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Ethnic Profiling by Police in Europe

Ethnic profiling, the inappropriate use by law enforcement of an individual's ethnic characteristics in identifying criminal suspects, is widespread but under-researched in Europe. *Justice Initiatives* examines profiling by police in Europe, and explores the methods used in the United States and the United Kingdom to confront it.

FOREWORD

Preparing a Fresh Assault on Ethnic Profiling

Christopher Stone[†]

In this first decade of the 21st century, efforts to end ethnic profiling by police are entering a new stage: more global, more collaborative, and more practical than the campaigns of the late 1990s. This volume of *Justice Initiatives* provides both a succinct summary of the lessons from the recent past and a guide for those who are now preparing fresh assaults against the invidious use of race and ethnicity as markers of suspicion.

In the late 1990s, the campaign against “racial profiling” by police services in the United States enjoyed a swift and somewhat surprising political victory. Despite resistance from many police organizations, first President Clinton and then President Bush took up the cause on the side of civil liberties, promising to end racial profiling. In June 1999, President Clinton committed his administration to “stop the morally indefensible, deeply corrosive practice of racial profiling.” As he explained: “Racial profiling is, in fact, the opposite of good police work, where actions are based on hard facts, not stereotypes. It is wrong; it is destructive; and it must stop.” Twenty months later, in a speech to a joint session of Congress, President George W. Bush similarly pledged “to end racial profiling.” Echoing Clinton’s words, he said simply, “It’s wrong and we will end it in America.”

For civil rights and civil liberties advocates, this was an extraordinary political victory. In a decade when the U.S. prison population was expanding at unprecedented rates and talking tough on crime was a prerequisite for every political office, this pledge by two presidents raised hopes that dramatic changes in American policing were just around the corner.

In the United Kingdom, a parallel campaign against racial bias in British policing achieved a similar, surprising victory. In language that continues to reverberate through British policing, the Stephen Lawrence Inquiry concluded in 1999 that “institutional racism” existed as “a corrosive disease” in the Metropolitan Police Service and in other police services “countrywide.”

Actions soon followed. In both countries, police agencies began to strengthen written policies and monitor the race and ethnicity of people subjected to stops and searches. Both national governments pressed their local police to eliminate racial profiling and both put procedures in place to hold police agencies accountable if they failed.

Then, in less than a year, progress slowed almost to a stop. Many civil liberties champions blame the Al Qaeda attacks of September 2001 for weakening the political commitment to end racial profiling; but that is not the full story. Certainly, following the attacks in the United States and the March 2004 attacks in Madrid, police in the United States and Europe were given tacit—and sometimes explicit—permission to rely on ethnicity, national

origin, and even religious affiliation as badges of suspicion. Yet even where police leadership voluntarily embraced the movement to end profiling or where courts ordered that police put an end to these patterns and practices, the hope among advocates that strong policies, new training, and strict monitoring could end racial profiling proved overly optimistic. Even before September 2001, the phenomenon of racial profiling was proving more complex and more resistant to reform than its adversaries had anticipated. For example, some police chiefs who had implemented all the best practices still found themselves with data that showed large racial disparities, suggesting, among other things, that the statistics compiled for advocacy purposes might not be best suited to serve as performance indicators.

The underlying injustice of racial profiling remains as repugnant as ever. In countless interactions with civilians every day, too many police presume that people with dark skin, foreign appearance, or a particular religious faith are likely to be criminals or at least worth checking out. And the police actions entailed in “checking out” these people are rarely pleasant. Finding oneself the object of a selective police stop and search is sometimes merely an embarrassing inconvenience, but more often a humiliating and upsetting experience, and occasionally a perilous encounter. This is as true in Europe as it remains in the United States. Indeed, as James Goldston points out at the start of his Introduction, this form of injustice may be growing in Europe in particular.

How, then, can a fresh assault on this injustice push beyond where the initial efforts stalled only a few years ago, and how can Europeans in particular make sense of this earlier experience. The papers in this volume point the way, suggesting seven practical principles that might guide the next, more global campaign.

1. Be clear about the purpose of reform. As Stephen Humphreys writes, those who naively hoped that an assault on racial profiling could reverse the growth of the prison population, reduce the overrepresentation of racial and ethnic minorities inside those prisons, or end the war on drugs have been sorely disappointed. Indeed, the attack on racial profiling was politically successful precisely because it did not aim to change the arrest, prosecution, or incarceration of actual offenders. Instead it took up the cause of innocent people who, because of their race or ethnicity, became caught in overly wide dragnets. Even within this narrow frame, an assault on racial profiling can challenge and help reduce the biases that contribute to the over-incarceration of ethnic minorities; but it is merely one of many vectors by which multiple biases infect the administration of justice.

2. Build the right benchmarks against which to judge police work. Monitoring of police stop and search activities has become much more sophisticated over the last decade. As John Lamberth describes, each situation should be separately evaluated to understand what figure one should use as the benchmark.

3. Monitor deployment of police and the volume of stops they make. Even with precise ambitions and appropriate benchmarks, merely monitoring the numbers of stops and searches is not enough. As Ben Hayes points out, monitoring in England and Wales “has not resulted in significant reductions in the numbers of stops and searches conducted or their disproportionate impact on non-whites.” Joel Miller’s insightful contribution explains why that might be: when stop and search numbers are compared with the right benchmark—the demographics of the population on the streets—it appears that there is little profiling going on: at least in that single location. As Miller writes: “When police stop and search activity was compared with these street populations, disparities involving minorities all but disappeared.” The deployment of police to high crime areas, particularly if those areas have disproportionate numbers of ethnic minorities on the streets, can generate disproportionate numbers of stops without any individual officers relying on stereotypes to guide their discretion. To end the disproportionate impact of stops in this context, police commanders must reduce the volume of stops made by police in minority communities, a plausible step in light of research showing that stop and search is not particularly effective at reducing crime. As Joel Miller explains: “searches are most effective when used sparingly” and in combination with intelligence that can guide police to a narrow group of suspect

individuals. Illustrating this precise point, Police Inspector Richard Keenan explains that he has succeeded in Leicester because “stop and search is used sparingly and within defined parameters, in the context of actual intelligence.”

4. Monitor what happens inside each stop. Racial profiling can continue to poison a police encounter during the stop itself. An aggressive approach by police officers can itself begin a cycle of escalation that ends with the civilian arrested for conduct during the stop. Misti Duvall describes this phenomenon in Europe, where a routine identity check can end in criminal charges of “insulting behavior” or “rebellion” against the police—the same cycle that U.S. Police Chief Harry Dolan describes as potentially generating charges of “hindering and opposing.”

5. Build trust between police and affected communities. Perhaps the most important lesson learned from the early efforts at confronting racial profiling was that success depended more on how the police attempted to redress the problems than on whether they eliminated statistical disparities. David Harris makes this point when he explains that “addressing the practice of ethnic profiling promises to build the trust of communities in their police department.” And Chief Dolan provides an example of what this means in practice when he tells the story of how he engaged community residents in shaping the measurement strategy to be used to monitor stops: “The city manager and I talked to citizens who were leaders

in the community, and especially those who were critical of the police department. We wanted a cross-section of leaders involved and this in itself generated a lot of excitement, as it had not been done before.”

6. Extend monitoring into the rest of the criminal justice system. Institutional racism and biased assumptions about what criminals look like are not confined to the police. In her contribution, Mary O’Rawe describes an innovative effort in Northern Ireland to create an inter-agency information-sharing system, called Causeway, that will allow users to track arrested persons on their journey through the criminal justice system, but on an anonymous basis. Because the system will include demographic details such as ethnicity and nationality, Causeway will, as O’Rawe explains: “eventually enable the results of equity monitoring to be recorded and analyzed.”

7. Monitor sources of bias in the wider society. As Iulius Rostas points out, “negative representation has a long pedigree.” The Roma, for example, have been seen as criminal within their own European societies at least since the 15th century. Such biases, he writes, are perpetuated by the mass media, reminding us that monitoring can extend well beyond the criminal justice system.

It is frequently easier to admit having a problem when there is a solution at hand. These seven lessons from earlier experience are not only useful as practical guides, they may help persuade police officials and government

Preparing a Fresh Assault on Racial Profiling

leaders that racial profiling can be safely addressed through rational discussion, empirical measurement, and practical reform. Indeed, as the practical steps described by the authors in this volume become better

understood, we can hope that more governments in Europe—and, indeed, around the globe—may be willing to concede the presence of this poison and its toxic effect on law enforcement and criminal justice.

Notes

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INTRODUCTION

Toward a Europe Without Ethnic Profiling

James A. Goldston[†] sketches the case against ethnic profiling under European law.

Ethnic^c profiling of minorities by law enforcement is a problem across much of Europe that has gained urgency since 2001 with the targeting of particular communities associated with what some term a “war on terror.”

Where police rely on generalizations about race, ethnicity, or national origin, they veer into impermissible profiling that amounts to discrimination.

Nonetheless, to date, efforts to examine, address and, where necessary, correct improper profiling practices have been comparatively few. The concept of “ethnic profiling” is little known or understood outside the United Kingdom. Indeed, no direct translation of the term appears in many European languages, and there has been little academic research on the matter.

Ethnic profiling lies at the convergence of three distinct, if related, fields. One is *discrimination*—the negative and differential treatment that minorities often suffer at the hands of the police and other law enforcement bodies. A second is the quality of

policing as it relates to crime prevention and criminal justice—and how to improve policing practices in a Europe which is rapidly becoming more multi-ethnic. Third is the question of *data*—specifically, how to gather secure, reliable information about police activity, including patterns of potentially discriminatory conduct, without compromising individual rights to privacy or self-identification. All three of these issues—discrimination, policing and data—are essential to tackling the challenge of ethnic profiling.

In early 2005, the Justice Initiative launched a project to document, raise awareness about, remedy, and foster good practices, which avoid unlawful instances of ethnic profiling, in several European countries.² As an organization with expertise in public security and police reform, racial discrimination, and freedom of information/data protection, we hope to make a contribution. This issue of *Justice Initiatives* is a first effort to map some of the problems, and explore several questions central to developing sound law enforcement policies that do not improperly discriminate on grounds of race or ethnicity.

In coming months, the Justice Initiative, working closely with local partners, will pursue the following activities:

Documentation: The project will undertake research and/or surveys in one or more countries to document police profiling, and perceptions about it, among law enforcement, minority communities, and others. One objective is to demonstrate by example the possibility of generating empirical evidence to confirm—or refute—the many allegations that suggest that police in a number of European countries are engaging in profiling practices against minorities.

Legal and Policy Measures: The project will explore and seek to disseminate legal and/or policy reforms—within individual countries, and regionally at European level—to promote effective policing and reduce ethnic profiling.

Collaborative Relationships: The project will attempt to address a major impediment to progress—the often wide difference in perceptions between law enforcement and minority groups—by fostering, not merely dialogue, but collaborative action in documenting problems and testing solutions.

What is ethnic profiling?

By “ethnic profiling” I refer to the use of racial/ethnic stereotypes, rather than individual behavior, as a basis for making law enforcement and/or investigative decisions about who has been or may be involved in criminal activity. Law enforcement may properly rely on sets of behavioral patterns associated with particular offenses to identify likely perpetrators. But such patterns of activity—for example, traveling with a one-way ticket, paying in cash, or carrying little baggage—should be

grounded in accumulated investigative experience about particular categories of crimes. Where judgments rely on generalizations about race, ethnicity, or national origin, they veer into impermissible profiling that amounts to discrimination.

Ethnic profiling is problematic in at least two respects. First, it assumes that the race/ethnicity of the person profiled is knowable and determinate. But this is not always so. While in some societies racial and ethnic categories are well-defined, in others they are more fluid or context-dependent.³ My own experience suggests their subjective nature. While I have never been (to my knowledge) the target of police surveillance, my facial features have been described, on three different continents, as “Jewish,” “Irish,” “African,” and “American.”⁴

Second, ethnic profiling assumes a consistent association, if not a causal relationship, between race/ethnicity and certain kinds of criminal activity. But policies premised on the notion that members of certain ethnic groups are more or less likely to sell drugs, carry firearms, or commit terrorist acts, are both under- and over-inclusive. They thus risk focusing undue law enforcement attention and resources on those who fit the profile, while overlooking others who don't. Stereotypes about ethnic minority involvement in criminal activity run deep. They powerfully, if often subtly, influence public attitudes and official policy. And yet, they are often wrong. Even when they are correct, this may be irrelevant for the purposes of crime

prevention or investigation. To take one example, it has been argued that pickpockets and thieves in some Central European rail stations are preponderantly Roma. If true, this may say more about the failure of government social policy than the appropriate contours of criminal justice.

Commitment to the rule of law demands that police enforce, not compromise, fundamental principles of equality.

Racial and ethnic profiling has become widely known in both the United States and the United Kingdom in the past decade. While the concept is not as familiar in much of continental Europe, the reality of discriminatory policing is well understood, whether in the form of police raids targeting Roma communities; disproportionate surveillance, stops and identity checks in immigrant neighborhoods; or a greater incidence of reported acts of police violence against ethnic minority members. In recent years, as a number of articles in the present issue of *Justice Initiatives* make clear,³ intergovernmental and civil society monitoring bodies have raised concerns about ethnic profiling and discriminatory police practices in many European countries. ECRI, the Council of Europe's Commission against Racism and Intolerance, has flagged the issue in several countries,

including Austria, Bulgaria, France, Germany, Greece, Italy, Romania, Russia, Spain, Sweden, Switzerland, and the United Kingdom.

Since September 11, 2001, in Europe as in the United States, views of ethnic profiling—what it is and what is permissible—have changed somewhat. Whereas previously ethnic profiling was often understood to concern the stopping of (in the United States) African-American or Latino citizens and (in Europe) Roma or persons of African origin for common crimes, “[n]ow [it] is more likely to mean security checks or . . . investigations that target Muslim men from Middle Eastern countries, in order to try to catch terrorists. And now lots of people are for it.”⁶ The calculus of inquiry may be somewhat different when the risk of failed police detection is not the sale of an ounce of crack cocaine, but a terrorist attack. Moreover, counter-terrorist profiling may focus not only on the race or ethnicity of suspected perpetrators, but also on other factors such as their national origin, nationality (country of citizenship), and religion. And yet, commitment to the rule of law demands that police enforce, not compromise, fundamental principles of equality. Fighting terrorists only underscores the need to ensure effective protection of human rights.

Ethnic profiling has long been under-acknowledged or misunderstood. On the rare occasions when it has been examined head-on, courts have often been hostile to claims that police should be barred from profiling on the base of race or ethnicity. A notable example is a 2001 decision

of the Spanish Constitutional Court in a case involving a police identity check of an African-American woman who was a naturalized Spanish citizen. Although the woman was accompanied by her Spanish-born husband and son upon exiting a train station, she alone was stopped by the police and required to provide documentary proof of her legal residency. By a five to one decision, the court found it lawful for the police to use ethnicity as a proxy for noncitizen status, and thus to single out only ethnic minorities for identity checks in the enforcement of immigration law.⁷ In the court's view, "certain physical or ethnic characteristics can be taken into consideration [by the police] as reasonably indicative of a person's non-national origin."

Whatever rational basis this logic may have had in the time of Franco, it makes little sense in the increasingly multiracial, multiethnic Europe of today. And yet, such deeply embedded attitudes are not easily changed.

The normative environment

One major challenge in addressing ethnic profiling in Europe is the absence of a Europe-wide norm which specifically identifies and outlaws the practice. This is a goal to strive for. And while it may take time, it will not require a great jurisprudential leap forward. Indeed, different strands of international and European law already suggest that ethnic profiling is illegal and provide the foundation for more concerted advocacy.

A number of core international human rights norms prohibiting

racial and ethnic discrimination are relevant to ethnic profiling. The United Nations Race Convention prohibits racial discrimination with respect to "freedom of movement"⁸ and the "right to equal treatment before the tribunals and all other organs administering justice."⁹ Both the general equality provision¹⁰ and more specific guarantees of the International Covenant on Civil and Political Rights (ICCPR) prohibit racial discrimination in relation to "the right to liberty and security of the person," outlaw "arbitrary arrest or detention," and bar deprivation of liberty "except on such grounds and in accordance with such procedure as are established by law."¹¹ These universal standards have been reinforced by intergovernmental exhortations. Thus, in 2000, the Programme of Action at the UN World Conference against Racism urged "States to design, implement and enforce effective measures to eliminate the phenomenon popularly known as 'racial profiling'..."¹²

At regional level, the European Convention on Human Rights prohibits racial discrimination in the enjoyment of civil and political rights, including the rights to liberty and security of the person, as well as the determination of civil rights and any criminal charge.¹³ In recent years, the European Court of Human Rights in Strasbourg has begun to flesh out the guarantee of nondiscrimination in the sphere of criminal justice. In the case of *Hugh Jordan v. the United Kingdom* in 2001, the Court held that where members of a minority group suffered disproportionate killings by security

forces, “it [was] not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.”¹⁴ Data broken down by religion—specifically, that, in a 25-year period, the overwhelming majority of persons killed by the security forces were from the Catholic or nationalist community—were at the heart of the discrimination claim in that case.

Acts of state agents motivated by “racist overtones,” the Court explained, are “particularly destructive of fundamental rights.”

In a landmark judgment in 2004, *Nachova v. Bulgaria*,¹⁵ a panel of the European Court held, in a case now on review before the Court’s Grand Chamber, that where racial animus underlay both the shooting by soldiers of two Roma and the botched investigation which followed, the Convention’s nondiscrimination guarantee, Article 14, was breached. Although *Nachova* concerned acts of murder, the Court’s reasoning offers guidance to advocates who seek to address racial profiling as well. Thus, the Court observed, “where there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality....”¹⁶ Acts of state agents motivated by “racist overtones,” the Court

explained, are “particularly destructive of fundamental rights.”¹⁷ “In order to maintain public confidence in their law enforcement machinery, contracting States must ensure that in the investigation of incidents involving the use of force, a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing.”¹⁸

When practiced in a systematic manner, ethnic profiling is also corrosive of public trust, and thus of the community cooperation so essential to effective law enforcement. All too often, allegations of ethnic profiling go unaddressed. As *Nachova* makes clear, the European Convention mandates that states carry out thorough and effective investigations of complaints. This happens all too rarely.

Building on European Convention standards and Court jurisprudence, ECRI has specifically addressed ethnic profiling in stops and identity checks, even in the context of a war on terror. ECRI’s general policy recommendation No. 8—on “combating racism while fighting terrorism”—issued in 2004, urges governments to “pay particular attention to...ensuring that no discrimination ensues from legislation and regulations—or their implementation” in, among other fields, “checks carried out by law enforcement officials within the countries and by border control personnel.”

Within the European Union, the United Kingdom may be one of the few countries explicitly to prohibit racial discrimination by the police.

Thus, with the Race Relations (Amendment) Act 2000 (passed in response to the recommendations of the Macpherson Report, following the inquiry into the police investigation of the murder of Stephen Lawrence),¹⁹ the parliament extended the prohibition on racial discrimination to the performance of public functions by public authorities, including the police and government departments.²⁰

International and regional rules of police conduct make clear that racial and ethnic discrimination is inconsistent with good practice and the duty to enforce the law. The United Nations Code of Conduct for Law Enforcement Officials²¹ provides that rights protected by the United Nations Race Convention, as well as other international instruments prohibiting racial discrimination, are among those “human rights of all persons” that law enforcement officials must “maintain and uphold.”²² The European Code of Police Ethics of the Council of Europe, adopted recently by the Committee of Ministers, expressly recommends that “[t]he police shall carry out their tasks in a fair manner, in particular, guided by the principles of impartiality and non-discrimination.”²³

Finally, important as they are to safeguard fundamental rights, data protection and privacy norms do not impede efforts—possibly involving maintenance and use of statistics on race and ethnicity—to document, and address, ethnic profiling. The 20th century legacy of misusing race statistics for inhuman purposes acts as a cautionary reminder of the need

to safeguard privacy and the right to voluntary self-identification.²⁴ But, as noted in Ben Hayes’ article in the present issue of *Justice Initiatives*, European data protection law does not place an unequivocal ban on the creation or preservation of ethnic data. Rather, it properly highlights the need to protect privacy and self-identification while making provision for the

The European Code of Police Ethics expressly recommends that “[t]he police shall carry out their tasks. . . guided by the principles of impartiality and non-discrimination.”

good-faith collection and dissemination of ethnic data for legitimate public interest purposes, with certain safeguards in place. It does this, in part, by reasonably distinguishing between individual, identifiable data, and collective, anonymous data that cannot be traced to any person.²⁵

To date, Europe—specifically, its minority population—has experienced ethnic profiling beneath the radar screen. This is too important, and too remediable, a problem to be allowed to continue. Europe has made great strides in recent years in laying a normative basis for combating racial and ethnic discrimination in social and economic life.²⁶ The time has come to extend these advances into the field of criminal justice, and policing in particular. As the day-to-day face of

officialdom for many, the police play a crucial role, not only in fighting crime and ensuring public security, but in fostering positive—or negative—attitudes about government in general.

Ethnic profiling strikes at the heart of the social compact between minority communities and society at large. All Europeans have a stake in eradicating this practice.

Notes

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1. Throughout this article, the terms “racial,” “racial discrimination,” and “racial profiling” are used interchangeably with their “ethnic” analogues—i.e., “ethnic,” “ethnic discrimination,” and “ethnic profiling”—consistent with the definition of “racial discrimination” in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force January 4, 1969 [“Race Convention”], which includes unjustified distinctions based, not only on “race” or “colour,” but also on “descent, or national or ethnic origin....”

2. An inaugural meeting, convened in Budapest in late January 2005, brought together representatives of law enforcement, academia, minority groups, and civil society organizations from Bulgaria, Greece, Hungary, Latvia, Spain, the United Kingdom, and the United States. Materials from the project and this meeting are available at: http://www.justiceinitiative.org/activities/ec/ethnic_profiling.

3. “[T]he meaning of race in the United States has changed and will likely continue to change over time with changing sociopolitical norms, economic patterns, and waves of immigration.... Moreover, race has and may continue to have different meanings for different groups....” Rebecca M. Blank, Marilyn Dabady, and Constance F. Citro (eds.), *Measuring Racial Discrimination*, The National Academies Press (2004), 33.

4. To be sure, the question of whether racial/ethnic profiling can be documented is different from whether it contributes to the prevention and/or prosecution of crime. The social construction of “race” undermines any attempt to use race as an indicator of criminal propensity. However, this does not make it impossible to measure to what extent police engage in racial profiling, where the focus of inquiry is not the “actual” race of the alleged perpetrator, but the race as perceived by the police.

5. See articles in the present issue of *Justice Initiatives* by Misti Duvall and Iulius Rostas.

6. Samuel R. Gross and Debra Livingston, “Racial Profiling under Attack,” 102 *Columbia Law Review* 1413, 1413 (2002).

7. Judgment 13/2001, Constitutional Court of Spain, January 29, 2001 (20010301).

8. Race Convention, Art. 5(d)(i).

9. Race Convention, Art. 5(a).

10. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force March 23, 1976 [“ICCPR”], Art. 26.

11. ICCPR, Art. 2(1), together with Art. 9(1). See also ICCPR, Art. 14(1) (“All persons shall be equal before the courts and tribunals”).

12. Durban Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance (September, 8 2001), para. 72. See <http://www.unucuh.ch/pdf/Durban.pdf>.

13. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 E.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 ["ECHR"], Arts. 14 together with Arts. 5(1) and 6(1). In addition, Protocol No. 12 to the European Convention, which prohibits discrimination "by any public authority" on all grounds (Art. 1(2)), entered into force in January 2005.

14. *Hugh Jordan v. United Kingdom* (Eur. Ct. Hum. Rts.), Judgement of 4 May 2001, para. 154.

15. *Nachova and others v. Bulgaria* (Eur. Ct. Hum. Rts.), Judgment of 26 February 2004.

16. *Nachova*, para. 157.

17. *Nachova*, para. 158.

18. *Nachova*, para. 158.

19. In April 1993, black teenager Stephen Lawrence was murdered by thugs at a bus stop in Eltham, southeast London. The flawed police investigation which ensued gave rise to a major report on racism in the criminal justice system in the United Kingdom. The report found that institutional racism played a part in the investigation by the Metropolitan Police Service of Lawrence's murder and recommended a series of major reforms to, *inter alia*, subject the police to greater public control, enshrine rights for victims of crime and extend the number of offenses classified as racist. See Report of The Stephen Lawrence Inquiry by Sir William Macpherson, published on 24 February 1999, available at: <http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm>.

20. Section 19B(1) of the 1976 Race Relations (Amendment) Act, as amended in 2000, now provides: "It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination." The Preamble makes clear that the purpose of the 2000 amendment was to "extend further the application of the Race Relations Act 1976 to the police and other public authorities; to amend the exemption under that Act for acts done for the purpose of safeguarding national security; and for connected purposes." Available at: <http://www.hms.o.gov.uk/acts/acts2000/00034-a.htm#1>.

21. Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979, available at: http://www.unhcr.ch/html/menu3/b/h_comp42.htm.

22. UN Code of Conduct, Arts. 2, 2(a) (Commentary).

23. Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, Appendix, Art. 40.

24. Thus, Article 3.1 of the Framework Convention on the Protection of National Minorities guarantees to every person belonging to a national minority the right freely to choose to be treated or not to be treated as such, and provides that no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice. This right to self-identification has been recognized in other documents, including the Copenhagen Document of the CSCE/OSCE of 1990 and the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. The right to private life is contained in Article 8 of the European Convention of Human Rights.

25. See James A. Goldston, "Ethnic data as a tool in the fight against discrimination," European Conference on Data to Promote Equality, Helsinki, Finland, 9 December 2004, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/events/helsinkijag.pdf.

26. See, for example, Council Directive 2000/43/EC of 29 June 2000 (prohibiting direct or indirect discrimination "based on racial or ethnic origin" in relation to employment, social protection, education, housing and other "goods and services which are available to the public").

