

BEST PRACTICES REVIEW

With the generous support of the Ford Foundation, **PARC** supports and assists those responsible for the oversight of police departments – law enforcement executives, monitors, civil officials, and government agencies – to advance effective, respectful, and publicly accountable policing.

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Agencies Under Investigation

Detroit officials met with Department of Justice (“DOJ”) lawyers in mid-April regarding a possible agreement for the selection of an independent monitor to oversee the Detroit Police Department. The DOJ has been investigating the department since December of 2000 following allegations of civil rights abuses. Police Chief Jerry Oliver initially said that he expects a settlement within a month. He later said only that he thought an agreement was likely. The monitor, selected by the city and DOJ, would assess whether that the Police Department was meeting the terms of the settlement agreement. According to news reports, the monitor could review or reopen any case involving the use of

force and reassess any previous disciplinary action against an officer. The DOJ made more than 175 policy recommendations last year and recently noted additional concerns. *Detroit News*, April 17, 2003, and *Detroit Free Press*, April 18, 2003.

Civilian Oversight

A recent edition of the *Saint Louis University Public Law Review* entitled, “New Approaches to Ensuring the Legitimacy of Police Conduct” includes a collection of articles that address police accountability and related topics. Samuel Walker assesses the nature and significance of DOJ police reform agreements and the corresponding best practices and conceptual framework in the article, “The New Paradigm of Police Accountability: The U.S. Justice Department Pattern or Practice Suits in Context.” In the article, “Racial Profiling Redux,” David A. Harris provides an overview of racial profiling before and after 9/11, the consequences of profiling Arabs and Muslims, and the effectiveness and ineffectiveness of different forms of litigation and legislation.

In the article, “State Revocation of Law Enforcement Officers’ Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism,” Roger L. Goldman, advocates the use of state procedures for the revocation of law enforcement

officers' licenses by federal prosecutors. Conversely, he suggests that state commissions that regulate law enforcement licenses use evidence and information gathered by federal authorities in seeking license revocations. In the article, "Civilian Oversight of the Police in the United States," which can be accessed online at www.parc.info/pubs/index.html, Merrick Bobb discusses the history of police reform in the United States and explores different models of civilian oversight, including independent monitors, civilian review boards and "pattern or practice" lawsuits requiring monitors.

In addition, the *Review* features "De-Certification: Achieving Interstate Reciprocity" by Clarence Harmon; "Remarks on Racial Profiling in Missouri," by Jeremiah W. Nixon; "Who is Actually Calling the Shots? Watch Out, They May Not Be Liable: *Irvin v. Smith*," by Teresa Baird; "Federal Responsibility for Police Accountability Through Criminal Prosecution," by Steven Puro; "Freedom of Liberty Takes on the Right to Privacy: An Analysis of *Adams v. City of Battle Creek*, The Circuit Split, and Possible Consequences of Anti-Terrorism Legislation," by Michelle Schipke Silies; "Misconduct Among Previously Experienced Officers: Issues in the Recruitment and Hiring of Gypsy Cops," by John Middleton-Hope; and "Prohibiting Racial Profiling: The ACLU's Orchestration of the Missouri Legislation," by Leland Ware. *Saint Louis University Public Law Review, Volume XXII, Number One, 2003*.

The Sacramento, California Office of Police Accountability ("OPA") released its 2002 annual report. The number of formal internal affairs investigations

