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Racial Profiling: Legal and Constitutional Issues

Charles V. Dale, American Law Division

November 21, 2004

Abstract. The prevalence of racial profiling among federal, state, and local law enforcement agencies has been highlighted by recent legal settlements and data collected by governmental agencies and private groups, suggesting that minorities are disproportionately the subject of routine traffic stops. The issue has attracted considerable interest in the 107th Congress, particularly with regard to existing and proposed legislative safeguards.

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Updated November 21, 2004

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Summary

Racial profiling is the practice of targeting individuals for police or security detention based on their race or ethnicity in the belief that certain minority groups are more likely to engage in unlawful behavior. The prevalence of the practice among federal, state, and local law enforcement agencies has been highlighted by recent legal settlements and data collected by governmental agencies and private groups, suggesting that minorities are disproportionately the subject of routine traffic stops. The issue has attracted considerable congressional interest, particularly in regard to existing and proposed legislative safeguards. Several courts have considered constitutional ramifications of the practice, as an “unreasonable search and seizure” under the Fourth Amendment, and more recently, as a denial of equal protection of the laws. A variety of federal and state statutes provide potential relief to individuals who claim that their rights are violated by race-based law enforcement practices and policies.

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Racial Profiling: Legal and Constitutional Issues

Racial profiling is the practice of targeting individuals for police or security detention based on their race or ethnicity in the belief that certain minority groups are more likely to engage in unlawful behavior. The prevalence of the practice among federal, state, and local law enforcement agencies is highlighted by recent legal settlements and data collected by governmental agencies and private groups, suggesting that minorities are disproportionately the subject of routine traffic stops. The terrorist attacks by the Arab Muslim hijackers on September 11th, and the resultant backlash against persons of Middle Eastern and South Asian descent, further underscore the tension between demands of national security and the need for even-handed law enforcement. Some argue that racial profiling is a rational and efficient method of allocating investigatory resources to safeguard the security of all. Others would counter, however, that the practice is not a legitimate security measure, but diverts investigatory scrutiny from real sources of potential threat, and that where discrimination is concerned, liberty and security do not conflict. The issue has garnered considerable interest in Congress, particularly with regard to existing and proposed legislative safeguards.¹ Several courts have also considered constitutional ramifications of the practice, as an “unreasonable search and seizure” under the Fourth Amendment, and more recently, as a denial of equal protection of the laws.² And in recent years, several major state and county law enforcement agencies, like

¹For a background on racial profiling legislation in the state and proposals before Congress, see CRS Report RL31950, *Racial Profiling and Traffic Stops in the States: Selected Issues and Legislative Approaches*.

²E.g. *Farm Organizing Committee v. Ohio State Highway Patrol*, 308 F.3d 523 (6th Cir. 2002)(affirmed denial of qualified immunity in § 1983 action against state trooper for allegedly confiscating the immigration documents of Hispanic motorists solely because of their race or national origin in violation of the Equal Protection Clause); *Price v. Kramer*, 200 F.3d 1237 (9th Cir. 2000)(affirming a jury verdict in favor of two black youths where it was alleged that officers with racial bias stopped the plaintiffs’ vehicle without probable cause or reasonable suspicion, conducted an illegal search, and used degrading and excessive force on the plaintiffs); *Daniel v. City of New York*, 138 F.Supp.2d 562 (S.D.N.Y. 2001)(class certification granted to Black and Hispanic males in § 1983 action for relief from alleged constitutional violation by Street Crime Unit of NYPD for conducting repeated stops and frisks based on improper racial profiling).

the New Jersey State police,³ have resolved DOJ charges of racial profiling by its officers by agreeing to extensive reform efforts and reporting requirements.

Constitutional Background

Fourth Amendment Issues. Racial profiling or consideration of race by police and law enforcement is a subject that the courts have reviewed on both Fourth Amendment unreasonable search and seizure, and more recently, federal equal protection grounds. In its 1968 Fourth Amendment ruling, *Terry v. Ohio*,⁴ the Supreme Court found that reasonable, articulable suspicion was sufficient grounds for a police officer to briefly stop and question a citizen. Such suspicion must not be based on the officer's "inchoate and unparticularized suspicion or 'hunch,' but on the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry* employed a "totality of circumstances" test to determine the reasonableness of police investigatory stops.