ETHNIC PROFILING BY POLICE IN EUROPE

Evidence of Ethnic Profiling in Selected European Countries

Misti Duvall[†] provides an overview of the evidence of ethnic profiling in European countries, gathered from reports by nongovernmental and human rights monitors.

The existence of ethnic profiling in European countries has been documented by human rights and intergovernmental organizations in Europe for years. The following paper collects evidence from recent reports on France, Germany, Italy, Spain, and Sweden.

“Abusive police raids are a regular feature of life for French Travellers and Gypsies.”

France

French police reportedly conduct discriminatory identity checks on Muslims, Travellers, and Gypsies. Services at Muslim mosques are monitored. Abusive raids of Gypsy and Traveller camps are regularly reported, as are forced evictions and ill-treatment of Roma, Gypsy, and Traveller minorities.

The European Commission Against Racism and Intolerance (ECRI) in 2004 expressed concern over the persistence of reports of “discriminatory identity checks” conducted by the French police.¹ In its latest report

on the situation of Muslims in Europe, the International Helsinki Federation (IHF) notes that French police “reportedly monitor mosque sermons regularly for the purpose of tracking extremist imams.”² The European Roma Rights Center (ERRC) has recently expressed concern over reports of discriminatory stops of Travellers and Gypsies:

Discriminatory profiling of Travellers and Gypsies seems to be widely practiced by the French police in carrying out controls on vehicles. Many Travellers and Gypsies reported that they are specifically targeted by police for checks on their car papers. Sometimes a group of Travellers can be stopped repeatedly during a single trip. Or police carry out the checks just outside of a place of residence of Gypsies and Travellers, or even at the site they are residing [in].³

According to the ERRC, “abusive police raids are a regular feature of life for French Travellers and Gypsies”, with raids often resulting in physical and verbal abuse and destruction of property.⁴ Notably:

Abusive police raids also frequently occur when police carry out searches, checks or arrests involving a Gypsy or Traveller. Systematically, police do not simply search, check or arrest a given Gypsy or Traveller. Instead they collectively target all of the occupants of a

given site. Large numbers of police arrive dressed in combat gear, and surround the site. They brandish their weapons in a threatening manner and order all residents out of their caravans. Once again racist insults are frequent, and there are instances of abusive use of weapons and physical ill-treatment. These raids, based on racial profiling, are a product of the racist prejudices prevalent in French society which label all Travellers and Gypsies as delinquents and criminals.⁵

ECRI reports that “complaints persist concerning ill-treatment inflicted by law enforcement officials on members of minority groups,” including of “physical violence, humiliation, racist verbal abuse, and racial discrimination.”⁶ The commission also notes the persistence of NGO reports of police harassment of Roma, Gypsies, and Travellers, and reports of violent evictions of Roma.⁷ In addition, the IHF has noted its concern over reports of law enforcement misconduct toward non-nationals.⁸ The UN’s Committee on the Elimination of Racial Discrimination (CERD) expressed concern in 1999 about “possible discrimination in effect in the implementation of laws providing for the removal of foreigners from French territory, including persons in possession of valid visas.”⁹

In its 2003 annual report on France, Amnesty International stated that “[i]ncidents of police brutality, a number of which related to foreign nationals or French nationals of foreign origin, were reported. They frequently involved disputes

arising from police identity checks.”¹⁰ Several lawyers’ associations expressed concern that such checks—leading to police charges of “insulting behavior” or “rebellion”—occur in urban areas of particular “sensitivity,” and focus on young people of non-European ethnic origin.¹¹ In Paris:

French authorities have responded that the collection of [ethnic] data is “inconceivable.”

[C]omplaints about police ill-treatment doubled between 1997 (216 complaints) and 2002 (432). According to a new human rights committee set up at Saint-Denis following established cases of police brutality, many incidents ... continued to arise out of identity checks and to be race-related. A report published in April by the National Commission of Deontology and Security (CNDS),¹² a police oversight body, examined a number of cases of police ill-treatment and expressed concern about the operation of Paris police patrols at night and the lack of supervision of officers in Seine-Saint-Denis.¹³

The government of France reported that it had stepped up police inspections, searches, and data collection pursuant to recent legislation adopted with the goal of preventing terrorism.¹⁴ CERD recommends that France compile statistics on racially motivated offenses, their investigation, and the punishment of the perpetrators.¹⁵ In its latest report, ECRI recommends

several measures to improve the conduct of law enforcement, including intensification of efforts with regard to human rights training for police, adoption of national measures to put a stop to police misconduct, and the collection of statistics broken down by ethnicity.¹⁶ French authorities have responded that the collection of such data is “inconceivable.”¹⁷

“Since September 11, thousands of Muslims have been subjected to ... house searches, interrogations, and arrests solely because their profiles have matched certain base criteria, foremost of which is an affiliation with Islam.”

Germany

In recent years, the German police have repeatedly engaged in racial profiling of Roma and Sinti. Allegations of police profiling of Muslim minorities have become more widespread since September 11, 2001. Reported conduct includes discriminatory police checks and raids, including on Muslim mosques, targeting of individual Muslims for surveillance, as well as collection and electronic storage of data, and ill-treatment by law enforcement of visible minorities.

According to OSI’s EU Monitoring and Advocacy Program (EUMAP), “although ethnic and racial profiling is officially forbidden, exception may be made for the investigation and/or

prevention of crime.”¹⁸ Though ethnic profiling of Sinti and Roma minorities has been officially discontinued, there have been allegations that the practice continues unofficially.¹⁹ ECRI has expressed concern over reports that members of “visible, notably black, minority groups” are “disproportionately subject to checks carried out by the police and disproportionately singled out for controls in railway stations and in airports.”²⁰

ECRI asserted that police in some states (Lander) collect data on the ethnic origin of suspects without the individual’s permission.²¹ The IHF has reported that, in the search for terrorists, law enforcement have “targeted specific groups of people in a discriminatory way,” including by using personal data compiled in electronic databases.²² In statements to the 2002 OSCE Human Dimension Implementation Meeting, the IHF observed:

In Germany, so-called *Rasterfahndung* has widely been used in an attempt to track terrorist suspects. This method, which is permitted under the German Criminal Procedure Code if approved by a judge, involves the screening of personal data registered in electronic databases. With information contributed *inter alia* by universities, resident registration offices, health insurance companies and utility companies, thousands of young men from Muslim countries who study natural science or technical subjects have been singled out ... since 11 September.²³

Recently, the IHF again charged that “since September 11, thousands

of Muslims have been subjected to screening of their personal data, house searches, interrogations, and arrests solely because their profiles have matched certain base criteria, foremost of which is an affiliation with Islam.”²⁴

The IHF also expressed concern over reports of police raids of German mosques: “According to the Central Council of Muslims, up to 70 mosques have also been raided since the attacks on the United States, in most cases without any concrete result.”²⁵ Lawyers have also reported practices of discrimination against visible minorities, and several instances of police ill-treatment and violence against Roma and Sinti have been alleged.²⁶ Amnesty International has documented cases of police ill-treatment and brutality toward foreigners and ethnic minorities, and has complained that comprehensive figures on complaints of ill-treatment have not been compiled by German authorities.²⁷ Incidents of racism in police stations and police ill-treatment have also been noted by CERD.²⁸

In its most recent report, ECRI urges Germany to take several actions to address discrimination by its law enforcement officers, including “the introduction of a system of registration in connection with police checks that enable individuals to document how frequently they are checked, in order to identify possible patterns of direct or indirect racial discrimination.”²⁹ ECRI also recommends the creation of an independent body to monitor police conduct, further training of law enforcement officials on

awareness of racism, efforts to ensure minority representation on police forces, and the collection of data broken down by ethnic origin.³⁰

Police also reportedly “single out old cars in bad repair for control on the road, because it is assumed that such cars are owned by immigrants.”

Italy

Italy has a history of racial profiling by police against its Roma minority. There have been reports of discriminatory stops against individual Roma, and widespread documentation of regular police raids into Roma camps across the country. Police abuse of Roma, both verbal and physical, is well-documented. There are also reports of police and prison-guard ill-treatment of foreigners. Foreigners are heavily overrepresented in Italian prisons.

ECRI has expressed concern over reports of “discriminatory checks” carried out by the Italian police against foreigners, Roma, and other ethnic minorities.³¹ The ERRC reported an instance of Italian law enforcement “waiting in ambush after having received a report that a ‘suspicious-looking car with Gypsies was in the neighborhood.’”³² Police also reportedly “single out old cars in bad repair for control on the road, because it is assumed that such cars are owned by immigrants. They then reportedly directly ask whether the travelers are

‘Gypsies’, or assume that the occupants are Roma if they are dark skinned.”³³

Italian police regularly target Roma settlements, conducting raids that often result in armed assaults, destruction of property, physical abuse, verbal abuse and humiliation, confiscation of papers, and detention.³⁴ The IHF reports that:

Italian authorities claim that “many illegal immigrants are more easily involved in criminal activities.”

On 11 September at around 6 a.m., five police squad cars entered the Romani camp at Arco di Travertino, on the northern periphery of Rome, and officers forced the approximately 40 Romani inhabitants of the camp to leave their homes and stand in an adjacent parking lot in cold morning weather. According to Salvo de Maggio of the Rome-based Italian NGO *Capodarco*, police proceeded to search the premises with dogs and metal detectors and were accompanied by... bulldozers. The search was carried out without a search warrant, and no arrest warrant was presented to any of the camp inhabitants.³⁵

The ERRC has documented numerous destructive raids, where Roma were forced to leave while police searched their camps without warrants, and camp residents were subjected to verbal abuse and humiliation, physical abuse, and destruction of property.³⁶ Police raids at Roma camps continue to the present. The ERRC reports that on February 10, 2005:

Italian police officers entered the Favorita Romani camp in Palermo, stating they were undertaking a “child census.” During the ensuing action, police officers reportedly arrested several Romani families from Kosovo and/or Serbia and Montenegro. Detained persons included young children, the elderly and the infirm. There were taken into custody and many of them were held for approximately 24 hours. During their detention, they were reportedly not provided with food. After their release, a number of the detained Roma [said] that when they complained to the officers about the treatment they were receiving, they were threatened by officers and roughly pulled about. According to statements by eyewitnesses, during the raid on the camp, police officers also notified twenty persons, including several Kosovo Romani individuals, pregnant women, children, the elderly and the infirm, that the Italian government had ordered their expulsion unless they left Italy voluntarily within five days.³⁷

The ERRC claims that Italian police often beat beggars thought to be Roma,³⁸ and that “police in Italy open fire on persons they believe to be Roma in circumstances in which they would be unlikely to shoot at non-Roma.”³⁹ The United Nations Committee on the Rights of the Child has registered its concern over “allegations of instances of ill-treatment by law enforcement officers against children and at the prevalence of abuse, in particular against foreign and Roma children.”⁴⁰

Roma are not the only group ill-treated by Italian law enforcement authorities. According to ECRI, foreigners, Italians of immigrant background, and ethnic minorities are

subjected to “insulting and abusive speech, ill-treatment and violence...”⁴¹ by police, and are reportedly ill-treated by prison guards.⁴²

About 30 percent of the Italian prison population are foreigners,⁴³ and of these “six of the ten groups most represented in prisons are from majority Muslim countries.”⁴⁴ Their overrepresentation in Italian prisons is perhaps due to the large increase in recent years of foreigners accused of crimes.⁴⁵ Italian authorities claim that “many illegal immigrants are more easily involved in criminal activities.”⁴⁶

Both the CERD and ECRI have recommended that Italy strengthen training on the promotion of human rights principles and racial tolerance for actors in the criminal justice system, especially law enforcement.⁴⁷ Further, ECRI has recommended the establishment of a separate commission to investigate police violence, and recruitment of ethnic minorities into the police forces.⁴⁸

Spain

ECRI reports increased allegations in 2003 of discriminatory police checks, abusive language, ill-treatment, and violence against minorities and non-nationals, leading to death in some cases.⁴⁹ Despite laws guarding against discriminatory and arbitrary conduct, “racial profiling is reportedly common,” affecting Roma, foreigners, and Spanish citizens of immigrant background.⁵⁰ Adul Jalo, the vice-president of the Cultural Association of Independent Immigrants Collective,

states that anyone who looks like a Muslim is searched by the police at airports, train stations, and even in the street.⁵¹ According to Amnesty International, Spain has a deliberate policy of “racial profiling,” defined as “unfair treatment by law enforcement officials, including stops and searches, on the basis of race or ethnic origin.” This may occur with or without sanction from government authorities.⁵²

Forty-two percent of Roma men and women express “zero” confidence in police.

A recent ruling by the Constitutional Court condones racial profiling in certain cases.⁵³ On January 29, 2001, the court ruled that police could use skin color or outward appearance to determine when to conduct identity checks. The case concerned an African-American, now a Spanish national and living in Spain for 33 years, who was targeted by police for an ID check in Valladolid railway station. When she asked why she but not her family had been stopped, the officer reportedly admitted he had been ordered to “identify people like her” (“*identificar a gente como ella*”). Amnesty International describes the court’s reasoning:⁵⁴

The family appealed to the Constitutional Court against a decision of the Interior Ministry (February 1994) and subsequent judgment of the National Court (November 1996), according to which the

police officer had not acted improperly. Their appeal was based on Article 14 of the Spanish Constitution, forbidding racial discrimination. However, the court's majority verdict found that police checks on foreigners in Spain did not constitute racial discrimination and, moreover, that "specific physical or ethnic characteristics can be taken into consideration (...) as reasonable indicators of the non-national origin of the person who possesses them".

Roma women are placed in pretrial detention at a rate of 86.8 percent.

The court considered that the use by police officers of skin color as a criterion for determining who should be asked for their papers was "merely indicative of a greater probability that the person involved was not Spanish." It added that the moment and place at which an identity check was made, such as railway stations, and other places of transit, lodgings used by foreigners or areas inhabited by a number of foreigners, had a bearing on whether it was logical for public officials to carry out identity checks. In dissent, Judge Julio Diego González Campos observed that the introduction of race as a criterion for selecting who should be subjected to police identity checks was an infringement of Article 14 of the Spanish Constitution.⁵⁵

Roma too are allegedly victimized in the criminal justice system. A study funded by the European Commission found that 25 percent of women in

Spanish prisons are Roma, although Roma make up only about 1.4 percent of the population.⁵⁶ Roma women are placed in pretrial detention at a rate of 86.8 percent.⁵⁷ According to another study, 40 percent of Roma women and 35 percent of Roma men claim to have "zero" confidence in judges; 25 percent and 27 percent respectively claim "little" confidence. Opinions regarding police were similar, with 42 percent of Roma men and women expressing "zero" confidence and 28 percent "little" confidence.⁵⁸ The ERRC describes the deep mistrust of the Spanish criminal justice system among minorities as a major impediment to its functioning.

ECRI notes with concern the failure of Spanish authorities to properly investigate incidents of profiling, the lack of transparency of proceedings to remedy alleged abuse, the practice by officers of bringing counter-charges against those who file complaints in order to intimidate them, and the fact that many officers with criminal records or pending disciplinary action are allowed to retain their positions.⁵⁹ Spanish authorities have claimed repeatedly that the collection of ethnic and religious information is against constitutional law and primary legislation.⁶⁰ Both CERD and ECRI disagree.⁶¹

Sweden

While ECRI notes that "racial profiling on the part of the police is...reported to occur" in Sweden, there is little information on the extent to which the practice is used.⁶² The IHF reports

increasing concern on the part of Muslim and human rights organizations over recent antiterrorism measures taken by the Swedish government. For example:

Shortly after the September 11 events, the Swedish government froze the bank accounts of three citizens of Somali origin who had been listed as “terrorist suspects” by the UN Security Council although no concrete evidence was presented to support the allegations against the men and they were not granted any opportunity to defend themselves.⁶³

CERD, ECRI, and the Swedish Helsinki Committee (SHC) have queried the scope of the Special Control of Aliens Act, which allows the police to conduct secret wire-tapping and wire surveillance of foreign citizens.⁶⁴ SHC reports that, as of 1999, the law had been used at least 16 times,⁶⁵ and CERD stresses that antiterrorism measures are not to “discriminate in purpose or effect on grounds of race, colour, descent, or ethnic origin.”⁶⁶

There is also concern about discrimination within the law enforcement system and police response to discriminatory crimes. Sixty-three of the 741 complaints received by the office of the Swedish Ombudsman Against

Ethnic Discrimination concerned law enforcement.⁶⁷ The IHF has also expressed concern that complaints of illegal discrimination are not being properly handled by the police,⁶⁸ and ECRI has noted that “police response to reports of crimes of racism and racial discrimination is still unsatisfactory.”⁶⁹

Both CERD and ECRI recommend that Sweden collect official statistics regarding ethnicity.

Both CERD and ECRI recommend that Sweden collect official statistics regarding ethnicity.⁷⁰ ECRI further recommends that Sweden ensure that police officers are properly trained regarding the prohibition of discrimination and appropriate actions, that allegations of police misconduct be investigated by an outside body, and that police training include human rights instruction relating to racism and discrimination.⁷¹ Although Sweden maintains that the collection of statistics regarding ethnicity is not permitted, the Security Service does compile statistical data about reported crimes with a racist or xenophobic motive.⁷²

Notes

† Misti Duvall is a J.D. candidate at the Columbia University School of Law. This article was researched and written in the course of an internship at the Open Society Justice Initiative in March and April 2005. The section on Spain is adapted from research conducted by Summer Austin, Emily Gumper, and Rahul Mukhi, Harvard Law Student Advocates for Human Rights, supervised by Jamie O’Connell, Harvard Law School Human Rights Program.

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ID Checks and Police Raids: Ethnic Profiling in Central Europe

Iulius Rostas[†] describes the experience of Roma in much of Europe—targets of both random police checks and organized police raids.

Not long ago, the police stopped me in Bucharest while I was on my way to Sinaia in the Carpathian mountains, for a conference on “Roma integration.” At the time, I was working in the Romanian government’s Department for the Protection of National Minorities. I was dressed casually in blue jeans and a jacket, carrying

I was singled out for a police ID check, even though I was with a large group of international friends.

a suitcase, but it’s true I could have been more presentable. I hadn’t shaved, thinking that since the conference began the following day, I’d have time to shave in the hotel. I had just entered the Piața Sudului metro station from where I intended to travel to the railway station, when a couple of police officers approached me. “What’s in your bag?” they asked. “What do you think?” I replied. I was used to extra attention from the police, but felt confident, knowing I had done nothing wrong. They asked me for my ID, and seeing that I was not originally from Bucharest, but from the small

town of Bistrita in Transylvania, they wanted to know what I was doing there. I was on business, I replied. They “invited” me to accompany them to the police station, which I did. There was no talk of charges, no reason given for suspicion, no explanation offered. In Communist times, vagrancy was an offense, and since that time ID checks have been a favorite pretext of police wishing to get people to the station for searches or other checks. Sure enough, when we got there, they again asked me to open my bag. “You do it,” I said. So they did. They went through all my clothes and personal belongings, taking their time, making jokes, telling me “so you’re the coolest guy in the neighborhood?” All this took about 15 minutes. Then one of them found my business card among my belongings. Their attitude changed completely. One thing about the police: they respect the government. The expression on their faces was comic. “I am sorry,” one of them said, “we thought you were a Gypsy. We thought you had stolen something; Gypsies are always thieving.” “Yes,” I said, “I am a Gypsy.” “But you are not like them,” he said, embarrassed. I asked him: “How do you know?”

This kind of occurrence is not unusual in Romania, as I knew too well, but it was disappointing to find, when later I went to Budapest for a graduate degree, that conditions

there were little different. In my first week, at the metro stop nearest my apartment—Örs Vezér Tér—I was singled out for a police ID check, even though I was with a large group of international friends. Not because I was Romanian—the other Romanians were left alone. I understood nothing of what the police said to me as they examined my passport and visa, except one Hungarian word with which I was already familiar—*cigányok*: Gypsies. Over the next year, I had occasion to watch what went on at Örs Vezér Tér metro station, and saw that the police there consistently stopped only those with darker skin.

Police raids

Little systematic research has been undertaken into the police propensity to conduct ID checks on Roma, so much as this experience is considered the norm by most Roma, it is difficult to say just how widespread it is and how many people it affects. Even recorded first hand accounts are relatively few. On the other hand, there is no shortage of information about a second prevalent form of ethnic profiling by police: raids on Roma neighborhoods.¹ The following eyewitness testimony was recorded by Romani Criss, a Bucharest-based NGO, about a police raid in a Roma neighborhood in Buhusi City, Bacau, about 250 kilometers northeast of Bucharest:

They surrounded the house and threw in [tear gas]; the smell was unbearable. Suddenly, I heard two shots. CC yelled from the attic: “don’t shoot anymore,

you’ve already killed two persons.” Then he gave himself up. [Then] CF got down from the attic. While descending, one of the police took a hunting rifle (I recognized its long barrel) and shot him in the stomach from two meters away. The bullet went through him and stopped in the adobe wall. ...I started to cry and yell and told the officers in Romani not to shoot anymore ... and the policemen said “if our instructions are to bring him in dead or alive, that is how we will do it...”²

This police raid took place on December 5, 2002, and, according to local media, involved 40 policemen from special units and 40 gendarmes. The result was two Roma dead, and two more wounded, including a 14-year-old boy shot in the back. No arrests were made. It turned out the police did not have any concrete information on the criminals they were seeking.

Similar incidents have happened and continue to occur with regularity in many European countries where Roma live, and are often reported by Roma and other human rights organizations.³ Police raids of this kind are undoubtedly one of the most egregious forms of racial profiling by law enforcement agencies.⁴ Fighting criminality, law enforcement agencies frequently extend their action to whole Roma neighborhoods. In these cases, entire communities are subject to investigation, regardless of whether the police objective is to search for one or several individuals. Police appear to take the view that guilt is not individual but collective. Violence is a usual ingredient of such actions.

Police raids are conducted frequently as a *preventive* measure, and follow a pattern well-documented by Roma and other human rights NGOs and intergovernmental organizations. Those targeted are asked to produce IDs to show whether they are registered at that address, and asked to justify their presence otherwise. A reason often given for targeting

Exacerbating the harm inflicted on individual Roma due to arbitrary police targeting is the lack of effective legal remedies for victims.

Roma is information from undisclosed sources that wanted criminals are hiding in the neighborhood—officers, it is argued, must use identity checks and search the homes of Roma for these criminals. In Russia, for example, the United Nations Committee on the Elimination of Racial Discrimination (CERD) queried the arbitrariness of such actions and stated its concern “at reports of racially selective inspections and identity checks targeting members of specific minorities, including those from the Caucasus and Central Asia and Roma.”⁵

Often, police conduct raids without search warrants. Often they arrive during the night. These actions are regularly accompanied by law enforcement abuses, including excessive use of force, lack of proportionality between the threat and the means employed, invasion of privacy, damage to property, and unlawful use of firearms often resulting in deaths.

One intergovernmental monitor in Romania concluded in 2001 that “police searching Roma homes or arresting Roma suspects sometimes use undue force ... Violent night-raids conducted by police are still frequent in Romania.”⁶

Exacerbating the harm inflicted on individual Roma due to arbitrary police targeting is the lack of effective legal remedies for victims in most central and eastern European countries. Expressing concern about “allegations of racially motivated ill-treatment, ineffective protection and discrimination against the Roma by law enforcement officials, especially the police,” in the Czech Republic, CERD records “it has been suggested that allegations of abuse by law enforcement officials are not always promptly and impartially investigated. While noting the many initiatives taken in the field of training and education of the police, the Committee stresses that prompt and impartial investigations are paramount in countering discriminatory attitudes and practices.”⁷

Investigations into police conduct, when they do take place, are marred by a lack of transparency or public scrutiny, tending to be closed and lengthy. Usually such investigations into the practices of law enforcement agencies are inadequately conducted and/or the perpetrators remain unpunished. The UN Human Rights Committee writes about Slovakia that it “should take measures to eradicate all forms of police harassment and ill-treatment during police investigations of the Roma, including prompt investigations, prosecutions of perpetrators and the provision

of effective remedies to the victims.”⁸ Ukraine too, according to the Committee, needs to take “effective measures to eradicate all forms of police harassment [of the Roma minority and aliens], and set up an independent authority to investigate complaints against the police. It should take steps against those held responsible for such acts of harassment.”⁹

Centuries of criminal representation

Racial profiling by the police is one of the most visible and frequent expressions of institutionalized anti-Gypsyism. It shows the failure of the state to protect equally the rights of its citizens. Since Roma are targeted by police presumed to be criminals, the presumption of innocence is lost from the outset. If there is no presumption of innocence there is no freedom. If there is no presumption of innocence there is no rule of law.

Anti-Gypsyism—a complex set of stereotypes, prejudices, attitudes, and behavior against Roma—is a constituent part of the culture in European countries. It is visible in a code of behavior that ranges from racist jokes and discrimination in access to rights to collective punishment and attempts to eliminate Roma. In much of the media in Europe, East to West, anti-Roma sentiment is so common today as to be unremarkable.¹⁰

Negative representation has a long pedigree. In the fifteenth century, when some Roma groups made their appearance in Western Europe, because of their nomadic lifestyle, they were characterized as vagrants,

outlaws, and beggars, people who were not bound to a landowner or a tradesman. As such, they were frequently criminalized.¹¹ Being non-Christians, the Roma were seen as “pagans” and heathens, and their darker skin made them the personification of evil.¹² Roma were perceived as religious deviants. This portrayal consolidated through the seventeenth and eighteenth centuries with the first European writers on Roma, who used few direct sources, relying instead on stories, legends, and myths.¹³

Can they really not tell the difference between their chosen suspect groups—national or foreign, Muslim or Gypsy—just that all are darker skinned?

