

RACIAL PROFILING

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March 2002

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The disparate impact of our criminal justice system on racial and ethnic minorities raises serious questions about the way law enforcement officials, prosecutors, courts, and juries go about their jobs.¹ Whatever their cause, racial disparities are stark throughout the system. At current levels of incarceration, for example, newborn black males have a greater than 1-in-4 chance of serving prison time, while Latinos have a 1-in-6 chance and whites 1-in-23. While all racial disparity in the justice system merits further scrutiny, a particular aspect of the problem – racial profiling – has attracted considerable public attention in recent years.

The term “racial profiling” has been used loosely and lacks a universally accepted definition, but it most commonly refers to police practices in which traffic and pedestrian stops, and the ensuing searches of cars or individuals, are shown to have a discriminatory impact. The undesirable and illegal consequence results when police officers use race or ethnicity as a deciding factor in focusing suspicion on a particular individual. Because most jurisdictions lack sufficient data on police stops to accurately assess the problem, suspicion and controversy continue to swirl around racial profiling.

In discussing the issue, it is important to distinguish between disparate impact and discriminatory impact. They are not the same, and it is unwarranted to leap from one to the other. A finding of a disparate racial or ethnic impact in traffic and pedestrian stops calls for further study and reflection, but there can be valid reasons for the disparities that do not derive from race-based discrimination, much less racial animus, and not every police action that considers the race of a suspect is racial profiling. It is not racial profiling, for example, for police to take into account that the victim of a crime described the assailant as “African-American” or “Hispanic.” Nor is it racial profiling when the conduct of a black or Latino individual provides a legally sufficient basis for a stop or detention without regard to race or ethnicity. On the other hand, it *is* racial profiling when mere stereotypes (a black man driving a BMW is a mismatch) or loose generalizations (a black man does not belong in this predominately white neighborhood) are used to justify a stop. And it *is* racial profiling when broad statistical correlations are used as a basis of focusing suspicion on a given individual; *i.e.*, more Latino

than white teenagers are arrested for street drug crimes, therefore that specific Latino teenager in this high drug crime area should be checked out.

More generally, enforcement of certain laws may produce a disparate impact overall: The proportion of blacks or Latinos stopped by law enforcement – or ticketed, arrested, frisked, or searched – may turn out to be higher than it is reasonable to expect given the mix in the population. And there may be no convincing explanation for the disparity apart from race or ethnicity. That kind of law enforcement activity produces a high level of "false positives" that falls more heavily on racial and ethnic minorities. The more general the criteria used to isolate individuals, the greater the likelihood that people will be targeted repeatedly or erroneously: the same black man is stopped again and again on his way home from work late at night; the correlation between a busted tail light and illegal drugs in a given car is so weak that many innocent people will be stopped.

Any police decision to detain an individual who is not visibly engaged in a crime may stir feelings of indignity and resentment. But it is even more corrosive and potentially explosive when the person believes he has been stopped solely because of his race or ethnicity, or because race or ethnicity is part of an over-generalized dragnet. Hence, the term "driving while black or brown."

So-called "pretext stops" add to the complexity of the racial profiling issue. In the case of traffic stops, for example, it is virtually impossible to drive any length of time without committing a traffic or vehicle code violation of some kind. The police, therefore, have a choice about whom to pull over. Whatever the underlying intent of the police officer, it does not violate the Fourth Amendment protection against unreasonable searches and seizures when the officer uses the "pretext" of a traffic or vehicle code violation to stop a motorist as long as probable cause exists to believe those laws have been violated. *Whren v. United States*, 517 U.S. 806 (1996). We would venture, however, that the traffic law "pretexts" used to stop a car rarely match the underlying suspicion of criminal activity motivating the police to want to check the car out. A drug interdiction program using busted tail lights and minor traffic violations as "pretexts" for a stop will likely yield too few drug violators to justify the proliferation of stops and the displeasure or animus engendered in the drivers. It is especially problematical when the "pretext" is so

common – illegal lane changes or rolling stops, for example – that the police officer can choose with relative impunity whom to stop based on any factor, legal or illegal, including race or ethnicity.

