

Controlling Racially Discriminatory Law Enforcement
Through Institutional Reform Litigation

A Case Study of Wilkins v. Maryland and Related Cases.

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Introduction

This paper examines the controversy over racial profiling by police in the United States through a case study of the most prominent and significant racial profiling¹ litigation, *Wilkins v. Maryland State Police*.² This case study also covers *NAACP v. Maryland State Police*,³ litigation with different plaintiffs, but covering the same actions by the Maryland State Police, largely relying on data developed as a result of the settlement of *Wilkins* to prove discriminatory practices and run by the same attorney.⁴

This paper is designed to evaluate the effectiveness of the settlement in *Wilkins* in light of the overall social problem of racial profiling and the challenges of institutional reform litigation. This requires a certain amount of bias: the main mission of this paper is to determine how effectively the goals of the plaintiff were met, and to suggest ways in which such goals can more reliably be met in future (and ongoing) litigation. While the position of the state defendants will be fully considered below, that consideration will be more in the nature of arguments to be overcome than acceptable positions on social policy.

The first section of this paper will discuss the general problem of racially discriminatory law enforcement, with a focus on the common practice of racial profiling. This section will attempt to define racial profiling, then examine the many arguments

¹ For a definition of racial profiling, see *infra* text accompanying notes 10-11. In the interests of clarity, the "Bluebook" method of citation is sometimes deviated from in this paper.

² *Wilkins v. Maryland State Police*, MJG-93-468 (D. Md., filed 1993)

³ *NAACP v. Maryland State Police*, CCB-98-1098 (D.Md., filed 1998)

⁴ In effect, *NAACP* is an extension of *Wilkins*.

civil rights advocates and law enforcement experts have put forward against and for the practice of racial profiling. The aim of this section is to provide vital background for the review of *Wilkins*.

The second, and primary, section of this paper will present the factual and legal circumstances surrounding *Wilkins*. The focus will be on the January 1995 settlement agreement and the effects of that agreement on the actions of the Maryland State Police (MSP).

The core thesis of this paper is that the settlement agreement was less successful than the plaintiffs expected (since racial profiling and discriminatory stops continue unabated in Maryland to this day) due to a weak agreement created by an unbalanced negotiation effort. There is a total absence of meaningful provisions for enforcement and monitoring of individual police officers. There are no checks in the system against police underreporting of minority stops and “codes of silence.” As the *NAACP* lawsuit indicates, many minority stops went unreported as a result of this procedure.

The third section of this paper will examine aim to find that combination of litigation and legislative reform efforts that will be most likely to curtail the natural police tendencies toward racial profiling, and to second-guess the *Wilkins* settlement, in the hopes of preparing future litigants for these difficult questions. In this process, similar litigation in New Jersey will be examined, and other perspectives on effective settlement will be reviewed.

The final section of this paper will examine *Wilkins* and other profiling litigation in the larger context of institutional reform litigation generally. Many of the traditional problems of institutional reform litigation as applied to the police (for example, the

historic inability of plaintiffs to get standing for injunctive relief against abusive police behavior) have been resolved here.

“Driving while black” cases represent a major change in the landscape of police department reform. At the same time, these cases present once again the extreme difficulty of enforcing remedial decrees against work of inherently independent and individual police officers. For this reason, this paper is worthwhile as an academic endeavor in addition to its potential value as a litigation manual for future racial profiling plaintiffs.

The Problem of Racially Discriminatory Law Enforcement

Racially discriminatory law enforcement has a long and sordid history in the United States. As recounted by Randall Kennedy⁵, law enforcement racial discrimination against minorities, especially individuals of African descent⁶, has been effectuated since the end of slavery through underenforcement of laws protecting Blacks (for example, anti-lynching laws)⁷, passing of laws which, while facially neutral, unfairly burden African-Americans⁸ and overenforcement of generally applicable laws against African-Americans (or their underenforcement against whites).⁹ It is this last category to which this paper is directed.

⁵ Randall Kennedy, *Race Crime and the Law* (1997)

⁶ In this paper, I use the terms "Blacks" and "African-Americans" synonymously to refer to persons, whether American citizens or not, of visually identifiable African descent. While police racial profiling, especially in states such as Florida, has also fallen heavily on members of other racial groups, the *Wilkins* case, and much of the historical discrimination against minorities, has primarily been focused on Blacks. *See generally* *id* at xii: "This is not to say that other racial conflicts are insignificant... [more] than any other racial divide in America, however, it is the racial frontier separating whites from blacks where the difficulties have proven hardest to overcome."

⁷ *Id* at 41-63.

⁸ The easiest example of these laws is the poll tax. In both historical and modern times, however, the restrictions on voting brought about by felony disenfranchisement laws have been more significant. *See Generally* Human Rights Watch, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998). The author has contended elsewhere, however, that the long-term political effects of these laws will no longer be solved by their repeal, but only by significant economic reforms leading to community empowerment. *See* Paul Gowder, Book Note 12 Harv. Hum. Rts. J., 399 (1999) (reviewing Human Rights Watch, *supra*).

⁹ *See Generally* Kennedy, *supra* note 5 at 136-167.

Racial Profiling Terminology

Racial profiling is used in this paper to refer to those police practices, whether formal or informal, intentional or unintentional¹⁰, which single out people of color at a rate significantly and materially above their percentage in the population for additional investigation or arrest in the process of enforcing racially neutral laws.¹¹

Driving while black (DWB) is used here in its popular sense. African-Americans stopped by police in instances of racial profiling which occur as a result of traffic stops use “Driving While Black” to describe the “offense” for which they were stopped.¹² Often, these are pretextual traffic stops of the type endorsed in *Whren v. United States*,¹³ which are actually designed to provide the police with

A) consent for search or

B) grounds to execute a non-consensual search of the driver’s person and automobile.¹⁴

¹⁰ On unintentional or unconscious racially biased law enforcement, including profiling at traffic stops, *see* Anthony C. Thompson, Stopping The Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956 (1999) at 983-987 (summarizing research in cognitive psychology supporting the proposition that police unconsciously create “schema,” mental expectations of what people in certain categories, including race, may do, then discard evidence that does not match that schema). A simpler definition of racial profiling is provided in Rebecca Porter, Skin Deep: Minorities Seek Relief From Racial Profiling, 35-NOV Trial 13 (1999)

¹¹ By “racially neutral laws” I mean laws that are racially neutral on their face, even if they are written in such a way that they sweep up more persons of a certain race.

¹² *See also* David Cole, “Standing While Black,” Nation, Jan. 4, 1999, at 24. (describing a Chicago loitering ordinance ostensibly designed to combat gang violence.)

¹³ *Whren v. United States*. 517 U.S. 806 (1996) (motives of officer with probable cause to stop for a traffic violation not relevant to 4th amendment inquiry)

¹⁴ *See eg.* *United States v. Roberson*, 6 F.3d 1088 (5th Cir. 1993) (upholding pretextual search despite the actual motive being drug detection)

These searches are often designed to uncover drugs. Non-consensual searches are sometimes initiated by a refusal of a consensual search, providing ostensible justification for a search by drug-sniffing dogs, which, if fruitful, provides justification for a more invasive personal and vehicular search.¹⁵ However, police officers are usually successful in obtaining consent for intrusive searches.¹⁶ This is probably because the police are not required to inform drivers that they have the right to refuse consent.¹⁷

A Recent History of DWB

Driving While Black is a significant social problem in the modern United States. Litigation has been undertaken in response to instances of DWB in at least Florida, Oklahoma¹⁸, Colorado¹⁹, Maryland, New Jersey, California, Illinois²⁰, Indiana²¹, and Pennsylvania²². Federal, state or local action or legislation has been proposed in Arkansas, California²³, Connecticut²⁴, Florida, Maryland, Massachusetts²⁵, New Jersey,

¹⁵ David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" 84 Minn. L. Rev. 265 (1999) at 313-318.

¹⁶ *Id* at 316-317.

¹⁷ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), *Ohio v. Robinette*, 519 U.S. 33 (1996).

¹⁸ See General Accounting Office, "Racial Profiling: Limited Data Available on Motorist Stops," March 2000 at 5.

¹⁹ See *id*.

²⁰ *Chavez v. Illinois State Police*, (1999 WL 592187 (N.D. Ill. filed Feb. 12, 1996).

²¹ See Statement of David Harris before the Congressional Black Caucus Annual Legislative Conference,

<http://www.aclu.org/issues/policepractices/harris_statement.html>.

²² *NAACP v. City of Philadelphia* (Civ. No. 96-CV-6045 (E.D. Pa. Dec. 15, 1997)) See also "Settlement in Pennsylvania Traffic Stop Suit" National Drug Strategy Network, <http://www.ndsn.org/NOV94/TRAFFICS.html>.

²³ Data collection legislation in California was vetoed by the governor. For the text of the legislation, See <http://www.jps.net/bca/Driving.html>.

²⁴ See General Accounting Office *supra* note 18 at 3.

²⁵ Two Massachusetts police departments currently collect data. See American Civil Liberties Union of Massachusetts, <http://www.aclu-mass.org/archives/whatabtdwb.html>.

North Carolina²⁶, Oregon, Pennsylvania, Rhode Island²⁷, Texas, Virginia and the United States Congress.²⁸

The President of the United States has ordered executive officials to report on racial profiling in their departments.²⁹ In addition to “driving while black,” people have coined terms such as “standing while black”(referring to legislation criminalizing loitering and apparent gang membership³⁰) and “flying while black” (referring to racial profiling of airline passengers by customs officials seeking smugglers³¹), both of which have fundamentally the same police rationale as DWB. Investigations by the Justice Department have been carried out in Maryland³², New Jersey, Michigan³³ and possibly elsewhere. The American Civil Liberties Union has issued countless reports and press releases, and has instituted a national hotline.³⁴ In particularly egregious cases,

²⁶ See several news articles archived on the internet at http://www.gocarolinas.com/news/charlotte/2000/01/driving_report.html and <http://www.fayettevillenc.com/foto/news/content/1999/tx99mar/n31dwbxx.htm>.

²⁷ See Rhode Island ACLU website <http://www.riaclu.org/dwb.html>.

²⁸ See Rebecca Porter, Skin deep: minorities seek relief from racial profiling, 11/1/99 Trial-Mag. 13 (1999 WL 17784336) (1999). The federal legislation, which passed the House of Representatives but not the Senate, is the Traffic Stops Statistics Study Act of 1999, H.R. 1443, 106th Cong. (1999) (Hereinafter TSSSA).

²⁹ Memorandum for the Secretary of the Treasury, the Attorney General, the Secretary of the Interior, 35 Weekly Comp. Pres. Doc. 1067 (1999).