Today’s media continue to play a critical role in perpetuating negative perceptions of Roma, not only in the extremist press but in the mainstream media.¹⁴ From countries with tiny Roma minorities, such as Lithuania and Slovenia, to those where they comprise a significant proportion of the population, as in Romania and Slovakia, media dwell on their darker skin and their alleged propensity to be beggars, thieves, or other kinds of criminal. Numerous newspapers give the impression that Roma are genetically criminal, or responsible for every social ill.¹⁵

The resulting mix of tradition, prejudice, and insinuation encourages and enables police profiling, both informing the perspectives of individual officers on the beat and justifying their

subsequent targeting in the eyes of the public. Color, followed by language and dress, are determinant in defining who is Roma—for Roma themselves as for law enforcement officials. Yet the difference between those using the distinction for purposes of shared memories and culture and those who use it as a pretext for criminal branding and harassment carries serious, sometimes catastrophic, consequences for those affected.

When earlier this year, at Budapest airport, preparing to fly to New York,

I found myself to be the only passenger singled out by airline staff for “supplementary checks”—a meticulous search through my clothing and bags in front of all the other passengers (who were not similarly searched)—I didn’t know what to think. Was this just habit on the part of the security staff—perhaps Gypsies are now likely to be terrorists as well as thieves? Or was it that they really can’t tell the difference between their chosen suspect groups—national or foreign, Muslim or Gypsy—just that all are darker skinned?

Notes

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1. For accounts of police raids on Roma settlements in France, Germany, and Italy, see the article by Misti Duvall in the present issue of *Justice Initiatives*.

2. Romani Criss, *Respecting Human Rights in Romania: Roma citizens of the state of law*, Bucharest (2004), 151. Details of the case are available at <http://www.romanicriss.org>.

3. See, for example, the reports on the situation of Roma prepared by the European Roma Rights Center (<http://www.errc.org>), Romani Criss, and the European Roma Information Office (<http://www.erionet.org>). Other relevant resources on the subject are: the country by country reports of the European Commission against Racism and Intolerance (available at: http://www.coe.int/E/human_rights/Ecri/4-Publications/#P28_299); the US State Department’s annual country reports on human rights practices (available at: <http://www.state.gov/g/drl/rls/hrrpt/2004/c14135.htm>); the opinions of the Advisory Committee on the implementation of the Framework Convention on National Minorities (available at: [http://www.coe.int/e/human_rights/Minorities/2._FRAMEWORK_CONVENTION_\(MONITORING\)/2._Monitoring_mechanism/4._Opinions_of_the_Advisory_Committee/default.asp#TopOfPage](http://www.coe.int/e/human_rights/Minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/2._Monitoring_mechanism/4._Opinions_of_the_Advisory_Committee/default.asp#TopOfPage)); and the Concluding Observations of the various UN human rights monitoring bodies.

4. This article uses the definition of racial profiling adopted at the Conference Against Racism in Durban, 2001: “the practice of police and other law enforcement officers relying, to any degree, on race, color, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity.” See Programme of Action adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, August 31 to September 8, 2001, para. 72, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/No2/215/43/PDF/No221543.pdf?OpenElement>.

5. CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, CERD/C/62/CO/7 (March 21, 2003), para 13. The Committee recommended “that the State party take immediate steps to stop the practice of arbitrary identity checks by law enforcement authorities.”

6. Council of Europe, Advisory Committee on the Implementation of the Framework Convention for National Minorities, Opinion on Romania, adopted on 6 April 2001.

7. CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Czech Republic, CERD/C/63/CO/4 (March 10, 2003), para 11.
8. Human Rights Committee, Concluding Observations of the Human Rights Committee: Slovakia, CCPR/CO/78/SVK (August 22, 2003), para. 11.
9. Human Rights Committee, Concluding Observations of the Human Rights Committee: Ukraine, CCPR/CO/73/UKR (November 12, 2001), para 13.
10. On the role of the media in reproducing negative attitudes toward Roma, see: Project on Ethnic Relations, *Conference Report: The Media and the Roma in Contemporary Europe: Facts and Fictions*, available at: <http://www.per-usa.org/rommedia.htm>.
11. See generally Angus Fraser, *The Gypsies*, London: Blackwell (1992), especially chapter II.
12. Donald Kenrick, Grattan Puxon, *The Destiny of Europe's Gypsies*, London and New York: Heinemann (1972), 19: "the conviction that blackness denotes inferiority and evil was well rooted in the western mind."
13. Wim Willems, *In Search of the True Gypsy – From Enlightenment to Final Solution*, London: Frank Cass Publishers (1997).
14. For a roundup of media representations of Roma in eight European countries, see Open Society Institute EUMAP, *Monitoring the EU Accession Process: Minority Protection* (2002), available at: <http://www.eumap.org/reports/2001/minority>.
15. See Istvan Haller, "Lynching is not a crime: mob violence against Roma in post-Ceausescu Romania," in *Roma Rights* (Spring 1998), available at: <http://www.errc.org/cikk.php?cikk=1824>. The author reports numerous attempts to associate Roma with the communists, including rumors in Romania that the dictator was Roma.

A Failure to Regulate: Data Protection and Ethnic Profiling in the Police Sector in Europe

Police in Europe can typically locate personal data on individuals, including their ethnicity, from countless sources, even though similar information on policing techniques is hard to get, writes **Ben Hayes**.[†]

The collection of data is relevant to ethnic profiling by police for two reasons. First, data is required to discover whether police are, in fact, engaging in profiling on the basis of race or ethnicity. Data on the ethnicity of individuals stopped by police is critical for monitoring police performance and ensuring it is nondiscriminatory. According to EU law, this kind of information can be lawfully collected with the consent of the individual, and used to generate statistical information as long as it is anonymized. Second, criminal or terrorist profiles can be generated by police on the basis of personal data gathered in numerous other contexts, including immigration points and places of employment and education—and these may include an ethnic component unless expressly prohibited. However, European law has consistently failed to improve on a non-binding Council of Europe Recommendation of 1987 on the collection, storing, and processing of personal data in the police sector, including “sensitive” data relating to race and ethnicity.

The two issues are connected: regulation defining the kinds of data police can collect, conditions on its collection, and limits on its use must be clarified and codified. The UK has taken first steps by requiring police to monitor their stops and searches in order to discover whether profiling or discrimination is taking place. Yet regulation of police collection and use of personal data is more pressing than ever today, given the recent revival of ethnic profiling in the context of antiterrorist action in both the UK and the rest of Europe. Much can be learned from looking at the legislative history in Europe, the practical experience in the UK, and the increasing demands for personal data in the context of the “war on terrorism.”

European legislation I: Council of Europe data protection measures

International data protection law in Europe is derived from the 1981 Council of Europe (COE) Convention on the “Protection of Individuals with regard to Automatic Processing of Personal Data,”¹ itself the result of a COE parliamentary assembly resolution of 1968.² The principles embodied in the Convention are that the collection of personal data, and access to it, must be restricted. Data should only be used for the purpose

for which it was collected, and retained only as long as strictly necessary. Individuals should be able to find out what data is held on them and have recourse to mechanisms to challenge its use, accuracy, or retention. The convention matters, as most EU member states do not have a constitutional right to privacy and the European Court of Human Rights has so far been unable to give meaningful effect to this right as guaranteed in Article 8 of the European Convention on Human Rights (ECHR).³

The convention singles out “special categories of data” for particular attention. Thus, “[p]ersonal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards.”⁴ However, states can ignore these safeguards “in the interests of ... protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences.”⁵ The police, in other words, were effectively exempt. To counteract this outcome, the COE drew up a recommendation in 1987 “regulating the use of personal data in the police sector.”⁶ This document advised that data held by the police be supervised independently, suggests limits on its collection, storage and use, and recommends restrictions on the exchange of information with other public bodies, as well as time limits, data security, and notification of the data subject. The recommendation included a stricter rule on the processing of “special categories of data,” such as race or religion:

The collection of data on individuals solely on the basis that they have a particular racial origin, particular religious convictions, sexual behaviour or political opinions or belong to particular movements or organisations which are not proscribed by law should be prohibited. The collection of data concerning these factors may only be carried out if absolutely necessary for the purposes of a particular enquiry.⁷

The UK reserved the right to “comply or not” with the provision on “sensitive” data.

COE recommendations, however, are non-binding. While their adoption implies and encourages acceptance by all member states, reservations are common, explicitly so in this case. The UK, for instance, reserved the right to “comply or not” with the provisions on notification of data subjects and on “sensitive” data.⁸

Three evaluations of the recommendation have been undertaken to date, but none have looked in any detail at how—or even if—it has been implemented by states. The evaluations suggested unsuccessfully, in 1994, the adoption of a new and binding convention, expressed concerns in 1998 about data mining⁹ and police access to genetic data, and ultimately, in 2002, recommended that no further evaluations be undertaken.¹⁰

In sum, then, COE legislative efforts to protect personal data amount to a 1981 Convention from which police forces effectively can—and frequently do—exempt themselves, and a

police-specific 1987 Recommendation with which states may “comply or not.”

European Legislation II: EU data protection measures

By the late 1980s, data protection advocates were concerned that the 1981 COE Convention was not implemented to a sufficient or uniform degree. To address this, the European Commission proposed binding EU legislation on data protection in 1990.

The latest figures show that black people in the UK are still six times more likely to be stopped and searched than whites, and Asians twice as likely.

Over the next five years, the COE Convention was harmonized to eliminate variation between member states’ national laws, and transposed into the EC Data Protection Directive.¹¹

The new directive did not regulate Europe’s police. It not only incorporated the “state security” exemption from the COE convention, but actually broadened it to include all “processing operations concerning public security, defense, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.”¹² Lest there be any doubt, the directive clarifies that it does not apply to activities “which fall outside the scope of Community law,” such as in the areas of foreign and security

policy, and justice and home affairs — precisely where policing policy sits.

Furthermore, the directive makes no reference to the 1987 COE recommendation on data protection in the police sector. This was to be addressed instead in a council resolution under the EU’s “Third Pillar” (policing, criminal law, and immigration). Despite lengthy negotiations, the final draft, agreed in 2001, was never adopted, apparently due to some states’ disagreement with its effective dilution.¹³ Several months later, in June 2001, the relevant working party was disbanded as part of a “streamlining” exercise.¹⁴ Although no explanation was offered, the impasse demonstrates significant resistance from member states to the introduction of meaningful rules governing the protection of personal data in policing and security work.

The right to data protection, as subsequently included in the EU Charter of Fundamental Rights of 2000 (and hence in the draft EU Constitution), offers a broader exemption for state agencies from data protection than that found in either the COE convention or the EC Data Protection Directive. However, at a minimum, the rights of individual access to data and the rectification of errors are entrenched.¹⁵

States may similarly restrict the right to privacy accorded by the ECHR where:

necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder

or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.¹⁶

In 2002, the EU set an alarming precedent when updating and amending an earlier (and separate) directive on data protection in telecommunications.¹⁷ The update removed the crucial obligation on service providers to erase communications traffic data immediately after it has been used for billing purposes. This reflected longstanding demands from law enforcement for the introduction of “data retention” regimes—whereby all internet and telecommunications traffic data is to be stored for 12-24 months and made accessible to law enforcement agencies.¹⁸ A majority of EU member states have now introduced such regimes—despite the unanimous view of European data protection commissioners,¹⁹ privacy advocates, and respected legal opinion that the regimes are unlawful and disproportionate to the need “in a democratic society,” as required by the ECHR.²⁰ In 2004, the European Council went further still, proposing mandatory data retention across the EU.²¹ Though that draft Framework Decision was finally withdrawn, the issue remains on the table and the European Commission has indicated that it will issue fresh proposals later in 2005.²²

Nevertheless, despite this assault on privacy and data protection, the EU remains at least ostensibly committed to the introduction of binding data protection standards in the police sector.²³

The United Kingdom: ethnic profiling, data protection and police accountability

The UK has introduced data regulation in the police sector to keep track of the impact of police stop and search operations on ethnic minorities. The collection of stop and search statistics is permissible within both the general exemptions of the EC Data Protection Directive applicable to police and a specific exemption for national census data and other “scientific research.”²⁴ Moreover, the directive does not prohibit the processing of data rendered anonymous “in such a way that the data subject is no longer identifiable.”²⁵ It is unfortunate, then, that at least two EU governments, Spain and Germany, have apparently claimed in the past that they are unable to put in place an ethnic monitoring mechanism for stop and search because they are prohibited by data protection rules.²⁶

To begin, some background on stop and search in the UK. *Statewatch* published critical analyses of the Home Office stop and search statistics in 1998, and again in 1999, finding that black people in England and Wales were almost eight times more likely to be stopped and searched than whites.²⁷ Where the Home Office had simply produced a total number of stops for each ethnic group within the most of the country’s 43 police districts, *Statewatch* researchers cross-referenced this data with that on ethnicity and population provided by the national census.

The use of stop and search powers by police was the issue raised most often by black and Asian communities during the 1999 “Macpherson inquiry” into the police handling of the racist murder of Stephen Lawrence, and the “institutional racism” identified by the report in the police force. The Macpherson report recommended that:

the Home Secretary, in consultation with Police Services, should ensure that a record is made by police officers of all ‘stops’ and ‘stops and searches’ made under any legislative provision (not just the Police and Criminal Evidence Act). Non-statutory or so-called ‘voluntary’ stops must also be recorded. The record [should] include the reason for the stop, the outcome, and the self-defined ethnic identity of the person stopped. A copy of the record shall be given to the person stopped.²⁸

One response of the German authorities to September 11 was to instruct police units to collect data on young men with Islamic backgrounds.

Although this recommendation has led to increased police accountability and sparked ongoing public debate, it has not resulted in significant reductions in the numbers of stops and searches conducted or their disproportionate impact on non-whites. The latest Home Office figures on stop and search, for 2003-4, showed that black people are still six times more likely to be stopped and

searched than whites, and Asians twice as likely. Under the 2000 Terrorism Act, which gives police the power to stop and search persons and vehicles without *any* suspicion in an “authorized” area, stops and searches have increased steadily since “9/11”, by 150 percent in total in 2002/3—with those affecting Asians up 285 percent and black persons up 229 percent.²⁹ The total number of stops and searches under the Terrorism Act went up by a further 36 percent in 2003/4. Taking all the stop and search powers into account, those conducted on white people have increased by less than 4 percent compared with 66 percent for blacks and 75 percent for Asians.³⁰

These increases have produced attempts to justify the disparities, which in turn have often simply exacerbated the climate of distrust between police and communities.³¹ In March 2005, Home Office Minister Hazel Blears made the extraordinary statement that antiterrorism legislation would inevitably be “disproportionately experienced by” the Muslim community since that is the nature of the terrorist threat.³² No minister before has publicly admitted that certain laws will be used in a discriminatory manner contrary to the Race Relations Act and the other equality legislation in force in the UK.

Antiterrorism: Ethnic profiling as EU police policy

Developments in law enforcement policy and practices since September 11, 2001, demonstrate afresh the

importance of data protection (or its lack) in the police sector, and raise serious concerns about increased ethnic profiling in the exercise of police powers. The “war on terror” coincides with rapidly developing law enforcement technology. Europe’s national data protection commissioners have expressed alarm about the “processing of personal data from different sources on an unprecedented scale.”³³ Much of this data specifically identifies and marks individuals as Muslims.

For instance, it has emerged that one response of the German authorities to September 11 was to instruct police units to collect data on young men with Islamic backgrounds from universities, registration offices, health insurance companies, Germany’s “Central Foreigners Register,” and other sources.³⁴ It is not known how many other states are creating similar databases.

In 2002, the EU’s Working Party on Terrorism drew up recommendations for member states on the use of “terrorist profiling,” using “a set of physical, psychological, or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect.”³⁵ The UK and Germany are among a number of countries participating in an expert group on “terrorist profiling,” with Europol, the European police office, participating.³⁶ Member states are also running a program on “radicalism and recruitment” within the EU framework, targeting Muslim communities’ places of education and worship.³⁷

The EU Network of Independent Experts in Fundamental Rights, an association of experts in international law set up by the European Commission to review recent developments, has serious concerns about

Europol, even before September 11, worked on the “express assumption that organized crime groups are ethnically based.”

the development of terrorist profiles by police or immigration authorities. Profiling on the basis of characteristics such as psycho-sociological features, nationality, or birthplace, they say, “presents a major risk of discrimination.”³⁸ To be acceptable, a statistical link would have to be demonstrated between these defined characteristics and the risk of terrorism, which has not yet been done.

Europol, according to one scholar, even before September 11, worked on the “express assumption that organized crime groups are ethnically based,”³⁹ a controversial *modus operandi*, and one that is, theoretically at least, incompatible with data protection principles. Europol was further empowered by the European Council to collect precisely the sort of “sensitive information” (on ethnicity, religion, political beliefs, and activities) prohibited by the COE.⁴⁰

Ethnically marked data is increasingly the subject of exchange between

law enforcement agencies both within EU countries and with non-EU countries. International agreements on the exchange of personal data regarding air travelers (passenger-name-record [“PNR”] data), have been signed within the EU and with the United States.⁴¹ The justification is that law enforcement agencies need this data to enable

European data protection commissioners say profiles compiled by the U.S. authorities could be shared by up to 1,500 law enforcement agencies.

screening of passengers against terrorist watchlists, and to create profiles on individual visa entrants (lifetime profiles, in the case of the United States). Data pertaining to nationality, ethnicity, and religion will clearly have a central role to play in this process, and may even subject innocent travelers to arbitrary stops, interrogations, and travel restrictions due to information added to a profile by a state agent.

Another logical concern is that the exchange of this data will lead in future to the *de facto* mutual recognition of arbitrary decisions, such as refusals of visas or admission at borders, placement of individuals on watchlists, or inclusion in databases, depriving people of their rights and offering no opportunity for redress.

The EU has entered into three treaties with the United States involving the exchange of law enforcement data (regarding Europol, PNR, and

mutual legal assistance).⁴² Although EU data protection law requires an equivalent level of protection from any state receiving data from the EU, U.S. privacy law only covers U.S. citizens, with no meaningful rules applying to data held on foreigners. European data protection commissioners say the profiles compiled by the U.S. authorities could be shared by up to 1,500 law enforcement agencies. The European Parliament three times voted to reject the EU-U.S. treaty on the exchange of passenger data and, having been ignored by the Commission, is now seeking the treaty’s annulment at the European Court of Justice.⁴³

Biometric data (fingerprints and facial scans) will also be included in these individual profiles. Encouraged by the United States to fingerprint all entrants, the EU has gone one step further, agreeing not only that all passport-holders, residence permit-holders and visa applicants will be fingerprinted, but also, in principle, that this and other personal data will be held in electronic chips in travel documents and in an EU-wide database to which there will be broad law enforcement access.⁴⁴ The clamor for “biometrics” is also driving plans for new national ID card systems in, for example, Britain.

Population registers, foreigner registers, ID cards, terrorist profiling, “watchlists”: these are all issues that appear strongly to promote, rather than restrict, ethnic profiling by police. They should also be seen in the context of restrictive immigration and expulsion policies, and the accompanying resources deployed to enforce these policies.

Where now for data protection in the police sector?

Three main problems inhibit data protection in the police sector. First is the absence of binding international standards. Second is the processing of personal data from different sources on an unprecedented scale. Third is the unregulated exchange of police data around the world. If and when the EU does introduce rules on data protection in the police sector, they are likely, in the current context of law enforcement “globalization,” to meet a very low standard.

Recent developments give further cause for concern. In October 2004, the EU agreed on a new “principle of availability.”⁴⁵ Under this principle, all law enforcement agencies in the EU should have access to all data held by all other law enforcement agencies, for the broad purpose of “cooperation to prevent, detect, investigate and prosecute crime and threats to security.” The EU has committed itself to this ambitious project, which is already well underway, for the next five years.

During the 1980s, when the Council of Europe was first writing up international data protection law, it was accepted that the police, for the purpose of preventing or investigating crime, need access to personal data—but that the processing of this data could not be unlimited and should be regulated by law. Moreover, it was understood that the processing of “sensitive” data should be the exception rather than the norm. Under the “war on terror” that has so far defined the twenty-first century, we can no longer be sure that these basic principles still hold true.

In December 2004, the new European Commissioner for Justice and Home Affairs, Franco Frattini, discussed “new balances ... between privacy and security.” A new framework, he suggested, was necessary to “take account of the times we are living in” and address “some of the supposed obstacles thrown up by the notion of privacy.”⁴⁶ The “principle of availability” and the “notion of privacy”: the future looks grim for data protection in the police sector in Europe.

Notes

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1. Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Convention no 108 (January 28, 1981), available at: <http://conventions.coe.intreaty/ENreaties/Html/108.htm>.

2. See Recommendations and Resolutions on Data Protection of the COE Committee of Ministers.

3. European Convention on Human Rights and Fundamental Freedoms, 213 E.T.S.222, entered into force September 3, 1953 [ECHR], art. 8: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

4. COE 1981 Convention, Chapter II, art. 6.

5. COE 1981 Convention, art. 9(2).
6. COE Recommendation R (87) 15 of the Committee of Ministers to Member States, Regulating the Use of Personal Data in the Police Sector (1987), available at: <http://cm.coe.inta/rec/1987/87r15.htm>. See also Explanatory Report, available at: [http://cm.coe.inta/rec/1987/ExpRec\(87\)15.htm](http://cm.coe.inta/rec/1987/ExpRec(87)15.htm).
7. COE Recommendation R (87) 15, art. 2(4).
8. Michael Spencer, *States of Injustice*, London: Pluto, (1995) 166.
9. Data mining was also addressed in part in a non-binding 1995 COE Recommendation on the “Problems of Criminal Procedure Law Connected with Information Technology,” which covers search and seizure of computer data, technical surveillance, legal obligations of service providers vis-à-vis investigating authorities, electronic evidence, encryption, research into computer crime and international cooperation. See COE Recommendation R (95) 13, Concerning Problems of Criminal Procedure Law Connected with Information Technology, available at: http://www.privacy.org/pi/intl_orgs/coe/info_tech_1995.html.
10. See 1994, 1998 and 2002 COE Evaluation reports on Recommendation R (87) 15, available at: http://www.coe.int/E/Legal_affairs/Legal_cooperation/Data_protection/Documents/Reports/default.asp#TopOfPage.
11. Directive 95/46/EC “on the protection of individuals with regard to the processing of personal data and on the free movement of such data” (October 24, 1995) [“EC Data Protection Directive”].
12. Directive 1995/46/EC, art. 3(2).
13. See EU Council doc. 6316/2/01 REV 2, “Draft Resolution on the personal data protection rules in instruments under the third pillar of the European Union” (April 12, 2001), available at: <http://register.consilium.eu.int/pdf/en/01/sto6/06316-r2en1.pdf>.
14. This working party should not be confused with the EC working party on data protection (the “Article 29” Committee) established under the 1995 Directive and consulted by the EU on “First Pillar” issues (economic and social policy).
15. Although the Charter is not yet in force, it has been cited in some judgments of the European Court of Justice. Article 8 of the Charter reads “1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified...” See EU Charter of Fundamental Rights, available at: http://www.europarl.eu.int/charter/pdfext_en.pdf.
16. ECHR, art. 8(2).
17. Directive 1997/66/EC “concerning the processing of personal data and the protection of privacy in the telecommunications sector” (December 15, 1997), available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/L_024/L_02419980130en00010008.pdf.
18. Directive 2002/58/EC “concerning the processing of personal data and the protection of privacy in the electronic communications sector” (July 12, 2002), available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/L_201/L_20120020731en00370047.pdf.
19. All EU member states have Data Protection Commissioners to oversee the implementation of national laws. In addition, the Commissioners meet in a number of institutional fora, including a Joint Supervisory Body on data protection for Europol, Eurojust, the Schengen Information System, and the Customs Information System. On September 14, 2004, European Data Protection Commissioners met in Wrocław, Poland and adopted a Resolution to set up a “joint EU forum on data protection in police and judicial cooperation matters (data protection in the third pillar).”

20. On the data retention regimes introduced by member states, see *Statewatch*, “Majority of Governments Introducing Data Retention of Communications” (undated), available at: <http://www.statewatch.org/news/2003/jan/12eudatret.htm>. For legal opinion on “data retention,” see *Privacy International*, “Data Retention Violates Human Rights Convention” (October 10, 2003), available at: [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-57875&als\[theme\]=Data%20Retention](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-57875&als[theme]=Data%20Retention).
21. See “Draft Framework Decision on Data Retention,” EU Council doc. 8958/04 (April 28, 2004). For full text and analysis of this proposal, see *Statewatch*, “Data Retention Comes to Roost—Telephone and Internet Privacy to be Abolished” (April 2004), available at: <http://www.statewatch.org/news/2004/apr/21dataretention.htm>.
22. The proposal was withdrawn in April 2005 after *Statewatch* published the opinions of the legal services of the European Commission and the EU Council. Both admit that the EU measure alone cannot lawfully introduce mandatory data retention and that an EC Directive (First Pillar) is required to give the policy an adequate legal basis, see *Statewatch*, “EU: Data Retention Proposal Partly Illegal, Say Council and Commission Lawyers” (undated), available at: <http://www.statewatch.org/news/2005/apr/02eu-data-retention.htm>.
23. Since the draft resolution on data protection in the police sector was abandoned in 2001, the European Commission has consistently said it will propose legislation, although none has yet been produced. The “Hague Programme” on cooperation in the field of Justice and Home Affairs to 2008 also commits the Commission to the introduction of data protection rules in the police sector.
24. Under Article 13(2) of the 1995 EC Data Protection Directive, “Subject to adequate legal safeguards... Member States may, where there is clearly no risk of breaching the privacy of the data subject, restrict [data protection] when data are processed solely for purposes of scientific research or ... for the sole purpose of creating statistics”. In addition, there have been two Council of Europe Recommendations on data protection and personal data used for statistical purposes (CoE Recommendations R (83) 10, September 23, 1983, and R (97) 18, September 30, 1997).
25. Recital 26, Directive 95/64/EC.
26. Open Society Institute EU Accession Monitoring Program, *Seguimiento de la protección de las minorías en la Unión Europea: La situación de los roma/gitanos en España*, Budapest: OSI (2003) 47. See also Andrea Krizsan (ed.), *Ethnic Monitoring and Data Protection: The European Context*, Budapest: CPS Books (2001).
27. See “Stop and search and arrest and racism,” *Statewatch bulletin*, vol 8, no 3/4 (May-August 1998) and “The Cycle of UK Racism—Stop and Search, Arrest and Imprisonment,” *Statewatch bulletin*, vol 9, no 1 (January-February 1999).
28. Recommendation 61, “The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson Of Cluny” (February 1999), available at: <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>.
29. See “Ethnic Injustice: More Black and Asian People Are Being Stopped and Searched Than Ever Before,” *Statewatch news online* (August 2004), available at: <http://www.statewatch.org/news/2004/aug/stop-and-search.pdf>.
30. In 2003-4, the total number of stop and searches increased by 16 percent to 807,616—the highest recorded total to date. The vast majority are conducted under the Police and Criminal Evidence Act (PACE). In addition to the Terrorism Act 2000, the Criminal Justice and Public Order Act 1994 enables a police officer to authorize, for a period not exceeding 24 hours, stops and searches “in anticipation of violence.” See “Stop & Search: Ethnic Injustice Continues Unabated,” *Statewatch bulletin*, vol 15, no 1 (2005).
31. In the UK, continued discrimination against black and Asian communities has led to justifications of the disproportionality of stop and search practice for different ethnic groups. These have varied from arguably racist statements about the propensity to crime and terrorism of different ethnic groups to controversial research that has found, by studying the “available population” (people

on the street), that there is “no general pattern of bias against people from minority ethnic groups, either as a whole or for particular groups.” See “Re-interpreting Stop and Search Statistics,” *Statewatch bulletin*, vol 10, no 5 (September-October 2000). See also Joel Miller’s article in the present issue of *Justice Initiatives*.