This does not, of course, mean that there must always be a one-to-one correlation between persons stopped by the police and persons found to have committed a crime. Nor does it mean that a weapon or contraband must be found every time there is legal justification for a frisk or pat-down. Nor does it mean that randomized, non-discriminatory stops should be condemned merely because of overbreadth problems. An example of the latter is a sobriety checkpoint – where scores of people, all of whom happen to be passing by the checkpoint, are stopped and inconvenienced without individualized suspicion. Where the basis for the stop is truly randomized and non-discretionary – every third car, for example – few will argue that the checkpoint is unlawful or wrong, even if the basis for a stop results in considerable overbreadth and few persons are found to be inebriated. Perhaps such stops can be rationalized on the grounds that drunk drivers pose an immediate danger to others.² The elimination of that danger is the predominant goal of the police; the checkpoint is not being used as a pretext to stop persons who may have committed other crimes. Tacit consent by those stopped, therefore, might be easier to obtain or assume: We agree you may stop us briefly for our own personal safety in order to take drunk drivers off the very road we are traveling because we know that the stop won't be used to conduct a fishing expedition for possible criminal activity and that we will be on our way as soon as you see we're not drunk.

Similarly, in the wake of the events of September 11, 2001, there is manifestly greater public tolerance of airport checkpoints and more intrusive and frequent searches of baggage and passengers. The rationale for public acceptance is similar to that described above for sobriety checkpoints. But unlike sobriety checkpoints, airport checks are a more complex combination of universal searches (everyone goes through the metal detector), random, non-discretionary searches (every fourth or fifth passenger stopped immediately prior to boarding for a particularized search of hand-luggage), particularized suspicion (bag going through the x-ray machine contains an object that looks suspicious), and profile-based stops (young male traveling alone with a one-way ticket paid for in cash). Because of the heightened danger associated with a terrorist act and the irreparable injuries occasioned thereby, as in

a sobriety checkpoint, there may be a tacit agreement by travelers that they can be stopped briefly so that the very airplane they will be traveling upon can be made less vulnerable to a terrorist act. Everyone swept into the dragnet benefits directly in terms of a safer flight. The airport check is not being used as a pretext or fishing expedition for criminal activity other than terrorism. Although many are swept into the dragnet and at best an infinitesimal few will be found to pose the danger for which they are stopped or searched, the horrendous consequences and massive loss of life from an undetected terrorist act is seen as justifying the inconvenience. It seems safe to say that for many people, the greater the potential harm, the greater the tolerance, at least momentarily, for dragnet-like stops with the barest minimal nexus between the person stopped and the potential culprit sought. We are fortunate that the occasions where such programs have seemed necessary, if only fleetingly, have been few.

These instances of airport searches should be clearly distinguished, however, from airport searches in which race or ethnicity is a factor in deciding whom to single out for a stop or search or to prevent from boarding. In the immediate aftermath of September 11, there was some public debate whether specific profiling of Arab-Americans or persons with a Middle Eastern appearance should be tolerated or even encouraged. There have been instances at airports where such persons have not been permitted to fly. Although the fear or panic that makes such profiling seem rational might seem at first blush to be understandable, we do not endorse such profiling. The nexus between the characteristic – looks Arab-American or Middle Eastern – and the potential culprit (a terrorist) is so attenuated as to be ephemeral, at best. Hence, the overbreadth of the searches will be extremely high without a corresponding benefit in improved air safety. And there will not be the same tacit acceptance of the inconvenience because those stopped will accurately see the stops as discriminatory and highly discretionary; not random.

Other hard cases to rationalize are when the motivation for a dragnet-like approach is general crime suppression rather than an attempt to solve a specific crime or to eliminate an immediate threat to public safety like the drunk driver. Assume that a given neighborhood, predominantly black, is experiencing an uptick in gun-related crime with a predominance of black victims and black perpetrators. The police perceive that the area has become saturated with guns. They decide, therefore, to deploy a

massive force in the neighborhood, to stop and search lots of cars, and to stop and frisk lots of individuals with the goal of seizing as many guns and making as many arrests for illegal possession of concealed weapons as possible. And if other contraband – drugs, for example – is found, arrests also will be made.

