

Analyzing Stops, Citations, and Searches in Washington and Beyond

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I. INTRODUCTION

Racial disproportionality¹ in the criminal justice system is a fact.² But the fact of racial disproportionality is the beginning and not the end of the conversation. The fact that blacks are overrepresented in stop,³ arrest,⁴ charge,⁵ pretrial detention,⁶ conviction,⁷ and incarceration⁸ statis-

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1. We follow the convention adopted in the *Preliminary Report on Race and Washington's Criminal Justice System*:

In this Report, we use disproportionality to refer to a discrepancy between reference groups' representation in the general population and in criminal justice institutions. In contrast, we use disparity when similarly situated groups of individuals are treated differently within those institutions, or to refer to overrepresentation of particular groups in the criminal justice system that stems from criminal justice practices or policies.

Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 630 (2012) [hereinafter *Task Force Report*].

2. See generally Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1259 (1982) ("Although blacks comprise roughly one-eighth of the population, they represent about one-half of the prison population."); AM. BAR ASS'N, JUSTICE KENNEDY COMM'N, REPORT WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 48 (2004) ("A report released by the Bureau of Justice Statistics found that a black male had a 1 in 3 chance of being imprisoned during his lifetime, compared to a 1 in 6 chance for a Latino male and a 1 in 17 chance for a white male."), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf; MARK MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY (2007), http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf (discussing incarceration disproportionalities).

3. See, e.g., Angela Y. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431 (1997) ("Empirical evidence suggests that race is frequently the defining factor in pretextual traffic stops.").

4. Cf. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993) (discussing proportion of prison racial disproportionality that might be accounted for by racial disproportionality at arrest).

5. See, e.g., *Task Force Report*, *supra* note 1, at 641 fig.1.

tics demonstrates only correlation and not causation.⁹ A number of commentators caution that disproportionality¹⁰ and the overrepresentation of blacks, Native-Americans, and Hispanics in Washington State's prisons do not prove racial discrimination.¹¹ Further, the fact of disproportionality at each stage of criminal justice processing does not prove that racial discrimination occurs at each particular stage.¹² For example, the observed disproportionality at imprisonment might merely be a downstream artifact of disproportionality at conviction, which might in turn be a

6. See Janet L. Lauritsen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, in THE HANDBOOK OF CRIME AND PUNISHMENT 58, 71 (Michael H. Tonry ed., 1998) (discussing the relative lack of empirical research in this area, with a few prior studies tending "to show that the direct influence of race on pretrial release is insignificant once a defendant's dangerousness to the community . . . and prior history of failing to appear at trial are controlled," but elaborating that "race is related to bail decision making in complex, interactive ways," with one study finding that "dangerousness and severity had stronger influences on bail decisions for whites" but that "in the main they suggest that white defendants receive better returns on their resources." (citation omitted)).

7. See Henry Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. MED. & ETHICS 248, 258 (2006). ("African-Americans constitute about thirteen percent of the U.S. population, or about thirty-eight million people. In an average year, over forty percent of people convicted of felonies in the United States are African-American.").

8. See, e.g., MAUER & KING, *supra* note 2; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 7 tbl.14 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf> (As of December 31, 2010, in state and federal prisons, "black non-Hispanic males had an imprisonment rate (3,074 per 100,000 U.S. black male residents) that was nearly 7 times higher than white non-Hispanic males (459 per 100,000)," and 7.3% of black males between the ages of 30–34 were incarcerated.).

9. Latino and Native-American disproportionality also exists within the criminal justice system, but those populations are not as consistently studied, and there are problems sometimes with data collection. For example, in Washington State, many local jails do not collect ethnic demographic information, which likely leads to an undercount of Latinos and an overcount of whites and probably skews the reported Latino-White disproportionality to be lower than what it actually is. See *Task Force Report*, *supra* note 1, at 639–40. For a general discussion about correlation and causation, see Brett Houlding & Simon P. Wilson, *Considerations on the UK Re-Arrest Hazard Data Analysis*, 10 LAW, PROBABILITY & RISK 303, 320 (2011) ("Confounding occurs when correlation is mistaken for causation, and such occurrences lead to spurious causal relationships.").

10. See, e.g., Clayton Mosher et al., *The Importance of Context in Understanding Biased Policing: State Patrol Traffic Citations in Washington State*, 9 POLICE PRAC. & RES. 43, 44 (2008); Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. C.R. L.J. 219, 239 (2005).

11. Overrepresentation is demonstrated by comparing the prison population with the state population. Compare WASH. STATE DEP'T OF CORR., QUARTERLY FACT CARD (2011), http://www.doc.wa.gov/aboutdoc/docs/msFactCard_003.pdf, with U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS: WASHINGTON (2010), <http://quickfacts.census.gov/qfd/states/53000.html>.

12. Cf. Blumstein, *supra* note 2, at 1261 (exploring the "degree to which . . . [disproportionality] is likely to have emerged as a consequence of racial discrimination . . . compared to the alternative explanation . . . of disproportionate involvement in criminal activity, and particularly in the kind of criminal activity that is most likely to lead to imprisonment and to longer sentences").

downstream artifact of pretrial detention, charge, arrest, or stop.¹³ Closer analysis of each stage is required in order to determine whether observed disproportionality is a product of legally relevant factors as opposed to suggesting more strongly that race plays an illegitimate role.

This Article seeks to examine more closely the disproportionality with regard to traffic stops, citations, and searches. We focus on three reports produced by a team of researchers from Washington State University (WSU) that examine Washington State Patrol traffic stops, citations, and searches.¹⁴

II. ACCOUNTING FOR RACIALLY DISPARATE CITATION RATES AMONG THE WASHINGTON STATE PATROL

In its most recent review of Washington State Patrol traffic stops, a group of researchers from WSU concluded the following with regard to stops and citations: “[W]hen racial differences in compliance with traffic and safety laws are statistically controlled for, there is no evidence of systematic racial bias on the part of the Washington State Patrol at the level of which drivers are issued citations.”¹⁵ With regard to searches, the researchers concluded that, although race continues to correlate with rate of searches, there is

no evidence that these disparities at the bivariate level are the result of intentional or purposeful discrimination, and thus we find no evidence of intentional “racial profiling” (evidence of purposeful or intentional discrimination is generally the first step required by the federal courts when attempting to prove racial discrimination under

13. *Id.* (concluding that 80% of observed disproportionality at imprisonment for certain serious crimes is likely an artifact of differential involvement in crime as measured by arrest). We note though that Blumstein relies on national statistics and that there is significant variation at the state level. See Robert Crutchfield, George Bridges & Susan Pitchford, *Analytical and Aggregation Biases in Analysis of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQUENCY 166, 179–89 (1994) (analyzing issue at the state level and observing that in 1982, only 20% of the Black-White disproportionality in Washington State prisons was an artifact of disproportionality at arrest).

