From Racial Profiling to Racial Equality

Rethinking Equity in Police Stops and Searches

David Thacher*
Assistant Professor of Public Policy and Urban Planning
University of Michigan

466 Lorch Hall
Ann Arbor, Michigan, 48109-1220
(734) 615-4074
dthacher@umich.edu

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ABSTRACT

Police departments across the country have come under scrutiny for racial bias in their stops and searches, but it is impossible to know whether the distribution of stops and searches is inequitable without first analyzing what equity requires of the police in this area. This paper provides that analysis in order to develop a normative foundation for empirical research. I first consider the legal definition of equity, which insists that police must be colorblind, but I reject that definition as too narrow after showing that colorblind practices can be inequitable. I then draw on normative principles from social theory to defend an alternative definition of equity that calls for equal burdens across racial and ethnic groups within morally homogenous groups. (For example, the risk that an innocent person will be stopped or searched should be equal across racial and ethnic groups). Finally, I illustrate the implication of this definition for empirical research by reanalyzing street stop data in New York City, and I consider its possible applications in several other contexts as well. In that way, the paper offers a general theory of equity in policing by calling attention to a neglected dimension of that ideal. In the process, it illustrates the significance of normative inquiry for empirical sociology.

Police departments across the country have come under scrutiny for their patterns of street stops, traffic stops, and probable cause and consent searches. In the process, terms like "racial profiling" and "driving while black" have become household words. As concerns about these practices have spread, hundreds of agencies and legislatures at the state, local, and federal levels have proposed or adopted requirements designed to encourage police to monitor who they stop or search more carefully (Strom and Durose 2000). Academic, legal, and policy analyses of this information have followed, with each study trying to determine how stops and searches are distributed across social groups, and particularly how they are distributed across racial and ethnic groups (*e.g.*, Verniero and Zoubek 1999; Lamberth 1996a, 1996b; Harris 1999; Zingraff, Smith, and Tomaskovic-Devey 2000; Spitzer 1999).

This flurry of empirical investigations faces a fundamental limitation: No one knows what a fair distribution of stops and searches would be. If social scientists and policy analysts intend to measure equity in the distribution of stops and searches by the police, and if they intend to identify the factors that explain more and less equitable distributions, they cannot avoid making normative choices about what counts as "equitable". To make those choices properly, they need to develop a normative theory of what equity requires from law enforcement agencies as they distribute (one of) the necessary burdens of policing. In this respect, empirical study of stops and searches by the police is like most sociological endeavors, whose progress depends partly on normative analyses of their central concepts (Zald 1991).[1]

This paper aims to provide that analysis by investigating what the norm of equity requires from the police as they distribute stops and searches. Many possible standards of equity exist, so the task is to sort out which among them best squares with our considered judgments about specific cases and with more general principles of moral and political theory.[2] Some existing studies, particularly those in the popular press, implicitly use a norm of *pure racial equality*, analyzing the rate at which the police stop blacks, whites, and other social groups and asking whether and how much these rates differ from one another (*e.g.* Verniero and Zoubek 1999). These analyses implicitly presume that police should try to ensure that individuals of all races face equal risks of being stopped or searched, since their central analyses measure how far reality diverges from that ideal. Other studies implicitly rely on a legal norm of

procedural equality, in which the distribution of stops and searches is fair if it results from colorblind decision-making by individual officers. On this view, the ultimate pattern of stops and searches across groups is not important in itself: What is important is whether that pattern can be explained by factors *other than* explicit racial profiling—factors such as the levels of crime and police presence in different neighborhoods (Spitzer 1999) or behavioral differences across racial and ethnic groups (Lamberth 1996, 1999; Zingraff, Smith, and Tomaskovic-Devey 2000). Equity is about the nature of the decision rules that police use to identify candidates for stops and searches (*i.e.*, whether they take account of race or ethnicity), not the distribution of stops and searches that results from using those decision rules.

This paper will argue that both of these norms of equity are inadequate—the first because it has no normative justification, and the second because it is incomplete. In place of the first norm and as a supplement to the second, I will defend a more complex standard of equity for the distribution of stops and searches by police. Police departments should aspire to the procedural principle of colorblindness in the decisions of individual officers, but with a few exceptions, they should also aspire to a principle of *racial equality* in the cumulative impact of those decisions—at least, racial equality within morally-homogeneous groups. Most important, the risk that an innocent person will be stopped or searched by the police should generally not depend on that person's race or ethnicity (the principle of *equal burdens on the innocent*), and the risk that a guilty person will be stopped or searched should not generally depend on race or ethnicity either (the principle of *equal burdens on the guilty*). This normative conclusion has important implications for empirical research, which has previously focused almost exclusively on procedural equality. Empirical research should investigate not only whether police are colorblind, but also how the burdens of policing are distributed by race and ethnicity within morally-homogeneous groups. It should also investigate the equity implications of different policing practices by investigating how they influence these distributions.

In short, this paper develops a general theory of equity in policing by calling attention to a neglected dimension of that ideal. In the process, it suggests how social science research and policy analysis might investigate the equity implications of police practices more fully than they have so far. I

begin in section 1 by analyzing the procedural definition of equity used in the law and in most existing studies of stops and searches, and I show that this definition cannot exclude many police practices that many people would find troubling. In the process, I offer a normative argument to justify the alternative ideal of equity that I have described, drawing on arguments from social philosophy and examples from actual stop and search controversies to do so. Next, in section 2, I describe a framework of analysis that can be used to assess how well a police department has realized this ideal, illustrating its application by reanalyzing data on stops and searches by the New York City Police Department. Section 3 concludes.

1. Beyond the Racial Profiling Paradigm

The most prominent definition of equity in police stops and searches comes from the law, which has framed the stop and search issue in the terms of "racial profiling." Put simply, the debate about racial profiling is a debate about whether officers may legitimately consider a person's race or ethnicity as they decide whether to stop or search that person. Those who defend racial profiling start with the view that, tragically, many types of criminality are more concentrated in some racial and ethnic groups than others (Tonry 1995) and that this fact means that racial profiling may often help police to target their surveillance more effectively (Derbyshire 2001). But even if this empirical claim about the distribution of criminal offending were true, it could not resolve the ethical debate about racial profiling, since public policy often prohibits the use of race or ethnicity in decision-making even when it might be useful. For example, life insurance companies may not use race as an indicator of life expectancy even though the association between the two is undeniable. The racial profiling debate is about whether there should be a similar prohibition for the police (Kennedy 1997, 1999; Applebaum 1996). In that way, it is a debate about which factors public officials should be allowed to consider as they decide how to treat individual citizens, and particularly about whether they must be colorblind. Legal standards continue to evolve in this area, but recent cases suggest that some courts will hold racial profiling unconstitutional under the equal protection clause of the 14th amendment (Buckman and Lamberth 1999), though they may not do so under 4th amendment law on search and seizure (Harris 1999, Kennedy 1997). Morover, public and political opinion clearly oppose racial profiling (for example, 81% of respondents to one Gallup poll

disapproved of racial profiling) (Newport 1999),[3] and few police agencies today admit to practicing it. In short, both law and public opinion have established colorblindness as an important principle of equity that the police should respect as they make stops and conduct searches.

In keeping with that near-consensus, most empirical studies of stops and searches by police also rely on the norm of colorblindness. The current wave of research on this topic began with John Lamberth's pathbreaking studies in New Jersey and Maryland. Because Lamberth's research aimed to support ligitation brought under 14th Amendment law, which only bars intentional racial discrimination (*Washington* v. *Davis*), it needed to demonstrate that police consciously used race to make stop and search decisions by ruling out other factors that might explain why people of color were stopped so often (Buckman and Lamberth 1999). Lamberth tried to do that by empirically documenting the racial composition of drivers who violated the traffic code, allowing him to determine whether racial differences in driving behavior (rather than racial profiling by police) explained the high rate at which police stopped people of color (Lamberth 1996a, 1996b). More recent research has extended this basic approach by analyzing larger geographical areas (Harris 1999) or investigating whether factors that Lamberth did not consider explain high stop rates for people of color (e.g., neighborhood-level variations in police patrol or more subtle differences in driving behavior than the simple distinction between violators and non-violators) (Zingraff. Smith, and Tomaskovic-Devey 2000; Spitzer 1999). These studies have extended Lamberth's initial research in significant ways, but all have retained its normative focus on the question of whether police are colorblind. In that respect, these studies echo older work on police discretion that also sought to determine whether race influenced police decision-making by investigating whether nonracial factors could explain apparent racial disparities (*e.g.* Reiss 1971; Black 1980; Smith and Visher 1981). They also echo recent work in economics that investigates whether police are colorblind, what the effects of colorblind policing are, and whether non-colorblind policing reflects racial animus or rational statistical discrimination (Hernández-Murillo and Knowles 2002; Knowles and Persico 2001).