³⁰ The paradigm case of this legislation was the Chicago anti-gang ordinance, held unconstitutional in *Chicago v. Morales*, 119 S. Ct. 1849 (1999). This ordinance is best discussed in Dorothy E. Roberts, Foreword: Race, Vagueness, and the Social Meaning Of Order Maintenance Policing, 89 J. Crim. L. & Criminology 775 (1999).

³¹ See *eg.* Porter, *supra* note 10. See also Keith L. Alexander, Profiling of Fliers Raises Racial Issue, USA Today, Sept. 28 1997.

³² See General Accounting Office, *supra* note 18 at 5 (DOJ investigation in Montgomery County, resulting in an agreement for data collection by the County Police Department).

³³ See Detroit News, <http://detnews.com/1999/metro/9906/03/06030056.htm>.

³⁴ See *eg.* Bill Johnson "It can be hazardous to 'drive while black'" Rocky Mountain News, 11-22-98, <http://insidedenver.com/johnson/1122bill.shtml> (discussing ACLU activities in Colorado).

investigative reporters from the local media get involved.³⁵ The Department of Justice Bureau of Justice Statistics (BJS) is conducting several studies to determine how much data police departments collect on stop victims, and surveying citizens to determine their experiences of police stops.³⁶

Do Black People Commit More Crimes?

Defenders of racial profiling generally point to an increased likelihood of blacks committing certain crimes. If Black people are more likely to distribute crack cocaine, a police officer with some racially neutral reason for heightened concern over crack cocaine³⁷ may increase the yield of successful stops, searches and arrests by searching an otherwise disproportionately large number of Black people.

Many people simply assume that African-Americans have a generally higher rate of many crimes with which they are associated by police and the public.³⁸ This includes primarily crack cocaine use and distribution and violent crimes for money (eg. mugging and armed robbery), and membership and associated activities in violent street gangs. The insufficiency of this, even if true, as justification for racial profiling is discussed

³⁵ This is widely credited with eliminating profiling in some parts of Florida. See "Orlando Area Drug Squad Disproportionately Searches Black Drivers" <http://www.ndsn.org/JULY97/ORLANDO.html>, discussing investigative efforts by the Orlando Sentinel.

³⁶ See General Accounting Office, *supra* note 10 at 11.

³⁷ Such as additional dangerousness of the drug, or increased prevalence of its use in the area.

³⁸ See generally Richard Delgado, Essay: Rodrigo's Eighth Chronicle: Black Crime, White Fears - on the Social Construction of Threat, 80 Va. L. Rev. 503 (1994) for an unconventional discussion of the construction of "black crime," including financial data on the harm perpetrated by crimes commonly committed by black people, as compared with white people, and the impact of "black" crimes of violence versus "white" crimes of profit.

below. However, it is not entirely clear that African-Americans do commit crimes at a substantially higher rate.

Some inference can be drawn from the higher incidence of black poverty³⁹ and the generally accepted correlation between poverty and crime⁴⁰ that African-Americans will commit more crimes. However, there is no basis for claiming any figure by which African-Americans would deviate from the norm as a result of poverty. This may be minimal.

Many people point to black arrest rates⁴¹ as the source for the idea that black people commit more crimes.⁴² However, there are a number of pervasive flaws with this method. First of all, there is a huge and multifaceted problem of circularity involved in

³⁹ See U.S. Census Data,

<<http://www.census.gov/hhes/poverty/poverty98/pv98est1.html>> (percentage of blacks below the poverty level in 1998 was 26.1%, compared to 10.5% for whites).

⁴⁰ See generally Douglas S. Massey, Symposium: Shaping American Communities: Segregation, Housing & The Urban Poor: Getting Away With Murder: Segregation and Violent Crime In Urban America, 143 U. Pa. L. Rev. 1203 at 1206 n.24 (1995) (listing commentators who credit black crime rates to poverty).

⁴¹ See eg. Kennedy, *supra* note 5 at 22, 149-150 (arguing, based on arrest rates, that Blacks are more likely to commit crimes than white people). Kennedy's analysis is very flawed. He first cites arrest rates as evidence for this, stating "Even after one makes a reasonable discount to offset some degree of racial discrimination in law enforcement, a strikingly large disproportionality remains." *Id.* at 23. One is forced to speculate as to what this "reasonable discount" is, and what it is based on, if anything.

As such, Kennedy's statement that "This proposition [that Blacks commit more crimes] has ceased to be controversial among most careful students of crime in America" *supra* at 22 is simply wrong. Others paint a very different picture of the proportionality of crime rates. See eg. Paul Butler, Affirmative Action and the Criminal Law, 68 U. Colo. L. Rev. 841, 884 (1997) ("Government statistics indicate that African Americans do not disproportionately use illegal drugs, yet they comprise more than seventy percent of people incarcerated for such conduct.")

⁴² For obvious reasons: presumably, if the state is aware of the identity of a criminal, that criminal will be arrested. While it is possible that a number of crimes may be reported by race but not apprehended, this is unlikely to be a factor here. For the purposes of this paper, the relevant crimes are traffic violations and drug trafficking, the two factors in DWB, neither of which is likely to be investigated following a witness report but rather by police discovery and subsequent immediate arrest.

racially motivated arrest rates.⁴³ Assuming (probably erroneously) arguing that the percentage of any particular crime committed by a racial group is roughly equal to its percentage in the population, unequal enforcement will create higher arrest rates among a targeted population. The high arrest rates are then used to justify future targeting of the group in question. In effect, a powerful feedback loop can be created by discriminatory law enforcement. The input, arrest rates, is used to justify action which reinforces the input.⁴⁴ Given these and countless other factors, it is functionally impossible to determine the extent of any alleged racial correlation with high crime rates using arrest data.

It is conceivable that conviction and incarceration rates could be used to determine crime rates by race. However, this allows a host of other confounds into the system, such as racially biased jury and venue selection⁴⁵ and higher sentences for blacks

⁴³ See David Harris, "Profiling-A Self-Fulfilling Racist Policy," Wall Street Journal 03/19/1999, <http://www.mapinc.org/letters/1999/03/lt86.html>.

"Yes, it is true that blacks are disproportionately arrested for certain crimes. But there is a strong relationship between looking for things and finding them. If police stop disproportionate numbers of black drivers, of course they will find evidence of crime on a disproportionate number of black drivers. Thus his view becomes a self-fulfilling prophecy: More blacks are arrested, so more blacks are criminals, so to catch more criminals, stop more blacks, which leads to more blacks arrested."

⁴⁴ This is best understood through the lens of behavioral psychology. The police department performs increased arrests of black people. This operant increases arrest rates of black people. However, the arrest rate for black people is a positive reinforcer: when it increases, the operant increases. Thus, the operant creates its own positive reinforcer, and will continue to increase, like a perpetual motion machine, until some intervening circumstances causes it to end. Since the same forces are at work on an individual police officer, the officer is presented with a discriminative stimulus every time (s)he is able to stop either a black or a white person, however each opportunity to stop a black person is positively reinforced, while each opportunity to stop a white person is relatively neutral. So each individual officer will stop black people every time, until such time as the positive reinforcement ends.

⁴⁵ See *eg. Batson v. Kentucky*, 476 U.S. 79, 406 S.Ct. 1712 (1986)

committing comparable crimes to whites,⁴⁶ such that at any one time more blacks may be in prison regardless of their proportion of the criminal population. This is of course also based on biased arrest rates created, in part, by racial profiling. In addition, arrest and conviction rates are likely to be higher for black people committing the same number of crimes even without discrimination, due to problems in witness cross-racial identification.⁴⁷ “All black people look the same” to many white people, causing them to identify defendants who did not actually commit the crime in question, increasing conviction rates.” There is also a problem with increased ease of investigation in the smaller population segregated racial minority areas of a city, leading to a higher capture rate per criminal investigation.

It is conceivable that rates of victimization⁴⁸ could be used, in conjunction with the generally accepted idea that most crime is intraracial to demonstrate higher black crime rates.⁴⁹ However, defenders of racial profiling have not done so, and that would

⁴⁶ See Clem Turner, Note What's The Story? An Analysis of Juror Discrimination and a Plea for Affirmative Jury Selection 34 Am. Crim. L. Rev. 289 at 291 and sources cited therein.

⁴⁷ See Sheri Lynn Johnson, Cross-Racial Identification Errors in Criminal Cases, 69 Cornell L. Rev. 934, 949 (1984).

⁴⁸ See generally Carolyn Wolpert, Note: Considering Race and Crime: Distilling Non-Partisan Policy From Opposing Theories at 266 (1999) (citing Department of Justice reports on black crime victimization), Marc Mauer, Sentencing Law Symposium: The Intended and Unintended Consequences of Incarceration-Based Sentencing Policies, 20 Whittier L. Rev. 577 at 582 Sentencing Law Symposium: THE INTENDED AND UNINTENDED CONSEQUENCES OF INCARCERATION-BASED SENTENCING POLICIES (1999) (“African-American males between the ages of sixteen and nineteen were particularly at risk. [for murder] Victimization among this group is double that of white males and triple that of white females.”).

⁴⁹ See John J. DiIulio, Jr., Symposium: Shaping American Communities: Segregation, Housing & The Urban Poor, Comment On Douglas S. Massey's Getting Away With Murder: Segregation and Violent Crime in Urban America, 143 U. Pa. L. Rev. 1275 at 1277 (1995).

still be subject to the other problems of circularity discussed below (such as arrests leading to impoverishment, leading to crime).

There is some evidence in the *Wilkins* litigation that profiling is effective in increasing search yield rates for drugs (or at least not lowering said rates). Data collected pursuant to the settlement agreement showed that officers were targeting blacks far above their percentage in any relevant population. Black drivers did not violate traffic laws at a rate meaningfully higher than their percentage of the driving population, around fifteen percent.⁵⁰ By contrast, 72.9% of the motorists stopped by the Maryland State Police on Interstate 95 between January 1995 and September 1996 were black.⁵¹ Interstate 95 is an area subject to special scrutiny by the Maryland State Police as a corridor for drug trafficking. Searches of black motorists recovered contraband in 28.4% of cases, as opposed to searches of white motorists, which uncovered contraband in 28.8% of cases in Maryland during the data collection period.⁵²

This indicates that the law enforcement strategy was effective: the percentage of stopped persons was consistent regardless of race. So an officer's suspicion of a black person was equally likely to be correct as an officer's suspicion of a white person. This implies that the standard for suspicion and search was not lowered for black people as for white people, just that more Blacks met the criteria for suspicion, which indeed turned out to be an accurate predictor of drug possession.⁵³

⁵⁰ Black drivers comprised 16.9% of the driving population sampled and 17.5% of traffic violators. *See* Report of John Lamberth, at 4.

⁵¹ *Id* at 6.

⁵² *See id* at 8.