14. NICHOLAS P. LOVRICH ET AL., DIV. OF GOV'TL STUDIES & SERVS., WASH. STATE UNIV., REPORT TO THE WASHINGTON STATE PATROL 1 (2007) [hereinafter 2007 WSP REPORT], available at http://www.wsp.wa.gov/publications/reports/wsu_2007_report.pdf; NICHOLAS P. LOVRICH ET AL., DIV. OF GOV'TL STUDIES & SERVS., WASH. STATE UNIV., ANALYSIS OF TRAFFIC STOP DATA COLLECTED BY THE WASHINGTON STATE PATROL 1 (2005) [hereinafter 2005 WSP REPORT], available at [http://www.policeforum.org/library/racially-biased-policing/supplemental-resources/wsu_2005_report\[1\].pdf](http://www.policeforum.org/library/racially-biased-policing/supplemental-resources/wsu_2005_report[1].pdf); NICHOLAS P. LOVRICH ET AL., DIV. OF GOV'TL STUDIES & SERVS., WASH. STATE UNIV., WSP TRAFFIC STOP DATA ANALYSIS PROJECT REPORT 1 (2003) [hereinafter 2003 WSP REPORT], available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.102.7223&rep=rep1&type=pdf>.

15. 2007 WSP REPORT, *supra* note 14, at 38 (emphasis removed).

the Equal Protection [C]ause of the Fourteenth Amendment of the U.S. Constitution).¹⁶

We do not take issue with the WSU researchers' conclusion in the 2003 report, which stated, "The Washington State Patrol is one of a very few agencies so far studied which does not exhibit a pattern of disproportionality at the stop level."¹⁷ We also agree that the evidence does not support a finding of widespread intentional discrimination on the part of the Washington State Patrol. We disagree, however, with WSU's methodology for accounting for racial disproportionality at the citation level, and we assert that there is a logical fallacy by which they discount racial disproportionality with regard to searches.

We note, though, that traffic stops conducted by the Washington State Patrol constitute only a fraction of the stops that are made by law enforcement agencies throughout Washington State. We applaud the Washington State Patrol for collecting the data and for commissioning reports by a team of researchers from WSU to analyze it. We encourage other law enforcement units throughout the state to do the same.

A. Washington State Patrol Citations

First, it is refreshing that the three reports done by the WSU researchers take seriously the requirement for a nuanced study of the meaning of race within the policing context. Recently, sociolegal scholars have called for empirical studies to be more sophisticated in their considerations of race and racialized data.¹⁸ Law scholars have also started to organize projects that meld critical and empirical approaches to the study of race.¹⁹ Along these lines, we appreciate the researchers' at-

16. *Id.* at 49.

17. 2003 WSP REPORT, *supra* note 14, at 41 (emphasis removed). We do note, as they do, that there are some Autonomous Patrol Areas (APAs) where significant disproportionalities exist. *Id.* We suggest follow up work to examine more closely whether race-neutral factors can account for these disproportionalities.

18. See, e.g., Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 455 (Austin Sarat ed., 2004) (opining that there is little to be gained from treating race as "an easily measured independent variable" within an empirical study); Laura E. Gómez, *Presidential Address*, 45 LAW & SOC'Y REV. (forthcoming 2012); Richard Lempert, *A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948–2009*, 44 LAW & SOC'Y REV. 431, 458 (2010) (calling for those doing empirical work in law to "critically examin[e] the modern jurisprudence on race").

19. One such project is the Critical Race Theory and Empirical Methods Working Group formed at UC Hastings Law School, which brings together critical legal scholars and social scientists to explore methodologies for studying race. On deploying social science data related to policing, see Eric J. Miller, *What Criminal Law and Procedure Can Learn From Criminology: Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31 (2009) (discussing how courts need to be more careful in

tempts to question the significance of the ostensibly racially disparate statistics for traffic citations in Washington State. In particular, the researchers should be commended for their attention to refining their methodology and exploring the benefits of multivariate analysis.²⁰ Again, it is helpful and encouraging that the data from the three separate time periods reveal that, unlike earlier studies in other jurisdictions,²¹ there is no discernible bias with regard to traffic stops (contacts). There were, however, racially disparate results for average citation rates,²² average number of violations per contact,²³ and the seriousness of the violations for which citations were issued.²⁴ Interestingly, in these latter two data

their reliance on social science data to support policing practices); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

20. The researchers, for example, broke out East Indians as a distinct group in the 2007 report. 2007 WSP REPORT, *supra* note 14, at 3. They also were responsive to data suggesting overrepresentation for African-Americans in certain locations and/or at specific times. 2005 WSP REPORT, *supra* note 14, at 11.

21. See, e.g., Clayton Mosher & J. Mitchell Pickerill, *Methodological Issues in Biased Policing Research with Applications to the Washington State Patrol*, 35 SEATTLE U. L. REV. 769, 772–74 (2012) (discussing studies of racial profiling in San Francisco, New York City, Illinois, Kansas, and Minnesota); IAN AYRES & JONATHAN BOROWSKY, ACLU OF SOUTHERN CAL., A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008) (looking at traffic stops in Los Angeles for an eleven-month period between 2003–2004, and finding that blacks and Hispanics were stopped and searched by Los Angeles Police Department officers significantly more frequently than whites), <http://www.aclu-sc.org/downloads/2/681086.pdf>; DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999) (looking at data reflecting racial profiling of Hispanics in Illinois and blacks in Pennsylvania and Maryland), <http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways>; 2005 WSP REPORT, *supra* note 14, at 27–28.

22. 2007 WSP REPORT, *supra* note 14, at 24 (“Black drivers were somewhat more likely to be issued traffic citations . . . than were White motorists in 23 of 34 APAs, Native Americans were more likely to be issued citations than Whites in 29 APAs, Asians were likewise more likely than Whites to be issued citations in 20 APAs, East Indians were likely to suffer the same fate in 20 APAs, and finally Hispanics were more likely to receive citations in 29 APAs across the state.”); 2005 WSP REPORT, *supra* note 14, at 29 (“The findings reported . . . that Blacks were more likely to be issued citations than Whites in 27 of 40 APAs, Native-Americans were more likely to be issued citations than Whites in 38 APAs, Asians in 25 APAs, Hispanics in 39 APAs, and East Indians in 26 APAs.”); 2003 WSP REPORT, *supra* note 14, at 79 (“Blacks received a greater number of citations in 12 APAs, Native Americans received a greater number of citations in 15 APAs (and a lower number of citations in one APA), Asians received a significantly higher number of citations in 15 APAs, while Hispanics received a significantly greater number of citations in 29 APAs.”).