Thus in nearly all cases, from early police research in the 1970s to the most recent research on racial profiling, most scholars have defined their task with reference to the ideal of procedural equality,

trying to determine whether officers make racially discriminatory decisions in individual cases. This orientation has an important justification. Colorblindness is not only important in 14th amendment law; it also enjoys widespread support throughout society, and it expresses a justifiable normative ideal (Applebaum 1996), so research that investigates whether police uphold it serves important purposes. Nevertheless, the ideal of colorblindness is incomplete in the sense that it does not capture every concern that is relevant to an assessment of whether policing burdens are distributed equitably. Consequently, research that only investigates it neglects significant questions about police practice. The remainder of this section will defend that view, arguing that procedural equality is a limited ideal because it takes no account of the ultimate distribution of policy burdens. Colorblindness cannot entirely determine who will be stopped, and it can't be the case that every colorblind distribution is equally equitable.

Unequal Distribution in a Colorblind World

Consider a world in which police are physically unable to consider race or ethnicity when they make decisions to stop or search people. One example would be a world where everyone's car has tinted windows, so that police have no way of knowing a driver's race or ethnicity. In that world as in ours, police would use traffic stops partly to locate serious criminals, using the minor violations that essentially all of us are guilty of as pretexts to look for more serious crime. To use that strategy successfully, police would need to develop a profile that helped them to select the most promising cars to stop, and they would need to choose appropriate times and places to concentrate their surveillance. They might pay special attention to old cars, dilapidated cars, cars with expired tags, red cars, cars from out of state, sports cars, or cars that simply seem to be out of place, and they might focus their surveillance on high-crime neighborhoods or on suspected thoroughfares for drugs at the times when those problems are most acute. Together, the profile and the geographic and temporal targeting would determine the distribution of traffic stops across groups and individuals.

All of these criteria are colorblind, since individual officers do not and cannot consider the race or ethnicity of the individuals they contemplate stopping. But people of color still might be stopped at a higher rate than whites. Indeed, people of color would be stopped at a higher rate if it were true that they

are more likely than whites to be involved in the types of crime that police have chosen to pursue, assuming that the profile and the geographic and temporal targeting are effective at locating people who commit those crimes. But it is not hard to imagine circumstances in which people of color who are innocent of those crimes would run a higher risk of being stopped than innocent whites would. If the profile emphasized characteristics that happen to be correlated with race or ethnicity—such as old cars, expired registration tags, or a certain style of dress (in the case of street stops)—then people of color who are innocent of the serious crimes that police are looking for would be stopped more often than innocent whites. The geographical targeting might also generate a high rate of stops for innocent people of color if police focused their surveillance on minority neighborhoods or the roads that lead in and out of them—even if they did not consider the race of individual suspects, and even if they chose to target the areas for nonracial reasons. These practices might very well make it more likely that police would catch criminals. But they might also make it more likely that innocent people of color would be stopped, questioned, and asked to consent to vehicle searches, even though individual officers never consider race in their decision-making. Thus colorblindness alone cannot guarantee equal risks of being stopped and searched.

The question, then, is whether results like these—in which officers are colorblind but the distribution of stops across groups is unequal—should ever be cause for concern. As suggested previously, most research has implicitly assumed that they should not. Researchers have often taken note of the distinction between deliberate discrimination and unintentional inequalities (*e.g.* Zingraff, Smith, and Tomaskovic-Devey 2000; Walker, Spone, and DeLone 2000), but they have usually done so in order to highlight what is distinctive about the former and to call attention the analytic challenge confronting scholars who hope to identify it (*i.e.*, the need to separate out unintentional discrimination before concluding that apparent disparities result from deliberate discrimination). That research strategy rests on the assumption that disparities are only significant if they result from deliberate discrimination. That view is not, however, a scientific position but a normative one, and assessing it requires normative analysis of a sort that is not often found in social science research (Zald 1991). The rest of this section offers that kind of analysis, asking whether research has ignored a significant dimension of equity in

police practice. I will argue that some unintentional inequalities do raise important normative concerns, so there are good reasons why research should investigate their level and causes. First, however, it is necessary to see why some unequal distributions may be equitable.

Equity and Disparity

Although the point is controversial, many people believe that—tragically—people of color are more likely to be involved in some varieties of criminal offending that police legitimately aim to control by using stops and searches (Tonry 1995; Kennedy 1997). If so, there are important reasons why it would be generally inappropriate to demand that all groups should be stopped at the same rate. In particular, stopping every guilty person and no one else—surely an appropriate ideal for the police to aspire to—would mean stopping some groups at higher rates than others. The important point is that some people deserve to be stopped by police, and we do not usually expect equal burdens for people whose desert is unequal (Miller 1999). As long as each person gets exactly what he or she deserves (or at least faces the same probability of getting it) and the distribution of deserving and undeserving people across groups explains any disparity in burdens among those groups, then the disparity should not be troubling.

This line of reasoning indicates why pure racial equality is an inappropriate ideal, but it does not indicate that *every* unintentional inequality is equitable. In particular, it does not justify the pattern of stops in the tinted windows example because no difference in personal desert explains many of the disparities there. In that case, people of color who are innocent of the serious crimes that police aim to intercept may easily run a higher risk of being stopped than innocent whites. People in those two groups are morally identical in terms of personal desert even if it is true that, overall, people of color are more likely than whites to commit certain types of crimes, since innocent people of color obviously cannot be held morally responsible for wrongdoing by others who happen to share their race. The same considerations apply to the guilty: People of color who are guilty of a specific crime are not morally different from whites who are guilty of the same crime (or an equally-serious crime), so differences in personal desert cannot justify unequal burdens between those two groups. We aspire to equal treatment for those who are morally alike even when they are only alike in their wickedness (it is our institutions,

not the wicked, whose actions are being judged). That aspiration is widely appreciated in the theory of punishment. For example, Andrew von Hirsch described it in terms of the requirement of "parity", which demands that two individuals whose conduct is equally blameworthy should receive equal punishments (von Hirsch 1987). For that ideal to have real meaning in the area of punishment, a similar notion should apply to the police. If police do not aspire to equality for the guilty, the requirement of parity in criminal justice is a fraud, since two offenders who committed the same offense can expect widely different degrees of censure. As Lester Thurow argued, to worry about equality after police have arrested a criminal but not before "is to have a façade of equity, but a reality of inequity" (Thurow 1970: 459).

These preliminary conclusions suggest a possible alternative to procedural equality and pure racial equality. The alternative ideal is this: *The members of morally-homogeneous groups should bear equal stop and search burdens* (where "morally-homogenous groups" are groups whose members contain individuals of equal deservingness—*e.g.*, the innocent and the guilty). To the extent that concern about inequality is primarily a concern about racial inequality, one way to interpret this standard is this: *Innocent people of color should run the same risk of being stopped or searched as innocent whites, and people of color who are guilty of a particular type of crime should run the same risk of being stopped or searched as whites guilty of that crime (or of others that are equally serious)*.[4] More formally:

P(Stop/Search | Innocent) should be constant by race/ethnicity *[Eq. 1]*

P(Stop/Search | Guilty of O) should be constant by race/ethnicity, $\forall$ offenses O *[Eq. 2]*

Call the first principle *equal burdens on the innocent* and the second principle *equal burdens on the guilty*.[5] So far I have simply stated these standards, offering only the barest arguments in their defense. But in the sections that follow, I will argue that these two principles together describe a well-founded ideal that police should aspire to—the endpoint on a scale that measures how equitable a distribution of stops and searches is. When a distribution falls short of that ideal, its level of equity might be measured using some measure of dispersion, such as the variance of the stop and search risk across racial and ethnic groups. In that case, the equal burdens principles should be read as relative standards: They insist that police should try to reduce the level of racial inequality among innocents and the guilty. Even in that

form, of course, they are pure standards of equity of burdens, and they may be in tension with other law enforcement values like police effectiveness. (They may also be in tension with each other.)[6] If a change in police practices would reduce inequity defined in this way, then police have *a* reason to make the change, but it is always possible that they may have other countervailing reasons not to make it. Nevertheless, I will argue that these standards capture equity of burdens itself in the right way.