audited by OPA has increased in the last three years; in 2000 there were 21 cases, 24 in 2001, and 38 in 2002. Two of the 38 audits in 2002 led to OPA recommendations that an officer with an extensive complaint history be counseled, and the establishment of a departmental policy that provides direction for officers when issuing a citation to a driver that is not in possession of a driver's license. The number of total complaints filed against officers decreased in the last three years from 219 in 2000, to 184 in 2001, and 174 in 2002. Allegations of force were the most frequently made complaint, followed by conduct, discourtesy, improper tactics, neglect of duty, and service. The number of force complaints decreased over the last three years while the number of service complaints increased. Most complaints were against officers with five years of service or less. In other activities, the OPA audited a sexual misconduct case involving multiple allegations that resulted in the arrest of the officer, assisted in the recruitment and selection of a new police chief, and revised the language of the department's canine policy so that additional responsibility is placed on the handler and appropriate notice is given before a canine is deployed. During 2002 the OPA Director was notified of all critical incidents that occurred that year, during 2002 there were five: four shootings by officers and one death in-custody. The OPA made several recommendations following a February 2001 police-involved shooting investigation. The department implemented some of those suggestions, including: a revised Taser policy, modifications to use of force training, and revisions to policies and training of on-the-scene communication tactics. The OPA posts their reports at:

www.cityofsacramento.org/cityman/monitor.html.

Consent Decrees/Memoranda of Understanding

The Sentinel Police Association, which represents 300 black officers in the Cincinnati Police Department's 1,000-member force, announced that it would offer to replace the Fraternal Order of Police ("FOP") if that union is allowed to withdraw from the court-supervised Collaborative Agreement. On April 29, the FOP announced that it wanted to withdraw from that agreement, alleging that the federal judge supervising the agreement is biased against the police. In citing reasons for the proposed withdrawal, the FOP's vice president also objected to the plaintiff's lead attorney Ken Lawson, alleging that he was taking information from meetings associated with the agreement and incorporating it into lawsuits against officers, and the estimated \$7.8 million cost of the agreement over the next five years, which is to be funded by taxpayers. The Cincinnati Black United Front ("CBUF") received court permission to withdraw from the agreement on April 7, claiming that it was frustrated by the slow pace of reform and wanted to focus on an economic boycott of the city. The city and its police union signed the agreement in April 2002 to settle a March 2001 racial profiling lawsuit that was filed by the American Civil Liberties Union of Ohio and the CBUF. The chief purposes of the agreement were to resolve social conflict and improve community police relationships. *Beacon Journal*, April 30, 2003, and *Cincinnati Enquirer*, May 2 & 6, 2003.

The Office of the Independent Monitor ("OIM") for the Metropolitan District of Columbia Police Department ("MPD") released a report on OIM's monitoring activities during the first quarter of 2003. The report focuses on MPD's compliance in the use of force and use of force incident report policies, canine unit methodologies, use of investigations, discipline and non-disciplinary actions, firearms policy, the personnel performance management system, management training, and the receipt, investigation, and review of misconduct allegations. In addition to its regular monitoring activities, OIM also conducted an in-depth review of MPD's canine unit. OIM praised the quality of many of MPD's compliance-related efforts, but stated that certain fundamental issues remain to be addressed.

OIM's findings and recommendations include the following:

- The MPD successfully implemented the Use of Force General Order and a specialized training program for supervisors; however, training instructors repeatedly alluded to the new policies and procedures as "works in progress." Also, uncertainty exists in the MPD ranks concerning reporting on use of force.
- MPD's narcotics "buy-bust" operations were functioning successfully as "no officers were hurt, many suspects were arrested, and not a single use of force or pointing of a firearm occurred."
- MPD needs to continue to establish a "find and bark" policy, requiring the dog to bark, rather than bite, upon encountering a suspect, and the MPD and DOJ need to resolve a dispute as to the meaning of the terms of the Memorandum of Agreement relating to canine deployment. In addition, the

MPD should exercise greater handler control over the dogs, improve practices related to verbal warnings before deployment, require supervisory approval prior to deployment, limit the circumstances in which canines can be deployed, prohibit biting passive resisters, and require handlers to order the dog to release a bite as soon as possible. MPD has begun such reforms, and MPD's bite ratio has decreased considerably as a result.