23. For the 2001–2002 data, average citation rates per contact were as follows: Asians (1.71), Whites (1.74), Blacks (1.94), Hispanics (1.98), and Native-Americans (2.05). See Mosher et al., *supra* note 10, at 46; see also 2007 WSP REPORT, *supra* note 14, at 26 (discussing the greater average citation rates per contacts for blacks, Hispanics, and Native-Americans); 2005 WSP REPORT, *supra* note 14, at 30–31 (same).

24. For the 2001–2002 data, citation seriousness rates were as follows: Asians (.14), Whites (.19), Blacks (.31), Hispanics (.33), and Native-Americans (.45). Mosher et al., *supra* note 10, at 46. The 2005 and 2007 reports contained similar seriousness results. See 2005 WSP REPORT, *supra* note 14, at 32 (“East Indian[s] . . . have the lowest average seriousness score calculated at .09, followed by Asian drivers computed at .13 and White drivers figured at .17. In contrast, the average serious-

categories, Asians and East Indians did not have a greater than average number of citations per contact or more serious citations than whites, but blacks, Hispanics, and Native-Americans did. Perhaps, even more ironically, when the studies applied multivariate analysis, including regression analyses that factored in interaction terms for race, citation disparities substantially dissipated for most groups and Autonomous Patrol Areas (APAs), but not for Asians.²⁵

Breaking out the distinctions between citations, average citations per contact, and seriousness of violations among different racial groups is potentially very helpful for those committed to ensuring particularized, antiracist policing. But the researchers' ultimate determination that bias may not explain disproportionate citation for various minority groups—when the number of violations and violation seriousness is taken into account—is problematic given that the data often vary for particular racial groups and that alternate explanations for the racially disparate variances within the reports have limited potential.²⁶

With regard to our analysis of the citation data, however, we acknowledge both a limit and a theoretical commitment that shapes our perspective and understanding. First, given the vastness of the data collected and the myriad types of dissimilar findings that are experienced across the various racial groups, it is important to be measured in our criticism. This is especially true given that a number of our concerns stem not from the findings of the three reports, but from a search for potentially alternate explanations for racial disparities. Second, we think it is important to mention that while we do accept the challenge to assess the research on its own merits, we do so with a perspective that addition-

ness score for Hispanic drivers was .27, for Black drivers it was .29, and for Native American drivers the much higher rate of .43 was calculated.”); *see also* 2007 WSP REPORT, *supra* note 14, at 28–29 (reporting similar results).

25. *See* Mosher et al., *supra* note 10, at 51 (discussing 2001–2002 data); 2007 WSP REPORT, *supra* note 14, at 30–35; 2005 WSP REPORT, *supra* note 14, at 38–40.

26. Here we agree with prominent researcher of racial profiling, Professor David A. Harris. In his assessment of the Lamberth 2002 New Jersey Turnpike study, which determined that speeding by black drivers led them to be stopped more often than members of other racial groups, Professor Harris opined:

Since everyone violates some aspect of the incredibly detailed traffic code during even the shortest drive, police must therefore decide whom they will stop. Police in New Jersey (and everywhere else) must use discretion when they make this decision. The fact that some groups may be over-represented among people who violate one particular kind of traffic law hardly means that they are the only ones who could (or do) get stopped. Speeding is only one possible violation among many. The bottom line is simple. Police officers have always known that the traffic code is law enforcement's friend. It allows an officer to pull over virtually any driver, almost any time, because everyone breaks the traffic laws.

David A. Harris, *The Reality of the Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71, 95 (2003).

ally brings a critical race—rather than purely empirical—focus to bear in analyzing the data and methods.

Initially, one of our concerns relates to how the traffic stops might have been coded for race and racial identification. The 2005 report data, however, referenced the use of audits that confirmed the consistency of the racial identification in the study.²⁷ A second concern about the way the reports consider race results from one of the explanations for disproportionate citation rates. The researchers essentially rely on claims related to driver behavior across race and ethnicity to explain differences in citation rates. For example, in the 2007 report, when the average number of violations and violation seriousness is controlled for, and in the single recorded violation condition, racial disparities in citations across APAs substantially disappear for all groups except Asians (for both controls in 5 APAs).²⁸ The report surmises that the higher rate for Asians in a number of APAs is largely explainable as a result of more contacts due to speeding violations.²⁹ The researchers also refer to data in the 2003 and 2005 reports indicating that certain minority groups wear seat belts less often³⁰ and have differential rates of compliance with traffic and safety laws.³¹

Furthermore, the reports cite data from other states that indicate certain minority groups may have different behaviors with respect to speeding and other forms of aggressive driving.³² Only one of the studies, a 1999 seat belt study for traffic fatalities and alcohol-related incidents, involved additional data from Washington State.³³ Moreover, there were multiple speeding studies that reached different conclusions with regard to the existence of race-based speeding differences.³⁴ These types of behavioral data, if more robust, could significantly assist researchers in more definitively explaining the existence of citation differences across racial groups.

27. 2005 WSP REPORT, *supra* note 14, at 4–8.

28. 2007 WSP REPORT, *supra* note 14, at 33.

29. *Id.*

30. Mosher et al., *supra* note 10, at 45; 2003 WSP REPORT, *supra* note 14, at 22–30, 32.

31. 2005 WSP REPORT, *supra* note 14, at 34.

32. *Id.* at 27–29.

33. 2003 WSP REPORT, *supra* note 14, at 36–37.

34. The Lamberth studies in New Jersey (1996) and Maryland (1997) found no racial difference in speeding. *See* 2005 WSP REPORT, *supra* note 14, at 27, 92. The Johnson study of the New Jersey Turnpike in 2001 found that blacks were more likely to speed in areas where the speed limit was 65 miles per hour, but not 55 miles per hour. *See id.* at 10, 92. An ACLU report on profiling from the 1990s also indicated that, at the time, there was little proof of racially specific driving habits. *See* HARRIS, *supra* note 21 (“[T]here is no study or data that supports the view that racial minorities violate traffic laws in any greater number than whites.”).