It may appear that these standards are identical to those used in legal thinking, since the law is concerned precisely with understanding whether officers have sufficient reason to think that the people they stop have done anything wrong. There is a difference, however, between an officer having legitimate grounds to make a stop or search and a citizen having no legitimate grounds to feel burdened by the event. When the law is concerned with the individual responsibility of police officers for upholding the duties of their station, and potentially with sanctioning them for failing to do so, it properly focuses on the first idea. But when public policy is concerned with who pays the costs of law enforcement, and with the distribution of costs that public institutions should aspire to as they make decisions about how to operate, it properly focuses on the second idea. To understand the consequences of public policies, it is necessary to take the viewpoint of the citizen—particularly the innocent suspects who have done nothing to deserve this infringement on their liberty. When those burdens are distributed unequally across racial groups, that fact has normative significance for the reasons I will describe.

Demands for Equality

With this clarification, it is possible to restate the original question provoked by the tinted windows example. The important question is not whether we should worry about just any inequality in the distribution of stops. It is whether we should worry about inequalities within morally-homogeneous groups. In particular, are there good reasons to be concerned about colorblind police practices when those practices burden innocent people of color more heavily than innocent whites?

There are several reasons why the answer to this question should be yes. All of those reasons begin with the recognition that stops and searches are one of the necessary burdens of policing, and that they can have a significant impact on the lives of those they affect. Sometimes these events may simply

be an inconvenience, particularly when they are merely stops that are not accompanied by searches. But they may also lead to humiliation or even unjust detainment. David Harris (1999) has documented in detail the experiences that ordinary African-Americans have had with police stops and searches, and he has shown how large these events have loomed in their lives. When they are repeated again and again, even the most innocuous stops may add up to a restriction on free movement—an unwelcome consideration that bears on decisions about where and when to drive and walk (Harris 1999; Kennedy 1997; Fletcher 1996). Harris, for example, reports that some of his interviewees chose to use longer routes that avoided major thoroughfares and leave extra time to reach their destinations because police had stopped them so often (p. 274). Thus as police distribute stops and searches, they distribute a significant social burden. The burden may be heavier for stops made due to racial profiling, since racial profiling sends a message of disrespect that adds to the burden of the stop itself (Applebaum 1996). But a significant burden is involved in both cases.[7]

None of this is to suggest that stops of the innocent can be avoided entirely. Police will always need to stop innocent people as they try to locate the guilty, so all innocent citizens must be prepared to countenance some infringements on their liberty for the sake of crime control. But a legitimate government committed to equal treatment of all citizens should strive to ensure that no innocent person bears a disproportionate share of such infringements. Police demonstrate some of the respect for civil liberties that government owes us by obeying rules of due process (*e.g.*, making searches only when they are justified by reasonable suspicion). But even within those constraints, stops of the innocent like those investigated by Harris are still burdens. If police do not strive to equalize the level of burden that each innocent person ultimately bears (regardless of whether officers have a good rationale for making each stop viewed in isolation) then they cannot be said to exhibit equal concern for each citizen's liberty, and they thereby violate a central responsibility of all legitimate governments (Dworkin 2000). In effect, they ask some people to pay an unequal share of the costs of public safety. To avoid doing that, they should monitor the way different policing practices distribute burdens on innocents, and they should prefer practices that distribute their burdens more equally (*ceteris paribus*)

In this respect, the same objections that apply to racial profiling apply to disparate impacts, so those who oppose the former should oppose the latter as well. Consider the arguments of Randall Kennedy, who argues against those who would defend racial profiling on grounds of police effectiveness. In Kennedy's view, even when racial profiling would help police to catch criminals it must be rejected because its burdens fall "with unfair severity upon minorities, imposing on Mexican-Americans, blacks, and others a special kind of tax for the war against illegal immigration, drugs, and other forms of criminality", implicitly claiming (as I have) that such taxes should be equal (Kennedy 1999: 35). Kennedy uses this analogy to suggest why police should be colorblind, not why they should strive to avoid disparate impacts. But in the tinted windows example, the same tax falls in the same unequal ways on people of color. If it is the unequal distribution of the tax that is objectionable, colorblindness is beside the point. The problem is that the burden of stops on innocent people is not shared equally—that government is making unequal demands on individuals' liberty. In this sense, the problem of disparate impacts is more fundamental than the problem of racial profiling.

This concern for disparate impacts embodies a commitment to substantive equality rather than procedural equality. That commitment has many foundations, including our desires to promote social cohesion, to preserve government legitimacy, and to reverse the persistent legacy of historical injustice, all of which arguably require a direct commitment to the pursuit of substantive equality (see, e.g., Tawney 1957; Miller 1982; Loury 2002). Here, however, I will only discuss one consideration that has special relevance for the stop and search controversy, namely, a concern about the rule of law. An important aspect of the rule of law is the idea that policies ought to affect everyone rather than be tailored primarily to particular people. Democracies are committed to this ideal because it promotes equitable policymaking by forcing all citizens to consider a policy's effects. It forces all of us to ask ourselves: "Am *I* willing to be subject to this law—to bear its burdens as well as to enjoy its benefits?" As Rousseau argued:

> The general will, to be really such, must be general in its *object* as well as in its essence . . . it loses its natural rectitude when it tends toward any individual, determinate object. For then, judging what is foreign to us, we have no true principle of equity to guide us . . . What makes the will general is not so much the

> number of votes as the common interest that unites them, for in this institution each person necessarily submits himself to the conditions he imposes on others, an admirable accord between interest and justice which bestows on deliberations a quality of equity (Rousseau 1987: 157-158).

This general idea has had important adherents in contemporary world. Justice Robert Jackson famously drew on a version of it in *Railway Express* vs. *New York*, writing:

> There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[8]

Put strongly, policies that place a grossly disproportionately burden on some identifiable groups but not others are illegitimate. They sidestep the important constraint on "arbitrary and unreasonable government" that Jackson defends, and any political deliberation that supported them would lack the "quality of equity" that Rousseau describes.

This idea has important implications for the case at hand because only police practices that distribute their burdens equally comport with the ideal that Rousseau describes. Such practices force each of us to ask: "Am *I* willing pay this price in the fight against crime? Are *my* gains in safety large enough to make up for this added burden of searches, interrogations, and delays that *I* endure?" By contrast, if one identifiable group bears a grossly disproportionate share of the burdens of policing (whether explicit racial profiling is to blame or not), the majority of us never have to ask these questions. The majority will face no significant burdens at all, only the speculative possibility that police actions may make us safer. This is a form of political cheating. Such practices secure their political majority by loading all of the costs onto one identifiable subgroup and giving the rest of us a free ride. They allow our politics escape the fundamental question of how much liberty we should reasonably trade for whatever benefits in safety we think increased surveillance will bring—and whether those benefits are real. Ultimately this

arrangement may support careless policing. If police practices do not significantly burden most of us, then most of us have no incentive to consider carefully whether those practices are worthwhile. Obviously not every policy can distribute its benefits and burdens with perfect equality. But *ceteris paribus*, a policy that distributes its benefits and burdens broadly should be preferred to one that concentrates them narrowly, since only the former creates Rousseau's happy concordance between interest and equity in political deliberation. That is one reason why gross inequalities in policing are defective, and why reducing those inequalities is a desirable goal. As Randall Kennedy has argued, increasing surveillance of white Americans to the level that blacks experience would "acquaint more whites with the burden of police intrusion, the knowledge of which might prompt more whites to insist upon reining the police in" (Kennedy 1999: 34). The argument I have just made indicates why exactly that knowledge would improve political deliberation, and therefore why it might be sensible to think that political judgments that incorporate it are more legitimate than those that do not.

None of this is to say that equal burdens are always an overriding value. Equality is not usually a trump card but only one consideration among many (Berlin 1999: ch. 5; Parfit 1997). If police equalized burdens on the innocent by stopping large numbers of innocent whites without any public safety benefit to anyone, they might well make stop rates more equal, and thereby support more equitable political deliberation. But in the process they would squander citizens' liberty (not to mention police resources) at an extraordinarily high rate overall. This "solution" to the problem of unequal burdens is perverse; it seems tantamount to putting out the eyes of the sighted to make them equal to the blind. Instead of pursuing such crude remedies for inequality, police should strive for equality along with their other aspirations, aiming to reduce unequal burdens with minimal or no damage to other values.[9]

That is, of course, easier said than done, and police may often face hard choices. If the burdens of policing fell disproportionately on innocent people of color, and the *only* alternative we could discover was the outrageously wasteful remedy just described, then we might reluctantly approve of current practices. But we would regret having to make that decision (even if it is the right one for us to make) because it sacrifices an important value (Williams 1978). Most important, in the future we would hope to

find a better policy that resolved this dilemma more successfully (Nussbaum 2000). So even if equity of law enforcement burdens is outweighed in a particular decision, it still exerts a significant pull on good public policy. It must be understood clearly in its own right so that we can properly bring it to bear on decisions about what to do, and so we have a constant reminder of the costs we are paying for our choices—a reminder that we have an obligation to try to do better. We should not expect that the police will ever reach the ideal of perfectly equal stop burdens across racial groups. But that ideal serves as a beacon that indicates the direction police should try to move whenever they are able to do so.

