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STATEMENT
OF
STEVEN H. ROSENBAUM
CHIEF, SPECIAL LITIGATION SECTION
CIVIL RIGHTS DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
PROBLEM SOLVING GROUP ON
LAW ENFORCEMENT STOPS AND SEARCHES

SPONSORED BY
THE UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF COMMUNITY ORIENTED POLICING SERVICES

AT
CRYSTAL CITY, VIRGINIA
DECEMBER 9, 1998

I would like to thank you for that kind introduction. It is my job to describe for you the nature of our collective task over the next day and a half. We are called a “problem-solving group” so let me begin by describing the nature of the “problem” we are here to address.

Our focus, in large part, will be on traffic stops and resulting tickets and searches by state and local law enforcement. The “problem” concerns the use of race or ethnicity in deciding who to stop, ticket or search and both the perception and reality of discrimination.

We are a “problem-solving group” with an intentionally wide range of perspectives and experiences. We have representatives of both state and local law enforcement, national law enforcement organizations with a management perspective as well as a labor perspective, civil rights groups, academics and researchers. We want to make sure that all of the participants have an opportunity to speak and share their views. As importantly, we know all of you will listen carefully and participate in the search for common ground.

I’d like to take a stab at suggesting two principles all of us share. First, traffic stops and the resulting tickets and searches are a legitimate and effective law enforcement tool. Second, racial and ethnic

discrimination in deciding who to stop, ticket or search is wrong, both legally and morally.

These principles are not at odds with each other. We do not have to abandon traffic stops in order to avoid discrimination. Nor do we have to engage in discrimination for traffic stops to be an effective law enforcement tool.

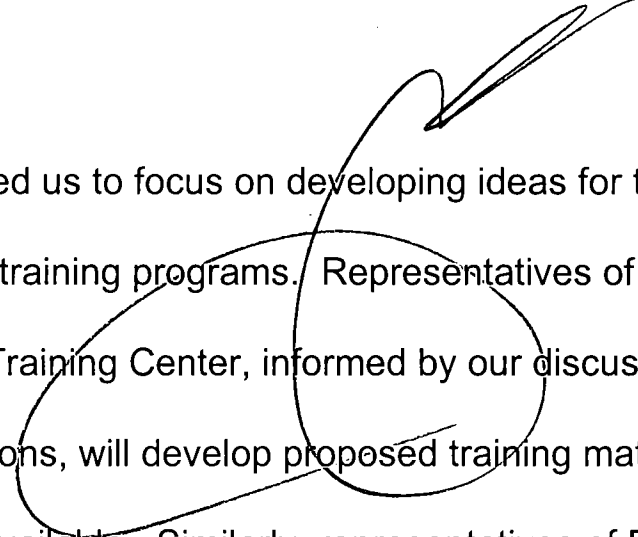
We do have to recognize and address the wide range of discretion law enforcement officers have in conducting stops. The Supreme Court has ruled that an officer may stop a car and detain a motorist if there is probable cause to believe the motorist has committed a civil traffic violation. Even the very best of drivers would have a hard time complying with all traffic rules at all times. What this means is anyone and everyone who drives a car is subject to being pulled over by a law enforcement officer almost any time and every time they get behind the wheel. We will be talking about how that discretion should be exercised, monitored and controlled.

The Supreme Court has “acknowledge[d] that even ordinary traffic stops entail a ‘possibly unsettling show of authority’; that they at best ‘interfere with freedom of movement, are inconvenient and consume time’

and at worst 'may create substantial anxiety.'" Whren v. United States, 517 U.S. 806, 817 (1996). For both the officer and the motorist, the tension can produce confrontations -- both verbal and physical -- that can escalate a "routine" traffic stop to an incident with serious consequences. When that "unsettling show of authority" is employed -- or even perceived to be employed -- on racial or ethnic lines, the respect for law and law enforcement is damaged. And an unfair burden is placed on law-abiding members of racial and ethnic minority groups.

In the Civil Rights Division, broadly speaking, we have seen two types of discrimination claims. One type involves allegations of discriminatory stop activity along interstate highways, often linked with a program to enhance drug interdiction. The second type involves allegations that officers in a predominantly white area of a city or a suburb use traffic stops to harass minority motorists to let them know they are unwelcome. We should talk about the issues surrounding both types of alleged misconduct and how to avoid both the appearance and reality of discrimination.

I know all of you are here because you care deeply about this problem and because you want to be part of the solution. One part of the solution is improved training for law enforcement officers. Attorney General



Reno has asked us to focus on developing ideas for training strategies and the content of training programs. Representatives of the Federal Law Enforcement Training Center, informed by our discussion and our recommendations, will develop proposed training material that we expect to make widely available. Similarly, representatives of DEA and the Department of Transportation, whose agencies also provide training for large numbers of state and local law enforcement officers, will benefit from our discussions. We will spend the entire morning tomorrow generating training proposals.

But before we get to training, we need to spend today talking as specifically as we can about the nature of the problem and possible solutions beyond training. This morning we will begin by providing an overview from a range of vantage points, from law enforcement to civil rights and community groups to legal and theoretical perspectives. We will then move to a fuller discussion of the nature of the problem. We will discuss the range of factors that cause both the perception and reality of discriminatory profiling, including the issues raised by policing diverse communities and the use of race or ethnicity as a proxy for dangerousness. We will also consider what the law has to say about the use of race or

ethnicity in policing. And we will begin to try to identify early indicators of problems as we consider the role law enforcement performance measures may play.

After hearing from Attorney General Reno at lunch we will discuss possible solutions, including appropriate policies and procedures to guide and monitor the exercise of law enforcement discretion, management responsibilities beyond setting non-discrimination policies and providing training, line officer and community involvement in proposed solutions and topics for research.

As I have mentioned, tomorrow morning will be devoted to ideas about training content and strategies.

We have much to do. So, let's begin. I am pleased to turn the mantel over to today's moderator, Mark Moore, who is a professor at the Kennedy School of Government at Harvard University whose expertise is in criminal justice policy and management. He also knows how to keep a rowdy bunch in line. Mark, it's your turn.

ESSAY

"DRIVING WHILE BLACK" AND ALL OTHER TRAFFIC OFFENSES: THE SUPREME COURT AND PRETEXTUAL TRAFFIC STOPS

DAVID A. HARRIS*

I. INTRODUCTION

The Supreme Court's decision in *Whren v. United States*¹ could not have surprised many observers of the Court's Fourth Amendment jurisprudence. In *Whren*, police officers used traffic violations as a pretext to stop a car and investigate possible drug offenses; the officers had neither probable cause nor reasonable suspicion to stop the driver for narcotics crimes.² In the Supreme Court, the government advocated the "could have" standard: any time the police *could have* stopped the defendant for a traffic infraction, it does not matter that police *actually* stopped him to investigate a crime for which the police had little or no evidence.³ The defense asked the Court to adopt a "would have" rule: a seizure based on a traffic stop would only stand if a reasonable officer *would have* made this particular stop.⁴ The Court sided with the government. If police witness a traffic violation, the

* Eugene N. Balk Professor of Law and Values, University of Toledo College of Law. J.D. 1983, Yale Law School; LL.M. 1988, Georgetown University Law Center. My thanks to Jeffrey Gamso, Deborah Jeon, Mark Kappelhoff, Tom Perez, Daniel Steinbock and Lisa Burget Wright for helpful comments on an earlier draft of this piece. Thanks also to Eric Crytzer and Mary L. Sawyers for research and editorial assistance.

¹ 116 S. Ct. 1769 (1996).

² See *infra* notes 15 through 19 and accompanying text. To legally stop a person, a police officer must have at least reasonable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968).

³ Brief for the United States at 5-6, *United States v. Whren*, 116 S. Ct. 1769 (1996) (No. 95-5841).

⁴ *Whren*, 116 S. Ct. at 1773 (defendant petitioners asked that the standard be "whether a police officer, acting reasonably, *would have* made the stop for the reason given" (emphasis added)).

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Court said, they have to be *imaginable* for a stop. The Court made post hoc Fourth Amendment mindsets of a reasonable officer, not the motives of the arresting officer, necessary, useful, or relevant to the legality of a seizure.⁶ After conducting a traffic stop because of a violation, if the officer is involved in some other activity, rather, once a driver's purpose will make no difference.

For the sake of our society, *Whren* makes some sense in the administration. But even if we opt for a more workable set of practices, neither the stop and seizure has reflected a profoundly dangerous and dedicated to the equal protection of the law.

First, the comprehensive power of the Fourth Amendment to tails of driving in ways that, in the most literal sense, no one would expect on a short drive, even with a traffic stop. It says that any traffic violation is a real reason for it is; that is, any time, anywhere, violation of an activity driving changes the Fourth Amendment.

⁵ *Id.* at 1772.

⁶ *Id.* at 1773-76.

⁷ *Id.*

⁸ See, e.g., *infra* note 27; *Id.* at 2 (1996 Supp.). Indeed, the Fourth Amendment activity in the past years. E.g., John M. Burkoff, *An Inconsistent Exclusionary Rule in Searches*, 57 N.Y.U. L. REV. 701 (1985); 1 WAYNE R. LAFAVE, *See It, Now You Don't*, 17 U. L. REV. 1 (1985); 1 WAYNE R. LAFAVE, *Amendment Activity: Another Justice, and the American Way* (1985); 1 WAYNE R. LAFAVE, 1.4(e) (3d ed. 1996). This argument is different. *Whren* almost always will—no inquiry

Court said, they have the simplest and clearest type of probable cause imaginable for a stop.⁵ Requiring more would force lower courts to make post hoc Fourth Amendment judgments based on either the mindset of a reasonable officer or the actual (perhaps ulterior) motives of the arresting officer, neither one of which the Court saw as necessary, useful, or relevant to the task of judging the constitutionality of a seizure.⁶ After *Whren*, courts will not ask whether police conducted a traffic stop because officers felt the occupants of the car were involved in some other crime about which they had only a hunch; rather, once a driver commits a traffic infraction, the officer's "real" purpose will make no difference at all.⁷

For the sake of of argument, I will concede that the decision in *Whren* makes some sense, at least from the point of view of judicial administration. But examined more carefully, *Whren* does more than opt for a more workable rule: it approves two alarming law enforcement practices. Neither are secret; on the contrary, the law of search and seizure has reflected both for a long time.⁸ But both represent profoundly dangerous developments for a free society, especially one dedicated to the equal treatment of all citizens.

First, the comprehensive scope of state traffic codes makes them extremely powerful tools under *Whren*. These codes regulate the details of driving in ways both big and small, obvious and arcane. In the most literal sense, no driver can avoid violating *some* traffic law during a short drive, even with the most careful attention. Fairly read, *Whren* says that any traffic violation can support a stop, no matter what the real reason for it is; this makes any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police. Given how important an activity driving has become in American society, *Whren* changes the Fourth Amendment's rule that police must have a reason

⁵ *Id.* at 1772.

⁶ *Id.* at 1773-76.

⁷ *Id.*

⁸ See, e.g., *infra* note 27; WAYNE R. LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 3.1, at 2 (1996 Supp.). Indeed, I would be remiss not to mention that the subject of pretextual Fourth Amendment activity has garnered a considerable amount of attention over the years. E.g., John M. Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 ORE. L. REV. 151 (1979); John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982); John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984); James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639 (1985); *Rejoinder: Truth, Justice, and the American Way—Or Professor Haddad's Hard Choices*, 18 U. MICH. J.L. REF. 695 (1985); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 1.4(e) (3d ed. 1996). This excellent commentary has framed the debate well. But my argument is different. *Whren* means that as long as a traffic infraction occurs—and one almost always will—no inquiry into pretext of any type is even necessary.

to forcibly interfere in our business—some basis to suspect wrongdoing that is more than a hunch.⁹ Simply put, that rule no longer applies when a person drives a car.

This alone should worry us, but the second police practice *Whren* approves is in fact far worse. It is this: Police will *not* subject *all* drivers to traffic stops in the way *Whren* allows. Rather, if past practice is any indication, they will use the traffic code to stop a hugely disproportionate number of African-Americans and Hispanics. We know this because *it is exactly what has been happening already*, even before receiving the Supreme Court's imprimatur in *Whren*. In fact, the stopping of black drivers, just to see what officers can find, has become so common in some places that this practice has its own name: African-Americans sometimes say they have been stopped for the offense of "driving while black."¹⁰ With *Whren*, we should expect African-Americans and Hispanics to experience an even greater number of pretextual traffic stops. And once police stop a car, they often search it, either by obtaining consent, using a drug sniffing dog, or by some other means.¹¹ In fact, searching cars for narcotics is perhaps the major motivation for making these stops.

Under a Constitution that restrains the government vis-a-vis the individual¹² and that puts some limits on what the authorities may do in the pursuit of the guilty, the power of the police to stop any particular driver, at almost any time,¹³ seems oddly out of place. And with

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[E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Delaware v. Prouse, 440 U.S. 648, 663 (1979); see *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¹⁰ I heard this phrase often from clients I represented in Washington, D.C. and its surrounding Maryland counties; among many of them, it was the standard way of describing the common experience of constant stops and harassment of blacks by police. Thus I was not surprised to see the phrase show up recently in the popular press. E.g., Michael Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, WASH. POST, March 29, 1996, at A1 (black men are stopped so often they say they are stopped for the offense one of them "calls DWB—driving while black."). See also Henry Louis Gates, *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 59 (constant stops by police is what "many African-Americans know as D.W.B.: Driving While Black").

¹¹ See *infra* notes 184-193 and accompanying text.

¹² See, e.g., WAYNE R. LAFAVE, *SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT*, § 1.1, at 3-5 (1996) (Fourth Amendment grew out of English and colonial experiences with abuses of general warrants and writs of assistance); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 5-6 (1994) (noting that the history and purpose of Fourth Amendment is about limitation of executive and police power).

¹³ Indeed, described this way, the Court would no doubt disagree and say that police behavior like this surely *does* violate the Fourth Amendment. E.g., *Delaware v. Prouse*, 440

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²¹ *Id.* at § 2204

the words "equal justice under law" carved into the stone of the Supreme Court itself, one might think that the use of police power in one of its rawest forms against members of particular racial or ethnic groups might prompt the Court to show some interest in curbing such abuses.¹⁴ The defendant-petitioners presented both of these arguments—the almost arbitrary power over any driver inherent in the "could have" approach,¹⁵ and the racially biased use of traffic stops—to the Court. Yet the Court paid little attention to these obvious implications of its decision. *Whren* is more than a missed opportunity for the Court to rein in some police practices that strike at the heart of the ideas of freedom and equal treatment; *Whren* represents a clear step in the other direction—toward authoritarianism, toward racist policing, and toward a view of minorities as criminals, rather than citizens.

II. THE CASE

Whren presented the Court with relatively simple facts. Plain clothes vice officers in an unmarked police car saw two young men driving a vehicle with temporary tags in an area known for drug activity.¹⁶ The police observed the vehicle pause at a stop sign for longer than usual.¹⁷ While the officers did not see the men do anything to indicate involvement in criminal activity, they still became suspicious.¹⁸ The driver turned without signalling and sped off.¹⁹ The police stopped the vehicle, and observed the passenger holding a bag of cocaine in each hand.²⁰

The government argued that the traffic violations the driver committed—not giving "full time and attention to the operation of the vehicle,"²⁰ failing to signal,²¹ and travelling at a speed "greater than is

U.S. 648 (1979) (random stops of automobiles prohibited). This may be true, but my intent is to describe what the law *does*, not what it *says*.

¹⁴ Brief for Petitioners at 17-30, *Whren* (No. 95-5841).

¹⁵ *Whren v. United States*, 116 S. Ct. 1769, 1772 (1996). Both of the young men were African-Americans.

¹⁶ *Id.*

¹⁷ *Id.* While the Court's opinion notes that the occupants were "youthful," that the vehicle was "a dark Pathfinder," and that the driver seemed to be looking down into the lap of the passenger, *id.*, there was no indication of criminal activity. As the Brief for the Petitioners notes, the main officer involved testified that the stop of the car was performed not to investigate specific acts of the occupants indicating criminality, but simply to speak to the driver about his poor driving. Brief for Petitioners, *Whren*, at 5-7 (No. 95-5841). This seems a transparently obvious lie; with *Whren* on the books, police will have no reason to tell such stories, since pretextual stops have been approved, and no "innocent" motivation need be voiced for the court reviewing a motion to suppress.

¹⁸ *Whren*, 116 S. Ct. at 1772.

¹⁹ *Id.*

²⁰ 18 D.C. Mun. Regs. § 2213.4 (1995).

²¹ *Id.* at § 2204.3.

reasonable and prudent under the conditions"²²—gave the police probable cause to stop the car. The government contended that with probable cause arising from the traffic violations, the stop of the car passed constitutional standards, regardless of the fact that the officers may actually have intended to investigate drug offenses and not traffic infractions.²³ The defense asserted that the officers had no actual interest in traffic enforcement, and had used the traffic infraction only as a pretext. For the real objective of the police—searching for evidence of possible drug offenses—no probable cause or reasonable suspicion existed.²⁴ The defense contended that this made the stop (and the resulting seizure of the cocaine) unconstitutional.²⁵ The District Court admitted the evidence, and at trial both defendants were found guilty.²⁶ The U.S. Court of Appeals for the District of Columbia Circuit affirmed, stating that "a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation," despite the fact that the officer may subjectively believe that those in the car may be engaging in some other illegal behavior.²⁷

The Supreme Court adopted the "could have" theory. The Court said that any time a police officer observes a traffic violation, she has probable cause to stop the vehicle, regardless of the fact that the detailed nature of traffic codes enables any officer that wishes to do so to stop virtually any motorist at almost any time by using the traffic in-

²² *Id.* at § 2200.3.

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When a police officer has observed a motorist commit a traffic offense, the officer has probable cause to justify a stop. . . . [A]ny argument [to the contrary] . . . conflicts with this Court's teaching that the validity of a search or a seizure under the Fourth Amendment turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time

Brief for the United States, *Whren*, at 7-8 (No. 95-5841).

²⁴ Transcript, *U.S. v. Whren*, U.S. D. Ct., D.D.C., Nos. 93-cr00274-01 and 93-cr00274-02, at 122-24, 126-30; *see also* Brief for Petitioners, *Whren*, at 13-14 (No. 95-5841).

²⁵ Transcript, *supra* note 24, at 124, 130; Brief for Petitioners, *Whren*, at 14 (No. 95-5841).

²⁶ *Id.* at 10-11.

²⁷ *Whren v. United States*, 53 F.3d 371, 374-75 (D.C. Cir. 1995). The D.C. Circuit's decision put it in line with eight other circuits that had adopted some form of the "could have" rule. *U.S. v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995) (en banc); *U.S. v. Johnson*, 63 F.3d 242, 247 (3d Cir. 1995), *petition for cert. filed*, No. 95-6724 (Nov. 13, 1995); *U.S. v. Scopo*, 19 F.3d 777, 782-84 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 207 (1994); *U.S. v. Ferguson*, 8 F.3d 385, 389-91 (6th Cir. 1993) (en banc), *cert. denied*, 115 S. Ct. 97 (1994); *U.S. v. Hassan El*, 5 F.3d 726, 729-30 (4th Cir. 1993) *cert. denied*, 114 S. Ct. 1374 (1994); *U.S. v. Cummins*, 920 F.2d 498, 500-01 (8th Cir. 1990); *U.S. v. Trigg*, 878 F.2d 1037, 1039 (7th Cir. 1989); *U.S. v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc). Two other circuits had adopted the "would have" rule. *U.S. v. Cannon*, 29 F.3d 472, 475-76 (9th Cir. 1994); *U.S. v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986).

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³⁰ *Whren*, 116 S.

³¹ 414 U.S. 218.

³² 436 U.S. 128.

³³ *Whren*, 116 S.

³⁴ *Id.* at 1774.

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fraction as a pretext.²⁸ The Court discounted statements in prior cases that seemed to cast pretextual stops in an unfavorable light,²⁹ and stated that the law actually supported the opposite proposition: An officer's motive does not "invalidate[] objectively reasonable behavior under the Fourth Amendment."³⁰ Relying heavily on *United States v. Robinson*³¹ and *Scott v. United States*,³² the Court said that the officer's state of mind in a Fourth Amendment situation is irrelevant, "as long as the circumstances viewed objectively, justify that action."³³ "We think," the Court went on, that *Robinson* and other cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivation of the individual officers involved."³⁴

Addressing the "would have" standard that the defendant proposed, the Court rejected the notion that the results of a suppression motion should turn on whether a reasonable officer, under the police practices and regulations in the jurisdiction in which the case arose, would have made the stop for the purposes of traffic enforcement.³⁵ Trial courts would find such a test much too difficult to administer, the Court said, and would end up "speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."³⁶ The result would be that the application of Fourth Amendment law would vary from place to place, depending on police regulations and practices, a result the Court found unacceptable.³⁷ But the Court failed to acknowledge that the district court in *Whren* would not have needed to speculate to apply the "would have" standard. District of Columbia Police regulations prohibited officers in plain clothes and officers in unmarked vehicles from making traffic stops unless the violations posed an immediate threat to others.³⁸ The officers clearly violated this rule in *Whren*; thus, there is little

²⁸ *Whren v. United States*, 116 S. Ct. 1769, 1772-1773 (1996).

²⁹ *Id.* at 1773-74 (citing *Florida v. Wells*, 495 U.S. 1 (1990) (impoundment of vehicles); *Colorado v. Bertine*, 479 U.S. 367 (1987) (same); *New York v. Burger*, 482 U.S. 691 (1987) (administrative inspections of businesses)).

³⁰ *Whren*, 116 S. Ct. at 1774.

³¹ 414 U.S. 218 (1973).

³² 436 U.S. 128 (1978).

³³ *Whren*, 116 S. Ct. at 1774 (quoting *Scott*, 436 U.S. at 138).

³⁴ *Id.* at 1774.

³⁵ *Id.* at 1775.

³⁶ *Id.*

³⁷ *Id.* at 1775.

³⁸ D.C. Metropolitan Police Department General Order 303.1 (Traffic Enforcement) (eff. April 30, 1992) ("Traffic enforcement may be undertaken as follows: . . . Members who are not in uniform or are in unmarked vehicles may take enforcement action only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.").

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doubt that their conduct was not what a reasonable officer in their department would do, at least assuming that a reasonable officer follows regulations. Additionally, there was no doubt that their traffic enforcement actions were a pretext for drug investigation without probable cause or reasonable suspicion.³⁹

The Court gave short shrift to the argument that police would use the power to make traffic stops disproportionately against minorities. Of course, the Constitution forbids racially biased law enforcement, the Court said, but the proper source for a remedy is the Equal Protection Clause, not the Fourth Amendment.⁴⁰ Dismissing this point in a few tepid lines buried in the middle of the opinion, the Court read the racial question out of the case without any substantive discussion. The real reasons police act, as opposed to the legal justification proffered for their actions, "play no role in ordinary, probable-cause Fourth Amendment analysis."⁴¹ It is difficult to say what is more striking: the blandness of these words, or the blindness of what they assert.

The Court's brief treatment of a position so central to the petitioners' case suggests that the Justices may not have taken the argument seriously. But it is the substance of the Court's answer, not its

³⁹ The main officer involved in the case testified that he was "out there almost strictly to do drug investigations" and that he stops drivers for traffic offenses "[n]ot very often at all." Transcript, *supra* note 24, at 78. Despite these statements, and the fact that the district judge was troubled by a "lengthy pause" before the officer's answer to the question whether he in fact stopped the vehicle because he was suspicious of a new car with two young black men inside, *id.* at 66-67, 76-77, 138, the court found the traffic stop proper under the "could have" test.

The Court also declared that the case need not be resolved by a balancing of interests. Past cases, the Court said, made a balancing of the government's interest in such stops against the individual's interests in freedom from such interference necessary only in situations without probable cause or in cases featuring an extraordinary search or seizure—for example, seizing a fleeing suspect by using deadly force. *Whren*, 116 S. Ct. at 1776 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985) (balancing interests to determine that using deadly force to seize a fleeing felon is an unreasonable seizure)). Since, by hypothesis, probable cause exists in a pretextual traffic stop case, courts need not do any balancing because "[t]he making of a traffic stop out-of-uniform does not remotely qualify as such an extreme practice." *Id.* at 1777. While a stop by an individual in plain clothes in a nondescript car may not be as "extreme" as shooting someone, the experience could still be quite frightening or even dangerous. See, e.g., *State v. Auxter*, No. OT-96-004, 1996 WL 475926, at *2 (Ohio Ct. App. August 23, 1996) (drunk driving case dismissed because officer made stop and arrest in unmarked car, and Ohio law prohibits officer who does so from testifying in case in order to curb abusive use of speed traps and "to provide for the safety of persons being stopped" (emphasis added)); Rose Kim, *Family Wants Answers*, *Newsday*, March 20, 1996, at 4 (family members allege that physician killed by police officers because police officers were in unmarked cars and not in uniform, precipitating violent incident); *Pennsylvania Bill Would Bar Use of Unmarked Police Cars*, *N.Y. Times*, Oct. 13, 1996, at A12 (proposed bill targeted at crimes by police impostors using unmarked cars).

⁴⁰ *Whren*, 116 U.S. at 1774.

⁴¹ *Id.*

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brevery, that confirms this feeling. On the practical level, equal protection will provide few of those subjected to this treatment with any solace; indeed, for each of the few successful suits brought to protest racially biased law enforcement practices,⁴² police may stop and search thousands of people who have no hope of redress. They do not have the resources, knowledge, or wherewithal to complain; they have learned that complaining about this treatment brings nothing (except maybe trouble), or that they may make unattractive plaintiffs unlikely to engender any jury's sympathy, regardless of the injuries to their rights.⁴³

Aside from these practical considerations, the Court's reference to the Equal Protection Clause seems to mean that persons aggrieved by racially biased stops and searches should attempt a statistical demonstration that pretextual traffic stops have a racially disproportionate impact. But plaintiffs in such suits would have to confront the Court's long-standing precedents barring proof of equal protection claims by a showing of disparate impact.⁴⁴ Moreover, the Court has shown hos-

⁴² See *infra* notes 89-161 and accompanying text.

⁴³ See *infra* note 120.

⁴⁴ In making this suggestion, the Court seemed to ignore its cases, which say disparate racial impact of a practice or policy is not enough to prove a violation of the Equal Protection Clause. Rather, to prove such a violation, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976); see also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65, 271 (1977) (proof of racially discriminatory aim is required to show a violation of the equal protection clause, and inference of discriminatory "ultimate effect" did not make out a constitutional claim). While the exact contours of what the Court would require in order to make out a claim remain unclear, *Davis* and the cases that follow seem to say that lawsuits over the racially discriminatory effect of facially race-neutral rules are to be "conducted as a search for a bigoted decision-maker," LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1509 (2d ed. 1988), a difficult standard to meet in contemporary America. Thus a case like that of *Robert Wilkins*, see *infra* notes 112-134 and accompanying text, may succeed, since the evidence uncovered in the case includes an actual memorandum explicitly targeting black men for pretextual stops. But the *Wilkins* case will prove to be the rare exception, because in most cases decision-makers will not commit such ideas to paper. The only equal protection cases that might provide some underpinning for the Court's equal protection suggestion in *Whren* are the peremptory challenge cases, in which discriminatory use of peremptory challenges may make out a prima facie case of discrimination that an adversary must then explain as stemming from nonracial reasons. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (applying rule to prosecutor's use of peremptories in criminal case); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying rule to civil cases); *Powers v. Ohio*, 499 U.S. 400 (1991) (exclusion of white jurors in trial of black defendant prohibited). But the underlying rationale of these cases has to do not just with discriminatory racial impact and equal protection, but with barring particular groups from an important civic function—jury service—and in the undermining of public confidence in the jury system that might then result. *Batson*, 476 U.S. at 87; *Georgia v. McCollum*, 505 U.S. 42, 48-50 (1992) (same). Thus it is not at all clear that the Court would find the peremptory challenge cases applicable.

tility toward the demonstration of constitutional violations through statistics. In *McCleskey v. Kemp*,⁴⁵ a statistical study showed undeniable racial patterns in the administration of the death penalty in Georgia. If the victim was white and the perpetrator was black, the state sought the death penalty 70 percent of the time;⁴⁶ if the victim was black and the defendant was white, the state sought the death penalty in only 19 percent of the cases.⁴⁷ If the victim and defendant were either both white or both black, the figures were 32 percent and 15 percent, respectively.⁴⁸ McCleskey claimed that the statistics demonstrated that he was discriminated against because of his race and the race of his victim.⁴⁹ As striking as these statistics may have been, the Court found them meaningless. "At most," the Court said, "the . . . [statistical] study indicates a discrepancy that appears to correlate with race," but it "does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."⁵⁰ McCleskey, the Court said, "must prove that the decision-makers in *his* case acted with discriminatory purpose."⁵¹ In other words, only evidence of racial animus of the most direct nature in the defendant's own case could prove an equal protection violation; statistical proof showing patterns of racial bias, the more logical way to demonstrate discriminatory application of the law, would be unacceptable.⁵²

Another example is *United States v. Armstrong*,⁵³ a selective prosecution case decided during the same Supreme Court term as *Whren*. In *Armstrong*, the defendants presented a study that showed that all 24 crack cocaine cases the district federal public defender had closed over the prior year involved only black defendants.⁵⁴ Finding this evidence insufficient, the Court sided with the government and made the already daunting challenge of proving a selective prosecution claim even more difficult: the defendant will have no right of access to the prosecutor's files unless he first introduces evidence that the prosecutor did not prosecute others similarly situated and acted out of racial hostility in the defendant's case.⁵⁵ Thus, the defendant must

⁴⁵ 481 U.S. 279 (1987).

⁴⁶ *Id.* at 287.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 292.

⁵⁰ *Id.* at 312-13.

⁵¹ *Id.* at 292.

⁵² *But cf.* *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987) (error to reject "racial impact or results evidence," given defendant's allegations of selective prosecution of vote fraud laws by targeting majority-Black counties).

⁵³ 116 S. Ct. 1480 (1996).

⁵⁴ *Id.* at 1483.

⁵⁵ *Id.* at 1488-89.

furnish evidence of the correctness of his claim, without access to the very evidence needed to prove his claim—a Catch 22 if ever there was one.⁵⁶

McCleskey and *Armstrong* make a jarring backdrop for the Court's blithe assertion in *Whren* that the Equal Protection Clause represents the proper way to address claims of discrimination in law enforcement. It is hard to avoid the conclusion that, given *McCleskey* and *Armstrong*, the Justices do not mean for many equal protection cases to succeed.

Even though I disagree strongly with some parts of *Whren*, I will concede for the sake of argument that the Court's reasoning is not entirely wrong. There is no question that it will be easier for lower courts to work with the "could have" rule than the "would have" rule. The "could have" rule requires very little evidence; the officer need only testify that she observed a traffic violation and stopped the car. The court will either believe the testimony or reject it.⁵⁷ By contrast, the "would have" test might require testimony about regular police practices, departmental regulations, and in the end a judgment from the court about whether the actions of the officer in a particular case were those a reasonable officer would have taken. These difficulties do not persuade me that courts *could not* cope with a "would have" rule; in fact, they make such judgments all the time in *Terry* stop cases, which require a decision about the reasonableness of the officer's actions in a given situation.⁵⁸ Nevertheless, the "could have" test would no doubt prove easier to administer.

To be sure, there are negative points to the opinion beyond those I have already mentioned. For example, one can make a good argument that the Court used a strained reading of its cases to reject the "would have" test. This seems especially true of the Court's treatment of *Robinson*. The Court was correct in *Whren*: *Robinson* said that the actual motivation of the officer does not determine the search's objec-

⁵⁶ See David Cole, *See No Evil, Hear No Evil*, *LEGAL TIMES*, July 29, 1996, at S29 ("In effect, one must provide evidence of one's claim without access to the very evidence necessary to establish the claim.").

⁵⁷ Given that lower courts nearly always take the word of the officer in these matters, even when it is obvious that the officer is lying, it seems unlikely in the extreme that courts will disbelieve officers' proffered justifications based on the traffic stops which *Whren* permits. See, e.g., David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 6 (1994) (testifying falsely on search and seizure issues is an accepted practice in lower courts); Alan M. Dershowitz, *Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A15 (when judges accept perjurious police testimony, they bear responsibility for it).