⁵³ However, it is important to put these numbers in perspective. This was only along I-95 in Maryland. It is possible that I-95 may be a center of black drug activity. It is also possible that other areas of Maryland may be centers of white drug activity, where a similar search pattern discriminating against whites would have yielded similar results. If

In addition, extend reporting ordered by the *Wilkins* judge after a motion for contempt brought additional evidence. *Stop data* (as opposed to the search data collected under the initial settlement) showed a much lower disparity between the races in stops.⁵⁴ This means that police officers were stopping drivers at a relatively less discriminatory (though still disparate) rate, then searching far more minority motorists. That implies that some additional, nonracial (it would have to be nonracial, since a driver's race is perceived before a stop) suspicion of black people could have accrued between the stop and the search. This is a troubling circumstance, in light of the similar yield rates between all searches of whites and all searches of minorities. This means that black people are also more likely to satisfy some accurate nonracial search criteria for drugs. After all, if the nonracial criteria used to stop black people more often were inaccurate, one would expect the yield rate of searches for black people to be much lower, because they are searched pursuant to these criteria more.

Of course, there are alternative explanations. One possibility is that whites are systematically undersearched. It may be that, had 70% of the search subjects been white, the yield rates would still have been a constant 23% for all races. This would imply that about 23% of all people stopped were carrying drugs, and that whatever nonracial criteria the police department was using to search drivers is not correlated with drug possession, but rather with race. If 23% of all drivers in all groups carry drugs and the police have no accurate nonracial criteria, an increase in the number of black people stopped will still yield a continual 23% search yield rate, it will simply be distributed differently.

this is the case, the choice of I-95 as an area of special focus in the "drug war" *itself constitutes an act of racial profiling*, one for which the police have no such obvious statistical justification.

However, it is implausible that 23% of the drivers along any stretch of highway, even interstate 95, carry illicit narcotics.

A second alternative interpretation of the two statistics is that the police officers are still making race-based decisions. Although their stop rates are less disparate, it could be that they decide to search black motorists at the time of stop, but decide to search white motorists when they have some additional nonracial indicia of suspicion. This would not avoid the problem of equal yield rates implying that race-based decisions are accurate. It would, however, explain these statistics in such a way as to preserve the possibility that police are presently engaging in racial profiling.

What if Black People Commit More Crimes?

The harms created by racial profiling are so pervasive that black crime rates are irrelevant. At some point, crime fighting prowess has to give way to the harms of racial discrimination.

The efficacy of law enforcement is likely to be decreased due to a perceived illegitimacy, by both the targets of the discrimination and other members of society. This may lead to increased crime⁵⁵, underreporting of crimes, nonparticipation of witnesses,

⁵⁴ About 30-35% of the stop victims were minorities. Telephone Interview with Deborah Jeon, esq., American Civil Liberties Union Attorney 5-17-00.

⁵⁵ See Tracey Meares, Place and Crime, 73 Chi.-Kent L. Rev. 669, 679 (1998) (citing evidence that people comply with the law because of a personal belief that the people who create and enforce it act justly “when a person receives information about government authorities from her peers indicating that government authorities have not treated people like her fairly, she will be less committed to compliance.”) Randall Kennedy, *supra* note 5 at 29 argues that the more pressing problem of racial discrimination in America is the underprotection of blacks from crime. Since crime is mostly intraracial, this would entail protecting neighborhoods from black crime. See Sheri Lynn Johnson, The Color of Truth: Race and the Assessment Of Credibility, 1 Mich. J. Race & L. 261, at 332 (1996) (“Certainly most accusations by racial minorities

active resistance to arrest, public support for the most brutal of criminals and other symptoms of distrust of the police. Randall Kennedy reports that these effects are currently being seen in the black community.⁵⁶ In addition, officer recruitment (especially for black officers) and tax support for police work may be jeopardized. Finally, resentment at societal racism, epitomized by the racism of the police, might lead blacks to violence.⁵⁷

Any real increase in Black criminality may in fact be caused by increased police activity. Criminality and poverty are often considered very closely related,⁵⁸ and it is likely that a community which is decimated by arrests of large numbers of its members (especially the most economically productive young adults) will be affluent.

In addition to the social effect, we must consider the effect racial profiling has on its victims. The American Civil Liberties Union distributes a set of anecdotes describing some of the actions taken by police during these DWB incidents.⁵⁹ Many of these have been marked by extreme dignitary harm. For example, Wilkins himself was stopped

are against other racial minorities, as witnessed by the far greater rates of reported intraracial crime (both by racial minorities and the racial majority) than of interracial crime”), DiIulio, *supra* note 49 (citing federal studies demonstrating that “Most street crime in America is intraracial. About 84% of single-offender violent crimes committed by blacks are committed against blacks, and some 73% of such crimes committed against whites are committed by whites.”). Perhaps one start on this would be to stop undermining the legitimacy of police by acting in ways which are perceived as unfair.

⁵⁶ Kennedy, *supra* note 5 at 24-27 (discussing black communities that “rally around” black people accused of crimes by whites, regardless of their actual guilt).

⁵⁷ See sources cited in Douglas S. Massey, Symposium: Shaping American Communities: Segregation, Housing & The Urban Poor: Getting Away With Murder: Segregation and Violent Crime In Urban America, 143 U. Pa. L. Rev. 1203 at 1206 n.23 (1995)

⁵⁸ See *eg. id* at 1206 n.24 (listing commentators who credit black crime rates to poverty).

⁵⁹ David Harris, American Civil Liberties Union Special Report: Driving While Black, Racial Profiling on Our Nation's Highways
<<http://www.aclu.org/profiling/report/index.html>>

while returning from a funeral and forced to stand in the rain for forty-five minutes while police went over his car, in front of his family, with dogs.⁶⁰

In effect, the police are allowed by the *Whren* decision to convert a traffic stop, which carries very little stigma, into a full scale drug search which possesses the full stigma of criminality.⁶¹ Likewise, this may add to the circularity by creating a negative public image of African Americans, increasing the perceived criminality of blacks and causing the polity to permit even more intrusions on the rights of African-Americans in the name of criminal justice.

It is possible that racial profiling is partly responsible for, as well as partly caused by, residential segregation in the United States. If suspicion is based on “being out of place,” such that a black person can be subjected to a Terry stop when in a white neighborhood, this will create a deterrent to racial integration⁶² which can contribute to

⁶⁰ See Alan Jenkins, See No Evil: bans on racial data collection are thwarting antidiscrimination efforts, 6/28/99 Nation 15 (1999 WL 9307202) (1999) a further circularity is established when Blacks experience this treatment or read these anecdotes and begin to avoid police officers out of fear, giving police a further justification for search. See L. Darnell Weeden, Essay: It is Not Right Under the Constitution to Stop and Frisk Minority People Because They Don't Look Right, 21 U. Ark. Little Rock L. Rev. 829 (1999) (discussing use of presence in a “high-crime” (black) area and avoidance of the police as grounds for a Terry stop)

⁶¹ On the stigma harms of police focus, See generally Tracey Meares, Place and Crime, 73 Chi.-Kent L. Rev. 669, 678 (1998) (“It is likely that stigmatization of minority law abiders through law enforcement programs that generate extremely racially disproportionate incarceration rates can undermine commitment to the law by minority law abiders by fostering a perception of illegitimacy of government among members of the stigmatized minority group.”) Yet another example of the circularity that pervades all attempts to justify racial profiling. In addition, of course, group stigma can reduce economic opportunities (and thus increase temptation to crime) for members of groups who otherwise would not engage in crime. The Meares article is almost canonical in its provision of the case against racially selective law enforcement.

⁶² Obviously, if black people, even if wealthy, are viewed as suspicious in certain neighborhoods, they will not move into them on a permanent basis. See Kennedy, *supra* note 5 at 153.

increased crime rates.⁶³ This is yet another permutation of the infinite rings of circularity which surround the issue of racial profiling. This increase in crime rates will again justify more racial profiling, under the arguments of its supporters. This may lead to a feedback loop encouraging more police racial discrimination, once they can rationalize unconscious discrimination by believing that they are merely policing the “dangerous neighborhoods.”⁶⁴

The Decision on Profiling

Given these situations, what is the optimal public decision on racial profiling? Racial profiling must be completely eradicated. First, it is impossible to prove that any real law enforcement benefit is being gained from profiling, since racial crime rates are far from clear, and the seemingly clear cases, such as the 28% yield across racial boundaries in *Wilkins* may mask “upstream” racially selective patterns of enforcement with no clear justification.⁶⁵

Second, the vast circular potential of many of the harms of racial profiling make it entirely possible that, even as it *catches* some criminals, it helps *create* still more. A pyrrhic victory surely. Third, the mere fact that a practice is effective law enforcement does not mean that the strong (and perhaps constitutionally mandated, by the fourteenth

⁶³ See Massey, *supra* note 57 (crediting black crime rates to concentrated poverty brought on by residential segregation). Residential segregation is an extremely important part of the general problem with racial profiling, but is not entirely germane to this paper, which focuses on traffic stops designed to reveal drug trafficking. See also Kennedy, *supra* note 5 at 153.

⁶⁴ See Weeden, *supra* note 60 at ?? (discussing increased police scrutiny of “dangerous neighborhoods”).

⁶⁵ This occurs, for example, when police concentrate efforts in high areas of black crime while ignoring areas of white crime, then investigate in those areas based on race. Since

amendment, though this is outside the scope of this paper) concern with nondifferential treatment on account of race by police disappears.⁶⁶

How to End Racial Profiling?

The pervasiveness and harm of this practice beg for a solution. Unfortunately, remedies have not been very forthcoming.

Individual remedies for racial profiling are not effective for a number of reasons. First, the exclusionary rule is generally unavailable.⁶⁷ Fourteenth amendment equal

the police have already selected an area where black crime is predominant (for example, a black neighborhood), their profiling will produce favorable data.

⁶⁶ Although it is beyond the scope of this paper, it is highly doubtful that racial profiling could survive constitutional scrutiny. *But see United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Law enforcement frequently gives way, as an insufficiently compelling interest, to constitutional safeguards. Justice Brennan perhaps puts it best in the dissent in *Martinez-Fuerte* 428 U.S. at 575-6:

“There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied. Dispensing with reasonable suspicion as a prerequisite to stopping and inspecting motorists because the inconvenience of such a requirement would make it impossible to identify a given car as a possible carrier of aliens is no more justifiable than dispensing with probable cause as prerequisite to the search of an individual because the inconvenience of such a requirement would make it impossible to identify a given person in a high-crime area as a possible carrier of concealed weapons. ‘The needs of law enforcement stand in constant tension with the Constitution’s protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.’”

(citations omitted).