A Qualification: Benefits and Burdens

These arguments indicate reasons why the equal burdens principles describe a valuable ideal, even if they are not the only ideals that police should consider. That ideal must, however, be qualified in one important way. In many cases, disproportionate burdens may result from heightened police surveillance in particular places where members of the burdened group live or work. This heightened surveillance may justify disproportionate burdens if it helps substantially to protect the people it burdens from crime (assuming that those affected endorse the tradeoff). Although government should try to treat all citizens equally, equal treatment does not automatically mean equal stops and searches. Equal burdens would clearly be required if police distributed the burdens of surveillance independent of everything else they distribute; in that case, police surveillance could be a self-contained sphere of decision-making governed by its own autonomous principles (namely, probabilistic distribution according to personal desert) (*cf.* Walzer 1983). But to the extent that police surveillance is inextricably intertwined with other public goods (like protection from crime), equal treatment may not necessarily mean equal stops. Government arguably treats citizens equally if it offers them a mixture of benefits and burdens appropriate to the conditions of their lives.

This consideration reveals an important limitation in the equal burdens principles. If police pursued those principles single-mindedly, they might end up with police practices that no one wants, since the only way to reduce burdens on innocent people of color may be to reduce police protection in the neighborhoods where most of them live. That kind of dilemma arises frequently in the pursuit of

equity because public policy rarely distributes one thing at a time. For example, the environmental justice movement has striven to reduce the level of industrial pollution in poor and minority neighborhoods, but it turns out that accomplishing that goal risks undermining economic development in those neighborhoods (Foreman 1998). Industrial activity, like police surveillance, is both a benefit and a burden; it is not clear whether poor and minority neighborhoods should want more or less of it.

This qualification is important, but its implications need to be drawn out carefully. That task is difficult because the relationship between the benefits of police protection and the burdens of police surveillance is ambiguous for both empirical and normative reasons. On the empirical front, we cannot assume *a priori* that a group receives any safety benefit from the surveillance it endures. At one extreme, neighborhood police may disproportionately stop African-American outsiders to protect white residents (as in the Harper Woods case described below). In that case, people of color receive no benefit at all that could possibly justify their disproportionate burdens, and there is no reason to qualify the equal burdens principles. At minimum, any claim that unequal burdens are tolerable in a specific case needs to show that the burdened group does benefit disproportionately from current practices.

Even in cases that pass this test, police practices are not always equitable because it is clearly not true that *any* level of protection (no matter how small) will justify disproportionate burdens.[10] The simplest way to explain this point is to examine the recent study of the New York City Police Department's stop and frisk practices (Spitzer 1999). That study, overseen by the New York Attorney General's office, stands out as the most statistically sophisticated analysis of street stops to date, but it raises the philosophical difficulty just mentioned when it suggests that disproportionate stops of minorities would not be troubling if they were explained by higher crime rates (and therefore greater need for police surveillance) in minority neighborhoods—a hypothesis that it goes on to test in detail. Suppose that hypothesis were true: That variations in neighborhood crime rates "explained" discrepancies in the risk of being stopped across racial groups. That might be the case, for example, in a completely segregated city in which each neighborhood was either all black or all white. If each black neighborhood suffered from twice the crime rate of a corresponding white neighborhood and its residents also ran twice

the rate of stops by police, statistical analysis would conclude that police practices are equitable. But in this example, innocent blacks will most likely put up with at least twice as much hassle as innocent whites.[11] Perhaps residents of the black neighborhoods would accept exactly that burden as the price of needed law enforcement. Indeed, perhaps they would tolerate three, four, or ten times the hassle in order to make their neighborhoods safer. But perhaps they would rather not accept any of these levels of burden; perhaps crime is not such a large concern for them that this much lost liberty is an acceptable price. Statistically "controlling" for neighborhood crime rates rules these possibilities out of bounds (or more precisely, it does not distinguish among them, since any of them would support a finding of statistical significance). It usurps the voice that communities themselves should have in deciding the right tradeoff between liberty and order by importing unexamined assumptions about what that tradeoff should be—by presuming that *any* amount of protection from crime would justify disproportionate burdens.[12]

These criticisms are not intended as a denouncement of the NYPD report. As explained below, many of the analyses in this report offer useful models of how to begin to investigate the concept of racial equity in police stop and search practices. Most important, these analyses were appropriate given the purposes they were designed to serve. The Attorney General's office was not looking primarily for evidence of racial equality but for evidence of colorblindness. In order to have reason to bring an equal protection case against the NYPD, the Attorney General needed evidence that officers must be considering race or ethnicity in their stop and search decisions even though they denied it when asked. If the level of police patrol completely "explained" the rate at which police stopped residents of a neighborhood, there would be no such evidence—the distribution of police patrol, not explicit racial profiling, would be the reason why blacks and Hispanics are stopped so often in the city. NYPD Police Commissioner Howard Safir made this point forcefully at the time (Spitzer 1999: 93-4). Nevertheless, the concerns of good public policy do not end at the boundaries of constitutional law, so it is not right to conclude that if crime rates accounted for the higher stop rates of minorities it would "demonstrate that there is [not] a problem with how the police conduct their operations" (Spitzer 1999: 107).

This discussion indicates that the benefits of surveillance to a burdened group may sometimes justify disproportionate burdens (for example, when the burdened group's members have explicitly called for more extensive police protection in their neighborhoods, and that heightened protection explains any disparities that exist). But it also indicates that those cases are special ones: They do not cover cases where disproportionate stops bring no benefit to the groups they burden, and they do not cover cases where the benefits of surveillance to the burdened group are small (though there can be no general standard regarding what counts as a "small" benefit). Any argument claiming to demonstrate that a group's benefits do justify its burdens will need to be subtle, complex, and attentive to contextual details.

Beyond Colorblindness

In sum, the principles of equal burdens on the innocent and equal burdens on the guilty are important tools in the analysis of stops and searches by the police. They capture an important dimension of what it means for stop and search practices to be equitable, and they properly isolate this aspect of equity from other values with which the police should be concerned. They offer important supplements to the principle of colorblindness because we care about who gets what from government independent of the reasons that public officials rely on to decide what to give them. Institutions and practices should be judged not only by whether they *intend* to achieve an equitable distribution (for example, by prohibiting public officials from considering race in their decision making) but whether they actually do so.

These conclusions draw on a common distinction made in law and philosophy between differential treatment and disparate impacts, and on the recognition that disparate impacts can sometimes be unjustified (*e.g.* Miller 1999: ch. 5; Kennedy 1991). This distinction rarely appears in discussions of racial profiling, which focus on the characteristics that police explicitly use in their profiles rather than the distribution of the impacts that their practices have. Zingraff. Smith, and Tomaskovic-Devey (2000) are among the few scholars studying racial profiling who have referred to disparate impacts, but their work does not analyze whether such disparities could ever be regrettable when they are not explained by explicit racial profiling. Even Kennedy does not make the distinction between differential treatment and disparate impacts in his writings about racial profiling (Kennedy 1997, 1999), despite the fact that he has

done so in other contexts. Defending disparate impact doctrine in employment law, Kennedy offered a particularly compelling statement of the view that we should strive to reduce disparate impacts:

> Intentional racial discrimination is not the only form of conduct affecting race relations that is morally deficient and worthy of legal rebuke. There are other forms of conduct worthy of moral and legal condemnation: For instance, thoughtless practices that unintentionally burden historically disadvantaged groups when alternative, less burdensome practices could be pursued without undue cost; and complacent practices that show indifference towards the imposition of avoidable burdens on groups that suffer from injuries received from oppression in the past. Action—or inaction—of this sort is not as evil as intentional discrimination. But it is certainly morally tainted. Moreover, it is precisely such conduct that now constitutes the most important hindrance that our society now faces in its struggle to transcend the gravitational pull of its racist history (Kennedy 1991: 98).

This principle has been accepted in a variety of legal and ethical contexts, notably the disparate impact jurisprudence that has emerged from Title VII of the 1964 civil rights act, which requires that hiring practices cannot have a disparate impact on blacks unless a business necessity for those practices can be demonstrated (*Griggs vs. Duke Power Co*). The point here is simply that the same ideal has relevance for police stops and searches. This principle allows that other compelling interests may sometimes override the pursuit of racial equality; Kennedy, for example, restricts his censure to cases where "less burdensome practices could be suffered without undue cost" to organizational effectiveness, and he echoes Title VII jurisprudence in doing so. But in many cases, alternative practices may be available that are more racially egalitarian than those currently in use and do not sacrifice effectiveness at all. Police agencies have not begun to ask whether such alternatives are available.