Additionally, the police embark on a program of rigid enforcement of a wide variety of laws relating to relatively trivial offenses that are often overlooked or not worth the effort to process – breaking a window, drinking beer from an open container on the corner, jumping turnstiles on the subway. People detained for these offenses are then searched for contraband or weapons and arrested for those more serious offenses if the search produces a "hit." At the station house they are questioned about other, more serious criminal activity of which they may be aware.

The result of all this police activity is that in this predominantly black neighborhood, blacks – particularly young black males – are "tossed" and arrested in substantial numbers without the police necessarily running afoul of the Fourth Amendment. Thus, even if each individual arrest seems to be properly grounded in probable cause and each stop grounded in reasonable, individualized suspicion – however pretextual or flimsy – it nonetheless happens that black male pedestrians and drivers are rousted repeatedly and unceremoniously and perceive themselves singled out by race. The number of "false positives" not only creates widespread inconvenience, it appears to validate a suspicion that people are being stopped because they are black. Unlike the example of the sobriety checkpoint, there is not tacit consent on the part of those stopped. At the same time, however, when taken together, the massive police presence, the increased likelihood of being caught with a gun and arrested, and the number of guns seized produce the intended effect: gun-related crime plummets. In this example, the minor offenses and the pretextual stops are essentially surrogates for stronger, more individualized suspicion. The correlations between stops and arrests may be weak, but in the end the goal is achieved.

Whether the residents of the neighborhood in question accept the crime suppression program is another question, and one that is hard to gauge. And the views of the residents may not be uniform: The storekeeper who has been held up repeatedly at gun point will feel differently than the mother whose son is repeatedly "rousted" by the police when he is out at night.

But one thing is clear: When a police stop of an innocent black or Latino results in serious injury or death – as in the case of the Amadou Diallo shooting in New York – whatever goodwill the police may have banked will evaporate. There will be little tolerance of, and forgiveness for, serious police error, even if it is the result of negligence or recklessness rather than intentional misconduct.

Generalized beliefs that the criminal justice system impacts disproportionately on minorities will be focused with laser-like intensity on the specific controversial incident. And the impact on policy is likely to be that officers will face greater hostility, anger, and risk of injury. Even so, these may not be the hardest cases of all.

In the absence of a search for a particular criminal or a targeted crime suppression effort, it becomes an even more complex societal problem when the cumulative results of uncoordinated, discrete, individual decisions by police officers about whom to stop and whom to search fall, over time, more heavily on racial and ethnic minorities. Even if almost all police officers make decisions about whom to stop without intentionally acting in a discriminatory way, it is still possible, over time, to produce disparate results from the actions of the few who do use race improperly and the stops that occur because of the unintentional stereotyping that is so prevalent in our society. What to do about this is a knotty question. But a good starting point is to collect the data that show what is actually happening on the streets.

For example, the Attorney General of the state of New York determined, after a review of some 175,000 stops documenting the race of persons stopped by the police in New York City, that blacks were stopped six times more often than whites. NYPD keeps statistics by race. *The New York City Police Department's "Stop & Frisk" Practices ("NYPD Stop and Frisk Practices")*, Office of New York State Attorney General Eliot Spitzer, Civil Rights Bureau (December 1, 1999), pp. 88 et seq. The report can be found on the Internet at http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html. Whereas blacks constituted one-fourth of New York City's residents, they accounted for half of the individuals stopped. *Id.* Not all stops led to an arrest, however. The Attorney General then sought to discover if similar racial disparities existed when only stops that had resulted in arrests were examined. They did: There were more "false positives" among blacks than among whites. The NYPD stopped 9.5 blacks to

generate one arrest of a black person whereas it stopped only 7.9 whites to generate one arrest of a white person. *Id. at 111.*

It can be argued that looking solely at the proportions of the population that are stopped or arrested is overly simplistic. It might be the case that crimes are committed by blacks and Latinos in greater numbers than their proportion of the overall population, or it might be that the precinct in question is so heavily black or Latino that population statistics based upon the city as a whole are essentially meaningless.