⁶⁷ See generally Lisa Walter, *Eradicating Racial Stereotyping From Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. Colo. L. Rev. 255 (2000)

protection exclusionary rules, while proposed by some scholars, have not been widely used.⁶⁸ Fourth amendment protection does not apply to a decision to stop.⁶⁹

Legislative attempts to solve this problem have also been mixed. For example, the TSSSA was proposed in Congress, passed the House of Representatives, and was in the Senate Judiciary committee when opposition from the Fraternal Order of Police (FOP) halted the bill.⁷⁰ The TSSSA would have required a public report sampling traffic stops across the nation, and would have been the first opportunity for complete information on the extent of this problem. Assuming the power of the FOP does not decrease to any appreciable extent, legislative solutions would have to be piecemeal. States have also been less than eager to pass legislation barring DWB stops.⁷¹ Obviously, legislation is not the optimal solution to this problem.

Litigation has already been brought in a number of states, however, there is as yet no United States Supreme Court precedent (most DWB lawsuits end in settlement) precedent to govern racial profiling nationally.

The only precedent which exists is somewhat negative. Racial profiling may in fact be constitutional, thanks to *United States v. Martinez-Fuerte*.⁷² However, *Martinez-Fuerte* is not determinative for several reasons.

⁶⁸ *Id.*

⁶⁹ *See eg. United States v. Avery*, 137 F.3d 343 (6th Cir. 1997)

⁷⁰ *See Jenkins*, *supra* note 60.

⁷¹ For example, California Governor Gray Davis vetoed a state version of the federal TSSSA in September 1999. *See* ACLU Press Release, <
<http://www.aclu.org/news/1999/n092899a.html>>

⁷² *Martinez-Fuerte*, *supra* note 66 (holding that race-based searches of motor vehicles and temporary seizure of the occupants at immigration checkpoints, when accompanied by other factors, do not violate the fourth amendment prohibition against unreasonable searches and seizures).

First, *Martinez-Fuerte* concerned a fourth amendment challenge, whereas racial profiling cases such as *Wilkins* are mainly concerned with fourteenth amendment and statutory challenges. The fourth amendment norm is reasonable suspicion, not nondiscrimination. Reasonable suspicion can be established in a situation where the police are looking for visual confirmation of possible illegal status, such as in immigration detection in Southern California. That does not answer the question of nondiscrimination under the fourteenth amendment. *Martinez-Fuerte* does not even address equal protection.

Second, *Martinez-Fuerte* does not stand for the proposition that stops can be made without any other criteria other than race. Indeed, the Supreme Court has held that using *race alone* as a basis for suspicion does violate the fourth amendment.⁷³ In racial profiling cases, at least at the time of a stop, it is possible that a police decision could be made on the basis of *race alone*.⁷⁴

Finally, *Martinez-Fuerte* was decided in an immigration case. Immigration is basically exempt from the constitution. The Supreme Court has, under the plenary power doctrine, watered down constitutional safeguards over the immigration process and the rights of immigrants in any federal area of concern to nearly nothing.⁷⁵ As a result,

⁷³ *United States v. BRIGNONI-PONCE*, 422 U.S. 873 (1975). Though *Martinez-Fuerte* suggests (*Martinez-Fuerte* at 573) that secondary checkpoint referrals (the seizure at issue in *Martinez-Fuerte*) may be subject to a lower standard of suspicion than the “roving patrols” at issue in *Brignoni-Ponce*, the typical “driving while black” case is more similar to a “roving patrol” than an established checkpoint that refers some drivers to a secondary checkpoint for greater scrutiny.

⁷⁴ The best example of this is when a black person is stopped for being “out of place” in a white neighborhood, or a car that is “too expensive for him.” (though not expensive enough to constitute a nonracial criterion)

⁷⁵ See eg. *Fiallo v. Bell*, 430 U.S. 787 (1977) (upholding otherwise unconstitutional gender classification for immigration purposes), *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding immigrant restrictions based on political ideology otherwise protected

immigration cases are not good precedent for litigation in areas of constitutional protection that are not so diluted.

As a result of the poor legislative and individual attempts to solve this problem, class action litigation brought by institutions such as the ACLU, the NAACP and the DOJ must occur. Eventually, of course, public education should end racial profiling with a recognition on the part of individual police officers of the massive harms caused. Until they learn to stop, however, they must be forced.

under the first amendment), *Mathews v. Diaz*, 426 U.S. (1976) (permitting distinction between immigrants and resident aliens in social security benefits).

Wilkins v. Maryland

History and Facts

In 1992, the Maryland Supreme Court revealed that the Maryland State Police had, at least since 1988, an unconstitutional policy of racially profiling drivers to attempt to judge their proclivity to smuggle illegal narcotics.⁷⁶ This, however, was apparently no deterrent to the Maryland State Police, since they issued a “Confidential⁷⁷ Criminal Intelligence Report” (CCIR) encouraging police to target Blacks for special scrutiny as potential crack cocaine traffickers.⁷⁸ The CCIR is allegedly the document which prompted the police to stop Wilkins on May 8, 1992.⁷⁹

Wilkins began with a District of Columbia public defender attorney, Robert Wilkins, returning from his grandmother’s funeral. With various family members (and co-plaintiffs), Wilkins was stopped in a rented car along interstate 68 in Maryland.⁸⁰ A relative, who was actually driving the car, was asked to step out of his car and consent to search.⁸¹ Wilkins identified himself and refused permission for a search.⁸² The officer

⁷⁶ *Dericott v. State*, 327 Md. 582, 611 A.2d 592 (Md. 1992) The court held that the mere fact that Dericott met a drug courier profile did not establish sufficient reasonable suspicion to justify a Terry “stop.” Dericott was arrested for drug possession after a search triggered, basically, by the fact that he was a young black male who looked like he had money. This “profile” may have been in existence since well before 1988 – 1988 was the year that Dericott was stopped pursuant to it.

⁷⁷ The *Dericott* decision was in August 1992, the CCIR was in April 1992. But for these facts, one would suspect that the application of the exclusionary rule only drove the profiling underground.

⁷⁸ NAACP complaint, paragraph 32.

⁷⁹ *Id.*, *Wilkins* complaint, paragraph 21

⁸⁰ *Wilkins* complaint, paragraph 16

⁸¹ *Wilkins* complaint, paragraph 19

⁸² *Wilkins* complaint, paragraph 20

waited for backup and brought a dog in to sniff the car for narcotics.⁸³ Wilkins and his family refused to leave the car, since it was raining and they were afraid of the dog brought to search their car.⁸⁴ They were eventually forced out of their car by the threat of continuous detention.⁸⁵ Finding no drugs, the officer wrote the driver a ticket and let them go after a forty-five minute delay.⁸⁶

Legal Claims

Wilkins filed a lawsuit against the Maryland state police and several individually named defendants, with the assistance of the local ACLU affiliate. With the filing of *Wilkins*, the racial profiling continued unabated. A Maryland State Police trooper testified in July 1993 (five months after the filing of *Wilkins*) that he had searched a defendant on the basis of his race, and in fact engaged in this practice on a regular basis.⁸⁷ The NAACP reports that this trooper has now been assigned to train other officers in highway drug interdiction.⁸⁸

In the *Wilkins* complaint, violations are claimed of the Fourth and Fourteenth amendments of the United States Constitution, Maryland common law, and Title VI of the Civil Rights Act.⁸⁹

The constitutional claims were brought through 42 U.S.C. 1983 (hereinafter 1983). Wilkins claimed that the police defendants subjected him and his family to intentional discriminatory treatment as a result of their race, in violation of the equal

⁸³ *Wilkins* complaint, paragraph 22

⁸⁴ *Wilkins* complaint, paragraph 25

⁸⁵ *Wilkins* complaint, paragraph 26

⁸⁶ *Wilkins* complaint, paragraph 27

⁸⁷ NAACP complaint, paragraph 33

⁸⁸ *Id.*

protection clause of the Fourteenth Amendment.⁹⁰ Wilkins also alleged a fourth amendment violation, in that the search pursuant to the drug courier profile did not constitute reasonable, articulable suspicion sufficient to make a Terry stop, nor sufficient grounds to suspect Wilkins of drug trafficking and subject them to the dog search.⁹¹ The Fourth Amendment claims were also based on the seizure of their persons and unlawful detention.⁹²

The title VI claim is based on a denial of rights on account of race to Wilkins by a police department receiving federal funds. Functionally, a second Fourteenth Amendment claim, premised on the Civil ⁹³Rights Act rather than 1983. Finally, *Wilkins* pled state common law false imprisonment based on the fact of their physical restraint ⁹⁴

⁸⁹ *Wilkins* complaint, paragraph 1.

⁹⁰ *Id* paragraph 38, 40.

⁹¹ *Id* paragraph 38,39

⁹² *Id* paragraph 38.

⁹³ *Id* paragraphs 46-50

⁹⁴ *Id*, paragraph 55

The Settlement Agreement

The provisions of the settlement agreement were as follows:

1. Jurisdiction was retained by the United States District Court in Maryland until mid-1997.⁹⁵ It could be extended until 1998 in the event of noncompliance.⁹⁶
2. The Maryland State Police were required to make a “policy and practice” of prohibiting race based drug courier profiling and to enforce that through disciplinary procedure.⁹⁷ Interestingly, however, the settlement never explicitly required the MSP to make policy and practice of prohibiting racially discriminatory law enforcement that was not pursuant to a drug courier profile. This seems to be an obvious deficiency in the settlement, allowing profiling activity to continue with a nudge and wink as long as no profile was actually written down.
3. The MSP must implement a training program to train police officers in the requirements of the settlement agreement, as well as the holding in *Derricott* (that searches pursuant to a drug courier profile are not made with reasonable suspicion).⁹⁸
4. The MSP must keep (and make available to the plaintiff and court) computer records of all stops in which:
 - a. Consent to search is given by a motorist
 - b. A search is made by a drug dog

⁹⁵ *Wilkins* settlement agreement, paragraph 1.

⁹⁶ *Id.*

⁹⁷ *Id.* paragraph 6.

⁹⁸ *Id.* paragraph 7-8

including the time and location of the search, the name of the searching officer, the race of the person searched and type of automobile, and “grounds for requesting that consent to search be given or search by drug dog made, if any.”⁹⁹

5. If the records turned over to the plaintiffs show a “pattern and practice” of recordkeeping, the court may require the MSP to provide additional information and extend jurisdiction to 1998.¹⁰⁰
6. Wilkins and his co-plaintiffs were awarded \$50,000 plus \$45,600 in attorneys’ fees.¹⁰¹

Notable Absences in the Settlement Agreement

The most glaring flaw in the settlement agreement is the absence of any provision to discipline individual officers who engaged in discriminatory stops unless they were actually following a noncompliant policy.¹⁰²

Indeed, paragraph eleven of the settlement agreement specifically excluded the actions of individual troopers from the agreement.¹⁰³ Thus, the only way the agreement

⁹⁹ *Id* paragraph 9.

¹⁰⁰ *Id* paragraph 10.

¹⁰¹ *Id* paragraph 13-14

¹⁰² This seems rather redundant: if the MSP is practicing a profiling policy, it is already out of compliance with the settlement agreement, and certainly does not need to additionally be out of compliance for failing to discipline officers for following their noncompliant orders.