The failure to recognize that both substantive equality *and* procedural equality are relevant to the assessment of police practices has lead to great confusion in the debate about police stops and searches. It has led to a stalemate between those who have uncovered racially disparate patterns and those—often police themselves—who are convinced that police already adhere rigorously to the principle of colorblindness. To the latter group, evidence of disparate impacts is beside the point, since all that

matters is whether the decision rules that they use in individual cases are colorblind. But that retort is deeply unsatisfying to the first group.

An example demonstrates how important this distinction is in practice. Consider a recent *Detroit Free Press* article that reported racial disparities in traffic stops by police in Harper Woods, a near-in suburb of Detroit. The article's reporter interviewed the officer in that department who had written the most traffic citations, and her description suggests how defensive and bewildered that officer has become:

> Bensinger [the officer] was uncomfortable discussing the issue of whether black drivers are ticketed disproportionately in Harper Woods. When asked, he fiddled with his car's computer. "I guess . . . " he said, before pausing and sighing. Later, after pulling over a black driver and finding no problem, Bensinger slowly returned to the question. "Well, it's hard to answer that," he said. Bensinger figured he cuts many drivers breaks, and most seem appreciative, so he must be doing something right. And he insists that he focuses on problem drivers, not particular people. "I look at the vehicle," he said. "If it's got things wrong with it, then the motorist needs to know there's something wrong with their car. That's the honest to God truth" (Arellano 2000).

Suppose this officer is sincere, intends no discrimination, and aims to do his job in the best way he knows. His hesitation at the reporter's question does seem to suggest that he is troubled by the obvious impact on blacks of what he is doing. But he cannot understand what has gone wrong, since he believes that he does have a legitimate, colorblind justification for every stop he makes.

The trouble is that this way of thinking about the "driving while black" phenomenon leaves significant questions unasked. The problem may not be that police are engaging in racial profiling. Instead it may be that police have worried about nothing *but* colorblindness, even though many of the policies and practices that that principle sanctions perpetuate racial inequality. In Harper Woods, for example, police have decided to heavily enforce laws against broken taillights and improperly displayed license plates. (Many Detroiters from tough neighborhoods display their license plates in their rear windows so that thieves cannot steal them.) They have also chosen to focus their patrols on thoroughfares that lead into the city from Detroit. All of these practices have the result that blacks run a higher risk of

being stopped than whites in Harper Woods, regardless of whether individual officers explicitly consider race in their decisions. In fact, if Harper Woods police wanted to hassle black Detroiters without explicitly considering race, they could not do much better than to enforce these particular laws on these particular streets. If that were the case, Harper Woods police would be committed to a colorblind policy that was deliberately designed to benefit whites and inconvenience blacks (cf. Loury 2002). Those who find such policies unacceptable must look beyond the principle of colorblindness to explain why.

2. Applying the Principles in Empirical Research

The alternative conception of equity described in equations 1 and 2 offers a framework for empirical research about the distribution of burdens by police that does not rely on the notion of colorblindness. This framework is sensitive to the distribution of burdens on morally-homogeneous groups rather than the nature of the factors that police officers consider as they exercise their discretion. Research that made use of this framework would offer an important complement to the dominant strand of research on police stops and searches, since its findings would illuminate a different normative ideal.

Consider its application to the Harper Woods case. An analysis of stops and searches by Harper Woods police modeled on Lamberth's studies would usefully seek to test the claim made by Officer Bensiger that he and other officers are colorblind. But an analysis that only sought to test that claim would not go far enough. It would only show that officers apply existing policies in the context of the existing distribution of police patrol without taking notice of race. The policies themselves, as well as the prevailing distribution of police surveillance, might disproportionately burden innocent people of color even when colorblind officers carried them out. They might also burden guilty people of color more than they burden equally-guilty whites. Research that looked only for evidence of color-consciousness in officers' exercise of their discretion would not shed light on those possibilities.

This section briefly illustrates how researchers might move beyond the limits of procedural equality by drawing on the two normative principles I have just defended. The two principles are discussed separately because each has a slightly different reach. Equal burdens for the innocent only applies to practices that affect some people who *are* innocent, including police searches (where not

everyone who is searched is in possession of something illegal) and street stops (where not everyone who is questioned has done what the officer suspects him or her of doing). On the other hand, that principle has less relevance for traffic stops. In nearly all of those stops the driver *has* committed some type of violation, so equal burdens for the guilty is the relevant principle.

A possible exception to this division of labor is the category of "pretextual" traffic stops, in which police stop individuals for a "pretext" violation in the hopes of discovering some particular "hidden" violation, such as drug trafficking, outstanding warrants, or illegal possession of firearms. (The stops in Harper Woods probably fall into this category.) These stops are perhaps best described as a hybrid case. It is surely relevant to ask whether the burdens of pretextual stops are distributed equally among those who are guilty of the pretext offense, and that is exactly what studies like Lamberth's have done. But it may also be relevant to ask whether the burdens of these stops are distributed equally among those who are innocent of the underlying "hidden" offenses, since the possibility of discovering those offenses is the main reason why police make these stops.

Equal Burdens for the Innocent

Leaving this more complicated case aside, applying the principle of equal burdens for the innocent is straightforward. The central question is whether the share of innocent minorities who are stopped or searched equals the share of innocent whites who are stopped or searched. As a practical matter, this question cannot usually be answered precisely because the number of innocent people in each racial group is unknowable. But for the purposes of comparing stop burdens across groups, the *total* number of people in each group can typically be used in place of the number of *innocent* people with no significant loss in accuracy.[13]

Consider how this approach could be used to reanalyze data from the New York Attorney General's study of stop and frisk practices in the New York City Police Department (Spitzer 1999). Although this study did not articulate the principles I have described, the general intuition may have guided one of its analyses, which calculates the ratio between stops and arrests for different racial and ethnic groups. That analysis speaks to the principle of equal burdens for the innocent. If blacks are

stopped but not arrested (*i.e.* nothing illegal was discovered) more often than whites, that fact could mean that innocent blacks face a higher risk of being stopped than innocent whites. In fact, the NYPD study concludes that blacks were stopped 9.5 times for every arrest, Hispanics 8.8 times, and whites 7.9 times. Using these figures together with others in the Attorney General's study, it is possible to apply the principle of equal burdens for the innocent in the form of equation 1. Table 1 does that:

TABLE 1 ABOUT HERE

The table shows that the risk that an innocent person will be stopped depends strongly on race, a violation of the principle of equal burdens for the innocent: An innocent black is seven times as likely to be stopped by police as an innocent white, and an innocent Hispanic is nearly five times as likely to be stopped.[14] It would be particularly interesting to analyze changes in these disparities over time, though unfortunately it is not possible to do that with existing data.

It is important to note that this analysis presumes that all innocent people—all those who are not carrying contraband, do not have outstanding warrants, and have not committed the crime that police suspect them of—are morally-identical: That they are all equally undeserving of infringements on their liberty, and therefore equally entitled to feel burdened by them. A more nuanced analysis might question that assumption, using the general principle of equality within morally homogeneous groups to critique its specific articulation in equations 1 and 2. For example, those who are on probation or parole arguably should expect to be stopped and searched more often than those who are not, even if they are not committing a new crime, since that burden is part of their deserved supervision by the criminal justice system. If so, it might make sense to disaggregate the analysis further—to present the distribution of burdens on the guilty, on the unsupervised innocent, and on innocent probationers and parolees (although in this case the necessary information is not available).

On the other hand, innocents who have the characteristics that police use in their profiles—such as those who are wearing suspicious clothing or those who are exchanging objects with someone else (Spitzer 1999: 141 ff.)—do *not* differ with respect to personal desert from innocents who lack these characteristics since they have not committed a blameworthy act. Consequently, these characteristics

should not enter into an analysis of the distribution of burdens on the innocent. The existence of such behavioral differences might show that police are colorblind. But they are irrelevant to the question at hand, which is whether the burden of police searches is shared equally across members of all racial groups who are not carrying contraband or otherwise committing a blameworthy act. A conclusion that non-blameworthy behavioral differences explain disparities in stop rates across races would support the contention that officers rely on race-neutral characteristics rather than race itself to decide whom to search. But that would simply mean that the use of those race-neutral characteristics leads to inequitable burdens—that it leads the police to stop innocent blacks more often than innocent whites. That consequence represents a social cost that ought to be reckoned in our assessment of those practices.

Equality for the Guilty?