In order to refine the analysis and take these arguments into account, the New York Attorney General tested whether the disparate rates at which minorities and whites were stopped could be explained by the racial make-up or crime rates in individual precincts. Even after accounting for the effect of the differing crime rates, it was still the case that blacks were stopped 23 percent more often than whites and Latinos were stopped 39 percent more often than whites. *Id. at x.* The results were similar after accounting for population mixes in different precincts. *Id. at 121.*³

New York's experience is similar to the results of a study by the San Diego Police Department, which issued its Vehicle Stop Study Mid-Year Report ("SDPD Stop Study") on September 21, 2000. The study can be found on the Internet at <http://www.sannet.gov/police/general-info/pdfs/stoprpt.pdf>.⁴ San Diego started collecting data on traffic stops in January 2000. Officers collect the data set forth in footnote five below⁵ on a 4x6-inch card that is filled out in the field. "Completing the form for each stop takes less than 20 seconds." SDPD Stop Study, Preface, p. 5. During the first six months of data collection, the SDPD documented 91,522 stops. San Diego found that "both Hispanic and African American drivers [were] over-represented in vehicle stops in comparison to the characteristics of San Diego's driving-age resident population." *Id.*, Executive Summary, p. 8.

More interesting was the observation that "the vehicle stop data also indicate that, once stopped, Hispanic and African American drivers are substantially more likely to experience searches and arrests than Asian or White drivers." *Id.*⁶ Less than two percent of vehicle stops resulted in arrests. About six percent resulted in searches; vehicles were most often searched, followed by drivers and then passengers.

Less than ten percent of the searches resulted in seizures of contraband or property. *Id.*, Preliminary Observations, paragraph 4, p. 11.

The San Diego report stressed its preliminary nature and emphasized that it did not purport to explain why the disparities occurred. "Numerous hypotheses could be offered, ranging from intentional police discrimination to unintentional stereotyping to the unintended consequences of police deployment practices to actual differences in gang involvement by race/ethnicity, and so on." *Id.*, at p. 8. The authors urged further analysis to get at the real answers. *Id.*

Because the implications of these studies are difficult to assess and, if looked at only cursorily, potentially inflammatory, it is not surprising that some leaders in law enforcement question the wisdom of compiling statistics for similar studies.⁷ Yet despite the risk that the answers might be uncomfortable, many cities and 13 states require some form of data collection, and a number of them have drafted detailed collection procedures. The Sacramento (CA) Police Department has a particularly thorough policy that requires officers to answer 17 specific questions for each stop.⁸

We strongly recommend that departments collect data on stops, while recognizing that there are both risks and rewards in doing so. If the data reveal patterns similar to those in New York or San Diego, a police department leaves itself open to arguments that it is simply creating bad publicity for itself, for use by persons with a political or ideological axe to grind or seeking a shocking headline. It may be leaving itself open to outright charges of racial bias. The contrary view, which we submit is the better one, is that lack of knowledge is a dangerous thing and that a willful lack of knowledge is more dangerous still. If the police do not collect and analyze data, it is certain that plaintiffs' experts will.

Facts are only facts; what they mean is often in dispute. As noted earlier, it is too simplistic to leap to conclusions of racial animus or bias, or illegality, solely because differential patterns emerge on racial or ethnic grounds. Concededly, the public may do so, and police departments will necessarily, have to deal with this perception. Second, forewarned is forearmed: If the a police department discovers that its officers are lax or less than precise in assessing probable cause or reasonable suspicion to stop or to search, better to know it and institute remedial training than face the risk of ongoing liability. Third, the tracking of the data and the their inclusion in an early warning system will allow the police

department to spot patterns or identify particular officers whose conduct may require attention, counseling, or re-training.

