police because of their race).

\textsuperscript{134} New Jersey Report, \textit{supra} note 24, at 1–12.

\textsuperscript{135} See New York Report, \textit{supra} note 24, ch. 5. See also Fagan & Davies, \textit{supra} note 35, at 479

(The results show that crime rates only partially explain stop rates overall, and fail to explain the rates at which minority citizens are “stopped” by the NYPD. After controlling for race- and crime-specific crime rates and the population composition of the precinct, the results showed that black and Hispanic citizens were significantly more likely to be stopped than were white citizens.).

\textsuperscript{136} For criticism and comparison of the laws, see UM Report, \textit{supra} note 127.
should be noted by local police, and many do not require the completion of any kind of standard statewide form. Merely recording the race of people stopped may show disparities, but may not provide more critical information, such as the identity of the officers conducting the stops and the kinds of searches performed. For example, it is important to record whether: a search took place; a warning, citation, or arrest occurred; and any contraband was seized. Information on the date, time, location, and duration of the stop are also useful. In addition, it is important that officers articulate what justified their stop to indicate whether they had reasonable suspicion. It is also important that officers note whether force was used, and if so, what kind, and whether injury resulted.

Their defects notwithstanding, the profusion of state laws has led to some significant innovations. For example, some laws give police departments discretion to increase the kinds of information collected at stops—a practice that could lead to useful experimentation. This principle can be expanded by allowing the community to provide input into what information is collected about stops. More creative efforts could be made to reach the public during stops. Some police departments require officers making stops to hand out business cards with information on how to make a civilian complaint. North Carolina releases state police statistics in an interactive website.

Beyond the problem of incomplete data collection, recent state laws are also too narrow in their reach. Their exclusive focus on traffic stops poses a serious limitation. Pedestrian stops are equally common, yet only one state requires collection of data on these encounters. In addition, several states place limits on which police

137. Recording the identity of the officer may be important to identify problem officers; no state law requires this information.
139. Only Kansas requires data on pedestrian stops. UM Report, supra note 127. This exclusive focus on traffic stops is hard to explain and very interesting. Is it that "Driving While Black" defined the debate, or that people with cars who are targeted feel more violated when police intrude on their property? Is it the American association of freedom with the automobile? Or is it that more affluent people have cars and when improperly stopped have more political capital to expend in protest? One officer explained that he believes racial profiling is "an interstate highway issue, not an inner-city issue," and that it grows out of drug
departments are subject to the regulation. Washington, Tennessee, and Texas only regulate state police, not local police, and North Carolina only discloses state police information.

While data collection has the potential to create accountability and inform the community about profiling problems, many of the laws passed leave data in the hands of police. Only one state, Rhode Island, requires that data from all local police departments be made public in quarterly reports. Departments are free to collect interdiction campaigns rather than routine local law enforcement.” Bruce Landis, *Police Begin Study of Racial Profiling*, Providence J., Jan. 16, 2001, at A8 (quoting Maj. Dennis W. Simoneau, commander of the Providence Police Department’s patrol division). This seems wrong, since in urban areas racial profiling has been an issue, and yet right in so far as drug-interdiction is the focus for targeting minorities. And outside large cities, most drug-interdiction, and most policing for that matter, probably occurs on highways. See *PERF Report*, supra note 2, at 122. Half of all encounters with police occur in traffic stops. Bureau Just. Stats., U.S. Dep’t Just., Contacts Between Police and the Public: Findings from the 1999 National Survey 1 (2001), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp99.pdf.


The attorney general shall collect data for a period of not less than twenty-four (24) months and report its findings and conclusions to the governor and the general assembly not later than twenty-eight (28) months after the commencement of the collection of data under this chapter. The report, findings, and conclusions submitted pursuant to this subsection are deemed a public record.

(e) In addition, the attorney general, with the advice of the committee, shall prepare, on a quarterly basis, a summary report of the monthly data provided by each police department and the state police for that quarterly period. This report is a public record. The summary report shall include a monthly breakdown by race for each police department of the number of traffic stops made and of searches conducted, and any other information deemed appropriate by the attorney general with the advice of the committee. The report shall be released not more than ninety (90) days after the end of each quarterly period. No information revealing the identity of any
statistics in secret, and then only announce favorable statistics or analyze information in a way that puts the best face on their conduct.\footnote{143}

Furthermore, there are strong suggestions that data collection is used as a sham. Many police departments have stated that they want to collect data to exonerate themselves. In this vein, some have announced, after only weeks of collecting data, that they do not engage in racial profiling.\footnote{144} Moreover, poor data collection has resulted in open squabbling between police and civil rights groups over the meaning of statistics, with police claiming that civil rights groups are liars or publicity mongers, and civil rights groups announcing that racial profiling occurs based on scant evidence or without suggesting meaningful reforms.\footnote{145}

\begin{quote}
individual shall be contained in the report.
\end{quote}

\textit{Id.}

\footnote{143}{Bell & Bush, \textit{supra} note 140, at 1B (criticizing the Texas Department of Public Safety's study of their stops: "To me, it seems like the DPS was hedging their bets. They didn't want the public to know, especially if it raised a flag, that they may have something to hide," [Will Harrell, executive director of the Texas American Civil Liberties Union in Austin] said. The fact they did it for some time and did not inform the public is puzzling."). Of course, many police departments do conduct studies in good faith and simply want to be sure that they do not engage in discriminatory stops. Paul Garber, \textit{Police Reveal Traffic-Stop Results: Police Chief Louis Quijas Says Data Collected at Traffic Stops Should Allay Fears of Racial Profiling in High Point}, News & Record (Greensboro, NC), Aug. 30, 2000, at B1 (stating that though a voluntary local police study showed that the race of those stopped matched the city population, police found the data valuable and planned to continue collecting data).

\footnote{144}{E.g., Shantee Woodards & Oralander Brand-Williams, \textit{Dearborn Tracks Race, Tickets: Record of Racial Group, Gender of Stopped Drivers Shows That Most Are White Males}, Detroit News, Feb. 9, 2000, at D1 (reporting, after only one month of an ongoing data gathering program in Dearborn, Michigan, that most motorists who were stopped were white men, thus implying that perceptions of racial profiling are unwarranted). The Michigan state police similarly announced that they do not profile after nine months of data collection. David Shepardson & Oralander Brand-Williams, \textit{Searches of Black Drivers Level Off: State Cops See No Racial Profiling; Critics Call Survey Flawed}, Detroit News, Jan. 24, 2001, at A1 (quoting State Police Capt. Jack Shepherd as saying "What the numbers have shown and will show is there is absolutely no evidence of racial profiling at the Michigan State Police"). In response, the state ACLU chapter argued that the report raises important questions, since the numbers of those stopped were not compared against the overall number of drivers.\textit{Id.}

\footnote{145}{The hubbub outside Kansas City provides an example of the rhetorical byplay. See Bullers, \textit{supra} note 56, at B1. The American Civil Liberties Union of}
If departments were compared in some way, then perhaps statistics would be on a sounder footing as a department’s performance could be rated against those from other towns or precincts. While auditing might provide a relatively simple check, none of the laws require it or independent monitoring. Further, none suggest how data is to be interpreted, with the consequence that there is no way to know whether collected data is representative. For example, racial profiling laws do not specify a control group against which the data is to be compared—be it the general driving population, the residents of a neighborhood, or the percentage of those committing traffic or quality of life violations. A persistent problem occurs where data is compared with the total state population, even though racial disparity may be more pronounced if the data is compared to the driving population. One possible solution is to conduct separate control

Western Missouri and Kansas put together its own study of stops based on traffic convictions. The ACLU director, Dick Kurtenbach, admitted they were not offering constructive advice. At the outset at least, “the role of the ACLU . . . is not to suggest ways to decrease racial profiling. Our job is to watch them and point out when we think there’s a problem. That’s what we did.” Id. The police chiefs of the suburbs in question all said that the ACLU study was faulty and irresponsible, and that the ACLU “took a swing and ran” and “destroyed” trust between it and the police. Id.

In another example, data from St. Paul and Minneapolis, Minnesota showed particularly egregious disparities in stops made by six officers, three of whom were removed. Heron Marquez Estrada, St. Paul Council Wants Deeper Look at Police Data, Star Trib., Jan. 11, 2001, at 3b. The St. Paul Police Federation president objected to making the data public, stating that the study was misleading and flawed, and commented, “It’s a shame that the city has given the impression that its cops are racist.” Id. The Minneapolis deputy police chief took a more nuanced approach, writing, “I fear also the chilling effect that the collection of race data might have on proactive police work if presented in a presumptively accusatory manner. Good community partnerships and improved public safety will not follow from such a climate.” Greg Hestness, In Collecting Racial Data, Police Face Risks, Opportunities, Star Trib., Jan. 26, 2001, at A19. See also infra note 152 on the controversy over the release of Connecticut’s study, and infra note 158 on the Dallas police chief’s opposition to data collection.

146. Juan Forero, Precinct’s Rosy Crime Rate Was a Distortion, the Police Say, N.Y. Times, Jan. 7, 2000, at B1 (describing how within a year, falsified crime statistics from a Brooklyn precinct were uncovered by department auditors, and reporting that New York City Precinct commanders are placed under great pressure to show reduced crime rates).

147. “This is the million-dollar question facing state police across the country: How do we go about figuring out who is on what highway and when?,” said Professor Chris Maxwell, quoted in Shepardson & Brand-Williams, supra
group studies that will estimate the demographics of the potentially relevant populations.\footnote{148}

Some laws open up the possibility of convening new groups of problem solvers. For example, Rhode Island brought together an interdisciplinary group of community and advocacy group leaders, legislators, and statisticians to advise the Attorney General regarding the collection of data and the preparation of a monthly summary report.\footnote{149} Other laws suggest oversight and analysis of the information by a disinterested state actor, which represents a step in the right direction.\footnote{150} The laws do not spell out what happens next, but ideally the departments with the greatest disparities could be singled out for special attention by the state attorney general or some other agency. The agency could then benchmark police departments to assess how

\footnote{144, at D1. Advocates called into question studies in Connecticut and Michigan which were based on population totals and not driving population. See Matthew Hay Brown, Racial Profiling Study Called Flawed: Experts Criticize Approach, Methodology of State Report, Hartford Courant, Jan. 26, 2001, at A1; Shepardson, supra note 128.}

\footnote{148. In New Jersey, these kinds of studies were conducted at toll booths. See infra note 264.}

\footnote{149. This diverse statewide body, the Traffic Stop Study Advisory Committee, included the Urban League of Rhode Island, the National Conference for Community and Justice, and the Rhode Island Commission for Human Rights, as well as the Attorney General’s Office, the Police Chiefs’ Association, and a statistician. Traffic Stops Statistics Act, R.I. Gen. Laws §§ 31-21.1-3, 31-21.1-4 (2000).}

\footnote{150. A recent law enacted in California does not require data collection, but does require that a “Legislative Analyst” study and report upon data that is voluntarily collected by police departments. Greg Lucas & Lynda Gledhill, Governor Signs Measure on Racial Profiling, S.F. Chron., Sept. 27, 2000, at A3.}

The Missouri and Rhode Island laws require police departments to submit data to the state attorney general’s office, which analyzes the data and publishes an annual report comparing data from different departments. \footnote{See Mo. Ann. Stat. § 590.650 (West Supp. 2001); Traffic Stops Statistics Act, R.I. Gen. Laws § 31-21.1-4(d) (2000) (describing how the Attorney General collects data and produces a public report: “The study authorized under this chapter shall include a multi-variate analysis of the collected data in accordance with general statistical standards.”).}
successful they were in implementing the remedies that resulted from their data gathering.\textsuperscript{151}

Finally, these laws are toothless. There seems to be an assumption in many of these efforts that statistics are only useful as a one- or two-year study to find out if police are ‘racist.’\textsuperscript{152} The laws do not suggest any ongoing reform or long-term use for the data. No laws provide avenues for action once data is collected, but only penalize departments for refusing to collect data. Once these studies have run their course, unless the data shows very dramatic disparities, the laws and political momentum behind them may fade away.

A few civil rights advocates also criticize the emphasis on data. Randall Kennedy fears that monitoring at best supports the status quo: “One danger is evasion—putting off making hard decisions in the guise of needing more information. This motivation, I fear, is behind Clinton’s directive ordering federal agencies to gather statistics on the racial demographics of stops, questioning, and arrests.”\textsuperscript{153} Some also have advocated legislation outlawing racial profiling as an alternative to collecting data; California and Oklahoma have enacted such laws.\textsuperscript{154} However, these laws do not reach out to

\textsuperscript{151} For example, the New Jersey Attorney General’s study found that the state Patrol Unit issued far more tickets to African Americans than the Tactical Patrol Unit, which operates in particular neighborhoods and with less discretion. New Jersey Report, \textit{supra} note 24, at 33–34. The study concluded that not only should the Patrol Unit be the focus for reform, but that police discretion might need to be limited across the board. \textit{Id.} at 98–111. “Problem” departments could face special scrutiny; successful departments should be rewarded and encouraged to assist other departments. \textit{Id.}

\textsuperscript{152} The Connecticut and Rhode Island laws provide only a two-year trial run of data collection. \textit{Traffic Stops Statistics Act, R.I. Gen. Laws} § 31-21.1-4(d) (2000); \textit{Conn. Gen. Stat. Ann.} § 54-1m (West 2001). In fact, the Connecticut study concluded that there is no pattern of police discrimination in the state, a result that experts called flawed, especially where statistics were compared against nearby residential populations, and where some statistics indicated racial disparity. Brown, \textit{supra} note 147, at A1.

\textsuperscript{153} Randall Kennedy, \textit{Profiling Revisited: It Helps Cops Catch Crooks, but We Should Ban It Anyway}, Star Ledger (Newark), Sept. 12, 1999, § 10, at 7.

\textsuperscript{154} Cal. Penal Code, § 13519.4 (West 2001) (banning racial profiling, which is defined as “the practice of detaining a suspect on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped,” and creating expanded training for officers on the use of race in profiling); Okla. Stat. Ann. tit. 22 § 34.3 (West 2001) (banning racial profiling). In the same spirit, Democratic presidential candidate Bill Bradley openly called for the next president to issue an executive order
extend protection to any type of racial profiling that is not already illegal under the U.S. and state constitutions. 155

Police raise two standard objections to reporting requirements: first, that they are burdensome for officers; and second, that they are counterproductive because they encourage officers to focus on race. 156 In practice, logistical difficulties often prove minor and dozens of departments have implemented these programs by using portable computers that reduce their paperwork dramatically. One participant noted that, with the aid of such computers, "it takes 20 to 30 seconds to complete a report." 157 Second, the argument that banning racial profiling. See supra note 18.

155. Such laws could only expand the definition of racial profiling under the Equal Protection Clause. As such, they might be unconstitutional under City of Boerne v. Flores, because they purport to expand the law beyond what the Fourteenth Amendment allows. 521 U.S. 507 (1997).


("If passed into law, the [Conyers] bill would place a burden on the police and lengthen traffic stops," said Robert Scully, executive director of the National Association of Police Organizations. . . . "It's ironic that in the quest for a colorblind society, some people want us to keep track of people by race," said Jim Pasco, executive director of the Fraternal Order of Police.);

Editorial, Chicago and Race-Based Policing, Chi. Trib., June 8, 2001, at 24 (describing how an alderman opposed collecting data on the race of people stopped "because minorities might find it offensive").