¹⁰³ *See id*, paragraph 11:

“The parties recognize that despite the training, individuals may disregard or disobey the Maryland State Police policy, and this Settlement Agreement is not a guarantee against violation of the policy by individual troopers. Plaintiffs may show a violation of this agreement either: (a) by establishing that defendants have failed to promulgate the policy described in paragraph 6, failed to provide the training described in paragraphs 7 and 8, or failed to collect

could be violated based on the actions of the individual troopers is if their effect was significant enough to constitute a “pattern and practice” of racial discrimination. This section of the agreement constitutes a complete abdication of the very idea of MSP control over its own employees.¹⁰⁴ Even if the actions of the troopers rise to the level of a policy and practice, the MSP is still not required to discipline anyone.

If the lack of internal police department enforcement is not enough, public pressure may never be brought against the police department, based on traffic stop statistics, to punish officers responsible for discriminatory stops. Public disclosure of police department records is not ever provided for in the agreement, even though there are no conceivable privacy interests implicated, since the only personal information required to be gathered about stop victims is their race and automobile.¹⁰⁵

After a violation of the settlement, when the need for public disclosure the lack of public disclosure requirements is even greater, the agreement, while providing for

the statistics as described in paragraphs 9 and 10; or (b) by showing that there is a pattern and practice of MSP stops conducted on the basis of race...”

Note that a violation of the agreement is not established by a failure to discipline officers for violating the policy, despite the provisions of paragraph 6 requiring “appropriate disciplinary action.”

¹⁰⁴ Deborah Jeon, the ACLU lawyer in charge of this litigation, believes that focusing on the actions of individual police officers allows the high police officials to avoid scrutiny for their part in the profiling. Interview with Deborah Jeon, 5-17-00. I am not suggesting that the high-level police officials should be exempted from scrutiny, but rather that individual police officers should also be included, so that even if high-level officials act in complete bad faith (as they have done here), there is still a bureaucratic mechanism set up for sanctioning egregious violators (like the officers in the I-95 STIF discussed infra note 122) without the explicit cooperation of the officials. An alternative angle of attack would be to make the sanctions on high-level officials so severe that they are forced to discipline street-level officers who engage in profiling to preserve their own jobs and the budget of the department. However, it is unclear that the plaintiffs could ever convince police officials with whom they are negotiating to agree to such severe sanctions.

¹⁰⁵ Wilkins settlement agreement, paragraph 9.

increased recordkeeping,¹⁰⁶ explicitly mandates that the data be under seal and not released to the public, and even imposes limitations on the data that can be released to plaintiffs.¹⁰⁷

There is no enforcement provision whatsoever for the recordkeeping requirements of the agreement. While the MSP is required to create the recordkeeping system, it is again not required to monitor or discipline officers who do not report all their stops or searches. In fact, many officers did not report the stops and searches of black motorists.¹⁰⁸

There is not even any provision requiring that the MSP maintain (as in “refrain from destroying”) these records for any specific length of time beyond the two year period in which the department is required to make them. The apparent opinion of the collective framers of this agreement is that the Maryland State Police is unable to control its troopers, and so should not bother to try.

In addition to the overly optimistic view of human nature which this betrays¹⁰⁹, it also does not provide any mechanism for individual troopers to change their behavior. Even if the heads of the MSP notice a startling racial disparity in stops in general, or even stops by particular officers, the agreement does not require the MSP compliance officer to communicate this disparity to the officers involved. It would perhaps be more effective in changing the behavior of the officers who actually create the discriminatory

¹⁰⁶ For unknown reasons, since the race of the victim and cause for search in any particular stop seem sufficient in any case to identify the validity of any particular stop.

¹⁰⁷ *Wilkins* settlement agreement, paragraph 10.

¹⁰⁸ The NAACP complaint against the MSP lists 10 separate incidents of reporting violations of the *Wilkins* agreement. These are only the ones that came forward and were used by the NAACP among the named plaintiffs. See NAACP complaint, paragraphs 71, 73, 78, 82, 83, 85, 86, 89, 92, 95.

effect if they were aware of their pattern of stops, so that the shaming deterrence could be communicated to the agents of discrimination.

In fact, there is evidence that the Maryland State Police officials did know of the racial disparity in stops established by data collected pursuant to the agreement. The Deputy Superintendent of the MSP circulated a memorandum in June 1995 to MSP regional and division commanders analyzing the *Wilkins* data and demonstrating the continued presence of racial discrimination.¹¹⁰ However, these regional and division commanders did nothing with the information which could affect ground-level officers.¹¹¹ A similar incident occurred in April 1996.¹¹²

None of this is surprising. There is substantial academic commentary to the effect that changing the customary actions of “street-level bureaucrats” such as police officers requires departmental priorities, backed up by strict sanctions.¹¹³ This means discipline and some evidence of buy-in from senior, intermediate and street-level personnel, none of which existed in *Wilkins*.

The settlement did work as a mechanism to pave the way for future litigation. A second lawsuit, under the name of the NAACP (but also being run by ACLU attorney Deborah Jeon) is in process right now, using data from the *Wilkins* settlement, to seek further changes in the system.

¹⁰⁹ The plaintiffs believed that the compilation of the data would be enough to convince the MSP to change their practice. Interview with Deborah Jeon, March 1, 2000.

¹¹⁰ NAACP complaint paragraph 48.

¹¹¹ *Id.*

¹¹² *Id.*, paragraph 51.

¹¹³ See Michael Lipsky, *Street-Level Bureaucracy* (1980) at 19. “Street-level Bureaucrats are interested in processing work consistent with their own preferences and only those agency policies so salient as to be backed up with significant sanctions. These sanctions must be limited. If everything receives priority, nothing does.”

The weaknesses of the original *Wilkins* settlement are understandable. While part of it resulted from plaintiff over-optimism and a belief that compiled data would shame the defendants into compliance, there were many unavoidable obstacles. The settlement agreement took approximately one year to negotiate.¹¹⁴ Deborah Jeon, the ACLU attorney, recalls that settlement negotiations were difficult.¹¹⁵

For one thing, the Maryland State Police were not very serious (one might even say unethical) about negotiating. For example, they reneged on several agreements after consulting with the governor or higher-up police officials.¹¹⁶ The plaintiffs also did not have as strong a case as they would have liked. While there was a “smoking gun” order instituting racial profiling,¹¹⁷ and the defendants were not eager to go to court against the ACLU and Robert Wilkins¹¹⁸ (a top public interest attorney in the District of Columbia in his own right), there was no statistical data upon which to base their claims of systematic discrimination.

It appears that more progress will be made with the *NAACP* suit. There are many more plaintiffs, and this litigation has the benefit of statistical data from *Wilkins*. In addition, it appears that the plaintiffs will not get fooled a second time. The MSP has initiated settlement talks,¹¹⁹ but has not demonstrated enough willingness to negotiate in good faith or make actual concessions.¹²⁰ As a result, the ACLU is pessimistic about the

¹¹⁴ Telephone Interview with Deborah Jeon, esq., March 1, 2000

¹¹⁵ Telephone Interview with Deborah Jeon, esq., March 1, 2000.

¹¹⁶ Telephone Interview with Deborah Jeon, esq., May 17, 2000.

¹¹⁷ *Id.* I believe this was the CCIR discussed *supra* text accompanying note 78. Unfortunately, I do not have a copy of this document.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

chances for settlement.¹²¹ With luck, the NAACP litigation will reach the stage where the MSP's actions are found in violation of the federal and/or state constitutions, and the plaintiffs will be put in a much stronger bargaining position.

Violation and Contempt

In late 1996, the ACLU submitted evidence of continuing discrimination to the court and asked for expanded monitoring requirements and contempt sanctions.

The plaintiffs hired John Lamberth, PhD., a psychologist at Temple university and regular expert witness on statistical matters, to design and implement a study of the racial composition of motorists on Interstate 95 (the prime focus of MSP drug interdiction activities¹²²) who violate traffic laws and compare that to the racial composition of motorists searched and detained by the MSP on Interstate 95.¹²³ Black drivers did not violate traffic laws at a rate meaningfully higher than their percentage of the driving population, around fifteen percent.¹²⁴ By contrast, 72.9%¹²⁵ of the motorists searched by the Maryland State Police on Interstate 95 between January 1995 and September 1996 were black.¹²⁶

On areas not subject to special monitoring for drug interdiction there was still a large difference between the number of blacks in the population and the number of blacks

¹²¹ *Id.*

¹²² The MSP drug interdiction team, the "Special Traffic Interdiction Force," (STIF) operates solely on Interstate 95. See Plaintiff's memorandum in support of motion for enforcement of settlement agreement at 2.

¹²³ See Lamberth, *supra* note 50 at 2.

¹²⁴ Black drivers comprised 16.9% of the driving population sampled and 17.5% of traffic violators. *Id.* at 4.

¹²⁵ Another chart provided by the ACLU suggests that this number is 62.1%. I am not certain which number is accurate, but it does not make any difference to the statistical significance of the disparity.

searched. However, it was not nearly at the scale of that on Interstate 95, betraying the motive for police searches of African Americans to be suspicion of drug activity. Black motorists were searched by officers outside Interstate 95 32% of times, a mere twice their percentage in the population.

In addition to the pattern and practice of racial discrimination, the ACLU recited a number of other settlement violations (and egregious behavior not otherwise specified) perpetrated by the MSP.

First, MSP officials withheld computer records from plaintiffs for nearly a year in an attempt to hamper plaintiffs' enforcement efforts, finally producing the records only after the court imposed a penalty for their not having done so earlier. Next, defendants rebuffed plaintiffs' effort to cooperate in conducting a traffic survey, suggesting that ACLU volunteers would be arrested if they attempted to conduct the survey without the States' consent. At the same time, MSP officials unreasonably refused to stipulate to use of traffic survey results from southernmost New Jersey (less than 20 miles north of the relevant segment of Interstate 95 in Maryland,) thus forcing plaintiffs to undertake the enormous effort of duplicating this survey. And according to sources within the agency, drug interdiction trainings conducted by MSP officials pursuant to the Settlement have included gratuitous insults

¹²⁶ *Id* at 6. No data was available for stops that did not end in searches.

toward the ACLU and plaintiffs' counsel, while stressing that MSP officials admit no wrongdoing in connection with their law enforcement practices and that the agency is going along with monitoring efforts not because there is any problem but only because it is being forced to do so by the Court and the ACLU.¹²⁷

The plaintiffs requested \$250,000 in contempt sanctions,¹²⁸ an extension of the court's jurisdiction and the MSP's record-keeping obligations until December 1998,¹²⁹ an order that the MSP provide the plaintiffs with names, telephone numbers and addresses,¹³⁰ provide stop data in addition to search data¹³¹ and produce the disciplinary files for a number of police officers.¹³²

In April 1997, Judge Catherine C. Blake extended the court's jurisdiction until June 1998;¹³³ required the MSP to supply stop data along Interstate 95,¹³⁴ information on any discipline taken against officers who were engaging in racial profiling¹³⁵, affidavits describing identifying information the MSP gathered concerning persons stopped¹³⁶; and

¹²⁷ Plaintiffs' memorandum in support of motion for enforcement at 4-5.