The second principle I put forward at the beginning of this section—that the risk a guilty person faces of being stopped or searched should not depend on race or ethnicity—is probably more controversial, and I have not defended it explicitly (though many of the arguments that justify equal benefits for the innocent also justify equal burdens for the guilty). Many people reject this principle on the grounds that society has few obligations (other than those of respecting basic legal rights) to those who willfully violate the law (Thurow 1970). I am skeptical of this view because it violates the basic moral principle that likes should be treated alike. Nevertheless, I recognize that this conclusion is controversial, so I suspect that the principle of equal burdens on the guilty will not find as broad an audience as the principle of equal burdens on the innocent.

Still, most people do seem to share the desire to equalize burdens on the guilty when the crimes in question are not serious. (In such cases we may be more certain about our conviction that likes should be treated alike than we are about our conviction that these marginal offenses are truly blameworthy.) If we discovered that blacks driving 65 mph in a 55 mph zone always get traffic tickets, but whites do not get tickets until they drive 75 mph, most of us would be concerned—despite the fact that the ticketed blacks *are* guilty. The same would be true if police always stopped blacks driving cars with broken taillights or wrongly displayed registration tags but never stopped whites driving similar cars. It would also be true if

police stopped blacks for these violations but ignored equally minor violations committed by whites. These scenarios obviously evoke accusations that have actually been made in the controversy over police stops and searches.

Since it is difficult to ascertain the actual distribution of offending by race, few studies have investigated these possibilities directly. The only exceptions I am aware of are Lamberth's studies of the Maryland and New Jersey State Police (though Zingraff, Smith, and Tomaskovic-Devey [2000] describe another study in progress that will also accomplish that important task). By investing considerable effort into observational studies of driving patterns on particular stretches of road, Lamberth's team was able to estimate the distribution of traffic violations by race on those roads. That information allowed Lamberth to show that the proportion of stops that involved black drivers far exceeded the proportion of traffic violations committed by blacks (Lamberth 1996a, 1996b). In effect, his analyses are the only studies to date that have properly estimated the distribution of burdens on the guilty.[15]

Although Lamberth's studies represent an important way of analyzing data on stops and searches, the discussion of pretextual stops above suggests that they are incomplete in one significant way. It may be true that driving patterns do not explain the higher rate at which police stop people of color on the stretches of road that he studied—that traffic stop burdens are distributed inequitably on those guilty of traffic offenses. But because police often use traffic stops as a pretext for interdicting more serious crimes like drug distribution (legitimately, according to *Whren* v. *United States*), some racial disparities might legitimately arise if people of color commit those more serious crimes more often than whites do. For example, if police were so effective at sniffing out serious crimes that they only stopped motorists who were guilty of them, racial differences in stops would reflect racial differences in serious criminality (if any such differences exist)—not racial differences in minor traffic violations. It is not clear that this result would be unacceptable. In reality, of course, traffic stops include some stops made purely for reasons of traffic enforcement and some made for the pretextual reasons just suggested. The point is simply that the racial distribution of pretextual stops might cause the racial distribution of all stops to diverge from the racial distribution of minor traffic violations (which is what Lamberth used as a

benchmark), and that such a result would not necessarily be illegitimate. Perhaps the most realistic way to assess this possibility would be to analyze the distribution of search burdens on those who are innocent of drug crimes, following the approach used in my reanalysis of the NYPD data.

Another limitation of Lamberth's important studies as a model for future research in this area is that they require significant investments in expensive observational study. A simpler and more widely-feasible way to investigate the distribution of burdens on the guilty would be to do so indirectly by analyzing the seriousness of the violations that police take action against. For example, if an analysis of traffic stops for speeding found that the average speed for blacks was 10% over the speed limit while the average speed for whites was 20% over, that would be reason for concern, since it would suggest that equally guilty whites were escaping justice. The general principle is that for any crime whose seriousness can be quantified (like speeding), seriousness should be constant across racial and ethnic groups (given reasonable assumptions about the distribution of offending within groups). Deviations from this ideal are a source of concern, for they suggest that police catch violators from some groups more often than others by digging more deeply into the pool of violators. Consequently, such deviations would suggest that the burdens of law enforcement on minor violators are borne more heavily by individuals from some racial or ethnic groups. I know of no published studies that tabulate this sort of evidence, but it would be straightforward to do so for many types of crime.

3. Conclusion

This paper has argued that police policies and practices should be evaluated in part according to the burdens they place on morally-identical people from different racial groups, not just according to whether they explicitly consider race. That conception of equity offers a useful complement to the legal conception of procedural equality. In a way, procedural equality has become a victim of its own success. So few police agencies admit to explicit racial profiling, and so many seem sincerely to believe that their officers no longer engage in that practice, that calls for colorblindness may have reached a point of diminishing returns. Exceptions clearly exist, so researchers should still investigate whether particular agencies appear to be engaging in racial profiling and what can be done to stop it. But today, the most

pervasive inequities in policing may take a less familiar form. There is a danger that continued scholarly emphasis on procedural equality could unintentionally obscure those other inequities from view. As R.H. Tawney argued in his treatise on equality, commitment to the procedural notion of "equal opportunity" can be important in some historical contexts, but it may eventually become counterproductive by serving to legitimize other forms of inequality—by surrounding them with "a halo of intellectual prestige and ethical propriety" (Tawney 1953: 104). Victory for colorblindness can suggest that inequality has been eliminated when in truth only one form of it has been.

That is not to say that studies premised on the ideal of procedural equality have no place in contemporary social science research. Such studies remain particularly important in legal research like Lamberth's. Legal scholars pursue the line of inquiry they do because they aim to help individual defendants stopped because of their race—to develop an argument that explains why those stops are unconstitutional. As they try to accomplish that job, they have no choice but to play by the rules that court precedents lay down for them (as described lucidly in Buckman and Lamberth 1999). Research intended to support these cases also has no choice but to use the procedural definition of equity contained in the 14th Amendment. But the policymakers, police agencies, and scholars who have increasingly turned their attention to stops and searches by police do not face the same constraints in the same ways. They do not need to rest content with importing legal norms (as well as the research methodologies that support them) into an arena where different ideals are possible and appropriate. Their analyses can and should make room for the equal burdens ideals (or for other applications of the ideal of equality within morally-homogenous groups) *as well as* the ideal of colorblindness.

Such analyses could usefully be pursued in many contexts. Most obviously, information about the distribution of burdens on morally-homogeneous groups could be incorporated into policy analyses of stop and search practices of the sort that have followed in the wake of legislative mandates for new data collection. Such studies have become extremely common at the state, local, and federal level, and it would be fairly simple for them to incorporate the analyses described here—in addition to, rather than in place of, the other analyses that they currently incorporate. Moreover, police departments themselves

could incorporate such studies into regular departmental performance measurement in order to monitor how the distribution of policing burdens changes over time. If these analyses indicated that stop and search burdens were becoming less equally distributed, or that they had diverged too far from appropriate benchmarks gathered from similarly-situated agencies, that would be cause for concern and further investigation (*e.g.*, investigation of whether particular practices or particular officers were responsible for the change). If police discover that their practices have the unintended effect of burdening innocent people of color more than they burden innocent whites, they have a responsibility to find out why and to make changes where it is possible to do so. They should certainly make changes if an equally-effective alternative can be identified. In some cases, it might be appropriate for them to make changes even if greater equality would sacrifice some degree of police effectiveness (though here I will refrain from speculating about when they should do that).

Moreover, more general academic evaluations of police strategies could also incorporate the analyses described in this paper in order to move beyond their current tendency to focus only on crime control (Thacher 2001). By investigating how police practices shape the distribution of policing burdens, research would help to offer a more complete picture of the strengths and weaknesses of police strategies. For example, evidence showing that an aggressive gun interdiction program based on traffic stops reduces crime is insufficient to support an overall judgment that gun interdiction "works"—i.e., that it is a good idea for police to adopt gun interdiction programs—since such programs may incur costs to liberty, equity, or other values that outweigh their public safety benefits.[16] It is of course very difficult to arrive at an overall judgment of a program that incorporates all of these considerations. Nevertheless, by incorporating the analyses illustrated here (in addition to the other outcome measures that researchers already use), evaluations could illuminate the equity implications of police strategies in order to offer a broader picture of their strengths and weaknesses. In the case of gun interdiction programs, that might mean analyzing the racial and ethnic distribution of searches of drivers who turn out not to be carrying guns. Just as existing studies ask whether gun crimes have fallen in police beats that implemented gun

interdiction efforts (Rogan and Sherman 1995), future studies might also ask whether burdens on the innocent have grown more unequal in those areas.