32. According to Minister Hazel Blears, “Dealing with the counter-terrorist threat and the fact that at the moment the threat is most likely to come from those people associated with an extreme form of Islam, or falsely hiding behind Islam ... inevitably means that some of our counter-terrorist powers will be disproportionately experienced by people in the Muslim community. That is the reality of the situation, we should acknowledge that reality and then try to have as open, as honest and as transparent a debate with the community as we counter the threat.” *Home Affairs Select Committee, Uncorrected Minutes of Evidence*, 1 March, 2005, HC 156-v. See also *The Guardian* (March 2, 2005).

33. Cited in “Memorandum by the Europol, Eurojust, Schengen and Customs Joint Supervisory Authorities,” *After Madrid: the EU’s response to terrorism*, House of Lords’ European Union Committee, 5th Report of Session 2004-05 (HL Paper 53), 148.

34. See “Police ‘trawling’ for suspect foreigners,” *Statewatch bulletin*, vol 12, no 1 (Jan-Feb 2002).

35. See EU Council doc.: 11858/3/02 REV 3, “Draft Council Recommendation on the development of terrorist profiles” (December 18, 2002), available at: <http://register.consilium.eu.int/pdf/en/02/st11/11858-r3en2.pdf>. See also EU Council doc.: 7846/04, “Terrorist Profiles’ [reply to a written question by Sarah Ludford]” (March 30, 2004), available at: <http://register.consilium.eu.int/pdf/en/04/st07/st07846.en04.pdf>.

36. Europol is an EU-wide policing body set up by the member states in 1990 with the primary purpose of combating “organized crime,” although its mandate is markedly broader in practice. EU member states are obliged to supply Europol with data relevant to its investigations and the agency is developing a sophisticated database and analysis system. Under recent EU legislation, Europol agents will be authorized to participate in “joint investigation teams” operating in the member states. See Europol website: <http://www.europol.eu.int>. See also Ben Hayes, *The Activities and Development of Europol: Towards an Unaccountable ‘FBI’ in Europe*, London: Statewatch (2002).

37. “Call for EU leaders to back scrutiny of mosques,” *European Voice*, Vol. 10 No. 43 (December 9, 2004). See also “EU Action Plan on Combating Terrorism,” Council doc. 10010/3/04 REV 3 (June 11, 2004).

38. E.U. Network of Independent Experts in Fundamental Rights, “The Balance Between Freedom and Security in the Response by the European Union and Its Member States to the Terrorist Threat” (2003), 38, available at: http://europa.eu.int/comm/justice_home/fsi/rights/networks/obs_thematiqu_en.pdf.

39. S. Peers, *EU Justice and Home Affairs Law*, London: Longman (2000), 216. The 19 operational projects (“Analysis Work Files”) that Europol is working on include for example the “illegal immigration of Iraqi Kurds,” “Illicit traffic in narcotic drugs by Turkish groups,” “Islamic terrorism,” and “Trafficking of Indian nationals.” See *Statewatch news online* (April 2004), available at: <http://www.statewatch.org/news/2004/apr/05europol-files.htm>.

40. Council Act “adopting rules applicable to Europol analysis files” (November 3, 1998), available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/1999/c_026/c_02619990130en00010009.pdf.

41. Council Directive 2004/82/EC “on the obligation of carriers to communicate passenger data” (April 29, 2004), available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/L_261/L_26120040806en00240027.pdf; Council Decision “on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection” (May 17, 2004) available at: <http://www.statewatch.org/news/2004/may/PNR-AGR.pdf>. For analysis see *Statewatch Observatory* on the exchange of data on passengers: <http://www.statewatch.org/pnrobervatory.htm>.

42. On the Europol-United States Treaty (which has not been published), see: <http://www.statewatch.org/news/2002/nov/analy15.pdf>; on the EU-U.S. treaties on mutual legal assistance and extradition, see EU Council doc. 9513/03 (June 3, 2003), available at: <http://www.statewatch.org/news/2003/jul/08euus.htm>.
43. By an application notified to the Council on August 4, 2004, the European Parliament has brought an action under Article 230 of the EC Treaty before the Court of Justice, for the annulment of Council Decision (2004/496/EC) of May 17, 2004, on the conclusion of an agreement between the European Community and the United States of America on the processing and transfer of PNR ("Passenger Name Record") data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection. At the same time, the European Parliament brought an action against the Commission, for the annulment of Commission Decision (2004/535/EC) of May 14, 2004, on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection.
44. Council Regulation (EC) No 2252/2004 "on standards for security features and biometrics in passports and travel documents issued by Member States" (December 13, 2004), available at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/L_385/L_38520041229en00010006.pdf; "Proposal for a Council Regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas" and "Proposal for a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals," *European Commission*, COM(2003)558 (September 24, 2003). On the agreement in principle that a central EU document register be created, and law enforcement granted access to that database, see *Statewatch*, "EU Declaration on combating terrorism," (March 25, 2004), available at: <http://www.statewatch.org/news/2004/mar/eu-terr-decl.pdf>.
45. See section 2.1 of the "Hague programme" on EU Justice and Home Affairs Cooperation to 2008, Council doc. 13302/2/04 REV 2, adopted by the Council of the EU on November 5, 2004. For full text and analysis, see: <http://www.statewatch.org/news/2004/nov/hague-annotated-final.pdf>.
46. Franco Frattini's address took place at a meeting of the EU joint supervisory authorities on data protection in Brussels, December 21, 2004.
47. See "EU: The 'principle of availability'..." *Statewatch bulletin*, vol 14, no 6 (November-December 2004).

The Case for Monitoring Ethnic Profiling in Europe

On balance, the achievements of the U.S. anti-profiling movement of the 1990s were modest. The main lesson for Europeans is: aim higher, writes **Stephen Humphreys**.[†]

For Europeans, “ethnic profiling” provides a new optic for an old critique. Nobody who has watched Europe’s long struggle with racism will be surprised by the claim that police throughout the continent use ethnic markers—skin color, language, religious symbols, dress, accents, names, even places of residence—to select individuals for questioning or arrest absent evidence of criminal involvement. Yet a focus on police behavioral patterns—and for many, particularly minority groups, the police are the most identifiable interface between the individual and the state—has not featured in policing or human rights documentation on the continent to date, apart from the UK. This is the more surprising as such an approach has been acclaimed in challenging discriminatory police practices in the United States through the 1990s.

A critical view of the U.S. experience, on the other hand, might find good reasons to doubt the usefulness of transferring skills learned there to the very different European context. Anti-profiling efforts in the United States have had little impact, for example, on the over-incarceration of minorities in that country, and have

failed to change the policies—notably the war on drugs—that give rise to rampant imprisonment and ethnic profiling alike. Some argue that the focus on police profiling has diverted attention to technical points of policing tactics and away from the underlying policy issues. And today, profiling is undergoing a resurgence in the United States, proclaimed as a viable means to combat terrorists, even as rhetorical condemnation continues to some degree.

Yet it may also be that the vocabulary of “profiling” and the methodology employed to combat it are useful in Europe precisely because conditions are so dissimilar from the United States. Minorities are overrepresented in numerous European prisons too: the difference is few challenge it. Unlike the hotly contested U.S. war on drugs, there are few campaigns in European countries challenging the impact of policing policy on minorities. Anti-profiling efforts may be unlikely in themselves to alter criminal justice or incarceration policy. However, they may help focus attention on these issues in a number of European countries where they still remain largely invisible. In addition, whereas both Europe and the United States increasingly resort to ethnic profiling in current antiterrorism efforts, many parts of Europe have had concrete and recent experiences in combating terrorism that

have shown the costs of undue focus on minorities: anti-profiling activities may find fertile soil.

Lessons from America?

First, the U.S. experience in brief: in the early 1990s, “racial profiling” was near-universally acknowledged among minority groups, while officially denied or ignored. By the mid-1990s, some in U.S. policing circles had come to recognize that racial profiling existed, but excused it as a justifiable crime prevention technique. Groundbreaking litigation in the state of New Jersey resulted in a 1996 ruling establishing both that traffic police had been profiling blacks and that this was illegal.¹ By the end of the decade, a series of studies had demonstrated that profiling was both widespread and inefficient. Popular opinion roundly condemned it. Many police departments undertook voluntary monitoring. A pernicious practice had been challenged, and the often vitriolic argument about race in America seemed briefly transcended.

Edifying though it is, however, this story is incomplete. For anyone wishing to transfer the techniques of tracking and eliminating racial profiling to the European theater, two questions arise: first, the negligible impact that apparent success in combating profiling has had on the egregious overrepresentation of minority groups, especially blacks, in U.S. prisons—or generally on policies affecting minority experience of the criminal justice system; second, the change of context and focus of profiling practices in the United States since September 11, 2001.

Bias in criminal justice policy

The consistent overrepresentation of minorities in U.S. custodial and correctional facilities is not contested. According to official Justice Department statistics, more than 60 percent of federal prisoners in 2002 were from minority groups, although they make up only 25 percent of the

There is no sign that widespread public condemnation of racial profiling in the United States has had any effect on the likelihood of minorities entering the criminal justice system.

population.² This figure, the department noted, was unchanged from 1996.³ Blacks alone have consistently made up 44-45 percent of the prison population since 1995,⁴ despite comprising only 12 percent of the total population.⁵ By 2002, there were 134,000 *more* blacks than whites in the country's prisons despite there being *six times* as many whites as blacks in the country as a whole.⁶

At the same time, the prison population has risen relentlessly. Between 1995 and 2002 the total number in custody increased by 30 percent (from 1,585,586 to 2,085,620).⁷ In the context of soaring incarceration, the unchanging disproportion in the imprisonment of blacks effectively means that the tranche of the black population who end up in prison is rising faster than any other group.

By 2003, blacks were seven times as likely as whites to be in prison.⁸

There is no sign whatever, in other words, that widespread public condemnation of racial profiling in the United States in the 1990s has had any effect on the likelihood of minorities entering the criminal justice system. Of course, many would argue that this was never the intention. Profiling was problematic not as the “gateway” into a biased justice

To combat profiling diverts attention from larger policymaking and instead toward the technical minutiae of policy implementation.

system, but because it unnecessarily taxed innocents and wasted police resources. Since studies invoked by activists relied on low “hit rates” to demonstrate the inefficacy of racial profiling, there was in fact little scope for extending criticism beyond the moment of police-minority contact.⁹ Had hit rates been higher—had more targeted individuals wound up in prison—profiling would only have appeared more justified.¹⁰

Although the critique of profiling has not visibly impacted prosecutorial discretion, bail decisions, or sentencing practice, there is nevertheless a critical link between high prison figures and racial profiling: the “war on drugs.” Severe and mandatory sentencing for narcotics offenses has been a significant factor in the inflation of U.S. prison statistics over

the last ten years, accounting for 15 percent of the growth in imprisonment between 1995 and 2002.¹¹ Blacks have been particularly victimized, comprising 56 percent of all convicted drug offenders. According to the U.S. Department of Justice, “Overall, the increasing number of drug offenses [to 2001] accounted for 27 percent of the total growth among black inmates, 7 percent of the total growth among Hispanic inmates, and 15 percent of the growth among white inmates.”¹² Human Rights Watch describes the war on drugs as “devastating to black Americans,” partly because it provides the background for ethnic profiling.¹³ Typically, police officers would stop a motorist on the basis of a minor traffic infringement, and proceed from questioning to a “consent” search, which would result in a hit if it yielded “contraband”—generally (though not exclusively) drugs.¹⁴ Not all commentators foreground the drug war pressure in profiling practice, but drug searches feature in relevant cases from U.S. courts and the “war” is a recurring theme throughout the literature.¹⁵

Leaving aside the well-worn drugs war debate,¹⁶ the principal point is that ethnic profiling is, like the overrepresentation of blacks in prison, an effect of policies including (but not limited to) the war on drugs—not a cause. It might be argued that to combat profiling diverts attention from larger policymaking and instead toward the technical minutiae of policy implementation—police are not, after all, responsible for the laws they are required to enforce.¹⁷

If it was hoped that eradicating or reducing profiling practices might have a multiplier effect on the criminal justice system, this has not materialized. Successful anti-profiling campaigns have produced less aggressive interaction between police and public and more efficient use of police resources. These are welcome results, but the debate has—almost inevitably, given the constraints of proving the innocence of those profiled in courts and attracting police support for reform measures—effectively gone quiet on the policies underwriting bias in criminal justice. Whether or not the U.S. anti-profiling movement started out with such modest ambitions, profiling hardly seems an ideal vehicle for addressing bias in the criminal justice system as a whole.

Rearguard activity

A second reason Europeans might pause before adopting trans-Atlantic tactics is that the U.S.-based campaign looks to have peaked and is now increasingly in retreat. On June 6, 2001, the End Racial Profiling Act, which would have outlawed the practice, came before Congress.¹⁸ Then, as Amnesty International put it, “in the aftermath of September 11, 2001, this legislation languished and finally died.”¹⁹ As many commentators have noted, public tolerance for profiling shot up after September 11: the 81 percent that had previously reviled the practice reverted to 56 percent or more in favor.²⁰ Reports of profiling increased.²¹ Since September 11, there have been mixed messages from the top—guidelines banning federal use

of profiling are exempt from antiterrorism application.²² At the same time, it has become increasingly uncontroversial to state or imply that “profiling works” or, at the least, that it cannot be effectively prohibited, since police believe it works.²³ The argument police have learned not to make is now often made for them by academics and ordinary members of the public: since “the terrorists” are presumed

An established and successful anti-profiling movement has found itself on the defensive in the United States today.

to be Muslim, it is reasonable to use religious indicators (names, dress, but also skin color and national origin) as relevant factors in identifying persons to stop.²⁴ Thus Muslims may have to spend hours stopped in streets and airports while their law-abiding credentials are scrutinized.

This trend has not, of course, been confined to the United States. Muslims in Europe, too, find themselves subject to an increasingly intricate web of surveillance devices based on their match against a checklist of ethnic/religious indicators.²⁵ If an established and successful anti-profiling movement has found itself on the defensive in the United States today, how much less propitious is the current environment for anti-profiling work in Europe, with no pre-existing public outrage to draw on for support?

The case for monitoring ethnic profiling in Europe

I have suggested that the challenge to racial profiling in the United States in the 1990s failed to impact the over-representation of minorities in the U.S. penal system, diverted attention from larger issues of policy to relatively minor points of police conduct, and

Informed critique of the impact on minorities of *any* criminal justice policy has been rare or absent in much of Europe.

has since suffered reversal. However, even if these charges are correct, they do not disqualify anti-profiling techniques and perspectives from application in Europe. To the contrary, the statistical and rhetorical force of the arguments themselves highlight areas of European law and practice that stand to gain from a sustained analysis of ethnic profiling.

Criminal justice in Europe

To take the first point, overrepresentation of minorities in prisons is not a complaint often heard in Europe (although it is true that overall rates of imprisonment generally are greatly lower than in the United States). Nevertheless, where research has been done, it points to clear racial disparities in prison populations in numerous countries. In Spain, according to one study, about 25 percent of women in prison are Roma (Roma constitute only 1.4

percent of the Spanish population).²⁶ The Council of Europe's European Commission Against Racism and Intolerance reports that Roma are likewise over-represented in Bulgaria's prisons.²⁷ In Italy, foreigners make up some 30 percent of prisoners.²⁸ The EU Monitoring and Accession Program claims that "six of the ten groups most represented in [Italian] prisons are from majority Muslim countries."²⁹ Anecdotal evidence abounds of similar bias in numerous countries, including Romania, Hungary, and France.

However, official information does not exist to confirm or refute these charges. In many countries, despite repeated requests from intergovernmental organizations striving to combat discrimination, governments claim they cannot legally compile data on ethnicity.³⁰ The existing studies, generally undertaken by nongovernmental groups in difficult conditions and with little funding, have yet to generate the support and momentum needed to isolate and query bias in criminal justice. The study on Spanish prisons mentioned above represents something of a first: it was EU-funded.

The absence of systematic research of the ethnic makeup of prison populations is replicated throughout the criminal justice systems of continental Europe, extending also to the outcomes of sentencing policies and the possible bias of police practices. It is not only that ethnic statistics are not available—but that the institutions of law enforcement have not

generally been regarded as appropriate subjects for empirical research: “[u]ntil comparatively recently, most of the writing—indeed the research—on policing had focused on the situation in England and Wales and the United States.”³¹ So while U.S. war-on-drugs profiling has no equivalent in much of Europe, it is also true that informed critique of the impact on minorities of *any* European criminal justice policy has been rare or absent.

Ethnic profiling requires rigorous research if it is to be established or refuted. By providing a possible entry point into wider issues of ethnic bias in Europe’s criminal justice systems, such research would have potentially wide-reaching impact. Where in the United States, anti-profiling efforts are the vanishing point of decades-long campaigns against criminal justice bias, in Europe they just might serve as the lever to open a much broader assault.

Antiterrorism in Europe

Despite their differences, Europe and the United States today share the policy that poses the greatest threat of ethnic bias: counterterrorism. On both continents, “terrorist profiles” are increasingly embraced by policy makers and accepted by the public. Yet, whereas in the United States, a focus on the “terrorist threat” has undermined a near-consensual opposition to profiling, in Europe the reverse is the case—the charge of profiling arises largely in response to overzealous counterterrorism measures. Furthermore, overreaction to terrorism is not new to Europe.

Police in the UK, France, and Spain have all learned the hard way that targeting entire “suspect communities” does not work.³² In the case of Northern Ireland, these lessons have led to a thorough restructuring of the police force, including ethnic quotas and measures against police discrimination, now being tested in other postconflict situations.³³ The recourse to profiling techniques by many European police forces³⁴ stands to meet some resistance, possibly in European institutions,³⁵ certainly among minorities and rights groups on the ground.

In both the United States and the UK, the study of criminal justice bias and the first institutional steps to address it—albeit often inadequately—followed extensive riots in the 1960s (U.S.) and in the 1980s (UK) provoked by poor police-minority relations. In a continental Europe juridically committed to tolerance, where sizeable old minorities are joined by now permanent new minorities, the alternative to confronting ethnic bias today is an explosion of anger tomorrow.

Despite its flaws, the U.S. anti-profiling movement achieved real popular support and demonstrated that discrimination is amenable to challenge though empirical inquiry. In the absence to date of any convincing measures—beyond endless “training”—to rein in police discrimination against Europe’s most vulnerable, confronting ethnic profiling has at least the distinct merit of being a first step.

Notes

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1. See *State of New Jersey v. Pedro Soto, et al.* 324 N.J. Super. 66, 734 A.2d 350 (1996). For accounts of this case, see Michael E. Buerger and Amy Farrell, “The Evidence of Racial Profiling: Interpreting documented and Unofficial Sources,” *Police Quarterly*, Vol. 5 No. 3 (2002), 278-280, and David Harris, *Profiles in Injustice*, New York: The New Press (2002) 53-59.
2. U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics, *Criminal Offenders Statistics* (as of December 28, 2004), online at: <http://www.ojp.usdoj.gov/bjs/crimoff.htm>. For census figures see Elizabeth M. Grieco and Rachel C. Cassidy, *Overview of Race and Hispanic Origin Census 2000 Brief* (March 2001) 3, available at: <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.
3. U.S. Department of Justice (2004).
4. Paige M. Harrison and Allen J. Beck, *Prisoners in 2003*, Bureau of Justice Statistics Bulletin, U.S. Department of Justice, Office of Justice Programs (November 2004) 9, available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>.
5. Grieco and Cassidy, 3. According to the 2002 Census, the total U.S. white population stood at 211,460,626; the black at 34,658,190.
6. U.S. Department of Justice, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2000, NCJ 198272, Washington, DC: U.S. Department of Justice (2003) 3, available at: <http://www.albany.edu/sourcebook/pdf628.pdf>. The white prison population stood at 453,300 in 2002; the black at 587,300. Add to this 251,900 Hispanics for a total minority figure nearing twice that of whites.
7. Harrison and Beck (2004), 2.
8. Harrison and Beck (2004), 9, table 12 (showing numbers of black (3,405) and white (465) sentenced prisoners per 100,000 of the respective populations).
9. See articles in the present issue of *Justice Initiatives* by John Lamberth and David Harris.
10. Ironically, figures used to demonstrate success in combating profiling sometimes appear to show that post-profiling practices have targeted proportionately *more* minority individuals in a context of falling overall stops and higher hit rates. See for example, the data before and after racial profiling was addressed by U.S. Customs, where the total number of blacks stopped fell absolutely between 1998 and 2000, but nevertheless *increased* as a proportion of total stops on all groups from 18 percent (6,141 out of 32,857) to 30 percent (2,437 of 8,099). U.S. Gen. Accounting Office, Report to the Hon. Richard J. Durbin, U.S. Senate, U.S. Customs Service, “Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results,” CAO-GGD-00-38, 55 (March 17, 2000). See also U.S. Customs Service, *Observations on Selected Operations and Program Issues* (April 20, 2000), available at GAO-GGD/AIMD-00-150. Press Release, U.S. Customs Serv., *Customs Releases New Personal Search Statistics: Latest Data Suggest Internal Reforms Are Working* (April 10, 2000).
11. Paige M. Harrison and Allen J. Beck, *Prisoners in 2002*, U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2002*, Washington, DC: US Dept. of Justice (July 2003), 10, available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf>.
12. Paige M. Harrison and Allen J. Beck, *Prisoners in 2001*, US Dept. of Justice, Bureau of Justice Statistics, Washington, DC: US Dept. of Justice (July 2002), 13, available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf>.
13. Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs* (May 2000), available at: <http://www.hrw.org/reports/2000/usa/Rcedrg00.htm>.

14. See article by John Lamberth in the present issue of *Justice Initiatives*. See especially *United States v. Sokolow*, 490 U.S. 1 (1989).
15. See, for example, *U.S. v. Sokolow*; *United States v. Sharpe et al.*, 470 U.S. 675 (1985); *Illinois v. Rodriguez*, 497 U.S. 177 (1990). See generally Harris (2002); Deborah A. Ramirez, Jennifer Hoopes, and Tara Lai Quinlan, “Defining Racial Profiling in a Post-September 11 World,” 40 *Am. Crim. L. Rev.* 1195 (2003).
16. For a comprehensive account see Human Rights Watch 2000.
17. See, for example, Richard R. Banks, “Beyond Profiling: Race, Policing and the Drugs War,” 56 *Stan. L. Rev.* 571 (December 2003).
18. The End Racial Profiling Act of 2001 (H.R. 2074/ Sen. 989).
19. See Amnesty International’s campaign against racial profiling in the U.S., at: http://www.amnestyusa.org/racial_profiling/index.do. Nevertheless, Amnesty is still campaigning for the bill’s passage, as it is “now more urgent than ever.”
20. Samuel R. Gross and Debra Livingston, “Racial Profiling Under Attack,” 102 *Colum. L. Rev.* 1413 (2002). For pre-9/11 statistics, see also Frank Newport, “Racial Profiling Seen as Widespread, Particularly Among Young Black Men,” Gallup Poll (December 9, 1999). For post-9/11, see also David E. Rovella, “Pro-Police Opinions on the Rise, Poll Says Wiretaps, Profiling Gains Juror Support,” *Nat’l L.J.* (January 21, 2002), A1.
21. See Amnesty International, “Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States,” Amnesty International USA (October 2004), available at: http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf. See also Muneer I. Ahmad, “A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion,” 92 *Calif. L. Rev.* (2004), 1276-1277: “The government’s racial profiling in immigration enforcement is reflected with stunning clarity in INS statistics, which show a dramatic increase in the numbers of immigrants from Muslim countries apprehended by the INS. Between September 2001 and September 2002, the number of deportable Pakistanis apprehended increased 228 percent over the previous year. The number of Saudis increased by 239 percent, Algerians by 224 percent, Egyptians by 83 percent, and Moroccans by 76 percent. The increase in the number of immigrants from Muslim countries removed (as opposed to merely apprehended) during this time is similarly dramatic: 129 percent for Pakistanis, 113 percent for Saudis, 111 percent for Algerians, 199 percent for Egyptians, and 229 percent for Moroccans. During this same time, the total number of deportable immigrants apprehended decreased by 23 percent, and the total number of immigrants removed decreased by 16 percent.”
22. Eric Lichtblau, “Bush Issues Federal Ban on Racial Profiling,” *The New York Times* (June 18, 2003).
23. See, for example, Gross and Livingston, 1422; Banks 589-591.
24. See, for example, George C. Thomas, “Terrorism, Race, and a New Approach to Consent Searches,” 73 *Miss. L.J.* 525 (2003); Stephen J. Ellman, “Racial Profiling and Terrorism,” 22 *N.Y.L. Sch. J. Int’l & Comp. L.* 305 (2003). Numerous examples of support for this view can be found in Ramirez, Hoopes, and Quinlan.
25. See article by Misti Duvall in the present issue of *Justice Initiatives*.
26. See article by Misti Duvall in the present issue of *Justice Initiatives*, citing the Barañ Project, Roma Women and the Spanish Criminal Justice System, available at: <http://web.jet.es/gea21/ing.htm>. The study was sponsored by the European Commission’s DAPHNE program.
27. European Commission Against Racism and Intolerance (ECRI), Second report on Bulgaria, CRI (2000) 3, Adopted on 18 June 1999 made public on 21 March 2000, available at: http://www.coe.int/E/human_rights/Ecri/5-Archives/1-ECRI’s_work/5-CBC_Second_reports/Bulgaria_CBC_2.asp

28. See article by Misti Duvall in the present issue of *Justice Initiatives*, citing International Helsinki Federation (IHF), *Human Rights in the OSCE Region: Europe, Central Asia and North America Report 2004 (Events of 2003): Annual Report Italy*, 3, available at: http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=3860. See also ECRI, 2nd Report on Italy, para 18, 55; CERD, Reports Submitted by States Parties Under Article 9 of the Convention: Thirteenth periodic report of states parties due in 2001: Addendum, Italy, July 26, 2000, para 196.