¹²⁸ *Id.* at 5

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 5-6.

¹³² *Id.* This request does not seem to be justified under the Settlement, since the MSP was never required to discipline individual officers.

¹³³ Order of April 27, 1997 at 1. (Hereinafter Enforcement Order)

¹³⁴ *Id.* at 2

¹³⁵ *Id.*

¹³⁶ *Id.*

ordered the MSP to not destroy identifying information gathered on search victims¹³⁷.

The judge did not provide for sanctions at that time.

This step did not result in changed police behaviors. A lawsuit has been filed by the National Association for the Advancement of Colored Persons, requesting declaratory, injunctive and monetary relief on behalf of the class of motorists who have been stopped as a result of their race. The complaint lists a litany of complaints from eighteen named plaintiffs of discriminatory stops, insulting treatment, obstructionism when the victims tried to get relief through police department internal processes and nonreporting of searches under the *Wilkins* agreement.¹³⁸

¹³⁷ *Id.*

¹³⁸ Some illustrative examples: Barry Flack was pulled over in 1998 on Interstate 95, where the officer addressed him as “boy” and, in the words of the complaint, “uttered the first syllable ‘nig’ before swallowing the rest of that epithet.” Flack attempted to file a complaint, but was obstructed in a variety of ways and finally hung up on. *NAACP* complaint at 28-29 (paragraphs 56-57). Nelson Walker was stopped in 1995. The officers made Walker stand in the rain, despite being informed that Walker had twice contracted pneumonia. They told Walker that if he refused to consent to a search, he would be detained while a search warrant was obtained. They then searched his person and belongings, and dismantled his car. Finding nothing, they handed Walker a screwdriver to rebuild his car and left. This search was not reported pursuant to *Wilkins*. *Id.* at 37-38 (paragraphs 71-72).

Suggestions for Future Litigation

There are several subsections in this section. First, the recent consent decree in New Jersey is discussed. Second, the data collection requirements of an effective settlement are reviewed. Third, some suggestions are made concerning safeguarding of the upward flow of information and the downward flow of enforcement from police to interest groups.

The New Jersey Model

Some insight for future settlements can be gleaned from some other prominent DWB lawsuits. Chief among those is the United States Department of Justice suit against New Jersey, settled by a consent decree.

This decree has the following exceptional provisions:

1. Individual troopers may not discriminate on the basis of race.¹³⁹
2. An independent monitor is appointed to ensure compliance.¹⁴⁰
3. Written consent must be given for a consent based search.¹⁴¹

¹³⁹ New Jersey Consent decree, para. 26.

¹⁴⁰ *Id* para. 115-121

¹⁴¹ There are several other exceptional provisions regarding consent to searches that are not immediately germane to this paper, but should be a model for other agreements:

[requiring] that every consent search of a vehicle be based on written consent of the driver or other person authorized to give consent which precedes the search; that the scope of a consent search be limited to the scope of the consent that is given by the driver or other person authorized to give consent; that the driver or other person authorized to give consent has the right to be present during a consent search at a location consistent with the safety of both the state trooper and the motor vehicle occupants, which right can

4. All traffic stops must be recorded by race, gender, reason for stop, and post-stop action.¹⁴²
5. Supervisors are regularly required to review the stop records of individual officers and provide retraining if necessary¹⁴³.
6. Structures, such as complaint forms and regular review of patterns in computerized records, to ensure that the police hierarchy is aware of discriminatory patterns.¹⁴⁴
7. Documented training in cultural diversity and nondiscrimination.¹⁴⁵
8. Actual disciplinary procedures for individual officers who engage in prohibited discrimination.¹⁴⁶

only be waived after the driver or other person authorized to give consent is advised of such right; that the driver or other person authorized to give consent who has granted written consent may orally withdraw that consent at any time during the search without giving a reason; and that state troopers immediately must stop a consent search of a vehicle if and when consent is withdrawn (except that a search may continue if permitted on some non-consensual basis).

Id para 28 (emphasis added).

¹⁴² *Id* para 29.

¹⁴³ *Id* para 35-39, 47-56

¹⁴⁴ *Id* para 58-69.

¹⁴⁵ *Id* para 93-109.

¹⁴⁶ *Id* para 73-90. Note especially paragraph 88:

88. The State Police shall discipline any state trooper who is the subject of a substantiated misconduct adjudication or disposition regarding: (a) prohibited discrimination; (b) an unreasonable use of force or a threat of force; (c) an intentional constitutional violation; (d) an intentional failure to follow any of the documentation requirements of this Decree, (e) an intentional provision of false information in a misconduct investigation or in any report, log, or transmittal of information to the communications center; or (f) a failure to comply with the requirement of ¶69 to report misconduct by another trooper.

(emphasis added)

9. Audits by the State Attorney General.¹⁴⁷
10. Public release of statistical traffic stop data.¹⁴⁸
11. Installation and use of video recorders on traffic enforcement vehicles to monitor officer conduct.¹⁴⁹
12. A five-year or longer term for the decree.¹⁵⁰

The most important aspects of this decree to focus attention on here are the public releases of information, the disciplinary procedures for individual troopers, and the enhanced monitoring, including regular supervisory review and videotaping facilities. Each of these will be examined in turn to show how it is an improvement on the *Wilkins* settlement.

Public Reporting

The public release of statistical information promises to be a boon to enforcement of this consent decree. There is a rising tide of public dismay, largely spurred by ACLU public education efforts¹⁵¹, aimed at racial profiling, especially DWB. Under those circumstances, it is likely that public disclosure of racially discriminatory policing would lead to public calls for reform, and subsequent local legislative action.

This, then, would be beneficial in giving local politicians and advocacy groups some evidence to support their claims. In general, as there is no reason to avoid public

¹⁴⁷ *Id* para. 110-113

¹⁴⁸ *Id* at 114.

¹⁴⁹ *Id* para 34.

¹⁵⁰ *Id* para 131.

disclosure of racial data on police stops, disclosure would have the positive effect of encouraging informed democratic discourse on social problems.

Individual discipline

This is another measure which is clearly optimal. The officers “on the beat” at any police department are the officers which actually produce the direct harm upon criminal suspects who are searched on the basis of their race. Thus, for reform litigation to effectively address the harm from racial profiling, its effect must reach the individual trooper attempting to enforce the law. The situation in Maryland demonstrates that measures designed only to sanction the higher ranks or the department as a whole in the event of noncompliance are ineffective. In Maryland, the supervisory personnel were in favor of racial profiling.¹⁵² Since the settlement only penalized the actions of upper management in the forms of policies, the supervisors were free to ignore reports of racial profiling by individual troopers, secure the knowledge that neither they nor the troopers would be held responsible for individual incidents.

When a settlement punishes not only the high officials, but, as in New Jersey, also requires high officials to punish employees who engage in profiling, it brings the focus from policies to the actual daily practice of police officers. This allows the chain of command to work effectively to enforce the norm of nondiscrimination.

¹⁵¹ See eg. “Racial Profiling in America < <http://www.aclu.org/profiling/index.html>>, New York Times advertisement (archived at <<http://www.aclu.org/features/nytimesad100698.html>>)

¹⁵² This is demonstrated by the excerpts from the ACLU’s motion for enforcement, *supra* text accompanying footnote 127. (complaining of training sessions where trainers

Monitoring

Another major flaw in the *Wilkins* agreement is the lack of facilities to monitor either the actions of the department in general or the actions of individual police officers. This is especially pernicious, for it creates two layers of opportunity for obstructionism and outright deceit (as is documented in the *NAACP* complaint).

The New Jersey consent decree mitigates this danger in a number of ways. First, it is by its very nature less susceptible to obstruction from the defendant because of the nature of the plaintiff. The ACLU in *Wilkins* reports a number of problems in enforcement based on its lack of state power and money. These problems will never exist, even if the New Jersey police attempt to not comply with the consent decree, because the plaintiff is the United States government. It is unimaginable that a state police department would threaten employees of the United States Department of Justice with arrest if they attempted to conduct a traffic study on interstate highways. Also, the DOJ presumably has more resources to overcome obstructionism by, for example, doing its own traffic studies when the defendant refuses to stipulate to similar ones.

However, many of the advantages the United States has as a plaintiff are also available to private plaintiffs through yet another device used in the New Jersey settlement, the independent monitor.¹⁵³ The independent monitor has greater access to the court than any plaintiff, and so is in a better position to enforce orders and carry out monitoring functions with the threat of judicial intervention than a plaintiff would in a settlement such as *Wilkins*.

complained of ACLU and court compulsion to eliminate racial profiling which did not otherwise constitute wrongdoing)

¹⁵³ See New Jersey Consent decree, paragraphs 115-121.

At the second stage of monitoring (authorities monitoring individual troopers), the New Jersey consent decree is clearly superior to the *Wilkins* settlement. Apart from the fact that the *Wilkins* agreement does not prevent troopers from engaging in discriminatory behavior, except discriminatory behavior done pursuant to some “profile,” the agreement is also deficient in that it provides no way for the MSP to verify that the troopers are acting in compliance with norms of nondiscrimination.

In contrast, the New Jersey decree provides many tools for supervisors to use to verify compliance. First, and most important, are the mandatory video recording equipment which must be placed on all police vehicles doing traffic work in certain areas.¹⁵⁴ The ten cases of search nonreporting cited by the plaintiffs in *NAACP* could never have happened if the entire transaction had been recorded and was in danger of being randomly reviewed by an officer’s supervisor,¹⁵⁵ who was herself likely to be audited by her superiors.¹⁵⁶

Second, the provisions for automatic supervisory review of submitted reports¹⁵⁷ make the New Jersey police hierarchy unlikely to miss incidences of disproportionate racial stops by a single officer. As a result, they may intervene to retrain or discipline an officer before major harm is done to the police relations with the surrounding community. By way of contrast, the Report of the plaintiff’s expert in *Wilkins* lists several officers patrolling along the Interstate 95 who searched wildly disproportionate numbers of

¹⁵⁴ *Id.*, paragraph 34.

¹⁵⁵ *Id.*, paragraph 36.

¹⁵⁶ *Id.*, paragraphs 38-39.

¹⁵⁷ *Id.*, paragraph 35.