Currently, however, the cited research provides more questions than answers for the types of citation disparities discovered in Washington State. In a discussion within the 2003 report, the researchers looked at data from external studies where the research was seven years old or older, but only one of these studies took place within Washington State.³⁵ For these external studies, it is not clear to us whether the researchers used multivariate regression analyses or precisely how race was considered. From the critical race perspective, this ambiguity produces at least two concerns. First, with the exception of the Engel study³⁶ cited in the 2003 report, very few of the studies seem to account for relevant intra-race distinctions. An important question is whether the other cited studies treat race as a monolith when making claims about driving behavior without routinely asking about the significance of categories such as gender and age. This call for intersectional analysis of data is consistent with a primary concern within the critical race discourse: that law be sensitive to overlapping and reinforcing forms of subordination in operation for persons who simultaneously inhabit multiple minority identity categories.³⁷

While the Washington reports do account for multiple factors,³⁸ they also do not provide intersectional data broken out specifically for the citation data in each of the three studied periods and for identity categories such that one could analyze results at the intersection of motorists' race, gender, and age.³⁹ Such data would be helpful in assessing just how

35. 2003 WSP REPORT, *supra* note 14, at 118–23.

36. *Id.* at 118.

37. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

38. For example, the reports demonstrate that women as a group received fewer citations, and younger drivers received a greater number of citations. See Mosher et al., *supra* note 10, at 49. These findings are consistent across the reports. 2007 WSP REPORT, *supra* note 14, at 30; 2005 WSP REPORT, *supra* note 14, at 38; 2003 WSP REPORT, *supra* note 14, at 101.

39. There is, however, some different treatment of multifactor analysis in the reports. The 2005 and 2007 reports include gender and age, as well as race data, but provide no significant intersectional data. See 2005 WSP REPORT, *supra* note 14, at 36–38; 2007 WSP REPORT, *supra* note 14, at 29–30. In the separate article reviewing the 2000–2001 data, the researchers also reported on the effects of race alone on citation rather than race mixed with interaction terms. Mosher et al., *supra* note 10, at 50 tbl.3. But when one reviews the 2003 report itself, there are references to statistics at the intersection of race and gender and race and age for contact data. See 2003 WSP REPORT *supra* note 14, at 48–50. For example, for contacts, “Approximately 30% of White drivers and Asian drivers stopped by WSP troopers were females, while approximately 25% of Black drivers and only 18.6% of Hispanic drivers contacted were female in gender. These statewide gender differences in the proportion of those contacted by WSP officers analyzed by race and ethnicity are fairly consistent across the 40 APAs in Washington state.” *Id.* at 48. It would have been very helpful to have such data for the citation stage. This failure to carefully look at the identity intersections produces criminology studies with confounding results. See also Edward L. Glaeser & Bruce Sacerdote, *The*

much race and gender—both separately and together—may figure into citation decisions during stops. For instance, the reports indicated that women are stopped and cited less than men.⁴⁰ As stated earlier, some racial groups, however, have higher and more serious citation counts. The next logical question then is whether women of color have citation counts more consistent with female gender numbers or with male race numbers.

There is a question about the role racial bias plays in constructing an understanding of driver behavior. A recent study at the University of Kansas discusses this question.⁴¹ The study focused on a survey of 2500 drivers within the Kansas City metro area and two different types of traffic stops. The researchers distinguished between traffic-safety stops, which pertain to serious traffic-safety violations, and investigatory stops, which involve minor violations such as driving a few miles over the posted speed limit. The researchers found the following:

[For] traffic safety stops, police do not stop African Americans at higher rates than whites and do not carry out investigatory intrusions of African Americans at higher rates than whites. But in investigatory stops, police stop African American drivers at rates dramatically higher than whites and more frequently subject African Americans than whites to such investigatory intrusions as questioning and searches.⁴²

The data suggest that the type of violation may dictate when race is a consideration. This finding is consistent with the unhelpful Supreme Court jurisprudence in this area. In the well-known case of *Whren v. United States*, the Court determined that where the police had reasonable cause to believe an actual traffic violation had been committed, it did not

Determinants of Punishment: Deterrence, Incapacitation and Vengeance, HARV. INST. OF ECON. RES. (2000) (study of accidental vehicular killings where defendants were punished more harshly for killing women and less harshly for killing blacks, but there was no data on black women victims), available at <http://www.economics.harvard.edu/pub/hier/2000/HIER1894.pdf>.

40. See 2007 WSP REPORT, *supra* note 14, at 30 (“WSP traffic stop data for the period of November 2005 through September 2006 indicated with respect to gender that males were significantly more likely to be issued a citation in 21 of 34 APAs.”); 2005 WSP REPORT, *supra* note 14, at 38 (“[F]emales were significantly less likely to be issued a citation in 31 of 40 APAs.”); 2003 WSP REPORT, *supra* note 14, at 74 (“Gender also has a strong effect on citation; females are significantly less likely to be cited in 30 of the 40 APAs.”).

41. Charles R. Epp et al., *Inventing the Investigatory Stop*, in PULLED OVER: HOW RACE MATTERS IN POLICE STOPS (manuscript on file with authors) (forthcoming 2013); Donald P. Haider-Markel et al., *Constructing Distrust: The Consequences of African-American Encounters with Police* (discussing the University of Kansas research and how discretionary police stops affect driver distrust of police), available at <http://2012sppconference.blogs.rice.edu/files/2012/02/Haider-Markel-et-al-SPPC-2012.pdf>.

42. Epp et al., *supra* note 41.

matter that the police also had other improper motivations for the stop.⁴³ Such a rule essentially empowers police to profile based on race just as long as officers can articulate any nominal violation of the law.⁴⁴

Based on the study from the University of Kansas researchers and the holding in *Whren*, one might expect there to be higher numbers of stops (and potentially citations) for blacks for low-grade speeding offenses and seat belt violations (in jurisdictions where seat belt offenses are labeled as a safety or investigatory offense). Study results and precedents such as these, then, generally support the contention that police bias in enforcement for legitimate but very minor traffic violations may also account for some of what studies capture as racialized driver behavior (e.g., claims that blacks or other persons of color are more serious offenders or more frequent offenders for certain types of offenses).⁴⁵

The three Washington State Patrol reports find an increasing number of serious violations for citations issued to certain minorities without breaking out a typology similar to that done in the University of Kansas study. Instead, in the 2007 report, for example, there are data for APAs 6 (South Seattle) and 11 (Yakima) that indicated overrepresentation of blacks when compared to whites in APA 6 (and APA 23).⁴⁶ In addition, data suggest disparities for Hispanics in APA 11 when compared to whites where the benchmarks were related to daylight stops, radar use, and collision data.⁴⁷ Data from the 2005 report also indicated disparities for Hispanics in the same APAs.⁴⁸

In those APAs, the researchers attempted to discern the importance of location and the reason for the stop. For blacks, the report found some difference in both location of the stops and reasons for the stops. The researchers, however, indicated that the location differences did not indicate systemic targeting and made no reference to the significance that blacks are less likely to be contacted via radar patrols and are more likely

43. *Whren v. United States*, 517 U.S. 806 (1996).