It's not unusual to hear the thoroughly discredited argument that collecting data is "only putting evidence in the plaintiff's hands." It's true that the more that has to be explained away in a lawsuit against the department, the harder the job of the defense counsel. And in the short run, an individual case might be dismissed or settled at less expense without the data. But such arguments are ultimately specious, and in the long run the department is poorly served by the lawyer who opposes collecting data. Police departments with their head in the sand do not win lawsuits. Their opponents, armed with data, do. More importantly, they lack the information to manage risk.

In the business of law enforcement, people do the same things in the same ways day in and day out, year in and year out. New training and techniques may introduce variations, but the basic job – patrolling, responding to calls, making stops, questioning people, performing searches, making arrests, being on the lookout – does not change. Accordingly, law enforcement is a business that is particularly vulnerable to multiple claims based upon similar conduct. It is vulnerable because if one officer is engaging in a risky pattern that may give rise to litigation, it's likely that many, many officers are doing the same thing. By the same token, if the risk can be analyzed and managed, the results can drop risk substantially.

Likewise, if race and ethnicity are improperly entering into decisions about whom to stop or search, the way to avoid liability is to respond sensibly to problems that need to be addressed. Collecting data is the first step.

It is important to focus on the impact of data collection on the police officers who will be called upon to record the information. Even if, as in San Diego, it takes no more than 20 seconds to complete a form or, as in Sacramento, the form is set up so that it can be rapidly filled out and fed into a scanner, the departments clearly are asking officers to do something additional. The officers likely will see data collection as an unwelcome burden. But there is more to their grumbling than that.

Line police officers also ask what's in it for them. Is data collection simply another way of appeasing the segment of the public that is already angry at the police? Or a way to create more

opportunities to sue police officers? Will officers have to start acting defensively, keeping track of whom they stop? If, by the end of the month, the percentage of blacks that they have stopped is more than the proportion of blacks in the overall population, should they start pulling over more whites to bring the percentage down? Or will they simply quit making stops?

These arguments and attitudes do not seem to abate until the police department's management lets it be known that it will tolerate neither officers who fail to do their sworn duty nor unfair and baseless attempts by the public to smear the reputation of good officers. When a police officer being asked to record data on stops wants to know, "What's in it for me?" the answer should be: Everything. If you do your job well and professionally and adhere strictly to legal and constitutional requirements, you will find that the department will strongly back you when times get rough and similarly will reward you when it is time to do so.

Police leadership must both "talk and walk" this message. Some police officers are already too quick to see themselves as victims or to interpret events to match their freewheeling, corrosive cynicism about management. It is vitally important, in an area as inflammatory as data collection and race, that management stack the tinder carefully, lest unintended victims get scorched.

¹We want to thank Chris Stone, Janet Mandelstam, and Jennifer Trone of the Vera Institute of Justice for their insights and suggestions for this article. In particular, we thank Janet Mandelstam for her wonderful editing assistance.

Whatever their cause, racial disparities are stark throughout the criminal justice system. A recent Justice Department study showed that 70 percent of the defendants facing the death penalty are black or Latino. As of the end of 1998, approximately 43 percent of all persons on Death Row in the United States were African-American men. Capital Punishment 1998, United States Department of Justice, Bureau of Justice Statistics (December 1999) (revised January 6, 2000) NCJ 179012. Black males comprise 49 percent of persons in prison. Correctional Populations in the United States 1997, United States Department of Justice, Bureau of Justice Statistics (November 2000). Black males comprise 42 percent of persons in local jails Id. Nine percent of all black adults over the age of 18 are in prison, jail, probation or parole, as contrasted to two percent of all white adults. Id. At current levels of incarceration, newborn black males in this country have greater than a 1 in 4 chance of going to prison during their lifetimes, while Latinos have a 1 in 6 chance, and white males a 1 in 23 chance of serving prison time. Lifetime Likelihood of Going to State or Federal Prison, United States Department of Justice, Bureau of Justice Statistics (March 1997) NCJ160092.

²²The Supreme Court recently reiterated this rationale in *City of Indianapolis v. Edmond*, ___ U.S. ____ (2000).