157. Maxine Bernstein, Exemptions Leave a Void in Police-Stop Data, Oregonian (Portland), Jan. 13, 2001, at A01 (quoting Portland Oregon's assistant police chief). Part of the enthusiasm may be that police get new toys. Montgomery County, Maryland police say they are very excited about the settlement of racial profiling suits, because they can now use Palm Pilots to enter data on stops. John Drake, Police Get a Hand From New Palm PCs, Wash. Times, Aug. 29, 2000, at C1

(Officer Johnson recently downloaded 76 traffic stops into a computer at headquarters in 2 1/2 minutes, cutting his paperwork to a fraction of its former amount. "It makes it a lot easier than filling out the paperwork, handing it to someone, who gives it to someone else, who gives it to a data entry person," Officer Johnson said.).

See also Acuna, supra note 128, at A3 (noting that San Diego was testing a system that would require officers to enter information on stops on hand-held computers); Holly Edwards, Deputies to Record Race Data: Program Aims to Curb
attending to race encourages officers to ‘see race’ ignores indications that undue focus on race is already a pervasive problem that, ironically, can only be addressed by attending to race in the short run. Critics are right to say that data collection will change the way officers perceive their work and how they behave, but, after all, that is part of its purpose.

Police have also begun to present a third argument: that data collection efforts are a waste of time because studies are always contested, lead to more conflict than progress, and never provide clear answers that help to solve actual problems. Police are understandably concerned about being branded as racists if data is used only to determine if their conduct is intentionally discriminatory. State laws do not suggest what should be done in the usual situation where police are not intentionally racist, but their behavior still leads to unnecessarily large disparities based on race.

These laws appear meaningless because they provide no guidance on how to interpret data. They lack teeth because they do not require concrete steps to be taken once a disparity is found. In fact, action is rarely taken unless someone, such as a state attorney general, seizes upon the data to force change. But worse, the laws suggest an all-or-nothing approach where little can be done to remedy prob-

Bias, Daily News of L.A., Jan. 11, 2001, at 3 (“At first, we thought this would be a lot of extra work, but so far it hasn't proved to be that bad,” said Deputy Dave Miklos.”); Michael Raphael & Joe Donahue, State Plans Database to Deter Profiling: Troopers to Get Laptops in $14 Million Project, Star Ledger (Newark), June 23, 1999, at 1 (describing how New Jersey will provide laptops to all officers in the state, streamlining record keeping, and recording data on all traffic stops).

In addition, designing equipment and software for police data collection is becoming a big business. See Chandrani Ghosh, Beat Reporting: The Latest From the Politically Correct Front: A New Wireless Device that Helps Cops Defend Themselves Against Charges of Racism, Forbes, Feb. 5, 2001, at 108 (describing Robert Michels's start-up company, Mobile Commerce & Computing, that designs and sells wireless software, a system called TrafficStop, to local police departments). Michels has already attracted competition from others attempting to develop comparable software. Id.

158. Dallas Police Chief Terrell Bolton said, “When you look at the number of departments that have collected statistics, once they have completed the data collection, they sit around and argue about what it means.” Dave Michaels, Chief Opposes Gathering Race Data; He Says Profiling Minimal in Dallas, Dallas Morning News, Jan. 24, 2001, at 15A (quoting Chief Bolton). Instead, Bolton instituted new training videos, a policy against profiling, and is seeking funds for video cameras in patrol cars. Id.
lems short of intentionally racist behavior.

Legislation suggests several important elements of a remedy for racial profiling, including: collecting data; disclosing data to affected communities; and creating new bodies to evaluate data. What they lack is the flexibility to give police a chance to interpret data and respond to problems without being branded as racist. Recent consent decrees in U.S. Department of Justice suits suggest ways to take the remedy a step further. The decrees require a response to problems like racial profiling, but give police departments the ability to use data to engage in problem solving on their own.

C. Justice Department Suits as an Avenue for Institutional Reform

The Violent Crime Control and Law Enforcement Act of 1994, passed in response to the Rodney King riots in Los Angeles, empowers the Department of Justice to secure an injunction against the misconduct of local police. The law permits the DOJ to obtain equitable and declaratory relief to eliminate a wide range of police misconduct—any “pattern or practice of conduct by law enforcement officers” that deprives persons of “rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” Thus, the focus can include police brutality or other kinds of misconduct.

The Department has brought three suits to date—in Pittsburgh, Pennsylvania; Steubenville, Ohio; and Columbus, Ohio—and has secured consent decrees in Los Angeles and New Jersey. While

160. Id.
161. Taking the focus off race seems to help diffuse a situation and permit more cooperation in resolving the problem. Columbus, Ohio has been the first to challenge a Justice Department suit. City officials reacted very negatively when the Department attempted to add to its allegations evidence of racially disparate stops. Presumably, the original complaint of civil rights violations was less controversial. See Columbus Says Feds Injecting Race into Lawsuit Against Police, Dayton Daily News, July 20, 2000, at 3B (describing how the city, in its request to deny the Department of Justice permission to introduce evidence of racial profiling, stated that the DOJ “has chosen to inject race into the case at this time in a transparent effort to ‘turn up the heat’ on the defendants”).
162. For the text of the consent decrees, see Consent Decree, United States v. City of Los Angeles, (Civ. No. 00-11769 GAF), http://www.usdoj.gov/crt/split/docu-
the DOJ has a powerful weapon in § 14141, it has tread softly, crafting consent decrees that permit local involvement in efforts to remedy racial profiling and the improper use of force. The decrees deserve special attention and analysis because they have become the leading model for remedying racial profiling, though there has been little discussion of their structure or how compliance has progressed. They have two main features: 1) early warning systems that collect information on police stops; and 2) freedom for local departments to design their own responses to problems.

1. Early Warning Systems

The Department brought its lawsuits in response to complaints of excessive force, improper searches and seizures, false arrests, including those targeting known critics of the police or witnesses to police misconduct, and lack of departmental discipline and su-

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163. News reports on the progress of the decrees have usually described court monitor reports, with some reporting on community objections and protests. The author has relied on discussions with lawyers at the Department of Justice and others involved with the decrees for information on interactions between lawyers and the community. For early commentary lauding the decrees, see Livingston, supra note 7, at 818 (arguing that innovative consent decrees that resulted from these first two suits promise to have an important impact on police reform efforts). All of the civil rights lawyers litigating racial profiling cases consulted by the author have said that the consent decrees provided the model for relief requested, though the consent decrees themselves may have been based on the reforms and study commissioned in the Maryland settlement. See supra note 7.
The expansive language of § 14141 permits broad reform of troubled police departments, so that the decrees need not focus exclusively on racial disparity or particular kinds of misconduct, but can also target institutional problems of police training, management, and monitoring. Despite their expansive mandate, the decrees thus far, have focused mostly on responding to individual instances of misconduct, on identifying 'problem officers,' and not on broader remedies.

At the core of the consent decrees is the automated monitoring program, usually referred to as an 'early warning system.' At the scene of every stop, officers use a computer to record: its date, time, and location; the age, sex, and race of persons involved; the reason—including legal grounds—for the encounter; and if any seizures or arrests resulted. A special report is prepared when non-consensual or warrantless searches are performed or force is used. Information from reports is automatically entered into a computer database that arranges and makes accessible information about arrests made by each officer. The database includes complaints lodged against an officer, listing any shootings in which the officer was involved, any misconduct alleged, and whether discipline resulted.

'Early warning' alarms go off if particular officers, or groups thereof, use questionable techniques or methods substantially more often than the norm in analogous situations. The computer database also signals a problem if officers are involved in several incidents with particular offenses or in a sufficiently serious event. For example, under the Pittsburgh and Steubenville decrees, periodic audits are required and review is triggered within a week of any complaint or use-of-force report. With the database, a citizen's com-

164. Livingston, supra note 7, at 821; Marshall Miller, Note, Police Brutality, 17 Yale L. & Pol'y Rev. 149, 193 (1998) (describing how the Pittsburgh consent decree stemmed from a lawsuit brought by the local ACLU and NAACP as well as the Police-Barrio Project of Philadelphia).

165. *See, e.g.*, New Jersey Decree, supra note 37, ¶ 29. The other decrees all have similar provisions.

166. *Id.* ¶¶ 32–33. The Pittsburgh Decree requires a special use of force report. See Pittsburgh Decree, supra note 162, ¶ 18.

167. New Jersey Decree, supra note 37, ¶¶ 40–56.

168. *Id.*

169. Pittsburgh Decree, supra note 162, ¶¶ 18–19; Steubenville Decree, supra note 162, ¶ 23, 66.
plaint about a stop can be instantly checked against the computer, whereas in the past, officers might not have bothered to sort through thousands of handwritten forms to find out whether a complaint was substantiated by a report.

While officers can avoid filing computer reports just as they do when using paper and pencil, the use of audio or video recorders in each patrol car—as is now done in New Jersey—may help prevent officers from forging or failing to complete reports. Moreover, computerized bookkeeping makes it easier to determine if particular officers fill out fewer reports than do other officers or than they did in the past. This sets off a different, but equally important, kind of early warning signal, especially in conjunction with citizen complaints.

The computer cannot replace human management, and police departments already have mechanisms of accountability and review by supervising officers. The database does formalize review, though, and more importantly, the system organizes information efficiently, making supervision and monitoring easier. Studies commissioned in New York and New Jersey required months and years of compiling hand-written reports to present the data in a useful form. The early warning database is instantly accessible by officer, unit, shift, or special unit, permitting close examination of sources of misconduct. This aids the department in quickly pinpointing issues of concern, such as problem units or 'rogue' cops.

These consent decrees also collect more local information

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170. See Nat Hentoff, *Giuliani's Lawless Police*, Wash. Post, Apr. 10, 1999, at A21 (quoting New York State Attorney General Elliott Spitzer, who estimates that police “may fill out one in five or one in 10” of the required stop and frisk forms). Police may tend to record violent stops in which misconduct could be alleged in order to protect themselves against complaints by filing their side of the story. Thus, few records may exist for most inconclusive stops in which a quick frisk is performed. As noted earlier, the DOJ approach permits inferences from the absence of records, as well as from the content of those reported, to raise red flags.

about individual officers and units than legislation has required, permitting close monitoring and supervision. Of course, departments can already supervise and discipline officers, and if they already ignore indications of abuse, new warnings may be avoided just as readily. However, placing information in a database makes police conduct and internal review transparent to internal supervisors and to outside monitors, like the DOJ, as well as to a court.

2. Experimenting and Remedying Racial Profiling

The consent decrees provide for mostly internal accountability, by encouraging police to monitor themselves. Likewise, the second half of the remedy—deciding what to do with the data once a problem is identified—is left to the police departments themselves to implement. Police are given room to experiment with techniques for combating misconduct and are encouraged to develop their own problem-solving skills in order to move beyond the mere identification of problem officers. Indeed, "[the negotiation of Section 14141 consent decrees offers the Justice Department an opportunity to push local police departments in the direction of best practices in the area of police accountability while not relinquishing the benefits of local knowledge and experimentation . . . .]" The consent decree requirements are mostly procedural, so that the departments must decide what kinds of policing will result in less disparity or misconduct. The hope is that local police will know more about what works in their neighborhoods and will be more likely to follow the rules and procedures set out by their own supervisors than they would those imposed by court orders.

As none of the police departments have completed implementation of the decrees, it is too early to determine how well reforms will work. Local experimentation might begin by identifying practices suggestive of racial profiling. Early warning systems could be used to identify stops with a high degree of racial disparity that have been performed by particular officers or units. Having determined the

172. For example, the Michigan State Police only log in a database the race and sex of individuals stopped. The Michigan plan might "reassure motorists that they aren't being singled out because of their race," but it does not record critical information, such as which officers are responsible for stops, where they occur, what the grounds for suspicion were, or the kinds of searches that resulted. Shepardson, supra note 128, at A10 (quoting U.S. Attorney Saul Green).

173. Livingston, supra note 7, at 845.
existence and source of disparity, police departments would ideally weigh options and experiment with solutions. For example, the department might decide that the best way to prevent disparity is to limit police discretion. Alternatively, it might determine that the disparity can be eliminated by: training police to be sensitive to race; hiring more minority candidates; or assigning officers to a fixed beat within a neighborhood and requiring their regular contact with neighborhood or community groups most concerned with crime and police practices. A department might even let each precinct choose its own approach for a trial period and use the results to determine those practices that most successfully eliminate disparity and combat crime.

Early indications suggest that some problem solving is occurring. Pittsburgh, for example, has identified problem officers for retraining and has also instituted a policy change, prohibiting use of a chokehold that it found resulted in excessive injury. New Jersey is also engaging in this kind of problem solving. The New Jersey Attorney General’s study identified excessive police discretion as the chief source of racial disparity. The existing procedure for performing stops stated:

174. The Steubenville Decree details the areas in which police must conduct regular audits of the data collected, including use of force, arrests, and potential racial bias. Steubenville Decree, supra note 162, ¶¶ 74–77. The Pittsburgh Decree requires similar audits by senior supervisors. Pittsburgh Decree, supra note 162, ¶¶ 19–20.

175. Telephone interview with Robert Moossy, Trial Attorney, Civil Rights Division, U.S. Department of Justice (Sept. 2, 2000). See also Jamie Stockwell, Federal Probe Lifts Hopes of Police Reform: Pr. George’s Should Expect Tension with Public to Increase, Experts Say, Wash. Post, Nov. 13, 2000, at B1 (“It was tough on everyone, and no one liked the fact that the Justice Department had to come in and clean us up, but now we’re a nationally recognized agency,’ said Sgt. Albert Preik, commander of Pittsburgh’s police research and planning division.”).

Pittsburgh, despite strong community statements to the contrary, claims it has successfully complied with its decree, though there is little evidence that reforms are complete. Timothy McNulty, Mayor Seeks End of Consent Decree: ‘97 Measure Required Oversight of Reforms in Police Department, Pittsburgh Post-Gazette, Nov. 5, 1999, at B1 (describing how the Mayor called for an end to the decree, while the ACLU promised a new lawsuit if the DOJ permitted the decree to end). See also Jonathan D. Silver, U.S. Urged Not to Lift Police Decree: Coalition of Activists Target Murphy Effort, Pittsburgh Post-Gazette, Nov. 18, 1999, at C1 (describing efforts by Pittsburgh civil rights, religious, and black organizations to prevent the Mayor from ending the consent decree, based on the belief that the reforms were only beginning).
Physical and personal characteristics such as race, age, sex, length of hair, style of dress, type of vehicle, and number of occupants of a vehicle may not be utilized to establish reasonable suspicion unless the member can identify and describe the manner in which a characteristic is directly and specifically related to particular criminal activity.\(^\text{176}\)

The report concluded that a new policy should limit discretion, but more importantly, should not mention race "in the same breath" as less suspect factors.\(^\text{177}\) The report suggests that changing the policy will not be enough and, along with the consent decree, calls for an examination of the training, rewards, and discipline systems.\(^\text{178}\) Change may be slow in coming, however, and after two years, traffic stop statistics are unchanged and still show great racial disparity.\(^\text{179}\)

3. Criticisms of the Decrees

Because Department of Justice consent decrees have become the leading model for police reform, it is important to evaluate them. They are influencing police departments seeking to avoid liability and private plaintiffs seeking to impose similar remedies.\(^\text{180}\) Additionally, some of the legislation being proposed and implemented in other states is based on requirements that are contained in the decrees. Finally, the decrees reflect approaches that have been used in other civil rights contexts. For example, in the areas of race discrimination and sexual harassment in the workplace, consent

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\(^{176}\) New Jersey Report, supra note 24, at 40.

\(^{177}\) Id.

\(^{178}\) Id. at 42–44. New Jersey Decree, supra note 37, ¶¶ 93–95 (on revising training procedures); ¶¶ 59–92 (on revising misconduct and disciplinary procedures).