⁵⁸ See *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (the question is whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate").

tive reasonableness.⁵⁹ But this is hardly a fair description of the actual thrust of the case. *Robinson* posed the question whether the search of the defendant incident to arrest met constitutional standards. The facts did not point to any danger to police or to the destruction of any evidence—the twin justifications for a search incident to an arrest until the *Robinson* decision.⁶⁰ Nevertheless, the Court in *Robinson* found that the arrest alone justified the search. In other words, a full search can always follow a legitimate arrest; that is, an arrest which police make for the purpose of apprehending an offender, not for the purpose of making the search. Thus, while the irrelevancy of the actual beliefs of the officer is consistent with the rest of *Robinson*, it hardly seems substantial enough to be the basis of the decision in *Whren*. Indeed, from the point of view of the proper use of cases and doctrine, the Court should simply have conceded in *Whren* that precedent did not supply a ready answer to the question of how to handle pretextual stops. The opinion could have said (1) our cases do not dictate which way to decide this issue, so (2) we think the “could have” rule clearly preferable for reasons of judicial administration, police understanding of the rule, and crime control.

But these arguments are not the primary reasons that *Whren* should disturb us. The real danger of *Whren* is not its use of precedent, its facile logic, or its rejection of one proposed test for another. Rather, *Whren*'s most troubling aspects lie in its implications—the incredible amount of discretionary power it hands law enforcement without any check—and what this means for our everyday lives and our freedom as citizens.

III. THE FOURTH AMENDMENT AND TRAFFIC OFFENSES

Commentators have criticized the Supreme Court's Fourth Amendment jurisprudence, with considerable justification. As the Court lurches between protecting what it considers bedrock Fourth Amendment values—the sanctity of the home, for example⁶¹—and the undesirable and distasteful result of suppressing probative evidence of guilt, it has generated a hodgepodge of conflicting rules so technical that law professors—let alone law enforcers—find them difficult to understand.⁶² Even so, some basic search and seizure rules

⁵⁹ *Whren*, 116 S. Ct. at 1774, (citing *United States v. Robinson*, 414 U.S. 218, 221 n.1 and 236 (1973)).

⁶⁰ See, e.g., *Chimel v. California*, 395 U.S. 752 (1969).

⁶¹ See, e.g., *Payton v. New York*, 445 U.S. 573, 589-90 (1980) (the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest).

⁶² E.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994)

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seem firmly ensconced in the law. Perhaps this is because they are so fundamental that disturbing them would create an even larger doctrinal mess than the one that already exists; perhaps it is because there is present-day consensus accompanied by historical evidence on these points. Whatever the reason, we can discuss two key rules, secure in the knowledge that they are accepted by the Court.

First, the police must usually have a reason to forcibly stop a person.⁶³ When I say "forcibly stop," I do not mean the application of force to a suspect, though that may be part of a seizure. And I am not referring to casual encounters with police, in which a citizen is asked whether he or she would mind talking to police. Even though it seems more than just plausible to argue that such encounters always carry with them some element of coercion,⁶⁴ I am willing to accept, for the purposes of argument, the idea that such encounters remain consensual. In contrast, a forcible stop is by its nature coercive. When a police officer orders a citizen to halt, questioning, a search of some kind, or even arrest may follow. Police cannot force a citizen to stop and submit in this way without probable cause or at least reasonable suspicion to believe that a crime has been or is about to be committed by the suspect.⁶⁵ The Supreme Court reaffirmed this standard just a few years ago in *Minnesota v. Dickerson*,⁶⁶ in which Justice White stated clearly that this rule had not changed. The police must still have a reason to force a citizen to stop and submit to their authority, something more than just a hunch.⁶⁷

The other basic rule important to our discussion is this: if police

(describing Fourth Amendment jurisprudence as a mess); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985) (chaotic state of Fourth Amendment law comes from the pulling of courts between the poles of following the law as decided in previous cases and suppressing evidence, and the desire to have the evidence of crime that will convict the guilty admitted).

⁶³ *Terry v. Ohio*, 392 U.S. 1 (1968), is of course the source of the rule that at least reasonable suspicion is necessary for a stop. I say this is usually the rule, because there are exceptions, such as the cases in which there is a special governmental need, e.g., *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (permitting suspicionless searches at roadblocks due to the special need to fight drunk driving), or administrative searches, e.g., *New York v. Burger*, 482 U.S. 691 (1987) (administrative inspection of junkyards).

⁶⁴ Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 249-50 (1991) (describing encounters between police and citizens as always carrying some element of coerciveness).

⁶⁵ *Terry*, 392 U.S. at 30. Even in the context of a *Terry* stop, the same rules have always applied. Justice Harlan's concurring opinion in *Terry* makes this clear. Without a justifiable stop, Harlan said, officers could not frisk to assure their safety. It is the right to stop the suspect in the first place that justifies getting close enough to the suspect that the officer might be in danger; the police cannot generate that danger by putting themselves at risk in the first place. *Id.* at 32-33 (Harlan, J., concurring).

⁶⁶ 508 U.S. 366 (1993).

⁶⁷ *Id.* at 372-73.

do not have the probable cause or reasonable suspicion necessary for a forcible stop, a citizen may ignore police requests to stop, respond to questions, produce identification, or submit to any further intrusion. The Supreme Court has reiterated this rule in a number of cases stretching over many years. For example, in *Brown v. Texas*,⁶⁸ police stopped a man in an area with a "high incidence of drug traffic"⁶⁹ because "the situation 'looked suspicious and we had never seen [the] subject in that area before.'"⁷⁰ The officers arrested the man under a Texas statute that criminalized any refusal to give police a name and address upon a legitimate stop.⁷¹ The Supreme Court invalidated the statute, and declared that nothing in the facts of the case allowed the officers to make a legitimate stop, even the defendant's presence in an area known for narcotics trafficking. The defendant had every right to walk away and to refuse to produce identification in such a situation, and any law to the contrary did not meet constitutional standards.⁷² The Court carried this doctrine forward in *Florida v. Royer*,⁷³ in which it stated that "[a citizen] may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds."⁷⁴ And in *Florida v. Bostick*,⁷⁵ the Court reaffirmed this principle, declaring that while the police may question a person about whom they have no suspicion, "an individual may decline an officer's request without fearing prosecution."⁷⁶

To be sure, I have not made the mistake of assuming that these legal rules necessarily reflect reality. I know that even though the cases discussed here may guarantee citizens the right to walk away from curious police without interference, the right may exist more in theory than in practice.⁷⁷ It may be that the mere appearance of au-

⁶⁸ 443 U.S. 47 (1979).

⁶⁹ *Id.* at 49.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 52-53. See also *Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979) (holding that police had no reasonable suspicion to detain the customer of a tavern, even if the police had a warrant to search the tavern and a general suspicion that drug sales took place at the tavern, when there was no indication that the customer himself was involved or armed).

⁷³ 460 U.S. 491 (1983).

⁷⁴ *Id.* at 498 (citing *United States v. Mendenhall*, 446 U.S. 544 (1980) ("a citizen who does not wish to answer police questions may disregard the officers questions and walk away")).

⁷⁵ 501 U.S. 429 (1991).

⁷⁶ *Id.* at 437.

⁷⁷ Professor Tracey Maclin has made this point in a persuasive way: It is all very well to say that a citizen need not respond to police inquiries; it is another to ask how many would actually resist and why they should have to do so. "The point is not [only] that very few persons will have the moxie to assert their fourth amendment rights, although we know

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thority—nothing more than the officer's uniform, badge and squad car, to say nothing of her weapon—will cause most people to do what she says or answer her questions. But the point is that even if the law remains more an ideal than anything else, the Court's pronouncements on the subject all point in one direction: the police need at least reasonable suspicion to forcibly interfere with one's movement, and if they do not have it the citizen may walk away.

When alters all of this for anyone driving a car. Simply put, it is difficult to imagine a more American activity than driving a car. We use our cars for everything: work (both as transportation to get to and from work and as mobile offices and sales platforms), play, and myriad other activities that make up everyday life. Of course, many Americans do not own cars, and some have even found it unnecessary to learn to drive. But this is not the norm. Most American kids date their emergence from adolescence not from high school graduation or a religious or cultural ceremony, but from something far more central to what they really value: the day they receive their driver's licenses. Americans visiting Europe for the first time often return with the observation that one can get to and from almost any little town entirely on public transportation. Europeans visiting America are often surprised at the lack of public transportation facilities and options outside of major urban centers, and at the sizeable cities that rely entirely on automobile transportation. Despite energy crises, traffic congestion, and the expense of owning a car, most Americans prefer to drive wherever they go.⁷⁸ In short, there are few activities more important to American life than driving.⁷⁹

With that in mind, consider traffic codes. There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic

that most will not. It is whether citizens in a free society should be forced to challenge the police in order to enjoy [their rights]." Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1306 (1990). Professor Maclin has also argued that the situation may be worse for some members of our society than for others, depending on the color of their skin. MACLIN, *supra* note 63, at 251-53 (describing numerous less-than-legal encounters between police and black men).

⁷⁸ Thus it was no accident when, several years ago, the company that provides "genuine" General Motors parts and service for that company's automotive products ran a series of commercials in which a chorus of hearty voices sang out the words: "It's not just your car, it's your freedom." This jingle represented a perfect blending of the American attitude toward the automobile—the essential part of life, without which one surrenders the "freedom" to come and go at will—with a huckster's willingness to appropriate patriotic feelings and symbolism.

⁷⁹ Steven Stark, *Weekend Edition Sunday: America's Long-Term Love Affair with the Automobile*, (National Public Radio broadcast, Aug. 18, 1996) ("It's virtually impossible to overstate the importance of the car in American life.").

offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation. Reading the codes, it is hard to disagree; the question is how anyone could get *as far as three blocks* without violating the law.

When we think of traffic offenses, we think of "moving violations"—exceeding the speed limit, crossing dividing lines, and the like. But in fact traffic codes regulate many other aspects of driving-related activity, including some that seem almost wildly hypertechnical. And some of these offenses have nothing to do with driving at all. Rather, they are "equipment violations"—offenses in which driving with incorrect, outdated, or broken equipment constitutes the violation. And then there are catch-all provisions: rules that allow police to stop drivers for conduct that complies with all rules on the books, but that officers consider "imprudent" or "unreasonable" under the circumstances, or that describe the offense in language so broad as to make a violation virtually coextensive with the officer's unreviewable personal judgment.

For example, in any number of jurisdictions, police can stop drivers not only for driving too fast, but for driving too slow.⁸⁰ In Utah, drivers must signal for at least three seconds before changing lanes; a two second signal would violate the law.⁸¹ In many states, a driver must signal for at least one hundred feet before turning right; ninety-five feet would make the driver a offender.⁸² And the driver making that right turn may not slow down "suddenly" (undefined) without signalling.⁸³ Many states have made it a crime to drive with a malfunctioning taillight,⁸⁴ a rear-tag illumination bulb that does not work,⁸⁵ or

⁸⁰ E.g., N.M. STAT. ANN. § 66-7-305 (Michie 1994) (prohibits driving "at such a slow speed as to impede the normal and reasonable movement of traffic"); 18 D.C. Mun. Regs. § 2200.10 (1995).

⁸¹ UTAH CODE ANN. § 41-6-69 (1993).

⁸² MD. CODE ANN. TRANSP. II § 21-604(d) (signal must "be given continuously during at least the last 100 feet"); N.M. STAT. ANN. § 66-7-325B (Michie 1994) (same); OHIO REV. CODE ANN. § 4511.39 (Banks-Baldwin 1993) (same); S.C. CODE ANN. § 56-5-2150(b) (Law Co-op. 1991) (same).

⁸³ E.g., MD. CODE ANN. TRANSP. II § 21-604(e) (1992) ("If there is an opportunity to signal, a person may not stop or suddenly decrease the speed of a vehicle until he gives an appropriate signal"); N.M. CODE ANN. § 66-7-325C (1994) ("No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal . . ."); S.C. CODE ANN. § 56-5-2150(c) (Law Co-op. 1991) (same).

⁸⁴ E.g., MD. CODE ANN. TRANSP. II § 22-204(a) (1992) ("[e]very motor vehicle . . . shall be equipped with at least 2 tail lamps mounted on the rear, which . . . shall emit a red light plainly visible from a distance of 1000 feet to the rear"); N.D. CENT. CODE § 39-21-04(1) (1987) (same); S.C. CODE ANN. § 56-5-4510 (Law Co-op. 1991) (same, except that red light must be visible from a distance of 500 feet).

⁸⁵ E.g., MD. CODE ANN. TRANSP. II § 22-204(f) (1992) (requiring "a white light" that will illuminate the rear registration plate "and render it clearly visible from a distance of fifty feet"); N.D. CENT. CODE § 39-21-04(3) (1987) (same); S.C. CODE ANN. § 56-5-4530 (Law

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tires without sufficient tread.⁸⁶ They also require drivers to display not only license tags, but yearly validation stickers, pollution control stickers, and safety inspection stickers; driving without these items displayed on the vehicle in the proper place violates the law.⁸⁷

If few drivers are aware of the true scope of traffic codes and the limitless opportunities they give police to make pretextual stops, police officers have always understood this point. For example, the statements by police officers that follow come from a book written in 1967:

You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made.

You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway.

In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search.⁸⁸

These officers may not fully understand search and seizure law; for example, even in 1967, it was far from clear that a search could follow any traffic stop that police "legitimately" made. But they are absolutely correct on the larger point: with the traffic code in hand, any officer can stop any driver any time. The most the officer will have to do is "tail [a driver] for a while," and probable cause will materialize like magic. *Whren* is the Supreme Court's official blessing of this practice, despite the fact that police concede that they use this technique to circumvent constitutional requirements.

But the existence of powerful and unreviewable police discretion to stop drivers is not the most disturbing aspect of *Whren*. That dubious honor is reserved for the ways in which the police will use this discretion.

Co-op. 1991) (same).

⁸⁶ E.g., MD. CODE ANN. TRANSP. II § 22-405.5(b) (1992) (tire considered unsafe if tread wear indicators are "flush with the tread at any place on the tire" or, in absence of tread wear indicators, do not meet precise measurements at three locations on the tire); S.C. CODE ANN. § 56-5-5040 (Law Co-op. 1991) (tires "shall be in a safe operating condition").

⁸⁷ E.g., S.C. CODE ANN. § 56-5-5350(a) (Law Co-op. 1991) ("No person shall drive . . . any vehicle . . . unless there shall be in effect and properly displayed thereon a current certificate of inspection").

⁸⁸ LAWRENCE F. TIFFANY ET AL., DETECTION OF CRIME 131 (1967). In its most recent case on traffic stops, in which the Supreme Court gave police making these stops the power to order passengers out of vehicles without any suspicion of wrongdoing or danger, Justice Kennedy's dissent points out just how powerful a tool *Whren* is. *Maryland v. Wilson*, No. 95-1268, 1997 U.S. Lexis 1271 (Feb. 19, 1997) (Kennedy, J., dissenting) (when coupled with *Whren*'s grant of power to "stop vehicles in almost countless circumstances," majority opinion in *Wilson* "puts tens of millions of passengers at risk of arbitrary control by the police.").

IV. WHO WILL BE STOPPED?

Once we understand that *Whren* will permit police to stop anyone driving a car whenever they observe the ever-present violations of the traffic code, the question becomes *who* the police will stop. At first blush, the question might seem unnecessary. After all, if *Whren* allows the police to stop any driver at virtually any time, everyone faces the risk of a pretextual stop. But while *Whren* certainly makes it possible for the police to stop anyone, the fact is that police *will not stop just anyone*. In fact, police will use the immense discretionary power *Whren* gives them mostly to stop African-Americans and Hispanics. I say this not to imply that individual officers will act out of racist motivations. Though some will, I believe most will not. Rather, my point is that whatever their motivation, viewed as a whole, pretextual stops will be used against African-Americans and Hispanics in percentages wildly out of proportion to their numbers in the driving population.

It may seem bold that I make this assertion as a fact. In fact, I lack the kind of systematically gathered and analyzed data anyone making such a statement would prefer to have. This is because virtually no one—no individual, no police department, and no other government agency—has ever kept comprehensive statistics on who police stop: basis for the stop, race of suspect, type of police activity after stop (e.g., questioning, search of suspect, search of car, use of drug-sniffing dog, whether consent was given), and the like. Of course, one type of record does follow some percentage of stops: traffic tickets and warnings, and arrest, charging and prosecution records of those suspects police find with contraband. But looking only at the records of those charged and prosecuted can mislead, and says nothing about the many other stops that result in no ticket and yield no contraband.

Even so, information uncovered in the last few years has begun to shed light on the use of pretextual traffic stops. This data reveals several patterns, which African-Americans and Hispanics understand quite well already: police use traffic regulations to investigate many innocent citizens; these investigations, which are often quite intrusive, concern drugs, not traffic; and African-Americans and Hispanics are the targets of choice for law enforcement. So even if we lack systemic data, we now have something that gives us a strong indication of current law enforcement realities and the direction of future trends. We can comfortably predict the effect of *Whren*: police will use the case to justify and expand drug interdiction efforts against people of color.

Here are four different stories of pretextual stops. They originate from different areas of the country: Florida in the South, Maryland in

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the Northeast, Illinois in the Midwest, and Colorado in the West. All involve independent police agencies. Other stories of this type of police activity exist,⁸⁹ but those presented here are among the best documented. Each of them teaches the same lesson. And with *Whren* on the books, we should expect more of what these stories tell, not less.

A. VOLUSIA COUNTY, FLORIDA

Located in central Florida, Volusia County surrounds a busy stretch of Interstate 95. In the late 1980's, this portion of highway became the focus of Sheriff Bob Vogel and his deputies. Using a group of officers called the Selective Enforcement Team, Vogel operated a major drug interdiction effort against drivers moving narcotics by car through his jurisdiction.⁹⁰ The deputies aimed not only to make arrests, but to make seizures of cash and vehicles, which their agency would keep.⁹¹

As with most police agencies, the Volusia County Sheriff's Department did not keep records of stops and searches in which no arrests or seizures occurred in the three years that the Selective Enforcement Team operated.⁹² Thus no one might ever have learned about the Selective Enforcement Team's practices, except for one thing: Volusia County deputies' were cars fitted with video cameras.⁹³ Deputies taped some of the I-95 stops; using Florida's public records law, *The Orlando Sentinel* obtained 148 hours of the videotapes.⁹⁴ Deputies made no tapes for much of the duration of the interdiction effort, and they sometimes taped over previously recorded stops.⁹⁵ But the tapes the newspaper obtained documented almost 1,100 stops, and they showed a number of undeniable patterns.

First, even though African-Americans and Hispanics make up only about five percent of the drivers on the county's stretch of I-95,⁹⁶

⁸⁹ E.g., Duke Helfand & Susan Steinberg, *Charges of Police Racism Tear at Beverly Hills' Image*, L.A. TIMES, December 27, 1995, at A1 (African-Americans "go out of their way to avoid Beverly Hills for fear of being stopped by police" and six have filed suit as a result of stops); Barbara White Stack, *The Color of Justice: The Race Question*, PITTSBURGH POST-GAZETTE, May 5, 1996, at A1 (common experience of police harassment has led some African-Americans to file suit).

⁹⁰ Henry Pierson Curtis, *Statistics Show Pattern of Discrimination*, ORLANDO SENTINEL, August 23, 1992, at A11.

⁹¹ *Id.*; Jeff Brazil and Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, August 23, 1992, at A1.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Curtis, *supra* note 90, at A11 (during five days of sampling, "about 5 percent of the drivers of 1,120 vehicles counted were dark skinned").

more than *seventy percent* of all drivers stopped were either African-American or Hispanic.⁹⁷ The tapes put this in stark terms. One African-American man said he was stopped seven times by police; another said that he was stopped twice *within minutes*. Looking at figures for all of Florida, seventy percent is vastly out of proportion to the percentage of Blacks among Floridians of driving age (11.7 percent), the percentage of Blacks among all Florida drivers convicted of traffic offenses in 1991 (15.1 percent), or to the percentage of Blacks in the nation's population as a whole (12 percent).⁹⁸ (Hispanics make up about nine percent of the population).⁹⁹ Second, the deputies not only stopped black and Hispanic drivers more often than whites; they also stopped them *for longer periods of time*. According to the videotapes, deputies detained Blacks and Hispanics for twice as long as they detained whites.¹⁰⁰ Third, the tapes showed that police followed a stop with a search roughly half the time; *eighty percent* of the cars searched belonged to Black or Hispanic drivers.¹⁰¹

It should not surprise anyone to know that deputies said they made these 1,100 stops based on "legitimate traffic violations."¹⁰² Violations ranged from "swerving" (243), to exceeding the speed limit by up to ten miles per hour (128), burned-out license tag lights (71), improper license tags (46), failure to signal before a lane change (45), to a smattering of others.¹⁰³ Even so, only nine of the nearly eleven hundred drivers stopped—considerably less than one percent—received tickets,¹⁰⁴ and deputies even released several drivers who admitted to crimes, including drunk driving, without any charges.¹⁰⁵ The tapes also showed that the seizure of cash remained an important goal of the stops, with deputies seizing money almost three times as often as they arrested anyone for drugs.¹⁰⁶ With regard to the seizures

⁹⁷ *Id.*; Brazil and Berry, *supra* note 91, at A1 ("Almost 70 percent of the motorists stopped were black or Hispanic, an enormously disproportionate figure because the vast majority of interstate drivers are white.").

⁹⁸ Curtis, *supra* note 90, at A11.

⁹⁹ *Id.*

¹⁰⁰ Brazil & Berry, *supra* note 91, at A1 (Average length of stop in minutes: minority drivers, 12.1, white drivers, 5.1).

¹⁰¹ *Id.* at A1 (in 507 searches shown by the tapes, four out of five were of cars with Black or Hispanic drivers; note, however, that these numbers do "not include 78 possible searches/incomplete video").

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* Even in these stops, race sometimes played a role. When a stopped white driver told a deputy he was not doing well, the deputy replied, "could be worse, could be black." *Id.*

¹⁰⁶ *Id.* (89 seizures of cash and 31 drug arrest, respectively). Note also that almost 87 percent of stops were in the southbound lanes, "where any drug traffickers would more

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of cash, race also played a role: Ninety percent of the drivers from whom cash was taken, but who were not arrested, were Black or Hispanic.¹⁰⁷

Notwithstanding these numbers, Sheriff Vogel said there was no racial bias in his department's work. Prior to the release of the tapes, he stated that the stops were not based on skin color and that deputies stopped "a broad spectrum of people."¹⁰⁸ The tapes eventually led to two lawsuits in federal court in which plaintiffs alleged violations of their civil rights because they were targeted for stops on the basis of their race.¹⁰⁹ In both cases, a judge refused to certify a class of all minority citizens illegally stopped; this resulted in the dismissal of the cases when they went to trial.¹¹⁰ On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissals.¹¹¹

The experience of drivers in Volusia County shows what we can expect under *Whren*. Police will use traffic regulations as an excuse to stop drivers they suspect of narcotics trafficking, and most of those stopped will be people of color. Of course, this is exactly the type of police activity that African-Americans and Hispanics have complained of for years, but few have listened.

B. ROBERT WILKINS AND THE MARYLAND STATE POLICE¹¹²

In the early morning hours of May 8, 1992, a Maryland State Police officer stopped a new rental car carrying four African-Americans on Interstate 68. The four, all relatives, were returning to the Washington, D.C. area from a family member's funeral in Chicago.¹¹³ After

likely be carrying cash to Miami," and "[o]nly 13 percent of stops were in the northbound lanes, where the catch would more likely be drugs." *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Steve Berry, *Drug Squad's I-95 Tactics Going On Trial*, ORLANDO SENTINEL, Jan. 6, 1995, at A1; *I-95 Cash-Seizure Stops*, ORLANDO SENTINEL, June 10, 1995, at D3 (first case denied class action status).

¹¹⁰ *Washington v. Vogel*, 880 F. Supp. 1542 (M.D. Fla. 1995); Steve Berry, *Judge Throws Out Suit Against Vogel*, ORLANDO SENTINEL, Jan. 14, 1995, at A1 (cases dismissed because "plaintiff had not produced enough evidence to show that Vogel had used illegal tactics," but did not address "whether Vogel had a policy of targeting minority motorists"); Steve Berry, *Bob Vogel Breezes Through Minorities' Legal Challenge*, ORLANDO SENTINEL, January 15, 1995, at A1 (first case dismissed at trial because judge refused to certify a class).

¹¹¹ *Washington v. Vogel*, Nos. 95-2190, 95-3123, slip op. at 7 (11th Cir. Jan. 7, 1997) ("[The plaintiff's] evidence of a race-based policy, while highly disturbing, fails to demonstrate that the policy, and not traffic violations, prompted the individual officers in this case to conduct [plaintiff's] traffic stops.").

¹¹² The facts described here are taken from the Complaint in the lawsuit *Mr. Wilkins and others filed after the incident*. See Complaint, *Wilkins v. Maryland State Police et al.*, Civil No. MJG-93-468, (D. Md. 1993) [hereinafter Complaint].

¹¹³ *Id.* ¶ 16.

obtaining the driver's license, the officer asked the driver to step out of the car and sign a form giving consent to a search.¹¹⁴ At that point, Robert Wilkins, one of the passengers in the car, identified himself as an attorney with a 9:30 a.m. court appearance in the District of Columbia Superior Court. Wilkins told the officer that he had no right to search the car without arresting the driver; the officer replied that such searches were "routine." After all, the officer said, if Wilkins and his relatives had "nothing to hide, then what [was] the problem?"¹¹⁵ Another officer joined the first, and they detained the group for an additional half hour while other officers brought a drug-sniffing dog to the scene.¹¹⁶ The driver asked whether he would receive a ticket; the officer said he would only give the driver a warning. The driver asked that the warning be written so that the group could leave, and Wilkins asserted that continued detention in order to bring the dog violated the Constitution; the officer ignored both of them.¹¹⁷ When the dog arrived, the officers ordered Wilkins and his relatives out of the car, despite their expressed fears of the dog and the fact that it was raining.¹¹⁸ They were forced to stand in the rain as the dog sniffed in and around the car.¹¹⁹ When the dog failed to react in any way, Wilkins and the others were then allowed back in the car—while the officer who had stopped them wrote the driver a \$105 speeding ticket.¹²⁰

Civil rights lawyers sometimes say that despite the volume of complaints they receive about racially biased traffic stops, victims of this treatment feel reluctant to become plaintiffs in legal actions for redress.¹²¹ Perhaps they fear retaliation; others may want to avoid the hassle of becoming involved in a very public way in complex and often politically charged litigation. Still others may fear that opposing lawyers may discover dirt in their pasts and use it against them. Not so with Robert Wilkins. A Harvard Law School graduate, Wilkins worked as a public defender for the highly-regarded Public Defender Service in Washington, D.C.¹²² As an attorney with an active practice in criminal law, he was no doubt thoroughly familiar with the law that gov-

¹¹⁴ *Id.* ¶ 19.

¹¹⁵ *Id.* ¶ 20.

¹¹⁶ *Id.* ¶ 22.

¹¹⁷ *Id.* ¶ 23.

¹¹⁸ *Id.* ¶ 24-25.

¹¹⁹ *Id.* ¶ 26.

¹²⁰ *Id.* ¶ 26-27.

¹²¹ Mark Pazniokas, *Discrimination by Police Often Hard to Prove*, HARTFORD COURANT, May 2, 1994, at A11 ("[V]ictims [of racially biased police practices] are reluctant to sue" and "shrug off the [racially biased] stops as an annoying fact of life.")

¹²² Complaint, *Wilkins*, at ¶ 20 (Civ. No. MJG-93-468).

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erned the situation in which he and his family members found themselves.¹²³ The prospect of public litigation against a police agency obviously did not scare him. Individually and on behalf of a class of all others treated similarly, he and his family members sued the Maryland State Police, supervisory and command personnel at the agency, and the individual officers involved. They alleged civil rights violations and other wrongs, stating that the officers had illegally stopped and detained them on the basis of a "profile" that targeted people based on their race.¹²⁴ State Police officials denied Wilkins' allegations; a spokesman said the practice of stopping a disproportionate number of blacks simply represented "an unfortunate byproduct of sound police policies."¹²⁵ The implication was clear: African-Americans commit the most crime; to stop crime, we must stop African-Americans. Officials maintained this supposedly race-neutral explanation even in the face of an official document that surfaced during litigation. Dated just days before the State Police officers stopped Wilkins and his family members, it warned officers operating in Allegheny County—the very county in which police stopped the Wilkins group—to watch for "dealers and couriers (traffickers) [who] are predominantly black males and black females . . . utilizing Interstate 68 . . ." ¹²⁶

The case eventually produced a settlement, in which the Maryland State Police agreed not to use any race-based drug courier profiles and to cease using "race as a factor for the development of policies for stopping, detaining, and searching motorists."¹²⁷ The State Police also agreed to conduct training that would reflect the prohibition on the use of race as both departmental policy and state law,¹²⁸ and to pay monetary damages and attorney's fees.¹²⁹ Perhaps more significantly, the State Police agreed that for a period of three years, they would:

maintain computer records of all stops in which a consent to search was given by a motorist stopped on any Maryland roadway by the Maryland State Police and all stops on any Maryland roadway by Maryland State Police in which a search by a drug-detecting dog is made, "minimally

¹²³ As recited in the Complaint, Wilkins demonstrated his familiarity with the law. *Id.* ¶ 20.

¹²⁴ *Id.* ¶¶ 21, 37-57.

¹²⁵ Fletcher, *supra* note 10, at A1.

¹²⁶ Maryland State Police, Criminal Intelligence Report (April 27, 1992) (on file with author).

¹²⁷ Settlement Agreement, *Wilkins v. Maryland State Police*, Civ. No. MJG-93-468 (D. Md.), Jan. 5, 1995, at ¶ 6 [hereinafter Settlement Agreement].

¹²⁸ *Id.* ¶¶ 7, 8. Both of these paragraphs reference *Derricott v. State*, 611 A.2d 592 (Md. 1992), which outlaws the use of racial profiles in Maryland.

¹²⁹ Settlement Agreement, *supra* note 127, at ¶¶ 13, 14.

including in such records: date, time, and location of consent or search, name of officer(s) requesting consent to search or directing search by drug dog; race of persons(s) stopped, detained, or searched; year make and model of vehicle; and grounds for requesting that consent to search be given or search by drug dog made, if any."¹³⁰

The State Police have, in fact, maintained these records, and submitted them to the court. The latest figures available track stops followed by consent searches and dog sniffs from January 1995 through June 1996, and they bear a striking similarity to the information revealed by the Volusia County videotapes. Of the 732 citizens detained and searched by the Maryland State Police, 75% were African-Americans, and 5% were Hispanics.¹³¹ The Maryland numbers are also broken down by officer; of the twelve officers involved, six stopped over 80% African-Americans, one stopped over 95% African-Americans, and two stopped only African-Americans.¹³² Based on this information, provided to the court by the State Police, the plaintiffs and their attorneys are preparing to reopen the litigation, as the Settlement Agreement allows.¹³³ Sad to say, the numbers show that very little has changed, despite the Wilkins suit and the Settlement Agreement.¹³⁴

C. PESO CHAVEZ AND THE ILLINOIS STATE POLICE

During recent years, African-Americans and Hispanics have made hundreds of complaints to the Illinois affiliate of the American Civil Liberties Union, alleging that the Illinois State Police targeted them for pretextual traffic stops.¹³⁵ The A.C.L.U. eventually filed suit; a

¹³⁰ *Id.* ¶ 9. Note that such records might tend to underestimate the total number of racially biased stops on the highways, because they only include stops that are followed by searches, and only two kinds of searches at that: searches by consent and searches with dogs. As the Volusia County data indicates, there are often significant numbers of citizens stopped who are not searched. See *supra* note 101 and accompanying text.

¹³¹ Summaries of records of Maryland State Police searches, January 1995 through June 1996 [on file with the author]. These data were provided to the court and plaintiff's counsel in raw form; the summaries on file with the author were produced by the plaintiff's legal team.

¹³² *Id.*

¹³³ Settlement Agreement, *supra* note 127, at ¶ 10. See also Plaintiff's Motion for Enforcement of Settlement Agreement and Further Relief, *Wilkins v. Maryland State Police*, Civ. No. CCB-93-468 (D. Md. Nov. 4, 1996).

¹³⁴ Thus it was not surprising to find that the continuation of these practices by the Maryland State Police has led to the filing of yet another, separate lawsuit. Michael Schneider, *State Police I-95 Drug Unit Found to Search Black Motorists 4 Times More Often than White*, BALTIMORE SUN, May 23, 1996 (detailing the "deeply humiliating" roadside search of the vehicle and possessions of Charles and Etta Carter who were travelling on the occasion of their 40th wedding anniversary).