44. For analyses and criticisms of the *Whren* opinion, see David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Bignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010).

45. For discussions on the importance of using benchmarks in racial profiling data collection, see Harris, *supra* note 26, at 84–86; Mosher & Pickerill, *supra* note 21, at 779–82. Cf. 2005 WSP REPORT, *supra* note 14, at 10–11 (discussing differing viewpoints on benchmarks and discussing the report's selection of archival, rather than observational, benchmarks).

46. 2007 WSP REPORT, *supra* note 14, at 17–22.

47. *Id.* at 20. The 2007 report performed this same detailed analysis for APA 23 (Kelso) and found that blacks were again more likely to be stopped on I-5, and they were more likely to be contacted for speeding (through combined categories of speeding) compared to whites. *Id.* at 22–23.

48. 2005 WSP REPORT, *supra* note 14, at 38–40.

to be targeted due to lane and HOV violations.⁴⁹ With regard to violation difference in general, the report suggests that stop data should be viewed cautiously because they may contain errors.⁵⁰ For APA 11, the data indicated that Hispanics were less likely to be cited for radar speeding violations and more likely to be cited for lane violations.⁵¹ Measures such as these indicate a need for a more nuanced study to determine when, in fact, race-based differences may be evidence of bias. A more particularized study also would require a discussion of when claims about difference should be discussed as a function of officer behavior, in addition to or instead of driver behavior, for certain groups and certain offenses. Some of the focus group data gathered by the researchers further demonstrate a need for such analysis.

One of the more disturbing citation results is consistent across the reports—minorities are more likely to be cited than whites, and the disparity results from differential rates of violating traffic laws. But the researchers' description of focus group comments from the 2005 report complicates this understanding. The description of the focus group comments starts with the premise that racial differences in traffic law compliance exist among drivers⁵² and that officers are aware of these differences.⁵³ To the extent differential offending may be partially informed by license and insurance offenses, which implicate socioeconomic class, what is reflected as a race-based violation potentially arises as a function of minorities being overrepresented among the poor.⁵⁴ While this point about class is helpful as an explanation for the connection between driver identity and violation behavior, claims that ostensibly implicate links between traffic violation and identity-based stereotypes are more problematic. For example, consider the following excerpt:

Troopers and sergeants taking part in the focus groups also offered useful suggestions with respect to explaining the higher rate of citation documented for Asian drivers. Some officers volunteered the comment that Asian drivers were not as “accomplished” in their driving skills as others and they were disproportionately responsible for accidents. As one WSP sergeant noted, “I’d take ten white drivers, ten black drivers, ten Asian, ten Hispanic drivers . . . I would

49. 2007 WSP REPORT, *supra* note 14, at 19.

50. 2005 WSP REPORT, *supra* note 14, at 6–7.

51. *Id.* at 34–35 (presenting quantitative data of differential rates of citation among minority groups for various offenses related to driving under the influence, seat belt violations, failure to maintain insurance, and license offenses).

52. *Id.* at 35.

53. *Id.*

54. *Id.* at 34–36.

say the highest percentage of lower driving skills lies within the Asian.”⁵⁵

The comment is disturbing because it taps into what many will regard as a stereotype—a “false or misleading association[] between a group and an attribute that [is] held by their subjects in a rigid manner, resistant to counterevidence.”⁵⁶—with regard to Asians and poor driving.⁵⁷ Moreover, without referencing the problematic nature of the statement, the report refers to the comment as “useful.”⁵⁸ Another focus group participant indicated that “[t]here’s a large population of Asians in our district Unfortunately, they’re not always the best drivers . . . they cause a huge amount of the accidents.”⁵⁹ Again, rather than ask about the potential shaping function on the behavior of police officers who subscribe to such beliefs, the report instead merely confirms that Asians had “the largest disparity between self-initiated and accident contacts for any of the five minority groups.”⁶⁰ There were also comments claiming that Asian drivers were more argumentative when stopped and that there were language barriers.⁶¹

Comments of this nature were not made about only Asians. In addressing the driving habits of Native-Americans and Hispanics, officers opined,

Every fifth person that we stop that is Native American will either be suspended, have a warrant, or be drunk . . . if we stop a white person, it would probably be every twentieth car we contact, at night-time, that would be suspended, have a warrant, or be drunk.⁶²

Another trooper commented as follows: “I remember when I first got here, a lot of the vehicles, especially in the Hispanic community, either

55. *Id.* at 43–44.

56. Lawrence Blum, *Stereotypes and Stereotyping: A Moral Analysis*, 33 PHIL. PAPERS 251, 288 (2004).

57. This notion of stereotype implicates the understanding of a false belief about a group. See Kwame A. Appiah, *Stereotypes and the Shaping of Identity*, in PREJUDICIAL APPEARANCES: THE LOGIC OF ANTIDISCRIMINATION LAW 64 (Robert Post ed., 2001). Another definition of stereotype raises the issue of “false positives” between some ascribed group behavior and a nonconforming group member. Professor Appiah has also described this belief about stereotyping as follows:

[T]he idea of ascribing to an individual a property in the belief that it is a characteristic of some social group to which she belongs, where there is indeed a statistical correlation between that property and being a member of the group, but where, in fact, she does not have that property.

Id. at 63.

58. 2005 WSP REPORT, *supra* note 14, at 43.

59. *Id.* at 44.

60. *Id.*

61. *Id.*

62. *Id.* at 35.

they were not licensed or driving on a suspended license. I mean, a *majority* of them.”⁶³

One might argue that there is minimal significance of the focus group comments given that data reflect differential citation among members of various racial groups, and there are no significant racialized disparities for contacts. Moreover, though these comments reflect prevalent stereotypes, just because one references a stereotype does not mean that one will act on that prejudice.⁶⁴ The problem is that the report presupposes that such comments are proof of racial differences in traffic violations. The comments could, however, be regarded as reflective of attitudes that inform the pre- and post-stop expectations of officers.⁶⁵ Even a finding that there is no significant evidence of profiling in contacts does not absolutely lead to a conclusion that there is no bias in the number of citations.