*United States v. Brignoni-Ponce*⁵ addressed the issue of race as a factor giving rise to reasonable suspicion of criminal activity. "In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants."⁶ Neither this single factor nor the police officer's belief that the occupants were illegal aliens satisfied the constitutional minimum for an investigatory stop. The Court conceded "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor. . . ."⁷ By itself, however, that factor did not support reasonable suspicion necessary for a roving stop. The Court proposed a multi-factored analysis: "Officers may consider the characteristics of the area . . .; usual patterns of traffic on the particular road, and previous experience with alien traffic."⁸ Additionally, erratic behavior and evasive acts by those under the observation of the police officer, as well as aspects of the motor vehicle, may support the reasonable suspicion necessary for an investigatory stop.

³United States v. State of New Jersey, No. 99-5970, available at [<http://www.us-doy.gov/crt/split/documents/jerseysa>]. Other settlements also have required the defendant law enforcement agencies to collect and report demographic data on all motorists (or pedestrians) stopped and searched. E.g. *Wilkins v. Maryland State Police* (Civ. No. MJG-93-468 (D.Md. Jan. 5, 1995); *NAACP v. City of Philadelphia* (Civ. No. 96-CV-6045 (E.D.Pa.. Dec. 15, 1997).

⁴392 U.S. 1 (1968).

⁵422 U.S. 873 (1975).

⁶*Id.* at 885-86.

⁷*Id.* at 886-87.

⁸*Id.* at 884-85. See also *United States v. Anderson*, 923 F.2d 450, 455 (6th Cir. 1991)("Suspensions based solely on race of person stopped cannot give rise to a reasonable suspicion justifying a Terry stop").

Subsequent courts, however, have upheld stops of persons that were partially based on race. Border patrol agents in *United States v. Martin-Fuerte*⁹ referred motorists selectively to a secondary inspection area on the basis of several factors, including Mexican ancestry. Of 820 vehicles referred for secondary inspection over the period in question, roughly 20 per cent included illegal aliens. On this basis, the Court determined that “to the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint, . . . that reliance clearly is relevant to the law enforcement need to be served.” Indeed, according to the majority, “even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional problem.”¹⁰ But the Court cautioned against extending the logic of border enforcement cases to situations remote from the border, where the government interest in immigration policing may be less compelling. Thus, a different conclusion might pertain “if, for example, reliance were put on apparent Mexican ancestry at a checkpoint operated near the Canadian border.”¹¹ Another Fourth Amendment case, *United States v. Weaver*,¹² likewise affirmed the conviction of a black drug courier suspect who was stopped at the Kansas City Airport based, in part, on information that “a number of young roughly dressed black males from street gangs in Los Angeles frequently brought cocaine into the Kansas City area.”¹³ The court ruled that federal drug enforcement agents can rely on racial characteristics if objective crime trend analysis validates use of these characteristics as “risk factors” in predicting criminal behavior.

The Ninth Circuit, however, has determined that it is impermissible to take Hispanic origin into account in stops in Southern California. In *United States v. Montero-Camargo*,¹⁴ the appeals court noted both significant “demographic changes” and “changes in the law restricting the use of race as a criterion in government decision-making”¹⁵ as reasons for precluding any consideration of race.

The likelihood that in an area in which the majority — or even a substantial part — of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus. . . . [F]actors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law¹⁶

⁹428 U.S. 543, 563 (1976).

¹⁰Id.

¹¹Id.

¹²966 F.2d 391, 392 (8th Cir. 1992).

¹³Id. at 392-93.

¹⁴208 F.3d 1122 (9th Cir. 2000).

¹⁵Id. at 1134.

¹⁶Id. at 1132.

The Supreme Court's contrary dicta in *Brignoni-Ponce* (*supra*) that ethnic appearance could be relevant was distinguished as relying "on now-outdated demographic information."¹⁷

A frequently criticized form of racial profiling involves the "pretextual" traffic stop — that is, detaining minority group members for routine traffic violations in order to conduct a more generalized criminal investigation. The U.S. Supreme Court directly addressed the constitutionality of the practice in 1996. Defendants in *Whren v. United States*¹⁸ were two motorists who were charged with drug offenses based on evidence discovered after they were pulled over for pausing at a stop sign for an unusually long time, turning without signaling, and taking off at an unreasonable speed. The *Whren* Court held that the Fourth Amendment is not violated when a minor traffic infraction is a pretext rather than the actual motivation for a stop by law enforcement officers. In other words, the fact that suspects were stopped for pretextual reasons did not, without more, constitutionally taint the police action or evidence of drug crimes discovered as a consequence. *Whren*, however, did not hold that the officers' motivation is entirely irrelevant when probable cause for a stop is based on a traffic violation. As explained by the Court, "[t]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."¹⁹

In *Atwater v. City of Lago Vista*,²⁰ the Court appeared to reinforce *Whren* by ruling that the Fourth Amendment did not prohibit the warrantless arrest and custodial detention of a motorist for misdemeanor traffic offenses, including failure to wear a seatbelt, punishable only by a fine. Citing the "recent debate over racial profiling," Justice O'Connor dissented, arguing for a Fourth Amendment principle that would require "officers' poststop action" in such cases to be reasonable and "proportional" to the offense committed.