¹³⁵ Andrew Fegelman, *Suit Charges State Police Improperly Stop Minorities*, CHI. TRIB., August 31, 1994, at 4 (Chavez's suit "echo[ed] complaints the organization has received from motorists for six years"); *Illegal Searches Used in Illinois, Suit Alleges*, N.Y. TIMES, Sept. 4, 1994, at 24 (suit filed after "hundreds of complaints from motorists") (hereinafter *Illegal Searches*);

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man named Peso Chavez became the lead plaintiff. However, Mr. Chavez's 1994 encounter with the Illinois State Police did not happen by chance.

Chavez was a private investigator with twenty years of experience and a former elected official in Santa Fe, New Mexico. In 1994, a lawyer for an Hispanic man who alleged that Illinois State Police had stopped him illegally hired Chavez to drive a late model sedan across areas of Illinois that had been the source of complaints of illegal stops and searches of minority motorists.¹³⁶ The plan called for Chavez, a man with an Hispanic appearance, to drive cautiously, taking care not to break the traffic laws; a paralegal in another car would follow at a distance to observe his driving. The idea was a "reverse sting"¹³⁷—an attempt to catch police in the act of making illegal stops and searches.

On February 18, 1993, in Bureau County, Illinois, Officer Thomas of the Illinois State Police began to follow Chavez. He followed Chavez for twenty miles, through Bureau and LaSalle Counties.¹³⁸ Eventually, Thomas activated his emergency lights and pulled Chavez over.¹³⁹ Thomas was soon joined at the scene by another officer. Officer Thomas told Chavez that he had stopped him for a traffic violation, and asked Chavez for his license and rental agreement. Chavez supplied both.¹⁴⁰ After questioning Chavez, Thomas gave Chavez a warning for failing to signal when changing lanes. This supposed infraction was an obvious and unfounded pretext for the stop; the paralegal following Chavez saw no such violation.¹⁴¹ The other officer then asked Chavez if he could search his car. Chavez asked whether he had to allow the search; the officer said that he wanted a drug-sniffing dog to walk around Chavez' car. Chavez unequivocally refused and asked to be allowed to leave, but the officers detained him.¹⁴² Another officer then led a dog around Chavez' car; the officers told Chavez that the dog had "alerted" to the presence of narcotics, and ordered him into the back seat of a patrol car.¹⁴³ For the next hour, Chavez watched as the interior, trunk, and engine compartment of his car were thoroughly searched. The police opened his

Profiles in Prejudice, ST. LOUIS POST-DISPATCH, September 19, 1994, at 6B.

¹³⁶ *Illegal Searches*, *supra* note 135, at 24.

¹³⁷ *Illinois Drug Searches Prompt Lawsuit By ACLU*, ORLANDO SENTINEL, September 1, 1994, at A12.

¹³⁸ Fourth Amended Complaint, Chavez v. Illinois State Police, Civil No. 94 C 5307 (N.D. Ill. 1994), at ¶¶ 23, 24 (on file with author).

¹³⁹ *Id.* ¶ 25.

¹⁴⁰ *Id.* ¶ 26.

¹⁴¹ *Id.* ¶ 22; Sam Vincent Meddis, *Suit Says Suspect 'Profiles' Are Racist*, USA TODAY, September 1, 1994, at 3A.

¹⁴² Fourth Amended Complaint, Chavez, at ¶ 29.

¹⁴³ *Id.* ¶¶ 30, 31.

luggage and searched through his personal possessions.¹⁴⁴ Meanwhile, an officer in the patrol car with Chavez questioned him about his personal life.¹⁴⁵ The police found nothing, and eventually allowed Chavez to leave.¹⁴⁶

Despite his background as an investigator, his government experience, and the knowledge that he was part of a reverse sting, Chavez found the experience more than unnerving. Watching police search his car and being told that the dog had detected drugs, Chavez said, "I became very frightened at what was happening. I never had my mouth as dry as it was—it was like cotton."¹⁴⁷

Chavez is now the named plaintiff in a lawsuit in federal court that seeks injunctive relief against the State Police to stop racially based searches and seizures, as well as other relief and damages. The suit seeks certification of a class of persons subjected to the same treatment. Many other African-Americans and Hispanics who were subjected to illegal stops and searches have become named plaintiffs.¹⁴⁸ At this writing, discovery is ongoing.¹⁴⁹

D. EAGLE COUNTY, COLORADO

In the late 1980's, the Eagle County, Colorado Sheriff's Department established a highway drug interdiction unit. The "High Country Drug Task Force" used a drug courier profile made up of twenty-two "indicators" to stop cars along Interstate 70; prominent among them was "race or ethnicity, based on 'intelligence information' from other law agencies . . ."¹⁵⁰ Although the Task Force used traffic infractions as a pretext to stop many people, not one person received a ticket.¹⁵¹

The story of one of the people stopped speaks volumes about what happened in Eagle County. On May 3, 1989, Eagle County deputies stopped Jhenita Whitfield as she drove from San Diego to Denver

¹⁴⁴ *Id.* ¶¶ 32, 33.

¹⁴⁵ *Id.* ¶¶ 33.

¹⁴⁶ *Id.*

¹⁴⁷ Meddis, *supra* note 141, at 3A.

¹⁴⁸ Fourth Amended Complaint, *Chavez*, at ¶¶ 39-129. Many of these plaintiffs were stopped by the Illinois State Police more than once.

¹⁴⁹ Telephone interview with Fred Tsao, Public Information Director of the American Civil Liberties Union, Chicago, Ill. (July 23, 1996).

¹⁵⁰ Patrick O'Driscoll, *Drug Profile' Lawsuit Settled*, DENVER POST, November 10, 1995, at A1.

¹⁵¹ Robert Jackson, *Minorities Win Suit Over Unfair I-70 Stops*, ROCKY MOUNTAIN NEWS, November 10, 1995, at 4A ("Of the 402 people stopped between August 1988 and August 1990 on I-70 between Eagle and Glenwood Springs, none was ticketed or arrested for drugs. . .").

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to visit relatives. With her were her sister and their four children.¹⁵² A disabled vehicle in the roadway forced them to change lanes; soon after, an officer pulled them over for failing to signal before changing lanes.¹⁵³ The deputies told her explicitly that she "fit the profile" of a possible drug runner," and asked if they could search her car.¹⁵⁴ Whitfield wanted to refuse, but felt concerned that if she did, she might be "set up."¹⁵⁵ She also felt she had no choice because the children were hungry and one needed to use a bathroom, so she consented.¹⁵⁶ The experience left Whitfield, an African-American, shaken, and it has changed her life in a significant way. Despite the fact that she has family out of town, she does not visit them. "I do not travel anymore," she said.¹⁵⁷

Seven people who, like Jhenita Whitfield, had been stopped by Eagle County deputies filed a class action suit in 1990, asking the court to halt the Task Force's practice of race-based profile stops.¹⁵⁸ The court eventually certified a class consisting of 400 individuals who had been stopped.¹⁵⁹ Among them were African-Americans and a large number of Hispanics, who alleged that deputies stopped them because of their ethnicity.¹⁶⁰ In November of 1993, a federal court ruled that the Task Force had violated constitutional protections against unreasonable searches and seizures. With appeals pending, the parties reached a settlement requiring Eagle County to pay damages to each person searched, amounting to a total of \$800,000. The County also agreed to abandon the Task Force program, and agreed not to stop, search, seize evidence or detain a person "unless there is some objective reasonable suspicion that the person has done something wrong."¹⁶¹

E. LIVING WITH PRETEXTUAL STOPS

These cases from Florida, Maryland, Illinois and Colorado show in no uncertain terms the impact *Whren* will have: The drivers police will stop for pretextual traffic violations will come from minority

¹⁵² O'Driscoll, *supra* note 150, at A1.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Jackson, *supra* note 151, at 4A.

¹⁵⁷ O'Driscoll, *supra* note 150, at A1.

¹⁵⁸ *Id.* For a criminal case in which a suppression motion grew out of the Eagle County deputies' use of pretextual stops, see *United States v. Laymon*, 730 F. Supp. 332 (D. Colo. 1990), finding that an Eagle County deputy had used a traffic stop as a pretext, and that the consent that followed the stop was not valid.

¹⁵⁹ O'Driscoll, *supra* note 150, at A1.

¹⁶⁰ *Id.*

¹⁶¹ Jackson, *supra* note 151, at 4A.

groups in disproportionate numbers. Police have done it in the recent past; in the Maryland case, police continue to do so despite a settlement reflected in a court order specifically prohibiting these practices. *Whren* insulates this activity by pronouncing any stop for a traffic violation proper and reasonable, whatever its real purpose.

But seeing the big picture should not prevent us from asking what effect pretextual stops have on the individuals who experience them. The answer highlights the hidden cost of racially skewed law enforcement techniques in a profound way.

For those stopped, the situation may produce fear, anger, humiliation, and even rage. Jhenita Whitfield, the African-American woman stopped in Eagle County, has given up travelling because she once had to balance her desire not to submit to a search against her fear that not consenting would lead the police to plant evidence on her.¹⁶² Peso Chavez, the experienced investigator stopped while driving through Illinois, knew he had no narcotics with him, knew he had a witness to prove that he had broken no laws, and knew and insisted upon his rights. Still, his mouth went dry with fear as officers reported that a dog had been alerted to drugs in his car and the officers proceeded to search through the car and his private effects.¹⁶³ Robert Wilkins and his family members, forced to stand in the rain while a dog sniffed through their car, felt degraded. "You can't imagine the anger and humiliation I felt during the entire episode," said Aquila Abdullah, a passenger in the car with Wilkins that night.¹⁶⁴ Wilkins himself expressed a sense of helplessness. "Part of me feels like there is nothing that I could have done to prevent what happened. You know, I was calm and respectful to the police. I tried to explain to the officer what my rights are."¹⁶⁵ Beyond the price paid by the person stopped, other African-Americans and Hispanics feel the effects, too. Because these pretextual police stops of blacks are so common—frequent enough to earn the name "driving while black"—many African-Americans regularly modify the most casual aspects of their driving behavior, travel itineraries, and even their personal appearance, to avoid police contact. Salim Muwakkil, an academic and journalist, makes trips in the Midwest in a nondescript rental car, strictly obeys the speed limit, and never wears his beret behind the wheel.¹⁶⁶ Before he adopted this strategy, police stopped Muwakkil so often that

¹⁶² See O'Driscoll *supra* note 150, at A1.

¹⁶³ See Meddis, *supra* note 141, at 3A.

¹⁶⁴ *ACLU Sues Maryland Police*, LOUISVILLE COURIER-JOURNAL, February 14, 1993, at 20A.

¹⁶⁵ Fletcher, *supra* note 10, at A1.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

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¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

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¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

he would compute the time these stops took into his travel time.¹⁶⁷ When lawyer and lobbyist Wade Henderson drives from Washington, D.C., to Richmond, Virginia, to teach, he eschews flashy rental cars for conservative ones, even though he is graying and wears a suit.¹⁶⁸ Others restrict their movements; they avoid driving in areas where a black person attracts "stares."¹⁶⁹ And when police stop Christopher Darden, one of the prosecutors in the O.J. Simpson case, he doesn't move, keeps his hands on the wheel, and makes no sudden gestures; he calls these "African American survival techniques."¹⁷⁰

But perhaps we should examine the issue from another perspective: that of law enforcement.¹⁷¹ And that outlook would no doubt seem quite different from what I have said so far. In a nutshell, it is this: Stopping a disproportionate number of African-Americans is not racist; it is just plain good police work. After all, African-Americans make up a large share of those arrested, prosecuted and jailed in this country. Police know jails are full of criminals, a substantial portion of whom are black, and that a high percentage of black males are under the control of the criminal justice system in one way or another.¹⁷² The police have no interest in harassing black or Hispanic people; rather, their motivation remains the apprehension of criminals. Race may play a part in law enforcement, but only as a proxy for a higher probability of criminal activity. In other words, racial disparities in stops and searches are nothing more than "an unfortunate byproduct of sound police policies."¹⁷³ Lt. Col. Ernest Leatherbury, commander of field operations for the Maryland State Police, puts it this way: "The facts speak for themselves . . . [W]hen you got a high number of these consent searches resulting in drug arrests do we in law enforcement or the public want to say the state police should discontinue these searches?"¹⁷⁴ In other words, police target blacks and Hispanics because they are the right ones, and this technique gets results. And

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Indeed, I would be remiss if I did not look to the position of law enforcement, given the Supreme Court's pronouncements on the right way for lower courts to make judgments on whether or not officers had reasonable suspicion or probable cause. See *United States v. Cortez*, 449 U.S. 411, 418 (1981) ("[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.").

¹⁷² MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 3 (1995) ("Almost one in three (32.2% of black men in the age group 20-29) is under criminal justice supervision on any given day—in prison or jail, on probation or parole.").

¹⁷³ Fletcher, *supra* note 10, at A1.

¹⁷⁴ *Id.*

if it works, we should not let the niceties of search and seizure law get in the way of catching the bad guys.

But this argument contains a flaw, and it is not a small one. Behind the race-neutral reasons police give lies a stark truth. When officers stop disproportionate members of African-Americans because this is "just good police work," they are using race as a proxy for the criminality or "general criminal propensity" of an entire racial group.¹⁷⁵ Simply put, police are targeting *all* African-Americans because *some* are criminals. In essence, this thinking predicts that all blacks, as a group, share a general propensity to commit crimes. Therefore, having black skin becomes enough—perhaps along with a minimal number of other factors, perhaps alone—for law enforcement to stop and detain someone. Under this view, all black citizens become probable criminals—suspects the minute they venture out of their homes.

The wrongheadedness and unfairness of treating *all* members of a group as criminals just because *some* are seems obvious. But even if not everyone feels this way, treating race as a proxy for criminality suffers from other serious problems. First, implicit in this view is the assumption that blacks are disproportionately more likely than whites and others to be involved with street crimes.¹⁷⁶ Even if this is true, African-Americans being more likely than whites to be involved in street crime is a far cry from any evidence that would strongly support the assertion that any *particular* black person is committing a crime. Yet *that* is the way police use this information. Second, even if we accept the assumption of the disproportionate involvement of blacks in street crime, police still greatly overestimate the value of race as a predictor of criminal behavior.¹⁷⁷ Using race as a proxy for criminality may result in "double counting."¹⁷⁸ If, for example, criminal involvement is strongly correlated with poverty, with presence in so-called "high crime areas," or with both, and if African-Americans are disproportionately poor and living in such neighborhoods,¹⁷⁹ race would add little to a police officer's ability to predict criminal involve-

¹⁷⁵ Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L. J. 214, 220, 236-237, 237-39 (1983) (police use minority race as a proxy for a greater probability of criminal involvement, even though, statistically and logically, this is problematic at best).

¹⁷⁶ Professor Johnson makes this assumption, but is careful to say that if so-called "white collar crime" were counted, the numbers might look very different. *Id.* at 237.

¹⁷⁷ *Id.* at 237-39.

¹⁷⁸ *Id.* at 238-39.

¹⁷⁹ See, e.g., David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677-678 (1994) (noting that segregation of urban areas usually means that minority group members often live and work in "high crime areas").

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ment beyond what poverty and geography already reveal.¹⁸⁰ As Professor Sheri Lynn Johnson has said, "(a)lthough probabilistic constraints may not preclude general racial propensities to commit crime, they clearly militate against according them substantial weight."¹⁸¹

V. WHAT HAPPENS AFTER THE STOP?

Once police stop a person for a traffic offense, what happens? By posing this question, I do not mean to imply that the stop itself is insignificant. On the contrary, the stop is itself not only unnerving but potentially dangerous, especially if it is ordered by an officer in plain clothes or in an unmarked car.¹⁸² Although pretextual traffic stops may be problematic in themselves, they are also disturbing because they may lead to searches. What rules govern what happens *after* a pretextual stop?

First, if police have probable cause to stop a vehicle, this alone does not entitle them to search it. There must be something more than the traffic offense to justify a search, some combination of facts that gives police probable cause to believe that an offense has been or is being committed or that the vehicle contains contraband. While we can argue *whether* any particular set of facts actually gives rise to probable cause or reasonable suspicion, the bottom line is that *something* is required to justify a search.¹⁸³

There are several variations on this theme. If police arrest the driver, they may search not only the driver but the interior of the car, closed parts of the interior like the glove box, and any closed containers inside the interior.¹⁸⁴ And if the police see evidence of crime in

¹⁸⁰ Johnson, *supra* note 175, at 238-39. Perhaps another way of looking at this, instead of "double counting," is that race becomes a proxy for poverty and presence in a high crime area, a view which makes little more sense than the one articulated in the text.

¹⁸¹ *Id.* In fact one commentator has gone even further, arguing that using race as a proxy for criminality "results from a self-fulfilling statistical prophecy: racial stereotypes influence police to arrest minorities more frequently than nonminorities, thereby generating statistically disparate arrest patterns that in turn form the basis for further selectivity." *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1507-08 (1988). This argument involves some major assumptions, not the least of which is that because blacks are disproportionately arrested and incarcerated, we can assume that a disproportionate number are being stopped. I do not think it is necessary to my argument to go this far.

¹⁸² See *supra* note 39 and accompanying text.

¹⁸³ *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (reasonable suspicion requires more than officer's "inchoate and unparticularized suspicion or 'hunch,' [rather, it requires] the specific reasonable inferences which he is entitled to draw from the facts in light of his experience")

¹⁸⁴ *New York v. Belton*, 453 U.S. 454 (1981). Note that *Belton* does not allow the police to search the trunk of the car, but once an arrest is made, the trunk might be opened and

plain view, of course, they may seize it and then arrest and search as appropriate. This, in fact, is what happened in *Whren*: Police stopped the vehicle, and upon looking inside—without any further searching—saw two bags of cocaine.¹⁸⁵

But in the great bulk of cases, there is no offense other than the traffic violation, no arrest occurs for the traffic offense, and police find nothing incriminating in plain view. Instead, police accomplish their goal of searching those they stop in two other ways.

The first is simple: officers ask the people they stop to consent to a search. While those asked need not consent, many do. The reasons for this seem as varied as human beings are, but several causes predominate. People simply may not know that they can refuse, and the Constitution does not require the police to tell citizens that they can withhold their consent.¹⁸⁶ Consequently, some undoubtedly feel they have no choice. Others surely feel intimidated, as Jhenita Whitfield said she did in Eagle County. Intimidation was no doubt what the Maryland State Police officer intended when he told Robert Wilkins that searches were "routine" and that if he had nothing to hide, he should permit the search—leaving in the air the obvious implication that a refusal would show Wilkins' guilt.¹⁸⁷

But the predominant reason drivers consent lies with police officers. Their goal, plain and simple, is to get people to agree to a search. They are accomplished at the verbal judo necessary to subjugate their "opponents," they have the authority of their office behind them, and they make it their business to get what they want. The officer starts with innocuous sounding questions: Where are you coming from? Where are you headed? Who's the person you're visiting? What's her address? Who's with you in the back seat? Then the questions often get more personal. They are designed to find contradictions that show the driver might have something to hide, and to put the driver in the frame of mind of responding to the officer's authority. Police call it "sweet talk," and it almost always leads to a consensual search. None of this is accidental; rather, it is a well-honed, calculated psychological technique that police departments teach their officers.¹⁸⁸ And it works. In the course of 150 stops over two

searched under proper inventory procedures, *Colorado v. Bertine*, 479 U.S. 367, 371-72 (1987), or if a drug sniffing dog alerts to the presence of narcotics in the trunk.

¹⁸⁵ *Whren v. United States*, 116 S. Ct. 1769, 1772 (1996).

¹⁸⁶ *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996) (Fourth Amendment does not require lawfully seized suspects to be told they are free to leave before suspect's consent to search is considered voluntary).

¹⁸⁷ Kate Shatzkin & Joe Hallinan, *Highway Dragnets Seek Drug Couriers—Police Stop Many Cars For Searches*, SEATTLE TIMES, Sept. 3, 1992, at B6.

¹⁸⁸ *Id.* ("We definitely tell [our officers] to try to talk their way into a search," said Lt.

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years, one Indiana state trooper said, "I've never had anyone tell me I couldn't search."¹⁸⁹

But what if the occupants of the car refuse? Must the police allow them to leave, ending the encounter? Not necessarily, as the Wilkins case and others show. If police encounter a person like Wilkins—one who knows he does not have to answer questions or consent to a search, one who will insist on his rights—they use another technique: they use a dog trained to detect drugs. If the dog gives the signal that it has smelled drugs, this provides the police with probable cause for a full-blown search of the vehicle and its contents. According to *United States v. Place*,¹⁹⁰ the use of such a dog does not constitute a search for purposes of the Fourth Amendment; therefore, use of the dog requires neither probable cause nor reasonable suspicion. *Place* gives the police just what they need if a driver refuses consent: a search for which consent is not necessary, which may yield the justification they need to do the very search the driver refused to allow.

There is one important wrinkle in this argument. Once the driver refuses consent, the police must not hold her any longer unless there is probable cause or reasonable suspicion to do so. Can the police hold someone long enough to have a drug detecting dog brought to the scene? The Supreme Court has not yet supplied a definitive answer, but analogous cases indicate that if the police have reasonable suspicion to suspect someone of involvement in a crime, they can detain the person for a "reasonable" period of time to allow the dog to be brought. In *Place*, a passenger's luggage was held for ninety minutes to allow for a dog to sniff it; the Court found this unreasonable, because the law enforcement officials had advance warning and could have gotten the dog there in much less time.¹⁹¹ And in *United States v. Sharpe*,¹⁹² the Court found a twenty minute detention reasonable, because the delay was caused by the suspect's flight.¹⁹³

Mike Nagurny of the Pennsylvania State Police bureau of drug law enforcement.").

¹⁸⁹ *Id.*

¹⁹⁰ 462 U.S. 696 (1983).

¹⁹¹ *Id.* at 706. But see *State v. Dickey*, 684 A.2d 92 (N.J. Super Ct. App. Div. 1996) (hours-long detention of motorist before dog sniff held constitutional).

¹⁹² 470 U.S. 675 (1985).

¹⁹³ In *Sharpe*, a DEA agent became suspicious of a Pontiac travelling in tandem with an overloaded truck and camper. The agent stopped the Pontiac, but the truck continued on, pursued by another officer. Once another officer arrived at the place where the Pontiac had been stopped, the DEA officer went in pursuit of the truck, which had been stopped and detained some miles up the road for about twenty minutes in anticipation of the agent's arrival. The Supreme Court said that in assessing whether an investigatory stop is too long, "we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Id.* at 686. Since the DEA agent

How the Court will ultimately resolve this question is anyone's guess; the most likely possibility is case by case discussion of what length of detention is reasonable under the circumstances. But given the Court's unbounded analysis of the Fourth Amendment implications of the use of dogs, the argument over the reasonableness of the length of detention will be the only argument any driver has left.

VI. RECOMMENDATIONS

Whren represents the Supreme Court's official approval for the use of pretextual stops by police. Defendants may no longer argue successfully that particular traffic stops were purely excuses to allow investigation of other crimes about which there was neither probable cause nor reasonable suspicion.¹⁹⁴ If I am right, all motorists are now fair game for police, and African-Americans and other people of color will suffer the great bulk of this treatment. Where does all of this leave us? Can anything be done to address these practices and the disparate impact they seem almost certain to have?

If *Whren* does nothing else, it takes courts out of the business of supervising this type of police conduct. Now, police need not come up with any rationale for stopping motorists save the easy and obvious one: violation of the traffic code.¹⁹⁵ Given that the door of judicial redress has closed, and that the Supreme Court's suggested equal protection remedy seems unlikely to bear any fruit, what other avenues are open to help grapple with the police practices highlighted here? Two modest suggestions follow.

A. ADMINISTRATIVE REGULATIONS

In a time when we continue to focus on courts to control police discretion, another tool is often overlooked: Police department policy and regulation. If unchecked discretion and racially biased traffic enforcement tactics infect a police agency's operations, written policies and regulation could fill the vacuum created by the Supreme Court's abdication of supervisory responsibility. Any time official discretion exists, we must ask not only how to eliminate unnecessary discretion, but also how to regulate and constrain the discretion that must exist as

acted "expeditiously" and the delay was attributable to the driver's own "evasive actions," the Court found the detention of twenty minutes entirely reasonable. *Id.* at 687-88.

¹⁹⁴ Of course, given that there was a circuit split before *Whren* on the question of the correct standard to review pretextual traffic stops, *see supra* note 27, *Whren* did not change either the law or practice in some places.

¹⁹⁵ Thus we can find at least one possible benefit of the decision, however else one feels about it: police will no longer have to perjure themselves in order to make these stops stand up in court. *See supra* note 17; Dershowitz, *supra* note 57.

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part of the system.¹⁹⁶ Departmental regulations have the potential to do both.

In the recent past, courts, especially the Supreme Court, played the dominant rulemaking role for law enforcement at the level of constitutional enforcement. This has been especially true in the Fourth Amendment area. This resulted from the fact that other agencies—the legislative branch, executive agencies, and police departments themselves—failed to take any significant role in regulation of police.¹⁹⁷ Courts in the post-*Mapp* era rushed to fill this void; in the Fourth Amendment field, this has been done through adjudication of search and seizure cases.

But, as Professor LaFave has said, this has begun to change.¹⁹⁸ Many police departments now put their practices down in written form as official policies or guidelines.¹⁹⁹ And the fact that police agencies themselves construct these self-regulatory systems has some important advantages. First police rulemaking makes for better police decisions, if only because it focuses the department on policy making and on the implications to the community of the police practices being regulated.²⁰⁰ Second, rules reduce the influence of bias because they make training more uniform, and because they guide and control discretion.²⁰¹ Third, police-made rules are most likely to be followed and enforced by police.²⁰² Last—but certainly not least—is the fact that, in cases such as *Whren*, the Supreme Court has simply taken the judiciary out of the equation. If there is no regulation at the agency level, there may simply be no regulation at all.

One line of the Supreme Court's own cases suggests that the practices highlighted in this essay might be successfully addressed through police regulation. Beginning with *South Dakota v. Opperman*,²⁰³ the Court passed upon the reasonableness of searches done pursuant to departmental inventory procedures. In *Opperman*, the police discovered marijuana in the glove compartment of a vehicle they had towed to an impound lot before they inventoried the contents of

¹⁹⁶ KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 51 (1969).

¹⁹⁷ Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970).

¹⁹⁸ Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 446 (1990) (police use of written policies as instruments to control discretion grew "immeasurably but [to] a noticeable degree" between 1965 and 1990).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 451 (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 421 (1974)).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 428 U.S. 364 (1976).

the car. The Supreme Court found the inventory search reasonable, perhaps because police performed the inventory "pursuant to standard police procedures."²⁰⁴ In the most recent inventory case, *Colorado v. Bertine*,²⁰⁵ police discovered contraband in a backpack found in the defendant's vehicle during an inventory search. In *Bertine*, the Court was much clearer in delineating the place of police rules and rulemaking in search and seizure law: "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."²⁰⁶ As Professor LaFave points out, to the extent that *Opperman* and *Bertine* encourage or require departments to make rules for inventories, this is all to the good. Since, according to *Bertine*, an inventory search may be reasonable without either probable cause or a warrant,²⁰⁷ standardized police procedures for inventories will limit and channel police discretion and prevent arbitrary police action.²⁰⁸

We should consider using the same approach to confine and regulate police discretion vis-a-vis the conduct of traffic stops. While *Whren* allows the police to stop motorists any time an officer could have done so, this *need not* be the rule within any given police depart-

²⁰⁴ *Id.* at 372. I say "perhaps" because while there is no majority opinion, the plurality does say that "inventories pursuant to standard police procedures are reasonable," *id.*, and Justice Powell, concurring, also takes care to say that the inventory "was conducted strictly in accord with the regulations of the Vermillion Police Department," under which all impounded vehicles are inventoried, including the glove compartment. *Id.* at 380 and n.6.

²⁰⁵ 479 U.S. 367 (1987). Note that *Illinois v. Lafayette*, 462 U.S. 640 (1983), which came between *Opperman* and *Bertine*, also dealt with an inventory search: a search of the contents of the backpack of a person who had been arrested. Since it was "standard procedure" to inventory all of an arrested person's possessions, *id.* at 642, the Court said that it was not unreasonable "for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures." *Id.* at 648.

²⁰⁶ *Bertine*, 479 U.S. at 374.

²⁰⁷ *Id.* at 371.

²⁰⁸ LaFave, *supra* note 198, at 454. It is worth noting that the majority opinion in *Bertine* treats the facts as if there were, in fact, regulations strictly governing inventory searches, *Bertine*, 479 U.S. at 374 n.6, and that three of the seven justices signing the majority opinion joined in a separate concurring opinion to say, explicitly, that inventory searches must follow "standardized police procedures" that ensure an "absence of [police] discretion" such that "it is permissible for police officers to open closed containers . . . only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle." *Id.* at 376-77 (Blackmun, J. concurring). But the dissenters vehemently disagreed with the majority's characterization of the regulations at issue. In fact, the regulations allowed the police a choice: upon the arrest of the driver, they could give custody of the vehicle to a third party; the vehicle could be parked and locked in the nearest public parking facility; or the vehicle could be impounded and its contents inventoried. *Id.* at 379-80. Thus the dissenters argued that "the record indicates that no standardized criteria limit [the] officer's discretion." *Id.* at 379 (Marshall, J., dissenting).

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ment. In fact, it was not the rule in the District of Columbia, where *Whren* arose; departmental regulations prohibited the making of traffic stops except within certain well-defined parameters.²⁰⁹ Departments could make rules that set out criteria for situations in which officers can stop cars when there is no intention of giving a traffic citation or performing other enforcement activities related to operation of the vehicle. At the very least, departmental regulations could prohibit the targeting of racial or ethnic groups for traffic stops and searches. To encourage rulemaking (or review of existing rules) along these lines, federal and state governments might offer incentives in the form of increased funding to those departments that make changes in their existing regulations or implement new ones. Alternatively, of course, there might be financial penalties for departments that do not comply, or some combination of carrot and stick.

B. COLLECTION OF DATA ON TRAFFIC STOPS AND SEARCHES AND THE RULES PUT IN PLACE TO GOVERN THEM

A second step we might take to address the problem of pretextual stops involves the collection of data. Police departments could be required (or financially encouraged) to collect data on all traffic stops. This data should include the reason for the stop, the race, ethnicity, and other identifying information concerning the person stopped, whether the driver received a citation or warning and for what, whether a search followed the stop, the basis for the search (consent, observation of incriminating items, or the like), whether a dog was used as part of the procedure, whether contraband was found and if so what kind, and whether any property was seized under forfeiture laws.

The collection of this data would allow for large-scale study of traffic stops and the issues they raise, and would allow for a more rigorous analysis than I have presented here. While the numbers of persons stopped in my examples are large—in Volusia County alone, for example, the number of stops on the video tapes is almost eleven hundred—any social scientist would no doubt prefer a more systematic collection of data. And even in the Maryland case, in which stops must be recorded, the court did not order Maryland State Police to collect all the information that might prove useful to someone studying these practices. On the contrary, only stops followed by consent searches or searches with dogs are included, whereas a more complete picture would, at the very least, require that all stops be tallied, whether or not followed by a search. A widespread, standardized

²⁰⁹ See *supra* notes 38-39 and accompanying text.

study of a number of police departments in a wide variety of geographic areas would give us the opportunity to arrive at a better understanding. If the data show that, in fact, African-Americans or other racial or ethnic groups are being targeted by police,²¹⁰ there would be no dismissing their experiences as isolated incidents or the work of just one or another particular police department. We might at last have the information necessary to understand fully what happens in these situations, and perhaps to finally persuade legislators and other leaders that we must take concrete steps toward solutions.²¹¹

Such data collection would also allow us to study the effectiveness of the police regulations proposed above. Departments with and without such regulations could collect data, and the side by side comparison this would allow would give us a better understanding of the effectiveness of this approach.

One can imagine at least two possible problems that might be suggested concerning the collection of data on police/motorist encounters. First, individual police officers might be reluctant to report information concerning their traffic stops. After all, would academics, policy makers, and others not use the data to attempt to prove police racism, either on the part of the individual or the institution? And would this concern not result in either incomplete and perhaps stilted reporting, or even reluctance to report at all, especially if the officer could be seen to be acting in contravention of departmental regulations? While these concerns are understandable, they would not be hard to address. Data collection could be anonymous, certainly as to the activities of individual officers. And if part of what we wish to study is whether departmental regulations might help limit or curb objectionable elements of police discretion in this area, the identity of the police *department* the data have come from might be hidden, too. With anonymity safeguarding them from implicating themselves in any way, there is no reason to believe that police and their superiors would not fairly and fully report their traffic stop activities. As an example, recall that the Maryland State Police have been reporting all

²¹⁰ To make a valid comparison, we would also need to know the relative frequency of traffic violations by African-Americans vis-a-vis other groups. If this information is not already available, it should be easy to collect.