\(^{179}\) Josh Getlin, Racial Profiling Still a Problem: Despite Efforts in New Jersey, Statistics Stay High, Chi. Trib., May 27, 2001, at 10. David Harris commented that it may take time for troopers to “unlearn” profiling practices since, “[t]his problem goes very deep into the past.” Id. (quoting David Harris).

\(^{180}\) Raphael & Donahue, supra note 157, at 1 (describing how New Jersey will provide laptops to all officers in the state as part of its effort to require that data be collected on all traffic stops and noting that the State approved the program after observing similar requirements in other consent decrees and pursuant to its ongoing negotiations with DOJ). See also Nat’l Congress Puerto Rican Rts. v. City of New York, 75 F. Supp. 2d. 154, 158 n.1 (S.D.N.Y. 1999) (noting that plaintiffs seek to require that the NYPD record all stops in a computer database).
decrees entered into with employers require early warning systems, statistical monitoring, and new training programs. Thus, although consent decrees may seem like a departure from traditional police reform, they are actually part of a broader new approach to institutional reform whereby collaborative problem solving is combined with information gathering.

181. See Haynes v. Shoney's, Inc., No. PCA 89-30093-RV, 1993 WL 19915 (N.D. Fla. Jan. 25, 1993) (approving a consent decree for a class of over 200,000 present and former employees of Shoney's restaurants, in a lawsuit alleging sexual harassment and race discrimination). The order required: hiring recruitment and equal opportunity officers; drafting new grievance and disciplinary procedures for harassment or retaliation; setting flexible hiring and promotion goals geared towards the minority populations of the communities in which the restaurants are located; designing training and education materials; establishing tuition reimbursement for minorities to pursue continuing education; adopting and implementing job qualification and performance standards; and introducing a 'tester' program to monitor compliance with the decree. Id. See also EEOC v. Astra USA, Inc., No. CIV. A. 98-40014, 1998 WL 80324, at * 2–5 (D. Mass. Feb. 5, 1998) (requiring compliance with new policy against sexual harassment, training employees to respond to problems with sexual harassment from customers and contractors, providing employees with the Policy Against Sexual Harassment, and appointing a neutral outside person to review compliance in each action and to report directly to the EEOC). For other consent decrees requiring information gathering, training, and monitoring, see, for example, McKnight v. Circuit City Stores, Inc., No. Civ.A. 3:95CV964, 1997 WL 328640 (E.D. Va. Mar. 12, 1997); Joint Mot. for Entry of Consent Decree, EEOC v. Mitsubishi Motor Mfg. of America (C.D. Ill. June 10, 1998) (No. 96-1192), http://www.eeoc.gov/docs/mmma.html.

182. Professor Sturm discusses the consent decrees listed in the previous footnote and describes how in cases of sexual harassment, some "courts have overseen the formulation, approval, and implementation of consent decrees, some of which contain many of the characteristics of effective problem solving..." Sturm, supra note 14, at 563 & nn.367–68. Sturm describes the court as a facilitator of the problem solving process:

A court that acts self-consciously to construct a framework for accountable deliberative decision-making as part of the remedial stage would provide not only a visible opportunity to witness a problem-solving process, but also to share the results of that process through a reported decision... Thus, in this structural regulatory regime, courts create a framework that will generate the information, incentives and opportunity to elaborate the meaning of a general norm in context and the development of contingent solutions in cases that do not lie on the normative boundary.

Id. at 563.
One misguided criticism is that flexibility gives departments the opportunity to choose mediocre solutions and possibly even to evade reform. Departments already choose to permit misconduct and disparate treatment based on race, and these consent decrees make departments more accountable than other available avenues because they are so comprehensive.

Serious concerns remain. There is the institutional concern that the DOJ may not be well situated to remedy racial profiling. As a political agency, the Justice Department's enforcement methods vary in degree and kind from administration to administration. For example, President Bush that he did not want to "federalize the local police forces." Such statements do not inspire community confidence that the DOJ will provide lasting protection. Bush has more recently stated that, "Racial profiling is wrong, and we will end it in America."

Even given the will, the DOJ lacks resources to remedy racial profiling across the country. Few consent decrees have resulted during the years since § 14141 was enacted. The DOJ has

183. For example, DOJ rushed to reach settlements in consent decrees in the Fall of 2000, fearing an incoming Bush administration. For criticism of DOJ inaction during the Bush and Reagan years that ignored police abuse in Los Angeles until the Rodney King beating was videotaped, and even then, reacted slowly, see Paul Hoffman, The Feds, Lies, & Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America, 66 S. Cal. L. Rev. 1453 (1993).

184. Comm'n on Presidential Debates, Transcript of Second Presidential Debate (Oct. 11, 2000), at http://www.debates.org/transcripts/textfiles/CPD_Debate_3_Final_Transcript_(English).txt. See also Eric Lichtblau, Bush Sees U.S. as Meddling in Local Police Affairs, L.A. Times, June 1, 2000, at A5 (quoting George W. Bush, stating, "I do not believe the Justice Department should routinely seek to conduct oversight investigations, issue reports or undertake other activity that is designed to function as a review of police operations in states, cities and towns."); Patt Morrison, George or Al? Answer Means Plenty in LA, L.A. Times, Nov. 10, 2000, at B1 ("George W. Bush is no lover of federal consent decrees, and has said he thinks local police issues should be handled locally.").


186. Gilles, supra note 2, at 1407–08, explains that the fact that only three suits have been brought seems to reflect the lax enforcement of the statute. This view is bolstered by the fact that the Justice Department has been "investigating" pattern or practice violations in at least twenty other police departments—mainly in large, urban cities—since
investigated police brutality in places like New York City and New Jersey where police killings drew attention to profiling, but smaller communities have had to rely on private suits to act as critical catalysts for change. The DOJ could provisionally immunize departments in compliance from lawsuits.\textsuperscript{187} However, the DOJ is federal, removed from communities in which it seeks to intervene, and cannot maintain close connections with local public interest or community groups.\textsuperscript{188}

It is important to note that decrees usually do not involve the community or require that the information collected be made public. The information only generates internal accountability, and all of the decision-making and interpretation of information is left in the hands of the local police. For example, the Pittsburgh Decree's short section on "community relationships" merely states that the police should make efforts to attend community meetings and hold quarterly gatherings to discuss policing issues.\textsuperscript{189} The Los Angeles Decree requires

\textsuperscript{187} See Skolnick & Fyfe, supra note 14, at 211 (noting that the DOJ has only forty-four civil rights prosecutors, and that, from 1982–89, it only brought twenty-two "significant civil rights prosecutions of police brutality cases").

\textsuperscript{188} Professor Livingston fears that Justice Department investigations alienate officers from their community:

\begin{quote}
You want the officers to exercise discretion, to reach out to citizens to let them know what's available, to work with them to combat crime . . . . But a department that feels it is under siege and is being punished by the community . . . it may be hard to establish good relations with the community.
\end{quote}

Stockwell, supra note 171, at B1 (quoting Professor Livingston). Of course, investigations occur because the community is dissatisfied, and officers should feel that they are subject to questioning. And while police may feel lower morale, the community may perceive an improved relationship. See David Voreacos, \textit{Peek at N.J. Troopers' Future? Federal Cuffs Chafe Pittsburgh Police}, Record (Trenton), Mar. 8, 1999, at A1 (quoting a black councilman's statement that the Pittsburgh decree "has improved" the department and that "police behavior is beginning to change").

\textsuperscript{189} Pittsburgh Decree, supra note 162, ¶¶ 31–32. The Decree adds, "The
annual meetings in precincts and meetings with “community advisory groups.” The Steubenville Decree does not even require meetings, and only asks that the police manual be made public. Part of the reason may be the Justice Department’s own distance from community concerns; they rarely meet with community groups after the decree is in place. For example, while they conducted meetings of interested groups in Pittsburgh during their investigation, after the Decree was established, they have returned to attend a meeting only once.

Each decree does require that information collected be released to an independent monitor, the court, and the Department of Justice, all of which retain a role in monitoring compliance. These monitors’ reports are made public and do indicate the kinds of

City shall hold quarterly open meetings in rotating zones to educate the public about proper police functions; police misconduct, including excessive use of force, improper searches and seizures; and the proper methods for filing complaints against police officers.” Id. ¶ 51. The New Jersey Decree also asks that the state police conduct “outreach.” New Jersey Decree, supra note 37, ¶ 60.

190. The Los Angeles Decree requires:

At least one open meeting per quarter in each of the 18 geographic Areas for the first year of the Agreement, and one meeting in each Area annually thereafter, to inform the public about the provisions of this Agreement, and the various methods of filing a complaint against an officer.

Los Angeles Decree, supra note 162, ¶ 155.

The Decree does not require police to ask for citizen feedback and only vaguely alludes to ‘interaction’ that might result from the meetings: “the open public meetings described above shall include presentations and information on the LAPD and LAPD operations, which presentations and information are designed to enhance interaction between officers and community members in daily policing activities.” Id. The Decree also refers to “community advisory groups” with which the LAPD will meet quarterly, but the function and makeup of the community advisory groups is not explained. Id. ¶ 157.

191. Steubenville Decree, supra note 162, ¶ 28.

192. Telephone interview with Vic Walczak, Executive Director, Greater Pittsburgh ACLU (Oct. 25, 2000) [hereinafter Walczak Interview].

193. Pittsburgh Decree, supra note 162, ¶¶ 70–76 (requiring that full access be given to an outside monitor appointed by the city that makes periodic compliance reports to the court and the parties and that full access to all data be given to the United States); Steubenville Decree, supra note 162, ¶¶ 82–86, 91 (stating that the City and DOJ will jointly choose an independent auditor who, along with the United States, has full, unrestricted access to all records and data).
progress that police are making. For example, the Pittsburgh reports are available on the Internet.\textsuperscript{194} In Pittsburgh, the monitor has also held informal meetings with community groups to talk about concerns. The New Jersey Decree takes an additional important step, asking that the State Police release aggregate information every six months, including breakdowns by race and type of civilian complaints.\textsuperscript{195} Similarly, the Los Angeles Decree requires release of semiannual reports.\textsuperscript{196} Hopefully, future settlements also will call for the

\begin{itemize}
\item \textsuperscript{194} The Pittsburgh report is available at the Pittsburgh ACLU website. See ACLU, Court-Ordered Pittsburgh Police Reform: Auditor's Reports Available (June 28, 2000), at http://www.pgh.aclu.org/aclu/features. Other monitors' reports may be made public on the DOJ website.
\item \textsuperscript{195} New Jersey Decree, \textit{supra} note 37, ¶ 6, 114.
\item \textsuperscript{196} Los Angeles Decree, \textit{supra} note 162, ¶ 156.
\end{itemize}
release of this information.

These consent decrees have short life spans, and without monitors’ reports and oversight, the accountability and sunlight disappear. The Pittsburgh Decree expires in less than a year, and community groups are understandably concerned that without the independent court monitor, they will lose access to all information about whether police have acted upon the information collected.\textsuperscript{197} The hope is that the Police Department will become more capable by that time. Thus far, however, this hope has not been borne out. In fact, over mayoral and city council opposition, the Department undermined the civilian complaint review board that citizens voted into place by referendum.\textsuperscript{198} Further, the Department consistently refused to permit community groups to sit at the negotiating table when it began settlement talks, even though these groups had filed the underlying lawsuit and the Department of Justice requested their participation.\textsuperscript{199} Given police hostility to community concerns, the consent decree may only be a temporary solution absent provisions that would make information permanently public or would involve community groups in monitoring police. Vic Walczak, Executive Director of the Greater Pittsburgh ACLU, said that unless the police express a new willingness to work with the community, once the decree expires, “We’ll be back to the community working with a closed system.”\textsuperscript{200}

Los Angeles civil rights groups have sued to be included as monitors of the consent decree because of their concern that the court-appointed independent monitor will fail to represent their interests.\textsuperscript{201} Their goal is to be included as ‘equal partners’ in implemen-

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\textsuperscript{197} Walczak Interview, \emph{supra} note 192.

\textsuperscript{198} \emph{Id.} (discussing efforts to undermine the review board). \textit{See also} Voreacos, \emph{supra} note 188, at A1 (describing how the review board was created by referendum).

\textsuperscript{199} Walczak Interview, \emph{supra} note 192.

\textsuperscript{200} \emph{Id.}

\textsuperscript{201} Mem. of Points and Authorities in Support of Mot. to Intervene Under
ting the decree, which "fences out those individuals who have the greatest interest in the most conscientious enforcement and that is the victims of these practices and the citizens and residents of Los Angeles." In the meantime, the consent decrees have not been implemented, and have languished amidst wrangling over who should be hired to serve as monitor. Similarly, in New Jersey, civil rights groups have sued in a class action, seeking separate injunctive relief because the consent decree does not sufficiently involve the public; "[P]laintiffs believe that a critical aspect of the injunctive relief is public awareness, a remedy which is hardly touched upon in the Consent Decree." 

Despite shortcomings, the Department of Justice has exacted the best settlements from police departments to date. Improving on these consent decrees, though, will require more local involvement. Remedies cannot remain stable where local groups are excluded, forcing them to seek inclusion or to work around the settlement. Building remedies with outside groups as 'equal partners' can solve many of the problems these decrees have encountered.

Rule 24(a)(2) and Rule 24(b)(2) at 5, United States v. City of Los Angeles (filed Jan 8, 2001) (Case No. CV-00-11769AF) (on file with author) ("Without intervention, then, members of the Los Angeles community must, once again, place trust in the incredible by believing that the LAPD will reform itself or be subject to illusory discipline by a body disempowered and disinclined to effect the necessary changes."). See Morning Edition (National Public Radio broadcast, Dec. 18, 2000) ("With President-elect Bush on the record opposing such decrees, [Los Angeles community groups] are concerned that an appointed federal monitor won’t effectively enforce the city’s agreement."), available at http://search.npr.org/cf/cmnn/cnnps05fm.cfm?segID=115661.


204. Pls.' Mem. of Law in Reply to Def.'s Opposition to the Mot. for Leave to Amend the Compl. and for Class Certification, Morka v. State of New Jersey (2000) (No. L-8429-97 66).
III. A COMPREHENSIVE APPROACH

One police chief noted: "Until they define [racial profiling], we can't really discuss it . . . . It means too many things to too many people." Indeed, no social or legal consensus exists on what degree of disparity in police treatment is tolerable and under what conditions. Defining racial profiling has befuddled courts and legislators dealing with the question of what to do if disparity is uncovered. The Justice Department consent decrees suggest a way of sidestepping this problem: they focus on eliminating disparity by making the policing process more responsive and informed. However, the decrees only use information supplied by officers during traffic stops and only provide for a few years of monitoring by an independent monitor or state attorney general's office. Further, as noted above, neither Justice Department consent decrees, state legislation, nor remedies pursuant to private litigation require that racial profiling data be made public. Additionally, all three of the mechanisms discussed above fail in significant ways to include outside actors in the decision-making process. If police departments can be made more responsive, the question is: Responsive to whom?

Police may have embraced collecting detailed data about stops because they have had complete control over the circumstances of the collection and interpretation of the results. Maybe advocacy groups have not questioned data collection as a remedy because they believe that lawsuits and consent decrees allow them to retain some control over interpreting data and to ensure that police efforts are not a sham. In order for lasting change to result from these lawsuits and consent decrees, permanent institutional monitors need to be in place when they end.