Equal Protection Issues. Racial profiling may be susceptible to two kinds of equal protection challenge after the *Whren* decision. First, claimants may argue that the conduct of an individual officer was racially motivated — that the officer stopped the suspect because of race. "If law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred."²¹ Or the defendant may argue that he was the victim of selective enforcement. Selective enforcement equal protection claims

¹⁷Id.

¹⁸517 U.S. 806 (1996).

¹⁹Id. at 813.

²⁰532 U.S. 318 (2001).

²¹*United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997).

frequently focus on the policies of departments, beyond the impact of particular enforcement actions on individual defendants.

Racial Motivation. Proof of discriminatory intent is an essential element of any equal protection claim. “Determining whether invidious discriminatory purpose was a motivating factor” behind a law enforcement officer’s actions “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”²² The task is complicated after *Whren* because there may be an objective, nonracially motivated basis for the stop or detention. In the case of a pretextual stop, the court must take the inquiry into illicit intent to the next level by addressing the officer’s reason for taking enforcement action. But if racially-motivated decision-making is shown, or an agency policy employs explicit racial criteria, the claimant need not demonstrate statistically that members of his racial or ethnic group were disproportionately targeted for enforcement. “[I]t 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.”²³ Rather, because the policy itself establishes a direct connection between the racial classification and the defendant’s enforcement action, the policy is subject to strict scrutiny under the Equal Protection Clause.

A challenge to the specific acts of a particular police officer is not unlike a claim of racial discrimination in the use of peremptory jury challenges, which also involves the acts of a single state actor — the prosecutor — in the course of a single transaction — the selection of a jury. The Supreme Court has instructed that “all relevant circumstances” be considered in the constitutional analysis of such cases, including the prosecutor’s “pattern” of strikes against black jurors,” and the prosecutor’s “questions and statements,” which may “support or refute and inference of discriminatory purpose.”²⁴ Similarly, a police officer’s pattern of traffic stops and arrests, his questions and statements to the person involved, and other relevant circumstances may support an inference of discriminatory purpose in this context.²⁵ But, usually, statistical evidence of disparate racial impact will not alone suffice to establish an illegal racial profiling operation.²⁶

²²*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

²³*Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000). See also *National Congress for Puerto Rican Rights v. City of New York*, 191 F.R.D. 52 (S.D.N.Y. 1999) (allegation that police stopped and frisked Black and Latino men without reasonable suspicion based on their race or national origin was sufficient to state equal protection claim, notwithstanding that complaint failed to identify similarly situated non-minority individuals who were not stopped and frisked, where complaint also alleged existence of discriminatory policy which contained an express racial classification, i.e. “a regular policy of racial profiling by law enforcement agencies — that is, making law enforcement decisions on the basis of racial stereotypes. . .”).

²⁴*Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

²⁵*Marshall v. Columbia Lea Regional Hospital*, 345 F.3d 1157 (10th Cir 2003).

²⁶ See *United States v. Chavez*, 281 F.3d 479 (5th Cir. 2002); *Anderson v. Cornejo*, 355 F.3d (continued...)

Direct evidence of discriminatory intent was sufficient to avoid summary judgment on a § 1983 claim of selective enforcement in the Tenth Circuit decision, *Marshall v. Columbia Lea Regional Hospital*.²⁷ There the claimant was able to present evidence of the officer's behavior during the events in question as well as his alleged record of racially selective stops and arrests in drug cases under similar circumstances. Further evidence was offered that the claimant did not commit the alleged traffic violation and that the officer made eye contact with him prior to activating his emergency lights. As soon as the officer approached the claimant, he accused him of being on crack, an accusation the officer repeated several times during the encounter. When the officer filled out the citation form, he noted the claimant's race, although the form called for no such designation. Most compellingly, it was shown that the officer had an extensive recorded history — or “modus operandi” — of similar misconduct during his prior employment as a police officer in another jurisdiction.²⁸