- MPD should accelerate efforts to establish a satisfactory policy pertaining to the carrying of service weapons while off duty.
- MPD should assess the level of training offered to all of its Specialized Mission Units and ensure that they are sufficiently staffed.
- Force Investigation Team's ("FIT") investigations were of high quality, though its reports should be completed more promptly.
- MPD's investigations conducted by the Office of Professional Responsibility and chain of command officials were not of the same high quality as the FIT investigations and need improvement. The full report can be accessed online at: www.policemonitor.org/.

Community Policing/Problem Oriented Policing

The Council on American-Islamic Relations ("CAIR"), a Washington-based Islamic civil rights and advocacy group, recently published a booklet designed to familiarize law enforcement personnel with relevant Islamic beliefs and practices. "A Law Enforcement Official's Guide to the Muslim Community" includes topics such as religiously-sensitive techniques for body searches, the rights of Muslim law enforcement officers, proper etiquette

for entering Muslim homes, and advice on outreach to the Islamic community. Excerpts from the booklet can be accessed online at:

www.cairnet.org/hdn/LawEnforceGuide/. The full booklet may be obtained from CAIR. *National Organization of Black Law Enforcement Executives ("NOBLE") News, May 1, 2003.*

The Police Executive Research Forum ("PERF") has published the first in a series of five white papers addressing local law enforcement's concerns in preventing and preparing for terrorist acts. The white paper stemmed from a meeting of chief law enforcement executives, FBI personnel, and anti-terrorist experts. Session participants examined how local and federal agencies work together, and how cooperation can be improved. The paper includes more than 50 recommendations focused on improving federal-local law-enforcement-coordinated responses to terrorist threats, dealing with how to promote efficient partnerships; joint terrorism task forces; FBI strategies; intelligence; multi-jurisdictional information sharing; security clearances; and training and awareness. The paper can be accessed at:

www.policeforum.org/terrorismwp.pdf

In "Problem Analysis and Policing," Dr. Rachel Boba defines problem analysis and demonstrates how to incorporate and apply problem analysis into contemporary policing practices. The recommendations in the report were mainly derived from a two-day meeting conducted in February 2002 by the Police Foundation and DOJ's Office of Community Oriented Policing Services ("COPS" Office). Key points include:

- Problem-analysis research should analyze crime and disorder problems,

not the police agency itself. Problem-analysis should be implemented to determine who is committing crimes, where such acts are occurring, and why crimes are happening.

- Problem analysis is important because it entails the in-depth analysis of fundamental factors leading to crime and disorder and facilitates effective responses and assessments of those responses. Problem analysis and crime analysis are interrelated, but essentially have a different focus. Crime analysis is the process of creating crime statistics whereas problem analysis utilizes information to examine problems and discover strategic interventions that address and prevent a whole class of crimes and incidents.

- Police agencies should establish internal capabilities to employ problem analysis. Agencies should be able to determine when analysis is needed, what scope is needed, whether they can conduct the analysis or will need outside assistance, how to understand analytical results, and how to translate those findings into new practices.

The report can be accessed at:

www.policefoundation.org/pdf/problemanalysisinpolicing.pdf.

Legal Affairs

Four Miami police officers were convicted of conspiracy and obstruction of justice by a federal jury. Two of the four officers were convicted for planting a .45-caliber handgun near a homeless, alcoholic man who was shot in the leg after an officer mistook the man's walkman for a gun. The other two officers were convicted for covering up the incident. The defendants were among 11 police officers charged in connection with four questionable

police shootings between 1995 and 1997 that resulted in three deaths and one serious injury. Federal prosecutors said they will retry four other officers as to whom the jury deadlocked. The remaining three officers were acquitted. The Miami Police Department had originally ruled all of the shootings justified and state prosecutors had declined to bring charges. Frustration over the shootings led to the chief's resignation last November, the creation of a civilian shooting review board, policy reforms, and millions of dollars paid to settle lawsuits. *CNN News, April 9, 2003, and Associated Press.*