Racial profiling remedies have left key constituencies without a role in the definition of policing norms. This is true, above all, of the community groups that acted as a critical catalyst in calling for an end to racial profiling. If these groups are shut out of the process, they will demand a role in defining remedies—by litigation, as in Los Angeles, or by establishing, via referendum, a civilian board to supplement the consent decree, as in Pittsburgh. Any approach at-


206. Pittsburgh's civilian complaint review board was created by referendum in 1997, though it only has the power to make recommendations to police. See
tempting to redress discriminatory policing should employ outside expertise and permit key outside actors to play a role in defining the remedy.

In explaining a more comprehensive approach to racial profiling, this Part discusses two examples of participatory reform, showing how police departments can begin to implement a more effective remedy. It will then analyze what makes participatory police reform work, examining three key elements of successful remedies: 1) information gathering; 2) institutional problem solving based on reflection upon, and assimilation of, collected data; and 3) partnership with outside participants.

A. Participatory Reform: A Look at Two Police Departments

After making information public, police must take more steps to include outside groups in the long-term project to solve police problems. Several police departments have moved towards a model of interpreting data and problem solving that stresses collaboration with experts, researchers, service-providers, and community groups. These projects show how police and the community can sustain a long-term commitment to work together and how remedies can be institutionalized. They also indicate a trend in the evolution of racial profiling remedies.

One recent project in Philadelphia demonstrates how community groups can rapidly become involved in interpreting data, designing how it is collected, and contributing to police department efforts to respond to problems and identify new ones. In 1999, the Philadelphia Inquirer uncovered a twenty-year practice by which the city police were "dump[ing]" reported sex crimes. Police either failed to investigate crimes at all, investigated them poorly, or

Voreacos, supra note 188, at A1.

207. This description was supplemented by a telephone interview with Carol Tracy, Executive Director of the Women’s Law Project, Philadelphia, Pa. (Oct. 19, 2000) [hereinafter Tracy Interview].

208. Mark Fazlollah et al., In Council, Questions on Rape Cases: Some Members Want to Know Why Many Assaults Were Not Investigated. Public Hearings Are Likely, Phila. Inquirer, Oct. 22, 1999, at A1 (describing how the city council proposed hearings on how thousands of sexual assault cases were not reported and how groups pushed for public review and monitoring of the police. Carol E. Tracy, Executive Director of the Women’s Law Project, called for "lots of sunshine.").
downgraded their seriousness by reporting them as lesser or non-criminal offenses. Reports indicated a pervasive attitude of blaming victims and an unwillingness to find their stories credible and worth pursuing. City Council hearings were held, and the new police commissioner, John Timoney, assigned forty-five detectives to look at over two thousand closed sexual assault cases, including hundreds of rapes, that dated back to 1995.209

In the midst of this unfolding scandal, the Commissioner did something dramatic—he invited women's and domestic violence groups in Philadelphia to form a special task force with police to review all relevant police files and help to decide if cases should be reopened. The police courageously admitted that they could not solve a problem without outside expertise and the credibility which those community groups would bring. This was a first—permitting outside groups to review police records without litigation. The groups involved were the Women's Law Project, Women Organized Against Rape, the University of Pennsylvania Women's Center, and the Pennsylvania National Organization for Women (NOW) Chapter.210 As a condition to their participation, these groups agreed that they would review only closed cases, take no notes, and keep all informa-

209. Craig R. McCoy & Mark Fazlollah, Review Turns Up Hundreds of Rapes: Police Had Dismissed More Than 300 of the Cases from 1995 on, Commissioner John F. Timoney Revealed, Phila. Inquirer, June 21, 2000, at A1 (describing that of the first 1000 cases reopened over half involved serious crimes, that forty-five new detectives would be hired to continue reviewing the cases, and that investigators in the past did not report crimes because they were "blaming victims").

Notwithstanding his laudable efforts on this issue, Commissioner Timoney has been less concerned with community coalition building in other contexts. Most notoriously, Philadelphia police made mass-arrests of protestors during the Republican National Convention in 2000, many of which were later thrown out for lack of any evidence. Rather than cooperate with protesters, police adopted a hostile stance, using tactics that may have been illegal. They infiltrated groups, targeted group leaders merely for espousing social activism, sought high bail to drain group resources, and destroyed protestors' signs and written material. Linda K. Harris & Craig McCoy, City's Push for Peace at GOP Meeting Raises Rights Debate, Phil. Inquirer, Jan. 14, 2001, available at http://specials.philly.com/content/specials/gop2000/1954464883.htm.

tion confidential. They did so, as it allowed them to continue assisting people who needed advice or advocacy on open cases while preserving police investigations. The review process most often ended in agreement, with a few cases provoking dispute over police handling of the case.

The project quickly led to joint problem-solving and reinterpretation of how data is collected, as well as the incorporation of new community groups—the sorts of remedies needed to address racial profiling. Using data to ask questions about the source of original problems, advocates and the police soon found that more information and expertise were needed to address broader underlying problems. For example, they found that part of the reason that sexual assaults were characterized as lesser offenses was that Philadelphia's police code manual had either vague definitions of sexual assault or definitions inconsistent with Pennsylvania law. They began to study how codes are written and began a project of rewriting the police code manual. They also found that files were often vague or incomplete, and suggested the need for training on interviewing techniques. Furthermore, they saw that supervision in the sex crimes unit was lacking. In response, they sought data from the police department on

211. Id.
212. Id.
213. Tracy Interview, supra note 207.
214. Jennifer Brown, Philadelphia Police Open Files for Review of Shelved Sex Cases, Seattle Times, June 25, 2000, at A2 (describing the origins of collaboration and the basis for police satisfaction:

Capt. Joseph Mooney, a former internal-affairs detective leading the special-victims unit, said the outside guidance was helpful and is likely to continue. "The advocates have worked with victims and cases similar to this, so you get an insight into victims. You don't see that side of it as clearly as you would or could on the police side," Mooney said.).

The International Association of Chiefs of Police, which had sharply criticized the project as an incursion into police authority, has now reversed its position and states that bringing in outside groups can provide valuable expertise and improve community relations. "Partnership between police and these groups is in line with national and innovative thinking. You have a situation where police gain expertise and information that they might not have on their own," said John Firman, research director of the association." Id.
215. Tracy Interview, supra note 207.
216. Id.
how it responded to sex crimes.217 Interestingly, they asked the police department to have the data broken down in ways useful to the outside groups—by sex, race, and zip code.218 They hoped to see if race or class affected disposition of complaints, although given the scope of the crisis, the problems may have been systemic.219 Finally, they discovered that many of these mishandled cases involved children, and lacking expertise in the area, they brought in two children’s advocacy groups: the Support Center for Child Advocates and the Philadelphia Children’s Alliance.220

What helped this collaboration come together so quickly? The police were willing to make the initial overture to grant access to outsiders. The existence of a crisis may have helped, though police departments can just as easily close ranks when there is a scandal or crisis. The Philadelphia police have also been willing, so far at least, to enter into a partnership extending beyond the immediate problem of reviewing case files, to allow an exchange of advice and information, and actually to cooperate on problem solving. Philadelphia also has a particularly cohesive group of public interest organizations that were ready to address the issue and made a show of good faith by being willing to take the risk of foregoing litigation in favor of collaborating. The existence of cohesive and able institutions with strong ties to the community must have helped make the police commissioner’s decision much easier. Other institutions also played an important role: the city council insisted on change and held hearings, and the Philadelphia Inquirer broke the initial story and then maintained continuing press coverage.

Successful problem solving may require the right kinds of in-

217. Id.
218. Id.
219. See Brown, supra note 214, at A2 (stating that advocates want to study trends in police response.)
220. Id. The Support Center for Child Advocates provides legal assistance and social service advocacy to children in Philadelphia who are victims of abuse and neglect. See Support Center for Child Advocates, at http://www.choice-phila.org/CHLguide/6i0og9hw.htm (last visited Dec. 6, 2001). The Philadelphia Children’s Alliance provides a point of contact between an abused child and an array of private and government services. They cooperate with the Philadelphia police to arrange joint law enforcement and child protective services interviews, provide case counseling, and advocate generally on the child’s behalf. See Philadelphia Children’s Alliance, at http://www.philachildrensalliance.org (last visited Dec. 6, 2001).
stitutions, not just in the police department, but in the community as well. One fear is that partnerships cannot occur in places where, unlike in Philadelphia, community groups do not exist, are at odds with each other, or are antagonistic towards the police or other parts of the community. Such divided communities may find it especially hard to accept the legitimacy of lawsuits or decisions over which they have had no input. However, just bringing different groups together to work on a problem may also foster institutions that can cooperate with police and represent the community. Conversely, institutions can be created to encourage community-police cooperation. For example, civilian complaint review boards have been created as oversight bodies with varying degrees of success. While most are organized as internal boards, or as external monitors, some have been more independent and have collaborated with police. For example, in Phoenix, citizens have been invited to sit on use-of-force review boards as well as hiring and promotion boards, to provide input, and to inform the public.

Another concern is that public interest and legal advocacy groups may not adequately represent the community; to some degree, they are elite and removed. However, these groups have stronger ties to the community than the impact groups that now control racial profiling litigation. To some extent, the process of litigation itself creates a hierarchical relationship that distances the Justice Department and groups like the ACLU from the community. In control of litigation, disclosing negotiations only to the court at the time of settlement or decision, these groups have only periodic informational meetings with the community. In contrast, collaboration permits a greater role for the community by giving people the opportunity to participate in an ongoing process of problem-solving—one in which they receive constant information about the progress of reform efforts.


222. PERF Report, *supra* note 2, at 112.
The strongest partnerships have resulted in two-way communication between the police and community groups where police share data with community groups and invited their input. While community and advocacy groups have not traditionally shared responsibility for data collection and interpretation, this process can be collaboratively designed and implemented. Police departments can bring together representatives from the department, the community, and expert and advocacy groups to discuss ways to design data collection as well as the means to implement and improve these measures. For example, Rhode Island took this approach when it convened an interdisciplinary group of community leaders and experts to decide how to interpret statewide data on race.\(^{223}\)

Along these lines, a Chicago project in the late 1980s involved both the police and the community in a collaborative data gathering and problem-solving effort to map crime in neighborhoods.\(^{224}\) Like collecting data on complaints and race, crime mapping has normally been exclusively in the hands of police. However, residents often have very different ideas of where trouble spots exist in their neighborhoods.\(^{225}\) With better computer technology, mapping was for the first time providing a powerful tool for community members to visualize crime patterns and to evaluate police response.\(^{226}\)

Community groups in Chicago had to overcome a history of strong police resistance to providing community groups with access

\(^{223}\) See supra note 149.


\(^{225}\) See Erik Luna, Transparent Policing, 85 Iowa L. Rev. 1107, 1172-93 (2000) (describing examples of crime mapping and showing sample maps).

\(^{226}\) Id. at 1175.

These two features—conveying complex information in a simple format and inspiring police-citizen collaboration—make crime mapping an excellent medium for transparent policing. By not only opening law enforcement data to the public, but also providing them in an understandable visual format, crime mapping offers an enhanced basis for trust.

*Id.*
to police information on neighborhood crime. As in Philadelphia, there were organized community groups that worked well together—the Chicago Alliance for Neighborhood Safety (CANS) and a consortium of local neighborhood watch and crime-prevention groups. The consortium had already cooperated with police, receiving some crime reports, and had worked with six local neighborhood groups that ran block meetings and crime watch programs.

CANS analyzed the crime data, prepared the basic neighborhood maps, performed daily data entry, linked the information to the maps, and evaluated and distributed the maps to the six other neighborhood groups. They also aspired to gather data on "incivilities," or other disturbing non-criminal incidents reported by community members, which would then be mapped together with crime data and discussed in a joint meeting. Unfortunately, this did not occur.

One of the great successes of the project was learning from the two-way exchange of information. Community input provided crime maps that showed trends and compared data in ways the police had never thought of before, pointing to a more comprehensive approach:

In one instance, the police thought that residents' fear of crime had overcome their objectivity and that their alleging that one busy corner was especially dangerous (particularly on weekends) was a clear error. But long-term data for the area, which community analysts were able to provide, and calls-for-service data, which were added to the mapped analysis, verified the accuracy of the residents' perceptions; relying on crime statistics alone gave a misleading picture.

227. Maltz et al., supra note 224, at 16-17 (describing stormy background of "mutual suspicion" causing police to initially refuse to provide community groups with neighborhood 24-hour activity reports, though the same reports were provided to news agencies, universities and "some favored community organizations").

228. Id. at 19 (stating that the project was only in District 25, with a population of 167,000).

229. Id. at 14, 30-31, 131.

230. Id. at 112.

231. Id. at 227.

232. Id. at 112.
of the corner's problems. This experience resulted in a vigorous response by the district commander, and each party's respect for the other was solidified.233

Identification of hot spots, in meetings that presented crime maps and gathered data to make a case to the police, resulted in successful crime prevention.234 Both the police and the community found they had a great deal to learn from each other. The researchers emphasized that any information system must be designed in collaboration with its users.235

Institutionalizing information sharing can occur with varying degrees of cooperation. The Chicago pilot project allowed community groups to prepare maps, to make information accessible, and to use their own knowledge and maps to solicit police response to their needs. Today, with its community policing approach, the Chicago police still create maps of crime using the techniques learned in the pilot project, and they bring them to community beat meetings as a basis for discussion. Making information public seems much easier when the information is in such a useful form.

However, the community has lost its stake in the process, its ownership in producing the maps, and its ability to decide how the maps would be organized, when they will be displayed to police, and in what cases maps are inadequate.236 Making the maps public and explaining them is helpful, but without giving the community an equal stake in interpreting the maps, there is no longer the same kind of problem solving.237 Similarly, the project in Philadelphia does

233.  Id. at xii.
234.  Id. at 115–20.
235.  Id. at 50–53 (advocating user-based system development). Decentralized, user-focused systems development has been a chief source of innovation and reliability in software design, with Linux being the most famous example. For the seminal work on open-source development and theory, see Eric S. Raymond, The Cathedral and the Bazaar, at http://www.tuxedo.org/~esr/writings/cathedral-bazaar/ (last visited Dec. 6, 2001).
236.  Telephone interview with Archon Fung, Assistant Professor of Public Policy at the John F. Kennedy School of Government (Nov. 6, 2000). Fung has carefully examined community policing in Chicago and the implications of deliberative, transparent, and accountable systems of governance. See Fung, supra note 14.
237.  San Diego provides detailed interactive crime maps, updated monthly, accessible by crime and by neighborhood on the Internet. Although they emphasize a community policing approach, they do not involve community groups in
not yet involve neighborhood groups, nor is collaboration on interpreting data formalized yet; hopefully the police will allow the external review to continue.

B. Creating Problem Oriented Partnerships

The examples provided by Chicago and Philadelphia suggest how police can institutionalize a problem-oriented approach that incorporates information gathering and analysis. Neither deals specifically with racial profiling, but the same kind of approach can apply in any problem solving effort. The prior section argues that this approach is particularly suited to dealing with problems of race in policing. Three features stand out: 1) police departments took the initial step of setting up a system of information gathering and making public the results; 2) they began an ongoing process of reflection, questioning, and problem solving based on that information; 3) they opened participation to outside groups that assisted in problem solving, lent support to the effort, helped rearticulate the process of information gathering, and even raised new problems.

1. Information Gathering

"Information is the lifeblood of the police."

Information is used to determine how to allocate patrol resources among districts and among beats within districts, when and where to patrol, who the likely suspects of a crime are, which offenses are likely to be solved, and in general how to serve and protect the community. For the most part, this information is provided to the police from community residents.

238. For a description of this approach, see Susan Sturm & Brandon Garrett, Moving Beyond Racial Profiling in New Jersey, Phila. Inquirer, Dec. 4, 2000, at A15.