By engaging in oversimplified race-based stereotyping, the Washington State Patrol undermines faith in the assertion that the racially disparate citation data are not, in some way, evidence of bias. The researchers’ somewhat uncritical assessment of the meaning of the focus group commentary also raises a concern about whether sufficient attempts have been made to investigate explanations for citation differences not tied to stereotypes. It is not absurd to question whether the researchers would at least consider the effect of race bias by patrols. The researchers do, at times, make other such normative-leaning claims that are not supported by robust data. For example:

Although we do not have strong data to support this speculation, it is possible that the high citation rate for Asian drivers is related to the fact that younger Asians are driving at higher speeds than Whites, and thus are more susceptible to citation. This high citation rate for Asians may also be related to the WSP attempting to deter the “street racing” phenomenon, which has become a problem at the

63. *Id.*

64. See Blum, *supra* note 57, at 254 n.3 (“Someone might regard . . . Asians as bad drivers, yet not feel negatively toward those groups. Moreover, even if a stereotype is negatively evaluatively charged, for a particular carrier of that stereotype, this charge need not always trigger the corresponding negative affect.”); see also Appiah, *supra* note 57, at 67 (“The problem is not stereotyping but bigotry—that is unjustified hatred or contempt . . . Bigotry often leads to stereotyping and stereotyping can lead to bigotry. But each can stand alone.”). Professor Appiah has, however, made a stronger claim in this area that “there is no reason to suppose that normative stereotypes as such must be wrong, or that public actions grounded on them are to be criticized, even where they involve differences in treatment that are judged to be invidious.” Appiah, *supra* note 57, at 65.

65. Cf. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012) (arguing that “implicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways”).

national level and in the Pacific Northwest . . . and which has been associated with young Asian males.⁶⁶

Focus group data of the kind collected in the 2005 report produce at least two other issues. First, given the persistence of the differential citing of Asian drivers and comments implicating Asian driver stereotypes among the Washington State Patrol, one normative question that arises is whether Asians in Washington State, like blacks in some other jurisdictions, suffer the consequences of being the most “otherized” minority population.⁶⁷ This question seems especially relevant where the 2005 report says, “[I]t is important to reiterate that when racial differences in compliance with traffic and safety legislation are statistically controlled for, there is not a single autonomous patrol area in which Blacks, Native Americans, Hispanics, or East Indians are significantly more likely to be issued citations.”⁶⁸ Second, one wonders how such a finding would inform data analysis of the current statistics and research design moving forward. Much like the researchers, one could look at the citation data and focus group information and decide that, in the absence of greater proof of bias, the most likely explanation for disparate citation practices is driver behavior. In the alternative, where one brings a critical skepticism to racially disparate results even where proof of animus is ambiguous,⁶⁹ one could decide that at this point it would be premature to eliminate bias as being at least partially responsible for the consistent citation disparities. Further, one embracing this latter view of the data would also be a bit more hesitant to declare that the findings across the reports produce little evidence of systemic problems. At bottom, then, the citation results are opaque enough to support multiple views on the operation of bias.

B. Seeking a Deeper Understanding of Methodological Choice

Our final concern, which is related to the strength of claims discounting racial bias as an explanation for higher citation rates for certain minorities, pertains to the methodology used by the researchers. First, related to all three data sets, researchers sought to explain the existence of bias by reviewing results for citations with only one recorded viola-

66. 2007 WSP REPORT, *supra* note 14, at 74.

67. Lenese C. Herbert, *O.P.P.: How “Occupy’s” Race-Based Privilege May Improve Fourth Amendment Jurisprudence For All*, 35 SEATTLE U. L. REV. 727, 738 (2012) (noting that “the disfavored status as nonwhites erroneously relegates [blacks] to the low status of The Other, the outsider”).

68. 2003 WSP REPORT, *supra* note 14, at 45 (emphasis removed).

69. *See* Smith & Levinson, *supra* note 65, at 801 (arguing that situational cues, rather than animus, often trigger racial stereotypes resulting in unintentional biased decision-making).

tion. For example, the 2003 report found the following results when there was only one recorded violation condition:

Th[e] table reveals that Black drivers who have committed only a single violation are significantly less likely to be cited in two APAs . . . and are significantly more likely to be cited in three APAs Native-American drivers who committed only a single violation are significantly less likely to receive a citation in four APAs . . . and are significantly more likely to be cited in four APAs Hispanics who have committed a single violation are significantly more likely to be cited in seven APAs Asians who have committed a single violation are more likely to be cited in 14 APAs.⁷⁰

In the 2007 report, in the one recorded violation condition, the researchers also found that blacks, Hispanics, and Native-Americans were not more likely to be cited in any of the thirty-four APAs, East Indians were significantly more likely to be cited in two APAs, and Asians were significantly more likely to be cited in five APAs.⁷¹

We question why the researchers find the one recorded violation condition so helpful in a data set where the most concerning racially disparate result has to do with multiple citations and citation seriousness. In other words, how is it that this data point should be considered in light of the other data of racial disparity? Is the one recorded violation condition helpful to explain what is going on in the more complex contacts? It seems to be an overstatement to make the claim that reduced racial disparities in the one recorded violation condition is supported by the claim that “they [the data] do not indicate the operation of systemic bias in citing minorities who have only a single violation recorded by the WSP.”⁷² We argue that one question in particular requires more consideration: at what threshold, and in what violation conditions, should one be comfortable speaking to the existence of structural or systemic forms of bias?

Finally, the researchers make a second claim with regard to potential bias that is problematic when analyzing the citation “not issued” condition. They assert that there is no bias or “piling on” evident in this condition because minorities who receive no citations do not have higher average violations and do not have violation seriousness numbers that are much lower than the averages for these measures in the noncitation condition for whites. Essentially, the researchers are constructing bias in the noncitation condition as evident only where minorities would need to be far more “innocent” than whites in order not to be cited. In the 2003 re-

70. 2003 WSP REPORT, *supra* note 14, at 84–85.

71. 2007 WSP REPORT, *supra* note 14, at 37.

72. *Id.*

port, for each minority group in all the APAs, violation numbers for the noncited were similar to or higher than the numbers of noncited whites.⁷³

This claim leads to two questions. First, why would disadvantageous treatment in violations be assessed as a function of the noncitation condition, especially where troubling issues seem to be in the cited condition? Second, are there other ways we could think about analyzing race differentials through a different lens other than “bolstering” or piling on violations per citation? For example, the report has already noted the potential socioeconomic explanation for the racialized violation disparity. Another explanation, at least for certain drivers, could pertain to police behavior once they have made a decision to stop a car or issue a citation. These questions are meant neither to be exhaustive nor to suggest fundamental flaws with the citation data and methodology. We merely seek to fully understand the connection between the non-, one-, and multiple-citation conditions, and to explore whether there are any other measures or conditions that would help us further assess the racial disparities observed in the broadest portions of the citation data.