29. EUMAP, "The Situation of Muslims in Italy" in *Monitoring the EU Accession Process: Minority Protection* (2002), 257, available at: <http://www.eumap.org/reports/2002/minority>.

30 For examples from the Czech Republic, Germany, Hungary, Slovakia, and Spain, see James A. Goldston, "Ethnic data as a tool in the fight against discrimination," European Conference on Data to Promote Equality, Helsinki, Finland (December 9, 2004) 4-7, available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/events/helsinkijag.pdf.

31. R. I. Mawby, "Approaches to Comparative Analysis: the Impossibility of Becoming an Expert on Everywhere" in R. I. Mawby (ed.) *Policing Across the World: Issues for the 21st Century*, University College London Press (1999), 13.

32. See, for an excellent discussion, M. O'Connor and C. Rumann, "Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland" 24 *Cardozo L. Rev.* 1657.

33. See article by Mary O'Rawe in the present issue of *Justice Initiatives*.

34. See article by Ben Hayes in the present issue of *Justice Initiatives*.

35. European Council plans to integrate data protection systems, for example, have encountered difficulty in the European Parliament. See, for parliamentary resistance to database sharing through the Schengen and Visa Information Systems, the Council of the European Union, "EU Plan of Action on Combating Terrorism" (December 14, 2004), available at: <http://register.consilium.eu.int/pdf/en/04/st16/st16090.en04.pdf>.

MONITORING AND MEASURING ETHNIC PROFILING

Measuring and Understanding Minority Experiences of Stop and Search in the UK

Joel Miller[†] examines the evolving use of statistics to monitor ethnic profiling by police in England and Wales.

Allegations of police racism date back decades in the history of British policing. Statistics, available since the 1980s, have contributed to these charges, showing that disproportionate numbers of people from ethnic minority backgrounds come into contact with the criminal justice system. In 1999, a landmark judicial inquiry into the bungled police investigation of the racist murder of the black teenager, Stephen Lawrence, concluded that London's Metropolitan police force was "institutionally racist." The report highlighted "stop and search" as a case in point—a controversial police tactic that statistics have shown consistently to impact disproportionately upon ethnic minorities, particularly black people.¹

Police officials, government, and social scientists in Britain have tried to measure and understand ethnic bias in police use of stop and search. At first glance, results from different approaches can seem to contradict one another, and so the same results have been used both to support and to counter the claim that police are racist in their use of stop and search. A closer look shows that findings from

different approaches can be reconciled, but doing so highlights the complexity of racism and racial bias. Yet it seems probable that, even if applied in a race-blind manner, stops and searches are still likely to result in "indirect discrimination" against ethnic minorities in the UK.

To be clear: a black person living in England and Wales is substantially more likely to be searched by the police than a white person.

Ethnic monitoring

Systematic data on stop and search and its impact on ethnic minorities are collected routinely by the police themselves, and these capture the extent of racial bias in its most raw form. In England and Wales, the police are required to complete a form whenever they carry out a search on a pedestrian or vehicle. Since 1996, this has included making a record of the visual ethnic appearance of the person searched.² The UK Home Office compiles statistics based on these forms for all 43 police forces within England and Wales, which are published on an annual basis.³ These statistics, when compared to available ethnic data

from the national census, have shown consistently that ethnic minorities, and black people in particular, are searched disproportionately compared to their numbers in the population. This is true for England and Wales as a whole and for individual police forces. To be clear: this means that a black person living in England and Wales is substantially more likely to be searched by the police than a white person.⁴

Chart 1: Number of searches per 100,000 persons in England and Wales, by ethnic group, 2002/3

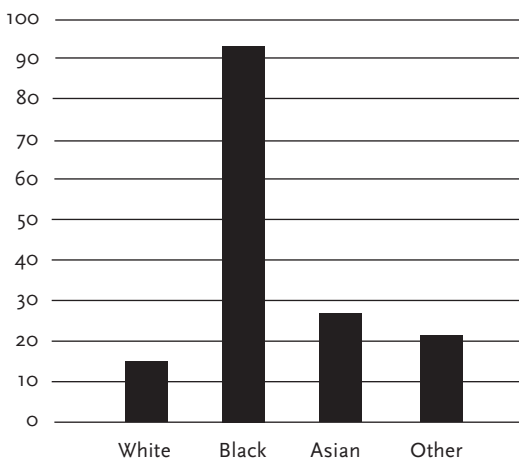


Chart 1 shows how the rates of search vary according to the resident population for 2002/3. Black people were close to six times more likely to be searched than white people in that year. Given that most searches do not lead to an arrest, this is a significant burden that innocent members of black communities have to bear.⁵

Research on ethnic bias

Confronted with these stark inequalities, some commentators have argued that the reasons for differing ethnic outcomes are more complex than simple racist stereotyping by police officers. Notably, some have suggested that the disparity in experience within the resident population may reflect, at least in part, differences in the profile of the people, whether on the streets or in vehicles, who come into contact with police officers—that might more often include those from minority backgrounds.⁶ Under such circumstances, even police officers exercising their discretion equally across the ethnic groups they encounter would still contribute towards disproportionality overall.

Research on stop and search published in 2000, carried out by researchers (including the current author) within the UK Home Office focusing on five largely urban case study areas, attempted to dig deeper into the reasons for disproportionality. This research relied upon more complex and resource-intensive research methods than police monitoring alone can accomplish.⁷ In doing so it provided very interesting, yet controversial, findings. The project involved geographical mapping of when and where stops and searches of pedestrians and vehicles took place, and comparing these with maps of recorded crime. It also involved visual profiling of people actually on the streets and in cars in places where stops and searches were concentrated—stop and search “hotspots”—by mounting mobile video cameras on cars that drove

around the hotspot areas through different days and times, mimicking the behavior of police patrols.

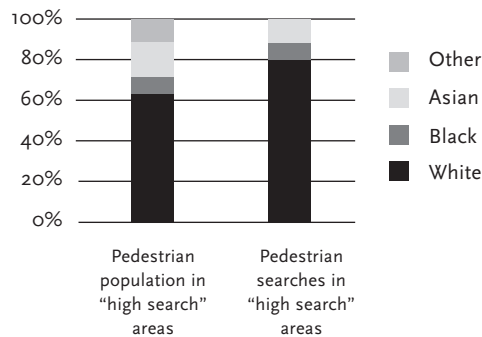
The results confirmed that the reasons for disproportionality were complex. They showed that stops and searches were targeted at areas with higher-than-average proportions of residents from minority ethnic groups—a fact which likely contributed to disproportionality in those areas. Yet, based on analysis of two of the case study areas (the only sites where data was available), the geographical pattern of stops and searches was fairly consistent with patterns of recorded crime, suggesting that stops and searches were targeted at areas with more crime.

The research also found that populations on the street and in vehicles inside the stop and search hotspots were very different from resident populations (as measured by the 1991 census). Most significantly, in areas with high stop and search activity, young men and people from minority ethnic backgrounds tended to be overrepresented in the populations on the street and in vehicles. When police stop and search activity was compared with these street populations, disparities involving minorities all but disappeared. White people tended to be slightly overrepresented in stops and searches. By contrast, Asian people tended to be underrepresented (with some exceptions), and black people's representation varied, with examples of both over- and under-representation.

Chart 2 provides an example of this phenomenon, comparing the ethnicity of pedestrians in hotspots in Central

Leicester with that of people experiencing pedestrian searches. It shows clearly that white persons from this population are more likely to be searched compared to the pedestrian population, Asians less so, and that Black people are searched in line with their representation on the street.

Chart 2: Ethnic profiles of pedestrian population in search “hotspots” and searched pedestrian population (1999/2000 data)



Broader structural factors, including local crime rates and people’s use of public space, can also contribute profoundly to disproportionate impacts.

Some have used this evidence to clear the police of charges of racism in their use of stop and search because it portrays police officers as race-neutral in their street level decision-making, while targeting stop and search toward higher crime areas.⁸ Yet this judgment is simplistic. For one, the study’s conclusions focus on specific places

and points in time that may not be generalized to the country as a whole—although research in other places and times does tend to reinforce the conclusions of the Home Office study⁹. More profoundly, however, racism involves a broader range of processes than direct racial

The aggregate patterns of stop and search remain remarkably similar now to the time of the Stephen Lawrence Inquiry.

stereotyping, and these can include indirect forms of discrimination. Other results that emerge from the same Home Office research program, which raise serious questions about the utility and deployment of stop and search tactics, could be used to argue that stop and search practice is—in its current form—discriminatory.

Analysis of police tactics and deployment

Stop and search, even when applied in a “race blind” way, still disadvantages ethnic minorities. It is targeted at higher crime areas that are also often places where ethnic minority people are concentrated. And for reasons which are unclear—but which might reflect differences in housing, employment, rates of school exclusion, or even recreational activities—ethnic minorities appear to use public space more than white people, so that stop and search neutrally applied further impacts them disproportionately. Given the alienation and tension

that can arise from stop and search encounters, this disproportionate impact has real consequences for minority communities’ relations with the police. A key question is: can the tactic of stop and search as currently used be justified given its impact on minorities? For when an apparently neutral practice disadvantages people on the grounds of racial or ethnic origin, yet is difficult to justify objectively, this may amount to indirect discrimination, according to the definition used in the EU “Race Directive,” which the UK and other member states are required to apply.¹⁰

The Home Office analyzed a range of available statistical data on crime and police activity in ways that shed new light on this question. This involved data on searches, crime rates, arrest rates, and population demographics. Two conclusions are worth highlighting here which challenge the justification for stop and search practice as currently used.

First, analysis of data on crime, arrests, and searches provided little evidence that searches are an effective crimefighting technique. For example, by comparing the numbers of arrests generated by searches with the prevalence of crime, it was estimated that less than one percent of crimes are detected by searches, and a fraction of a percent of crimes might be directly disrupted by searches. Statistical evidence provides little evidence that search rates over the long term are associated with crime rates. The research also found evidence that while searches are most effective when used sparingly, when based on

good intelligence, and where there are strong grounds for suspicion, these characteristics are often not present in the day-to-day practice of searches. An objective justification for searches as currently used—which is needed to rebut charges of indirect discrimination—is difficult to find from the existing evidence.

Second, the Home Office research indicated that rates of searches by different police forces in England and Wales are somewhat arbitrary: different police forces rely on searches to widely varying degrees, even between areas with similar characteristics. This variation is not a result of differences in crime or crime detection rates. The latest search statistics, from 2002/3, show that the prevalence of searches ranges between 5 and 63 per 1,000 people across the 43 police forces of England and Wales—a more than 10-fold variation. And while the largest UK police force, in London, carries out 42 searches per 1,000 population, there are only 11—about a quarter as many—in the West Midlands (another large urban force). The London area has simultaneously high rates of search and the largest numbers of ethnic minority people. This fact alone, acts to exacerbate disproportionality on a national level: if rates of search were consistent across police forces the overrepresentation of blacks compared to whites would reduce from a sixfold to a fourfold difference. Yet, the variation itself further undercuts any objective justification for patterns of searches that could be used to rebut charges of indirect discrimination.

Using data to improve minorities' experiences of policing

Different types of data and analysis can produce quite distinct insights into minorities' experience of the same policing tactic, and the reasons for variations in experience. Data can yield insights about the broader deployment and effectiveness of a tactic. Taken together, the analyses show that it is not only direct racism that is pernicious in its effects on minority communities. Broader structural factors, including local crime rates and people's use of public space, can also contribute profoundly to disproportionate impacts, even when the tactic is applied according to considerations other than race.

If these kinds of insight are to improve the outcomes for minority persons, they require both police and community to engage honestly with the data and analysis that underlies them—for it is only through understanding the nature and origins of a problem that effective solutions might be crafted. Following the recommendations of the Stephen Lawrence Inquiry and using insights from the Home Office research program and other research, stop and search policies have changed: regulatory legal codes have been revised, individual police forces have strengthened policies, and new standards for accountability and monitoring have been mandated.

Yet the aggregate patterns of stop and search remain remarkably similar now to the time of the Stephen Lawrence Inquiry, both in terms of

their overall rates and their disproportionate impact on minorities. More profound change may emerge when forces and communities, working together, draw on insights from data and analysis to explore what alternatives exist for dealing with crime problems—particularly in areas where high levels of stop and search activity coincide with large minority populations—and consider how these would

impact on different sections of the population. At the least, it might involve a greater commitment on the part of policing commands and local communities to agree upon the circumstances and standards according to which stop and search tactics should and should not be used. Once decided, these principles would provide the basis for police officers' use of the tactic, if it is to continue.

Notes

† Joel Miller is a Senior Research Associate at the Vera Institute of Justice.

1. *The Stephen Lawrence Inquiry: Report of an inquiry by Sir William Macpherson of Cluny*, Cmd 4262-I, London: HMSO (1999).

2. In April 2005, this system was revised to include stops without searches, and will also capture self-defined ethnic identity. It will also oblige police officers to provide those stopped with a copy of the record made.

3. See, most recently: *Statistics on Race and the Criminal Justice System - 2003: A Home Office Publication under Section 95 of the Criminal Justice Act 1991*, London: Home Office (2004).

4. This finding of disproportionately has also emerged from research dating back to the 1980s that predates ethnic monitoring by police forces.

5. Only 13 percent of searches on average lead to an arrest according to the 2002/3 figures.

6. See, for example: Her Majesty's Inspectorate of Constabulary (HMIC), *Policing London - Winning Consent: A review of murder investigations and community and race relations issues in the Metropolitan Police Service*, London: Home Office (2000).

7. For a summary of this research, see: Joel Miller, N. Bland, and P. Quinton, *Police Stops and Searches: Lessons from a Programme of Research*, Briefing Note to Police Research Series papers 127-132. London: Home Office (2002). Two key papers relevant to this article are: MVA and J. Miller, *Profiling Populations Available for Stops and Searches*, Police Research Series paper 131, London: Home Office (2002); and Joel Miller, J., N. Bland, and P. Quinton, *The Impact of Stops and Searches on Crime and the Community*, Police Research Series paper 127, London: Home Office (2000).

8. See, for example: *Daily Mail*, "Police cleared of 'stop and search' racism," Friday, November 24, 2000; *The Daily Telegraph*, "Police 'show no race bias in searches': New figures counter Macpherson claim" Friday, November 24, 2000.

9. See, for example: P. A. J. Waddington, Kevin Stenson, and David Don, "In Proportion: Race, and Police Stop and Search," in *The British Journal of Criminology* 44:889-914 (2004).

10. European Union, *Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000/43*.

Benchmarking and Analysis for Ethnic Profiling Studies

John Lamberth[†] summarizes the statistical methods used in the United States to monitor ethnic profiling by police.

Possibly the most complex and misunderstood activity in assessing whether a police department is targeting minorities for stopping and/or searching is the role that benchmarking plays in the process. A benchmark is the standard against which stops by police are measured. Consider the following. We know that the police department in Grand Rapids, Michigan, stopped about 32,000 motorists in 2002 and that 32 percent of these were African-Americans. The question that faced the department was, in order to discover whether their officers were employing ethnic profiles, to what should they compare this volume of stops? Or, using the terminology of ethnic profiling data analysis: “What is the appropriate benchmark?”

To begin, two terms need definition: “stop data” are the *records* of police stopping activity, whether these records come from the police or have to be monitored and estimated independently. The “benchmark” is the appropriate fixed point for comparison to determine if too few, too many, or a roughly proportionate number of individuals from a given minority are being stopped. These concepts—stops by the police and the appropriate benchmark against which to compare

them—are the same regardless of the type of stop involved: of motorists, pedestrians, bicyclists, train travelers, or any other category of person stopped by police.

In the United States, when police departments and researchers first began to analyze data on police stops, many decided to use the most easily obtained data as a benchmark, which was the census data for the jurisdiction where motorists were stopped. In the case of Grand Rapids, Michigan, census data indicated that 18 percent of the city’s population was African-American. If the stops by the Grand Rapids Police were compared to this percentage of African-Americans living in the city, we would conclude that African-Americans were more than twice as likely to be stopped by the Grand Rapids Police than were non-African-Americans, and that the Grand Rapids Police were racially profiling. However, there are several important mistakes in this analysis. To name only three, the people who live in Grand Rapids are not the only people who drive in the city, some of the residents drive more than others, and the analysis does not take into account where police patrol in the city.² To make a long story short, census data in the United States have proven to be quite unreliable as a predictor of who drives in the cities and on the highways of the country.³

Benchmarking

If the census of the resident population is not the appropriate benchmark, what measure should be used for comparison for traffic or any other type of police stop? To date, the most appropriate benchmark has been observations of the target population, whether that be motorists, pedestrians or any other group. My own organization has been involved in the benchmarking of motorists, pedestrians, bicyclists, train travelers, and even an open air drug market.

Observations are the only benchmark accepted by courts in the United States.

These “observation benchmarks” are exactly what the name suggests: surveyors observe the target population at randomly selected times and days, recording the race/ethnicity of that population. In this respect, the benchmark is a census of the pedestrian, motorist, train, or other traffic population. As the benchmark measures the population directly, it is an estimate only in the sense of generalizing from randomly selected times and days to all times of the day and week. Observations are the only benchmark accepted by courts in the United States.⁴ Attempts by researchers to validate other benchmarks have so far failed to find court acceptance.⁵

The logic of observational benchmarks may be simple, but their implementation is not. Several issues need to be addressed. Probably the

most important is training and managing the surveyors. Many purportedly scientific articles have questionable results partly because the training of observers has been minimal or nonexistent.⁶ Training takes a minimum of a day, and should include “in the field” experience, and testing of agreement between different observers with regard to racial/ethnic identifications (“inter-rater reliabilities”). Another sometimes neglected issue is that observers must be able to see clearly to make accurate observations: good sightlines are critically important. This simple fact was ignored in a Department of Justice benchmarking exercise at an immigration point, where the observers were placed 9 feet above the line of traffic looking down at an 18 degree angle. Thus observers could only see the driver from the side looking through the windshield, a very difficult angle for accurately viewing motorists.⁷ Another commonsense issue is lighting, which must be adequate if observation is also to take place at nighttime. In addition, observers must be able to view readily countable “segments” of pedestrian traffic. Motorists are neatly divided into lanes, but observing pedestrians requires that the viewing area must be divided into something analogous to a lane to assure that all pedestrians are enumerated once and only once.

The next issue is whom to benchmark. That, of course, depends upon the situation. Courts in the United States have said that motorists who are violating traffic laws and are thus subject to being stopped by the police are the appropriate benchmark for

traffic violation stops.⁸ But this hardly helps: in highway studies in both New Jersey and Maryland, well over 90 percent of the traffic was exceeding the speed limit. In addition, in a study asking officers to determine whether randomly selected motorists were violating a traffic law, officers spotted violations in 93.8 percent of the cars in an allocated time period.⁹ With pedestrians, those who are openly violating a law should be the target group. For example, in an open air drug market, only those people who buy or sell drugs should be enumerated. In a crowd from which police might pick people to stop and ask for identification (in countries where that is legal), it would be everyone in the crowd. The general rule is to benchmark those people who are subject to being stopped by the police, which often can be discovered by examining data on the kinds of people police stop in a given context.

When stop data are not available from police, collecting those data is crucial to the study. This has happened most often when litigation is undertaken against a police department, or a community's members wish to determine whether anecdotal evidence that abounds can be statistically corroborated. Under these conditions, it may be necessary to look at public records to determine who has been detained. For motorists, at least in the United States, these records are available in the municipal courts where traffic citations are adjudicated. If records of this sort are unavailable, it is necessary to observe the target area and monitor and record those people who are approached, searched, or arrested by

the police. That gives the stop data. For a “benchmark,” where police data on violators is not available, we must use the “available population”—i.e. all those who happen to be in a given location at a given time.

When stop data are not available from police, collecting those data is crucial to the study.

At Lamberth Consulting, we used first-hand monitoring of this kind in one case of litigation, in which it was alleged that police were detaining too many African-Americans at Union Station in Chicago. The allegations were even more specific: that more African-Americans were detained boarding certain trains. As it was impossible to obtain information from the police concerning these stops, we took two measures: the people boarding the trains in question were benchmarked *and* the racial/ethnic makeup of those detained by police was also recorded. The number of stopped African-Americans could then be compared to the number observed as a benchmark. While it is always better to have police data, when they are not available it is possible to collect those data, particularly when police are detaining people in public.

Data analysis

Stops

As mentioned, an appropriate benchmark should be compared to stop data. Ideally, this means a benchmark at a

specific place and time compared to stops at that same place and time. Race/ethnicity can vary enormously by place and even places that are fairly close to each other can have quite different proportions of racial/ethnic groups. Temporal comparisons are also important, because we know that the race/ethnicity of motorists and pedestrians can vary with the time of day and day of week.

As an example, in one study the stops of African-Americans increased markedly between 10:00 p.m. and 3:00 a.m. on one roadway, leading the police department to question whether some of their night officers were targeting black motorists. However, benchmarking data showed that there was a corresponding increase in the proportion of black motorists during that time period. Therefore, the best comparisons are of stops in a specific place and time, with a benchmark taken in the same place within the same time parameters. Stops of motorists, and to a lesser degree pedestrians, are the simplest types of encounters to analyze with precision, because the police have interacted minimally with the motorist/pedestrian and the analysis does not have to control for many other variables. Once police-civilian interaction begins, many variables can come into play and affect the decisions that a police officer might subsequently make.

Searches

It is not always possible to compare stop data to benchmark data at a given place and time. In these cases, it may be necessary to use multiple regression analysis, which allows the

prediction of one variable (the variable that interests us) from two or more other (predictor) variables. Of course, it is important to use predictor variables that are themselves reliable. If we attempted to use unadjusted census data as a predictor variable for traffic stops in the United States, its unreliability would call into question the whole analysis.

One type of police-citizen encounter that often requires multiple regression analysis is the post-stop scenario—for example, if an officer chooses to search or frisk an individual, after having stopped them. This is more difficult than stop analysis, simply because the possible variables that influence the behavior of the police officer increase enormously once interaction between the motorist and the officer takes place. When a decision to make a motor vehicle stop is considered, for instance, a relatively limited number of variables enter into the equation. The officer knows the year and make of the vehicle, and may know the race/ethnicity of the motorist, and the violation, if any. If the officer has obtained information on the owner from the license plate number, there may be additional knowledge.

However, after an officer stops a motorist and the two interact, many more variables can and do enter in. For example, the motorist may treat the officer rudely, the officer may see, hear, or smell something in the vehicle that arouses suspicion, the motorist may behave nervously, the motorist and passengers may tell conflicting stories, the officer may check the license plates of the vehicle and find

that the owner has a criminal record, and so forth. To analyze adequately all the variables that may be relevant is impossible, but clearly it is important, if we are to understand post-stop activity, to consider as many variables as possible.

Some have asserted that searches—the typical post-stop scenario—should be measured against the proportion of those stopped in a community,¹⁰ ignoring the many variables that enter into a face to face encounter, as well as many other variables that are important to a post-stop analysis. For example, the location of the search, the type of duty to which the officer is assigned and whether the officer knows that the motorist or pedestrian has a criminal record will impact the decision to search. To illustrate only one of these variables, let us concentrate on data relating to officers' decisions to ask motorists for consent to search. These data come from the New Jersey State Police, Moorestown Station, in 2000, and cover all 145 of

the station's consent searches that year. Of these, 142 were race identified (i.e. officers had recorded the race/ethnicity of the stopped person). Further, troopers had to explain why they asked for consent to search. The two most popular reasons by far were that the motorist was nervous or that conflicting stories were told when the trooper

The best comparisons are of stops in a specific place and time, with a benchmark taken in the same place within the same time parameters.

separated driver and passengers. The troopers could and most often did list more than one reason. Table 1 provides the data by race for those motorists that were asked for consent to search because they: (a) were nervous; (b) told stories that conflicted with their passengers; or (c) were both nervous and told conflicting stories.

Table 1. Reasons for troopers' asking for consent to search by percentage of motorists of different race/ethnicity asked.

	White	Black	Hispanic	Asian	Total
(a) Nervous N=23	13.0 %	52.2 %	26.1 %	8.7 %	100.0 %
(b) Conflicting stories N=36	16.7 %	63.9 %	19.4 %	30.0 %	100.0 %
(c) Both nervous and conflicting stories N=35	11.4 %	62.9 %	22.9 %	2.9 %	100.0 %
(d) Neither nervous nor conflicting stories N=51	35.4 %	35.4 %	27.1 %	2.1 %	100.0 %

Many (d) were neither nervous nor told conflicting stories.

It is clear from Table 1 that there are relatively large race/ethnicity differentials for the two most prevalent reasons given by the troopers for asking for consent to search. This tells us that blacks are more likely to be listed by troopers as being nervous and/or providing conflicting stories than are white motorists. What is implied, though not affirmed, is that black motorists might actually be more likely to be nervous and/or provide conflicting stories because of that nervousness (or some other reason) than are whites and to a much lesser extent Hispanics.