239. Maltz et al., supra note 224, at 12. Maltz adds that

[information] is used to determine how to allocate patrol resources among districts and among beats within districts, when and where to patrol, who the likely suspects of a crime are, which offenses are likely to be solved, and in general how to serve and protect the community. For the most part, this information is provided to the police from community residents.

Id.

240. Former Police Commissioner William Bratton hails Compstat as the
use the same problem-solving and information systems to improve their services and to monitor themselves.\textsuperscript{241} 

Racial profiling, itself defined through statistics, has led to a new expansion of police information gathering. Laws passed and remedies in consent decrees have encouraged police to take advantage of technology in order to modernize their approach to routine traffic stops. One example of the revolutionary possibilities information technology can provide to communities is a website maintained by the state of North Carolina. The website allows one to backbone of their quality-of-life policing problem solving strategy, embodying “an organizational method both for holding precinct commanders accountable and for developing anti-crime tactics . . . .” George L. Kelling & William J. Bratton, Declining Crime Rates: Insiders’ Views of the New York City Story, 88 J. Crim. L. & Criminology 1217, 1227 (1998). For a description of how Compstat works and the problems with its exclusive focus on tracking crime and arrests, see W. Reese Davis & Bruce D. Johnson, Criminal Justice Contacts of Users and Sellers of Hard Drugs in Harlem, 63 Alb. L. Rev. 877, 880–83 (2000); Jenny Berrien & Christopher Winship, Lessons Learned from Boston’s Police-Community Collaboration, Fed. Probation, Dec. 1999, at 25, 32 (criticizing the way that Compstat is applied in New York versus Boston, where the approach is community-focused: “Computer-based technology, aggressive initiatives, and preventive tactics are all important. However, if the community is at odds with local law enforcement agencies, these innovations will be less likely to bring about long-term improvement.”).

241. New York’s new Police Commissioner Bernard B. Kerik intends to do exactly that, to use Compstat-like data to evaluate police ability to meet community needs. William K. Rashbaum, Broad Plan Aims to Improve Police Rapport with Public, N.Y. Times, Jan. 15, 2001, at A1. Kerik intends to have an outside consumer expert design a survey to evaluate community satisfaction and to have precinct commanders report on their progress in meeting neighborhood issues, providing incentives to officers that attend to their communities. The survey “would be a tool similar to the department’s vaunted Compstat process, in which weekly crime statistics are used to measure the performance of police supervisors.” Id. Precinct commanders must also now attend precinct community council meetings and “must also hold a monthly meeting with local clergy members and attend a monthly meeting organized by their local community board’s district manager, which is held to review city services.” Id. at B5. The commanders must file reports on problems raised at the meeting and what actions were taken in response. Invoking the language of partnership, the Commissioner called this a new “working relationship” with the community, and Michael E. Clark, of the Citizens Committee for New York City, “said the groups he works with would welcome more regular input into how the department polices their neighborhoods. ‘Our hope would be that this doesn’t just involve measuring how many times people attend meetings, but how many crime problems get solved in partnership with the community.’” Id.
select a police department and view statistics each month, broken down by race, sex, age and ethnicity, initial reason for stop, basis for search, and what enforcement action was taken.\textsuperscript{242}

The most critical aspect of the data collection is that its results be disclosed. This should be the goal of any initial remedy. Disclosing data from early warning systems would create a dramatic change in community access to policing information. It could give communities access for the first time to in-depth information about how police work in their neighborhoods. Thus, residents would find it easier to show that a department is deliberately ignoring the abuses of ‗problem‘ officers.

More importantly, making information public allows police to announce their policies and goals, and build the trust of the public by allowing them to assess the success of a policy. Thus, public information helps police accomplish key law enforcement goals. "\textit{[T]ransparency requires not only visibility of policy choices but a publicly declared rationale for these decisions. Requiring government to announce both positive action and normative justification acknowledges the human desire to assess the bona fides of public officials.}\textsuperscript{243}\textit{ Transparency of government action also provides stronger democratic legitimacy. }\textit{[T]ransparency is a prerequisite of legitimate, democratic government. Nowhere is this mandate more important—in terms of rights, interests, and costs—than in the criminal justice system.}\textsuperscript{244}"

Despite the benefits, police have strongly resisted sunlight, so much so that they have even resisted sharing information with other law enforcement organizations. Police have historically resisted any attempt at civilian review and public access.\textsuperscript{245} This distrust of the public leads to insularity. Further, a police culture of silence can then take on an institutional life of its own. Thus, although police departments increasingly applaud data collection requirements, they adopt tepid forms of data collection. If they eventually acquiesce to the consent decrees and state laws, it is only because the information is kept out of the public eye.

\begin{itemize}
\item \textsuperscript{242} North Carolina Traffic Stop Statistics, \textit{supra} note 138.
\item \textsuperscript{243} Luna, \textit{supra} note 225, at 1164.
\item \textsuperscript{244} \textit{Id.} at 1166.
\item \textsuperscript{245} See \textit{supra} notes 124 and 221.
\end{itemize}
Police may fear liability from data, though such concerns seem unwarranted. After all, if plaintiffs decide to sue, they can obtain data through discovery even if none has yet been collected. Racial profiling lawsuits have only required data collection as a remedy. Any individual damages are premised on the harm caused by use of force and unreasonable searches; no damages have been awarded for the purely stigmatic harm caused by being part of a statistical pattern of disparate stops. Concerns about liability or access to privileged information could be easily avoided by having a monitor decide which data could safely be made public, perhaps aggregating data by neighborhood without names of officers. The New Jersey Decree and the Rhode Island state law both require release of aggregate information.

Police also justifiably fear releasing data that might be misunderstood or seized upon by opponents. They worry that if information is made public, advocates will exaggerate this data to make it appear that they are 'racists.' Given that such data is often released into such highly charged situations, it stands to reason that its interpretation will be in dispute. On the one hand, police departments are very quick to declare that the data proves that they do not engage in racial profiling, despite deep-seated community feelings to the contrary. On the other hand, advocates often latch on to incomplete data given their limited access.

In order to defuse this conflict, departments should release enough information to be meaningful to communities, broken down by neighborhood, and compared with relevant demographic information. Police can release the information in different ways depending on the audience. Aggregate information may be of interest to groups addressing systemic problems, while more specific information will prove critical to individuals, victims, and their advocates. Public information will make police information gathering less suspect, but

246. For example, the Los Angeles Decree makes public reports quarterly, including aggregate statistics. The independent monitor, however, has unfettered access to all non-public police records, which, in turn, can be used to inform this office's public reports. See Los Angeles Decree, supra note 162, ¶¶ 163-68, 173. The monitor can also petition the court for access to 'sensitive data' in open criminal investigation files. Id. ¶ 170.


248. See supra notes 143-45 and accompanying text.
only if the information released is comprehensive.

Collecting highly personal information during stops also presents a civil liberties threat that justifies public scrutiny of the information.\(^\text{249}\) While police departments may resent requirements that they collect data, these new databases give police access to an unprecedented amount of information about the people with whom they come into contact. Two of the consent decrees permit officers to ask for personal information even though these requests may serve to intimidate people and may be of dubious value in reforming policing. The New Jersey Decree asks that police collect license plate numbers and dates of birth of those stopped, and that they videotape or tape record the stops.\(^\text{250}\) The Steubenville Decree mandates collection of the names and contact information for those stopped, as well as for witnesses.\(^\text{251}\)

Personal information itself should not be made public. For example, the names of officers or of people stopped should be withheld, with detailed figures from databases being made public. The hope of the decrees is that increased police accountability will minimize opportunities for abuse. However, the threat of misuse of so

\[\text{249. See Livingston, supra note 7, at 854–55.}\]

\[\text{These provisions are not dramatically different from record keeping requirements in some other departments; whatever civil liberties costs are attendant upon the maintenance of such records, moreover, will presumably be more than offset by the records' value in constraining police illegality. The example nevertheless points to the fact that police activities—even those directed at the control of police abuse—impact on citizens' lives in many ways that can be vitally important, but that often go unremarked and unregulated by positive law.}\]

\[\text{Id.}\]

\[\text{250. New Jersey Decree, supra note 37, ¶ 29, 34. Police are often happy that racial profiling controversy has given them funds to outfit patrol cars with video-cameras that they hope will be used to vindicate them when complaints are made or when evidence needs to be introduced in prosecutions. Brendan Miniter, Video Vindication, Am. Enterprise, Sept. 2000, at 7.}\]

\[\text{251. Steubenville Decree, supra note 162, ¶ 24. See also Brian Bakst, Criminal Profiling Program Criticized: Minneapolis Police Say Computer Software Helps Them Target Problem Areas. Others Say Officers Have Become Too Aggressive, L.A. Times, Feb 5, 2000, at A12 (following the New York model, Minneapolis uses computer databases not to monitor police, but instead to identify and target “problem” neighborhoods for aggressive street tactics combating “quality of life” offenses).}\]
much personal information justifies some accountability to the public, especially where it originally sought this information to prevent, and not further compound, police abuse.

One way to disclose very specific information, without compromising the police or public, is to ensure that officers provide badge numbers when they make stops, so that citizens can follow up on complaints. The New Jersey Decree provides that, "The State Police shall require all state troopers to provide their name and identification number to any civilian who requests it." Making badge numbers clearly visible also reassures people during a stop that they have some recourse. Even better, the new Colorado law requires police to give those stopped business cards to explain how to file a complaint. Recording or videotaping stops also provides a more comprehensive public record. Ultimately, the effectiveness of this information depends on whether a real review follows a civilian complaint, and whether police also publicize how to make a complaint.

Not only will data transform the relationship between police and the public, it will transform internal relationships within the department. The examples above show how information systems can help organizations abandon habits and traditional assumptions in order to become more effective. Information makes general police policies and the specific actions of officers more transparent to the community and to problem-solvers within the department. Moreover, information can spearhead a new, more open approach to organizational change; Malcolm Sparrow describes a "new philosophy of information management" where agencies broadly share data, embrace public access, and encourage cross-analysis and integration of different kinds of data.

252. New Jersey Decree, supra note 37, ¶ 57.
254. New Jersey Decree, supra note 37, ¶¶ 58–60 (describing requirements that New Jersey State Police disclose information about complaint and police procedures, and provide convenient access to complaint forms).
255. On the advantages and challenges of information systems, see Sparrow, supra note 14, at 108–11.
256. Id. at 119 (describing the Environmental Protection Agency's new approach).
In designing information gathering systems, departments should begin with a comprehensive approach. Consent decrees and lawsuits have sought to broaden the data set, including information about the use of force, neighborhood, and time of day, in order to capture the quality of the stop and not just its rationale or racial focus. Unlike those mandated by state legislation, questionnaires must avoid becoming simplistic litmus tests. On the other hand, if they are too complicated, police, feeling burdened, will be less likely to fill them out. As discussed earlier, data must also be made public so that the process is transparent. The data should not just be released in the aggregate, but also by neighborhood, so that communities know how policing affects them specifically. Further, information must be organized in an accessible database, so that data can be assembled or analyzed easily. Finally, and critical to the legitimacy of the project, the data must be compared against control groups, such as driving populations or demographic samplings of neighborhood street traffic. Internal comparisons, against data from other pa-

257. Id. at 102–03 (describing the pitfalls of investing in an inflexible system of information management). Sparrow describes how the Houston, Texas police invested in a computer dispatch system only to find after a few years that the system could not accommodate neighborhood policing values, like assigning the same officers to calls in an area, saving more information about calls, or allowing discretion in assignments. Id. For a comprehensive description of data elements that should be included, see PERF Report, supra note 2, at 126–28.

258. An additional pitfall would be to make forms too easy to use, so that police simply check off reasons for a stop. Write-in blanks force officers to articulate specific reasons for a stop. On the other hand, blank spaces also require more time and effort, and text is more subtle to interpret and less easy to manage in a database. For examples of well-designed forms, see Ramirez et al., supra note 2. The authors provide a description of several data collection programs and their successes and failures, which are intended as a blueprint for designing data collection systems. See id. app. I for examples of forms used in different states.

259. See, e.g., supra note 57.

trol units, should also be done.\textsuperscript{261}

The way that police gather information will also be critical. First, data collection design efforts will necessarily transform how stops, searches, and arrests are conducted. Second, data collection itself sends a strong message of concern and accountability to the community, indicating that racial disparity is being watched and is not tolerated. For example, data collection can send a negative message if police gather information in an intrusive way, leading to perceptions of racial profiling or unfair singling-out. Citizens also may be suspicious of police asking too many personal questions, such as where they live. Such concerns may themselves be diffused by providing an explanation for the stop at the time it occurs, or by apologizing for its inconvenience.\textsuperscript{262} Further, if police fill out a stop questionnaire in front of the citizen, it may diminish any outrage over the encounter.\textsuperscript{263} The citizen knows that the stop is documented, that its rationale is being recorded, and that she can check the identity of the officer. However, if the form is filled out after the fact without any questions being asked, then the citizen may be less likely to trust in the reporting.

Alternatively, perhaps citizens should be asked to enter information about stops into a database after the fact, so that officers are not the only ones recording the data.\textsuperscript{264} If police rarely fill out forms,\textsuperscript{261} The PERF Report evaluates different kinds of control group data and controlled survey data that can be used; the report recommends the use of sampling, recognizing that more cost-effective methods are needed. PERF Report, supra note 2, at 137-42. See also supra note 148 and infra note 264 (on use of samples as controls in New Jersey).

\textsuperscript{262} New York's Police Commissioner unveiled a new stop and frisk policy aimed to improve community relations, asking police to explain the reason for the stop. Marzulli, supra note 260, at 2. (Commissioner Kerik said, "I honestly believe that it makes a big difference when an officer tells you why you were stopped .... I think it will take the level of confrontation down by 50%.") Id. (quoting Commissioner Kerik). Kerik has even ordered officers to "play the radioed description of a suspect for someone questioned for resembling the description." Amy Waldman & Michael Cooper, Where Badge is Seen, Views Vary, N.Y. Times, July 24, 2001, at B1. However, "[m]ost people stopped recently said officers had not done that." Id. at B6.

\textsuperscript{263} Rhode Island has chosen to have officers fill out cards after the fact; "the data collection is intended to be invisible to the motorist." Landis, supra note 139, at A08.

\textsuperscript{264} Control group surveys can be used separately, as in New Jersey, where drivers are asked their race at toll booths to provide a sample of the driving
or citizens never witness officers performing this duty, then any statistics will be suspect. All of these decisions reflect strongly on how the citizen and officer interact, and all depend on the values and concerns of the police department and the community. Any protocol or policy for conducting stops, searches, and arrests should come to reflect the decisions that were made in the data collection design process.265

Police perceptions and concerns will also prove important in deciding how to collect information. Police are trained as expert observers and should be involved in the process of designing a system that takes maximum advantage of their skills.266 Sparrow emphasizes the importance of tapping into the ‘local knowledge’ of officers on the beat.267 Information collection systems must give officers a convenient way to submit information, but also an opportunity to raise problems and concerns. For example, consent decrees have allocated money to provide officers with personal digital assistants to reduce paperwork and make the process easier than the old system. By doing so, this policy prevents police from viewing data collection as an imposition that they are tempted to avoid. On the other hand, if a form is too easy to fill out, police may check off boxes rather than provide a nuanced description of the stop.268 Police should also be given regular opportunities to raise problems that cannot be expressed on a form, or to offer suggestions that would prevent repeat problems on their beats.

Standards for effective information gathering will evolve, as police learn from their mistakes. The Department of Justice and state governments should help by funding research to evaluate and compare information gathering, thereby assisting police in improving population and receive five dollars for their trouble. Diamond, supra note 57, at A1.