In the report entitled "A Critical Analysis of Lessons Learned: Recommendations for Improving the California Criminal Justice System in the Wake of the Rampart Scandal," the Los Angeles County Bar Association proposed 30 criminal justice system reforms intended to deter policing abuses. In the scandal, officers assigned to the Los Angeles Police Department's Rampart Division anti-gang unit planted guns and drugs on suspects, lied on arrest reports, and made false statements in court proceedings. The association's recommendations stem from surveys with judges, prosecutors, and defense lawyers and include the following:

- Important civilian witnesses should testify at preliminary hearings in order to allow assessment of the quality and strength of a case at an early stage of the criminal proceedings.
- Prosecutors should improve their procedures for complying with the constitutional requirement to obtain and provide the defense with information favorable to the defendant, including information relating to the credibility of individual officers. Prosecutors should

create and maintain a comprehensive database tracking information concerning police officers and other recurring witnesses whose honesty may be in question so as to be able to discern possible patterns of misconduct.

- Procedures should be established to allow prosecutors, judges and defense counsel to report suspicions of false testimony by police officers to the District Attorney.
- Law enforcement agencies should keep comprehensive databases on their personnel and on issues that might relate to their credibility to facilitate disclosure during criminal proceedings.
- Prosecutors should keep plea offers open "for a reasonable period of time" in order to provide defense lawyers with sufficient opportunity to examine evidence against their clients.

The full report can be accessed online at: www.lacba.org/.

Racial Profiling

Findings from a study of data from seven Kansas law enforcement agencies suggested that profiling was occurring in some areas. The study determined that "serious" disparities were evident in stops performed by the Kansas Highway Patrol and that police in two city departments in Johnson County were twice as likely to stop black drivers as compared to whites. A driver-population benchmark was developed by researchers that estimated and recorded the race, age and gender of drivers at designated intersections or stretches of highway. The researchers compared their benchmarks to traffic stop data provided by the seven agencies. The study, commissioned by the Kansas Legislature, was conducted by the Police Foundation at a cost of

between \$200,000 and \$300,000.

Researchers originally examined traffic stops by ten law enforcement agencies; however, data from three departments could not be assessed because it was insufficient. *Kansas City Star*, April 24, 2003.

Standards/Training

The International Association of Chiefs of Police ("IACP") released a Police-Media Relations Model Policy. The policy includes the following points:

- No law enforcement employee should ever release any information that would jeopardize an active investigation, prejudice an accused person's right to a fair trial, or violate the law.
- Information should be released to the news media in an impartial, accurate, and timely fashion. Employees are responsible for facilitating an open, positive, and communicative working relationship with the media.
- While the responsibility can be delegated, the agency chief executive ("CEO") should assume primary responsibility for releasing information to the public.
- The Public Information Officer ("PIO") should assist the news media by giving interviews or by organizing interviews with other relevant agency personnel. Employees contacted directly by the media should inform the PIO. The PIO should be available during regular business hours and be on call for emergencies and serious matters.
- News releases should be written and released to the media and to agency employees regarding major incidents and events of community interest or concern. The agency should develop a procedure for review and authorization of news releases.

- The agency CEO and PIO should regularly meet with media representatives to discuss issues of mutual interest or concern. Anticipated changes in agency policy or procedures relating to interactions with the media should also be addressed at such meetings.
- Agreements should be made to establish voluntary guidelines for the broadcast of live pictures or information emanating from critical incident scenes such as hostage situations, barricaded subjects, and similar ongoing crises. The full model policy and discussion paper can be accessed at www.iacp.com.