From the perspective of ethnic profiling, we would have to know whether these two behavioral characteristics that cause—or, at least, are assumed to justify—searches are in fact indicative of criminality. Statistically speaking, if the hit rate (the rate at which contraband is found following these searches) is higher for those individuals searched for the two reasons given by troopers, then possibly these differences speak to behavior that potentially identifies criminal behavior. However, the hit rate for all 145 searches was 13.8 percent, and hit rates for the four conditions listed in Table 1 were as follows:

Nervous	8.7 %
Conflicting stories	13.9 %
Both nervous and conflicting stories	17.1 %
Neither nervous nor conflicting stories	13.7 %

None of these differences reach statistical significance. In other words, the data do not show that nervousness or “telling conflicting stories” are more likely to be an indicator of carrying contraband than the absence of either or both.

What is more, these data do not tell us whether blacks are more nervous and tell more conflicting stories than whites and Hispanics, or whether this is just the perception of the troopers, or whether instead the troopers are merely using these reasons to justify consent searches. In the latter case, decisions justified on these grounds would mask the fact that they were based on race/ethnicity—but we do not know this either. What we do know is that if analysis finds that racial disparities result from police decisions about whom to *search* (as distinct from whom to *stop*), an already complicated analysis becomes even more so. The determination of whether ethnic profiling is occurring does not become easier under these circumstances, but more complicated. For these reasons, it is best to view the search situation as a continuation of the analysis of stops. Using a benchmark that is strong enough to allow a determination of whether profiling is occurring when the *stop* occurs is the best analysis, although analysis of searches and other post-stop activities yields important additional information.

To sum up, it is important to consider carefully the situation when determining what the proper benchmark is in a given situation. When we first faced this question in 1993 in New Jersey, we rejected census data

as a benchmark and collected data on the percentage of motorists who were violating traffic laws and thus subject to being stopped, using what has come to be called observational benchmarks. This litigation resulted in a court finding that the New Jersey State Police were targeting black motorists on the southern end of the New Jersey Turnpike. The state later admitted racial profiling. This same benchmark

was used in successful litigation in Maryland and Arizona. It is crucial that the collection of police stop data be as complete as possible and compared to an appropriate benchmark. While police data are often available or can be estimated by the methods discussed above, the area where most analyses have foundered is in collecting the appropriate benchmark data.

Notes

† John Lamberth is CEO of Lamberth Consulting.

1. The statistic used here is called the “odds ratio,” which takes the form of “If you are African-American you are X times as likely to be stopped as if you are not African American.” It takes into account the odds of African-Americans being stopped compared to the odds of non-African-Americans being stopped, which in this case is greater than two.
2. The Grand Rapids Police Department, in partnership with community groups, contracted with Lamberth Consulting to determine whether profiling was occurring in Grand Rapids. When the appropriate benchmarks were utilized, we determined that the GRPD was not profiling.
3. Geoffrey P. Alpert, Michael R. Smith, and Roger G. Dunham, “Toward a Better Benchmark: Assessing the Utility of Not-at-fault Traffic Crash Data in Racial Profiling Research,” Paper presented at “Confronting Racial Profiling in the 21st Century: Implications for Racial Justice,” Boston (March 2003) [“Boston Conference”]. Amy Farrell, Jack McDevitt, Shea Cronin, and Erica Pierce, “Developing a modified census benchmark for traffic stop data Rhode Island,” in Amy Farrell et al., *Rhode Island Traffic Stop Statistics Act Final Report*, available at: http://www.racialprofilinganalysis.neu.edu?IRJ_docs/RIFinalReport.pdf; John Lamberth, “Measuring the Racial/Ethnic Make Up of Traffic: The How, What, and Why,” Boston Conference.
4. *State v. Soto*, 734 A.2d 350 (N.J. 1996); *State v. Ballard*, 752 A. 2d 735 (2000); *Wilkins v. Maryland State Police*, Civil Action No. CCB-93-483 (D. Md. 1993).
5. See Alpert, Smith, and Dunham; Farrell, McDevitt, Cronin, and Pierce; and Jeff Rojek, Richard Rosenfeld, and Scott Decker. “The Influence of A Driver’s Race on Traffic Stops in Missouri,” Boston Conference.
6. U. S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Assessing Measurement Techniques for Identifying Race, Ethnicity and Gender: Observation Based Data Collection in Airports and at Immigration Checkpoints* (January 2003).
7. U.S. Department of Justice, 3.
8. *State v. Kennedy*, 588 A.2d 834 (N.J. Super. Ct. 1991).
9. Lamberth (2003).
10. M. A. Schlosberg, *Department in denial: The San Francisco Police Department’s Failure to Address Racial Profiling*, available at <http://www.aclunc.org/police/021007-report.html>.

POLICING PRACTICE: CASE STUDIES

Confronting Ethnic Profiling in the United States

David A. Harris[†] provides an overview of the anti-profiling movement in the United States and of the gradual, sometimes reluctant, acceptance by police departments of the need to stop the practice.

The public discussion of racial and ethnic profiling that began in the United States in the late 1990s came as a surprise to some Americans. Many had not thought about the effect police bias might have on members of

A widespread perception of police bias taints the relationship of all citizens with their police.

minority groups, notwithstanding that minorities across the country had complained for years that police stopped, questioned, and often searched them, frequently and sometimes aggressively. Most police—and most people—in the United States had ignored the phenomenon, chalking it up to a few disgruntled police haters, or criminals trying to escape responsibility by crying racism. Exposure in the media in the late 1990s finally helped those Americans not themselves subjected to these practices to see that police use of race as a proxy for criminality had

profound consequences for many non-criminals.

Extensive press coverage of the near-ubiquity of the practice in the mid-1990s sparked a nationwide debate on bias in policing, one that continues today. While the issues remain far from settled, the landscape surrounding it has changed within American law enforcement. When the debate began in the late 1990s, almost every police department and high-ranking police official fought both the validity of the concept and the idea that anything could or should be done about it.¹ Now, literally hundreds of American police agencies have responded and are collecting statistical information that can be used to monitor possible police bias in traffic and pedestrian stops, searches, and other law enforcement tactics on the streets.²

Can the American experience help to spark and inform a dialogue on ethnic bias in policing in Europe? One would have to be both foolish and arrogant to assume that the issues were the same on both sides of the Atlantic. Nevertheless, the commonalities are enough that a description of some of the practices established, mistakes made, and complexities uncovered in the United States over the last ten years might help those interested in tackling similar problems in Europe.

“Racial profiling”: a working definition

Racial or ethnic profiling, as the term has evolved in the United States, encompasses the use by police of racial or ethnic characteristics as one set of clues among others to decide whom to stop, question, search, or otherwise investigate for as-yet-unknown criminal offenses.³ In this definition, profiling involves the use of racial or ethnic characteristics to *predict* which persons among some group might be involved in criminal behavior, even where there is no evidence yet of any particular crime, and no unique suspect. This definition may help avoid some of the arguments that surfaced in the United States in the early phases of discussion, which typically defined the problem away by imputing police decisions on whom to investigate *solely* to race or ethnicity. This made the problem so narrow that it effectively disappeared.

It is also worth noting what the definition used here omits. There is no requirement that the officer’s behavior be purposefully racist, or that it have the conscious objective of oppressing any person or particular group. Ethnic profiling is not about the views of one or even a few individual bigots in police departments. Rather, the problem is an institutional one—and solutions must be crafted at an institutional level.

Does ethnic profiling work?

Powerful arguments against profiling have been made, from both moral and social cost perspectives. It is not

hard to see the moral dilemma involved in burdening individuals with police harassment—stops, searches, and questioning—just because they belong to a particular racial or ethnic group, absent evidence of illegal activity. In such a situation, racial characteristics become indicators of guilt across an entire population, a clearly unacceptable norm.

The social costs are also substantial. If police stops and questioning are perceived as unfair and biased near universally among a particular group, the cost spreads across a substantial section of the country’s population. And when the majority population becomes aware of the practice even when they do not experience it personally, as happened in the late 1990s in the United States, society as a whole suffers. A widespread perception of police bias taints the relationship of all citizens with their police, generating mistrust that will cause some not to credit police testimony in court, or to hesitate to cooperate with officers when requested.

But to some these arguments about moral and social costs will ultimately prove unconvincing—because they believe that racial or ethnic markers can help officers catch more criminals. This once common view remained an untested assumption until quite recently. How might such a hypothesis be verified or disproved? In the mid-1990s, this was simply not possible, because there was little data available that might plausibly be used to determine whether police in fact used profiles incorporating race or ethnicity.

The situation changed in the late 1990s, with the advent of data collection on police-citizen encounters, usually vehicle stops.⁴ These enabled researchers to ask two important questions. First, in any given jurisdiction, were blacks, Latinos, or other minorities more likely than whites to be stopped, questioned, or searched for any credible reason other than

Using race does not cause hit rates to go up; instead, the hit rate actually drops.

racial or ethnic appearance? Second, if officers were apparently targeting people on the basis of their race or ethnicity, did this help them catch more criminals, as most police seemed to believe? The principle behind this second question is captured in the notion of “hit rates”—the proportion of stops that yields contraband, such as drugs, weapons, or something else that results in an arrest.⁵ If officers use race or ethnicity in profiling, the reasoning goes, they will get higher hit rates, because they are targeting the right people.

Among the studies conducted in that period, data from New York City makes a particular telling example.⁶ In 1994, Mayor Rudolph Giuliani and his police commissioner enacted so-called “zero tolerance” policies that resulted in a skyrocketing rate of arrests. This policy involved intensive use of stop and frisk⁷ tactics on the streets.⁸ Under written departmental policy,

the New York Police Department (NYPD) began to use stops and frisks at a frequency and an intensity not seen before.⁹ Many in the minority community, who were hardest hit by these practices, complained, but to no avail.

In the wake of a tragic police killing of a civilian whom police mistook for a criminal, New York State’s Attorney General, Elliot Spitzer, ordered a study of stop and frisk practices by the New York police.¹⁰ New York was one of the few cities anywhere that required its police officers to file a report when they stopped and frisked citizens. These reports contained the location of the stop, the articulated reason for the stop—i.e., why the police officer thought the person suspicious enough to warrant a stop, the identity and a description of the person stopped, including race or ethnicity, whether any contraband was found, and whether an arrest was made. Spitzer mandated that the NYPD hand over all stop and frisk reports for all of 1998 and the first three months of 1999. The resulting dataset was both large and rich.

Spitzer’s report was completed and released at the end of 1999. It was a well-conceived and superbly executed effort, and effectively interrogated the use of aggressive and intense policing in New York in the 1990s. On racial and ethnic profiling, the report proved an incomparable resource. The data showed that, although the Latino population of New York during the study period was about 22 percent, Latinos made up about 33 percent of all of those police stopped and frisked.

New York's black population was approximately 24 percent overall, but closer to 52 percent of all those stopped and frisked. In other words, both of these groups were "over-stopped" in comparison to their presence in the population. By contrast, whites, just over 40 percent of the city's population, comprised only about 10 percent of all of those stopped and frisked: they were "under-stopped."¹¹ The report concluded that only one possible reason explained the results: police in New York were using racial and ethnic appearance as a factor in deciding whom to stop and frisk.

To move, then, to the second question: does the use of race or ethnicity as one—of several—criteria to target suspects help police catch more criminals, as proponents of ethnic profiling have long assumed? Or, to put it another way, how did the hit rates for stopped blacks and Latinos—where race or ethnicity appeared to operate as a profiling factor—compare to whites, where it apparently did not? According to the data, the hit rate for whites during the study period was 12.6 percent; that is, in 12.6 percent of cases where police stopped and frisked whites, the result was an arrest for some crime. For blacks, the hit rate was 10.5 percent; for Latinos, 11.5 percent.¹²

Notice two things about these hit rates. First, they represent *statistically significant* differences. The sample size was very large—175,000 frisks over the fifteen-month period studied. The differences between the hit rates for different groups—about one fifth lower for blacks than whites, and one tenth lower for Latinos than whites—

are not estimates or extrapolations. These are measurable, significant gaps, involving thousands of real individuals. Second, and perhaps more to the point, the data do not support the profiling assumption—that using racial or ethnic appearance to target enforcement efforts will make for more efficient, more accurate policing,

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or for the arrest of more criminals. In fact, the opposite is true. Using race does not cause hit rates to go up; instead, the hit rate actually drops.

Why should this be? In the final analysis, it is because using a racial or ethnic profile disregards the fundamentals of good police work.¹³ Trying to detect criminals in large populations when no crime has yet been reported requires police officers to pay extremely close attention to behavior. When police have a description that includes a particular suspect's ethnic appearance, it is standard, acceptable police practice to seek individuals matching the description, including ethnicity. Applying descriptions which include a physical characteristic that is visible and (unlike clothing or hairstyle) unchangeable, is not ethnic profiling. Profiling using race is, by contrast, an attempted shortcut—using race or ethnic appearance as a proxy for individual propensity

to commit crime—in the absence of a suspect description or crime report. In other words, profiling is a predictive tool. The problem is that while race describes beautifully, it predicts behavior poorly or not at all. Policing becomes less accurate when race is used as a predictor because the officer's attention is directed towards appearance, which is not relevant, and away from what really counts: behavior.

Connecting with the people that police serve

A common reaction to discussions of profiling among police is: “We don't do this—we have a policy against discrimination. Other police departments might need to change, but not us—we are not bigots.” This is unfortunate, and shows a misperception of the problems that arise when racial or ethnic bias is present. Ethnic profiling does not occur only—or even primarily—because there might be racial or ethnic bigots in police departments. Rather, it is an institutional problem, involving assumptions held within policing institutions that have been unquestioned for too long; training that, explicitly or implicitly, reflects these biases and assumptions; a command hierarchy that does little to address the issue because it is not “serious” or because the bias, if it exists, is unintentional.¹⁴ However, for those who are subject to police bias, it matters not at all that the damage is inflicted without intentional malice, or by unrepresentative bigots. What matters is that the practice cease.

Viewed from another perspective, the issue may become somewhat

clearer. By late 1999, the dominant perception in the United States was that racial profiling was widespread. Furthermore, fully *80 percent of all* Americans—not just blacks and Latinos—agreed that it “was harmful and should be stopped.”¹⁵ An 80 percent consensus on anything in American society is rare indeed; how much rarer, then, when it concerns the often-incendiary combination of race and criminal justice. Whether or not racial and ethnic profiling actually is widespread, the perception that it is common is itself a finding that law enforcement ignores at its peril.

A widespread perception of bias undermines the legitimacy of the police in a democratic society. Police have the privilege to use force, even deadly force, and to arrest and detain in pursuit of peace and order. Their efficacy relies not only on their own information gathering capacity, but also on the tips and observations passed on by citizens. Furthermore, police must testify in court. All of this becomes considerably more difficult when a perception of biased law enforcement eats into public confidence that police officers are treating everyone fairly. Without that confidence, for example, police testimony will be treated with more skepticism by juries and others, inevitably impacting the capacity of police to prosecute criminals. Police-citizen relations will weaken; citizens will be less forthcoming with information.

On the other hand, police have much to gain from addressing ethnic profiling in a straightforward, non-defensive manner, even if they regard

the evidence as doubtful. In 1999, in San Diego, California, Jerry Sanders, who was then the city's chief of police, made his department the first in the nation to voluntarily collect data on traffic stops that included race. Sanders did not believe that his department targeted motorists based on race, but understood that “[i]f we have large segments of our community who feel that they're being stopped for no reason, it's awfully difficult to engage them in a relationship where trust is the basis.”¹⁶ Bill Lansdowne, who was then chief of the San Jose, California, Police Department, announced that his department would begin recording statistics on all traffic stops because it was “the right thing to do...There is a very true belief and perception in this community” that police were making stops based on race and other improper criteria, and that perception alone was sufficient to prompt him to undertake the department's voluntary study.¹⁷ The response both chiefs got was immediate and positive. Representatives of the American Civil Liberties Union and the National Association for the Advancement of Colored People praised both men, as did a state legislator who had introduced legislation to require all Californian cities to follow the example set voluntarily by San Diego and San Jose. A failure to address the issue entirely—to deny the problem's existence, or refuse to consider, for example, collecting data on traffic or pedestrian stops—divides the police from the public.

The issue of ethnic profiling can thus be seen as an opportunity.

Agreeing to address the problem in some concrete way, usually through data collection on stops and searches, offers a chance to generate or mend trust between the police and the public. The trust of the public is an indispensable element of law enforcement's arsenal in the fight against crime; addressing ethnic profiling can help build and enhance that trust. But the problem of ethnic profiling will not disappear just because police believe it is “a perceived problem,” not a real one.

Moving away from ethnic profiling promises to result in better, more accurate, and more efficient police work.

Recalcitrant police departments

In police departments where there is evidence of consistent and systematic use of race or ethnicity inappropriately, but which lack the will, leadership, or ability to change, the federal government can now intervene. Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 gave the U.S. Department of Justice the power to bring suit against any police department that engages in a “pattern or practice” of violating the rights of citizens. One or even a number of incidents would not be sufficient; rather, the idea was to allow the federal government to get involved when violations of constitutional and legal rules had become “standard operating procedure” for police departments.

These interventions, known as “consent decrees,” are sometimes prompted by complaints of citizens or advocacy organizations that have attempted to “stand up” to what they believe are improper police practices. In other cases, police chiefs have invited the U.S. Justice Department to investigate their departments, as part of their own efforts to bring them to heel. The Department then investigates thoroughly and brings its findings and a proposal for comprehensively addressing any problems to the police department and the city government. In almost all cases, this has resulted in a settlement between the Department of Justice and the jurisdiction, in which the police department agrees to changes in a number of its operations: training, tracking of (and the collection of data on) traffic and pedestrian stops by officers, tracking of officer misconduct with early warning systems to head off police misconduct, use of force, and the like. Changes in police policies are also often required.¹⁸

This power has been used only a relative handful of times since its enactment in 1994. Nevertheless, it has had a significant impact across

American policing, as the leadership in many agencies is keen to avoid possible Justice Department intervention. The upshot has been that police leadership in many cities has looked to implement best practices in policing voluntarily, before any action by the federal government.

Perhaps the most important lesson from experience in the United States is that the use of race or ethnicity as a factor in deciding whom police should stop, question, and search is a knotty issue. It is not easy to measure and it is difficult to address. Yet, aiming to minimize ethnic profiling can help police achieve their core goal of crime fighting in two concrete ways. First, moving away from ethnic profiling promises to result in better, more accurate, and more efficient police work. Moving from a reliance on ethnic appearance to the use of behavior-based cues is the key to catching criminals. Second, addressing the practice of ethnic profiling promises to build the trust of communities in their police department—and that trust and the relationships with the public created as a result are invaluable assets that police simply cannot do without if they want to fight crime.

Notes

† David A. Harris is Balk Professor of Law and Values at the University of Toledo College of Law in Toledo, Ohio, and the author of *Profiles in Injustice: Why Racial Profiling Cannot Work*, The New Press (2003) and *Good Cops: The Case for Preventive Policing*, The New Press (2005). He is a former Senior Justice Fellow at the Open Society Institute.

1. See, for example, Robert L. Jackson, “Push Against Bias in Traffic Stops Arrested,” *L.A. Times* (June 1, 1998) (regarding the Traffic Stops Statistics Act, the first proposed legislation on the subject, and quoting an official of the National Association of Police Organizations, an umbrella group claiming to represent 4,000 police unions, as declaring there was “no pressing need” for action” and that officers would “resent” any such moves).

2. For the most up-to-date tally and explanation of U.S. federal, state, and local legislation on the subject of racial profiling, see the website of the Institute for Race and Justice at Northeastern University, which has a page on racial profiling analysis, available at: <http://www.racialprofilinganalysis.neu.edu>.
3. Another widely used definition of racial profiling is: “Any police-initiated action that relies on the race, ethnicity, or national origin, rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.” Deborah Ramirez, Jack McDevitt, and Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, Washington, D.C.: Department of Justice (November 2000). Another, says “Racially-biased policing occurs when law enforcement inappropriately considers race or ethnicity in deciding with whom and how to intervene in an enforcement capacity.” Lorie Fridell, Robert Lunney, Drew Diamond, and Bruce Kubu, *Racially Biased Policing: A Principled Response*, Washington, D.C.: Police Executive Research Forum (2001), 5.
4. Paul Van Slambrouck, “Two Cities Tackle Racial Profiling,” *Christian Science Monitor* (March 29, 1999) (discussing advent of data collection efforts in San Jose and San Diego, California, the two first large American cities to do so); and Julie N. Lynem, “San Jose Police Study Race in Arrest Patterns,” *San Francisco Chronicle* (March 25, 1999) (examining announcement by San Jose police that department would begin collecting data on traffic stops).
5. The idea of “hit rates” is discussed in David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work*, The New Press (2002), and earlier research upon which the book was based.
6. This study, used throughout this section, is Eliot Spitzer, Attorney General of the State of New York, “The New York City Police Department’s ‘Stop and Frisk’ Practices: A Report to the People of the State of New York” (December 1, 1999).
7. American police officers are allowed to “stop” (temporarily detain for quick questioning and investigation on the street) and “frisk” (perform a limited search for weapons by patting down the suspects’ outer clothing) an individual when they have reasonable, fact-based, articulable suspicion that crime is afoot in which the suspect is involved, and that the suspect may be armed and dangerous. See *Terry v. Ohio*, 368 U.S. 1 (1968).
8. See, for example, the published versions of the NYPD’s policing strategies. New York Police Department, “Getting Guns Off the Streets of New York,” Police Strategy No. 1 (1994), and New York Police Department, “Reclaiming the Public Spaces of New York,” Police Strategy No. 5 (1994).
9. New York Police Department, “Getting Guns Off the Streets of New York,” and “Reclaiming the Public Spaces of New York.”
10. See generally Spitzer.
11. Spitzer, III, table 1.B.1. The ratios given in the table are here converted to percentages.
12. Spitzer, III, table 1.B.1.
13. See, for example, *Profiles in Injustice*, Chapter 8, discussing changes made at the U.S. Customs Service by its then-new Commissioner, Raymond Kelly, in the wake of a scandal involving the selection of hundreds of African American women for intrusive body searches based on race and gender. Hit rates among blacks in this period were lower than among other demographic groups. When Kelly took over, he revamped much of the Service’s training and operating procedure, so that decisions on which people would be stopped and searched were based not on race, but on observed behavior. The result, just two years later was an overall improvement in hit rates—from the range of four to six percent to thirteen to fifteen percent—even as the number of searches dropped to a third of the prior level, and recoveries of narcotics rose.
14. See, for example, *Profiles in Injustice*, Chapter 7 (in which all of the proposed ways for addressing profiling involve changes in institutional practices).

Ethnic Profiling by Police in Europe

15. Frank Newport, "Racial Profiling Seen as Widespread, Particularly Among Young Black Men," Gallup Poll (December 9, 1999).

16. Tom Fudge, "San Diego Police Department Monitoring the Race and Ethnic Group of Those Stopped for Routine Traffic Violations by Police," Morning Edition, National Public Radio (April 9, 1999).

17. "San Jose Will Track All Stops By Officers," *New York Times* (March 28, 1999).

18. See, for examples, *U.S. v. New Jersey* (12/22/99); *U.S. v. City of Pittsburgh* (02/26/97); *U.S. v. City of Steubenville, Ohio* (08/28/97). For more, see the Department of Justice website, available at: <http://www.usdoj.gov/crt/split/police.htm>.

Voluntary Monitoring of Law Enforcement in Michigan

In 1999, Grand Rapids police department in Michigan became one of the first police departments in the United States voluntarily and systematically to monitor police activity for evidence of racial profiling. Police chief **Harry Dolan** talks about how it was done.[†]

Justice Initiatives: Can you tell me about Grand Rapids and its police force?

Harry Dolan: Grand Rapids is the second largest city in Michigan, approximately 45 square miles. We have just under 200,000 citizens. Our metropolitan area exceeds one million. Our population increased by about 9 percent between 1980 and 2000. We are 20 percent African-American, 9 percent Hispanic and other groups, so we are around 69 percent Caucasian. I have been chief of police since April 1, 1998. We have 337 officers and 65 civilians. Although we have one police headquarters we have four distinct areas of the city, headed by separate captains, so we are virtually decentralized. The four teams are located here in one building. The captain of each area team is responsible for providing personalized service to meet the unique needs of that region. We've implemented a flat organizational chart—chief, captains, lieutenants, sergeants. It is my considered opinion that numerous levels inside an organization can stifle creativity and add barriers to effective communication.

When and why did you begin to collect traffic data?

Racial profiling became a very significant issue in the United States following a very well publicized case of profiling occurring in New Jersey, in the mid-1990s. Democratic Representative Conyers [of the U.S. Congress] here in Michigan put

In order to develop a more reliable methodology, we formed a citizens' committee representative of community leaders.

forward a bill [the End Racial Profiling Act] whereby data collection would be mandatory; it didn't pass but prompted a great deal of discussion around the country. It was also discussed here in Grand Rapids, where racial profiling was viewed by many African-Americans as a real problem. I believe that what we were hearing from the community wasn't so much an assertion or an allegation, but more *a belief* that racial profiling was occurring, which to me was impressive enough that I decided we needed to answer the question even without a directive from above. So I voluntarily started a system for collecting traffic stop data.

Our first internal study was based on population demographics and

traffic stops, but we felt it really didn't give us much information to forward the debate. So we realized that we needed to improve the collection process. It is not just a matter of collecting data, there is a lot more to consider. In other words, if you compare traffic stops to the general census population, that may not be an accurate benchmark. For example, the argument is that if you have 50 percent residents of X-ethnicity, you should have 50 percent traffic stops of that group. But then we realized from talking to some academics that you really have to use the actual number of people driving in your community as your benchmark, or more specifically, the chances of being stopped for those individuals actually driving in a given place and time. In order to develop a more reliable methodology, we formed a citizens' committee representative of community leaders. The city manager and I talked to citizens who were leaders in the community, and especially those who were critical of the police department. We wanted a cross-section of leaders involved and this in itself generated a lot of excitement, as it had not been done before. The committee reviewed proposals that we then sent out to five different academics specializing in traffic stop data collection analysis. The committee unanimously selected Dr. [John] Lamberth because of his groundbreaking work in New Jersey in the early 1990s, where he established that racial profiling by police was in fact taking place. He began his work in Grand Rapids between 2002 and 2003.