However, if race or ethnicity is “but one factor” and not the “sole basis” for a stop detention, there may be no Fourteenth Amendment violation. In *United States v. Valenzuela*,²⁹ an Hispanic motorist traveling from Tucson to Denver was stopped for weaving in traffic by a Colorado trooper. The officer then became “suspicious” that plaintiff may be a drug courier because of his “stiff and uncomfortable” behavior, a “fabricated” story about visiting a sister in a Denver hospital, a vehicle registration showing salvage title, and because Tucson was a known source of illegal drugs, among other things. The driver ultimately consented to a search of his vehicle which uncovered large amounts of cocaine under the carpet and rocker panels. At trial, the trooper testified that beyond noted factors, he sometimes considered race or ethnicity in making probable cause determinations, in part because of DEA information that the majority of area drug smugglers are Hispanic. Affidavit evidence in the case revealed a “large number of Hispanic arrestees,” but failed to reveal “any stops made by [the trooper] in which no search was conducted or no drugs were found” or that any stops were made for pretextual reasons. As a consequence, the district court denied motions to suppress, there being “no persuasive evidence that the Trooper targeted any of these suspects solely because of their race.”

Similarly, the Second Circuit, in *Brown v. City of Oneonta*, concluded that there was no violation of the Equal Protection Clause where plaintiffs charged that

²⁶(...continued)

1021, 1026 (7th Cir. 2004)(“disparate impact does not imply disparate treatment” where there was no evidence that supervisory official “sponsored, encouraged, or failed to stop” alleged profiling practices).

²⁷345 F. 3d 1157 (10th Cir. 2003).

²⁸Id. at 1170-71. See also *Rodriguez v. California Highway Patrol*, 89 F. Supp.2d 1131 (N.D. Cal. 2000)(allegations that state supervisors “acted with discriminatory intent and . . .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.”).

²⁹*United States v. Valenzuela*, 2001 WL 629655 (D.Colo.).

they were questioned solely on the basis of their race, where the physical description of the suspect provided by the victim of the crime included race among other factors. The policy of the department, which included obtaining a description of the assailant and seeking out persons matching that description, was found to be race-neutral on its face.³⁰ Thus, only when race-based law enforcement decisions are a product of racial stereotyping by police officials, as opposed to government's response to evidence developed from other sources, may constitutional issues arise.

Selective Enforcement. Absent an overtly discriminatory policy, or direct evidence of police motivation, racial profiling claimants face additional evidentiary burdens. A claimant alleging selective enforcement of facially neutral criminal laws must demonstrate that the challenged law enforcement practice “had a discriminatory effect and that it was motivated by a discriminatory purpose.” In *United States v. Armstrong*,³¹ criminal defendants sought to attack their federal firearms and drugs charges for crack cocaine as selective prosecution based on race. The Supreme Court rejected the contention because there was no showing that similarly situated defendants of another race were treated differently by criminal prosecutors. “To establish discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.” A claimant can satisfy this requirement by naming an individual who was not investigated in similar circumstances or through the use of statistical or other evidence “address[ing] the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated.”³² This latter recourse calls for a reliable measure of the demographics of the relevant population,³³ a standard for determining whether the data represents similarly situated individuals,³⁴ and relevant comparisons to the actual incidence of crime among different racial and ethnic segments of the population.³⁵

This framework has been applied in a number of proceedings involving allegations of discriminatory police enforcement practices.³⁶ *Armstrong* was relied upon by the Fourth Circuit in affirming the dismissal of a racial profiling action

³⁰195 F.3d 111, 119 (2d Cir. 1999)(distinguishing equal protection claims based on racially neutral policies applied discriminatorily from claims based on policies containing express racial classifications).

³¹517 U.S. 456 , 465 (1996).

³²*Chavez v. Illinois State Police*, 251 F.3d 612, 638 (7th Cir. 2001).

³³*Id.* at 626

³⁴*Id.*

³⁵*Armstrong*, 517 U.S. at 469-70.