III. WASHINGTON STATE PATROL SEARCHES

Although the Washington State Patrol data divide searches into seven categories, the WSU researchers chose to group them into three general categories: No Search; Low-Discretion Search (Search Incident to Arrest, Impound/Inventory Search, Warrant Search); and High-Discretion Search (Consent Search, K9 Search, Terry (Pat Down) Search).⁷⁴ This strikes us as a generally useful way to differentiate searches because of the difficulty of tracking trends or patterns within the seven search categories; we are curious, however, about what the more differentiated data would show, especially with regard to the different kinds of high-discretion searches. We were troubled by the way the 2003 report discusses the lack of data regarding the frequency of trooper requests to conduct a search that is refused by the driver in the absence of probable cause. Without any data, the following hypothetical is posed:

If, hypothetically, White drivers and Asian drivers who refuse to consent searches more often than Hispanics, Blacks and Native Americans, the disparities in discretionary searches would be diminished and we would conclude that troopers do not use their own dis-

73. 2003 WSP REPORT, *supra* note 14, at 84–86.

74. 2007 WSP REPORT, *supra* note 14, at 42; 2005 WSP REPORT, *supra* note 14, at 50; 2003 WSP REPORT, *supra* note 14, at 92 (This report characterized the Low-Discretion Search category as Nondiscretionary Searches).

cretion to target any particular racial or ethnic groups. This is an empirical question for which we presently have no data, however.⁷⁵

One recent study found no difference between races or levels of income with regard to whether a person felt free to terminate their encounters with the police.⁷⁶ The subsequent 2005 report stated that “troopers consistently told us that very few people actually refuse when asked to consent to a search.”⁷⁷ Therefore, for the researchers to suggest, without data, that they lack information that might reveal the problem does not really exist is unsupported and misleading.⁷⁸

During the 2003, 2005, and 2007 reports, searches occurred in 3.5%, 3.5%, and 3.3% of all Washington State Patrol contacts with drivers in the respective periods.⁷⁹ Of these searches, the following table breaks down the frequency by type of search—low discretion or high discretion (using the typology in the reports).

Table 1. Type of search⁸⁰

| | Mar. 2002– Oct. 2002 | July 2003– June 2004 | Nov. 2005– Sept. 2006 |
|-----------------|-------------------------|-------------------------|--------------------------|
| Low discretion | 77% | 87% | 88% |
| High discretion | 23% | 13% | 12% |

One immediate observation is that, as a proportion of total searches, high-discretion searches dropped from 23% during the first observation period to 13% and 12% in the later two periods. Given some of the problems (e.g., improperly coded searches, including the search field left blank) noted by the researchers in the 2003 and 2005 reports,⁸¹ it is not

75. 2003 WSP REPORT, *supra* note 14, at 95.

76. David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 53 (2009).

77. 2005 WSP REPORT, *supra* note 14, at 68.

78. *Id.*; 2003 WSP REPORT, *supra* note 14, at 95.

79. 2003 WSP REPORT, *supra* note 14, at 93 tbl.S-1; 2005 WSP REPORT, *supra* note 14, at 51 tbl.S-1; 2007 WSP REPORT, *supra* note 14, at 44 tbl.18.

80. Because the data come from different length time periods, we include in the table the frequency of search expressed as a percentage of total observations. For the period of March 2002 through October 2002, the total observations were 677,514; low-discretion searches were 18,062; and high-discretion searches were 5331. 2003 WSP REPORT, *supra* note 14, at 93 tbl.S-1. From June 2003 through June 2004, total observations were 1,103,121; low-discretion searches were 32,552; and high-discretion searches were 4965. 2005 WSP REPORT, *supra* note 14, at 51 tbl.S-1.

81. See 2005 WSP REPORT, *supra* note 14, at 47-48 (discussing data in the 2003 and 2005 reports).

apparent that anything conclusive can be stated with regard to why the proportion of high-discretion searches has dropped.

Table 2. Frequency of search by race, expressed as a percentage⁸²

| | Mar. 2002– Oct. 2002 | | July 2003– June 2004 | | Nov. 2005– Sept. 2006 | |
|---------------------|-------------------------|------|-------------------------|------|--------------------------|------|
| | Low ⁸³ | High | Low | High | Low | High |
| White | 2.5 | .4 | 2.6 | .4 | 2.6 | .3 |
| Black | 6.6 | 1.0 | 5.6 | 1.0 | 5.3 | .7 |
| Native- American | 12.9 | 2.1 | 11.8 | 1.6 | 12.7 | 1.4 |
| Hispanic | 5.7 | 1.0 | 5.6 | .9 | 5.4 | .9 |
| Asian/Pacific | | | 2.3 | .4 | 2.3 | .3 |
| East Indian | .9 | .3 | 1.0 | .2 | .7 | .1 |

Table 3. Disproportionality ratio in comparison to white drivers⁸⁴

| | Mar. 2002– Oct. 2002 | | July 2003– June 2004 | | Nov. 2005– Sept. 2006 | |
|---------------------|-------------------------|------|-------------------------|------|--------------------------|------|
| | Low | High | Low | High | Low | High |
| White | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 |
| Black | 2.6 | 2.5 | 2.2 | 2.5 | 2.0 | 2.3 |
| Native- American | 5.2 | 5.3 | 4.5 | 4.0 | 4.9 | 4.7 |
| Hispanic | 2.3 | 2.5 | 2.2 | 2.3 | 2.1 | 3 |
| Asian/Pacific | | | .9 | 1 | .9 | 1 |
| East Indian | .4 | .8 | .4 | .5 | .3 | .3 |

For low-discretion searches during the three respective time periods, blacks were 2.6, 2.2, and 2.0 times more likely to be subject to a low-discretion search than whites; Native-Americans were 5.2, 4.5, and 4.9 times more likely to be subject to a low-discretion search than whites; Hispanics were 2.3, 2.2, and 2.1 times more likely to be subject

82. 2007 WSP REPORT, *supra* note 14, at 44 tbl.19; 2005 WSP REPORT, *supra* note 14, at 52 tbl.S-2; 2003 WSP REPORT, *supra* note 14, at 95 tbl.S-3.

83. The later 2005 and 2007 reports substituted “low discretion” for “nondiscretionary searches,” which was used in the 2003 report. See 2005 WSP REPORT, *supra* note 14, at 50; 2003 WSP REPORT, *supra* note 14, at 92.