What system do you use to collect traffic stop data?

In our first study we weren't capturing data as effectively as we could—we were using a “fill in the blanks” form that officers took with them in the car. We were real novices back then. So when we started the process with Dr. Lamberth we developed a computer program to help us (using “Filemaker,” which we are happy to share with anybody who needs it). When police officers stop vehicles in Grand Rapids today, they must record certain information on computers installed in their cars, including the race of the driver and other information such as the type of search—consent-based or “probable cause” [when a police officer is permitted by law to search a vehicle without consent, because there is “probable cause” to believe that an offense has occurred, or is about to occur]. Then when the officer finishes a shift, that information is automatically downloaded into the records management system. So we can look at our traffic stop data as a department. We did that with Dr. Lamberth's assistance, and we collected one year's worth of data, for 2002-2003. The process has worked so well that today we have institutionalized the recording of traffic stop data in a way that involves very little difficulty or hardship for the officer.

Dr. Lamberth also used data from our Division of Criminal Information Inquiries (DCI) system to cross-check recording of the newly required information. In the DCI system, when officers stop cars they run searches on

the tag [license plate]. So the new information recording system was developed such that Dr. Lamberth could compare a random sample of license plate checks against the traffic stop data, in order to cross-check that information was in fact being recorded by officers at times when license plate checks were being run. He found out that we were reliable—our officers were indeed reporting their traffic stops. Also we were well underway to completing our installation of video cameras in all vehicles, which record the interactions of officers during all their traffic stops. This cost U.S. \$5,000 per car and the process is now complete.

What kinds of indicators do you look for in the data?

The main indicator that had to be determined was to know who was available to be stopped at a given time and place. Dr. Lamberth had to go out and benchmark 15 intersections around the city to assess the demographics of those driving, so that he could develop an “odds ratio.” In other words, based on the population that is actually driving, what is their probability of being stopped in all those intersections? Lamberth and his team hired people whom he trained to record individuals’ race as they were driving by, and this was done at different times of the day. Lamberth’s team would then come up with the odds ratio for a traffic stop in that area. When Lamberth finished the analysis, he found that overall as a police department we had a 1.4 odds ratio for African-Americans. So from all those

intersections throughout the city you are 1.4 times more likely to be stopped if you are African-American. The odds ratio for Hispanics was 1. For a police department, a 1.4 ratio falls within what Lamberth calls the “benign range.” Above 1.5 to 2 would raise concerns, because that would tend to indicate that African-Americans are twice as likely to be stopped. Looking at other variables in the neighborhood, such as calls for service and so on, a 1.4 ratio, according to Dr. Lamberth,

This is a complex issue with many dynamics to it, such as how race and poverty conspire to generate disproportionality in statistics.

does not demonstrate a pattern or practice of profiling. So we completed that study, reported it to the citizens’ committee, we made it public, and put it on our website.

What was the reaction of police officers to the decision to collect data?

Initially, officers took this initiative as a professional insult. They believe they are professionals who make decisions based on behaviors and actions they witness and calls for service they respond to. They certainly were not pleased about having to record this information, but over time they became accustomed to it—today we do it as a matter of course. I sincerely understand their concerns because we can all imagine what it would feel like

to have your every working move and interaction with others recorded on camera. Today officers document traffic stops routinely and record interactions on video camera in a very professional manner. Both methods have proven to be overwhelmingly beneficial to the officers—they have proven exceptional as evidence in courtrooms and have vindicated the officers against false allegations of misconduct.

What training were officers given?

Officers were trained in non-biased policing and on operating the new electronic reporting system. Dr. Lamberth had a very well developed training curriculum on “preventing biased-based policing,” and we provided in-house training on using the electronic reporting system. I have to boast for a moment that the instructors providing the training were very impressed with my officers. I have a very educated force, a lot of college degrees, Masters, and some working on Ph.D.s. During the training they were quoting recent books and articles on the topic, resulting in very challenging and stimulating discussion in classes—because they, like me, believe this is a complex issue with many dynamics to it, such as how race and poverty conspire to generate disproportionality in statistics. At the same time, during the training it was clear that officers considered rather insulting the idea that they somehow must be profiling, based on a *prima facie* argument. But during training we were able to talk about the issue, explain why people have these perceptions, and (which I think is key) understand how perceptions can become

reality for a number of our citizens—and how a belief system can follow from that. We all must be mindful of the role that stereotyping may play in the discussion. Specifically, if a community member has a bad experience with a police officer, they ought not stereotype all police officers, and the police too must be mindful not to stereotype a group based on the behaviors of individual members of that group. I don't know how else to address that belief system without training the officers and providing citizens with the facts and information.

I personally conduct training for the officers on providing service excellence. We have also assigned officers, 100 so far, to a 16-hour course at the Institute for Healing Racism. In particular, my goal for the officers is for them to get a clear understanding of the history of racism in this country. I believe we especially have to look at modern history and the role of the police in the 50s and 60s in the United States, during the civil unrest this country experienced. We should review the importance of the Civil Rights Bill in 1964 and the Voting Rights Act in 1965, understand the community dynamics occurring during this time period, and review how police officers were used to quell civil unrest, resulting from citizens' response to racism and oppression. Today, the memories and realities of that era are still very vivid and real to our African-American citizens. American law enforcement history has been marred by some very difficult times. To think that police officers arrested Rosa Parks because she was

sitting in the back of a bus, as directed by law, and didn't give up her seat to a white man is very disturbing to me. It is shocking to young officers today that this could ever have happened, and they need to be aware that it wasn't long ago, and many people vividly remember that time. So the Institute for Healing Racism plays a big role, particularly for my younger officers, in helping them understand the history of racism.

What internal benchmarks do you use? How do you determine if individual officers are profiling? And what action is taken?

In our studies, we did not identify individual officers. Our study was based on the department as a whole. We rely upon the sergeants to review traffic stop data and determine if there are any patterns of bias. The sergeant should be aware of the fact that an officer in a high crime area, an aggressive officer, dealing with real problems in the community—may use force or conduct traffic stops more often. But the fact that an officer is more proactive is not necessarily indicative of problematic use of force or bias. You have to look at individual cases. So therein lies a very difficult and complex challenge.

I think that the first thing is to look at the issue broadly, based on the opportunities to be stopped given the driving population and the odds ratio. To deal with individual officers, we need training to prevent biased policing and supervisors that are on top of all performance-related issues and will address immediately any problem.

I would strongly caution a community from leveling bias claims against police officers without thoroughly examining this very complex issue, because a chilling effect may occur. If you say one officer stopped a certain number of individuals, and that indicates a problem, without having reviewed all the facts, you will have a very difficult time getting any officer to work in a location that is predominately of X race. You can get to the point where officers say “you don't get in trouble for the stop that you

What I can promise is that when we see it we will deal with it, but I would never have said it doesn't happen or that I have not had to deal with it in the past.

don't make.” You get the philosophy of “no contact-no complaint.” We should be very conscious of the fact that we have problem officers and we should do all we can to identify and correct the behaviors of those we feel are biased—and if that is not possible, to remove that person from our ranks. And further, every department has individual problem officers who should never have become a police officer—we should certainly deal with those individuals, acknowledge that they exist, and hopefully develop systems to more effectively confront personnel issues. We are no different from school systems that have teachers who should not be teaching or businesses who have managers who should never have been promoted.

That aside, as a twenty-five year veteran and a police chief since 1987, I believe very strongly that the overwhelming majority of police officers I have worked with and—I would go so far as to submit—in general in this country, are dedicated people. It is very important that we look at the numbers, look at the statistics, and explain our actions, because only thereafter can we start discussing some of the biases that we feel are leveled against police officers, and I believe that to continue to do that, and explain your actions, is part of what it is to be a police officer. We are here for the community, we are asked to answer calls, we are asked to be proactive and prevent crime through field stops, and those types of actions have responsibility attached to them. There have been occasions when I have had to criminally charge individual officers, but that is a rare circumstance: the vast majority of officers are noble people who are trying to fulfill their mission of community service.

What was the reaction of your community to the study?

Many of the community leaders that had been involved in the citizens' committee did not accept the report. They not only disagreed with its findings, but they took exception to it.

There was disappointment expressed by members of the committee who selected the researcher that we didn't demonstrate bias as a department. In assessing some of that reaction, I think that because the study said we didn't have a pattern or practice of profiling, many interpreted that to

mean it never happened and does not happen. And that was unfortunate—and we tried to make it very clear that we would never assert that there are no individuals within the department that have biases. What I can promise is that when we see it we will deal with it, we will train to prevent it, but I would never say it doesn't happen or that I have not had to deal with it in the past. Dr. Lamberth just reviewed the 2004 data and he finds that we are now a 1.3 odds ratio city wide. He was very impressed with the fact that we don't, as a department, show a pattern or practice of racial profiling.

So how do we feel about that as a department? We feel that we did the right thing. All in all, implementing the data collection system, not including the video cameras, has cost the department close to U.S. \$200,000 (the consultation contract on its own was U.S. \$120,000). But we feel that it was important to demonstrate that we are a professional department. We know we have problem officers but that was not what the study demonstrated. What it showed was that the police department, during the study period, did not demonstrate a pattern or practice of racially profiling its citizens on traffic stops. This was only a one-time snapshot. It was argued that we should continue to collect this data, so it has now become a matter of course to us. What is important for us as a department is that we had the courage to do this, to look at ourselves critically. And had we discovered a problem we were willing and able to address it and see how we could improve. I still think we need to

continuously look at the data and take a look at how we police our community. The community has recently raised concerns about arrests for “hindering and opposing” police officers in their duty [resisting arrest and/or interfering with the police officer], so we are reviewing our arrest figures and making them public. I believe strongly in Peelian principles,² one of which is that a police department can only do its job with the support and trust of the community. I don’t know how else you would do that without doing data collection when requested by the public.

What have been the benefits of collecting data for your police department?

Interestingly, many of my peers look at me and would say that I am the poster chief for why you shouldn’t collect data. “Dolan collects data and it seems like he can’t collect enough data. He’s put cameras in cars but still can’t seem to please anyone. Now he has to start collecting data on hindering and opposing.” That said, I still think that we have done the right thing, and I would encourage police departments to do it because I believe in the accountability and transparency of the police service. It is an incredible responsibility and an honor to be a police officer, and I believe we have to

be held to a high standard. We need to be accountable—and counting traffic stop data, putting out our arrest data by race, addressing concerns, having academics look through it—all of this is part of being a professional police officer. It does bring stress to the organization, and we certainly lived through that, but I think that history will vindicate us, and our legacy will be that the Grand Rapids Police Department really tried to do the right thing. I think there are many citizens that are proud of us for doing this. I think that the officers take great pride now knowing that they are looked upon as people who are open, professional, and unafraid to record what they are doing. Those are fundamental building blocks to becoming a professional police department.

I am also reminded of the need to stay focused on the fact that I work for the community and not only the state. I am governed and regulated by the state but I am accountable to the citizens to whom I provide police services. If I could give any advice to my European counterparts it would be to stay focused on your mission to the community, be there when they are in trouble and need a police officer, prevent crime, and give them a voice in setting local police priorities.

Notes

† Harry Dolan is Chief of Police at Grand Rapids Police Department, Grand Rapids, Michigan. This interview was conducted by Rebekah Delsol, a consultant with the Open Society Justice Initiative, on April 25, 2005.

1. See article by John Lamberth in the present issue of *Justice Initiatives*.
2. Robert Peel founded the London Metropolitan police in 1829, the first formalized police force. His “nine principles” of policing, are available at: <http://www.nwpolice.org/peel.html>.

Stop and Search: the Leicestershire Experience

Richard Keenan† gives the background to the techniques adopted by police in England and Wales, and how they work.

When a police officer stops a member of the public with a view to searching them, they initiate an encounter that can shape that person's view of the police that could last a lifetime.

It has long been the experience of minority ethnic communities that they are often targeted because of their ethnicity. This experience breeds fear and mistrust that can lead to a total lack of confidence in, and even hatred of, the police.

The British Police Service learned this bitter lesson in its relationship with the African-Caribbean community from the 1960s onwards. Young black men were subject to repeated searches for no objective reason. The bad feeling engendered spilled over into violence in the early 1980s in Brixton, London, and Toxteth, Liverpool. Although the violence died down, the animosity remained. Subsequent riots in Tottenham, London, in 1986, sparked by the death of an African-Caribbean lady during a premises search, ended with the killing of a police officer. The double tragedy was compounded by the fact that the slain man was a beat officer, well respected by the community.

The response to community concerns about police stop and search

activities and the detention of suspects led to enactment of the Police and Criminal Evidence Act 1986 (PACE). The Act gave police the power to stop and search anyone in public when they have reasonable suspicion that they will find stolen or prohibited articles. This was not new.¹ However, for the first time, PACE required that the police service keep accurate and objective records of the exercise of a number of powers including stop and search. Under the Act, an officer must inform any person subject to a stop and search of the officer's name and police station, the reasons for the stop and the specific object of any search, and the fact that the search will be recorded and that the individual is entitled to a copy of the record.

The officer can also ask the individual for personal details, with no obligation to respond. In such cases, the officer has to include a description of the individual. The person's ethnicity must be recorded by the officer, and, separately, the person must be asked, but is not required, to self-define their ethnicity from a menu of choices. In addition the form includes the location, time and date of the search. These forms are stored centrally and the data entered into a stand-alone database (these databases are centrally shared, but only after the information has been anonymized).

Until 2005, these regulations applied only to encounters where

officers actually engaged in physical searches of an individual following a stop. As of April 2005, based on recommendations of the Macpherson Inquiry report,² the police must record any encounter where an officer stops someone and questions them about their activity or presence in a particular location, even where it does not result in a search.³

Alongside these legal safeguards, the British Police Service realized that it could not take community support for granted, but had to win the trust of those it served. Community Affairs departments or their equivalents were established throughout the country with a remit to engage with all communities living in a particular police area. All police forces in Britain now have such departments made up of officers of all ranks assisted by experienced support staff.

Most recently, it has been decided that the Community Affairs departments will audit police activity to see if any particular community is subject to a disproportionate degree of stop and search. The data can also be used to monitor individual officer behavior so that any existing bias against a given community can be identified.

These, then, are the rules governing the use of stop and search in Britain.

Stop and search in Leicester: the context

How is the stop and search tactic deployed in practice? Unfortunately, a disproportionate focus on ethnic minorities in stops and searches

persists and so the Home Office has set up an action team to look at the issue and recommend best practices. As part of this work, my own station (Asfordby Street) in the city of Leicester was visited by a member of the team. They were pleased to find no evidence of disproportionality in the use of stop and search—and I will now outline the reasons for this.

Further safeguards were introduced following an inquiry into the failures of the police to investigate the racially motivated murder of teenager Stephen Lawrence.

Leicestershire is a county in the middle of England, combining a large ethnically diverse city surrounded by rural towns and villages the like of which are seen on picture postcards. In the words of the local radio station, Leicester is the “world in one city.” According to the 2001 census, the Black and Minority Ethnic (BME) population of Leicester City stood at 38 percent of 280,000. This figure has undoubtedly increased, given the influx of new communities, including 10,000 Somalis and several thousand Iraqis who have arrived since. Within ten years, it is projected that Leicester will be the first European city with a non-white majority. The area served by my police station covers 10,000 households, amounting to over 40,000 residents. The ethnic mix includes about 85-90 percent BME

communities. There are over 30 different languages spoken. Religious establishments include a synagogue, a Hindu temple, two Sikh gurdwaras, seven Christian churches and over twenty mosques.

It was clear that persistent harassment of ethnic minorities would exacerbate police-community relations without addressing the root crime problem in Leicester.

To serve this area, I command around 55 officers of whom only five are black or Asian. The average length of service is a little over two years and most officers are in their twenties. I am very lucky, however, to have a cadre of half a dozen officers older in years and service who have been “on the beat” for an average of 15 years each and are well known and respected by many.

To enable my younger officers to understand better the people they serve, we have an in-house diversity program. This includes visits to each of the local religious establishments, where officers hear from the communities about their beliefs and cultures. Some officers have begun to learn some of the languages spoken in the city, such as Gujarati and Somali. There is no compulsion on officers to learn community languages—the urge to do so is prompted more by a desire to show respect and gain trust.

The crime profile of my area is straightforward. Vice and drugs dominate. There are about 30 women sex workers. Until recently, this group was concentrated in a residential area that included one of the largest mosques in the city. The activities surrounding prostitution caused disruption and consternation to local residents: robbery of customers and innocent members of the public was also common.

An undercover operation conducted by colleagues identified over 100 people involved in the sale of hard drugs. These were concentrated in an area no more than ten kilometers square. This area was also a hotspot for acquisitive crimes such as burglary, robbery and vehicle crime. Intelligence provided to us by undercover operatives showed a clear link between these crimes and the drug trade. Addicts would come into the area from towns and estates up to 40 miles away to buy hard drugs. They would then commit crime to pay for these drugs.

Stop and search in Leicester: the practice

Our response to this state of affairs was twofold. First, we had to win the trust and confidence of the community; then we had to act. We had been severely criticized at public meetings for an apparent lack of action. Even one of the local nuns felt compelled to tell us how bad things were. I publicly acknowledged the problems through attendance at meetings with all communities and through articles in the local media, where I also outlined our commitment to act. It was clear that persistent

harassment of ethnic minorities would exacerbate police-community relations without addressing the root crime problem in Leicester. Accordingly, stop and search is used sparingly and within defined parameters, in the context of actual intelligence. Ethnicity, in other words, is never a basis for profiling in Leicester.

Police activity in Britain is focused using an intelligence-led discipline called the National Intelligence Model. This is not the place for an in-depth discussion of the system, but at a tactical level the process is simple. Once a fortnight, throughout the country, all stakeholders (detectives, patrol staff, crime scene investigators, crime analysts, informant handlers, and management) sit down and look at the crime picture. Like Janus, this meeting looks in both directions. It analyzes the crimes of the last two weeks, looking for similar *modus operandi*, and comparing this to current intelligence, supported by knowledge of past offenders. From this, participants try to predict possible hotspots and allocate resources on the basis of *core crime profiles*. Individuals or locations will be targeted on the basis of intelligence.

In Leicester, a daily phone conference is then held among the same parties, so that activity can be redirected on the basis of activities undertaken. Ethnicity features in this profiling effort only if a particular suspect in a specific case has been seen and reported by a witness. Even then caution is exercised, as witness bias can influence their recall. It is only in this context that stop and search is used. A person will be searched either

because there is specific intelligence about them as an individual, or because they are behaving suspiciously in a location identified by intelligence as a hotspot for drugs or crime.

Police at Asfordby Street station, which has a resident population of 40,000, carry out an average of 40-50 searches per month. These searches are monitored in the first instance by each shift sergeant, who has to sign

The discipline involved in tracking stops and searches by ethnicity ensures that, with limited resources, we put the right people in the right place at the right time.

a form to indicate that a lawful search has taken place. I also view the forms before submission. They are then entered into our local database from which a monthly report is compiled. The report includes the age and ethnicity of those stopped, and compares arrest rates. This is used at both area and force level to assess performance and proportionality.

The area commander (a chief superintendent) reports on a regular basis to the assistant chief constable on service delivery matters. Stop and search is an important part of this report. The chief superintendent also chairs a “religious and racial incidents review panel,” which looks at police handling of such incidents. The panel is composed of independent community members, who usually speak plainly if police fail to reach the high

standards they set for themselves. Again stop and search features in these discussions.

At force level, a “policy and advisory group on race issues,” made up of independent community members, looks at race and religious matters more strategically. This body also considers stop and search trends.

Table 1: Stops and searches conducted in Asfordby Street, Leicester city (2004 and February 2005)

	Resident population	Stops and Searches	
		2004	Feb. 2005
Asian	80%	52%	35 (45%)
Black	16%	13%	18 (23%)
White	4%	35%	21 (27%)

Source: Asfordby Street LPU

The chief constable is obliged to submit monitoring data directly to the Home Office about the use of stop and search in his area. This is used to prepare a national report. A series of checks and balances operating at all levels of the Police Service seeks to ensure that the tactic of stop and search is not abused.

The retention and subsequent use of data is governed by the Data Protection Act 1998. Data must be relevant, collected for a lawful reason, and processed lawfully and fairly. Data must also be accurate and not kept for longer than its purpose.

In the resulting picture of stops by ethnicity, some disproportionality is revealed—in particular, stops of whites are greatly disproportionate to the residential population. Nearly half the people stopped were young white men between the ages of sixteen and twenty five years. Very few of them were residents in the area. Most were found to have come to the area to buy drugs. The arrest rate from these stops runs at about 20 percent which is twice the national average. I share this data with the community on a regular basis.

The figures are not significant enough to draw wider conclusions on arrest rates. For example, the rate of search for a given community may seem disproportionate. However the figures do not show activity directed by Intelligence—i.e. an individual subject to current intelligence is liable to be searched more than once in a month. The system shows this activity as separate stops. The community to which that individual belongs would then seem to have been subject to a disproportionate rate of stops and searches. So for 2004, our data suggest that those of Asian ethnicity are stopped more often than they are arrested, whereas whites are arrested proportionally less often. However, this may not be a reliable assessment of events.

The discipline involved in tracking stops and searches by ethnicity ensures that, with limited resources, we put the right people in the right place at the right time. We target dealers both through search warrants and street searches. As part of the wider

fight against crime, we have moved sex workers out of the residential areas through a mixture of negotiation and enforcement. This has removed the basic building block on which more serious crime was founded.

All of this began to have a visible effect upon the drug trade and thereby on crime. We found that we were now in a virtuous circle. Because we had acted upon the concerns of the community and used stop and search intelligently we had begun to earn the trust of many. The community was then prepared to engage and give us more information. Community intelligence makes up 30 percent of the intelligence available to my officers. We will act on this and so the circle continues. What I have found month on month is that the stop and search picture reflects the crime picture as revealed by analysis of intelligence received and crimes committed.

One word of caution. As a manager, I receive monthly updates on the activities of my officers, including the

number of stops and searches and the resulting arrests. I would never set stop and search as a performance target in itself, as the pressure to hit a target could induce illegal or inappropriate use of the power.

The results achieved over an 18-month period, in 2003-2004, show that acquisitive crime has fallen by an average of 45 percent for each category of crime. More importantly, residents feel safer in their own homes and can walk the streets without fear of crime. At a recent community meeting, I was able to share with people the fact that crime levels were now comparable with one of the picture postcard market towns I referred to earlier.

To conclude, stop and search used without community engagement is an imposition that leads to alienation. When directed by accurate intelligence in an atmosphere of trust between the police and those they serve, it is one of the most effective tools available to fight crime.

Notes

† Richard Keenan is Police Inspector with the Leicestershire Constabulary.

1. Section 23 of the Misuse of Drugs Act 1971 gave officers powers to search anyone and any vehicle when they have reasonable suspicion that they will find controlled drugs.

2. For more on the Mapherson Inquiry, and the Stephen Lawrence case that gave rise to it, see articles in the present issue of *Justice Initiatives* by James A. Goldston and Joel Miller.

3. PACE, Code A, paras. 4:11-4:20.

Ethnic Profiling, Policing, and Suspect Communities: Lessons from Northern Ireland

Police in Northern Ireland have a long history of ethnic profiling—with disastrous consequences, and lessons for more effective policing there and beyond, *Mary O’Rawe*[†] writes.

Northern Ireland is currently undergoing a period of extensive police restructuring and reform, based on the 1999 recommendations of the independent Patten Commission.¹ The Commission was established in 1998 as part of the “Good Friday Agreement,” the result of lengthy multiparty negotiations aimed at achieving a comprehensive end to decades of violent political conflict in Northern Ireland. The Commission’s mandate included “to make recommendations for future policing arrangements in Northern Ireland.”² These focus on the centrality of human rights to effective policing.

A principal problem with policing in Northern Ireland has been the historical failure by both British and Northern Irish governments to place human rights at the core of policy, in deference to a perceived national security imperative. Partly as a result, ethnic profiling has played a significant role in the policing of Northern Ireland. Police profiling has been one manifestation of the partisan implementation of successive pieces of antiterrorist legislation which have

fuelled rather than contained the violence.³ In fact, the term “ethnicity” describes inexactly the basis of profiling in Northern Ireland, which has been premised on religion, socioeconomic status, and political allegiance, and fashioned around several poles which comprise a complex web of loyalties and identities: “Irish-British,” “Catholic-Protestant,” “unionist-nationalist,” and “loyalist-republican.”⁴ The term “ethnic profiling” is used here with the important qualification that it is frequently manifest in terms of religious or political affiliation.

The causes, manifestations, and implications of discriminatory security practice must be scrutinized in order to render the practice visible and provide a necessary counterweight to stock official denials. It is necessary to analyze the rationale behind ethnic—and religious—profiling, explore its compliance with democratic principles, question its effectiveness as a counter-terrorist strategy, and evaluate whether the measures adopted for its eradication will be sufficiently robust.

The present situation can only be understood against the backdrop of the history of Northern Ireland’s security laws and their application. Despite the absence of official statistics, there is no shortage of indicators that ethnic

profiling by police existed and is still perceived to exist. Recent developments have made policing in Northern Ireland fairer, more transparent, and more accountable, but it is increasingly clear that the policing techniques of the past undermined the “fight against terrorism” and left a problematic legacy for the current peace process.

The counterproductive processes by which “suspect communities”⁵ are created (and radicalized) have similar effects everywhere. What has happened in Northern Ireland provides lessons beyond that conflict. It shows that a firm brake should be applied, as a matter of urgency, to one of the most invidious aspects of the current “war on terror”—the apparently relentless drive by numerous governments to deploy antidemocratic tactics in the name of safeguarding democracy.