³⁶ E.g. *Gardenhire v. Schubert*, 205 F.3d 303 (6th Cir. 2000)(When the § 1983 claim is selective enforcement of the traffic laws or a racially motivated arrest, the plaintiff must normally prove that similarly situated individuals were not stopped or arrested in order to show the requisite discriminatory effect and purpose); *Johnson v. Crooks*, 326 F.3d 995 (8th Cir. 2003)(Despite the “seemingly impossible burden,” proof that a similarly situated person was not stopped is required where motorists challenge their own stop on equal protection grounds).

against Virginia Beach police. The district judge in *Harris v. City of Virginia Beach*,³⁷ rejected statistical evidence of a “pattern, practice, or custom of racial profiling” offered by a black driver who alleged that he was stopped for driving under the influence without probable cause. Without evidence that the officer was aware of plaintiff’s identity and race before stopping his vehicle, there was no proof of illicit motivation. Moreover, even if plaintiffs could show that a disproportionate number of minorities were stopped for traffic violations, they could not prove their claim of discriminatory treatment absent a showing that similarly situated non-minority drivers were treated differently. Since no record was kept concerning stops where no citations were issued or searches conducted, the court found that plaintiffs could not meet their burden. “Statistical evidence is generally not sufficient to show that similarly situated persons of different races were treated unequally.”

Other courts have disagreed, however, and refused to apply the “similarly situated requirement” in *Armstrong* to racial profiling by law enforcement officers because the police “never have been afforded the same presumption of regularity extended to prosecutors” and because “in the civil context, . . . such a requirement might well be impossible to meet.”³⁸ In *United States v. Duque-Nava*, the court concurred that application of the *Armstrong* standard to racial profiling cases would require a § 1983 claimant to make an “impossible” showing “that a similarly situated individual was *not stopped* by the law enforcement.”³⁹ For this reason, in the *Marshall* decision,⁴⁰ the Tenth Circuit found that discriminatory effect could be demonstrated *either* by showing a similarly situated individual, *or* by relying on statistical evidence. And in *Chavez v. Illinois State Police*,⁴¹ the Seventh Circuit similarly held that statistical evidence of discriminatory effect should be accepted as proof of a selective enforcement claim based on a traffic stop.

While dispensing with *Armstrong*’s “similarly situated” requirement, however, *Chavez* illustrates the difficulty of proving racial profiling claims based on statistical evidence. The Seventh Circuit affirmed dismissal of a class action lawsuit challenging *Operation Valkyrie*, a state police program to fight illegal drug trade by

³⁷11 Fed.Appx 212 (4th Cir. 2001).

³⁸Rodriguez, supra n. 27 at 1140.

³⁹315 F.Supp.2d 1144, 1155 (D.Kansas 2004). Continuing, the district court noted:

It is virtually impossible to identify a ‘similarly situated’ individual who was not stopped. The person cannot be identified at all, nor is there any recorded information from which one can compare whether the motorists present similar factors to an observing officer, such that there has been disparate treatment or not. Because law enforcement agencies do not make or keep records on individuals they do not stop, and certainly not on “similarly situated” individuals they do not stop, imposing such a requirement on this defendant or any defendant who challenges a traffic stop as selective enforcement, effectively denies them any ability to discover or prove such a claim. Thus, the defendant challenging a traffic stop for selective enforcement must be allowed to show discriminatory effect in some other way.

⁴⁰Supra n. 27.

⁴¹251 F.3d 612 (7th Cir. 2001).

focusing on traffic enforcement. After stopping a vehicle for a legitimate traffic offense, Valkyrie officers were trained to request permission to search if any of 28 indicators of illegal drug trade unrelated to race were noted. Chavez was stopped for failing to signal a lane change — after which he was questioned, his car searched, and he was released with a warning — while a white female companion (from the public defender’s office) driving in identical fashion immediately behind him was not stopped. A second class member, Lee, claimed that he violated no traffic laws but was nonetheless stopped, patted down, and subjected to a search of his car three times in 1993. In their bid for class certification, the plaintiffs proffered statistics, which they argued showed a disproportionate number of Blacks and Hispanics being stopped and searched. The district court granted the state’s motion for summary judgment on the equal protection claims, and the Seventh Circuit affirmed.

The appeals court found that Chavez did identify a similarly situated white motorist who was treated differently, but that the *Armstrong* requirement was neither necessary nor sufficient to satisfy the plaintiff’s burden of proving discriminatory purpose and effect in an equal protection case. The *Armstrong* rule governing selective prosecutions did not apply in racial profiling cases, first, because it would be impossible to prove. “[P]laintiffs who allege that they were stopped due to racial profiling would not, barring some type of test operation, be able to provide the names of other similarly situated motorists who were not stopped.” Second, racial profiling involves police conduct, not prosecutorial discretion, and is in a civil, not criminal, context.