African Americans (in one particularly egregious case, the officer *only* searched African Americans).¹⁵⁸

Third (although slightly sinister-seeming) is the provision for mandatory reporting of violations by officers.¹⁵⁹ It may seem unpalatable to some to require police officers to “rat” on each other. This is based on a denial of the plain reality that for many years, “codes of silence” have existed to conceal police abuses from higher authorities and the public.¹⁶⁰ The only way to break these codes is to provide a penalty for nonreporting equal to the penalty for committing the reportable act in the first place. The New Jersey consent decree enables this.

¹⁵⁸ Lamberth, *supra* note 50 at 3. One officer searched a total of 68 people, of whom 51 were African-American. Another searched 150 people, of whom 125 were black. A third searched 65 people, of whom 53 were black. One officer only searched one non-black person out of 40. Presumably, had the supervisors of these officers been watching this record in good faith, they could have intervened long before anyone could rack up 125 practically consecutive searches of black people over almost two years.

¹⁵⁹ New Jersey Consent Decree, paragraphs 69, 88.

¹⁶⁰ The difficulties of guarding against illegal conduct by individual street-level police officers has been discussed many places. *See eg.* Kennedy, *Supra* note 5 at 120 (“internal policing of police departments is typically inadequate because police officials (like all officials) are loathe to discipline ‘their own’” and discussing police successes at preventing or capturing civilian review boards) (draw on “street-level bureaucrats” in here somewhere). *See generally* Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. Rev. 17, 19-22 (2000) (discussing the ineffectiveness of prosecutions against police officers due to “pervasive unwritten codes of conduct followed by rank and file officers that regularly abridge the constitutional rights of the citizenry.”) DWB becomes one of those unconstitutional “customs” once it is driven underground by poorly crafted settlement agreements like the *Wilkins* agreement. On codes of silence specifically, see *id* at 63-78 (“police abuse continues to exist primarily because of the code of silence. But for the knowledge that misconduct will go unreported, a police officer would never mistreat a detainee in the presence of other officers, falsely arrest or harass witnesses of police misconduct, or orchestrate elaborate police cover-ups...”). This article is also very important to review to fully understand the major errors that result from regulating police at the level of “policy” without regulating them at the level of “custom” or daily practice.

Data Collection Requirements

How is one to determine the existence of racial profiling? The easiest form of evidence of racial profiling is an explicit written order from the highest ranks of the Department. However, many profiling cases do not have such an order, and it is incumbent upon the plaintiffs to determine and gather enough data to make a prima facie case of discrimination.¹⁶¹ It is a premise of this paper that significantly disparate stops and/or searches, even without a clear profile, constitute racial profiling, for the harms of this disparity exist whether or not the police are ordered to create it by their superiors.

One of the clear advantages of the *Wilkins* settlement is that it created a strong statistical evidentiary trail that future litigants (such as in the NAACP-titled suit) could use to determine the presence of profiling. Although this was in some senses a failure in that it did not meet the ACLU's intended goals, it did at least advance the movement of forces in Maryland against profiling.¹⁶²

Types of data needed

At this point, the definition of racial profiling needs to be made somewhat more sophisticated. There are several stages where racial profiling can creep in, and the rationale for profiling and utility for the plaintiffs may be different at each stage.

- There may be racially disparate stops. This is an area that "drug courier" profiles often are directed against. Presented with a multitude of law-breakers (speeders,

¹⁶¹ At some point soon, the BJS plans to release a Resource Guide indicating the optimal data for police departments to collect to avoid racially discriminatory stops. See General Accounting Office, *supra* note 18 at 6.

¹⁶² Another, more subtle, success of this litigation is that it provided extra axes of complaint against the MSP for the NAACP litigation through the violation of the reporting requirements of the *Wilkins* settlement.

illegal lane changes and the like), an officer is forced to rely on non-traffic factors in deciding who to pull over. If the officer has an additional goal of interdicting drugs, they will often pull over those who are believed to be likely drug traffickers. The ACLU motion for enforcement of the agreement requested this data in addition to search data.¹⁶³ It is easiest to determine disparate data for stops, as any significant deviation from the racial proportion of traffic-law violators indicates a racially-determined stop, as there appears to be very few reasonably nonracial indicia of suspicion for drug trafficking that can be determined before a stop.¹⁶⁴

- There may be racially disparate requests for search, compulsory searches (such as by dogs) and investigative detentions. It is possible for a traffic officer to stop a racially proportionate number of drivers and only search black drivers. In settlements that only collect data about stop rates, the danger of this is paramount. This is the complaint the ACLU relied upon in its motion for enforcement. It is more difficult to determine disparate here, as the searches may be based on nonracial indicia of suspicion that are also correlated with race.¹⁶⁵ Data collection in this area, for this reason, should also include any nonracial indicia of suspicion the searching officer relied upon, complete with details of what specific behaviors ignited this suspicion.

¹⁶³ See Memorandum in Support of Plaintiffs' Motion for Enforcement at 1.

¹⁶⁴ The indicia that do exist, such as age, should be controlled for before analyzing any data.

¹⁶⁵ One example would be hostility and/or unusual reticence with the police officer, which could be associated with fear of detection of serious crimes, but also with racial experience of discrimination and reasonable fear of police discrimination and violence that exists among many African-Americans. See *generally*, Kennedy, *supra* note 5.

- There may be racially disparate consent to search. While this does not so clearly indicate profiling behavior, this may still be a result of police abuses directed against blacks, such as intimidation and detention under poor conditions (such as in the rain). This may also be a result of the extreme power differential between African-Americans and white police officers.
- There may be racially disparate arrests. It is doubtful that this could exist without some other racially motivated step in the previous level. If police, once they have discovered an offense for which arrest is indicated (in profiling cases, this is most often drug trafficking), choose to arrest black suspects but not white ones, the racial problems in US police forces are far worse than even the ACLU alleges at this time, and well beyond the scope of this paper. If this is not the case, racially disparate arrest rates without racially disparate stop or search rates may be a good cue that the department is *not* engaging in racial profiling, but rather that the crimes in question are more often committed by minorities.

It is imperative that plaintiffs collect *all* of this data, whenever possible, for the most effective enforcement actions.

Information Up, Power Down

Drawing on the lessons presented by Lipsky in *Street-Level Bureaucracy* and the various and sundry settlements against police departments in profiling cases (and others, such as the Stubenville decree), the following is a proposed supervisory and informational structure designed to facilitate compliance at the level of individual officers.

At least three groups have an interest in effectively influencing the actions of individual officers.¹⁶⁶ These will be referred to as “primary interest groups.” First, the judge (representing the legal system as a whole) is likely to want settlement agreements and consent decrees to be complied with using minimal judicial intervention and resources. Second, the plaintiffs clearly have an interest in enforcing settlement agreements without suffering the costs of excessive enforcement proceedings. Third, assuming the settlement is weighted with the public interest (as police settlements invariably are), the general public should be involved in enforcing the settlement. Unfortunately, these three parties are interdependent and often act to prevent each other from effectively enforcing anything.

Members of the public rely on the plaintiffs, for the most part, for enforcement (except when they act through the political system), who in turn must rely on the judge for sanctions to back up enforcement attempts. At the same time, plaintiffs must rely on the public for information as to specific violations and the defendants as to the general pattern of compliance. The judge must rely on plaintiff for all of this information, unless there is a court-supervised independent monitor in play. The public must rely on the plaintiffs or judge for information both as to their rights under the settlement and the general pattern of violations.

When the complexities of street-level bureaucracies are added to the mix, such that the supervisory personnel at police departments (the main contact points for plaintiffs and judges) are also deprived of information and unwilling to engage in enforcement, it

¹⁶⁶ Even when police “voluntarily” collect and disclose data, they need to be watched. For example, the Rhode Island police decided to collect stop data, then changed their mind and stopped again. See Rhode Island ACLU <http://www.riaclu.org/dwb.html>.

becomes clear why the *Wilkins* settlement failed, and why other settlements are in jeopardy.¹⁶⁷

This analysis must be along six axes: the transfer of information about the actions of street-level officers to judges, plaintiffs and the public, and the transfer of authority from these parties down to street-level officers. All of these are different.

The key in all of this is to reduce the number of layers between information and the primary interest groups, and between power and the street-level police officer. With each additional transmitter of information distortions, omissions, errors and outright obstruction can occur. *Wilkins* provides clear examples of this sort of behavior, where street-level officers were failing to report stops to their superiors, and superiors were actively obstructing ACLU attempts to conduct traffic studies.

Judges

Judges have the least information about the actions of individual police officers in settlements such as *Wilkins*. With no independent monitor and no contact with the public, judges must rely on the plaintiffs for all of their information. Plaintiffs have their own informational problems, which will be further elucidated below.

Since judges, as a systemic matter, have the power to directly affect street-level police officers, it is vital that they have good access to information. Perhaps the best way

Legislation is now being proposed to compel this data collection, as an exercise of public power. See *id.*, <http://www.oso.com/partners/abc6/01news/1999/03/30/dwblaw.html>.

¹⁶⁷ An interesting illustration of the relationship between high-level police officials and street-level officers: In the aftermath of *Wilkins*, the high-level officials, though attempting to obstruct the plaintiff from collecting data, also were frustrated at the continuing discrimination of their “Special Traffic Interdiction Force (STIF)” on Interstate 95 and reduced the “all-white” force as a result. See “Maryland State Police

to provide this access would be through an independent monitor. It is obviously highly inefficient for judges to interact with police departments directly.

An independent monitor could, at best (and probably only in small departments) gather information directly from street-level officers. This would allow for perfect targeting of judicial sanction authority (assuming individual police officer's actions are covered by a well designed settlement) against the officers with the most continuing violation of curative settlements. In a larger police department, the independent monitor could at least focus judicial scrutiny, and thus enforcement power, at the station or watch level.

Plaintiffs

Plaintiffs have both severe informational problems and severe enforcement problems. On the informational side, plaintiffs in most settlements must rely on the complete hierarchy of police to provide information about the actions of individual police officers. In a conventional structure, a street-level police officer must give information to a supervisor, who must give information to any number of intermediate supervisors, who must give information to a compliance officer, who must give information to a high-level police official, and only then can information be brought to the attention of the plaintiffs. If any one of these persons is lying or in error, the plaintiffs must get inaccurate information.

Settlements should provide for strict record-keeping requirements, such as those in the New Jersey case, and random plaintiff inspections of records to ensure they do not

contain information not being delivered by high-level police officials, or omit information delivered by the public.

Finally, some direct plaintiff interaction with low-level supervisory personnel or individual officers may facilitate improved information gathering. In this, judges can act as a proxy for plaintiffs, if judicial independent monitors are used and communicate with plaintiffs.

Solutions to the problem of enforcement by plaintiffs are not so simple. Plaintiff authority is by its very nature exercised using the power of others, since plaintiffs have no sanction power of their own. Plaintiffs must act either through bringing information to judges or to the public. The best way to increase plaintiff authority, then, is to increase the authority (and thus the information) of judges and the public. If judges are readily accessible to the plaintiffs, they can more easily wield authority over officers. As such, periods of active supervision should be long in these agreements. Likewise, public information allows plaintiffs to effectively wield their authority. As such, settlements should not bar plaintiffs from communicating details of compliance with the public.