The accumulation of emergency powers

Policing in Northern Ireland has been a site of conflict, division, and alienation since the creation of the state, with its own ruling executive, by the Government of Ireland Act (1920). Religious discrimination was often actively promoted.⁶ For the next 70 years (at which time direct rule from Britain was re-imposed⁷) the gerrymandering of political boundaries and discriminatory practices in housing and employment ensured the continued disenfranchisement of Catholics, many of whom, unsurprisingly, became distrustful of government and its agents.

The Royal Ulster Constabulary (RUC) was created in 1922 to police Northern Ireland. Although an initial quota of one-third Catholics was set, the police force attracted few Catholics to its ranks; by 1999 the RUC remained 92 percent Protestant. This raises questions as to whether an ordinary policing function can be carried out in a non-partisan way by an unrepresentative police force, out of step with the experience of a large section of the community. The RUC (and its auxiliaries) were equipped with a vast array of discretionary powers under the 1922 Special Powers Act (SPA).⁸

Despite the absence of official statistics, there is no shortage of indicators that ethnic profiling by police existed.

These powers tended to be used overwhelmingly against Catholics. By the late 1960s, repeal of the SPA was among the primary targets of a civil rights movement that was brutally repressed.⁹ Police targeting of Catholics became increasingly visible. In 1969, Lord Cameron, in a report on the police response to civil rights protests in Derry, Northern Ireland’s second city, concluded: “One very unfortunate consequence of ... breaches of [RUC] discipline was to add to the feeling ... that the police are biased in their conduct against Catholic demonstrations and demonstrators.”¹⁰ Justice Scarman, in his official 1972 report on the tactics used by

police during the civil rights period, identified a “fateful split between the Catholic community and the police.”¹¹

Throughout Northern Ireland’s history through to the 1970s, successive Northern Irish governments empowered the RUC through renewed SPAs. In 1972, the British government in Westminster assumed direct rule over Northern Ireland and adopted the 1973 “Northern Ireland (Emergency Provisions) Act” (EPA) and the 1974 “Prevention of Terrorism (Temporary Provisions) Act” (PTA). These two “temporary” laws were repeatedly renewed and extended for close to three decades.¹² Between them, the original and extended EPAs and PTAs authorized extraordinary measures, including proscription of defined organizations (generally, in practice, Catholic/nationalist) and special powers to arrest, search without warrant, or stop anyone; ascertain their identity, movements, and knowledge of terrorist activity; and seize property and enter any premises at any time. The legislation further permitted incommunicado detention of suspects for up to 48 hours, detention without charge or judicial oversight for up to seven days, limitations on the rights to bail and to counsel, suspension of jury trials for some offenses, and lower standards of admissibility of evidence at trial.

This legislation effectively created a dual criminal justice system, with fewer safeguards for those deemed “terrorist suspects,” a highly elastic label that could be stretched to encompass most of the Catholic minority. Frequent and often arbitrary arrests,

vehicle checkpoints, stop and search operations, and house searches opened the way for widespread abuse by police agents.¹³

In practice, these powers were often used to target the Catholic minority without regard to individual culpability for any crime.¹⁴ An example is Patrick Shanaghan, a 30-year-old Catholic murdered in 1991. In a case alleging that the RUC had colluded in his murder, the European Court of Human Rights was provided with evidence that he had been arrested and detained ten times in six years, with six of the arrests resulting in detention for four or more days.¹⁵ Insofar as he was never charged with any crime, his experience was similar to that of thousands of other Catholics/nationalists arrested under the PTAs or EPAs.¹⁶ Again, like many other young people in his area, Shanaghan was stopped and questioned by the RUC and the British army (present in Northern Ireland from 1969) on a daily basis. His family home, shared with his mother, was searched 16 times between 1985 and 1991. His mother advised the court that “sometimes the RUC would not even search certain rooms, indicating that the search was not a concerted effort to locate and seize illegal material, but carried out solely to harass the family.”¹⁷ The Strasbourg Court found a breach of Patrick Shanaghan’s right to life and held that concerns that his murder reflected a pattern of discriminatory policing practice were “legitimate,” although not proven.

For nongovernmental entities, compiling evidence of ethnic profiling

is difficult, particularly where there is no effective official monitoring of such practices. Throughout the conflict, the British government's response to allegations of sectarian targeting in Northern Ireland was to argue that formal channels existed to address them. In reality, these were ineffectual. An Independent Commission for Police Complaints, established in 1987 to oversee RUC investigations of complaints against them proved, in the words of the Chair of the U.S. Commission on Security and Cooperation in Europe, "toothless."¹⁸ Of 16,375 complaints received by the Commission prior to 1994, not one resulted in disciplinary action against an RUC officer.¹⁹ Over time, the effect of long-standing emergency legislation, coupled with the *de facto* official posture that policing was impartial and evenhanded, was to erode the rule of law in Northern Ireland.

Some indicators of ethnic profiling

Police in Northern Ireland differentiate Catholics from Protestants (and loyalists/unionists from nationalists/republicans) largely on the basis of their names, addresses, dialects, or, given the geo-demographics of Northern Ireland, their very presence in a particular locality. In the absence of official data, the practice of profiling must be established through inferences from a variety of sources.

Harassment

For years, anecdotal evidence pointed strongly to sectarian targeting by the RUC, with many Catholics experiencing hostility from police and army

at checkpoints. In particular, young Catholic men reported being searched several times in the course of a day by the same patrols, and being ordered to remove shoes and stand in the rain for prolonged periods of time. Many came to regard such indignities as "part of life here."²⁰

Approximately 50 percent of young Catholics surveyed reported that they had been harassed by the security forces at some point.

Government authorities repeatedly dismissed claims of police misconduct as unsupported anecdotes. Yet, no official attempt was made to monitor patterns of abuse that might have refuted or supported widespread allegations that Catholics were significantly more likely to be stopped, searched, arrested, and detained than Protestants. It was the early 1990s before the first major piece of research on harassment by the security forces—including both the RUC and the British army—was commissioned by a nongovernmental human rights organization, the Committee on the Administration of Justice (CAJ).²¹ This extensive quantitative and qualitative survey of young people provided the first real evidence that ethnicity (as evidenced by a complex of factors including name, address, and religious or political affiliation) was used by police for profiling purposes. The study concluded that 26 percent of young people had experienced some form

of harassment by the security forces, with the figure lowest (16 percent) in Protestant communities and highest in republican areas (66 percent). Approximately 50 percent of young Catholics surveyed reported that they had been harassed by the security forces at some point.

Internment without trial

One of the single most significant factors leading to diminished respect for the rule of law in Northern Ireland occurred between 1971 and 1975.

Far from countering or even deterring terrorism, internment was acknowledged as among “the best recruiting tools the IRA ever had.”

Following an extended outbreak of severe civil disturbances, the British government introduced (not for the first time) a policy of indefinite internment without trial. The RUC’s elite Special Branch was ordered by Northern Irish Prime Minister Brian Faulkner to assist in “drawing up a list of those Catholics who should be interned.”²² The army then swooped on Catholic residential areas, arresting and detaining individuals whose identities fitted the RUC profile.

Not only were these raids purely partisan—indeed, the RUC claimed to hold no files on loyalist paramilitaries²³—but the intelligence on which arrests were based proved inaccurate, out of date, and riddled with cases

of mistaken identity. Of 1,981 people detained during this period, 1,874 were Catholics. Only four had any leadership responsibility within the Irish Republican Army (IRA).²⁴ Eventually, 1,600 of those detained were released without charge after “interrogation.”

Far from countering or even deterring terrorism, internment was acknowledged as among “the best recruiting tools the IRA ever had.”²⁵ Although eventually accepting that the vast majority of internees had not been actively involved in terrorism, the British army estimated that up to 70 percent of those interned did go on to become, as the army put it, “reinvolved.”²⁶

Within days of the first internments during this period, stories of ill-treatment and torture of detainees began to emerge. These were substantiated in the case of *Ireland v. UK* before the European Commission and Court of Human Rights.²⁷ However, with respect to allegations of discriminatory treatment, neither the Commission nor Court looked beyond the explanations offered by the UK government that a similar policy was unnecessary against loyalists. Violence surged in the immediate aftermath of internment, with 35 persons killed, and additional arrests by the RUC. The next year, 1972, was the most violent of the conflict, with 146 persons killed (including 47 members of the security forces and 99 civilians), 729 explosions and 1,437 shooting incidents.²⁸ The population of Northern Ireland at the time was a mere 1.5 million.

Arbitrary arrests and unjustified detentions

Between 1975 and 1987, 44,705 persons were arrested by the security forces under successive pieces of anti-terrorist legislation. Of these, only a small number were ever charged. In the 27 years of operation of successive Prevention of Terrorism Acts, 22,282 persons were detained, among whom only 1 percent (262 persons) were ever charged with offenses under the respective Acts.²⁹ Escalating compensation payments for house raids further suggested an unnecessary degree of abuse and heavy-handedness by police and army officers.³⁰ Although all these laws were formally nondiscriminatory, in practice the use of stop and search, proscription, and house raids under the EPA and PTA legislation focused predominantly on those perceived to be Catholic, nationalist and/or republican.³¹ The legislation appears to have been used primarily for harassment and intelligence gathering, and to recruit informants.³²

Policing public dissent

In the late 1990s, following an IRA ceasefire from 1994 to 1996, evidence of sectarian-based policing persisted. The policing of parades and demonstrations was a constant source of contention until an independent Parades Commission took this role over from the RUC in 1997. During severe public disruptions in the summer of 1996, police came under attack from both unionists and nationalists. Between July 7 and 11, during unionist demonstrations, 662 plastic bullets were discharged by police, as against

more than eight times as many (5,340) fired at nationalist demonstrators between July 11 and 14, the period of nationalist protest.³³ According to the CAJ, no objective evidence indicated that “the danger posed during the period of nationalist demonstrations was so much greater than that posed by unionist demonstrators that the difference could explain the eightfold increase in plastic bullets.”³⁴

What emerges from these examples, taken together, is “a systemic failure—the targeting of a community by casting a very broad net without regard for who will be ensnared in it.”³⁵

Recent developments

In many ways, the Patten Commission acted as a surrogate truth commission, hearing stories of real pain and abuse perpetrated both on and by the RUC. Although the Commission did not pronounce on the relative merits and demerits of policing in the past, its proposals for sweeping change make clear that the RUC had not been policing effectively. The Commission recommended not merely reform of the police but the transformation of policing.³⁶

The resulting Police Service of Northern Ireland (PSNI), established in November 2001, is undoubtedly subject to a higher level of scrutiny and transparency than the RUC ever was. A Police Oversight Commissioner monitors the implementation of the Patten Commission recommendations and a Criminal Justice Inspectorate oversees other aspects of criminal justice reform. In addition, a part-elected

Policing Board has produced an auditing tool to measure police compliance with the 1998 Human Rights Act.³⁷

An impressive Code of Ethics, with an article specifically devoted to equality, has been developed for police officers and linked to the disciplinary procedure.³⁸ Under Section 75 of the 1998 Northern Ireland Act (NIA), there is now a statutory duty on public authorities such as the PSNI to “have due

What emerges is systemic failure—the targeting of a community by casting a very broad net without regard for who will be ensnared in it.

regard to the need to promote equality of opportunity between persons of different religious belief and political opinion.” Section 76 further makes it unlawful for a public authority to discriminate against a person or class of person on the grounds of (among others) religious belief or political opinion.³⁹ In furtherance of these aims, the Secretary of State now has a statutory duty to publish information to assist those engaged in the administration of justice to avoid discrimination against anyone on any improper ground.⁴⁰

Under NIA Section 75, the PSNI has established an Equality Scheme to carry out “equality impact assessments” of potentially discriminatory aspects of its policy and practice. This is overseen by the Equality Commission for Northern Ireland. There is a clear need for a robust statistical and research evidence base,

and the PSNI has recently set up an internal working group to consider appropriate monitoring methods and the harmonization of information systems. However, to date, no statistics are kept about religious background. The PSNI systems in place to monitor use of stop and search powers, for example, are modeled on those used in Britain and lack the dimensions to accommodate the scope of discrimination peculiar to Northern Ireland. Under the 1989 Police and Criminal Evidence (Northern Ireland) Order, statistics on stop and search are monitored by gender and ethnicity (in terms of race), but not religion.

More generally, in March 2000, a Criminal Justice System Review, undertaken as part of the Good Friday Agreement, recommended “equity monitoring” of the criminal justice system as a whole, according to community background, gender, ethnic origin, sexual orientation and disability.⁴¹ An interagency information-sharing system currently under development to implement the results of the review, called “Causeway,” may help. Aimed at producing anonymized statistical data on all defendants processed within the criminal justice system, Causeway will eventually enable the results of equity monitoring to be recorded and analyzed. However, Causeway’s monitoring is limited to those who enter the criminal justice system, and does not extend to individuals merely stopped, for example, and not arrested. The timescale for equity monitoring is still some way off, and at the time of writing, there is still no breakdown

of government figures on the numbers of Catholics vis-à-vis Protestants in the criminal justice system.⁴²

In addition to these initiatives, after long discussion over the definition of sectarianism, the PSNI launched a monitoring system in September 2004 to track incidents perceived by individual victims to be motivated largely or solely on “sectarian” (religious) grounds. Unlike the “equality impact assessments,” which comprise internal evaluations of the possible discriminatory effects of policing policy, the newer system is intended to track incidents, such as hate crimes, reported by the public. The statistics are not intended to identify police officers involved in sectarian behaviour. Complaints against police are investigated by a Police Ombudsman in a system, which, by contrast, lacks a category to track complaints on sectarian grounds.⁴³

Thus in spite of the foregoing measures, certain sections of the Catholic community do not believe that the bias that dominated the RUC has been eliminated.⁴⁴ No shared narrative yet exists about the conflict’s causes or objectives, or the part played by the security forces in its exacerbation. The legacy of decades of “suspect community” profiling coupled with a continued refusal by the government to acknowledge the extent of the problem, is a new post-ceasefire, post-Patten policing system still plagued by inconsistencies. While legislation provides for a 50:50 quota system within the PSNI to recruit more “Catholics,” it is silent on “nationalists” or “republicans,” thus leaving open

the possibility of politically-based discrimination. The PSNI is still grappling with religious discrimination (“sectarianism”) and how to address it in, for example, definitions of hate crimes, stop and question statistics, police training programs, and community consultation processes.

To this day, there is no breakdown of government figures on the numbers of Catholics vis-à-vis Protestants in the criminal justice system.

The failure of profiling as a counter-terrorism measure

Perhaps the fundamental lesson to be learned from decades of *de facto* ethnic profiling by police in Northern Ireland is its failure to check terrorism. To the contrary, discriminatory police action fuelled terrorist recruitment and radicalized the affected population. Although the threat to police lives from terrorism was real, the potential perpetrators comprised only a small minority. Yet stereotypes intended to expedite security action were applied broadly to the entire Catholic community.

Police adoption of tactics based on negative stereotyping was not proportionate, necessary, or effective in stopping the terrorist threat. Levels of violence rose following periods of intense repression. Certain members of profiled communities came to tolerate actions by paramilitaries that they might otherwise have deplored. As one study of the efficacy

of antiterrorist measures in Northern Ireland concluded, “The more a community feels voiceless, unable to address the injustice in their lives, the more tolerant of violence they become particularly when it is aimed at the perceived source of injustice.”⁴⁵

In the final analysis, many of the powers assumed by the government of

Northern Ireland, and much of the policing strategy adopted, caused more political violence than it thwarted.⁴⁶ The state does not yet “see” the legacy of ethnic profiling.⁴⁷ Until it does, and misguided notions of self-preservation give way to objective analysis, democratic policing will continue to be elusive.

Notes

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1. The “Independent Commission on Policing for Northern Ireland” was chaired by Christopher (now Lord) Patten, formerly Governor of Hong Kong and European Commissioner for External Relations, now Chancellor of Oxford University.

2. See the Commission’s website: <http://www.belfast.org.uk>.

3. See, for example, M. Farrell, *Northern Ireland—The Orange State*, London: Pluto Press (1976); Youth for Peace submission to the Opsahl Commission on Northern Ireland; A. Pollack (ed.) *A Citizens’ Enquiry*, Dublin: Lilliput Press (1993), 264 “Rather than dealing with the ‘terrorist threat’ [emergency legislation] undermines public confidence in the apparatus of the state, thereby creating the dissent in which violence can take root.” Committee on the Administration of Justice “No Emergency: No Emergency Laws,” Belfast: CAJ (1996).

4. To oversimplify: Protestants, who form the majority of the Northern Irish population (around 60 percent), often see themselves as British rather than Irish, and may favor union with Britain (“unionism”) or, in a more politicized form, be “loyal” to the British Crown and to Ulster (“loyalism”). Catholics in Northern Ireland might view themselves as Irish and often favor a united Ireland (“nationalism”). “Republicanism” is viewed as a more extreme form of nationalism.

5. See Patrick Hillyard, *Suspect Community: People’s Experience of the Prevention of Terrorism Acts in Britain*, London: Pluto Press (1993).

6. The parliamentary Basil Brooke, Northern Ireland’s Prime Minister from 1943 to 1963, once said: “I recommend those people who are Loyalists not to employ Roman Catholics, ninety-nine percent of whom are disloyal. I want you to remember one point...if you don’t act properly now ... we shall find ourselves in the minority instead of the majority.” *Londonderry Sentinel*, March 20, 1934, cited in F. O’Dochartaigh, *Ulster’s White Negroes – from civil rights to insurrection*, Edinburgh: AK Press (1994) 122.

7. Northern Ireland was governed directly from Westminster from 1972 to 1999, and from 2002 to the present, apart from some months in 1974.

8. L. Donohue, “Temporary Permanence: The Constitutional Entrenchment of Emergency Legislation,” 1 *Stanford Journal of Legal Studies* 35.

9. See Government of Northern Ireland, Report of Commission chaired by Lord Cameron, cmd 552, Disturbances in Northern Ireland, Belfast (1969) [“Cameron Report”], 532 (emphasizing the adverse impact of RUC misconduct on Catholics’ confidence in the police).

10. Cameron Report, 74. Concerning allegations that the RUC had led civil rights marchers into a trap at Burntollet Bridge in 1969, Cameron observed that “such a suspicion, baseless and indeed ridiculous as it is, could never have arisen at all if there had been such general confidence in police impartiality throughout the community as one would hope and expect to exist,” Cameron Report, 75.
11. Government of Northern Ireland, Report of Tribunal of Enquiry chaired by the Honourable Mr Justice Scarman “Violence and Civil Disturbances in Northern Ireland in 1969,” cmnd 566, HMSO Belfast, (1972) [“Scarman Report”], 17.
12. The EPA was renewed and extended in 1978, 1987, 1991, and 1996, the PTA in 1976, 1984, and 1989. They were finally replaced by the Terrorism Act 2000, applicable throughout the United Kingdom and Northern Ireland, and since supplemented in 2001 and 2005. For more on antiterrorism legislation in Northern Ireland, see Northern Ireland Human Rights Commission, *Countering Terrorism and Protecting Human Rights* (September 2004), available at: http://www.nihrc.org/documents/landp/Terrorism_HR_Septo4.pdf.
13. See Robert McVeigh, “*It’s Part of Life Here: The Security Forces and Harassment in Northern Ireland*,” Belfast: CAJ (1994), 38 (Security policy focused on “intensive intelligence gathering, high density police and army patrols, detention for questioning in police custody and frequent searches, making it both easier and more likely for harassment to happen and be perceived to happen.”).
14. Dermot Walsh “The Royal Ulster Constabulary – A Law Unto Themselves?” in M. Tomlinson, T. Varley, T., and C. McCullagh, *Whose Law and Order?*, Belfast Sociological Association of Ireland (1988), 95 (concluding: “It would appear...that the RUC have exceeded their powers regularly in their dealings with republican individuals and groups...This prompts the question why has there not been a much greater volume of prosecutions, convictions and successful civil actions against police officers in Northern Ireland? A large part of the answer lies in the functioning or malfunctioning of the criminal justice process...”).
15. *Shanaghan v. the United Kingdom* (Eur. Ct. Hum. Rts.), Judgment of 4 May 2001.
16. *Shanaghan v. U.K.*, para. 13.
17. *Shanaghan v. U.K.*, para. 20.
18. Commission on Security and Cooperation in Europe (CSCE), *Protecting Human Rights and Securing Peace in Northern Ireland: The Vital Role of Police Reform, Hearing before the Commission on Security and Cooperation in Europe* (September 22, 2000) [CSCE 106-2-14], Opening Statement by Hon. Christopher H. Smith, Chairman, 2, available at: <http://files.csce.gov/092200.pdf>. See also Prof. Brice Dickson, “Submission to the Opsahl Commission on Northern Ireland,” in Pollack, 262.
19. CSCE, 2. In November 2000, the Independent Commission for Police Complaints was replaced by the current Police Ombudsman for Northern Ireland. Today, however, the substantiation rate remains less than one percent. See: <http://www.policeombudsman.org>.
20. See Robert McVeigh, substantiating Hillyard (1993) on the operation of the PTA in England.
21. Robert McVeigh, 60.
22. J. McGuffin, *Internment*, Co. Kerry: Anvil Books (1973), 85.
23. McGuffin, 84.
24. See McGuffin. See also the Conflict Archive on the Internet summary of the internments, available at: <http://cain.ulster.ac.uk/events/intern/sum.htm>.
25. Former IRA Commander Jim McVeigh, quoted in M. O’Connor and C. Rumann, “Into the Fire: How to avoid getting burned by the same mistakes made fighting Terrorism in Northern Ireland” 24 *Cardozo L. Rev.* 1657, 1662 (2005).
26. M. Shaw and V. Millar, *Detention of Suspected International Terrorists: Part IV of the Anti Terrorism Crime and Security Act 2001*, Research paper 02/52 (September 2002), 14, available at: <http://www.parliament.uk/commons/lib/research/rp2002/rp02-052.pdf>.

27. *Ireland v. UK*, (Eur. Ct. Hum. Rts.), Judgment of 26 October 1988. See also *Brogan and Others v. UK*, (Eur. Ct. Hum. Rts.) Judgment of 29 November 1988, for examples of other violations committed by the RUC in its application of the anti-terrorist legal apparatus.

28. See *Ireland v. UK*, para. 44.

29. O'Connor and Rumann, 1682, citing Northern Ireland Office (NIO), *Research and Statistical Bulletin, Statistics on the Operation of the Prevention of Terrorism Acts*, Northern Ireland (2000).

30. NIO Research and Statistical Bulletin, Annual Statistics on the Operation of the NI Emergency Provisions Act 1996, available at: <http://www.nio.gov.uk/pdf/epa2000.pdf>.

31. From the mid 1980s, harassment of the Protestant community was also increasingly common. Additionally, police increasingly used antiterrorism provisions to combat ordinary crimes such as burglary. Over 27 years, 26 percent of charges under the PTAs related to offenses not listed under the Acts. O'Connor and Rumann, 1682 and note 116.

32. Sinn Fein asserts that between 1985 and 1987, around 50 individuals approached its offices claiming the RUC had entrapped them for the purpose of recruiting them as informants. See D. O'Carraigh, *The Politics of Britain's Legal, Judicial and Security System in "Northern Ireland,"* Sinn Fein 1988 International Publicity and Information Committee.

33. Committee on the Administration of Justice, *The (Mis)Rule of Law – a report on the policing of events during the summer of 1996 in Northern Ireland*, Belfast: CAJ (1996), 28. [CAJ 1996a]. See also, e.g., *Plastic Bullets and the Law*, Belfast: CAJ (1990).

34. CAJ 1996a, 34.

35. O'Connor and Rumann, 1691.

36. However, there was no purging of past human rights violators and many former RUC officers continue to serve in the ranks of the PSNI.

37. The Human Rights Act 1998 incorporates the European Convention of Human Rights and Fundamental Freedoms into the domestic law of the United Kingdom and Northern Ireland.

38. Article 6: "(6.1) Police officers shall act with fairness, self-control, tolerance and impartiality when carrying out their duties. They shall use appropriate language and behaviour in their dealings with members of the public, groups from within the public and their colleagues. They shall give equal respect to all individuals and their traditions, beliefs and lifestyles provided that such are compatible with the rule of law; (6.2) In carrying out their duties police officers shall not discriminate on any of the following grounds, i.e. sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, disability, age, sexual orientation, property, birth or other status."

39. See Northern Ireland Act 1998, available at: <http://www.legislation.hmso.gov.uk/acts/acts1998/19980047.htm>

40. Justice (Northern Ireland) Act 2002, available at: <http://www.legislation.hmso.gov.uk/acts/acts2002/20020026.htm>.

41. See "Review of the Criminal Justice System in Northern Ireland," the report of the Criminal Justice System Review (March 30, 2000), paras. 3.38 and 3.41, available at: <http://cain.ulster.ac.uk/issues/law/cjr/report30300.htm>. The Criminal Justice System Review comprised nine individuals with terms of reference to "address the structure, management and resourcing of publicly funded elements of the criminal justice system and ... bring forward proposals for future criminal justice arrangements." See para. 1.3.

42. "Equity monitoring" will be linked to the implementation of the Causeway Programme, which is due to be completed in November 2006. See Criminal Justice System Northern Ireland, *Criminal Justice Review Implementation Plan Updated June 2003*, 17, available at: <http://www.nio.gov.uk/cjimp2003.pdf>.

43. See articles in the present issue of *Justice Initiatives* by Richard Keenan and Joel Miller.
44. For example, the *Northern Ireland Statistics and Research Agency Community Attitudes Survey 2003* (March 2004) finds over 30 percent of Catholics still of the opinion that the police do not treat everyone fairly. Available at: <http://csu.nisra.gov.uk/publications>.
45. O'Connor and Rumann, 1749.
46. See, for example, O'Connor and Rumann, 1677; CAJ 1996.
47. See F. NiAolain and C. Campbell, "The Paradox of Transition in Conflicted Democracies," 27 *Human Rights Quarterly* 172-213 (2005).

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