265. For a model policy on conducting stops, see PERF Report, supra note 2, at 51–53.

266. See id. at 27 (describing the one-letter codes that are used in San Jose to make entering descriptions of stops easier). Letters stand for races, reasons for stops, and outcome of stops. Their system costs under $10,000, including software, training, and materials. Id. at 28. Obtaining police union support was also necessary to ensure that officers complied with the program. Id. at 29.

267. Sparrow, supra note 14, at 125.

268. See Marzulli, supra note 260 (quoting Norman Siegel of the New York Civil Liberties Union fearing that the NYPD’s new form might be too convenient and facilitate officers’ justifying improper searches after the fact).
their efforts. Police departments will also have to recruit new

269. See Ramirez et al., supra note 2, at 56 (suggesting a Best Practices Guide, funded by the DOJ, as well as assistance in developing benchmarks to compare statistics on race, with recognition and rewards granted to especially successful programs). State attorneys-general, or other agencies with closer ties to local police may be better able to conduct such benchmarking and comparison. The Rhode Island statute creates such an advisory commission. See supra note 149 and accompanying text. Such benchmarking provides an avenue for encouraging problem solving and experimentation. See Dorf & Sabel, supra note 14, at 329–32; James Liebman & Charles Sabel, A Public Laboratory Dewey Barely Imagined: The Emerging Model of Public School Governance and Legal Reform (unpublished paper) (arguing that the concomitant use of educational standards and flexible administrative structures have led to innovation and improvement in several state school systems), at http://www.law.columbia/sabel/papers/dewey-lab4.doc (last visited Dec. 6, 2001).

The Justice Department could tie funds to compliance with such benchmarks, creating a national scheme to remedy racial profiling. Alternatively, the Department could issue guidelines immunizing police who comply from suit under § 14141. Representative John Conyers has proposed such a scheme. Law Enforcement Trust and Integrity Act of 1999, H.R. 2656, 106th Cong., § 201, § 601 (1999) (calling on the Commission on Accreditation of Law Enforcement Agencies (CALEA) to promulgate rolling standards, including “early warning programs, civil review procedures, traffic stop documentation, and procedures and administrative due process requirements” and directing the Justice Department to deny funds to noncompliant departments or to grant funds to exemplary departments). The Department of Justice could withhold federal funding from departments that do not comply with benchmarks. Title VI suggests such an approach, barring disparate impact discrimination by recipients of federal funds. Civil Rights Act of 1964, tit. VI, § 601, 42 U.S.C.A. § 2000d (1994) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Id. at § 2000d-1. Considerable funds are tied to Title VI compliance. The Bureau of Justice Assistance at the Justice Department distributes block grant money and other funds allocated by statute to state and local police departments. For example, New York City receives over $30 million a year. New York Receives
analysts, expert in interpreting data and in asking questions about what new kinds of information would be helpful.270

2. Institutionalizing Problem Solving

The great hope of the consent decrees design does not lie in setting up a computer system, but instead that by doing so, police will develop expertise in using information to question their practices and engage in ongoing problem solving. Commentators have termed this approach "problem-oriented" policing.271 Under this approach, police become skeptics and form the habit of asking why problems occur, what larger social conditions contribute to the problem, and who can help assist in solving the problem.272 Police identify systemic issues and become willing to make systemic changes. Along these lines, the Justice Department's hope is that the information structure of the consent decrees will help to create a cadre of supervisors that will maintain capacity for reflection.

Creating a cadre of problem solvers poses unique issues in a traditionally hierarchical institution not used to tolerating, much less fostering, internal debate and questioning. For example, a traditional response to the racial profiling problem might be to merely issue a police regulation requiring or suggesting that officers follow the Fourth Amendment and not rely predominantly on race. This would not be a reflective solution, though lawsuits and consent decrees have begun by asking for such a policy as a starting point to begin problem

$30.3 Million to Improve Public Safety, PR Newswire, June 3, 1999.

The Commission on Accreditation plans to release a policy on racial profiling following a report in March, with standards that will be binding on the thousands of police departments that choose to become members of the Commission. See Residents Share Racial Profiling Stories, Herald (Rock Hill, SC), Jan. 25, 2001, at 3B. Hopefully, the Commission can serve a role in propagating expertise on monitoring and remedying racial profiling.

270. Sparrow, supra note 14, at 114.
271. See supra note 17.
The process must proceed by asking profound questions about why officers rely on race, under what circumstances they do so, what incentives help shape their behavior, how to train them better, what law enforcement goals they are trying to accomplish by making stops the way they do, and whether the goals are themselves appropriate.

Police departments, paralyzed by accusations of racial profiling, often manifest organizational inflexibility or inability to respond to problems in order to change traditional ways of policing. They also possess insularity, an inability to reach out to others who might be able to assist them in understanding the problem. Admitting mistakes can be difficult for police; "The police culture makes it tough to be honest about operational failures. The traditional belief is that failures can only result from officers ignoring or forgetting the correct procedures." Rather than blaming officers, the procedures themselves may need to be reconsidered. Thus, problem solving will require sustained efforts to change the organizational sub-culture and break down rigid attitudes, such as the 'blue wall of silence.'

This problem solving process must be ongoing, and will require a change in attitude on the part of police.

Rather than teach officers to follow procedures set in stone,

273. Adero S. Jernigan, Driving While Black: Racial Profiling in America, 24 Law & Psychol. Rev. 127, 137 (2000) ("Police rulemaking makes for better police decisions, if only for the reason that it focuses the department on policy-making and on the implications to the community of the police practices being regulated, at the departmental level.").

274. See supra note 43 (discussing the silence of New Jersey officials for over ten years, regarding disproportionate stops of minorities).

275. Sparrow, supra note 14, at 47.

276. See Fagan & Davies, supra note 35, at 500 ("Although the empirical literature on police 'subculture' offers inconsistent evidence of generalizable attitudes and beliefs, several studies show that the dynamics and structure of the police workplace may work to reinforce social (behavioral) norms, perceptions, and beliefs."). On police reluctance to speak out about corruption or abuse, see Ariza v. City of New York, No. CV-93-5287, 1996 WL 118535, at *3 (E.D.N.Y. Mar. 7, 1996) (stating that the "blue wall of silence" serves to "shield corrupt officers and discourage honest police officers from reporting . . . corruption"). See generally Gabriel J. Chin & Scott C. Wells, The 'Blue Wall of Silence' as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. Pitt. L. Rev. 233 (1998) (describing the effect of the 'blue wall of silence' on police testimony in criminal prosecutions and proposing that courts recognize the existence of the problem as impeachment evidence).
police must be encouraged to experiment with policy change and to respond rapidly to new information. While many police departments are beginning to do this with new technology, this work is usually limited to supervisors. Police officers are not encouraged to be creative; they are taught to follow rules and orders, not to think about them. Individual officers should be encouraged to use their skills and knowledge to address problems and should be rewarded for doing so. In part, innovation and change may itself begin to unsettle hierarchy and traditional ways of making decisions; police will be forced to confront and question data that is collected, which may help lead to more long term strategic thinking. As the crime-fighting advantages of flexible, rapid response become apparent, these reforms may take hold more quickly.

Instead of taking orders, police must become used to open-forum debate and deliberation. Police use of standing committees or project-based work teams will, in effect, flatten the police hierarchy and lead to more flexible definitions of people’s jobs, so that officers can question supervisors. As one commentator noted, “[R]igid supervisory control should give way to a more respectful, more collegial, more participative style of management.” These kinds of changes may engender resentment and fierce opposition from police unions in particular, as reforms may undermine hard-won work rules by threatening the seniority system, offering rewards for creativity and problem solving, requiring flexibility and ambiguity in job descriptions, and broadening the police mission to include community needs. Thus, any reform effort along these lines must involve unions in the planning process and make clear that officers will be given more responsibility, at the same time that they will be able to develop their skills and contribute more than ever before.

If departments learn to institutionalize responsiveness to the information that they gather, they will prove more able to adapt to

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277. See, e.g., New Jersey Decree, supra note 37, ¶¶ 35–39, entitled “Supervisory Review of Individual Reports and Incidents.”
278. Sparrow, supra note 14, at 76 (describing how to best foster creativity and innovation).
279. Id. at 153.
280. Id.
281. Id. at 154 (“If left out and allowed only to pick up disconnected snippets of the plan, [the union’s] legitimate efforts to defend members’ job security could torpedo efforts aimed at empowerment.”).
problems like racial profiling. Measuring the effectiveness of policies is not easy and requires asking questions about what the goals of policing should be. By focusing on effectiveness, police will be able to assess policies and ask whether discretionary stops lead to sufficient arrests, seizures, or other benefits to the community so as to justify the harm that such discretion may cause. Indeed, evidence increasingly shows that police should consider alternatives to deterrence-oriented policing—in which officers engage in large numbers of pretextual stops—because, rather than leading to less crime, or more arrests or seizures, these methods instead lead to shoddy police work that requires prosecutors and judges to dismiss more cases.

The information gathering techniques described suggest a new model for problem-oriented policing. While problem-oriented police departments have engaged in some of these practices, they have only engaged community groups informally and have shared limited information when they desired to do so. Even though community policing has become a mantra adopted by most police departments, few actively engage the community, and even when

282. See Ramirez et al., supra note 2, at 55.

Historically, the police have defined their purpose as regulatory: ensuring the greatest possible order. Their task was reactive and involved responding to obvious signs of disorder, such as emergency calls. Realizing the profound limitations of this model, the community policing strategy began to use information, technology, research and data in order to engage in more effective and better managed policing by anticipating and disrupting the causes of disorder. Nationwide, police departments have begun using information and technology to measure and identify crime clusters and develop strategies to intervene and disrupt violent crime before it occurs.

Id.

283. See Fagan & Davies, supra note 35, at 476–77 (describing results of the New York Attorney General's Report, showing vast increases in misdemeanor arrests due to quality of life policing, but a 60% increase in cases dismissed). The debate over whether New York style policing was responsible for the crime drop is hotly contested, but there are strong indications that policing practices were not the cause. See Fagan, supra note 52, at 1285–86, 1289–91 (arguing that changes in crime rates are caused by predictable cyclical changes in violence rates, and that the only non-cyclical change has been in gun crime rates); Andrew Karmen, New York Murder Mystery: The True Story Behind the Crime Crash of the 1990s, at 13–24 (2000) (finding insufficient evidence to support any single causal explanation for the decline in New York City's homicide rate from 1991–98).
they do, community policing has generally occurred on the police's terms and without full disclosure of information to participants.\textsuperscript{284} Creating new information systems allows outsiders to help evaluate the success of police work in a systematic way. Combining information sharing and pooling with problem-oriented policing, as in the examples described, can itself institutionalize problem solving.\textsuperscript{285}

Future remedies should move beyond both the consent decrees and old models for problem-oriented policing by combining problem solving with information gathering. They should create incentives for problem-oriented policing by encouraging supervisors to spend time evaluating information and questioning practices in a regular forum. This kind of change is feasible. Something as simple as weekly meetings to discuss data and suggest responses could suffice. Establishing a standing commission to give this body some permanence and an institutional place within the police department would also help. Police also could be given the message that attending the meetings and making helpful suggestions on how to address problems suggested by the data will be considered for promotions. Openness of leadership and continuing support will be critical to maintain problem solving.

\textsuperscript{284} More than two-thirds of police departments describe themselves as community policing institutions. Bureau of Just. Stats., U.S. Dept of Just., Law Enforcement Management and Administrative Statistics, 1997: Data For Individual State and Local Agencies with 100 or More Officers v (1999) (stating that 63% of larger county police departments and 61% of larger municipal departments say they have written community policing plans). Actual implementation varies widely, however. \textit{See} Waldeck, \textit{supra} note 17, at 1255. Waldeck adds, "In the vast majority of police departments across the country ... [r]elationships with the community are valued primarily because they ease the task of maintaining law and order—not because a department views itself as a community-rooted, service-oriented organization." \textit{Id.} at 1299–1300.

\textsuperscript{285} \textit{See} Dorf & Sabel, \textit{supra} note 14, at 331–32 ("Viewed through the lens of democratic experimentalism, the very recent project of Chicago community policing reforms is therefore promising but incomplete. Though the fundamental elements of experimentalism are in place, the essential institutional machinery of benchmarking discipline has yet to be installed."). The projects discussed in this Article, which do make public information available and bring in outsiders to evaluate, come closer to this goal, and while I view participation as more critical than benchmarking, more systematic comparison and benchmarking could be included as part of the remedy. \textit{See} \textit{supra} note 269 (discussing benchmarking).
3. Partnership

Participation by key actors in the community has proved critical to successful problem-oriented policing efforts. Where police have reached out to solve quality of life problems by working with schools, landlords, neighborhood watch groups, businesses, and others, the results have been positive. As Susan Sturm describes, "more interactive forms of participation are both possible and crucial to achieving remedial legitimacy and success." Participation provides police with information and expertise, and helps build relationships and support for their initiatives. Moreover, considerable research suggests that, in general, high quality problem solving and analysis results from participation of people with diverse backgrounds. As the recent Police Executive Research Forum (PERF) report notes, "participation preserves the identity and expertise of the police, outside groups, and the community, and compromises none. Partnership can be contrasted then with community control where precincts would be divided by neighborhood and subject to strong local political control. See Samuel Walker, The Police in America 273 (1999) ("A radical form of controlling the police through the political process is known as community control. Under this concept, a municipal police department would be divided into separate agencies according to neighborhood, each with its own board of commissioners.")." Research suggests that diversity is an independent
report states, since "conducting analysis wholly internal to the agency can make the results appear suspect," not only should outside analysts be employed, but "[c]itizens ... should be represented in developing and implementing the data collection and analysis system." 290

Participation can begin with a simple invitation to join in problem-solving efforts. Both the Chicago and Philadelphia examples show how despite a history of mistrust between community groups and the police, extending a simple but genuine invitation to work on the problem was enough to begin a meaningful relationship. Police-community meetings have often led to serious efforts to remedy racial profiling. 291 Next, institutionalizing participation, so that regular opportunities exist for police to interact with others, formalizes the relationship and gives outside actors assurance that they will not be shut out, abandoned, or blamed for failures. This can be achieved by convening a committee, as in Philadelphia, on which experts from interested groups are invited to collaborate in solving a problem, not just to serve as outside monitors. 292 Bringing outside groups into the decision-making process also avoids the problems that plague external monitors; excluded from police culture, these actors have been dismissed as out of touch or lacking a stake in the outcome or real access to police information. 293

value in generating creative solutions to problems. This aspect of diversity focuses on the interactive dynamic among individuals with different vantage points, skills, or values. Studies have shown that work-team heterogeneity promotes more critical strategic analysis, creativity, innovation, and high-quality decisions.

Id. at 1024.

290. PERF Report, supra note 2, at 142-44. Though they do not strongly endorse intimate police-citizen collaboration, the recommendation is noteworthy, and will hopefully influence its intended audience, police departments trying to decide how to approach the racial profiling problem.

291. Id. at 112-13 (describing efforts stemming from meetings in Denver, Colorado and Spokane, Washington).

292. In another example, Tacoma, Washington recently responded to a study indicating racial disparity in police stops by convening a task force including civil rights groups and community members. Stacey Burns, Tacoma Police Review Tickets; Racial Profiling? Department Checks if Breakout Signifies Problem, News Trib. (Tacoma), Jan. 9, 2001, at A1. The task force was convened to solicit input from community members, analyze the survey data, and make recommendations to the police. Id.