Despite its decision to permit statistical proof that minority class members were treated differently than other motorists, the court concluded that the numbers presented failed to support an inference of racial profiling. First, plaintiffs relied on a “random sample” of Valkyrie field reports, without indication of the total number of stops made during the relevant period. Secondly, the “benchmarks” for the presence of various racial groups on Illinois roads was the 1990 census, which is “widely acknowledged” to undercount certain groups, particularly Blacks and Hispanics. Thus, without reliable data on whom Valkyrie officers stop, detain, and search, or of a proper demographic benchmark for the motoring public on the Illinois roads in question, the court “[could] not find that the statistics prove that the Valkyrie officer’s action had a discriminatory effect on the plaintiffs.” Nor did “isolated instances” of “racially insensitive remarks” made by troopers during stops provide sufficient evidence of racial motivation in a racial profiling case.

Apart from problems of proof, established equal protection doctrine instructs that where race or ethnicity is the sole or “predominant” factor behind the decision to stop or arrest, “strict scrutiny” requires that government demonstrate a “compelling” justification served by “narrowly tailored” means. “Strict scrutiny” is not, however, a *per se* rule of invalidity — “strict in theory is [not] fatal in fact”⁴² — but instead describes an analytical framework requiring the government to demonstrate a “close fit” between any distinction in treatment of its citizens on the basis of race and a “compelling” law enforcement or national security interest. The government’s burden of justification for focusing upon race as a predominate factor

⁴²Adarand Constructors Inc. v. Peña, 515 U.S. 200, 227 (1995).

in the law enforcement process is undoubtedly a weighty one, unlikely to be met in most circumstances. Nonetheless, much might depend on the “totality” of circumstances, not the least of which may be the magnitude of any public safety or national security interests at stake.⁴³ “In the end, . . . even when formally strict, judicial scrutiny under the Equal Protection Clause must be ever sensitive to the circumstances in which government seeks to act and to the methods by which it seeks to achieve even its legitimate ends.”⁴⁴

The Equitable Standing Doctrine. Besides substantive proof requirements, major procedural obstacles may limit the efficacy of private actions to end racial profiling practices. First, there is the “equitable standing doctrine” that has been applied by courts to deny an individual plaintiff the legal standing to seek injunctive relief against unconstitutional police practices unless he can show a “substantial certainty” that he will suffer similar injury in the future. In *City of Los Angeles v. Lyons*,⁴⁵ the Supreme Court reversed the grant of injunctive relief to a black motorist permanently injured by a police chokehold applied during a routine traffic stop. Notwithstanding his allegation that numerous other individuals had been injured or killed as a result of the same practice, the plaintiff had not shown that he himself was “realistically threatened by a repetition of his experience” with the LAPD. Although he had standing to assert a damages claim, said the Court, the plaintiff could not obtain an injunction because it was unlikely that he again would be subject to a chokehold. Moreover, in order to show actual threat of future injury, Lyons “would have had not only to allege that he would have another encounter with the police but also to make the credible assertion . . . that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter.”⁴⁶ The *Lyons* principle has been extended by lower courts to racial profiling cases, permitting claims for damages to go forward while denying the plaintiffs standing to seek injunctions against future police abuse. “[I]t is important to keep in mind that these are two distinct inquiries, and that it is possible to have standing to assert a claim for damages to redress past injury, while, at the same time, not having standing to enjoin the practice that gave rise to those damages.”⁴⁷ It could be argued, however, that a damages remedy is a less effective deterrent to constitutional misconduct because

⁴³Cf. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴⁴Rubin, Peter J., “Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After *Adarand* and *Shaw*,” 149 U.Pa.L.Rev. 1, 5 (2000).

⁴⁵461 U.S. 95 (1983).

⁴⁶Id. at 105-06.

⁴⁷*Farm Organizing Committee v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 730 (N.D. Ohio 2000) (Hispanic motorists’ claim of racial profiling by state highway patrol in interrogating them about immigrant status and confiscating immigration documents based on their Hispanic appearance). *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (Class of Hispanic motorists who alleged that they were stopped by the Border Patrol along the United States border with Mexico because of their Hispanic appearance lack standing to seek an injunction because of their inability to show that they would have another encounter with federal enforcement officials).

individual officers are cloaked by qualified “good faith” immunity in most cases, or may be indemnified against personal liability by their public employer.