The Public

The public has perhaps the worst position with respect to information. They can get information concerning individual incidents directly from street-level police officers, to the extent that individual members of the public are victimized by noncompliance, and then only if the information from individual members is transmitted to the rest of the public through the press. Otherwise, the public has to rely on the parties for information. The defense is rarely forthcoming with this information, and the plaintiffs, even if they

have the information, may be barred from publicizing it, as in the expanded stop information granted the plaintiffs in the *Wilkins* enforcement order. To prevent this, independent monitors and plaintiffs should be encouraged to provide information to the public.

In exercising authority, the public is perhaps at its maximum capacity. They can exercise authority through elected officials in either the executive or legislative branches, or through press pressure. This is perhaps all that can be hoped for in a republican system of government.

In summary, the requirements for an effective information authority and transfer system, a goal that plaintiffs should negotiate toward, are:

1. An independent monitor, answering to and appointed by, the judge, who gives information from street-level or low level supervisory personal to the judge, plaintiffs and public,
2. Continuing, long term supervision by the judge with easy access by plaintiffs,
3. Plaintiff rights to disclose all information to the public,
4. Plaintiff rights to inspect all records and randomly monitor street-level officers,
5. Draconian judicial sanctions for all attempts to stymie plaintiff monitoring,
6. Strict record keeping requirements, with videotape verification where possible and

This should solve many of the enforcement problems highlighted in *Wilkins* and elsewhere. The utility of a settlement without many of these features is so limited (unless it can be used, like in *Wilkins*, to provide evidence for future litigation) that it is unlikely to be worthwhile to pursue the litigation in the first place. Indeed, comparing the list of items here to the situation in *Wilkins*, a reasonable question can be asked about whether

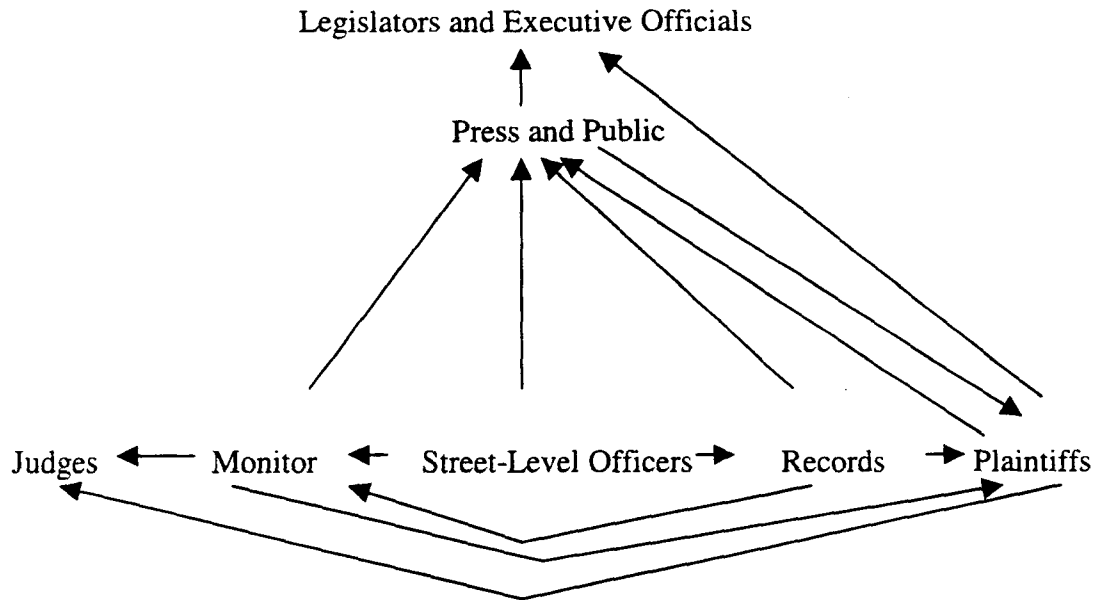
the suit should have been brought. *Wilkins* had no independent monitoring, no public disclosure of any time, no sanctions for official obstructionism, minimal record-keeping requirements, and a compliance officer who was, predictably, useless.

In states where the local ACLU or NAACP affiliate does not have enough evidence to negotiate a stronger settlement than *Wilkins*, the plaintiff should endeavor to gather data *before* filing suit. Examples in other states prove informative:

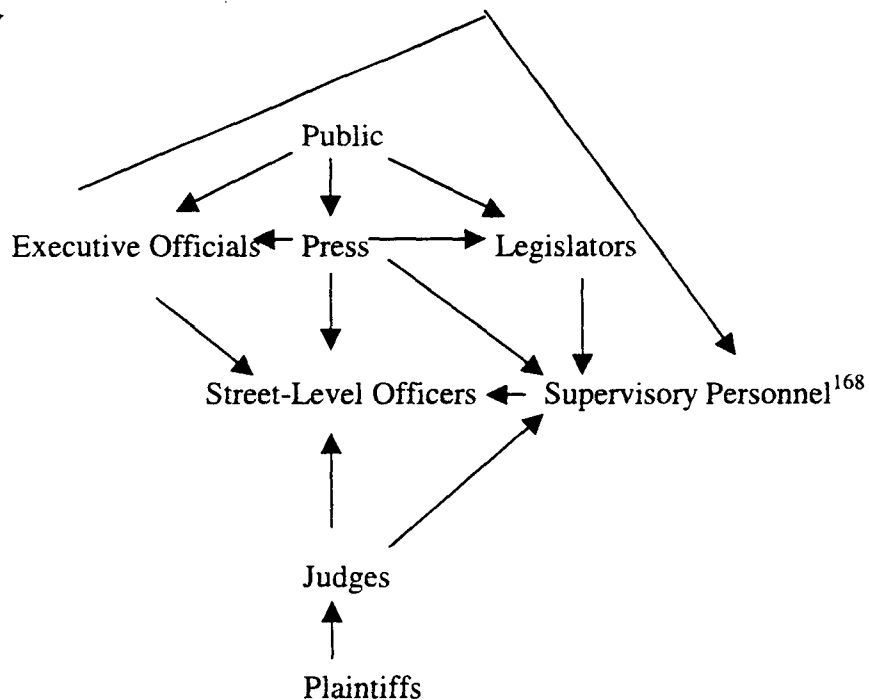
- In many states, the legislatures are being lobbied by ACLU affiliates to collect stop data and make it publicly available. If this data collection is well designed, this could enable plaintiffs to obtain stronger settlements when it comes time to sue the police department.
- The Department of Justice Civil Rights Division is apparently eager to end racial profiling, as is demonstrated by the New Jersey litigation. It may be possible for plaintiffs, upon some showing of discrimination (such as a large number of anecdotes), to convince the Department to investigate the local jurisdiction. If a report is generated, this could provide strong evidence for future litigation.

An Ideal Information And Authority Transfer System

INFORMATION



AUTHORITY



¹⁶⁸ This refers to both low-level supervisors and high-level police officials. In the case of legislators or executive officials, the target will be police structures generally and the highest of officials subject to impeachment or high-level officials, respectively. In the cases of judges, the power may be targeted anywhere, but would be most effective the closer it reaches to the rank and file police officers.

Conclusion

Wilkins in the Context of Institutional Reform Litigation

Wilkins and other DWB cases occupy a special place in the history of institutional reform litigation, mainly because they are one of the first examples of successful reform litigation against police departments by private plaintiffs.

Previous litigation against police has failed because of one core legal doctrine: standing. The standing issue is based on the idea that a person who is mistreated by the police is extremely unlikely to suffer the same treatment again, since people very rarely get arrested, and even more rarely get arrested and mistreated when they commit no crimes. As such, the plaintiff has nothing to gain from the injunction, and so lack a personal stake in the outcome.¹⁶⁹

In the *Wilkins* chronology, standing is most directly addressed in the NAACP lawsuit. In the judge's memorandum of law accompanying her order (hereinafter memorandum) of September 30, 1999, denying summary judgment, she rejected a claim based on *Lyons* that the plaintiffs did not have standing.¹⁷⁰ Distinguishing *Lyons* on the grounds that there was no showing in *Lyons* that the behavior (illegal chokeholds) constituted a regular pattern and practice of the police department in question, the judge

¹⁶⁹ See *Rizzo v. Goode*, 423 U.S. 362, 372-373 (1976) (standing absent because claimed future injury would be committed by unknown police officers to unnamed members of the plaintiff class).

¹⁷⁰ Memorandum at 3-5

recognized that the mere fact of being black and traveling on interstate 95 constituted an immediate risk of harm from the police.¹⁷¹

The judge's ruling implicitly makes findings of fact that it is impossible to avoid disobeying traffic laws and that police have in the past and are likely to continue harassing African-Americans unabated if no injunction is issued.¹⁷² This is remarkable.

¹⁷¹ *Id* at 4.

¹⁷² If the judge followed Supreme Court precedent faithfully, the stronger prong of this implicit finding is the finding of racial discrimination. The Court in *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) did not find an immediate threat of future misconduct partly because the plaintiff had not demonstrated that he would be stopped for a traffic violation (although mainly that he was unlikely to be strangled again). As such, something beyond "everybody is at risk for being stopped for traffic violations" is necessary. In this case, that is an acknowledgement of racial discrimination. Ironically, while *Lyons* is famous for being the case that sanctioned chokeholds, *Lyons* was in fact a DWB case: the plaintiff, a Black man, was stopped for a traffic ticket, put up against the police car, and choked. Before he was choked, he was searched without reasonable suspicion. However, *Lyons* was decided before there was widespread public awareness of police discrimination against African-Americans in traffic stops. In dissent, Justice Marshall recited the incriminating facts:

Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a pat-down search, Lyons dropped his hands, but was ordered to place them back above his head, and one of the officers grabbed Lyons' hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within five to ten seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.

For the first time, the pat answer “well, they will not be affected by this conduct in the future if they do not commit crimes” has been rejected out of hand by a court.

Epilogue

Wilkins v. Maryland was a landmark case in many respects. It opened the door for future litigation on the issue of racial profiling. Because Wilkins was an upper middle class African-American lawyer, he was willing and able to be one of the first plaintiffs in such a case, allowing the ACLU to build public sentiment based on his case to create more litigation. As a method of reform, public agitation to encourage further litigation by plaintiffs such as the Department of Justice and the NAACP has proven very effective here. While the settlement could have been drafted more effectively, it is nearly certain that, if the NAACP litigation ends in settlement, the settlement will be substantially more effective.

Id at 114-115. Perhaps if there had been a more widespread public understanding of the nature of racially discriminatory traffic stops, Lyons would have come out the other way.