293. See Livingston, supra note 17, at 666 ("Monitoring mechanisms,
Alternatively, police can identify the fora in which they already have regular contact with outside groups or the community. Beat meetings, cop watch programs, and even city council meetings could be used as initial ways to disclose data and invite public discussion about a problem. Once there is some dialogue, police can then invite closer participation of interested groups in the actual problem-solving effort.

Information gathering distinguishes this approach from past attempts to start discussion about race and policing. Simply convening a group with a vague mission to discuss race, or the problem of racial profiling, might degenerate into a shouting match. While dialogue alone may help create trust, this lack of definition may be a failing of efforts to hold discussion forums, community meetings, or initial attempts to solicit feedback. The key to formalizing the relationship is that all sides have a project to work on—designing procedures for data collection, developing protocols for stops and the use of race in these encounters, interpreting the information, and reevaluating the procedures.

Data collection, if nothing else, gives everyone something discrete to work with and evaluate. One criticism is that data collection is only a partial solution. Where departments need to rethink training, supervision, hiring, and general policies and procedures, why focus on data collection? Data collection is a point of entry into those larger efforts. By looking at the data collection process, and even deciding what to include in the form that officers fill out, groups will be forced to think about what happens during an encounter, what officers should do and say during a stop, and what elements of this interaction should be scrutinized most closely. In designing data collection, police and citizens will have a chance to evaluate their priorities and begin to think about how to approach racially biased policing. In turn, the data itself will help evaluate the success of other reforms.

Advantages of outside participation itself run in several directions. Bringing in outsiders, by its nature, introduces a new democratic element of shared decision-making in the police department itself, and thus helps break down the insular and hierarchical
processes that themselves create barriers for effective problem solving.\textsuperscript{294} As Professor Waldeck explains:

\begin{quote}
By encouraging alliances between the police and the community, the strategy breaks through the "us and them" mentality. Moreover, when the emphasis is on partnerships, aggressive and quasi-militaristic attitudes that risk alienating significant segments of the community are counterproductive. In sum, community policing has the ability to alter not only the external face of policing—with the introduction of permanent beat officers, neighborhood meetings and the like—but also the internal dynamics and values of a police department itself.\textsuperscript{295}
\end{quote}

This challenge to traditional internal decision-making processes can be viewed as a threat, and poses many of the same challenges that effective problem solving poses.

Outsiders have access to different information, and working partnerships allow everyone to 'pool' their data and expertise.\textsuperscript{296} The process of institutional reflection requires questioning, which can be better informed by others who share a commitment to a problem, but have a different perspective, or access to different information. Thus, making police information public is a precondition to any meaningful problem solving. Participation requires evaluating police information, comparing it with information groups may have, and deciding

\begin{itemize}
\item \textsuperscript{294} See Fagan & Davies, \textit{supra} note 35, at 502–03 ("The extent to which opportunities for community interaction with police are routinized and institutionalized can break down the insularity of police social norms at the top and bottom of its hierarchy.").
\item \textsuperscript{295} Waldeck, \textit{supra} note 17, at 1267–68.
\item \textsuperscript{296} See Dorf & Sabel, \textit{supra} note 14, at 327.
\end{itemize}

That there is demonstrably effective citizen participation in community policing in cities such as Chicago suggests that experimentalist institutions can serve two complementary functions. On the one hand, they act as organizational emollients, making hierarchies more fluid internally and more open to the outside. On the other, they validate local knowledge as a form of expertise by demonstrating its utility, thus fostering participation (and the learning it occasions) by those usually held incapable of it.

\textit{Id.} at 328. See also \textit{supra} notes 210–20 and accompanying text for an example of the pragmatic and democratizing effects of police involving the community in problem solving.
whether new decisions should be made.

If the controversy surrounding the way that statistics are gathered teaches us anything, it is that accuracy and completeness can only be gauged by the purpose of the data, which is value laden, requiring the input of a diverse group of outsiders. By defining the racial profiling 'problem' as a numerical disparity, only the race of those stopped would be collected and data collection would become a litmus test. The consent decrees recognize that many more complex factors are at work. As discussed above, the way stops are conducted, the way police talk, body language, cultural differences, whether force is used, and the number of people watching all affect perception about whether a stop is unjust, and those perceptions prove critical to the ways that groups define the problem. Thus, even for sound data gathering, outside groups will be needed to supply that kind of information about perceptions. Police observations about a stop are one-sided and may not capture the full problem. Day-to-day observation may help interpret data, as in the Maltz project in Chicago, and community concerns may help to improve the quality of the data and uncover new problems. Participation may also suggest new ways of collecting data and suggest new sources of information.

Second, outside expertise may be needed. Many police departments, unsure of what the law or the public requires, and facing alle-

297. See supra note 33 and accompanying text.

298. Maltz et al., supra note 224, at 21 (describing how the public's observations and the social context of incidents are critical in designing crime prevention strategies:

For example, the sex, age, identifying features, and clothing worn by an assailant may be described down to the color of his shoelaces, but the geographical and social contexts of the incident—such as the community's perception of dangerousness of the incident's location . . . and other environmental factors (e.g., the type of street lighting; the amount of traffic on the street; the location of bars, parks, abandoned buildings, etc.)—are usually not captured by the incident reporting system . . . .

299. Richard R.W. Brooks, Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities, 73 S. Cal. L. Rev. 1219, 1224 (2000) ("[E]xpanded service-oriented patrols and heightened community involvement are plausibly more consistent with the desires of minorities in high-crime neighborhoods than a policy of unleashing special tactical units (e.g., gangs, guns or drugs) with limited guidance.").
gations of racial profiling, have turned first to the community to decide how to address the problem. They have held meetings and open discussions on the problem. Outsiders also may help open up these discussions and permit a more experimental approach. In Philadelphia, legal groups used their unique perspective to question policies and to revise legal standards that the department had relied on. Furthermore, community groups, as in Chicago, may provide the data itself as well as political support. Other police departments facing similar problems may be interested in cooperating, as may other government institutions. In addition, researchers and information systems experts may prove helpful. The role of the press also proves important as many lawsuits and investigations into racial profiling began through press investigations and studies.

Police have found outside participation necessary because solving a problem requires building new relationships and enlisting the support of others. Collaboration with key actors in Philadelphia provided a coalition of support for the changes the police began to make and helped them respond to anger over past wrongs. Political legitimacy flowed from the participation of individual neighborhood police watch groups in Chicago. Part of the racial profiling problem is perception of inappropriate behavior, and police must open up dialogue with outsiders if they are to understand and allay that perception and to gauge improvement.

Trust is particularly critical where police are accused of ra-

300. See, e.g., Patricia Davis, Chief Says Arlington Fights Racial Profiling, Wash. Post, Feb. 11, 2000, at B9 (describing how Arlington County, Virginia's police chief responded to complaints about racial profiling by confronting the issue in a series of group discussions, resulting in a departmental pledge to reject tactics based on race, which in turn would be used to generate further discussion among residents); Stefano Esposito, At Hearing: Expand Collection of Racial Profiling Data, News Trib. (Tacoma), June 1, 2000, at B1 (describing a Tacoma, Washington community meeting where citizens complained that collecting data about stops was not enough, and that concrete action was required and more comprehensive data should be kept).

301. Mia Penta, Seattle Police Face $100 Million Claim, Oregonian (Portland), Aug. 31, 2000, at D2 (describing how a Seattle Times study showing dramatic disparity in traffic stops helped spark a one hundred million-dollar private lawsuit over racial profiling and promised reforms from the City). See also Jeff Brazil & Steve Berry, Color of Driver is Key to Stops in I-95 Videos, Orlando Sentinel Trib., Aug. 23, 1992, at A1 (presenting a study reviewing videotapes of police stops, showing dramatic racial disparity. The article ultimately led to an NAACP lawsuit.).
cial discrimination.\textsuperscript{302} As the Terry Court stated, "in many communities, field interrogations are a major source of friction between the police and minority groups."\textsuperscript{303} Race and police stops raise deep political issues that require political dialogue. For example, Boston police in the early 1990s used a racially charged profile when investigating a murder, causing a rift between police and the community.\textsuperscript{304} They have made great strides since then to involve the community in all decisions, making special efforts to build relationships with a Ten-Point Coalition of key community leaders.\textsuperscript{305} In 1995, crisis loomed again when a white Assistant Attorney General, Paul McLaughlin, was shot, apparently because of his work to combat gangs.\textsuperscript{306} A new murder investigation began with the use of a sparse, racially charged

\textsuperscript{302} Trust itself is an elusive concept. For a summary of literature discussing the definition of trust in the context of policing, see Luna, \textit{supra} note 225, at 1158–59 n.205. Luna summarizes the literature with the following definition:

\textquote{Trust is: (1) an expectation of (2) appropriate (3) future (4) behavior of another actor (5) in the face of risk (6) based on perceived benevolent motivations of that actor.}

\textit{Id.} Thus the notion of trust is linked to the burgeoning literature on legitimacy of government action, another source of spirited debate both in legal philosophy and the social sciences.

\textsuperscript{303} Terry v. Ohio, 392 U.S. 1, 14 n.11 (1968).

\textsuperscript{304} In 1989, police investigating the murder of Carol Stuart created a scandal when they 'blanketed' the predominantly black Mission Hill neighborhood in response to a description of a black assailant provided by her husband, Charles Hill, who was later identified as the perpetrator. Berrien & Winship, \textit{supra} note 240, at 26.

\textsuperscript{305} For example, Berrien and Winship note:

Key decision-makers in the Boston Police Department now consult Reverend Rivers and other members of the Ten-Point Coalition prior to any major police action in their neighborhood. This preemptive action has three benefits. First, the key community members feel that they are being included in major decisions and that their needs are being considered by law enforcement officials. In addition, clergy representatives have first-hand knowledge of the situations on the street that may lead law enforcement officials to redirect their approach or change their tactics. Finally, regular conversations with each other solidify relationships and build trust between the two groups.

\textit{Id.} at 29.

\textsuperscript{306} \textit{Id.}
suspect description: "black male, about 14 or 15 years old, 5 foot 7, wearing a hooded sweatshirt and baggy jeans." However, because of their new partnership, "Boston law enforcement officials and Ten-Point Coalition ministers used their response to the McLaughlin murder to solidify and publicly display their new-found cooperation." The situation was handled sensitively by all sides and has only deepened cooperation by solidifying the degree to which police and the community rely on one another to solve problems.

Cooperation can gradually foster trust of advocates and community groups. If the public is involved and understands why decisions are being made, the discussion can move beyond divisiveness to issues of how to reform training, allocation of resources, or patrol methods. Being involved in data collection may help allay a perception of discriminatory policing. For example, in the Maltz study, word of mouth would sometimes amplify one incident into a perception of a crime wave, so that collaboration reduced community fears. Trust

307. Id.

308. Id.

309. Berrien and Winship suggest that police departments cooperating with the community can "[c]hannel the power of a catalytic event." Id. at 30.

The tactics and investigative approach of Boston's law enforcement officials during this tense period showed marked differences.... Both clergy and police representatives were very sensitive to the delicate implications of a racially charged case. Police Commissioner Paul F. Evans immediately made a statement to address community fears.... The commissioner spoke on a radio station with a largely black audience soon after the murder, to emphasize the limited value of the vague assailant description, and to say that an effective investigation depended on cooperation between the police and the community. The commissioner also joined the ministers at the Ten-Point Coalition's press conference in an additional illustration of police cooperation, rather than antagonism, with the African-American community. Thus, both the ministers and law enforcement officials responded in a way that emphasized the extent of their partnership, made the cooperation public, showed the community that they worked together and that each was respected by the other. They also used media attention, which was readily available, to show that the precedent had changed in police-community interaction....

Id.

310. Maltz et al., supra note 224, at 13.
moves in two directions, so cooperation also may help police trust the community. Individual officers may abandon stereotypes once they get to know and work with community members and become more familiar with a neighborhood.311

Inviting participation seems natural where policing is no longer seen as specialized work, but instead a social service that has become part of an interlocking web of services. Police regularly cooperate with schools, social services, domestic violence advocates, legal groups, and others.312 In the past, police have violently and


If, however, as social science data suggest, police behavior may result from various types of "cues" and negative perceptions that such cues trigger, then the best place to begin changing police officers' behavior is by changing their experience with communities and individuals of color. Exposing officers to these communities in less confrontational ways may begin to broaden officers' perception of individuals within these neighborhoods.

312. "An interagency approach, permitting the application of a varied menu of sanctions and incentives, can greatly increase the effectiveness of the strategy." David M. Kennedy, Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention, 31 Val. U. L. Rev. 449, 451 (1997). All of the examples of problem-oriented policing involve multiple service providers. For one example, see Berrien & Winship, supra note 240, at 29.

Boston Police, Boston Probation, Department of Youth Services, clergy members, city Street and Youth Workers, Mass Bay Transit Authority Police, the School Department, and School Police meet weekly to share information on important developments on the street. For example, several disturbing incidents of sexual assault and harassment have occurred recently on the city's public transportation system. MBTA police and city youth workers as well as clergy brought up the importance of addressing these incidents at the weekly Bloods and Crips Initiative meetings. A task force on sexual harassment and assault was established in order to address these issues effectively. School presentations on the subject are planned in the future.

Another objective of this collaboration is to exhibit strong, supportive, and unified authority to the targeted youth. This is achieved through the participation of multiple agencies
bitterly resented civilian involvement in work that they feel only police officers can understand. However, police have increasingly found such participation useful and have granted broader access to outsiders in ways that are now starting to occur with racial profiling, often using information systems to facilitate communication. In turn, advocacy groups and experts are finding police increasingly receptive to what they have to offer, and have begun to cooperate by providing services and helping to reform police practices.

This move to wider participation and joint problem-solving reflects a shift in the structure of local government. Public-private partnerships, created to address perceived failings in social services, increasingly replace traditional city government bureaucracies. As and clergy representatives in all of the initiative's activities: school visits and presentations, home visits to youth suspected of gang involvement, regular street patrols, and a strong presence in popular "hang-out" areas during peak hours. The collaborative approach serves to notify youth of alternative options and brings them into contact with a network of resources designed to serve their specific needs.

Id.


In response to the new political realities, local government agencies have instituted forums to share information and resources among themselves; established new and innovative links with non-profit agencies, foundations, and community-based organizations; capitalized on new information technologies; and developed sets of social indicators to make their data more publicly available and understandable.

Id. Information systems are being developed to link social workers to police and prosecutors databases, in order to inform them of child abuse complaints when placing children in parent's homes. See Jane Brady, Drop in Crime Rate Bypasses Child Victims, 15 Crim. Just. 10, 12 (2000) (describing Delaware's prevention and intervention strategies to decrease the number of child victims, including the linking of information systems among government branches).

315. Martha Minow describes an explosion in new kinds of partnerships that combine business, government, and the community. These emerged, in part, out of desperation as social services funding has been cut. Hence, funding for non-profits is increasingly dependent on government funding, or on collaboration with
more community groups provide services in cooperation with government and others, they blur the lines between the government and community. Structural reform remedies can benefit from these new partnerships that are developed precisely because neither community groups nor government think that they can solve the problems alone. Some groups have done innovative work to change the nature of the services delivered, combining social services and providing health, housing and legal help under one roof. While blending private and public can mean an abdication of government responsibility, partnership need not take that form. To the contrary, the idea of government as separate from the community implies hierarchy or isolation; community partnership can make government more accountable.

Community policing suggests ways that community members can directly participate in police decisions, allowing them to share in the responsibility for decisions made while police retain accountability.


317. One example is The Partnership for the Homeless in New York City. For a description of their structure and services, see The Partnership for the Homeless, at http://www.partnershipforhomeless.org/ (last visited Dec. 6, 2001).