²¹¹ In fact, legislation has been introduced in the 105th Congress that would mandate just such a study. Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997). H.R. 118's sponsor is Representative John Conyers of Michigan. In its current form, the Act would mandate collection of a number of categories of statistical information on drivers stopped for traffic offenses, including race and ethnicity, the reason for the stop, and the rationale for any search that follows a stop. It also obligates the Attorney General to publish an annual summary of the data acquired, and attempts to encourage full and complete reporting by masking the identities of reporting officers and departments.

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stops resulting in canine and consent searches for many months now. While they do this pursuant to a court order, there is still every reason to believe that the Maryland State Police officers might feel reluctant to report fully and accurately for just the reasons I have described. In fact, their feelings might even be somewhat more intense, since the data collected in Maryland is broken down officer by officer, with names attached. Thus if one could imagine a scenario in which police might fail to fully and fairly report their actions, the Maryland case would be it. But that does not seem to be happening. While no one but the individual officers involved knows for sure whether some stops are not being reported, it would seem that underreporting would skew the data away from any racial bias in stops, since all of the officers know that this was the problem from which the reporting obligation arose in the first place. Yet after eighteen months, the data show that roughly eighty percent of the stops counted still involve people of color. In other words, if the officers were trying to affect the numbers (and one could argue that if anyone had incentive to do so, they do), they are doing a poor job of it. The other explanation, of course, is that they are not doing this at all.

The other problem that might be raised concerns the practical side of reporting. What officer will want to fill out a form, even a simple one, for every traffic stop? Police are already busy trying to do the job we send them out to do. Why should they do extra paperwork to help study that job? The first answer to this objection is that many police departments already request a short report on every stop, whether or not the officer issues a citation or a warning. The second answer lies with technology. Already, many police vehicles carry not just radios, but computer terminals that can be used to check a car's license plate number or a motorist's drivers license, or to see if a person is wanted on outstanding warrants. It would take little more to enter the basic information on traffic stops discussed above into such a computer. The process would involve little more than punching agreed-upon code numbers into the available machine. In fact, small hand-held units now exist that can handle quite a bit of simple data. Waiters and waitresses in restaurants sometimes carry these small devices, on which an order can be taken, transmitted to the kitchen, tallied for billing purposes, and then saved for marketing and other business purposes. Such a machine would be more than capable of receiving and storing the relatively small amount of data that would be generated by traffic stops, and transfer of the data into analyzable form would involve no extra work. Another possibility is to do what Volusia County did: have the police cars in departments under study fitted with video cameras which would be turned on and off each time

a stop was made. This arrangement would also benefit the police by providing evidence in stops resulting in arrests. Police could simply turn the tapes in, without having to do extra paperwork. Researchers would then gather the statistics. While particulars would have to be worked out, using video cameras might be the easiest way to do this.

VII. CONCLUSION

Whren leaves us in an unsatisfactory situation. Any time we use our cars, we can be stopped by the police virtually at their whim because full compliance with traffic laws is impossible. And we can feel relatively certain that past will be prologue: African-Americans and Hispanics will suffer the bulk of this treatment. Whites will not have to endure it very often; if they did, it probably would not happen. And, once police stop drivers, the officers will be able to search almost everyone they want, some with consent and others with dogs. I, for one, feel considerably less than comfortable with this outcome.

We may not always agree on the full contours of the Fourth Amendment, but if nothing else it stands for—indeed, imposes—restraint on the government's power over the individual in the pursuit of crime. At the very least, the police must have a reason—probable cause, or at least reasonable suspicion—to pursue, stop and search citizens. The point is not that the police are powerless until criminals strike, but rather that police cannot treat everyone like a criminal in order that some secretive wrongdoers be caught. From every practical vantage point, *Whren* upends this venerable and sensible principle in the name of the war on drugs. Its implications are clear: everyone is fair game; members of minority groups will pay the largest price, but there are casualties in war, so African-Americans and Hispanics will just have to bear the cost. The Supreme Court could have used *Whren* as an occasion to repudiate the worst of what this tragic and ultimately unwinnable war has brought us. Instead, it increased police power and discretion. We are all the losers for it, but unfortunately some of us—those of us with dark skin—will lose a lot more than the rest. Perhaps police departmental regulation, and further study, can lead us in new directions.

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NEWS BRIEFS

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"Driving While Black," Motorists Sue States, Claiming Racist Police Practices **LAW ENFORCEMENT** **May-June 1998**

On the New Jersey Turnpike on April 23, police officers fired their guns into a van of young minority men during a traffic stop, prompting renewed protests alleging racist law enforcement (Dore Carroll, "Sharpton Leads Turnpike Protest," *Home News Tribune (East Brunswick)*, May 17, 1998, p. A1; Associated Press, "Hundreds Protest Alleged Racial Profiling," May 17, 1998; Associated Press, "Witnesses: Van Moving Slowly At Time Troopers Opened Fire," *Bucks County Courier (Levittown, PA)*, May 10, 1998 p. A2)

Police allegedly pulled the van, containing three black men and one Hispanic man, to the shoulder of the turnpike because it was speeding. As the two officers approached, the vehicle went into reverse, knocking one of the policemen over. His partner fired two shots into the vehicle. The van then slid across traffic lanes, hitting another car, and slowly began backing towards the officers, according to witnesses. At this point, the officers fired nine more shots at the men in the van who were found to be unarmed.

Three of the van's passengers are suing the police in civil court. Critics question the veracity of the speeding claim used to stop the van and whether the officers had reason to fire their weapons. On May 16, Reverend Al Sharpton led a motorcade of 500 protestors to the site of the shooting.

A poll conducted by the *Star-Ledger* after the shooting found that 72% of the African Americans polled felt that state troopers do not treat drivers of different races, ages and gender equally. In contrast, 61% of white respondents felt that troopers treat all races the same (Bill Gannon, "Races Split on Rating Troopers," *Star-Ledger (Newark)*, May 17, 1998, p. A1).

In response to the incident, on June 15 New Jersey Governor Christine Todd Whitman (R) said that all 245 state police vehicles that patrol the New Jersey Turnpike will be equipped with video cameras. Such a move is "very important for law enforcement and public confidence," Whitman said, and would provide "noncontrovertible evidence of what happens when a police stop is made" (David M. Herszenhorn, "After Shooting, New Jersey to Put Cameras in State Police Cars," *New York Times*, June 16, 1998, p. A35).

MARYLAND ACLU FILES SUIT ALLEGING DISCRIMINATORY MOTOR VEHICLE STOPS AND DRUG SEARCHES

In Maryland, the American Civil Liberties Union (ACLU) filed a class action suit charging state troopers with pulling over a disproportionately high percentage of African American motorists on Interstate 95 to search for drugs (Paul W. Valentine, "ACLU Files Suit Against Md. Police," *Washington Post*, June 5, 1998, p. B1).

Eleven black drivers involved in the suit told reporters at an ACLU news conference that they suffered deep humiliation when officers pulled them over on Maryland roads. In each case, officers searched their cars and found nothing.

ACLU attorneys had successfully sued the Maryland State Police in 1994, and said that discrimination in traffic stops by police officers is a nationwide problem. The phenomenon has earned the name

"DWB" or "Driving While Black." Similar lawsuits have been brought in New Jersey, Pennsylvania, Florida, and Indiana (see "Settlement in Pennsylvania Traffic Stop Suit," **NewsBriefs**, November 1994; "Watergate Veteran Hired to Represent Florida Sheriff's Department," **NewsBriefs**, September-October 1994; "ACLU Files Suit Against Illinois State Police," **NewsBriefs**, September-October 1994).

BILL TO STUDY "DRIVING WHILE BLACK" INTRODUCED IN CONGRESS

U.S. Rep. John Conyers (D-MI) proposed a bill that would require the Justice Department to collect records of the race of the person pulled over on traffic stops. The bill passed the House of Representatives but has stalled in the Senate Judiciary Committee (Robert L. Jackson, "Push Against Traffic Stop Bias Is Arrested," *Los Angeles Times (Washington Times)*, June 1, 1998, p. A7).

The National Association of Police Organizations (NAPO), which represents 4,000 police labor organizations, lobbied against the bill. They argued that it would inconvenience police officers and that there is no need for the study.

The Justice Department supported Conyers' bill, saying that it would make it easier to find out whether traffic stops are race-based.

**Maryland ACLU - 100 N. Liberty St., Centreville, MD 21617, Tel: (410) 758-1975,
Fax: (410) 758-1977.**

**Rep. John Conyers - 2426 RHOB, Washington, DC 20515, Tel: (202) 225-5126,
Fax: (202) 225-0072, E-mail: <jconyers@hr.house.gov>.**

**NAPO - 750 1st Street, NE, Suite 920, Washington, DC 20002, Tel: (202) 842-4420,
Fax: (202) 842-4396.**

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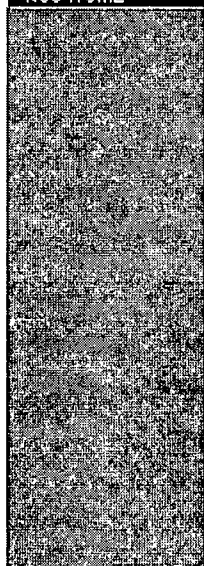
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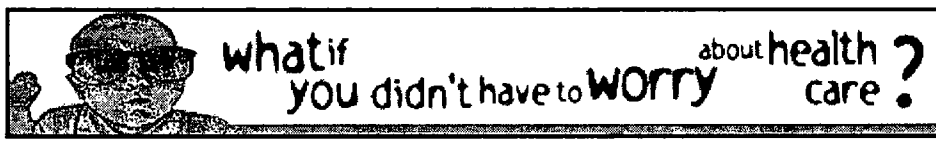
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The Star-Ledger

THE NEWSPAPER FOR NEW JERSEY

NEWS BUSINESS SPORTS FEATURES

Do lawmen target minorities? Crash rekindles debate

By Michael Drewniak and Tom Hester
The Star-Ledger
5/03/98

A state trooper testifies in court that he knows of cases where black drivers and passengers were stopped and forced to tap dance on the side of the highway.

A judge in Gloucester County finds state troopers engage in "selective enforcement" of highway traffic laws based on skin color.

Lawyers in Hunterdon County find that all but one of 24 drug arrests in a year by state police on Route 78 involved blacks or Hispanics.

A trooper proves in court that he was passed over for promotion because of his racial and ethnic heritage.

The New Jersey State Police's history of racial conflict was well documented before the shooting 10 days ago that has drawn the attention of high-profile civil rights activists and lawyers, including the Rev. Al Sharpton and Johnnie Cochran Jr.

Over the years, black motorists and even state troopers themselves have contended New Jersey highways are patrolled by officers who routinely stop minorities for no other reason than the color of their skin.

Inside the department, racial identity plays a factor in hiring, promotions, and how some troopers are treated, it is alleged.

Against this backdrop, two state troopers on April 23 stopped a minivan with New York license plates carrying four young men three African-Americans and one Hispanic. The van, troopers said, was traveling at 74 mph on the New Jersey Turnpike.

There's little agreement on what happened next.

The troopers, John Hogan and James Kenna, said the van was put in reverse and tried to run them down. The occupants have said the vehicle accidentally rolled backwards while the driver was trying to put it in park.

What is not in dispute is that the two troopers fired 11 bullets into the minivan. Three of the men were wounded, one critically. He is still hospitalized.

State Police spokesmen deny that the incident was racially motivated. Lawyers for the African-American men say it was. A county grand jury will review the case and determine whether criminal charges should be brought against the troopers or the van's occupants.

However the case is resolved, it is likely that the history of racial conflict and New Jersey State Police will be at issue as much as the facts of the incident last week.

"There have long been questions about whether minorities are being singled out for stops on the New Jersey Turnpike," said Alan Zegas, a West Orange attorney and president of the Association of Criminal Defense Lawyers of New Jersey.

"These questions have lingered for years and have been the source of litigation, quite a bit of litigation. I suspect this case will mean more of the same," he said.

State Police officials disagree. "Motor vehicle stops are made on the basis of observed motor vehicle violations or probable cause," said John Hagerty, a State Police spokesman.

The threats of new legal trouble for the State Police come while it is appealing the Gloucester County case which, from a defense point of view, is potentially the most damaging for the agency. It originated from traffic stops and arrests of blacks and Hispanics on the Turnpike in Gloucester County between 1988 and 1991.

Using police statistics gathered by defense attorneys, Superior Court Judge Robert Francis declared in March 1996 that troopers patrolling the Turnpike in South Jersey were using racial profiles in their stops.

The judge cited an "utter failure by the State Police hierarchy to monitor and control ... or investigate the many claims of institutional discrimination."

Lawyers for 19 defendants produced a statistical survey showing that while only 15 percent of all motorists charged with violating traffic laws in New Jersey were black, 46 percent of the motorists stopped on the Turnpike during a 40-month period were black.

If the judge's ruling is upheld and the stops of the defendants are found to be unconstitutional because they were race-motivated, drugs and weapons seized in the criminal cases are likely to be suppressed as evidence.

Then there is the case of Trooper Vincent Bellaran. A federal judge in March ruled that the 20-year veteran was passed over for promotion because of racism.

Bellarán, of Filipino and Puerto Rican descent, said he was called "spic" and "gook," that black troopers were called "porch monkeys" and that troopers referring to black motorists sometimes radioed that they were pulling over a "carload of coal." He also recalled a traffic stop in which

black motorists were told they could get out of a ticket if they tap danced.

A hearing is scheduled for this summer for a judge to determine how much money Bellaran should be awarded. His lawyer, Philip Moran, said he will seek a "seven-figure" judgment.

In 1996, a judge in Hunterdon County approved a public defender's request that State Police produce records to show the percentages of blacks, Hispanics and white drivers stopped on Route 78. That was after the defender's own survey found data to support the conclusion that minorities were being targeted.

Assistant Public Defender Dale Jones said his office ultimately didn't pursue the records because attorneys were able to have evidence in some cases suppressed and obtained favorable plea deals in others.

"Because we took advantage of the situation that way, we never did mount a full-scale investigation as we did in Gloucester County," he said.

David Rocah, a staff attorney with the American Civil Liberties Union of New Jersey, said studies have found that 90 percent of New Jersey drivers violate the speed limit on New Jersey highways.

That makes virtually the entire motoring public eligible for being pulled over by State Police. Yet, he said, the proportion of blacks being stopped is much higher, as the judge in Gloucester County found.

The question emerges, he said: of the number of blacks arrested with drugs or other contraband in racial profile stops, how many other innocent minority drivers and passengers are stopped illegally and let go?

Civil liberties organizations and defense lawyers have long asked that local and state police agencies be required to keep numbers on exactly who they pull over. They have resisted, Rocah insists, because it would show that race is a factor in stops. That could be costly in civil cases and criminal prosecutions, since stops based primarily on race are illegal.

Rocah said the ACLU is drafting state legislation, for which it is seeking a sponsor, that would require police to keep such statistics.

"If you talk to black motorists, they will tell you their experiences with police are completely different from yours and mine. Many of them have been stopped dozens of times," Rocah said.

"It is one of the examples of the daily indignities that people of color suffer in this society. Whether it's intentional or not is completely irrelevant. If the different treatment is based on race, it's especially problematic because it's the government that's doing the treatment."

Tom Iskrzycki, president of the State Troopers Fraternal Association, the police union, insists race was not an issue in the stop of the New York men.

"They make these allegations, but what was it, 11 o'clock at night? It's dark, you can't see who's inside a van no way in hell," he said.

"Eleven o'clock at night, these troopers aren't looking for trouble, they're

just doing their damned job."

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DRAFT

Race, the Police, and "Reasonable Suspicion"

Randall Kennedy

Should police be able to use race as a proxy for an increased risk that people of a given racial background have engaged in or are about to engage in criminal misconduct? That is the question to which I address these remarks.

Currently, in a wide variety of contexts, state and federal police officials routinely use race -- typically coloredness -- as a negative signal, a risk factor, a question mark. For example, there are cases in which the United States Border Patrol has acknowledged that apparent Mexican ancestry is one factor among several that prompt its agents to scrutinize some motorists more closely than others in the Southwest United States. There are cases in which officials of the federal Drug Enforcement Agency (DEA) have acknowledged that blackness is one of several factors that prompts them to question certain passengers deplaning from airliners. And throughout the United States there are cases in which local law enforcement officials use race as a proxy for an increased risk of criminal misconduct. In many of these cases, police focus their suspicions on persons who seem racially out of place -- incongruous -- as when a black is in a predominantly white neighborhood late at night.

Before proceeding further I shall attempt to clarify more fully the precise target of my inquiry. First, I am not focusing primarily on those instances in which officers question or detain or arrest someone solely on a racial basis. Such conduct does occur and merits attention; indeed, such conduct figures into my analysis as will be seen. That such conduct ought to be condemned, however, is uncontroversial; the great majority of police officers, lawyers, and judges would agree that acting solely on the basis of race would be wrong and should be illegal. The controversial issue is whether police ought to be allowed to view race as a factor at all in making determination of suspiciousness.

Second, I am not focusing on those instances in which race is cited as an identifying feature of a specific suspect. I do not object, for example, if a robbery victim notes the race of the perpetrator as part of an individualized description and the police use that description to hunt the criminal. Mentioning race as part of a detailed description of a robber is no different and no more objectionable than mentioning that the perpetrator had purple hair or a prominent scar.

The principal focus of my attention is the practice whereby police use racial generalizations routinely as a system of profiling aimed at allocating efficiently crime-fighting resources. Pursuant to this practice police do not have a specific suspect in mind; rather they use race as

part of an array of factors that are threaded together to create a net with which police go trawling for criminals.

Most courts have broadly affirmed the constitutional legitimacy of the conduct to which I object. Consider the case of United States v. Weaver, 966 F. 2d 391 (CA 8 1992).

In Weaver an officer of the Drug Enforcement Agency stopped and questioned a person who had just exited an airliner at the Kansas City, Kansas airport. According to the officer, he questioned Weaver because Weaver was "roughly dressed," young, black, got off a direct flight from Los Angeles, a source city for drugs, walked rapidly from the airplane toward a cab, had two carry-on bags and no checked luggage, and appeared to be nervous. As it turned out, the young man was carrying illicit drugs. He challenged the legality of the officer's intervention. The Eighth Circuit court of appeals upheld the officer's conduct and expressed no misgivings about it despite the fact that he admitted having taken race into account in calculating Weaver's suspiciousness. According to the Eighth Circuit, "large groups of our citizens should not be regarded by law enforcement officers as presumptively criminal based upon their race." The court went on to say, however, that

Facts are not to be ignored simply because they may be unpleasant -- and the unpleasant fact in this case is that the [DEA agent] had knowledge, based upon his own experience and upon the intelligence reports he had received from Los Angeles authorities, that young male members of the black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race when coupled with

the other factors [the agent] relied upon, was a factor in the decision to approach and ultimately detain [the suspect]. We wish it were otherwise, but we take the facts as they are presented to us, not as we would wish them to be.

Realism is the central theme of the court's response:

"we take the facts as they are presented to us." Since the facts indicated that black gangs were exporting drugs to Kansas City it seemed reasonable for officers to direct their attention upon airline passengers fitting the profile of such gangsters, a profile that included blackness among other indicia. Judges and others who permit or champion the approach taken by the agent in Weaver emphasize its effectiveness. They assert that using race as a proxy for increased risk of criminal wrongdoing allows authorities to apprehend criminals more efficiently than would otherwise be possible. A proponents of this view might well note that the man targeted in Weaver did turn out to be a drug courier just as the agent suspected.

Another theme in the court's response was that the use of race in Weaver could not rightly be viewed as invidious because race constituted only one of several factors in the officer's calculation. It would have been wrong, the judges declared, had the officer cited only race as a basis for questioning Weaver. In the court's words: "We would not hesitate to hold that a solely race-based suspicion of drug courier status would not pass

constitutional muster." But that is not what occurred. Race was only one of several factors on which the officer relied.

In my view, however, as a matter of law and policy, it is wrong for officials to use race as was done in Weaver.

First, as a starting point, it should be acknowledged that the officer engaged in racial discrimination when he used race as a factor in deciding to direct his attention onto Arthur Weaver. That race was not the only factor considered goes to whether the racial discrimination was justified. But racial discrimination occurs whenever race is taken into account at all -- even if it is taken into account only to a small degree and alongside other factors.

Second, racial discrimination in policing should be handled by policymakers and courts in the same way that other sorts of racial discrimination is handled in our society --namely, with a strong presumption against the legitimacy of making racial distinctions. Officials ought not engage in any type of racial discrimination unless they can offer an extraordinary justification for doing so.

Unfortunately, many courts have demanded only good faith reasonableness as a justification for racially discriminatory policing. Their argument is that, in many contexts, as a matter of verifiable fact, people fitting certain profiles in which race is a factor are more likely to commit (or to have committed) certain crimes. They might point, for example, to jurisdictions where last year 90% of

the drug couriers were African American men between the ages of 18 and 40. They contend that in such settings it makes good sense to use those markers, including race, as a means of directing attention onto those most likely to be drug traffickers. Proponents of this view might well quote my colleague Cornell West and declare that "race matters"!

All too frequently, however, police officials and courts lack a firm factual basis for concluding that race (in addition to other factors) correlates closely with a higher risk of criminal misconduct. Much more care than is currently shown needs to be taken before reaching that conclusion. But even if such a correlation can be decisively established, officials should be more attentive than they currently are to the special significance of racial distinctions in American life. Racial discriminations are different than other discriminations. Because of the long and ugly history of racial discord in America, racial lines are the paradigmatic example of what should be a presumptively illicit social distinction. That is why courts typically insist, under the Equal Protection Clause of the Fourteenth Amendment, that mere reasonableness is an insufficient justification for officials to discriminate on racial grounds. When officials discriminate on racial grounds, courts have increasingly demanded that such discriminations be subjected to "strict scrutiny" -- the most intense level of judicial review. Under strict scrutiny, a racially discriminatory governmental action will

be upheld only if it can be supported by a compelling justification and only if the government's racial distinction is narrowly tailored to advance the project at hand. In the affirmative action context, courts and public opinion have become noticeably more impatient with racial distinctions. That the legal propriety of racial distinctions in policing has received a conspicuously lesser level of attention is remarkable and troubling.

I do not want my objection to racially discriminatory policing to stand or fall, however, on a point of constitutional law. Even if courts conclude that a practice is constitutional, that does not mean that the practice is wise. Police authorities' routine use of race as a proxy for increased risk of criminal misdoing is profoundly unwise. That policy opens the door wide for officers to use racial discrimination as a means of racial harassment. My primary focus has been on good faith efforts to use racial discriminations in policing as an efficiency-enhancing mode of law enforcement. I have had in mind primarily racial distinctions deployed by Officer Friendly as opposed to Officer Bigot. It must be recognized, however, that an appreciable number of Officer Bigots populate the ranks of police forces. Because current policies allow officers too much leeway in making racial discriminations, these policies invite abuse by bigoted officers who can all too easily camouflage their racial harassment with claims that race constituted only one of several factors in causing them to

act against a black or Hispanic suspect. For prophylactic reasons, then, policymakers ought to insist that officers be able to articulate not merely some reason for using racial distinctions in policing but an extraordinary reason for doing so.

Police could properly take race into account in an emergency in which the social need is weighty, immediate, and incapable of being addressed sensibly by any other means. I have in mind a scenario such as this: Police receive a credible tip that a black man armed with a bomb is somewhere in an office building. Upon entering the building, police examine black men more closely than those who are not black. Under such circumstances, no one can rightly feel aggrieved, even if he is the object of racial discrimination. After all, freedom from official racial discrimination, albeit dear, is but one of other weighty freedoms that are sometimes in tension with one another. Care must be taken to insure that the category of exceptional emergency circumstances remains tightly circumscribed. But if that is done, racial discrimination in an emergency should be viewed as an unpleasant necessity and not a racial injustice. What is a racial injustice is the situation today in which police officials deploy racial discriminations routinely and casually under circumstances that cannot plausibly be described as emergencies.

This situation nourishes the mistrust, resentment, and anger that many colored Americans feel toward police

authorities. Nothing contributes more to these poisonous feelings than the knowledge that, as a matter of policy in many circumstances, police view black or brown skin as a question mark or warning signal and act accordingly. This is why journalist Don Wycliff, speaks for many people when he asserts that, notwithstanding his middle-class status, he feels "an ambivalence tilting toward antipathy for the police." He feels that way, he explains, because "a dangerous, humiliating, sometimes fatal encounter with the police is almost a rite of passage for a black man in the United States."

If the police may properly view race as an indicia of suspicion, thereby making people of color more vulnerable to questioning and stops and all that stems from unwanted attention from the police, then it follows that people of color will have more reason than whites to fear the police, regardless of their compliance with the laws. That racial minorities, are on average, more likely to be victimized by crime than whites only compounds the problem. The communities most in need of police protection are also those in which many residents view the police with the most ambivalence, much of which stems from a recognition that color counts as a mark of suspicion relied upon by police as a predicate for action -- questioning, stopping, detaining and so on. This causes people who might otherwise be of assistance to police to avoid them, to decline to cooperate with police investigations, to assume bad faith or

dishonesty on the part of police officers, and to teach others that such reactions are prudent lessons of survival.

In sum, enhancing the effectiveness of the police in many locales will require the creation of better police-community relations. But in many places better police-community relations will only be possible if people of color are confident that they are being dealt with by the police on the same basis as whites. That confidence cannot be created so long as police, on a routine basis, view blackness and brownness as a warning signal.

Before I conclude, I shall anticipate and address certain criticisms of my position. First, some critics resist my call for reform on the grounds that good-faith, racially-discriminatory policing is simply too beneficial to give up. The rebuttal to this claim takes two forms. One questions its cost-benefit calculation. Proponents or defenders of good-faith, racially-discriminatory policing often minimize dramatically the costs imposed by this practice. They point to the instances in which such practices capture criminals. They often neglect, however, to consider the numerous instances in which such practices burden innocent persons. They point to the brevity of the police intrusion and contend that that is a small price to pay for enhanced police protection. But the man who is pulled over for questioning on Monday in the Southwest United States by the Border Patrol because, in part, of his apparent Mexican ancestry, will not cease to be of apparent

Mexican ancestry on Tuesday. Rather, he will be of apparent Mexican ancestry on Tuesday, Wednesday, Thursday, and so on, and will thus be vulnerable not only to one stop stemming (in part) from his racial ancestry, but a lifetime of such stops. Nor do proponents or defenders of good-faith, racially-discriminatory policing weigh sufficiently the cumulative negative effects of this policy on policing itself. To restate and emphasize a point made above: the resentment generated by racially-discriminatory policing, even when done in good faith, impedes law enforcement by eroding the cooperation and trust the police need to carry out their difficult tasks.

Second, proponents of good-faith, racially-discriminatory policing often talk as if there existed no sensible alternatives. But that is not so. Instead of placing a special, racial, burden upon people of color, authorities could decide to spread the cost of policing by hiring more officers or imposing upon everyone a non-racial scheme for dealing with criminality -- e.g., random questioning or stops or even a system for questioning, stopping, and searching everyone engaged in certain modes of transportation. Bare facts do not determine how we proceed; how we proceed is a matter of choice. And the choice before us is whether we shall continue to place a racial tax on certain groups in our society, groups that have been historically oppressed, or whether we shall decide to tax everyone equally, regardless of race, paying the costs that

a full and authentic embrace of racial justice sometimes exacts.

Third, some respond to my argument with a shrug, saying that regardless of its merits, police will do what they think will work best regardless of the content of the formal rules that govern them. They argue further that implementing my proposed reform will simply drive officers to lie. Instead of an agent saying candidly that race was one of several factors that prompted him to question someone like Arthur Weaver, the agent will continue to use race as a marker of suspicion but omit any reference to race when called upon to justify his conduct. Fear of futility, however, is an insufficient basis for rejecting my argument.

It is fair to assume that some substantial number of officers would seek to conform their behavior to new rules even if they disagreed with them. Moreover, even if the new rules I am proposing pushed racially discriminatory policing underground, that would be a better outcome than the situation which currently exists whereby police are authorized and expected to use race lines for purposes of calculating suspiciousness. There is, I grant, a danger in constructing a norm that will likely be underenforced to a substantial degree. Underenforcement will further nourish the corrosive cynicism of those who believe, all too understandably, that when it comes to colored people, the criminal justice system habitually breaks its own promises.

The correct response to this danger, however, is not to

promise less but to work harder to bring the actual conduct of officials into line with appropriate goals. Even when rightful rules are underenforced, they are worth fighting for because they set the standards for legitimacy, exerting moral force that affects peoples' conduct and expectations.

Conclusion

Political leaders and police authorities ought to declare clearly that, except in extraordinary circumstances, officers in the field should not take race into account in determining the suspiciousness of individuals. Courts ought to prohibit non-emergency, racially-discriminatory policing even when it is done in good faith. But even if courts decline to invalidate such conduct, police should eschew it themselves on the grounds that it is counterproductive.

THE PRESIDENT'S INITIATIVE ON RACE

+ + +

ADVISORY BOARD MEETING

+ + +

RACE, CRIME, AND THE ADMINISTRATION

OF JUSTICE

+ + +

Tuesday, May 19, 1998

+ + +

The meeting was convened in the Dorothy Betts Margin Theatre, George Washington University, 800 21st Street, N.W., Washington, D.C., at 10:00 a.m., Dr. John Hope Franklin, Chairman, presiding.

PRESENT:

DR. JOHN HOPE FRANKLIN, Chairman

SUSAN JOHNSON COOK, Member

THOMAS KEAN, Member

ANGELA OH, Member

ROBERT THOMAS, Member

LINDA CHAVEZ THOMPSON, Member

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1 that law enforcement officials are their protectors,
2 that prosecutors bring cases based on evidence and the
3 law, that juries decide without weighing race, and
4 that judges sentence defendants based on the character
5 of the crime of the individual, not the ethnic or
6 racial group to which he or she belongs.

7 We must also make sure that those who
8 cannot afford a lawyer know and believe that their
9 lawyer representing them is equal to the lawyer
10 representing the person who can afford a lawyer. We
11 must do more in terms of providing for indigent
12 defense in this country.

13 (Applause.)

14 ATTORNEY GENERAL RENO: I think there are
15 some points that must be made first.

16 First, it is wrong to assume that members
17 of one race or ethnicity are more prone to criminal
18 behavior than any other. That's simply not true.
19 Reliance on such stereotypes is as wrong in law
20 enforcement as it is in other endeavors.

21 This includes situations where law
22 enforcement officers improperly use race to target

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1 individuals for a traffic stop, a pedestrian stop, or
2 a request for consent to search in the absence of
3 information about a specific suspect or other special
4 characteristics.

5 Under President Clinton's 1994 Crime Act,
6 the Justice Department now has the authority to bring
7 what are called pattern and practice cases against law
8 enforcement agencies that engage in such practices.
9 Our Civil Rights Division is currently looking into
10 allegations of discriminatory traffic stops in a
11 number of jurisdictions.

12 Secondly, the existing disparity in
13 sentencing for crack and powdered cocaine also
14 contributes to the sense of unfairness and bias in the
15 criminal justice system.

16 In addition, the crack powder disparity
17 has not led to the most effective use of law
18 enforcement resources. We should be focusing our
19 enforcement efforts on mid and high level drug
20 traffickers rather than low level drug offenders.

21 We believe that the cocaine penalty
22 structure should be revised to reduce this disparity.

1 This will target our resources more effectively and in
2 a manner that does not seem to fall more harshly on
3 minority communities than others.

4 (Applause.)

5 ATTORNEY GENERAL RENO: Third, there are
6 many points throughout the criminal justice system
7 where discretion plays a role, from the investigation
8 stage to the determination as to whether you treat a
9 child as an adult or as a juvenile, to arrest, to the
10 charging stage, to sentencing. Race neutral policies
11 at all of these states are essential to sound and
12 credible law enforcement and the fair administration
13 of justice.

14 It is incumbent on law enforcement to
15 critically review our efforts to insure that
16 stereotypes and prejudice, whether conscious or
17 unconscious, do not creep into the work we do. All
18 citizens must respect the law, but the law must also
19 respect all of our citizens.