Normative Analysis and Empirical Sociology

Beyond its specific implications for research about policing, this paper lends support to the broader argument that choices about values have important implications for empirical analysis (Zald 1991; Selznick 1961). By showing how an implicit set of ideals has shaped research about police stops and searches, and by demonstrating that those ideals neglect important normative concerns, this paper reveals a limitation of current research methods that stems from their normative commitments rather than any narrowly technical considerations. Normative analysis does not make empirical study irrelevant, but it does help to reveal what kinds of empirical study are relevant.

Because choices about values can have such important implications for scholarship, those choices need to be made in a considered and reasoned way, and their implications for empirical study must be identified clearly. Unfortunately, purely empirical studies often neglect the first task, and purely normative analyses often neglect the second. In research about stops and searches by police, future studies need to embrace a more interdisciplinary approach. One of the most important tasks facing this body of scholarship is developing an adequate conception of equity that can legitimately guide empirical analyses, as well as showing how that conception of equity can be investigated empirically. Whether or not the account of equity that I have outlined here is satisfactory, it can hopefully serve as a starting point for this important line of inquiry, which has significant implications for empirical research.

To pursue that kind of inquiry in a compelling way, scholars will need to draw on both normative and empirical research. As this paper suggests, analyzing whether a normative principle is satisfactory is a matter of evaluating the implications it has for other judgments—both for more concrete judgments about what should be done in particular cases and for more general judgments about moral and political theory (Sen 1980). In order to make such evaluations, social scientists need to cultivate two forms of knowledge. First, to determine whether a normative principle is consistent with more general ideals of moral and political theory, social scientists need to deepen their familiarity with scholarship in those

fields (Zald 1991). Second, to determine whether a principle is consistent with the judgments that we make about specific cases, social scientists need to incorporate concrete cases into their normative scholarship. That area of normative inquiry offers perhaps the greatest promise for contributions from social scientists because it draws on their distinctive skills of empirical investigation (Hoffmaster 1992; Flyvbjerg 2001; Thacher 2001). Thought experiments, stylized examples, and second-hand cases (such as the Harper Woods case) can play an important role in illuminating the adequacy of general principles. But where possible, sophisticated normative analysis should seek to explore real and detailed case studies, since we often elaborate and enrich our understanding of what our values are as we encounter new and unfamiliar experiences (Millgram 1997). Future case study research should try to develop a clearer picture than we now have about the kinds of practices that police departments actually use that may unintentionally lead to unequal burdens.

[1] Mayer Zald has made a compelling case that sociology is as much a part of the humanities as it is a part of the sciences. "The real metier of sociologists," Zald explains, is "the contextually qualified generalization about *important* social processes" (Zald 1991: 175). The significant point is that importance is not just a question of theoretical interest and analytical tractability (*q.v.* Stinchcombe 1968) but also a matter of the values that do and should matter to a society. In Zald's words: "Importance stems not only from the role of the process or concept in explaining social reality, which would be an internal, theoretical basis for establishing importance, but from the concern of scholars with civilizational values and outcomes . . . More often than not, the choice of problems, the definition of what is important, even the terms of analysis are freighted with political, moral, and civilizational overtones. Although the scholar attempts to distance herself from the more purely ideological or self-serving definitions of the phenomena, the problems take on meaning precisely because they resonate with this larger social context. Indeed, when the work becomes too isolated from the concerns of the larger society and its civilizational context it begins to resemble a kind of technicism—problems without purpose" (Zald 1991: 175-7). Zald insists that sociology cannot avoid this entanglement with civilizational concerns and that when it attempts to do so it descends into irrelevance. Two risks are especially significant: On the one hand, scholarship may diverge from civilizational concerns altogether and lose its reason for being; on the other hand, it may become tied up with the most banal understandings of social values and indulge society in its least noble and most confused pursuits. Zald suggests that the second risk is the greater one today: "Because sociology is so weakly tied to humanistic traditions, it has become, especially in its more empiricistic and positivistic components, a flat discipline—heavily dependent on assumptions and concepts drawn from the world view of contemporary western civilization." For that reason, sociologists should aim to "tie to humanistic modes of thought," notably by "explicitly link[ing] themselves with the literatures in other humanistic disciplines" (Zald 1991: 180). Zald takes sociologists to particular task for failing to engage the strands of moral and political philosophy that could help to clarify the ideals at the root of sociological study (Zald 1991; *cf*. Selznick 1961; Miller 1999: ch. 3; Rein 1976).

[2] It is, to put it mildly, beyond the scope of this paper to offer a complete account of how one can know whether a theory of a normative obligation like "equity" is true. But Amartya Sen has offered a concise and useful approach to the assessment of moral theory that can serve as a minimal basis for my analysis: "When it is claimed that a certain moral principle has shortcomings, what can be the basis of such an allegation? There seem to be at least two different ways of grounding such a criticism, aside from just checking its *direct* appeal to moral intuition. One is to check the *implications* of the principle by taking up particular cases in which the results of employing that principle can be seen in a rather stark way, and then to examine the implications against our intuition . . . . The other is to move not from the general to the particular, but from the general to the *more* general. One can examine the consistency of the principle with another principle that is acknowledged to be more fundamental" (Sen 1980: 197). I will use these two approaches to assess different accounts of equity in police stops and searches. I will begin by examining the legal account of equity, showing that it has unacceptable implications in at least one important type of case. I will then develop an alternative account of equity, showing how it is consistent with more general normative considerations and how it offers an intuitively satisfactory account of a number of particular cases.

[3] There are, however, exceptions, particularly since the September 11 terrorist attacks. For the sake of clarity and focus, this paper will primarily discuss stops and searches of African-Americans by urban police agencies associated with street crime control and drug law enforcement. But although the issues are not identical, many of the paper's arguments are relevant to the more recent discussion of ethnic profiling in the control of terrorism, which I have discussed elsewhere (Thacher 2001a).

[4] By describing the demands of equity in terms of equal risks of being stopped or searched across racial and ethnic groups, I am focusing on what Douglas Rae (1981) describes as "bloc-regarding" equality, which calls for equal burdens on average across groups but puts no constraint on the distribution of burdens *within* each group. Moreover, I have privileged racial and ethnic groups as the appropriate "blocs" because race and ethnicity are clearly central to current discourse about police stops and searches. Consequently, the principles described in the text only articulate one ideal of equity of burdens. I believe it is a particularly important ideal that lies at the center of the public discourse about police stop and search practices, but it is important to note that it may be in tension with other possible ideals. In most cases where such tensions exist, I suspect that racial and ethnic equality as I have defined it probably deserves priority, but the matter deserves more attention than I can give it here.

In this connection, it is worth noting that equal burdens (like most forms of equality) can rarely be achieved completely because more equality in one dimension often means less equality in another (Rae 1981). Consequently, questions about which form of equality deserves priority are very important. This point should not, however, be taken too far. It is at least logically possible that in a city where local police use a varied set of strategies for crime-fighting and criminal investigation, all innocent people would face similar probabilities of being stopped or searched.

[5] Lester Thurow proposed a similar definition of equity in law enforcement thirty years ago, though his definition focused on individuals rather than groups (Thurow 1970). While this paper does not endorse all of Thurow's conclusions, students of racial profiling could learn much from his neglected essay. More recently, an interesting unpublished paper by Jeff Dominitz (2002) also discusses standards similar to the equal burdens principles, analyzing the mathematical relationship between those standards and other possible measures of equity (as discussed in footnote 6). Neither author, however, examines the normative question addressed in this paper—whether the equal burdens standards describe a well-founded normative ideal, and therefore whether they merit attention in scholarly research and police practice.

[6] Dominitz (2002) offers a useful formal analysis of these tensions, showing that unless all groups break the law at the same rate, the two equal burdens principles cannot be satisfied simultaneously if police also hope to equalize find rates (the proportion of searches that discover contraband) by race. (On further analysis, however, this rule has a trivial exception: Police can satisfy all three standards if every search is successful. The nontrivial corollary to this exception is that the degree to which equal find rates and equal burdens are in tension is a function of police accuracy: As police approach 100% find rates, burdens and find rates can simultaneously be nearly equal across races, but as find rates fall, the trilemma becomes more severe.) Since burdens and find rates cannot usually be equal simultaneously, it is especially important to determine whether equity requires both. The argument in this paper suggests that it does not. If equity is a matter of equalizing burdens within morally-homogeneous groups, then find rates are only indirectly relevant to it; what matters are the levels of burden suffered by people who deserve to be stopped in varying degrees. I suspect that equal find rates are a matter of efficiency rather than equity: When find rates are unequal, police can increase efficiency on the margin by refocusing stops from a low-find-rate group to a high-find-rate group (Knowles, Persico, and Todd 2001). If so, the tension Dominitz identifies is not a tension internal to equity but a tension between equity and efficiency. Footnote 9 suggests that equity should usually take priority in such conflicts.