318. In contrast, the idea that government exists separately presupposes unaccountable, command-and-control governance, and public involvement can mean transparency and more democratic government. Professor Jody Freeman argues that private-public interdependence is pervasive and can resolve the legitimacy crisis in administration. Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543 (2000). It is also hard to argue that policing is necessarily a public institution when most security professionals are private. As such, policing has been privatized. See David A. Sklansky, The Private Police, 46 UCLA L. Rev. 1165 (1999).
IV. NEW ROLES AND RELATIONSHIPS THROUGH WORKING PARTNERSHIP

The model described poses many challenges that require longstanding commitment of police and outside groups, and deep changes in the ways that these groups work with clients, community, and each other. Police must first be willing to collect incredibly comprehensive data about their work. They must then be willing to make that data public and the focus of problem solving efforts. Finally, and most critically, they must invite outside partners to participate in designing remedies and to tackle the issues that new data reveals. There is some reason to have faith, though, that after the initial invitation to participate, groups can overcome mutual distrust, especially once collaboration begins, and when all sides start to develop common goals.

One objection might be that long-term collaboration appears especially difficult around the volatile issue of race; after all, "strained relations between the police and minority communities have historically been among the most well-documented and difficult urban problems to solve." With these laws, lawsuits, and settlements, police are already being forced to reckon with race and to cooperate with outsiders. Further, the relationships and alliances that result from this approach make it particularly well suited to addressing controversial problems like race in policing. The racial profiling debate has already begun to shift to the stage where the question is not whether racial profiling exists, but rather what is a practicable solution. Mixing issues of the use of force with race, as in the consent decrees, will defuse the volatility of race. Regardless, all of these issues are linked.


320. Crime mapping involves race if police ignore problems in minority neighborhoods, but adopt the rhetoric of response to crime and the allocation of police resources. Mapping could be used to help respond to racial profiling in those cases where police make stops that impact minorities—stops that are perceived as unfair because they are unreasonable and do not effectively combat crime. A comprehensive approach to information sharing might allow the community to create maps featuring the breakdown of stops by race, force complaints, crime rates, police resource allocation, and neighborhood conditions and demographics.
Police once refused to discuss or respond to domestic violence. Beginning in the 1980s, a few initial lawsuits led to reform. These started with a few landmark decisions and consent decrees, then branched out to include more widespread experimentation and institutional change, so that today many police departments have domestic violence projects that work in cooperation with victim's advocacy groups, domestic violence shelters, and legal groups. In ten years time, racial profiling programs in police departments may be as prevalent as domestic violence programs are today.

Political complexities of cooperation across institutional borders run in several directions. Police run the risk of being thought soft on crime or capitulating to pressure by 'special interest' or 'legal' groups. The role of the police chief proves especially critical, in setting the tone of cooperation and willingness to engage the community; Chief Timoney in Philadelphia made collaboration possible by reaching out to community groups.

Community groups also take on a big risk by working with police. Martha Minow voices a fear that through such partnerships, community groups may lose their distinctiveness. Groups may be seen by some of their members as untrustworthy collaborators with the police. Further, they may actually become co-opted by police, lose touch with community concerns, or simply become overwhelmed with police work and have fewer resources to help people with individual problems. Moreover, groups may be less willing to take radical stands against police for fear of alienating their new partners and jeopardizing their newfound access.

On the other hand, through partnerships, community groups can make themselves heard, enabling them to change the way they


322. Tucker, supra note 319, at 606. "[P]erhaps the most important driving force behind effective change and the improvement of management, administration, and operations in policing has been the leadership of more progressive police administrators who understood the importance and value of exploring new crime-prevention and crime-fighting strategies." Id.

323. Minow, supra note 315, at 1084.
are treated by police. This new influence may be empowering, so that people will be willing to get involved and come forward with problems, knowing that there is redress. Hopefully, community groups will be able to maintain separate grassroots identities. Partnerships with police may enable these groups to stay truer to their constituency. By contrast, a reliance on litigation—although emotionally satisfying—preserves an adversarial stance and requires a heavy dependence on outside legal help that is far less likely to result in the needed relief.\(^3\)

While there will likely be some institutions and actors prepared to advocate police reform, the relationship between these groups and the community at large will also determine the legitimacy of reform. The community may not have well organized groups or groups mobilized around the issue of racial profiling. Or community groups may have a history of antagonism and infighting.

Many have asked who is the relevant community to work with police. The answer to that question, of course, depends on the definition of community, if such a thing can be defined.\(^3\)\(^2\)\(^6\) At minimum, a community includes people who share an interest and are capable of cooperating to secure that interest. Police may begin, as in Boston, by seeking out key leaders to work with, even if they risk alienating less prominent, and maybe more representative, groups.\(^3\)\(^2\)\(^6\) This task may be more difficult if a community is diffuse. The community may not depend on geography in the sense of living in the same neighborhood. For example, a state highway patrol affects a ‘community’ of transient drivers, to whom it is not directly accountable as many of them do not live in the state. Even such a diffuse community can be reached, though. The New Jersey consent decree has attempted to reach those stopped by using hotlines and posting

\(^3\)\(^2\)\(^4\) See \textit{supra} note 70 for evidence that many victims do not want to be part of litigation, but may become politicized and seek long-term community-based support.

\(^3\)\(^2\)\(^5\) Livingston, \textit{supra} note 17, at 577 (“Academics have warned that the concept of ‘community’ in community policing is imprecise at best, and even idealized.”). See, e.g., Jerome E. McElroy et al., Community Policing: The CPOP in New York 3–4 (1993) (“Virtually all commentators agree that the concept of ‘community’ as used in the rhetoric of community policing is imprecise, perhaps interchangeable with the concepts of neighborhood, district, or beat, and largely uninformed by a century of sociological usage and study.”).

\(^3\)\(^2\)\(^6\) See \textit{supra} note 305 and accompanying text.
information at highway rest stops. In addition, statewide advocacy groups could be included in monitoring.

No community can exist where information about policing is not made public. In contrast, police can create community by sharing information and inviting participation. Once people have awareness of what police are doing and are given a stake in making decisions, groups of people will get involved and organized. In other contexts, initial outrage and lawsuits have led to collaborative efforts that created a ‘community’ of citizens involved in police reform and constructive efforts to assist police in their work. Groups may be less antagonistic once a common project is defined through open policing. Litigation, on the other hand, may foster distrust between legal groups and organizers.

Collaborative relationships have been formed out of a desire to improve policing. Maltz emphasizes that formerly hostile community groups and police began to trust each other and appreciate each other's usefulness once they began to cooperate. This trust comes with openness, with less police secrecy, and the sharing of information. As such, “trust can be stimulated by citizen-government collaboration on the basic rules of law enforcement accompanied by a monitoring system worthy of trust.” In turn, rebuilding trust with the community brings broader benefits to police departments, including: better compliance with laws; more willingness to cooperate with

327. "The State shall publicize the State Police mailing address, internet address, and toll-free telephone number at state-operated rest stops located on limited access highways." New Jersey Decree, supra note 37, ¶ 59.

328. In a concrete way, release of data has created debate over how police do their work. See supra notes 237–39. And in a theoretical sense, community can be defined as a set of actors in dialogue. For example, Habermas believes that “communication community” is created through rational dialogue with others and a diversity of voices. Jurgen Habermas, Legitimation Crisis (1975). His view posits a kind of institutionalized and rationalized deliberation that does not seem far removed from the kind of political movement and reaction that has characterized police reform. For the view that discourse should not be a preferred mode of decision making, see Frederick Schauer, Discourse and Its Discontents, 72 Notre Dame L. Rev. 1309 (1997).

329. See Rose, supra note 69, at 665.

330. Maltz et al., supra note 224, at xii.

331. Luna, supra note 225, at 1163 (“A solid basis for trust begins with a willingness to share information.”).

332. Id. at 1164.
police, share information and report crimes; and greater belief in the legitimacy of government.\footnote{333}

Lawyers and legal institutions can also play a role in facilitating partnership by requiring that data be made public and by including community groups structurally in remedies. To do so, lawyers must abandon their exclusive focus on litigation and must engage the community and other groups to help shape more creative remedies.\footnote{334} Indeed, a growing community of lawyers is committing itself to such an approach, perhaps because of legal obstacles, but more likely because class action litigation is impersonal, time consuming, expensive, and may not provide the sort of assistance that victims of misconduct and their families often require.\footnote{335} These lawyers find it especially effective to dedicate resources towards work with clients as part of a larger progressive movement to remedy police misconduct, rather than to pursue repeated § 1983 suits.\footnote{336}

\begin{footnotesize}
333. See, e.g., Cole, supra note 21, at 169–78 (describing the costs that inequality places on law enforcement, causing distrust and unwillingness to cooperate with law enforcement, and encouraging crime); David Cole, What’s Criminology Got to Do With It?, 48 Stan. L. Rev. 1605, 1619–23 (1996) (citing increasing minority distrust in the legitimacy of law enforcement that may lead to disobeying the law); Tom R. Tyler, Citizen Discontent With Legal Procedures: A Social Science Perspective on Civil Procedure Reform, 45 Am. J. Comp. L. 871, 891 (1997) (arguing that trust leads to compliance).

334. See Rose, supra note 69, at 660–62 (describing the shortcomings of the litigation centered approach to racial profiling). Rose compares this approach to that of “regnant lawyering”; “the characteristics of regnant lawyering are: focusing on litigation; seeing ‘community education’ as diffuse, marginal, and uncritical work; seeing ‘organizing’ as sporadic, supplemental mobilization; and viewing lawyers as preeminent problem-solvers and clients as fact-givers.” Id. at 660. Gerald Lopez introduced the idea of rebellious versus regnant lawyering. Gerald P. Lopez, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 1603, 1608 (1989); Gerald P. Lopez, Rebellious Lawyering, One Chicano’s Vision of Progressive Law Practice 23–24, 37–38 (1992).

335. See Rose, supra note 69, at 643–47, 649–52 (describing the work of the National Congress for Puerto Rican Rights and the Committee Against Anti-Asian Violence (CAAV), both of which combine legal work with advocacy, organizing, public education, and non-legal work to help empower victims of police brutality). By using a variety of strategies, they maintain the ability to problem solve and respond to clients’ individualized needs. Interestingly, Hyun Lee, an organizer with CAAV, noted that litigation, while sometimes productive, can give victims a “false sense of security and justice.” Id. at 651.

336. Id.
\end{footnotesize}
Lawyers could also provide a supportive role for community groups. Behind all of the success stories in police reform lie well-organized community efforts, including new approaches in Philadelphia and Chicago, passage of state laws, and the impetus for consent decrees. The Chicago story, in particular, shows how reform efforts can tap the local knowledge of organized residents. Lawyers could help facilitate participation in police problem solving.

Prosecutors can also play a critical role in assisting these efforts. Lawyers representing cities or police departments may reconsider aggressive defenses that may operate at cross-purposes with the department's own goals of maintaining connections with the community. Unwillingness to comply with discovery or attacks on the character of victims of police misconduct may alienate the community and prevent settlements that could satisfy all sides.

Courts can take on a role in helping to encourage collaboration between police and outside groups. In considering remedies, courts will hopefully find them less intrusive when the community, not the court, monitors the decree. This program is decentralized, but the police departments' progress can be compared, and could be benchmarked by a government agency. In fact, government agencies have already become more involved in assisting local police re-

337. In particular, the Pittsburgh decree followed a lawsuit by civil rights groups. See Miller, supra note 164, at 192. Similarly, all of the consent decrees have been influenced by pressure from community groups, including lawsuits and efforts to intervene. See supra notes 201–04.


339. For example, New York City Corporation Counsel lawyers have proved notoriously unwilling to cooperate with discovery requests in police litigation. See supra note 124. And in a class action alleging racial profiling, the court rejected out of hand detailed arguments the city made attacking the reputations, moral character, and even the intelligence of victims of allegedly suspicionless stops. Daniels v. City of New York, 198 F.R.D. 409, 418–19 (S.D.N.Y. 2001) (describing defendants' allegations that named plaintiffs were mentally incompetent, had outstanding warrants for public consumption of alcohol, and were generally of questionable moral character).

340. For a discussion of the role that courts can play in encouraging participation and experimentation in remedies, see supra note 182. See also Dorf & Sabel, supra note 14 at 463–64; Sturm, supra note 14, at 556–64.

341. See supra note 269 (discussing benchmarking).
form under state laws, and they can do more than provide needed financial assistance. Hopefully, they can also dedicate resources and expertise towards encouraging stronger remedies, by evaluating and benchmarking police efforts at reform, sharing expertise with departments, and fostering ties between the community and police.

Through these remedies, new connections can be made, so that "[l]awyers, community organizers, survivors of police brutality, families of victims of police brutality, students, members of street organizations, and others . . . recognize each other as collaborators in a joint struggle."

V. CONCLUSION

The racial profiling problem as defined in Equal Protection law runs aground on questions of how much disparity should be tolerated and how to limit police discretion. Conceiving law as only a negative limit on police decision-making underestimates the role that law can play in assisting with police reform. Traditionally, problem-oriented policing advocates argued that cities should pass laws to expand police discretion to solve problems on their beats and address 'quality of life' issues, but that otherwise, lawyers should leave police to find solutions on their own. However, discretion of any kind is empty if uninformed, and when unguided, it is prone to abuse. The evolution of racial profiling remedies presents a radically different and more powerful role for law to define police reform. Legal remedies create the framework for information gathering, informed problem solving, and finally, partnership involving sets of interested outside actors.

Hopefully, this discussion, together with descriptions of participatory police problem solving, makes the proposal concrete. Remem-

342. Rose, supra note 69, at 665.
343. See Livingston, supra note 17, at 651 (discussing the new 'street laws' directed at enhancing police discretion and ability to respond to quality of life problems with only small civil penalties). Livingston recognizes that the check on police discretion is not in law. Rather, "the management of police discretion in a community policing framework is about the exchange of information between neighborhoods and the police. The very reciprocity between police and communities that is deemed essential to effective community policing is thus also critical to ensuring that discretion is adequately constrained." Id. at 653. Law, however, can have a role in facilitating that information exchange, rather than simply granting empty discretion.
dies already implemented have changed the way police use information, creating some of the right incentives for problem solving to begin. Harnessing this information will allow police to institutionalize problem-oriented policing and require more formal analysis and information sharing than past informal community policing arrangements. Racial profiling remedies already in place, and experiments in Philadelphia and Chicago, suggest that problem-oriented policing can be information-driven and formal. Further, these efforts imply that remedying racial profiling is not just a problem for the police. Taking the next step, and designing the remedy around partnership requires openness and reaching out to groups that must themselves realize they can play a helpful role. Collaboration may develop naturally over time, as police and participating groups share a common interest in solving the problems they face.

By creating partnership, these remedies create new bonds between police, the community, reformers, and other government institutions. They reveal the narrowness of current racial profiling theory. Not only is the legal understanding of police action limited to numerical disparity and individual motivation, but the focus is only on police and not on outside actors. These remedies extend structural reform beyond institutional reform, to shaping relationships across institutions and in the community context. By doing so, not only will they better remedy racial profiling, but they allow police to move beyond constraints of traditional policing to acquire new allies and analytical techniques. Uncovering structural constraints that lie beneath the surface of the racial profiling problem helps police evolve along with lawyers, advocates, and the community. By bringing together concerned actors, and structuring relationships around information gathering and problem solving, these remedies draw on new synergies, changing the composition of law enforcement. Through this remedial approach, police may turn a crisis of modern policing into a source of renewed legitimacy and trust.