20 And in that connection, I think the first
21 step that every agency in the criminal justice system
22 must take is how can we meet our obligations under the

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Sources

- Criminal Victimization in the United States, 1993: A National Crime Victimization Survey Report. Table 40, 44.
- Lifetime Likelihood of Going to State or Federal Prison. 2. 1997
- Recidivism of Prisoners Released in 1983. No date given.

Substantive Questions

Where would the fact, “persons of color have experienced the sharpest decreases in crime victimization,” come from?

Would you deny that homicide remains the leading cause of death for young black and Hispanic males.

What’s the most recent data on the percentage of black males under the supervision of the criminal justice system?

[Or, in the “certified question” format, “Is it true that people of color comprise more than 2/3 of the Federal and State prison populations, with blacks alone comprising nearly 50 % of the prison population?”]

Can you certify the following statement: “Nearly half of all murders committed in the U.S. each year are committed by persons under 24 years old with guns.

FBISources

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Bureau of Justice Statistics

Criminal Victimization in the United States, 1994

- **NCVS-measured crimes**
- **Demography of victims**
- **Victims and offenders**
- **Geography**
- **The crime event**
- **Victims and the criminal justice system**
- **Survey instrument**
- **Survey methodology**
- **Glossary**

A National Crime Victimization Survey Report

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics



Criminal Victimization in the United States, 1994

A National Crime Victimization Survey Report

May 1997, NCJ-162126

**U.S. Department of Justice
Bureau of Justice Statistics**

Jan M. Chaiken, Ph.D.
Director

This report was prepared by Tina Dorsey and Jayne Robinson of the Bureau of Justice Statistics, under the supervision of Michael R. Rand and Thomas Hester. Bruce Taylor and Patsy A. Klaus provided statistical review and verification. Christopher Laskey, of the Bureau of the Census, produced the tables in this report. Marilyn Marbrook supervised production, assisted by Yvonne Boston.

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Understanding and Preventing Violence

Albert J. Reiss, Jr., and Jeffrey A. Roth, Editors

Panel on the Understanding and Control
of Violent Behavior

Committee on Law and Justice

Commission on Behavioral and Social Sciences
and Education

National Research Council

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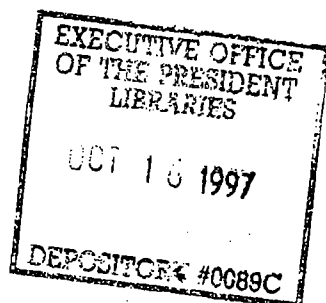
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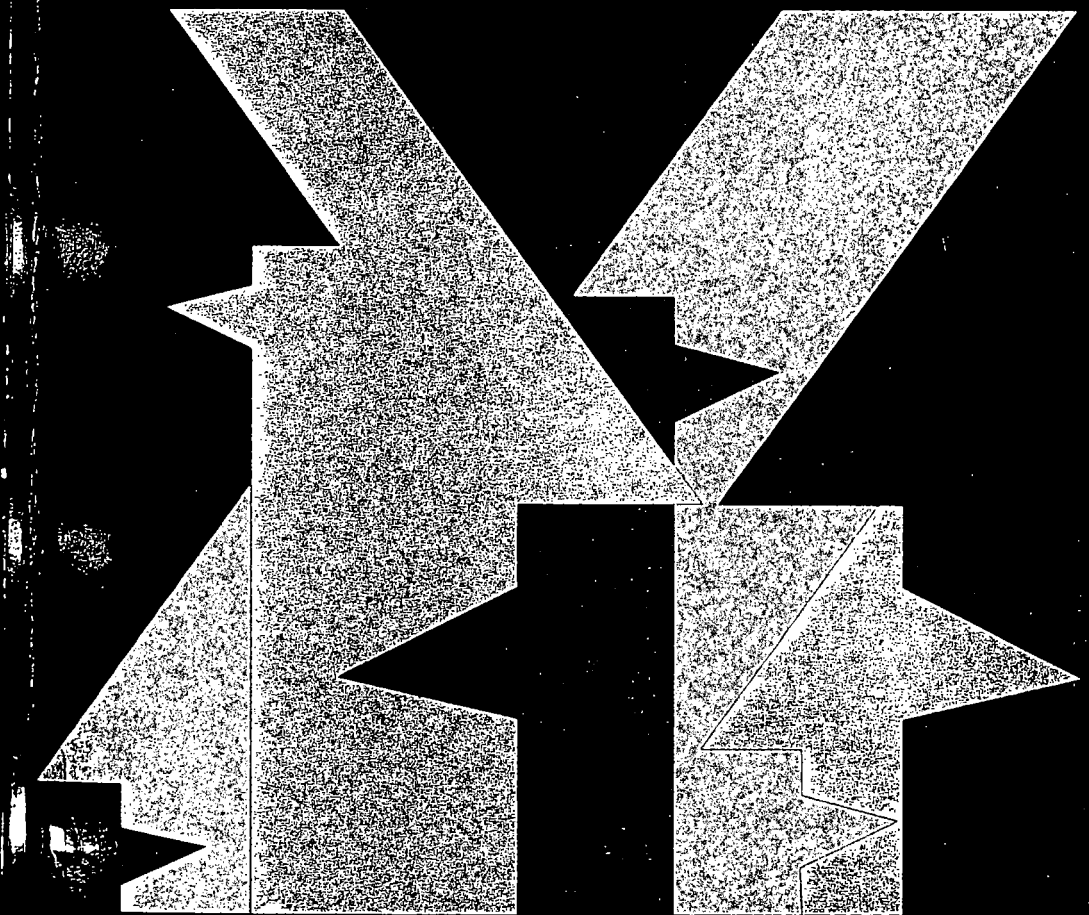
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CLEAR AND CONVINCING EVIDENCE

MEASUREMENT OF
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Edited by Michael Fix and Raymond J. Struyk

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Why People Obey the Law

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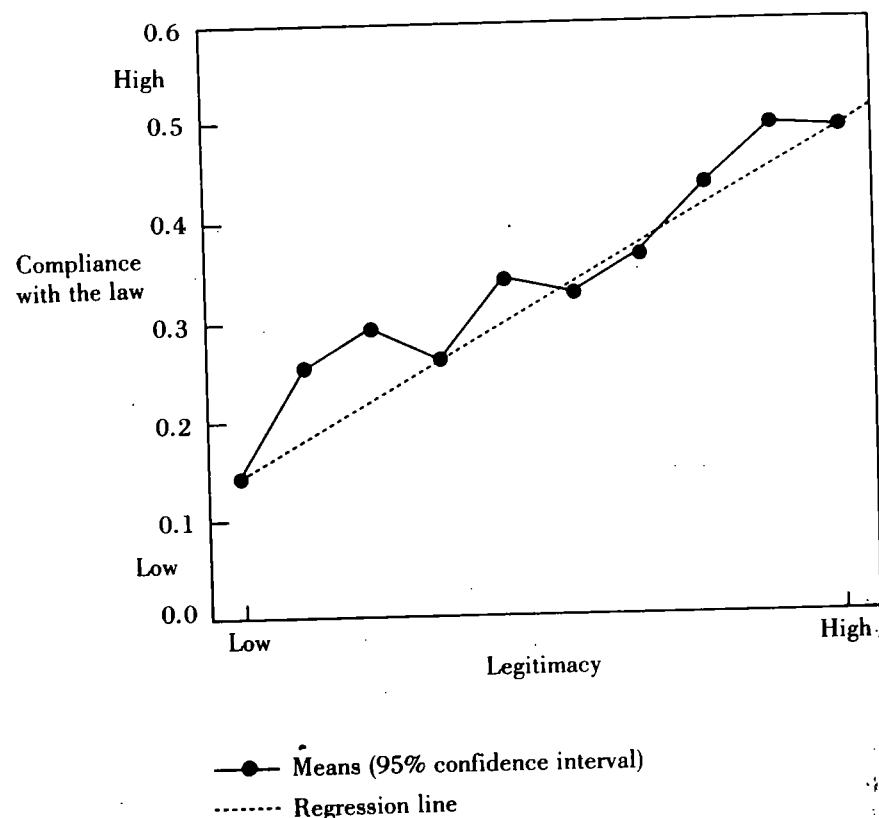
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Fig. 5.1 Legitimacy and compliance



one. The correlation between the two measured variables will therefore not represent the true relationship between the variables.

Regression analysis was used to test the independent contribution of legitimacy to compliance when the influence of such third variables as demographic and sociological factors is controlled for. Such a regression analysis allows the independent impact of each factor in an equation to be assessed. In this case two types of regression analysis were used: simple and reliability-adjusted. Simple multiple regression assumes that all variables in the equation are measured with equal reliability; reliability-adjusted multiple regression controls for differences in the reliability with which the various constructs are measured. The analysis was performed using the LISREL-VI structural equation program (Joreskog and Sorbom 1986a).⁴

The results of the regressions suggest that legitimacy has a significant independent effect on compliance, even when other potential causal factors are controlled

for (see table 5.1). This effect is even stronger in the reliability-adjusted regression.⁵ The increase in the relative importance of legitimacy when adjustments are made for reliability of measurement reflects the relatively poorer quality of its measurement. The results also suggest that other factors influence compliance. As has been previously noted, sex and age exert a strong influence on compliance. In addition, judgments of personal morality were found to have an important independent influence.⁶ Interestingly, evaluations of performance did not influence compliance.⁷

Because regression analysis looks at independent influences, controlling for other factors in an equation, the results of the regression analysis support the premise that legitimacy has an independent influence on compliance. This premise can also be tested by means of a "usefulness" analysis, in which first one

Table 5.1
Influences on compliance with the law, first wave

	Zero-order correlation	Beta	Beta with reliability adjustment
Legitimacy	.22***	.06*	.11**
Sociological factors			
Deterrence	.28***	.05	.02
Peer disapproval	.34***	.11***	.08*
Personal morality	.42***	.23***	.33***
Political factors			
Evaluation	.09**	.03	.01
Background factors			
Sex	.28***	.18***	.26***
Race	-.11***	.00	-.02
Age	.38***	.25***	.24***
Income	-.24***	-.05	-.15**
Education	-.26***	-.03	-.06*
Conservatism	.11***	-.04	-.03
R-squared		.32***	

n = 1,575

NOTE: High scores indicate the belief that lawbreakers are likely to be caught and punished, the belief that peers would disapprove of law breaking, the belief that law breaking is immoral, evaluating the authorities positively, believing that the authorities are legitimate, being female, being white, being old, being well educated, having a high income, being conservative, and complying with the law.

CHAPTER 13

The Psychology of Legitimacy

People generally feel that existing legal authorities are legitimate, and this legitimacy promotes compliance with the law. To understand why legitimacy leads to compliance requires a psychological model of the individual's relationship to social organizations. A starting point for examining people's relationships to organizations is the social exchange model (Thibaut and Kelley 1959), according to which people are self-interested. They join groups and stay in them because they gain by doing so. The idea that people seek to maximize their personal gain when interacting with others is a key feature of several social science and behavioral models of the person, including economic models (Laver 1981), models associated with learning theories, and sociological and social psychology models of social exchange and interdependence (Homans 1961; Kelley and Thibaut 1978; Thibaut and Kelley 1959). These models, which dominate law, public policy, and the social sciences, have widespread intuitive appeal and have proved to contain important assumptions in many studies of the behavioral and social sciences.

The image of the person developed by the social exchange model provides the underlying assumptions that shape the procedural justice model of Thibaut and Walker (1975). One of the basic ideas embodied in this model is that people who find themselves in conflict and have little success in negotiating a settlement turn to a third party to resolve their dispute. They then seek maximum control over the outcome of the effort to resolve the dispute by means of maximum control over their own presentation of evidence. The assumption underlying the control model of Thibaut and Walker is that people are fundamentally concerned with their own outcomes. As a result, procedural preferences develop in social settings out of the operation of self-interest. Basing models of justice on an image of a self-interested person is not unique to Thibaut and Walker. Walster, Walster, and Berscheid (1978) similarly develop their theory of equity (distributive justice) out of a conception of a self-interested person.

In these models of justice, people recognize that they must curb their self-interest to cooperate with others. Even in such simple interactions as bargaining, people are faced with the problem of balancing the desire for maximum self-interest and the desire to maintain the relationship with others. A child will prefer always to sit in the swing and for other children always to push, but such a

relationship cannot be maintained. Even in simple situations, interaction is a game of mixed motives. In bargaining this is called the bargainer's dilemma. If one pushes harder to reach an agreement favorable to one's own interests, one may gain more, but this also increases the risk of disrupting the relationship and securing no agreement.

Given the limits of social interaction, why do people choose to engage in it? According to the perspective grounded in self-interest, in the long run people gain more through cooperation than they can gain alone, even with the compromises inherent in interaction. This logic of long-term gain applies to membership in small and informal groups as well as in large and complex organizations. Whether in the legal or political system, a social group, or a work organization, people join and remain in the group because they believe they can gain in the long run. In long-term relationships in social organizations the mixed motives of social interaction become complex. People are members of a legal and political system for many years, perhaps for their entire lives. Similarly, they belong to educational, work-related, and social organizations for long periods. How can people decide how well their interests are being served by the organization and its authorities, how loyal they should be to an organization, its rules, and its authorities?

When assessing loyalty toward groups people must consider whether the authorities allocating resources or restricting their actions are doing so in a way that will benefit the members in the long run. In organizations to which people have a long-term commitment involving many areas of exchange, calculations based on short-term self-interest are difficult. People typically receive many types of benefit and incur many types of cost through membership in the group. The literature on distributive justice demonstrates that people typically focus not on the absolute number of resources they receive, but on how their level of resources compares with that of others. In doing so they use some rule of relative fairness that tells them the level of resources they deserve.

A calculation of distributive justice of the type outlined is quite complex, for membership in organizations involves gains and losses in a variety of areas. How, for example, can the benefits of flexible work time be compared to a higher salary or a larger office? Further, such calculations are not typically short-term: people must assess the probable future benefits and costs of membership in the group. And how are people to know whether they are receiving a level of resources that is appropriate relative to the resources received by others? What makes people believe that they will fairly benefit in the long run from belonging to the group?

The problem people face in dealing with legal authorities is similar to the problem they face when dealing with authorities in general. They must decide how committed they should be to the organization to which they belong. One way they can decide this is by comparing the benefits received from the organization

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Steven R. Donziger, Editor

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Community Policing. In this respect the debate about Community Policing differs from the community control debate of the 1960s; at that time, the Black Panther Party demanded that the public have a direct voice in hiring, disciplining, and firing officers, and in day-to-day management issues. The Black Panthers wanted to ensure that the police would reflect community priorities by making them *responsible* to the community, through political mechanisms that placed direct authority over them firmly outside the organization (Fogelson, 1977). Community Policing, by contrast, attempts to make police *responsive* to the community by restructuring authority within the organization.

Perhaps it was this police attempt to handle in an administrative manner decisions about what they should do, instead of democratizing the procedures, that contributed to one of the most striking findings of the Police Foundation's evaluation of these Community Policing programs—their unequal impact, and the great differences in program awareness and participation evidenced by different races and income groups in Houston's program areas. The police could work with whoever they felt most comfortable, and conveniently avoid conflict over what they should be doing, and to whom. They were not forced in any structured way to confront conflicting views of their activity, and in the end what they did seemed to have been irrelevant to the lives of many in the community.

Finally, the evaluations of policing programs in Houston and Newark also could not answer whether attacking disorder in this fashion was the wisest thing to do. Were there better things the police could have done with resources they invested in the project, or could the cities have spent their money more wisely on non-police activities? To probe these questions would involve fielding a variety of larger and much more expensive field experiments to test the costs and benefits of alternative strategies. Nothing like this has ever been done, but the next chapter does consider one alternative to formal policing: that of helping communities police themselves.

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Community Organizations and Disorder

Can communities confront disorder on their own? In the 1970s and 1980s, there has been increased interest in the role that voluntary community efforts can play in dealing with local problems. Earlier in the 1960s, "more social programs" and "more police" seemed the obvious answers to urban decay and its attendant problems, but by the late 1970s municipal and federal fiscal crises made those solutions less viable, and a great deal of research had accumulated indicating they were not necessarily the best ideas. The emergence at about this time of community approaches to crime prevention presented a rationale for experimenting with off-budget approaches to local problem-solving. The community approach emphasizes collaboration between government agencies and neighborhood organizations. It also assumes that voluntary local efforts must support official action if order is to be preserved within realistic budgetary limits and without sacrificing our civil liberties.

The community approach assumes that disorder and crime (the two are almost always lumped together) reflect the dissipation of the forces that traditionally held urban neighborhoods together. In the past, many city residents were poor and illiterate, housing was

crowded and conditions unsavory, wages were low, and cyclical unemployment levels were often extreme. However, levels of social disorder often remained low because the traditional agents of neighborhood social control were strong: families, parish churches, schools, the bonds of ethnic solidarity, and conservative values. Disorder problems are worse now because those forces have lost their hold.

The perhaps too simple idea is that, since mounting disorder and crime reflect the declining strength of informal social controls in urban neighborhoods, efforts to reinvigorate those informal controls may succeed in reversing the trend. While there might be other mechanisms for doing this (for example, by attacking unemployment and family breakdown, and upgrading the quality of schools) organizing communities to recapture the past has emerged as our newest hope for reshaping urban neighborhoods.

After a decade or more of focusing on crime and disorder problems, surveys point to modest national levels of participation in these efforts. In 1981, 12 percent of American adults claimed membership in a neighborhood group or organization that was involved in crime prevention (O'Keefe and Mendelsohn, 1984). A national survey conducted in 1984 found that 7 percent of adults had joined a neighborhood-watch group, one of the most common forms of collective activity (Whitaker, 1986). Organized participation (but not individual or household preventive measures, which are more uniformly adopted) is about twice as high in central cities as in non-metropolitan areas.

Here we explore the role that community organizations might play in the control of neighborhood disorder by examining the expectations of its proponents and reviewing some research on how things work in practice, followed by descriptions of organizing efforts in Chicago and Minneapolis which tested whether these efforts can be transplanted to new areas.

CURES FOR DISORDER: THE THEORY

There are really two steps in the process by which local groups can affect levels of neighborhood disorder. Both steps must work if group efforts are to make a long-term difference. The first step involves identifying "root solutions" for disorder problems; groups must identify the mechanisms that will suppress social

disorder and reverse the process of physical decay. As we shall see, this is not necessarily the same thing as attacking their "root causes." Theories about solutions for disorder and crime problems take two forms: roughly, social and political. Social approaches stress the importance of communal forces within neighborhood exerting pressure to conform to an approved standard of behavior. They typically focus on developing neighborliness, watchfulness, a sense of territorial responsibility, and norms about public conduct. Political approaches point to key decisions by public and private organizations that provide leverage points for concerted action. Groups pursuing political strategies typically focus on the lending policies of local banks, on municipal land use and economic development policies, and on decisions in Housing Court about building abandonment and disrepair.

The second step involves identifying how organized efforts can set those social and political solutions in motion, and keep them moving over the long haul. Can local groups actually affect the factors that stimulate or retard disorder, and do so with practical levels of effort and within reasonable periods of time? We must pay particular attention to assumptions about how organizations can help rearrange neighborhood social processes. Their efforts typically involve the formation of block clubs, neighborhood patrols, and programs for teenagers. Social strategies have a great deal of romantic appeal, for they promise to bring village-like harmony to twentieth century city neighborhoods. However, they involve interpersonal relationships that are powerfully affected by other factors, including the family organization of the community, the age of residents, and the area's physical layout. The ease with which these interventions can be mounted is greatly determined by the social and economic stability of an area, and its homogeneity of class and race (Skogan, 1987). Political action, on the other hand, reflects an organization's analysis of its political position. Groups must identify the forces and actors inside and outside the community that lie at the heart of their problems, forces that they think they can successfully counter; thereby they must develop a political agenda. This assumes that urban neighborhoods are an effective locus for action—that regional and national macroeconomic forces and large-scale demographic shifts at the metropolitan area level can be countered effectively at the small-area level. As we shall see, this is more likely to happen in some areas than in others.

The key social factor shaping a community's capacity to control disorder is its *intervention capacity*. A great deal of evidence (summarized by Goodstein and Shotland, 1980; Shotland and Goodstein, 1984; and Greenberg, Rohe, and Williams, 1985) points to the importance of the territorial perceptions of neighborhood residents, and their willingness to intervene in events when necessary. Intervention in local events is a two-step process: area residents must be alert to untoward persons and activities, and they must be willing either to call the police or to challenge those who are up to no good. To do this effectively, they must know when and where to watch, and recognize what is or is not suspicious at that time and place (Mayhew, 1981). In stable neighborhoods, where area residents are familiar with one another, exchange information, share a solid sense of community, and define the block or the neighborhood as territory for which they feel responsible this capacity is a rather ordinary aspect of social life. But it is undermined in neighborhoods that have entered the cycle of decline, and evidence suggests that the commitment of individuals to "defending" their immediate turf is much reduced by the destabilizing forces of urbanization.

Community organizations have developed strategies to foster both watching and acting. Block-watch groups are intended to build the familiarity and exchange of information needed to make this work—who lives where; when they will be away; who the troublemakers are. For example, block-watch organizers stress the importance of setting up and maintaining phone networks so neighbors can contact one another if need be. At the extreme, neighborhood patrols may be mounted to watch and act aggressively. Information campaigns are aimed at enhancing people's sense of efficacy in taking action against disorder and crime, spreading the message that they can make a difference. Community meetings typically involve discussions of local problems; through this, organizers hope to identify the common interests of participants, emphasize their interdependence, and generate enthusiasm for intervention.

The second set of "root solutions" are political and economic rather than social in nature. They place much more emphasis on dealing with forces outside the neighborhood that impact upon local conditions. Strategies in this category include efforts to use building inspections, and housing court, as levers for resisting residential blight, keeping large old homes from being cut up into

rooming houses through enforcement of zoning regulations, and seizing or demolishing abandoned buildings. Community groups interested in housing renewal (as most are) also keep a keen eye on the investment patterns of local banks and savings and loans associations, to ensure that they make reasonable purchase or rehabilitation loans in their areas. They battle "panic peddling" and blockbusting techniques by which real-estate operators reap enormous profits trading on fear of crime and racial change. They monitor land-use policies, resisting attempts to locate (for example) community-based drug or mental health treatment centers in their area, or new public housing. They also search for ways to reinvigorate the local employment market through government programs that leverage private investments likely to produce jobs for their constituents. Most root solutions involve property and land use, and take on a political cast when decisions are closely held by politicians and large corporate actors. These are fundamental to the political economy of American urban areas, and underlie the distribution of many forms of disorder.

CURES FOR DISORDER: THE PROGRAM(S)

The community approach stresses (a) identifying root solutions to problems (broadly characterized here as "political" and "social"), and then (b) mounting and sustaining programs to translate those solutions into action. The programs include several different tactics. They range from narrow, technical approaches to prevention to broader, social-reform strategies for reshaping communities. Some efforts involve collective action (these activities are carried out by groups), while others call for individual initiative, but can be encouraged and facilitated by groups. Some programs aim at *defusing the threat of neighborhood problems*. For example, groups offer escorts for senior citizens on shopping days, and produce and distribute newsletters identifying actions that individuals can take to make themselves feel more secure at home and on the street. Other programs focus on *collective surveillance* and on mobilizing the police. Groups organize neighbors to watch over the neighborhood and one another's homes, to be alert for suspicious people and for unsettling or disorderly circumstances, and to call the police promptly. Thoroughgoing surveillance programs can involve organized civilian patrols. Organizations also push for the

sanctioning of offenders, through crime-tip hotlines that identify troublemakers, and by court-watch programs that attempt to ensure they get tough treatment from judges. Finally, organizations mount programs aimed at attacking the social origins of disorder and crime; what these causes are perceived to be varies from place to place, but the programs frequently involve recreational activities for youths, anti-drug and anti-gang efforts, and campaigns to clean up neighborhood parks and vacant lots, and to foster youth employment.

Where Are Organizations Active? Systematic studies of the distribution of anti-crime organizations across neighborhoods indicate that they are least common where they appear to be most needed—in low-income, heterogeneous, deteriorated, high-turnover, higher-crime areas. Community organizations are more frequently encountered in better-off neighborhoods.

Actually, it may be that the relationship between the number of local voluntary associations and indicators of social and economic stability is *curvilinear* (Podolefsky and DuBow, 1979). Aside from church activities, organizational life is at its nadir in poor, crime-ridden areas.¹ Residents typically are deeply suspicious of one another, report only a weak sense of community, perceive they have low levels of personal influence on neighborhood events, and feel that it is their neighbors, not "outsiders," whom they must watch with care (Greenberg, 1983; Greenberg, Rohe, and Williams, 1985; Garofalo and McLeod, 1986). As we saw earlier, crime-prevention activities which require frequent contact and cooperation among neighbors are less likely to be found in poor areas, and in areas where there are high levels of disorder.

Local organizations are also less frequently encountered in the most stable and tightly-knit (usually white, working-class) areas. There, informal networks take the place of formal channels of communication. Residents know one another, and frequently are linked by church and family to many others in the immediate neighborhood. Life in these areas can resemble an "urban village." This is not necessarily to their advantage. In modern society, tight-knit, cohesive neighborhoods, like those uncovered by sociologist Herbert Gans (1962) in his study of ethnic neighborhoods in Boston, can persist only in isolated nooks and crannies of the city, and are measured in size by blocks rather than square miles. Within a small area residents may still be able to identify "strangers," and quasi-vigilante activity may help preserve their

isolation, but they remain very vulnerable to larger political and social forces.

It is the moderately cohesive areas that appear to need participation in more formally organized voluntary associations, and that do indeed support them. They may be the most typical urban neighborhoods. They are stable working-class and middle-class areas. Relatively prosperous and homeowners live there, but they have few strong local social and familial ties. In the absence of close ties, residents require some mechanism to bring them together to deal with local problems. They may succeed, because they are familiar with using organizations for instrumental problem-solving (Crenson, 1983). Of course, their advantage is not complete; the poor are also capable of organizing. There is considerable variation in the extent of organization within categories of neighborhoods, and not all middle-class communities are capable of responding collectively to external threats (Henig, 1982). However, their head start in the quest for neighborhood advantage is clear.

Successful neighborhood organizations also are more common in homogeneous areas. Neighborhoods featuring a mix of lifestyles may need organizations in order to identify their residents' common interests, but more frequently they do not seem to have any organization that meets that need. Anthropologist Aaron Podolefsky (1983: 136) noted the problem in an ethnically and economically heterogeneous area, Wicker Park in Chicago:

While many community organizations and social service groups can be found in Wicker Park, there is no single cohesive organization with which the entire community can identify. Community groups are either almost exclusively white or almost exclusively Latino. None is composed of an ethnic mixture which replicates the population of the neighborhood. The concerns to which the white and Latino groups address themselves are frequently different (Podolefsky, 1983: 136).

Wicker Park was rated the third most disorderly of the 40 neighborhoods studied, and the worst in Chicago, but community-wide efforts to battle decay were almost impossible to organize. In heterogeneous areas, or those that like Wicker Park are undergoing transition, middle-class residents often unite against "bad elements" in their own community, and their organizations—and

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thus the residents' opportunities for participation—remain small and exclusionary. The advantage of economic, racial, and culturally homogeneous areas is that residents share a definition of what their problems are and who is responsible for them. They share similar experiences and objective life conditions, and the same broad conception of their public and private responsibilities (Henig, 1982). The empirical evidence (summarized in Rosenbaum, 1987) is that in homogeneous areas residents exercise more informal control, are more likely to intervene when they see problems, feel more positively about their neighbors and personally responsible for events and conditions in the area, and are more active in crime-prevention programs.

In multicultural areas, by contrast, there often are conflicting views of both the causes of local problems and what should be done about them. Where neighborhoods are divided by race and class, concern about disorder and crime can be an expression of conflict between groups. Watching for "suspicious people" easily becomes defined as watching for people of particular races and aggressively monitoring the circumstances under which different races come into contact. Robert Yin and his colleagues (1976) found that civilian patrols were most common in racially mixed areas of cities. Groups in these areas, rather than drawing the community together, may selectively recruit members on the basis of their values and backgrounds, and their efforts—including "crime prevention"—may be divisive rather than integrative (Emmons, 1979; Rosenbaum, 1987).

Gentrifying neighborhoods provide a case study of the process at work. In gentrifying areas, early comers and real-estate developers organize to promote the area and establish a middle-class environment. New residents use neighborhood redevelopment strategies to push up housing values and rents to levels which longer-term residents cannot afford. In these areas, "one group's solution is likely to become another group's problem" (Lewis and Salem, 1986: 90). Part of the redevelopment push involves attacking undesirable land use, including rooming houses and single-room-occupancy hotels. The newcomers often form patrols or block-watch groups (McDonald, 1986; Taub, Taylor, and Dunham, 1984), and attempt to use their political influence to persuade the police to act against "undesirables" (Bottoms and Wiles, 1986). In a study of Washington, D.C., Jeffery Henig of George Washington University (1984) found block-by-block differences in neighbor-

hood-watch formation and participation that mirrored the spread of gentrification. Participation levels were higher and organized efforts more sustained on blocks with more homeowners, fewer blacks, fewer children, and fewer elderly residents.

Who Participates? Participation in community organizations is a form of "constrained volunteerism" (Emmons, 1979). That is, the extent and nature of organized activity in their neighborhood defines to a large extent the alternatives open to those who live there. Ordinary people participate by affiliating with existing groups, that have their own agenda and may or may not be interested in disorder problems. The local distribution of groups of various persuasions therefore defines the opportunities for individual participation in that area (Stinchcombe 1968). Who participates, and in what, depends on what opportunities are available, and neighborhoods differ in the opportunities they present.

Surveys suggest that individual participants in local voluntary associations are more likely to be better-off, married, more educated, have children, own homes, and be longer-term residents of their community (Greenberg, Rohe, and Williams, 1985). Involvement in anti-crime groups appears to be due to the same factors that stimulate other kinds of involvement in neighborhood affairs. Those factors are, above all, indicators of socioeconomic status and class-linked attitudes concerning personal and political efficacy, the extent of political information, and civic-mindedness (Lavrakas, 1985; Greenberg et al., 1984; Verba and Nie, 1972). In a national survey, Carol Whitaker (1986) of the Bureau of Justice Statistics found that, among those aware that groups were active in their area, participants in neighborhood-watch were more likely to be better-off homeowners. In a study involving 10 of the 40 neighborhoods examined here, Aaron Podolefsky and Fred DuBow (1981) also found that families with children and those who planned to remain in their neighborhood were more likely to report involvement in anti-crime groups. Where people know that community organizations are at work, general participation levels run between 10 and 20 percent, and participation of some sort in crime-linked groups runs at between 7 and 20 percent (Greenberg, Rohe, and Williams, 1985).

It appears that neighborhood as well as individual factors work along the same lines. Whitaker's national study confirms other research on the distribution of *opportunities* to participate in anti-crime efforts; in that survey, better-off, homeownership families were

more aware of the possibility of participating in anti-crime groups. A study that examined the joint influence of *both* individual and neighborhood factors on participation found that area-level characteristics were at least as important as personal ones. Controlling for individual factors, program awareness and participation still were higher in racially homogeneous, higher-status areas (Bennett, Fisher, and Lavrakas, 1986). Survey studies of intervention behaviors, or (more often) self-reported predispositions to intervene, also point in the same direction—intervention is less frequent in central cities, in poor and heterogeneous communities, and in highly disorganized areas.*

Research has found few unique factors that directly drive people to join organizations involved in anti-crime activities. Participation is a function of opportunity, while what the groups are doing is a function of leadership and group decision-making. Where such an alternative is available, some people participate in local voluntary associations. Joiners participate in what their group chooses to do. The level of participation in organized efforts against crime thus stems mostly from the degree of success of the local organizations that happen to pursue these issues. This explains why programs organized on the premise that people join groups "because of crime" (for example, because they are driven by fear) usually lose momentum.

This suggests that individual decisions to participate in efforts against disorder will not be critical to the survival of disorder-prevention initiatives. Rather, the critical factor will be decisions by *organizations* to add disorder to their agenda, and to keep it there. Participation levels will be high in areas where those organizations are successful and attract members. Most successful organizations have complex agendas, and people join them for a variety of diffuse reasons revolving around their stake in the community and their citizenly instincts. It is when these groups tackle disorder that this form of participation will peak. As a result, there is a great deal of interest in some quarters in manipulating the agendas of successful local organizations.