[7] Arthur Applebaum's analysis of racial profiling suggests that only deliberate discrimination is inequitable because its inequity resides in the nature of the burden it entails: The real problem is the message of disrespect that racial profiling sends, not the practical burden of stops (Applebaum 1996). On this view, disproportionate stops without the disrespect would be unfortunate but not unfair. This distinction between types of burdens is interesting, but it is hard to see why should be viewed as a distinction of kind rather than degree, and it is at least debatable whether the African-Americans interviewed by Harris were principally burdened by implied disrespect rather than the practical burden of

the stops. Moreover, to the extent that they *are* concerned about disrespect, it is not clear that that this concern arises only in stops motivated by racial profiling. Those who are stopped almost never know what an officer's real motivation was, and if they are stopped again and again (as so many blacks are), they are likely to assume the worst. Applebaum appears to concede the latter point (1996: 152).

[8] Like most commentators on the rule of law, Jackson (and perhaps Rousseau) refers here to *formal* inequality—*i.e.,* to legislative provisions that explicitly single out a particular group to bear the burdens of public policies. But formally equal policies that have a disparate *impact* on a specific group still suffer the defect that Jackson and Rousseau describe. That kind of policy, too, "opens the door to arbitrary action" because it allows government officials to "escape the political retribution that would be visited upon them if larger numbers were affected." What matters for political deliberation is whether large numbers are *affected*, not whether the law formally names them. Discussions of the rule of law have too seldom noted this substantive dimension of equal treatment—that formal equality often cannot guarantee the benefits associated with the rule of law.

[9] In the text I have argued that equity and other values are in tension, but it might be objected that this way of formulating the matter is misleading—that in some cases, the demands of public safety and other values are so strong that unequal burdens are not even inequitable. Many political theories hold that it is unreasonable for anyone to reject a small burden that would bring a much larger benefit to others (Scanlon 1982), and some form of this argument might conceivably justify unequal stop and search burdens (*cf.* Applebaum 1996). On this view, people of color are only being asked to bear a minor burden of disproportionate stops and searches in order to bring a large public safety benefit to the general public, and it would be unreasonable for them to refuse this request. This argument suggests that in some cases, extraordinary public safety benefits may justify disparate impacts. But it faces two problems in the case at hand. First, it entails asking a generally disadvantaged group (people of color) to bear a burden for the sake of a generally more-advantaged group (the public at large), and many people would find such a proposal unjust no matter how large the public benefit (*e.g.*, Rawls 1971). Second, it seems unlikely that the sacrifice does bring a large benefit to the public at large. At best, the sacrifice helps police to operate more efficiently—to stop fewer people to arrest a given number of criminals. But it need not mean the difference between safety and rampant criminality. The alternative to disproportionate stops of people of color is not less safety but a more equal stop risk borne by everyone (and possibly a higher risk, on average). Consequently, the disproportionate burdens borne by people of color would bring no more than a modest benefit to whites—a lower risk that whites themselves will be stopped. It is hard to see why it would be unreasonable for a group that already bears a significant share of social burdens in other spheres (Fix and Turner 1998) to reject yet another burden in order to secure this modest benefit for whites.

[10] Put formally, such cases are equitable if the balance of benefits and burdens distributed to the burdened group is comparable to the balance of benefits and burdens distributed to other groups. Such judgments are obviously difficult to make, partly because the weight of a benefit or burden depends on the values of the people it affects. Conceptually, however, this complex kind of equality is what would be required to conclude that government has in fact treated everyone equally (despite the initial appearance of unequal burdens), since what is at stake is government's obligation to treat everyone equally overall.

[11] *E.g.*, assume that this segregated city has two neighborhoods of 10 people each, and that the higher crime rate in the black neighborhood is explained by the fact that there are two criminals there but only one in the white neighborhood (though it could just as easily result from one especially active black criminal, or a white criminal who operated outside his neighborhood). Now suppose that police stop 8 different blacks and 4 different whites in order to catch every active criminal. Innocent blacks in this city will face a 75% probability of being stopped (6 stops of innocent blacks out of 8 innocent blacks in total), while innocent whites will face a 33% probability of being stopped (3 stops of innocent whites out of 9 innocent whites in total). The innocent blacks' burden is 2.3 times that of the innocent whites' burden.

[12] This claim—that Spitzer's analysis presumes that *any* amount of protection would justify unequal burdens—does not exaggerate. Spitzer's analysis essentially looks for a correlation between the need for protection (measured by victimization rates) and the level of stops across neighborhoods. The analysis tests for the statistical significance of this relationship, not its magnitude. A 100:1 relationship between stops and victimization levels (i.e. a relationship where 100 additional stops is associated with one additional victimization) could be just as statistically significant as a 1:1 relationship.

[13] This is true so long as the share of every group that is guilty is not large. As an extreme example, consider a case where 10% of blacks are guilty and only 1% of whites are—surely a gross exaggeration of both the overall level of guilt at any given time for most crimes and of the discrepancy across races for any crime (if there is a discrepancy). Even in that extreme case, the share of *innocents* who are black will differ from the share of *all* people who are black by less than 10%. For example, if 20% of the population is black, 18.6% of innocents will be black. Thus in Table 1, below, it is not plausible to suggest that the use of total population rather than total number of innocents explains the large disparities across groups. In this regard, the principle of equal burdens on the innocent is simpler to apply than the principle of equal burdens on the guilty. In the latter case, possible discrepancies in the level of guilt across races would have a significant effect on any approximate analysis; it would simply be invalid to use the racial makeup of the total population as a proxy for the racial makeup of the guilty.

[14] Like the NYPD report, Table 1 uses the demographic composition of New York City residents as the denominator to calculate the risk that individuals of different groups will be stopped. In reality, some people stopped by police come from the surrounding region (*e.g* to work or shop in the city), so that denominator is not technically appropriate. (The same problem plagues most analyses of city crime rates.) Instead of the racial composition of New York City residents, it would be better to use the racial composition of the city's ambient daily population. That information is not available, but it would likely exacerbate the disparities I have found, since residents of the surrounding metropolitan region are less likely to be people of color than residents of the city (e.g. while the 1990 census found that the city's population was 52% white, it found that the surrounding CMSA was 70% white). If inflow of residents from the surrounding region into the city exceeds outflow of city residents over the course of a typical day, and if each flow of population roughly matches the composition of the area it originates from, then the ambient daily population will be more skewed towards whites than line 1 of table 1 suggests.

[15] I say "in effect" because Lamberth presented his analyses in a slightly different form than eq. 2 suggests. Lamberth compared the proportion of blacks stopped with the proportion of blacks who violated the traffic code, but eq. 2 advises a comparison between the proportion of white violators who were stopped and the proportion of black violators who were stopped. That comparison would show directly whether morally-identical individuals (those who are or are not violating the traffic code) run different risks of being stopped depending on their race.

In this connection, it is worth noting that the distinction between violators and non-violators may be too crude for these purposes, since it does not seem right to say that a driver who barely exceeds the speed limit is "morally-identical" to one who greatly exceeds it. A better analysis might investigate the proportion of drivers who drive at different speeds who are stopped, broken down by race. For example, such an analysis would describe the proportion of individuals by race who were driving 1-10% above the speed limit and were stopped for it, the proportion by race driving 10-20% above the limit who were stopped, and the proportion by race driving more than 20% above the limit who were stopped.

[16] See Rogan and Sherman (1995) for an analysis of such a program that focuses on the reduction of crime as its central outcome measure. Rogan and Sherman recognize the general limitation of their analysis that I raise in the text; I only mean to suggest one possible way to help rectify it.

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Table 1

Equity of Burdens for "Stop and Frisk" Practices in the NYPD

	Blacks	**Whites**	**Hispanics**
1. Population	1,877,136	3,182,333	1,737,818
2. Number of Stops	88,509	22,565	57,723
3. Stops per Arrest	9.5	7.9	8.8
4. Arrests (2 ÷ 3)	9,317	2,856	6,559
5. Stops of Innocents (2 – 4)	79,192	19,708	51,164
6. **P(Stopped | Innocent) (5 ÷ 1)** *Risk an innocent person will be stopped*	**4.2%**	**0.6%**	**2.9%**

Source: Author's calculations from Spitzer (1999), Tables I.B.2 (population and stop/arrest ratios by race) and I.A.5 (stops by race). "Stops" are those recorded on UF-250 forms from January 1998 through March 1999, as explained in Spitzer (1999). See footnote 13 for an explanation of the use of total population rather than total number of innocents to calculate line 6.