Federal Statutes

42 U.S.C. 1983. Judicial decisions reflect the crucial role that racial recordkeeping and statistics may play in mounting a successful legal challenge to racial profiling. This is because the plaintiff must prove both racial motivation and “discriminatory effect” of law enforcement practices in federal lawsuits under 42 U.S.C. § 1983. Section 1983 provides a monetary damages remedy for harm caused by deprivation of federal constitutional rights — including equal protection of the laws — by state or local governmental officials or those acting in concert with them, i.e. under “color of law.” Claims against federal defendants — usually in the context of border, customs, or airport searches — may be maintained directly under the Constitution as a *Bivens* action,⁴⁸ or under the Federal Tort Claims Act.⁴⁹ Not every violation of a Fourth or Fourteenth Amendment right is entitled to a damage remedy, however. The qualified immunity doctrine broadly protects against individual liability for damages where the right asserted was not “clearly established,”⁵⁰ or where a reasonably well-trained officer would not have known that his conduct violates the Constitution.⁵¹ Similarly, the Eleventh Amendment prohibits suit against a state or state law enforcement agency for damages, and controlling § 1983 precedent only makes municipal employer’s liable for constitutional violations cause by municipal “law, policy, practice, or custom.”⁵²

The Violent Crime Control and Enforcement Act of 1994. This act included a provision, 42 U.S.C. § 14141, authorizing the Department of Justice (DOJ) — but not private victims — to bring civil actions for equitable and declaratory relief against any police agency engaged in unconstitutional “patterns or practices.” DOJ’s Civil Rights Division has moved against state and local law enforcement agencies engaged in a “pattern or practice” of police abuse under 42 U.S.C. § 14141, again relying on statistical evidence of discriminatory enforcement patterns. A federal lawsuit against the State of New Jersey claimed that officers patrolling the New Jersey Turnpike intended to discriminate on the basis of race and that state police “criteria and methods of administration” had a racially discriminatory effect. By failing to implement policies to properly discipline officers for racially discriminatory conduct, the government’s complaint alleged, the New Jersey State Police were responsible for the pattern of racial profiling.⁵³

⁴⁸*Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971)(holding that plaintiffs can sue federal defendants in federal court for Fourth Amendment violations).

⁴⁹Federal Tort Claims Act, P.L. 79-601, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.).

⁵⁰*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

⁵¹*Anderson v. Creighton*, 483 U.S. 635 (1987)

⁵²*Monell v. Department of Social Services*, 436 U.S. 658 (1978).

⁵³See Complaint, *United States v. New Jersey*, Civ. No.99-5970 (MLC)(D.N.J.) at [<http://> (continued...)]

The suit was brought under § 14141, authorizing civil action by the Attorney General to “obtain appropriate equitable and declaratory relief to eliminate the pattern or practices” of racial discrimination by law enforcement agencies. Settlement was reached in the case in January of 2000, providing that 1) unless specific suspects are sought and are known to be of a certain race or ethnic or national origin, troopers may not use such factors in deciding whether to stop an automobile or investigate the automobile’s occupants or physical contents; 2) the New Jersey State Police must implement a protocol that establishes criteria to be followed by state troopers in determining which motorists are to be stopped; 3) troopers may request consent to search an automobile only if they have reasonable suspicion that a search will reveal evidence of a crime; and 4) a consensual search may proceed only after the driver signs a written consent form (printed in English and Spanish) that informs the motorist of the right to withhold consent, which contains boxes to be checked indicating whether consent has been given and allows the consenting party to limit the scope of the search. The consent decree further provides that the state police shall continue to use in-car videotape equipment to record motor vehicle stops and that statistics shall be maintained on the race of all persons from whom consent to search is requested and of all persons searched in the absence of consent. When consent is not given, officers must document the basis for the search; whenever a drug dog is employed in a stop, officers are to document the reason. Other elements of the decree require the state police to establish a twenty-four hour, toll-free telephone number to receive complaints about police activities; to publicize the number on informational materials and on all “consent to search” forms; to investigate all complaints and to take appropriate disciplinary against any errant officer, depending on “the nature and scope of the misconduct.”

The Law Enforcement Act has been employed by the Justice Department to combat racial profiling by major law enforcement organizations around the country. The statute allows the federal government to proceed to federal court when the facts demonstrate not just a single or sporadic violations of the law, but a pattern of civil rights deprivations by police over a sustained period. Besides the New Jersey case, settlements in Pittsburgh, Los Angeles, Steubenville, Ohio and Montgomery County, Maryland have resulted in police departments implementing comprehensive plans and programs to address patterns and practices of police abuse, including racial profiling. But while the law provides the federal government with an important tool for dealing with police abuse, its efficacy may be limited for want of a private right of action.