What Are the Effects on Participants? One way in which organizations try to control disorder and crime is by initiating and supporting activities that will enhance residents' feelings of efficacy about

*Greenberg, Rohe, and Williams, 1985; Hackler et al., 1974; Boggs, 1971; Maccoby et al., 1958.

individual and collective action, as well as increase their sense of personal responsibility for taking these actions. Organizers hope to stimulate attempts to regulate anti-social behavior in the neighborhood by enhancing the residents' feelings of territoriality and willingness to intervene in suspicious circumstances, and they hope to facilitate neighboring, social interaction, and mutual helpfulness to enhance solidarity and build commitment to the community. These ideas are as old as the Chicago School of Sociology. They assume (and this is supported by a great deal of evidence) that qualities such as efficacy, responsibility, territoriality, and commitment are undermined by the destabilizing forces of urbanization. In this view, the way to put trouble-ridden communities right is to organize them. Since disorder and delinquency are themselves evidence of social disorganization, organizing forces can defeat them as well.

Research on the linkages between organizing efforts and these social processes suggest that community crime-control theory contains a nugget of wisdom, but may also point in some wrong directions. Surveys typically find that participants in community organizations are more likely than nonparticipants to take protective measures.* They are also more likely to report being predisposed to intervene (Rosenbaum, Lewis, and Grant, 1985; Lavrakas and Herz, 1982). Political scientist Anne Schneider (1986) found that, controlling for a host of demographic and victimization measures, attendance at local crime-prevention meetings was correlated with more frequent watchfulness, asking neighbors for assistance, intervening in suspicious circumstances, and taking personal and household crime-prevention measures.

There is less evidence that organizing efforts have much effect on nonparticipants, those who did not personally attend meetings. This is very important, for informal control can work only when a large proportion of area residents can be counted on to watch and act; there should probably be many more of these (no one knows what the threshold figure is) than can be counted on to join organizations or show up at meetings. A quasi-experimental evaluation of several organizing efforts in Chicago concluded there were no "rub-off" effects on nonparticipants (Rosenbaum, Lewis, and Grant, 1985). Another, more modest, one-time study

*Lavrakas, 1981; Skogan and Maxfield, 1981; Pennell, 1978; Schneider and Schneider, 1977.

of 43 blocks in New York City concluded that there were general effects on participation, individual protection, and informal social activity (Perkins et al., 1986). However, activists are self-starters with many distinctive attributes, and block groups form more readily where trust and informal social activity are already high (Unger and Wandersman, 1983). Because individual activists or active blocks usually differ from their quiescent neighbors in many ways other than their level of participation, we should pay more attention to the findings of two-wave comparison-area evaluation strategies like those described in the last chapter and this one.

Individual efficacy and responsibility may be enhanced by what goes on when people do succeed in getting together. Organizers lead discussions of local problems, try to identify the common interests of the participants, emphasize their interdependence, and drum up support for the organization's political agenda. They also stress the efficacy of specific actions, such as target hardening, property marking, and setting up telephone networks so neighbors can contact one another (Cook and Roehl, 1982; Podolefsky and DuBow, 1981; McPherson and Silloway, 1980). Some descriptive reports of those meetings (e.g., Lewis, Grant, and Rosenbaum, 1985) reveal there can be a great deal of confusion, uncertainty of purpose, and poor leadership at them, and a great deal of frustration with the process among people who have few meeting skills and no familiarity with Roberts' Rules of Order. The effects of all this are not clear. In a review of many research reports and his own work on community organizations, Dennis Rosenbaum (1987) concluded that such meetings may magnify perceptions of area problems, stimulate fear, exaggerate the individual racial concerns of participants, and lead them to feel more helpless as a result of attending.

Thus, neighborly activities may not be the best approach for community organizing efforts. The assumption may be correct that these rather ordinary aspects of social life are "the precursors of social control" (Fisher, 1977). However, it may be difficult to launch practical programs that encourage them. The reality is that levels of active participation in neighborhood associations usually are so low that those individuals classified by researchers as being "active" in groups typically attend just one or a few meetings, and often are only peripherally involved in group programs (Podolefsky and DuBow, 1981; Rosenbaum, Lewis, and Grant, 1985). Merely attending a few meetings or receiving a newsletter cannot

change behaviors that are rooted in people's lifestyles and household organization. Moreover, there is only a very tenuous link between the frequency of these behaviors and levels of area disorder (Skogan, 1987). Neighboring activities in particular activate very subtle social processes; they exert control by reinforcing certain norms about appropriate public behavior and by teaching new residents how to behave; their sanction is gossip, social exclusion, and embarrassment. Research does not suggest that theories emphasizing the role of social processes in the informal control of disorder will steer organizing efforts in the right direction.

TWO EXPERIMENTS IN ORGANIZING

The "transplant" hypothesis is that community organization activities can be implanted in neighborhoods where they do not now exist (Rosenbaum, 1987). Transplant efforts have been pursued along two lines. The first involves identifying existing organizations and encouraging them to make a greater commitment to the prevention of disorder and crime. The money behind this comes from private foundations, real-estate developers, private or not-for-profit institutions, and the federal government. The funding agencies do this in the hope of grafting the local organization's visibility, legitimacy, leadership, and membership on their own agenda for solving urban problems. An alternative strategy is to encourage the formation of organizations in communities where viable opportunities for participation in anti-crime activities do not appear to exist. This is a far riskier approach, albeit one more likely to help poor communities that lack an infrastructure of successful organizations.

The Ford Programs

In 1982, the Ford Foundation paid ten community organizations in Chicago a total of about \$550,000 to organize new block-watch groups and other crime prevention efforts. They were not amateurs; the groups were all long-established and staffed by professionals. Most had already experimented with crime prevention, with support from the now-defunct federal Urban Crime Prevention Program. They were awarded the Ford money so that they could hire new staff to expand their grass-roots organizing efforts.

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They worked with the guidance of a citywide organization that monitored their expenditures and activities. Four of the groups were selected for a full-blown evaluation of the impact of their organizing efforts. They were chosen because they were the largest and most professional of the groups, and seemed the most likely to succeed. The evaluation also was sponsored by the Ford Foundation, and was conducted by Dan Lewis, Jane Grant, and Dennis Rosenbaum at Northwestern University.²

The four organizations which were evaluated developed somewhat different programs. The umbrella agency monitoring their activities encouraged them to devote a considerable amount of effort to organizing block-watch groups. This involved leafletting, door-to-door canvassing, sponsoring block meetings and educational workshops, and holding leadership training sessions. Other elements of their programs varied from place to place, as did their success in implementing them.

The Ford program billed itself as a "community crime-prevention" effort. However, a close examination of what most of the groups did most of the time indicates that it just as fairly could be dubbed a "disorder reduction" project:

The *Northwest Neighborhood Federation* traditionally was involved with housing, and during the evaluation period they continued to promote housing rehabilitation and monitor building-code violations, building abandonment, unscrupulous real-estate practices, and mortgage redlining. They agitated for the cleanup of dangerous dump sites in their area. They gathered local crime statistics and attempted to identify local "hot spots" for intensive police attention. They also gathered information for the police on local drug trafficking and gang activity, and formed special crime-prevention committees to plan other activities in the future. In addition, the Federation was the most successful of the groups at organizing and maintaining block-watch groups.

The *Northeast Austin Organization* organized neighborhood patrols which coordinated their activities via citizens' band radios (until they were stolen). They also organized recreational and job-counselling programs for area youths, held workshops on drug abuse, burglary prevention, and self-defense, posted signs marking the area, and tried to close down an adult bookstore in the area. They sponsored a

victim/ witness advocacy program and agitated for improved city services. Theirs was a racially changing neighborhood, and many of NAO's activities focused on disinvestment—mortgage and insurance redlining, building deterioration, inattentiveness by absentee landlords, and real-estate sales practices. NAO's goal was to stabilize the racial balance of the community and "preserve the quality of life" of area residents. It ranked second in the number of block-watch groups it formed.

The *Back of the Yards Council* sponsored a number of different activities, befitting its status as a large and powerful community organization. In addition to organizing some new block-watch groups (it ranked third in this respect), it also deputized a network of block representatives who were to organize "phone trees" linking their neighbors. Security inspections were arranged for area businesses, and a youth-counselling program was set up. The organization's staff met with the police to encourage them to be responsive to local complaints. During the evaluation period the Council also helped close down two taverns whose customers were disrupting nearby residential areas. Its other programs focused on delinquency prevention and treatment, senior citizens, parks, schools, commercial development, building maintenance and code enforcement, and towing abandoned cars.

The *Edgewater Community Council* did the least. Its block-watch program was virtually nonexistent, although large numbers of people did turn out for meetings in one area plagued by a rash of burglaries. Its other activities emphasized arson prevention, property marking, lakefront development, youth recreation, and problems with video arcades, massage parlors, street prostitution, and liquor stores in the area. It was very involved in housing rehabilitation and building code enforcement in the worst part of its service area, and at least one staff member was concerned about what to do with visibly disturbed people who had been placed in halfway houses in the community when the state released many patients from its mental hospitals.

Given the traditional concern of community organizations with zoning, housing, and local investment, it was inevitable that many of these groups would focus on disorder reduction. Problems in the physical disorder category generally are those they were already organized to combat. As a practical matter, those problems may also appear a bit more tractable than common crime. It is almost an article of faith among organizers that crime is a no-win issue, and few would be willing to bet their organization's survival on its capacity to focus exclusively on crime, much less on its ability to succeed in doing anything about it. Most criminals are a furtive, almost invisible enemy; crime is an atomizing force; and victories are difficult to point to, or sustain next year. Community organizations actually may be more effective at controlling social and physical disorder than at controlling crime, no matter what they choose to dub their activities. For example, stable zones of visible social disorder (such as street prostitution, "shooting galleries," or bad bars) can provide a rallying point for area residents and can be forced to the attention of the police.

The Evaluation. The evaluation of the Ford-financed programs resembled those conducted in Newark and Houston, described above. Surveys of neighborhood residents were conducted before the new programs were put into effect, and again one year later. As in the evaluation of policing programs, the repeated interviews allow us to control for the perceptions and behaviors of respondents living in the target areas before the programs got off the ground. Matched comparison areas were also surveyed, to monitor general trends in similar areas of the city that might otherwise be taken for effects of the programs.

An important feature of the evaluation is that it was designed to examine both the anticipated *outcomes* of the programs and the *linkages* that in theory should have (a) been affected by the program, and in turn (b) should have affected levels of disorder in the program areas. Measures of the perceived extent of social and physical disorder could be constructed that would be almost identical to those employed in the previous chapter on the police. In addition, the surveys were designed to gauge the extent of program awareness and participation, and the level of cooperation, intervention behavior, and prevention efforts reported by community residents.

Impact on Participation. To assess the impact of the Ford programs on opportunities for local participation, respondents were

asked if they were aware of, and had participated in, either "neighborhood crime-prevention meetings" or "a block-watch program on your block" during the past year. If the leafletting, canvassing, block-watch meetings and other workshops or forums sponsored by these organizations did translate into generally higher levels of awareness and participation, the surveys conducted at step 2 should reveal distinctively higher levels of activism in the program areas. Of course, those surveyed were aware of and reported participating in similar activities in the comparison area as well, for activities resembling those fielded under the auspices of the Ford Foundation are an every-day feature of big-city life. Did the Ford efforts add to the total? Both awareness and participation were somewhat higher in the program areas than in the comparison neighborhoods even before the program began, despite some success in matching them demographically. Also, both the program and comparison areas demonstrated increased awareness and participation over the next two years. This illustrates the importance of employing pre-tests and comparison areas in the evaluation. The evaluation could still reveal that there were significantly greater percentage changes in the program areas. Participation in community organizations went from 12 to 16 percent in the program areas, and from 8 to 10 percent in the comparison areas. There were parallel changes in awareness that those activities were going on.

The statistical analyses summarized in Table 6-1 are more revealing; they take into account pre-program levels of participation and awareness, and eight other demographic differences between

Table 6-1 Program Impact on Awareness and Participation

	Program Effects Controlling for Pre-Program Measures and Eight Other Factors		
	Awareness of Programs	Participation in Programs	N
All Programs	up	up	1026
Northwest Neighborhood	+	+	386
Northeast Austin	+	+	199
Back of the Yards	up	up	179
Edgewater Council	up	up	262

Note: Significant effects are described as "up" and "down;" insignificant effects are described as "+" and "-". The multivariate controls include pre-program levels of the linkage variables, plus age, sex, income, education, home ownership, marital status, race, and length of residence. Each program area is contrasted to a matched comparison area which was also surveyed at both points in time.

residents of the two areas, to see if there were significant differences between the program and comparison areas after two years of organizing. This is done separately for each target neighborhood. If the programs were universally successful, all the entries in Table 6-1 would read "up," indicating that levels of program awareness and participation had gone up significantly in the program areas. For the four areas as a whole, and for two of the four individually, there were significantly higher levels of both program awareness and participation when those other differences were taken into account, and they at least went up (but not significantly, which is indicated by a "+") in the remaining areas. In sum, these data point to the modest but real effects of the programs on opportunities for participation in two of these Chicago neighborhoods.

An analysis of *who* participated reveals that these Chicago neighborhoods resemble others. In the program areas, where widespread efforts were made to contact residents and inform them of what was going on, program awareness was significantly higher among higher-income, homeowners, more educated, long-term residents; actual participation was higher among homeowners and the more well-to-do. For example, 38 percent of renters and 68 percent of homeowners were aware of the programs; in terms of participation, the comparable figures were 6 and 22 percent (these findings are not displayed). As in many places (including Houston, as we saw earlier), it appears that where expanded opportunities for participation were made available, those who were already better off were more likely to take advantage of them.

Impact on Linkages. Did the programs affect important social linkage factors that they were to activate, and that in turn were to reduce levels of neighborhood disorder? The original proposal presented to the Ford Foundation stressed that an important goal of the program was to increase community cohesion, and organizers and theorists alike stress the potential that organizations have for enhancing neighborhood interaction, building shared norms, fostering community attachment, and enhancing an area's capacity for intervention. Four propositions about the linkages could be tested using the Ford evaluation data:

1. the programs should increase local social interaction and mutual solidarity;
2. the programs should enhance people's feelings of efficacy about individual and collective action;

3. the programs should stimulate action to regulate events in the neighborhood by enhancing residents' willingness to intervene in suspicious circumstances;
4. the programs should encourage residents to take positive steps to prevent disorder and crime.

The extent of neighborhood *social interaction* was measured by combining responses to three questions about knowing neighbors, visiting neighbors' homes, and chatting with people on the street. *Solidarity* was measured by responses to four questions about neighbors helping out, neighbors working together, feeling a part of the neighborhood, and liking living there. These two measures were used to test Proposition One. The perceived "helpfulness" of each of six common kinds of crime-prevention tactics were combined to measure how respondents perceived the *efficacy of prevention efforts*. This was used to test Proposition Two. *Intervention* in local events was measured by counting the number of times respondents reported taking some action on a list of neighborhood problems. The problems included "garbage and litter on the streets," "vandalism," "teenagers hanging out," and other forms of social and physical disorder. Finally, *prevention efforts* were assessed by whether or not respondents had installed special locks or window bars, marked their property, and had a home security inspection. These measures were used to test Propositions Three and Four.

Table 6-2 summarizes the effects of the programs on those linkage measures. If the programs were universal successes, all the entries in Table 6-2 would read "up"; however, insignificant find-

Table 6-2 Program Impact on Linkages

	Program Effects Controlling for Pre-Program Measures and Eight Other Factors				
	All Areas	NoWest Neighb.	NoEast Austin	Back of the Yards	Edgewater
Interaction	-	+	down	-	-
Solidarity	down	-	down	down	+
Efficacy	+	+	-	up	+
Intervention	+	-	+	up	-
Prevention	+	+	+	-	+

Note: Significant effects are described as "up" and "down;" insignificant effects are described as "+" and "-". The multivariate controls include pre-program levels of the linkage variables, plus age, sex, income, education, home ownership, marital status, race, and length of residence. Each program area is contrasted to a matched comparison area which was also surveyed at both points in time.

ings (shown as "+"s and "-"s) predominate, and most of the significant differences are in the *wrong* direction. Nowhere did neighborhood solidarity go up or social interaction increase, and any success in increasing residents' sense that what they could do was efficacious, or in increasing their self-reported activism, was confined to Back-of-the-Yards. In brief, none of this suggests that the programs had any impressive effects on day-to-day activity in these Chicago neighborhoods.

In the chapter on policing we saw how the Houston and Newark programs had different effects on different kinds of people. That possibility was also examined here, but there was no clear pattern of differential effects in community organizing efforts in Chicago. Higher-income residents of the program neighborhoods were somewhat more likely to feel that they could take effective steps to prevent crime, but at the same time they were less likely than others to act in response to specific neighborhood problems. Even though differences in levels of program awareness and participation were linked to social and economic factors, there seem to be no major social groups within these programs areas who were especially helped (or hurt) by the programs. The Ford Foundation programs simply had little effect on the factors underlying social theories of disorder control.

Impact on Disorder. Table 6-3 examines the impact of the Ford programs on disorder and fear. *Social disorder* was measured by responses to questions about "teens hanging out," insults by passers-by, gang activity, and drug use. *Physical disorder* was measured by answers to questions about vandalism, abandoned build-

Table 6-3 Program Impact on Disorder and Fear

	Program Effects Controlling for Pre-Program Measures and Eight Other Factors				
	All Areas	NoWest Neighb.	NoEast Austin	Back of the Yards	Edgewater
Social disorders	+	-	up	up	-
Physical disorders	-	-	up	+	-
Fear of Crime	up	up	up	up	-

Note: Significant effects are described as "up" and "down." Insignificant effects are described as "+" and "-". The multivariate controls include pre-program levels of the linkage variables, plus age, sex, income, education, home ownership, marital status, race, and length of residence. Each program area is contrasted to a matched comparison area which was also surveyed at both points in time.

ings, and problems with refuse handling. In these areas, problems of vandalism clustered together with other physical rather than social disorder problems. *Fear of crime* was indexed by responses to questions about neighborhood safety and concern about being assaulted and robbed in the area.

In light of the programs' apparent failure to affect people's perceptions and behaviors, the results to no one's surprise are equally gloomy. If the programs were a complete success, all of the entries in Table 6-3 would read "down." However, all of the significant differences between the program and comparison areas were in the wrong direction, pointing toward *higher* levels of social and physical disorder in areas served by the groups being evaluated. The most consistent finding was that fear of crime went *up* overall, and this happened in three of the four areas. Some of the insignificant area differences documented in Table 6-3 also point in an unexpected direction. This was also true of the program's only apparent differential impact—long-term residents were *more* likely to think that social and physical disorder were "big problems" after the program than before; the perceptions of short-termers did not change.

Organizing in Minneapolis

The preceding section examined the success of an attempt at encouraging new efforts by existing local organizations to reduce crime and disorder, and indicated how difficult that can be. It should be a great deal more difficult to transplant collective anti-crime groups to poorer, high-crime areas plagued by fear and other severe social problems. To organize such areas it is important that incentives be distributed early to participants, with vigorous support by the police (Garofalo and McLeod, 1986). Someone has to make hundreds of door-to-door contacts, distribute flyers, identify and train block captains, organize meetings, and find some way to get people to attend them. Paid staff appear to be crucial to sustain the level of participation of local voluntary associations of all types, particularly in such areas (Garofalo and McLeod, 1986; Greenberg, Rohe, and Williams, 1985; Taub, Taylor, and Dunham, 1984).

A transplant experiment of this type took place in Minneapolis in the early 1980s. The program is described in more detail in a

report by Tony Pate, Marlys McPherson, and Glenn Silloway (1987), published by the Police Foundation. In brief, professional organizers working for the city attempted to organize neighborhoods around crime issues "from the ground up". Their efforts were carefully monitored by an evaluation team from the Police Foundation in Washington, D.C. The program involved all of the grass-roots organizing efforts described above. The Minneapolis project in effect created an attractive new opportunity for participation by neighborhood residents. A distinctive feature of the evaluation is that it directly examined the relationship between this increased opportunity to participate and how people reacted to it. The results were not encouraging.

The object of the program was to create block clubs. Early in the program, professional organizers tried to work through local leaders by training them to organize the clubs; later, they went on the streets to do grass-roots organizing themselves. The program was structured so that there was continuous organizing in each area. If it was not successful, the organizers tried harder, devoted more staff time to the area, and increased the intensity with which households were bombarded with pleas to come to meetings. What residents were to *do* at and after those meetings was left up to them. The leaders and organizers encouraged them to pursue a fairly narrow, "crime-prevention" approach to their block's problems; they stressed security consciousness, meeting your neighbors, and setting up phone networks.

The evaluation of the project followed now-familiar lines. Seven different areas of the city were identified as ripe for organizing. Each was divided into three matched subareas about 21 square blocks in size; one subarea was the target of the city's organizing efforts, in another these efforts were supplemented by the assignment of a uniformed police officer to assist the block group to be formed, and one was set aside as a comparison area. The true randomization of areas set this evaluation apart from those in Houston and Chicago, where areas were selected for the program, and matching comparison areas were chosen separately later. As in the other evaluations, before-and-after surveys were conducted to gauge each program's impact on perceived neighborhood conditions, citizen's attitudes, and their behaviors. Because groups first had to be formed, then given an opportunity to affect neighborhood conditions, the program ran for two years before the follow-up evaluation survey was conducted.

A unique feature of this organizing experiment was its "cop-on-the-block" component. Police officers were to be assigned to assist block clubs in their efforts, to lend them legitimacy and technical support. This was to be done in a random half of the target areas. However, cop-on-the-block proved to be a logistical failure. As in many cities, Minneapolis police officers rotate between the day and night shifts every few months, so it was not possible to assign an officer permanently to assist an organization; it also proved impossible for the city to free up enough police to attend meetings during busy evening shifts (Silloway and McPherson, 1985).

Impact on Participation. From the outset, the evaluators planned to examine the relationship between the *effort* extended by organizers and leaders and the *response* to that effort by neighborhood residents. Effort was measured by such things as the frequency with which leaders were trained and meetings were called; the response was measured by the number of people who showed up and the percentage of households in each area that could be classified as organized.

The effort was real. The professional organizing staff invested about 25 hours of on-street work in each target block; this does not take into account their planning and administrative efforts, or the training of block leaders, which would add about 10 hours to this figure, or activities by the block leaders themselves. *Every* household in the program areas was contacted an average of 4 times. A full 85 percent of households received an invitation to a scheduled block-organizing meeting. In areas where local leaders could not turn out participants, the organizers conducted "blitz" campaigns to back their efforts. People did turn out in substantial numbers in some places, but not in others, and there was not much response on about 30 percent of the target blocks. Only 17 percent of all blocks fully met the project's goal of having a trained leader and holding one meeting in each of the two years of the program.

The evaluation confirmed the power of the matching and true random assignment procedure employed in this research; there was a close match between the two sets of areas in the preprogram surveys. As in Chicago, involvement in crime prevention went up in both areas during the two-year implementation period, but it went up much more in the program neighborhoods. Both recalled-awareness and (especially) recalled-participation were *much* higher in these program areas than in comparable areas of Chicago. In the program areas, awareness that organizing was going

on went from 37 to 77 percent, and participation in those activities went from 11 to 38 percent. As can be seen in Table 6-4, comparable changes in the comparison areas were much smaller. These differences were significant in multivariate analyses that controlled for pre-program levels of awareness and participation, and for a host of demographic characteristics.

Now the familiar irony. As in Chicago (and Houston), higher-income, homeowners, long-term residents of single-family homes were more likely than others to learn about the opportunities for participation provided by the program, and the same group—with the addition of whites—were more likely than their counterparts to take advantage of them. Block-level records on participation in meetings indicated that people turned out in substantial numbers only in the better-off areas. The lack of any early response by residents of poor and minority areas led organizers to increase their efforts there, but participation remained slight. Because the program continued to push where there was no early success, overall turnout in the end was *inversely* related to program effort. Even though program effort was greatest in poorer, black, and higher-crime areas, attendance at meetings was highest in white and middle-to-upper-income areas where crime problems were not substantial. Better-off areas were organized with the least effort.

To redouble the irony, those middle-class successes then faded. The initial block meetings in better-off areas were well attended, but at the end of the evaluation period they were not particularly likely to have been followed up with any other efforts. The evaluation team attended a number of those meetings, and speculates that the difficulty was there were no real problems to be dealt with in those areas, or at least no problems that block clubs could deal with. There was hopeful news in the finding that the few Minneapolis groups that *did* persist were in poorer, minority neighbor-

Table 6-4 Program Impact on Participation

	Two Waves of Surveys for All Areas					
	Awareness of Programs			Participation in Programs		
	Wave 1	Wave 2	(N1-N2)	Wave 1	Wave 2	(N1-N2)
Program areas	37	77	(783-496)	11	38	(792-502)
Control areas	39	48	(402-259)	11	17	(403-257)

Note: Recalculated from Tables 6.1 and 6.3 in Pate, McPherson, and Silloway, 1987.

hoods with real problems. They were, however, painfully few in number.

Impact on Outcomes. The before-and-after evaluation surveys revealed that the Minneapolis programs were extremely visible. There were large increases in the percentage of program-area residents who had heard of the program, and impressive increases in the proportion who reported participating in some way. But the programs appear to have had no discernible impact on neighborhood processes or problems. There was no evidence of any program impact on such factors as residents' watchfulness, or reporting to the police. After two years, residents of the program area did not differ in any significant way on measures of perceived social disorder, physical deterioration, crime problems, and fear of crime. As in Chicago, in most cases the statistically insignificant changes were in the wrong direction, accruing to the disadvantage of residents.

WHAT HAPPENED IN CHICAGO AND MINNEAPOLIS?

The Chicago and Minneapolis organizing experiments were two of the most carefully evaluated efforts to attack local disorder and crime by organizing block-watch groups and encouraging household and community prevention efforts. Both had a great deal of visibility, and generated levels of participation that seem substantial. However, both programs failed to affect neighborhood problems, and failed to affect the processes by which they were to have done so. These failures—especially in light of their success at gaining visibility and involvement—raise important questions about the viability of community approaches to disorder and crime control.

Were they bad programs? Could their apparent failure be attributed to the fact that they were poorly designed, badly implemented, or missed their target? If this is true, they could not have set in motion the forces required to reduce levels of disorder and crime, but another—better—program might have done so.

The answer, of course, is a judgment call. In both cities the programs were in the hands of experienced professional organizers. In Chicago, they were designed and fielded by long-established community organizations with a track record of success. The Minneapolis organizers made extensive, documented

efforts to rally area residents. Their efforts were widely visible and generated impressive levels of initial program participation. In the view of the evaluators, "[T]he program was implemented energetically and appropriately, ruling out program failure as a possible explanation for the failure to achieve results" (Pate, McPherson, and Silloway, 1987: 7-13). The Minneapolis program's biggest flaw was probably that what the block clubs were to *do* was left in their own—largely untutored—hands.

The Minneapolis experience parallels the findings of research on participation reviewed earlier in this chapter. Voluntary participation cannot easily be initiated in poorer, higher-crime areas. Studies of organizations find they arise and are disproportionately concentrated in the homogeneous, better-off areas of cities. Better-off city residents more frequently know of opportunities to participate, and are more likely to participate when they have the opportunity. Attempts to transplant organized anti-crime efforts are more likely to get off the ground in better-off target areas. This does not mean that it's impossible to organize areas that are in need, but that it is not possible to do so "easily." Governments must find relatively simple and direct mechanisms for effectuating social change, if they are to engineer that change across many areas, among many kinds of people, using relatively blunt policy instruments.

It may be that "more" of a program, or a "longer" program, *could* have succeeded in organizing and sustaining anti-crime efforts in worse-off areas. As criminologist Dennis Rosenbaum (1987) points out, *any* evidence of program failure is liable to that countercharge. However, the effort involved in the Chicago and Minneapolis programs was substantial enough to raise another question—*can* reasonable, affordable organizing efforts affect day-to-day life in city neighborhoods like these?

The logistical problems that torpedoed Minneapolis' cop-on-the-block component of the program seem simple in retrospect, but that does not mean they would now be easy to solve. Minneapolis could not get the police involved in their program, and in Chicago the Ford projects chose not to involve them in their social strategies, so neither of these programs sheds any further light on the hard question of the role of the police in community crime-prevention. Several observers have noted that crime-focused groups start up and persist more easily when they operate in conjunction with the police (Garofalo and McLeod, 1986; Yin,

1986). Criminologists James Garofalo and Maureen McLeod (1986) conducted a questionnaire study of 550 neighborhood-watch programs across the country. They found that only 6 percent had not received help from the police, who provided them with training, information, technical support, and equipment. The police can also lend visibility and apparent legitimacy to organizing efforts, which can be important in neighborhoods starting out with lower levels of mutual trust. We have seen that Houston's effort to use police to organize a community and spawn a viable group concerned with disorder and crime appears to have been a substantial success. Unfortunately, police-community cooperation is more difficult to secure in poor and minority neighborhoods in which those relationships often are strained, and the first impulse of organizers in those areas will not be to attempt to borrow legitimacy from the police.

Was the underlying premise wrong? Is it hypothetically possible that reasonable, affordable programs can work in this way? Are day-to-day interaction, intervention, and prevention efforts powerful enough to reverse the course of neighborhoods that have slipped into the cycle of decline?

Even if extensive organizing efforts are mounted, it is not clear that they will have their intended effect. The Minneapolis and Chicago projects described here found that professional and well-financed organizing campaigns increased target area residents' awareness of opportunities to participate, and stimulated participation in (some) organized activities. However, in neither case (and both projects involved several target areas and programs) was there any evidence of the hypothesized *effects* of these efforts. These findings raise the issue of whether "program failure" or a more fundamental "theory failure" was at work in the two cities. It may be the former—that the programs were too weak, that their "dosage" levels were too low, or that they were not correctly targeted at neighborhood problems. However, in both these cases there was a documented program of some magnitude, and it was reflected in impressive survey measures of awareness and participation.

An alternative explanation is that the root solutions which the organizers pursued may have been wrong, or misdirected in terms of what they presumed could be accomplished with realistic levels of local organizing. Past research and the Chicago evaluation presented here both suggest that a focus on *social* solutions may be misguided. There was no evidence of area-level effects on the

attitudes and behaviors they intended to improve, and they may in fact have spread concern and enhanced levels of fear. Fear of crime went up in virtually every area of Chicago after the programs had been at work. There is no good evidence that the effects of participation "rub off" on (more numerous) nonparticipants, and more that most people find it easier to be a free rider and reap any benefits of local activism without becoming involved themselves. To attempt to tackle neighborhood disorder by rekindling local friendship networks, seeking solidarity, and encouraging informal intervention is to define a solution that is difficult to implement effectively.

It is also possible that there *were* real effects of these programs, but that the evaluations were inadequate to discern them. There is a long list of standard problems with evaluations in the criminal justice field (cf. Lurigio and Rosenbaum 1987), some of which are applicable to the Chicago and Minneapolis evaluations. The major problems of relevance here include:

- (1) *There might be problems with the program and comparison areas—they might be "unmatched," "self-selecting," or competing events could have occurred there.*

The evaluations could have been threatened by some of these problems. The Minneapolis areas were selected as being "ripe" for organizing; then they were matched, and each matched group of three was randomly divided into program and comparison groups. In Chicago, the program areas were selected by the Ford Foundation and its local umbrella organization; the evaluators could only pick the comparison areas. In both cities the evaluators had an idea of what was going on in their program areas, but did not closely monitor events in the comparison areas. However, in both cities respondents from the comparison areas did not come from just one neighborhood, but from a variety of places; in Chicago, small comparison samples were interviewed in each of several scattered areas which matched each program area, while in Minneapolis 21 different comparison areas were combined in the analysis.

As a result, the biggest problem here was probably self-selection. In Chicago, self-selection could account for the unexpectedly high level of pre-Ford participation and awareness in the program areas there. The apparently negative effects of the programs in Chicago

may have been because the areas chosen for treatment were "on the brink" of a downward trend, while the demographically-matched comparison areas were not.

- (2) *The evaluation surveys might not have been large enough to detect modest program effects.*

None of the Chicago panel surveys were as large as those employed in Houston and Newark, and none of the individual target areas in Minneapolis could be analyzed separately (the evaluation surveys were designed from the outset simply to be pooled into large program and comparison samples). However, the pooled multivariate analyses for Chicago (Tables 6-1 to 6-3) and the Minneapolis evaluation were based on large samples of respondents, and there was no relationship between the size of the evaluation surveys and the significance (or not) of the findings.