84. 2003 WSP REPORT, *supra* note 14, at 95 tbl.S-3; 2005 WSP REPORT, *supra* note 14, at 52 tbl.S-2; 2007 WSP REPORT, *supra* note 14, at 44 tbl.19.

to a low-discretion search than whites; Asian/Pacific Islanders were searched about the same rate as whites; and East Indians were searched at lower rates than whites.⁸⁵

For high-discretion searches during the three respective time periods, blacks were 2.5, 2.5, and 2.3 times more likely to be subject to a high-discretion search than whites; Native-Americans were 5.3, 4.0, and 4.7 times more likely to be subject to a high-discretion search than whites; Hispanics were 2.5, 2.3, and 3 times more likely to be subject to a high-discretion search than whites; Asian/Pacific Islanders were searched about the same rate as whites; and East Indians were searched at lower rates than whites.⁸⁶

The 2003 report stated:

It is noteworthy, however, that the influence of race would not seem to depend on whether a trooper conducts a nondiscretionary or discretionary search. The coefficients for Black, Hispanic and Native American drivers remain positive and at about the same magnitude for both categories of searches. **This finding of no difference in rate of search of minority drivers between discretionary and nondiscretionary searches suggests that where WSP officers have the most discretion in choosing to conduct a search, they do not act any differently toward different racial groups than when they act with no (or with little) discretion.** This finding in turn suggests that while there appear to be systematic disparities in the probability that these three minority groups will be searched compared to Whites and other racial groups, those disparities do not seem to be the result of the intentional bias of troopers.⁸⁷

The 2005 and 2007 reports repeated the assertion that because the magnitude of the disproportionality is roughly the same for low- and high-discretion searches, it reflected consistent trooper behavior toward different racial groups regardless of search, which is inconsistent with a finding of bias.⁸⁸

This comparison between the conclusions drawn based on nondiscretionary or low discretion and high discretion is mistaken. The very reason for differentiating between the two is that, for low-discretion searches, presumably very little discretion is allowed because there is a triggering event (e.g., arrest, impound/inventory, or warrant) that leads to the search. The events or circumstances that trigger the low-discretion

85. 2003 WSP REPORT, *supra* note 14, at 95 tbl.S-3; 2005 WSP REPORT, *supra* note 14, at 52 tbl.S-2; 2007 WSP REPORT, *supra* note 14, at 44 tbl.19.

86. 2003 WSP REPORT, *supra* note 14, at 95 tbl.S-3; 2005 WSP REPORT, *supra* note 14, at 52 tbl.S-2; 2007 WSP REPORT, *supra* note 14, at 44 tbl.19.

87. 2003 WSP REPORT, *supra* note 14, at 101.

88. 2007 WSP REPORT, *supra* note 14, at 49-51; 2005 WSP REPORT, *supra* note 14, at 52.

searches presumably are not connected to race. If someone is stopped for a DUI and arrested, and there is no suitable unimpaired driver, a search is supposed to occur. In contrast, high-discretion searches occur in the absence of these specific triggering events and require further investigation.⁸⁹

The 2005 and 2007 reports included a more detailed analysis that tried to control for more factors in order to see if the racial disproportionalities can be accounted for by nonracial factors.⁹⁰ The 2007 report predicted search rates for eighteen- and fifty-year-old drivers for “stops involving a white male police officer, in the daytime, on an interstate, with one (non-serious) violation.”⁹¹

Table 4. Predicted search rate for eighteen-year-old male driver, non-Latino white male officer, daytime, interstate, one nonserious violation.⁹²

| | Low-discretion search | High-discretion search |
|------------------|-----------------------|------------------------|
| Native-American | 3.1% | 1.6% |
| Latino | 1.1% | .7% |
| Black | 1.2% | .6% |
| Non-Latino White | .8% | .4% |
| Asian/PI | .6% | .25% |
| East Indian | .1% | .1% |

For high-discretion searches, in comparison to an eighteen-year-old white male driver, the eighteen-year-old Native-American male driver is four times more likely to be searched; the eighteen-year-old black male driver is 1.5 times more likely to be searched; the eighteen-year-old Latino male driver is 1.75 times more likely to be searched; and Asian-Americans, Pacific Islanders, and East Indians are less likely to be searched than whites.⁹³

When age, seriousness of the violation, race of the officer, time of day, and location of the stop are factored in, race remains an unaccounted for factor that correlates with a heightened probability of search. The fact that the magnitude of search probability differences is roughly equal for low- and high-discretion searches does not support the conclusion “that

89. We also think further work needs to be done with regard to the operation of discretion even with what are characterized as low-discretion searches.

90. 2007 WSP REPORT, *supra* note 14, at 46–51; 2005 WSP REPORT, *supra* note 14, at 56–64.

91. 2007 WSP REPORT, *supra* note 14, at 48.

92. *Id.*

93. *Id.*

officers do not act differently based on race when they have higher levels of discretion.”⁹⁴

IV. CONCLUSION

We agree with the WSU researchers that the evidence does not support a finding of widespread intentional discrimination on the part of the Washington State Patrol. But the persistence of the disproportionality by race, especially for high-discretion searches, is consistent with the operation of implicit bias. This heightened probability of a search cannot be justified by “hit rates” when the likelihood of finding contraband is either the same or lower for racial minorities than it is for whites.⁹⁵

We commend the Washington State Patrol for not “engaging in disproportionate enforcement at the level of original driver contact” that are found in many other jurisdictions.⁹⁶ We also agree that disproportionality by itself does not constitute evidence of purposeful or intentional discrimination. The unfortunate state of our antidiscrimination laws is that much discrimination occurs for which there is no legal remedy.⁹⁷ But rather than rely on law’s failure to provide a remedy, the Washington State Patrol should explore the ways that unconscious or implicit bias can operate to produce the observed differences and institute policies and trainings to mitigate this bias.⁹⁸

It is not enough to tell the eighteen-year-old Native-American male driver, stopped by a white male officer for a nonserious violation on the interstate during the day, that we don’t know why he is four times more likely to be searched than a similarly situated eighteen-year-old white male driver.

We can do better. We must do better.

94. *Id.* at 49.

95. We find it odd that the 2007 Washington State Patrol Report emphasizes that the hit rate for low-discretion searches is exactly the same for non-Hispanic whites, African-Americans, and Native-Americans. *Id.* at 50. We think the more appropriate reference points are the hit rates for high-discretion searches, where the hit rates are lower for African-Americans, Hispanics, and Native-Americans than for whites. *Id.* at 46.

96. 2003 WSP REPORT, *supra* note 14, at 47.

97. See Alan D. Freeman, *Legitimizing Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

98. *Cf.* Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 762 (2012) (contending that criminal defense attorneys should explore the ways unconscious and implicit bias may affect the best interests of their clients).