Omnibus Crime Control and Safe Streets Act of 1968. The Crime Control Act was enacted to “aid State and local governments in strengthening and improving their systems of criminal justice by providing financial and technical assistance. . . .”⁵⁴ State and local governments receiving assistance are prohibited from discriminating in programs or activities funded in whole or in part by the

⁵³(...continued)

www.usdoj.gov/crt/split/documents/jerseycomp.htm]

⁵⁴42 U.S.C. § 3789d.

federal largess.⁵⁵ The Civil Rights Division of Justice Department is responsible for enforcing the statute which, in addition to authorizing civil actions by the federal government, also allows individuals to pursue a private right of action.⁵⁶ The Law Enforcement Assistance Administration (LEAA) was created to administer the grant program to state and local governments and is authorized to terminate assistance to fund recipients found guilty of discrimination.⁵⁷

Title VI of the 1964 Civil Rights Act. Title VI prohibits discrimination because of race or ethnicity in all federally assisted programs and activities — including law enforcement agencies that receive federal funds.⁵⁸ Racial profiling cases have only infrequently included Title VI claims, which have not yet been litigated to conclusion. While this avenue remains largely untested, courts have held that Title VI permits a private right of action for individuals to seek injunctions against recipients of federal funding, including police, for a policy or practice that discriminates on account of race.⁵⁹ Moreover, local police departments that receive DOJ assistance are subject to agency regulations providing that recipients may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination . . . or have the effect of defeating or substantially impairing” program objectives because of race.⁶⁰ After the Supreme Court decision in *Alexander v. Sandoval*,⁶¹ however, private parties no longer have a right to sue for damages to enforce Title VI “disparate impact” regulations, and may have to rely on administrative enforcement by federal agencies.

Guidance Regarding the Use of Race by Federal Law Enforcement Agencies

In February 2001 — notably, before the events of September 11th — President Bush directed the Attorney General to the use of race by federal enforcement agencies and “to develop specific recommendations to end racial profiling.” The

⁵⁵Id. at § 3789d(c)(1).

⁵⁶Id. at § 3789d(c)(4)(A); *National Black Police Ass’n, Inc. v. Velde*, 712 F.2d 569 (D.C.Cir 1983).

⁵⁷*United States v. City of Los Angeles*, 595 F.2d 1386 (1979)(holding that the LEAA was justified in discontinuing funds to the Los Angeles Police Department when the Department refused to abandon certain racially discriminatory practices).

⁵⁸42 U.S.C. § 2000d et seq.

⁵⁹See *Rodriguez v. California Highway Patrol*, 89 F. Supp.2d 1131, 1139 (N.D.Cal. 2000)(finding that plaintiffs adequately pled a Title VI claim by alleging that the police department receives federal funding and engages in “racial discrimination by stopping, detaining, interrogating and searching motorists on the basis of race”); *Maryland State Conference of NAACP Branches v. Maryland Dep’t of State Police*, 72 F. Supp. 2d 560, 566-67 (D.Md. 1999)(finding that a private right of action exists under Title VI and that plaintiffs alleging a practice of racial profiling have adequately stated a claim).

⁶⁰28 C.F.R. § 42.104(b)(2).

⁶¹532 U.S. 275 (2001).

Justice Department then undertook a study of policies and practices of federal law enforcement agencies to determine the nature and extent of racial profiling. Two years later, the Administration issued a ban on the practice by federal law enforcement agencies — including the FBI, the Secret Service, the Drug Enforcement Agency, and the Department of Homeland Security — but permitted exceptions for the use of race and ethnicity to combat potential terrorist threats.⁶²

The policy prohibits the use of “generalized stereotypes” based on race or ethnicity, and allows officers to consider racial factors in “traditional law enforcement” activities only as part of a specific description or tip from an informant. However, the guidance “do[es] not affect current Federal policy with respect to law enforcement activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation’s borders.” When federal law enforcement officers are “investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or enforcing laws protecting the integrity of the Nation’s borders,” they may consider both race and ethnicity “to the extent permitted by the Constitution and laws of the United States.”

The likely impact of the guidance may be limited by several factors. First, it applies only to federal agents, whereas the bulk of national law enforcement remains a state and local matter. In addition, the guidance is largely advisory, since it imposes no penalties and otherwise appears to lack legal force. Its numerous exceptions, particularly for national security investigations, may in the present climate invite broad circumvention where individuals of alien or Middle Eastern origin are concerned. Similarly, profiling of Latinos to preserve “border integrity” with Mexico would apparently be permitted by the current policy.

⁶²Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, U.S. Dept of Justice, Civil Rights Division (June 2003), available at [<http://www.usdoj.gov>].