- (3) *The evaluation findings may have been threatened by panel attrition.*

None of these evaluations had substantial problems with people refusing to be reinterviewed. However, as is frequently the case in longitudinal time studies of not-so-nice neighborhoods, a number of people *moved out* and could not be reinterviewed. In order to account for this, both the Minneapolis and Chicago evaluations (and those in Houston and Newark) conducted supplemental interviews to represent new residents. All the analyses were duplicated using both the respondents who were interviewed twice and the new data which represented all the residents of the areas at Step 2. The panel data are better suited for measuring true individual-level change, and a few more findings were significant (often in the wrong direction) when those interviews were analyzed, but in the main both sets of data pointed to the same gloomy conclusions.

- (4) *The evaluations might have employed poor or inappropriate measures of linkages and outcomes, and the data analysis may have been insensitive to the real effects of the programs.*

In this regard, these evaluations were better than many. All of the linkage and outcome measures were based on several questions and had acceptable reliabilities. The measures probably were weakest at tapping informal social behavior (for example, visiting or talking with neighbors), for it is difficult to get people to recall

with any accuracy the frequency with which they actually perform routine, low-salience, almost habitual acts. As a result, it may be that these evaluations, because of measurement error, are biased against finding any program effects of that type. All of the analyses were controlled for pretest scores and individual demographic characteristics, and their panel design was best suited for making efficient inferences about individual change.

In summary, each of these evaluations had its individual flaws. Those flaws *may* have shrouded what were in fact successful attempts to set in motion neighborhood processes that reduced the level of disorder. However, not all of the evaluations shared the same flaws, yet they came to the same conclusions. Further, the Houston and Newark evaluations reported in the previous chapter shared most of these flaws in varying degree, yet many of those programs appear to have scored some successes. In Chicago and Minneapolis, community organizing probably did not work the way it was assumed it would.

Finally, were these programs still *political* victories? As the evaluators point out, there is more than one level at which the organizations involved could count these programs as successes or failures. For example, in Chicago they succeeded in getting the money, they were able to hire more full-time staff members, they could sport the imprimatur of the Ford Foundation, and through the project they were linked in a city-wide movement with other large and successful organizations. Staff members of the organization hired by Ford to provide technical assistance to the neighborhood groups in Chicago "spun off" their own organization, which now operates independently and receives public and private contracts to do crime-prevention work. In Minneapolis, the city agency running the program was able to hire more staff; in bureaucratic circles this is no small victory. The two Chicago organizations that were the most decentralized, membership-based, and participatory in style succeeded in enhancing their recognition and "presence" in the community, expanding their network of block clubs, and activating new local leaders. All of the groups in Chicago used the opportunity to make more (and often successful) demands on the police and other city agencies for support and services. In short, in Chicago they were able to exert some political as well as social pressure in seeking solutions to their problems.

In this case these organizations clearly were not outstandingly successful at meeting their proximate social goals, for none of the

community factors or disorder problems they aimed at changed substantially. This is important; as the evaluators point out:

The groups we studied all took as their mandate the exercise of control over the local areas; by that, we mean they sought to shape the nature of the community in terms of the activities that took place and how their turf was used. Community organizations seek to shape the character of the area they purport to represent (Lewis, Grant, and Rosenbaum, 1987: 1-8).

There was also no evidence that the groups in Chicago had any special success with "political" strategies that could be attributed to their participation in the Ford program. In Minneapolis, the city employees who conducted the program stuck to narrowly defined "technical" solutions to crime problems, and could not encourage political action, for fear of running afoul of the City Council. However, organizations also have "maintenance" needs—they must recruit and maintain members and generate resources to pay their staff and reward their members. It is difficult to judge how great their victories were on this front, and that probably varied by how large and successful each organization or agency was before the Ford Foundation came along. However, their success at meeting their maintenance needs through this program may have made up somewhat for their apparent failure to make a dent in the problems on which they focused.

CONCLUSIONS

During the 1970s and early 1980s, the community approach to local problem-solving developed a diverse constituency. It attracted the attention of politicians, who found various reasons for supporting it. It emphasized volunteerism and had smaller budgetary implications than most alternatives for dealing with crime and disorder-related problems, and it diverted attention from what some thought to be their root causes—poverty, illiteracy, and racism. This suited conservatives. On the other hand, it promised to support organizing efforts in poor neighborhoods and to provide money for established community organizations—which suited many liberals. The community approach also attracted the

attention of researchers. During a period of growing public militancy with respect to crime, it offered an alternative to hiring more police, which researchers generally did not think would work. Researchers were skeptical that affordable increases in traditional policing would have many positive effects on neighborhood problems. In addition, the concurrent political exhaustion of rehabilitation as the ideal for dealing with individual offenders also had created an intellectual vacuum, one that was easily filled by the notion of empowering people to solve their own problems. Finally, community-based programs attracted the attention of public and private agencies with money. During the 1970s, a succession of federal agencies stepped forward to support organizing efforts around crime problems, and in the early 1980s the Ford Foundation put private support behind them as well. During the same period, federal research agencies sponsored studies of many aspects of this new approach to crime prevention, which further fueled the interest of the research community.

Here we reviewed some of the results of this research. The attempts to create new opportunities for participation in Minneapolis, and to manipulate the agendas of successful local organizations in Chicago, provided a test of the "transplant" hypothesis. They also tested the conclusions of earlier research concerning the relationship between community organizations and disorder, conclusions based upon studies of "naturally occurring" groups. Together, these two streams of evidence suggested some sobering conclusions.

They are sobering because troubled communities *need* organizations, notwithstanding all the difficulties involved in forming and sustaining them. Serious neighborhood problem-solving admits to few avenues for autonomous action. However, social change at the end of the twentieth century is working in the opposite direction. Most of the demographic correlates of opportunities for participation, and levels of actual participation (income, ownership, education, family status, length of residence), show a trend in the wrong direction in cities. Demographic projections of these factors predict declining activism in the future. To a certain extent, theories that stress the importance of resurrecting informal social control reflect nostalgia for a village life that is long gone from cities, and which certainly will not look like life there in the twenty-first century.

However, the practical dynamics of neighborhood organizing may also work to the positive *disadvantage* of the poor. Group

formation succeeds more easily in better-off and white neighborhoods. They focus on housing, and want to freeze the current race and class distribution of desirable real estate. Residents of those areas find it much easier to work in conjunction with the police, and their programs frequently can function autonomously and without external funding. Better-off areas are more often "self-starters." Foundations or agencies that provide assistance to neighborhoods that organize to ask for it, or which try to assist neighborhoods and only pursue those efforts in places that seem responsive, will also contribute to class and race-based inequities. It appears that the government and foundation funds that are available for community mobilization efforts are now usually scooped up by a few aggressive and already well-organized neighborhoods, while most languish without support (Henig, 1982). To the extent to which the organizations can actually make a difference with regard to disorder and crime, the differential distribution of opportunities to participate has further implications for the quality of life in city neighborhoods. Relying upon voluntary local organizations to deal with disorder and crime places poorer communities at a disadvantage relative to middle-class areas.

Race, Crime, and the Administration of Justice: A Summary of the Available Facts

Presented to the Advisory Board of the President's Initiative on Race
May 19, 1998

Christopher Stone, Director of the Vera Institute of Justice

What do we know about race, crime, and the administration of justice? At the most general level, we know that many people of color—Native Americans, Asian-Americans, Hispanic Americans, Black Americans—do not trust the justice system. A study of Hispanic Texans in the mid-1980s found that less than 30 percent thought the job performance of their local police was good.¹ In a 1995 Gallup poll, more than half of Black Americans said the justice system was biased against them. Moreover, two-thirds of Black Americans in that same Gallup poll said that police racism against Blacks is common across the country; and a majority of White Americans (52%) agreed.²

Social scientists usually explain this broad distrust in two ways: historical experience and present-day practice. The historical experience with the justice system among Native Americans, Asian immigrants, Black Americans, and Hispanic Americans is more than enough to provoke distrust; but is it being reinforced by current practice? How does the pattern of crime and victimization keep us from living as one America? How do stereotypes work to cause people of some races and ethnic groups to be unfairly suspected of crime? How and when does the justice system itself treat defendants and offenders differently on the basis of race or ethnicity? Does a lack of diversity in the justice system add to the distrust?

Social science research has shed some light on each of these concerns, but our empirical knowledge is uneven. We know a lot about some of these issues, but there are great gaps in what we know through research. We know much less about discrimination in judicial decisions regarding Asian-American defendants, for example, than we do about "Black and White" discrimination. And we know much more about reported index crimes (homicide, robbery, rape, burglary, aggravated assault, larceny, auto theft, and arson) than we do about other criminal conduct. The lack of data and good research on the experience of Asian Americans and Native Americans in particular is a problem that the Advisory Board might address.

¹ David L. Carter, "Hispanic Perception of Police Performance: An Empirical Assessment," *Journal of Criminal Justice*, 13:487-500 (1985).

² *Gallup Poll Monthly*, October 1995.

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Let us begin with the pattern of crime victimization. The basic pattern here is that Whites generally have the lowest victimization rates, followed by Asians, followed by Native Americans, then Hispanics, then Blacks. But the differences are dramatic. In 1995, for example, there were 5.1 homicide victims per 100,000 Non-Hispanic White males. The rate for Asian-American males was more than one-and-a-half times higher, at 8.3 per 100,000. But the rate for Native American males was 18, more than three times the White rate. The rate for Hispanics was 25.1, almost five times the White rate. And the rate for Blacks was 57.6, more than ten times the White rate.³

This pattern changes somewhat for different crimes. For more common violent crimes, such as robbery, the relative position of the groups is the same, but the differences are not as great. For household crimes, such as burglary, Hispanics report the highest rates of victimization in the annual victimization surveys conducted by the Census Bureau for the Justice Department.⁴

Why the differences? The crudest analyses focus on the offenders. Most crime is intra-racial. More than 80 percent of homicides where we know the race of the killer are either White-on-White or Black-on-Black. Research among Vietnamese and Chinese in California has also shown that most crime there is intra-racial.⁵

Does this mean that groups with high victimization rates also have high offending rates? Yes, but with three crucial caveats. First, it is crucial to remember that most crime is committed by Whites. Their offending rates may be low, but there are so many of them that they still manage to commit most of the crime. Second, the chances that a young adult has ever committed a violent offense are roughly equal across races. The difference in rates is a function of the greater frequency and persistence over time among individuals of certain groups.⁶

Third, the more sophisticated analyses today focus on neighborhoods, and they show us that the differences in victimization and offending rates between groups may have more to do with neighborhood and community conditions than with race itself. Where people live in neighborhoods of concentrated disadvantage, victimization and offending rates are high. When researchers compare similar neighborhoods of different races, the racial differences seem to disappear.⁷ The problem is that for the most disadvantaged urban communities, we cannot find White communities to compare. That seems to be the reason that crime falls so heavily on some groups.

³ Unpublished analysis of various data provided to the author by the U.S. Department of Justice, Bureau of Justice Statistics.

⁴ *Criminal Victimization Rates in the United States, 1994*, United States Department of Justice, Bureau of Justice Statistics (May 1997).

⁵ Song, et al., "Attitudes of Chinese Immigrants and Vietnamese Refugees Toward Law Enforcement in the United States" in *Justice Quarterly*, 9:4, pp. 703-719 (1993).

⁶ Delbert S. Elliott, "Serious Violent Offenders: Onset, Developmental Course, and Termination—The American Society of Criminology 1993 Presidential Address," *Criminology* 32(1):8, 1994.

⁷ Robert J. Sampson, Stephen W. Raudenbush, and Felton Earls, "Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy," *Science* 277:1-7 (August 15, 1997).

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Most people of all races and ethnic groups are never convicted of a crime, but stereotypes can work to brand all members of some groups with suspicion. These stereotypes may have their roots in past biases, but they also can be re-enforced through broadcast news and newspaper reports. One social scientist, for example, finds that Asians are over-identified with Asian gangs.⁸ A team of researchers at UCLA has found that Blacks and Hispanics are over-represented in TV news depiction of violent crime, while Whites are overrepresented in stories involving non-violent crime.⁹

These stereotypes are bad enough in the culture at large, but they work their way into law enforcement through the use of criminal profiles, putting an undue burden on innocent members of these groups. A particularly clear example of this phenomenon is found in a study of the Maryland State Troopers and the searches they made of motorists on Interstate Highway 95 in 1995. On this particular stretch of highway, motorists were found to be speeding equally across races. Black motorists, for example, constituted 17 percent of the motorists and 17.5 percent of the speeders. But Black motorists were the subject of 409 of the 533 searches made by the police looking for contraband.¹⁰

racial
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Why were Black motorists searched so often? The police explain that Blacks are more likely to be carrying contraband. And the statistics show this to be true: the police found contraband in 33 percent of the searches of Black motorists, and in 22 percent of the searches of White motorists. But the mischief in this practice is quickly exposed. Blacks had a 50 percent higher chance of being found with contraband, but were searched more than 400 percent more often. The result is that 274 innocent Black motorists were searched, while only 76 innocent White motorists were searched. The profiles apparently used by the Maryland State Troopers make 17 percent of the motorists pay 76 percent of the price of law enforcement strategy, solely because of their race.

* * *

The combination of higher rates of crime and higher levels of police attention produce disproportionate numbers of arrests among some groups. Arrest rates for violent crimes among Asian Americans are about half of that among White Americans. Rates for Native Americans are about one-and-a-half times that for Whites. And rates for Blacks are about five times that for Whites. Again, as with crime, the arrest rate for Whites may be low, but there are so many Whites that they account for 55 percent of all arrests for violent crime.¹¹

⁸ "Asians Are Automatically Labeled Gang Members," *Los Angeles Times*, December 12, 1994, B-5.

⁹ Frank D. Gilliam, Jr., Shanto Iyengar, Adam Simon, Oliver Wright, "Crime in Black and White: The Violent Scary World of Local News" in *Press/Politics* 1(3):6-23 (1996).

¹⁰ Katheryn K. Russell, *The Color of Crime* (New York University Press, 1998), pp. 41-42.

¹¹ Federal Bureau of Investigation, Uniform Crime Reports, 1996.

But then what happens? Here is the problem that has attracted more research than any other area under discussion today. Black Americans account for less than half of the arrests for violent crimes, but they account for just over half of the convictions and approximately 60 percent of the prison admissions.¹² At the beginning of this decade, the chance that a Black male born in the United States would go to prison in his lifetime was more than 28.5 percent. Not reform school, not a few days or weeks in jail, but state or federal prison following conviction for a felony and a sentence of more than a year: 28.5 percent. The corresponding chance for an Hispanic male was 16 percent, and for a White male, 4.4 percent.¹³

A similar pattern of disproportionate representation of Black and Hispanic Americans appears in juvenile detention facilities, where, in 1994, 43 percent of juveniles were Black, 19 percent were Hispanic, and 35 percent were White.¹⁴

These are national figures; but the reality in many individual juvenile and adult institutions is even more stark as geography and classification systems increase the segregation and concentration of minority inmates. How has this happened? Is this simply the result of fair-minded prosecutors and courts applying the law to disproportionate arrests, or is there bias at work at these later stages of the justice process?

Researchers have looked carefully for evidence of bias, reaching different of conclusions. Some of the disparity we see when we visit these institutions is clearly explained by differences in arrest charges, and much more is explained by differences in the prior records of those convicted. There is no evidence of disparity that stretches across the justice system as a whole when we consider index crimes. But studies of individual jurisdictions and specific parts of the court process do find some evidence of race bias in some significant number of cases.

The most we can say is that when crime type and prior record are taken into account, Black defendants in some jurisdictions are more likely to receive prison sentences than are White defendants. In addition, there is some evidence that race influences detention and placement decisions in juvenile justice processing.¹⁵ The problems we encounter in this research are illustrated in recent study of sentencing disparity of Native Americans in Arizona. After accounting for prior felony records and other factors, American Indians were found to receive longer sentences than Whites only for robbery and burglary, while Whites received significantly longer sentences for homicide than did American Indians.¹⁶

¹² Unpublished analysis of various data provided to the author by the U.S. Department of Justice, Bureau of Justice Statistics.

¹³ Thomas P. Bonczar and Allen J. Beck, *Lifetime Likelihood of Going to State or Federal Prison*, U.S. Department of Justice, Office of Justice Programs, NCJ-160092 (March 1997).

¹⁴ Mark Roscoe and Reggie Morton, *Disproportionate Minority Confinement*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, April 1994.

¹⁵ Robert J. Sampson and Janet L. Lauritsen, "Racial and Ethnic Disparities in Crime and Criminal Justice in the United States" in Michael Tonry (ed.) *Ethnicity, Crime, and Immigration* (1997), p. 355.

¹⁶ A. Alvarez and R.D. Bachman, "American Indians and Sentencing Disparity. An Arizona Test" in *Journal of Criminal Justice*, 24:549-561 (1996).

Of course, both of these findings could be evidence of bias. The longer sentences could be evidence of harsher treatment of Native American offenders for crimes against strangers, while the lower sentences for homicide could be evidence that the courts do not treat seriously offenses among acquaintances within this population. Across race and ethnic groups, concerns about both of these kinds of bias are regularly reported: under-enforcement of laws within a minority community and over punishment when that community is seen as a threat to the majority. These two kinds of bias can cancel each other out in simple studies. Their interaction is captured most famously in the research on death penalty, showing that black offenders found guilty of murdering white victims are at the highest risk for the death penalty, while offenders of any race found guilty of murdering black victims are least likely to receive the death penalty.¹⁷



Finally, in considering the work of the justice system itself, the special case of drug offenses needs to be considered separately. Asian-American youth report very low drug use compared with other groups. Black youth consistently report lower rates than whites; Hispanic youth report more than Black, but less than Whites.¹⁸ Yet police activity, new criminal legislation, special courts, and longer sentences were all brought to bear in the late 1980s against the use and sale of drugs, particularly crack cocaine. Whatever one believes about the rationality of the decision to create special, harsher penalties for crack cocaine, the concentration of these sentences on Black defendants is striking. For example, of the drug defendants sentenced in the United States District Courts during the 1995 federal fiscal year for powdered cocaine, 35 percent were Black, 37 percent were Hispanic, and 21 percent were White. Of those sentenced for crack cocaine, in contrast, 86 percent were Black, 9 percent were Hispanic, and less than 5 percent were White.¹⁹



As striking as these statistics can be, the most powerful reminder of bias in these stages of the justice system sometimes comes from qualitative research. That is because bias in the system is most often found in local practices rather than aggregate statistics. For example, in a study in Washington State in the late 1980s, researchers found that nonwhites were sentenced to prison at higher rates in counties with large minority populations. In follow-up interviews, justice officials and community leaders told the researchers directly that the public in their counties were concerned with the "dangerousness" of these minorities and admitted using race as a code for a culture that to them signified criminality.²⁰

* * *

If these biases were eliminated from the justice system itself, would we still have a problem? If the police abandoned the use of offensive stereotypes, if the remnants of institutional bias were driven from the courts, would the justice system deserve and win

¹⁷ Sampson and Lauritsen, pp. 354-5.

¹⁸ "Drug Use Among Racial/Ethnic Minorities," U.S. Department of Health and Human Services, National Institute on Drug Abuse (Pub. No. 95-30008, 1995).

¹⁹ U.S. Sentencing Commission, 1996 datafile, MONFY96

²⁰ Sampson and Lauritsen, p. 357.

respect across lines of race and ethnicity? Or is the sheer volume of Black and Hispanic prisoners in America a problem in its own right?

There is little empirical evidence on this, but it is a question worth considering. Respect for the justice system can be won or lost not just in its decisions, but in who is making them.

There has been slow but real progress in strengthening the diversity of law enforcement throughout the United States, but there are also signs that this effort is losing momentum. A recent study of hiring of police executives in Florida commissioned by the National Institute of Justice, for example, concluded that the number of minority law enforcement executives has declined in recent years, after earlier gains. A large percentage of minority officers remain in entry-level positions throughout their careers and the outlook for any change, the researchers concluded, is bleak.²¹

* * *

If there is a strong reason for optimism among all these data, it is in the steady decline in crime over the last several years in most large U.S. cities. Let me focus here on the often neglected yet dramatic decline in domestic homicide, where we again find a stark difference between Black and White. Twenty years ago, White men were rarely victims of domestic homicide—about one victim per 100,000 males age 20-44. White women were victims at about twice that rate. Both rates have declined modestly over these two decades. Rates for Black victims of domestic homicide were roughly 7 times the rate for Whites twenty years ago, and they have plummeted since. The rate for Black male victims has dropped from more than 16 to less than 3 homicides per 100,000; and for Black women the rate has fallen from more than 12 to less than 5.²²

These declines leave us with two important lessons. First, they remind us of the power of neighborhood disadvantage, for as stark as the Black/White differences are, they disappear when you control for housing conditions.²³ Second, they remind us of the power these communities have to help themselves. There are currently some aspects of the drop in crime for which police can claim the credit, and there is plenty of crime reduction for everybody to claim some; but this drop, occurring over twenty years, exceeds the reach of any single program or administration. It is an example of cultural change and a community working to heal itself.

In sum, these declines hold out the promise of a day when race will no longer be a proxy for suspicion, and crime no longer a proxy for concentrated community disadvantage.

²¹ *The Future of Minority Law Enforcement Executives in the State of Florida*, National Institute of Justice, NCJ-153059 (1994).

²² Lawrence A. Greenfeld, et al., "Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends," U.S. Department of Justice, Bureau of Justice Statistics, NCJ-167237 (March 1998).

²³ James F. Short, Jr., "Measuring Violent Crime: Trends and Social Distributions" in *Poverty, Ethnicity, and Violent Crime* (Westview Press, 1997), p. 24.

Examining Chicago's Alternative Policing Strategy

Chicago, Ill.

Chicago's Alternative Policing Strategy (CAPS) is one of the nation's most ambitious community policing initiatives. In an average month, some 6,000 Chicagoans connect with their beat officers through the 230 community meetings held throughout the city. Their purpose is to identify and resolve problems of crime and disorder in Chicago's neighborhoods. Both the police and community members have been trained in problem solving and partnership building, resulting in the formation of meaningful partnerships. Other city agencies have been brought into the process to address quality-of-life issues. Beat officers work the same neighborhood and watch for one year to ensure they become a familiar presence in the community.

The Chicago Police Department (CPD) made evaluation a major part of CAPS from the very beginning. The department agreed to cooperate with a team of independent evaluators who had obtained federal and state funding, and gave them unprecedented access to CPD's operations. The evaluators talked to beat officers, attended community meetings, sat in on training and joined high-level planning sessions. They surveyed community residents and looked at hard crime data.

The evaluators' efforts, in short, were as ambitious as CAPS itself. In return for the department's cooperation, the evaluators reported their findings quarterly. Had the department waited for a final report long after the fact, it would not have had the opportunity to make needed program changes based on the findings.

The department needed an evaluation because it intended CAPS to be no less than a radical transformation in policing—one that would impact how every member of the department does his or her job. A radical transformation, however, is not to be undertaken lightly. Before it implemented the strategy citywide, the CPD did a trial run in five (of Chicago's 25) prototype police districts. Working with new and untested ideas, CPD needed to know what would work and what wouldn't. Once the strategy was implemented citywide, department personnel needed to know if the plans formulated and refined in the trial run would indeed work on a significantly larger scale.

The Evaluation Approach

The principal approaches the evaluators used were impact and process evaluation: impact evaluation to determine if CAPS was having an effect on the problems it was targeting, and process evaluation to determine if CAPS was operating the way it was designed to operate. By looking at process and outcome, CPD had a basis for knowing not only what the successes and failures were, but what accounted for them.

Impact Evaluation

In the prototype phase, the impact evaluation was based on a quasi-experimental design, in which each of the five prototype districts was matched with a comparison district, based on population and housing data from the 1990 census. If changes in perceptions of crime, incidence of crime



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toward police occurred in the prototype districts but not in the comparison districts, and these changes could be logically related to the CAPS strategy, there would be grounds for attributing the changes to CAPS. Had the department limited itself to simple before-and-after comparisons in the CAPS districts, it would not be able to tell whether any observed changes were the result of its new policing strategy, or if they were the result of extraneous factors such as weather, economic conditions, media attention to crime and the police, or even the work of other agencies.

Process Evaluation

Process evaluation was used to evaluate interactive situations that extended over time, such as beat community meetings, training or planning sessions. The first step was to go back to the CAPS model to define criteria of effective performance for the activity being evaluated. The criteria were then translated into observational frameworks to capture relevant behaviors. After observers from the evaluation team were trained in the use of these frameworks, they attended a sampling of meetings and recorded their observations. These observations were then coded and analyzed, to reflect the extent to which CAPS goals were being met.

Process evaluation requires a substantial investment of time and effort. When it is an appropriate technique, however, it can yield commensurate insights. To an extent that other evaluation techniques cannot, process evaluation can indicate the specific changes needed to improve a program. In our beat community meetings for example, process evaluation indicated that police and citizens often emphasize traditional responsibilities for each other. The police expect citizens to report crime, while citizens expect the police to prevent and solve crime.

What CPD Learned

This finding gave the department a clear indication of the need for additional training for each group to think more broadly about the other's responsibility under CAPS. When the police and community challenge each other to do new things, their partnership will gain in strength and effectiveness. Training officers and civilian beat facilitators in how to share responsibility is now a top priority.

This is not to say that the department did not learn a great deal from the quasi-experimental research. It did. CPD learned that CAPS does have a positive impact on crime and disorder problems, people's fear of crime, and their attitudes toward the police. When the quasi-experimental research indicated that public awareness of CAPS was slipping, the department launched a massive public outreach campaign to reverse that trend and encourage people to get involved in CAPS.

Evaluation has been an invaluable part of the department's community policing strategy. CPD is committed to maintaining an evaluation capacity in the future as CAPS continues to expand and develop. The department's model of working with outside evaluators--in which findings are communicated quickly so that they can be implemented immediately--has proved highly successful. The model has now been adopted by other law enforcement agencies throughout the country.

By Richard Glasser and Kevin P. Morison

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Kids Draw Beat Officers for Prizes

CHICAGO, ILL.

The District Advisory Committee (DAC) of the Seventh Police District in Chicago's Englewood community sponsored an art contest that promoted the importance of citizens getting to know their beat officers. The committee sent flyers to all 33 elementary schools in the community both public and private encouraging the 20,000 students in the area to participate. The "Young Artists Contest" was usually referred to as the "Draw Your Beat Officer Contest" because that's exactly what the students had to do to participate. Kids drew the officers using snapshots or drawings of the officers as their model. The major goal of the contest was to promote awareness of the Chicago Alternative Policing Strategy (CAPS). Not only was this achieved, but the contest produced a positive side effect friendly relationships between the police officers and the students. Through the officers' visits to the schools, the students were able to talk freely with the officers, discuss concerns and ask questions.

Various banks and businesses provided contributions to purchase prizes. The grand prize winner, his or her parents and the child's teacher were treated to a Chicago Bulls game. Each first place winner in three divisions received a 13-inch color television and a \$100 savings bond. Second through fifth place winners in three categories received CD players or digital portable radios along with savings bonds. Patricia Reed, director of Boulevard Arts, a fine arts institution in the community, provided art scholarships to the winners as well.

Winning drawings from last year's contest are displayed in the main hall of the seventh district police station and this year's winners will be added. The awards program for the contest was held at a local community college and the auditorium was packed with students and their parents.

"As we strive to develop a stronger partnership between the police department and the community, we are constantly seeking new ways in which we can work together to solve problems. The members of the community need and want to know the beat officers. As a result of this contest, more members of the community got that chance. Most importantly, the encounter was positive, which also promoted trust between the students and the beat officers," said Commander Ronald Evans of Chicago's seventh police district.

DAC Chairperson Jamesetta Harris also thought the art contest was a great idea and commented, "Commander Evans has been our inspiration and leader. He listens to us and encourages us to express our ideas. The art contest was an idea presented at one of our meetings as a way to involve the educational institutions in our CAPS Program. Dolores Evans, chairperson of the education subcommittee took it from there. We've been blessed to have so many people working together. Some are talented, others provide support. We need all of them together we have made some changes, experienced some success, and as a result the community as-a whole has improved."

By Dolores Evans and Jamesetta Harris

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Building a Field of Dreams: Anatomy of a Problem-Solving Strategy

CHICAGO, ILL.

"Gang activity, drug dealing, shooting, prostitution(you name it, it was all coming from here." So said a frustrated Lakeview resident, a community on Chicago's north side. He was talking about Gill Park, an area that had experienced these problems for years. Parents quit letting their children play there. The physical layout of Gill Park practically invited criminal activity. There were several hidden areas, and an empty, shallow, concrete pool that attracted loitering.

Anyone familiar with this picture of Gill Park would be astonished at Gill Park today. There is new lighting. The trees have been trimmed. There are beautiful flowers. A foot patrol officer walks the park during strategic hours. Best of all, the secluded areas and concrete pool where so much criminal activity took place are gone. They are being replaced by a baseball diamond--a true "field of dreams." Parents and children have returned to the park, displacing the criminals who had controlled it for years.

These dramatic changes show what can happen when the community, the police, and other city agencies form a partnership to tackle community problems. That partnership is the backbone of Chicago's Alternative Policing Strategy (CAPS).

Strategic Building Blocks Used to Achieve Gill Park Victory

1. **Community residents raised the Gill Park problem in beat community meetings.**
The Chicago Police Department hosts regular community meetings in each of its 279 beats. These meetings give the community, and the police, the opportunity to discuss crime and disorder problems. The meetings are run by the eight or nine officers assigned to the beat. Beat officers work the same beat and watch for one year so they become a familiar presence in the community. On Beat 2324, Gill Park was high on the list of problems discussed.
2. **Residents were trained in cooperative problem solving.**
Community training for all of the city's 279 beats was jointly designed and conducted by the police department and the Chicago Alliance for Neighborhood Safety, a not-for-profit organization. Residents learned that a problem is defined as a group of related incidents that affects a number of people and is unlikely to disappear on its own. It is something that people agree to work on together, and something that can be solved with available resources. Based on these criteria, residents voted Gill Park the priority problem on Beat 2324.

Once a problem is selected, it must be analyzed. Residents learned that every problem has three sides: offender, victim and location. The three sides constitute the crime triangle. Each side must be analyzed during group discussion. Residents on Beat 2324 made the following determinations: The offenders were the gang members, drug dealers and drug buyers. The victims were the adults and children who could no longer enjoy the park, and the property owners whose buildings were devalued by the criminal presence there. As for location, the park was dark and unkempt; patrolling police did not have a good view because of poor lighting and overgrown trees and bushes. The design of the park was conducive to criminal activity.

3. **The community and police designed strategies based on their analysis.**

The ground rules were that at least two sides of the crime triangle had to be addressed; the strategies had to be feasible; and the community, police and agencies each had to play a role. The group decided to bombard both the offender and the location sides of the triangle with strategies. Everybody recognized that simply arresting more offenders wouldn't work. That had been tried, and new offenders moved in.

4. Strategies were implemented.

The 23rd District instituted foot patrols in the park to address the offender side of the crime triangle. Officers aggressively enforced curfew and loitering laws. Residents of a nearby high-rise agreed to use their bird's eye view to keep closer watch on the park and report suspicious activity.

On the location side of the triangle, city crews trimmed the trees and installed more lighting, giving criminals fewer places to hide. Residents secured approval from the Chicago Park District to renovate the park and eliminate the troublesome back areas. A neighborhood architect donated plans for the park's renovation and showcased a baseball diamond as its central feature.

What stood between dreams and deeds at this point was funding. The park district had approved the plans, but the community was responsible for financing them. Enter the Chicago Cubs, who have a park of their own in the Lakeview community--Wrigley Field. What makes more sense than a major-league baseball team helping to build a baseball diamond for its own community? The Cubs contributed \$20,000 for the new sports field, and their generosity prompted contributions from other businesses and organizations. City and park district crews were soon at work, and local school children were planting flowers. After a little more than a year, the renovation is nearly complete.

5. Results were evaluated.

All those involved in the Gill Park transformation looked back on their work. They considered which strategies worked and which didn't; which challenges were met and which remained. They agreed that Gill Park was a glorious success. The park looked better than it had in years. The criminals were gone and families were back. Next summer, the happy sounds of baseball will resound from the new diamond. The partnership of community, police and city agencies had done its work, and done it well.