³Studies in New Jersey of stops on the New Jersey Turnpike reached similar results: 13.5 percent of the individuals using the New Jersey Turnpike were African-American, and African-Americans comprised 15 percent of the drivers who sped on that Turnpike. Blacks, however, constituted 35 percent of the drivers stopped on the Turnpike and 73.2 percent of those arrested. Report of Dr. John Lamberth, Plaintiff's Expert, Revised Statistical Analysis.

⁴A second report, dated May 8, 2001, reconfirming the results of the first study, was recently published at the same San Diego Police Department website.

⁵The San Diego PD collects for every vehicle stop:

- Date and time of the stop;
- Division where the stop occurred;
- Primary reason for the stop (moving violation; equipment violation; radio call/ citizen contact; officer observation/knowledge; supplemental information on the suspect, etc.);
- Driver's sex and age;
- Driver's race;
- Action taken (citation, written warning, verbal warning, field interrogation, other);
- Whether the driver was arrested;
- Whether the driver was searched, and if so:
 - a. Type of search (vehicle, driver, passengers);
 - b. Basis for search (visible contraband, contraband odor, canine alert, consent search; 4th Amendment waiver, search incident to arrest, inventory search prior to impound, observed evidence related to criminal activity, other);
 - c. Whether a Consent Search Form was obtained;
 - d. Whether contraband was found;
 - e. Whether property was seized.

⁶If stopped, Latinos had a 10.6 percent chance of being searched; blacks a 10.2 percent chance; Asians and Pacific Islanders, a 3.4 percent chance, and whites, a 3.0 percent chance. If inventory searches of impounded vehicles were not counted, blacks had a 5.8 percent chance of being searched; Latinos, 2.8 percent; Asians/Pacific Islanders, 2.0 percent; whites, 1.5 percent. If stopped, blacks had a 3.0 percent chance of being arrested; Latinos, 2.7 percent; whites, 1.3 percent; Asian/Pacific Islander, 0.9 percent. *Id.*

⁷Respected academics, including Professor Sam Walker of the University of Nebraska at Omaha, have also raised questions about how to interpret the data the appropriate benchmark to do so. Walker, Samuel (2000)(draft). "Searching for the Denominator: Problems with Police Traffic Stop Data and an Early Warning System Solution." The challenge is to identify the right base against which to measure the disparate impact of traffic stops on minorities. It is relatively easy to do so on a controlled access Interstate highway; it is tougher- although doable- in a large metropolitan area. The US Department of Justice is in the forefront in attempts to do so.

⁸The Sacramento SPD employs a Scantron form which has 17 different variables for the officer to fill in. The form is set up so that it can be filled out quickly after each stop by darkening an appropriate box in each category. The 17 categories and related choices are:

- Time of stop, with choices for am or pm and the hour and minute of the stop;
- Date of stop, with choices for date, month, and year;
- Reason for stop; with choices for:
 - Hazardous violation of the Vehicle Code
 - Violation of the Penal Code
 - Violation of a city ordinance

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- Call for service
 - Preexisting knowledge or information
 - Equipment or registration violation
 - Special detail (i.e., DUI checkpoint; narcotic suppression detail)
 - Other
 - Race and gender of the driver
 - Driver's date of birth
 - Driver's license no. and state
 - Yes or no to whether the driver was asked to exit the car
 - The number of passengers
 - Was a search done, with choices for the driver, passenger, or the vehicle or no.
 - Search authority, with choices for consent, Terry cursory (reasonable grounds to believe that the person may be armed and dangerous), incident to arrest, parole/probation, or tow inventory.
 - What was discovered or seized, with choices for weapons, drugs, cash, the vehicle, alcohol, other property, or nothing
 - The result of the stop, with choices for citation, arrest, etc.
 - the stop location, by precinct
 - the vehicle license plate and state
 - the duration of the stop in total minutes
 - the officer's badge number and the badge number of a secondary officer, if applicable
 - whether the radio car was equipped with a video camera or not.