This five-step problem-solving process is the way that ordinary people did extraordinary things in Gill Park. In the process, the enthusiasm of the community and the police fed off each other; that is another benefit of the CAPS strategy. Said one community resident, "It's been great. I'm working with my neighbors and the police. We all have something to bring to the table. We all feel we can make a difference." Added the district's neighborhood relations officer, "I was very humbled and inspired by the community involvement."

By Barbara B. McDonald and Richard Glasser

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DAILY SOUTHTOWN

CHICAGO, IL
TUESDAY 57,338
JAN 20 1998

Major crimes decrease again in Chicago

Serious crime falls 20% from '91; robberies drop 42%

By Steve Metsch

Staff Writer

Major crimes in Chicago declined for the sixth straight year in 1997, according to preliminary statistics released by the police department.

Compared to 1991, there were 63,000 fewer victims of serious crime in 1997, which marks a 20 percent reduction, the police said. That includes a 42 percent drop in robberies from 1991.

"Every major crime category is significantly lower today than it

was at the beginning of this decade with the largest reductions coming in the area of violent crime," acting Police Supt. John J. Townsend said.

Major crimes include violent crimes (homicide, criminal sexual assault, robbery and serious assault) and property crimes (burglary, theft, motor vehicle theft and arson).

There were 65,110 violent crimes reported in 1997 compared to 67,501 in 1996, a drop of 3.5 percent. And there were 195,392 property crimes reported

in 1997 compared to 195,618 in 1996, a slight 0.1 percent drop.

"You're never going to be totally safe, you know that. The world is changing and everybody does what they want to do," said longtime Archer Heights resident Tom Ziroti, who is active in organizing seniors groups.

But Ziroti said he feels "pretty safe" living on the city's Southwest Side.

Townsend credited increased involvement in the Community Alternative Policing Strategy, the city's community policing pro-

gram that encourages more communication between residents and the police, with playing a role in the drop of major crime.

"Crime and violence remain serious concerns for our city," he said. "But we have made steady and significant progress, thanks in large part to the efforts of Chicago police officers, residents and other city agencies working together under our CAPS strategy."

Other significant drops since 1991 include criminal sexual assaults, down 29 percent, and homicides, down 18 percent. There were 757 murders in Chicago in 1997, the city's lowest

total since 1989. And, for the seventh straight year, the number of motor vehicle thefts dropped.

Noreen Stewart, president of the Ashburn Civic Association, said she felt safe living on the Southwest Side in a neighborhood that is patrolled by officers from the Chicago Lawn Police District.

"I believe the police are doing very good job," Stewart said.

"Some people feel that you should see a squad car whenever you look out the window. I don't believe that because then you have a complete police presence and that wouldn't be good for the community," she said.



Michael P. Lingenfelter
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Subject: Atlantic Monthly Article

March 1982

Broken Windows

The police and neighborhood safety

by James Q. Wilson and George L. Kelling

In the mid-1970s The State of New Jersey announced a "Safe and Clean Neighborhoods Program," designed to improve the quality of community life in twenty-eight cities. As part of that program, the state provided money to help cities take police officers out of their patrol cars and assign them to walking beats. The governor and other state officials were enthusiastic about using foot patrol as a way of cutting crime, but many police chiefs were skeptical. Foot patrol, in their eyes, had been pretty much discredited. It reduced the mobility of the police, who thus had difficulty responding to citizen calls for service, and it weakened headquarters control over patrol officers.

Many police officers also disliked foot patrol, but for different reasons: it was hard work, it kept them outside on cold, rainy nights, and it reduced their chances for making a "good pinch." In some departments, assigning officers to foot patrol had been used as a form of punishment. And academic experts on policing doubted that foot patrol would have any impact on crime rates; it was, in the opinion of most, little more than a sop to public opinion. But since the state was paying for it, the local authorities were willing to go along.

Five years after the program started, the Police Foundation, in Washington, D.C., published an evaluation of the foot-patrol project. Based on its analysis of a carefully controlled experiment carried out chiefly in Newark, the foundation concluded, to the surprise of hardly anyone, that foot patrol had not reduced crime rates. But residents of the foot patrolled neighborhoods seemed to feel more secure than persons in other areas, tended to believe that crime had been reduced, and

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seemed to take fewer steps to protect themselves from crime (staying at home with the doors locked, for example). Moreover, citizens in the foot-patrol areas had a more favorable opinion of the police than did those living elsewhere. And officers walking beats had higher morale, greater job satisfaction, and a more favorable attitude toward citizens in their neighborhoods than did officers assigned to patrol cars.

These findings may be taken as evidence that the skeptics were right- foot patrol has no effect on crime; it merely fools the citizens into thinking that they are safer. But in our view, and in the view of the authors of the Police Foundation study (of whom Kelling was one), the citizens of Newark were not fooled at all. They knew what the foot-patrol officers were doing, they knew it was different from what motorized officers do, and they knew that having officers walk beats did in fact make their neighborhoods safer.

But how can a neighborhood be "safer" when the crime rate has not gone down--in fact, may have gone up? Finding the answer requires first that we understand what most often frightens people in public places. Many citizens, of course, are primarily frightened by crime, especially crime involving a sudden, violent attack by a stranger. This risk is very real, in Newark as in many large cities. But we tend to overlook another source of fear--the fear of being bothered by disorderly people. Not violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.

What foot-patrol officers did was to elevate, to the extent they could, the level of public order in these neighborhoods. Though the neighborhoods were predominantly black and the foot patrolmen were mostly white, this "order-maintenance" function of the police was performed to the general satisfaction of both parties.

One of us (Kelling) spent many hours walking with Newark foot-patrol officers to see how they defined "order" and what they did to maintain it. One beat was typical: a busy but dilapidated area in the heart of Newark, with many abandoned buildings, marginal shops (several of which prominently displayed knives and straight-edged razors in their windows), one large department store, and, most important, a train station and several major bus stops. Though the area was run-down, its streets were filled with people, because it was a major transportation center. The good order of this area was important not only to those who lived and worked there but also to many others, who had to move through it on their way home, to supermarkets, or to factories.

The people on the street were primarily black; the officer who walked the street was white. The people were made up of "regulars" and "strangers." Regulars included both "decent folk"

and some drunks and derelicts who were always there but who "knew their place." Strangers were, well, strangers, and viewed suspiciously, sometimes apprehensively. The officer--call him Kelly--knew who the regulars were, and they knew him. As he saw his job, he was to keep an eye on strangers, and make certain that the disreputable regulars observed some informal but widely understood rules. Drunks and addicts could sit on the stoops, but could not lie down. People could drink on side streets, but not at the main intersection. Bottles had to be in paper bags. Talking to, bothering, or begging from people waiting at the bus stop was strictly forbidden. If a dispute erupted between a businessman and a customer, the businessman was assumed to be right, especially if the customer was a stranger. If a stranger loitered, Kelly would ask him if he had any means of support and what his business was; if he gave unsatisfactory answers, he was sent on his way. Persons who broke the informal rules, especially those who bothered people waiting at bus stops, were arrested for vagrancy. Noisy teenagers were told to keep quiet.

These rules were defined and enforced in collaboration with the "regulars" on the street. Another neighborhood might have different rules, but these, everybody understood, were the rules for this neighborhood. If someone violated them, the regulars not only turned to Kelly for help but also ridiculed the violator. Sometimes what Kelly did could be described as "enforcing the law," but just as often it involved taking informal or extralegal steps to help protect what the neighborhood had decided was the appropriate level of public order. Some of the things he did probably would not withstand a legal challenge.

A determined skeptic might acknowledge that a skilled foot-patrol officer can maintain order but still insist that this sort of "order" has little to do with the real sources of community fear--that is, with violent crime. To a degree, that is true. But two things must be borne in mind. First, outside observers should not assume that they know how much of the anxiety now endemic in many big-city neighborhoods stems from a fear of "real" crime and how much from a sense that the street is disorderly, a source of distasteful, worrisome encounters. The people of Newark, to judge from their behavior and their remarks to interviewers, apparently assign a high value to public order, and feel relieved and reassured when the police help them maintain that order.

Second, at the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. This is as true in nice neighborhoods as in rundown ones. Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are

populated by window-lovers; rather, one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing. (It has always been fun.)

Philip Zimbardo, a Stanford psychologist, reported in 1969 on some experiments testing the broken-window theory. He arranged to have an automobile without license plates parked with its hood up on a street in the Bronx and a comparable automobile on a street in Palo Alto, California. The car in the Bronx was attacked by "vandals" within ten minutes of its "abandonment." The first to arrive were a family--father, mother, and young son--who removed the radiator and battery. Within twenty-four hours, virtually everything of value had been removed. Then random destruction began--windows were smashed, parts torn off, upholstery ripped. Children began to use the car as a playground. Most of the adult "vandals" were well-dressed, apparently clean-cut whites. The car in Palo Alto sat untouched for more than a week. Then Zimbardo smashed part of it with a sledgehammer. Soon, passersby were joining in. Within a few hours, the car had been turned upside down and utterly destroyed. Again, the "vandals" appeared to be primarily respectable whites.

Untended property becomes fair game for people out for fun or plunder and even for people who ordinarily would not dream of doing such things and who probably consider themselves law-abiding. Because of the nature of community life in the Bronx--its anonymity, the frequency with which cars are abandoned and things are stolen or broken, the past experience of "no one caring"--vandalism begins much more quickly than it does in staid Palo Alto, where people have come to believe that private possessions are cared for, and that mischievous behavior is costly. But vandalism can occur anywhere once communal barriers--the sense of mutual regard and the obligations of civility--are lowered by actions that seem to signal that "no one cares."

We suggest that "untended" behavior also leads to the breakdown of community controls. A stable neighborhood of families who care for their homes, mind each other's children, and confidently frown on unwanted intruders can change, in a few years or even a few months, to an inhospitable and frightening jungle. A piece of property is abandoned, weeds grow up, a window is smashed. Adults stop scolding rowdy children; the children, emboldened, become more rowdy. Families move out, unattached adults move in. Teenagers gather in front of the corner store. The merchant asks them to move; they refuse. Fights occur. Litter accumulates. People start drinking in front of the grocery; in time, an inebriate slumps to the sidewalk and is allowed to sleep it off. Pedestrians are approached by panhandlers.

At this point it is not inevitable that serious crime will flourish or violent attacks on strangers will occur. But many residents will

think that crime, especially violent crime, is on the rise, and they will modify their behavior accordingly. They will use the streets less often, and when on the streets will stay apart from their fellows, moving with averted eyes, silent lips, and hurried steps. "Don't get involved." For some residents, this growing atomization will matter little, because the neighborhood is not their "home" but "the place where they live." Their interests are elsewhere; they are cosmopolitans. But it will matter greatly to other people, whose lives derive meaning and satisfaction from local attachments rather than worldly involvement; for them, the neighborhood will cease to exist except for a few reliable friends whom they arrange to meet.

Such an area is vulnerable to criminal invasion. Though it is not inevitable, it is more likely that here, rather than in places where people are confident they can regulate public behavior by informal controls, drugs will change hands, prostitutes will solicit, and cars will be stripped. That the drunks will be robbed by boys who do it as a lark, and the prostitutes' customers will be robbed by men who do it purposefully and perhaps violently. That muggings will occur.

Among those who often find it difficult to move away from this are the elderly. Surveys of citizens suggest that the elderly are much less likely to be the victims of crime than younger persons, and some have inferred from this that the well-known fear of crime voiced by the elderly is an exaggeration: perhaps we ought not to design special programs to protect older persons; perhaps we should even try to talk them out of their mistaken fears. This argument misses the point. The prospect of a confrontation with an obstreperous teenager or a drunken panhandler can be as fear-inducing for defenseless persons as the prospect of meeting an actual robber; indeed, to a defenseless person, the two kinds of confrontation are often indistinguishable. Moreover, the lower rate at which the elderly are victimized is a measure of the steps they have already taken--chiefly, staying behind locked doors--to minimize the risks they face. Young men are more frequently attacked than older women, not because they are easier or more lucrative targets but because they are on the streets more.

Nor is the connection between disorderliness and fear made only by the elderly. Susan Estrich, of the Harvard Law School, has recently gathered together a number of surveys on the sources of public fear. One, done in Portland, Oregon, indicated that three fourths of the adults interviewed cross to the other side of a street when they see a gang of teenagers; another survey, in Baltimore, discovered that nearly half would cross the street to avoid even a single strange youth. When an interviewer asked people in a housing project where the most dangerous spot was, they mentioned a place where young persons gathered to drink and play music, despite the fact that not a single crime had occurred there. In Boston public housing projects, the greatest fear was expressed by persons living in the buildings where disorderliness and incivility, not crime, were the greatest.

Knowing this helps one understand the significance of such otherwise harmless displays as subway graffiti. As Nathan Glazer has written, the proliferation of graffiti, even when not obscene, confronts the subway rider with the inescapable knowledge that the environment he must endure for an hour or more a day is uncontrolled and uncontrollable, and that anyone can invade it to do whatever damage and mischief the mind suggests."

In response to fear people avoid one another, weakening controls. Sometimes they call the police. Patrol cars arrive, an occasional arrest occurs but crime continues and disorder is not abated. Citizens complain to the police chief, but he explains that his department is low on personnel and that the courts do not punish petty or first-time offenders. To the residents, the police who arrive in squad cars are either ineffective or uncaring: to the police, the residents are animals who deserve each other. The citizens may soon stop calling the police, because "they can't do anything."

The process we call urban decay has occurred for centuries in every city. But what is happening today is different in at least two important respects. First, in the period before, say, World War II, city dwellers- because of money costs, transportation difficulties, familial and church connections--could rarely move away from neighborhood problems. When movement did occur, it tended to be along public-transit routes. Now mobility has become exceptionally easy for all but the poorest or those who are blocked by racial prejudice. Earlier crime waves had a kind of built-in self-correcting mechanism: the determination of a neighborhood or community to reassert control over its turf. Areas in Chicago, New York, and Boston would experience crime and gang wars, and then normalcy would return, as the families for whom no alternative residences were possible reclaimed their authority over the streets.

Second, the police in this earlier period assisted in that reassertion of authority by acting, sometimes violently, on behalf of the community. Young toughs were roughed up, people were arrested "on suspicion" or for vagrancy, and prostitutes and petty thieves were routed. "Rights" were something enjoyed by decent folk, and perhaps also by the serious professional criminal, who avoided violence and could afford a lawyer.

This pattern of policing was not an aberration or the result of occasional excess. From the earliest days of the nation, the police function was seen primarily as that of a night watchman: to maintain order against the chief threats to order--fire, wild animals, and disreputable behavior. Solving crimes was viewed not as a police responsibility but as a private one. In the March, 1969, Atlantic, one of us (Wilson) wrote a brief account of how the police role had slowly changed from maintaining order to fighting crimes. The change began with the creation of private detectives (often ex-criminals), who worked on a

contingency-fee basis for individuals who had suffered losses. In time, the detectives were absorbed in municipal agencies and paid a regular salary simultaneously, the responsibility for prosecuting thieves was shifted from the aggrieved private citizen to the professional prosecutor. This process was not complete in most places until the twentieth century.

In the 1960s, when urban riots were a major problem, social scientists began to explore carefully the order maintenance function of the police, and to suggest ways of improving it--not to make streets safer (its original function) but to reduce the incidence of mass violence. Order maintenance became, to a degree, coterminous with "community relations." But, as the crime wave that began in the early 1960s continued without abatement throughout the decade and into the 1970s, attention shifted to the role of the police as crime-fighters. Studies of police behavior ceased, by and large, to be accounts of the order-maintenance function and became, instead, efforts to propose and test ways whereby the police could solve more crimes, make more arrests, and gather better evidence. If these things could be done, social scientists assumed, citizens would be less fearful.

A great deal was accomplished during this transition, as both police chiefs and outside experts emphasized the crime-fighting function in their plans, in the allocation of resources, and in deployment of personnel. The police may well have become better crime-fighters as a result. And doubtless they remained aware of their responsibility for order. But the link between order-maintenance and crime-prevention, so obvious to earlier generations, was forgotten.

That link is similar to the process whereby one broken window becomes many. The citizen who fears the ill-smelling drunk, the rowdy teenager, or the importuning beggar is not merely expressing his distaste for unseemly behavior; he is also giving voice to a bit of folk wisdom that happens to be a correct generalization--namely, that serious street crime flourishes in areas in which disorderly behavior goes unchecked. The unchecked panhandler is, in effect, the first broken window. Muggers and robbers, whether opportunistic or professional, believe they reduce their chances of being caught or even identified if they operate on streets where potential victims are already intimidated by prevailing conditions. If the neighborhood cannot keep a bothersome panhandler from annoying passersby, the thief may reason, it is even less likely to call the police to identify a potential mugger or to interfere if the mugging actually takes place.

Some police administrators concede that this process occurs, but argue that motorized-patrol officers can deal with it as effectively as foot patrol officers. We are not so sure. In theory, an officer in a squad car can observe as much as an officer on foot; in theory, the former can talk to as many people as the

latter. But the reality of police-citizen encounters is powerfully altered by the automobile. An officer on foot cannot separate himself from the street people; if he is approached, only his uniform and his personality can help him manage whatever is about to happen. And he can never be certain what that will be--a request for directions, a plea for help, an angry denunciation, a teasing remark, a confused babble, a threatening gesture.

In a car, an officer is more likely to deal with street people by rolling down the window and looking at them. The door and the window exclude the approaching citizen; they are a barrier. Some officers take advantage of this barrier, perhaps unconsciously, by acting differently if in the car than they would on foot. We have seen this countless times. The police car pulls up to a corner where teenagers are gathered. The window is rolled down. The officer stares at the youths. They stare back. The officer says to one, "C'mere." He saunters over, conveying to his friends by his elaborately casual style the idea that he is not intimidated by authority. What's your name?" "Chuck." "Chuck who?" "Chuck Jones." "What'ya doing, Chuck?" "Nothin'." "Got a P.O. [parole officer]?" "Nah." "Sure?" "Yeah." "Stay out of trouble, Chuckie." Meanwhile, the other boys laugh and exchange comments among themselves, probably at the officer's expense. The officer stares harder. He cannot be certain what is being said, nor can he join in and, by displaying his own skill at street banter, prove that he cannot be "put down." In the process, the officer has learned almost nothing, and the boys have decided the officer is an alien force who can safely be disregarded, even mocked.

Our experience is that most citizens like to talk to a police officer. Such exchanges give them a sense of importance, provide them with the basis for gossip, and allow them to explain to the authorities what is worrying them (whereby they gain a modest but significant sense of having "done something" about the problem). You approach a person on foot more easily, and talk to him more readily, than you do a person in a car. Moreover, you can more easily retain some anonymity if you draw an officer aside for a private chat. Suppose you want to pass on a tip about who is stealing handbags, or who offered to sell you a stolen TV. In the inner city, the culprit, in all likelihood, lives nearby. To walk up to a marked patrol car and lean in the window is to convey a visible signal that you are a "fink."

The essence of the police role in maintaining order is to reinforce the informal control mechanisms of the community itself. The police cannot, without committing extraordinary resources, provide a substitute for that informal control. On the other hand, to reinforce those natural forces the police must accommodate them. And therein lies the problem.

Should police activity on the street be shaped, in important ways, by the standards of the neighborhood rather than by the rules of the state? Over the past two decades, the shift of police from order-maintenance to law enforcement has brought them increasingly under the influence of legal restrictions, provoked by media complaints and enforced by court decisions and departmental orders. As a consequence, the order maintenance functions of the police are now governed by rules developed to control police relations with suspected criminals. This is, we think, an entirely new development. For centuries, the role of the police as watchmen was judged primarily not in terms of its compliance with appropriate procedures but rather in terms of its attaining a desired objective. The objective was order, an inherently ambiguous term but a condition that people in a given community recognized when they saw it. The means were the same as those the community itself would employ, if its members were sufficiently determined, courageous, and authoritative. Detecting and apprehending criminals, by contrast, was a means to an end, not an end in itself; a judicial determination of guilt or innocence was the hoped-for result of the law-enforcement mode. From the first, the police were expected to follow rules defining that process, though states differed in how stringent the rules should be. The criminal-apprehension process was always understood to involve individual rights, the violation of which was unacceptable because it meant that the violating officer would be acting as a judge and jury--and that was not his job. Guilt or innocence was to be determined by universal standards under special procedures.

Ordinarily, no judge or jury ever sees the persons caught up in a dispute over the appropriate level of neighborhood order. That is true not only because most cases are handled informally on the street but also because no universal standards are available to settle arguments over disorder, and thus a judge may not be any wiser or more effective than a police officer. Until quite recently in many states, and even today in some places, the police made arrests on such charges as "suspicious person" or "vagrancy" or "public drunkenness"--charges with scarcely any legal meaning. These charges exist not because society wants judges to punish vagrants or drunks but because it wants an officer to have the legal tools to remove undesirable persons from a neighborhood when informal efforts to preserve order in the streets have failed.

Once we begin to think of all aspects of police work as involving the application of universal rules under special procedures, we inevitably ask what constitutes an "undesirable person" and why we should "criminalize" vagrancy or drunkenness. A strong and commendable desire to see that people are treated fairly makes us worry about allowing the police to rout persons who are undesirable by some vague or parochial standard. A growing and not-so-commendable utilitarianism leads us to doubt that any behavior that does not "hurt" another person should be made illegal. And thus many of us who watch over the police are

reluctant to allow them to perform, in the only way they can, a function that every neighborhood desperately wants them to perform.

This wish to "decriminalize" disreputable behavior that "harms no one"- and thus remove the ultimate sanction the police can employ to maintain neighborhood order--is, we think, a mistake. Arresting a single drunk or a single vagrant who has harmed no identifiable person seems unjust, and in a sense it is. But failing to do anything about a score of drunks or a hundred vagrants may destroy an entire community. A particular rule that seems to make sense in the individual case makes no sense when it is made a universal rule and applied to all cases. It makes no sense because it fails to take into account the connection between one broken window left untended and a thousand broken windows. Of course, agencies other than the police could attend to the problems posed by drunks or the mentally ill, but in most communities especially where the "deinstitutionalization" movement has been strong--they do not.

The concern about equity is more serious. We might agree that certain behavior makes one person more undesirable than another but how do we ensure that age or skin color or national origin or harmless mannerisms will not also become the basis for distinguishing the undesirable from the desirable? How do we ensure, in short, that the police do not become the agents of neighborhood bigotry?

We can offer no wholly satisfactory answer to this important question. We are not confident that there is a satisfactory answer except to hope that by their selection, training, and supervision, the police will be inculcated with a clear sense of the outer limit of their discretionary authority. That limit, roughly, is this--the police exist to help regulate behavior, not to maintain the racial or ethnic purity of a neighborhood.

Consider the case of the Robert Taylor Homes in Chicago, one of the largest public-housing projects in the country. It is home for nearly 20,000 people, all black, and extends over ninety-two acres along South State Street. It was named after a distinguished black who had been, during the 1940s, chairman of the Chicago Housing Authority. Not long after it opened, in 1962, relations between project residents and the police deteriorated badly. The citizens felt that the police were insensitive or brutal; the police, in turn, complained of unprovoked attacks on them. Some Chicago officers tell of times when they were afraid to enter the Homes. Crime rates soared.

Today, the atmosphere has changed. Police-citizen relations have improved--apparently, both sides learned something from the earlier experience. Recently, a boy stole a purse and ran off. Several young persons who saw the theft voluntarily passed along to the police information on the identity and residence of the thief, and they did this publicly, with friends and neighbors

looking on. But problems persist, chief among them the presence of youth gangs that terrorize residents and recruit members in the project. The people expect the police to "do something" about this, and the police are determined to do just that.

But do what? Though the police can obviously make arrests whenever a gang member breaks the law, a gang can form, recruit, and congregate without breaking the law. And only a tiny fraction of gang-related crimes can be solved by an arrest; thus, if an arrest is the only recourse for the police, the residents' fears will go unassuaged. The police will soon feel helpless, and the residents will again believe that the police "do nothing." What the police in fact do is to chase known gang members out of the project. In the words of one officer, "We kick ass." Project residents both know and approve of this. The tacit police-citizen alliance in the project is reinforced by the police view that the cops and the gangs are the two rival sources of power in the area, and that the gangs are not going to win.

None of this is easily reconciled with any conception of due process or fair treatment. Since both residents and gang members are black, race is not a factor. But it could be. Suppose a white project confronted a black gang, or vice versa. We would be apprehensive about the police taking sides. But the substantive problem remains the same: how can the police strengthen the informal social-control mechanisms of natural communities in order to minimize fear in public places? Law enforcement, per se, is no answer: a gang can weaken or destroy a community by standing about in a menacing fashion and speaking rudely to passersby without breaking the law.

We have difficulty thinking about such matters, not simply because the ethical and legal issues are so complex but because we have become accustomed to thinking of the law in essentially individualistic terms. The law defines my rights, punishes his behavior and is applied by that officer because of this harm. We assume, in thinking this way, that what is good for the individual will be good for the community and what doesn't matter when it happens to one person won't matter if it happens to many. Ordinarily, those are plausible assumptions. But in cases where behavior that is tolerable to one person is intolerable to many others, the reactions of the others--fear, withdrawal, flight--may ultimately make matters worse for everyone, including the individual who first professed his indifference.

It may be their greater sensitivity to communal as opposed to individual needs that helps explain why the residents of small communities are more satisfied with their police than are the residents of similar neighborhoods in big cities. Elinor Ostrom and her co-workers at Indiana University compared the perception of police services in two poor, all-black Illinois towns--Phoenix and East Chicago Heights with those of three

comparable all-black neighborhoods in Chicago. The level of criminal victimization and the quality of police-community relations appeared to be about the same in the towns and the Chicago neighborhoods. But the citizens living in their own villages were much more likely than those living in the Chicago neighborhoods to say that they do not stay at home for fear of crime, to agree that the local police have "the right to take any action necessary" to deal with problems, and to agree that the police "look out for the needs of the average citizen." It is possible that the residents and the police of the small towns saw themselves as engaged in a collaborative effort to maintain a certain standard of communal life, whereas those of the big city felt themselves to be simply requesting and supplying particular services on an individual basis.

If this is true, how should a wise police chief deploy his meager forces? The first answer is that nobody knows for certain, and the most prudent course of action would be to try further variations on the Newark experiment, to see more precisely what works in what kinds of neighborhoods. The second answer is also a hedge--many aspects of order maintenance in neighborhoods can probably best be handled in ways that involve the police minimally if at all. A busy bustling shopping center and a quiet, well-tended suburb may need almost no visible police presence. In both cases, the ratio of respectable to disreputable people is ordinarily so high as to make informal social control effective.

Even in areas that are in jeopardy from disorderly elements, citizen action without substantial police involvement may be sufficient. Meetings between teenagers who like to hang out on a particular corner and adults who want to use that corner might well lead to an amicable agreement on a set of rules about how many people can be allowed to congregate, where, and when.

Where no understanding is possible--or if possible, not observed--citizen patrols may be a sufficient response. There are two traditions of communal involvement in maintaining order: One, that of the "community watchmen," is as old as the first settlement of the New World. Until well into the nineteenth century, volunteer watchmen, not policemen, patrolled their communities to keep order. They did so, by and large, without taking the law into their own hands--without, that is, punishing persons or using force. Their presence deterred disorder or alerted the community to disorder that could not be deterred. There are hundreds of such efforts today in communities all across the nation. Perhaps the best known is that of the Guardian Angels, a group of unarmed young persons in distinctive berets and T-shirts, who first came to public attention when they began patrolling the New York City subways but who claim now to have chapters in more than thirty American cities. Unfortunately, we have little information about the effect of these groups on crime. It is possible, however, that whatever their effect on crime, citizens find their presence reassuring, and

that they thus contribute to maintaining a sense of order and civility.

The second tradition is that of the "vigilante." Rarely a feature of the settled communities of the East, it was primarily to be found in those frontier towns that grew up in advance of the reach of government. More than 350 vigilante groups are known to have existed; their distinctive feature was that their members did take the law into their own hands, by acting as judge, jury, and often executioner as well as policeman. Today, the vigilante movement is conspicuous by its rarity, despite the great fear expressed by citizens that the older cities are becoming "urban frontiers." But some community-watchmen groups have skirted the line, and others may cross it in the future. An ambiguous case, reported in The Wall Street Journal involved a citizens' patrol in the Silver Lake area of Belleville, New Jersey. A leader told the reporter, "We look for outsiders." If a few teenagers from outside the neighborhood enter it, "we ask them their business," he said. "If they say they're going down the street to see Mrs. Jones, fine, we let them pass. But then we follow them down the block to make sure they're really going to see Mrs. Jones."

Though citizens can do a great deal, the police are plainly the key to order maintenance. For one thing, many communities, such as the Robert Taylor Homes, cannot do the job by themselves. For another, no citizen in a neighborhood, even an organized one, is likely to feel the sense of responsibility that wearing a badge confers. Psychologists have done many studies on why people fail to go to the aid of persons being attacked or seeking help, and they have learned that the cause is not "apathy" or "selfishness" but the absence of some plausible grounds for feeling that one must personally accept responsibility. Ironically, avoiding responsibility is easier when a lot of people are standing about. On streets and in public places, where order is so important, many people are likely to be "around," a fact that reduces the chance of any one person acting as the agent of the community. The police officer's uniform singles him out as a person who must accept responsibility if asked. In addition, officers, more easily than their fellow citizens, can be expected to distinguish between what is necessary to protect the safety of the street and what merely protects its ethnic purity.

But the police forces of America are losing, not gaining, members. Some cities have suffered substantial cuts in the number of officers available for duty. These cuts are not likely to be reversed in the near future. Therefore, each department must assign its existing officers with great care. Some neighborhoods are so demoralized and crime-ridden as to make foot patrol useless; the best the police can do with limited resources is respond to the enormous number of calls for service. Other neighborhoods are so stable and serene as to make foot patrol

unnecessary. The key is to identify neighborhoods at the tipping point--where the public order is deteriorating but not unreclaimable, where the streets are used frequently but by apprehensive people, where a window is likely to be broken at any time, and must quickly be fixed if all are not to be shattered.

Most police departments do not have ways of systematically identifying such areas and assigning officers to them. Officers are assigned on the basis of crime rates (meaning that marginally threatened areas are often stripped so that police can investigate crimes in areas where the situation is hopeless) or on the basis of calls for service (despite the fact that most citizens do not call the police when they are merely frightened or annoyed). To allocate patrol wisely, the department must look at the neighborhoods and decide, from first-hand evidence, where an additional officer will make the greatest difference in promoting a sense of safety.

One way to stretch limited police resources is being tried in some public housing projects. Tenant organizations hire off-duty police officers for patrol work in their buildings. The costs are not high (at least not per resident), the officer likes the additional income, and the residents feel safer. Such arrangements are probably more successful than hiring private watchmen, and the Newark experiment helps us understand why. A private security guard may deter crime or misconduct by his presence, and he may go to the aid of persons needing help, but he may well not intervene--that is, control or drive away--someone challenging community standards. Being a sworn officer--a "real cop"--seems to give one the confidence, the sense of duty, and the aura of authority necessary to perform this difficult task.

Patrol officers might be encouraged to go to and from duty stations on public transportation and, while on the bus or subway car, enforce rules about smoking, drinking, disorderly conduct, and the like. The enforcement need involve nothing more than ejecting the offender (the offense, after all, is not one with which a booking officer or a judge wishes to be bothered). Perhaps the random but relentless maintenance of standards on buses would lead to conditions on buses that approximate the level of civility we now take for granted on airplanes.

But the most important requirement is to think that to maintain order in precarious situations is a vital job. The police know this is one of their functions, and they also believe, correctly, that it cannot be done to the exclusion of criminal investigation and responding to calls. We may have encouraged them to suppose, however, on the basis of our oft-repeated concerns about serious, violent crime, that they will be judged exclusively on their capacity as crime-fighters. To the extent that this is the case, police administrators will continue to concentrate police personnel in the highest-crime areas (though not necessarily in the areas most vulnerable to criminal invasion), emphasize their training in the law and criminal apprehension (and not their

training in managing street life), and join too quickly in campaigns to decriminalize "harmless" behavior (though public drunkenness, street prostitution, and pornographic displays can destroy a community more quickly than any team of professional burglars).

Above all, we must return to our long-abandoned view that the police ought to protect communities as well as individuals. Our crime statistics and victimization surveys measure individual losses, but they do not measure communal losses. Just as physicians now recognize the importance of fostering health rather than simply treating illness, so the police--and the rest of us--ought to recognize the importance of maintaining, intact, communities without broken windows.

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