An audit conducted by the Maine Freedom of Information Coalition, a group composed of news media associations, determined that many police departments were not fully complying with the state's Freedom of Access Law, which provides that anyone can go to a police department and view a public record. The coalition found that 49 of the 74 departments audited permitted access to their daily logs. Nearly 47 percent required identification; 33 percent asked inquirers to name their employer; 41 percent wanted to know the reason for the request; and six percent said they would release their incident reports to the press, but not to the general public. Four agencies said that they did not maintain logs. The Maine Chiefs of Police Association has scheduled training sessions to help departments to establish proper protocols. A bill being considered by the Maine Legislature's Criminal Justice Committee would require the Maine Criminal Justice Academy to adopt basic standards for public information policies and require each police department to adopt written policies and training to ensure

compliance with the law. The Chiefs Association and the Maine State Police indicated that they opposed the bill. *Law Enforcement News, February 14, 2003.*

The International Law Enforcement Educators and Trainers Association ("ILEETA") is a new member-based organization dedicated to the dissemination of information between individuals involved in educating and training the criminal justice community. Membership benefits include receipt of a quarterly periodical; an invitation to attend the annual international training conference; and information sharing. Former American Society of Law Enforcement Trainers founder and director Ed Nowicki will serve as the Executive Director. The organization's web site is located at: www.ileeta.org. *Law Enforcement News, March 15/31, 2003.*

Researchers at Iowa State University concluded that crime eyewitnesses' recollections of an event are often distorted when they receive feedback from the police following their identification of a suspect in a lineup. The research team presented staged crime videos to 253 participants and asked them to select a suspect from a photo lineup. All members of the lineup fit the general description of the culprit, however the actual culprit was never shown. If witnesses had trouble selecting a suspect, the interviewer would encourage them to "try to pick out the person the best you can." Each participant made a choice and was given feedback. By random selection, the feedback falsely confirmed the choice, refuted it, or was neutral. The study examined how both immediate and delayed feedback affected eyewitness perceptions. Researchers

found that witnesses who were falsely told that they chose the correct person overestimated how confident they were at the time of the identification, their level of attentiveness while witnessing the crime, and their ability to recognize facial features. Researchers suggested that witnesses generally have weak recollections of the event, so when asked about it later, they formulate views about it based on feedback they received. The research team recommended that police use double-blind techniques, in which the witness cannot be given any feedback since the officers conducting the lineup do not know if the actual suspect is present. In addition, they suggested that police acquire witness statements about their level of confidence at the time of identification, rather than later when their opinions may have been influenced by feedback.

Criminal Justice Newsletter, April 15, 2003.

Use of Force

The Santa Ana, California Police Department has acquired eight FN 303 Launchers for patrol officers as a substitute for shot-gun-fired beanbags. The launchers fire non-lethal paint, dye, or water rounds. The launcher is 29 inches long, weighs five pounds, and uses compressed air and a 15-round magazine. The launcher has an optimum range of nearly 55 yards, double the range of a beanbag shotgun or Taser. The launchers cost between \$1,000 and \$1,500 each. Santa Ana's SWAT team will still be permitted to use beanbag shotguns. Various law enforcement agencies are looking at alternatives to beanbags because of concerns about their safety and accuracy. *Law Enforcement News, March*

15/31, 2003, and Justice Technology Information Network, January 30, 2003.

The National Institute of Justice ("NIJ") recently published a report entitled, "The Effectiveness and Safety of Pepper Spray." The report describes the results from two NIJ-funded studies that assessed pepper spray's safety and effectiveness. Law enforcement and corrections agencies utilize pepper spray, or oleoresin capsicum ("OC"), as a tool to restrain and apprehend dangerous and uncooperative individuals in an array of circumstances. In one study researchers examined the injuries suffered by officers and suspects before and after pepper spray was dispersed in three North Carolina police jurisdictions: Charlotte-Mecklenburg Police Department ("CMPD"), Winston-Salem Police Department ("WSPD"), and the North Carolina State Highway Patrol ("SHP"). In the other study a professor of forensic sciences and pathology from the University of Texas, Southwestern Medical Center assessed the deaths of 63 suspects held in custody after pepper spray was used in their arrests.

Researchers engaged in the North Carolina study found declines in injuries to SHP officers, suspect injuries in Charlotte, and excessive use-of-force complaints against SHP officers following the introduction of pepper spray. Injuries to CMPD officers began to decline before pepper spray was introduced and continued to decline at roughly the same rate afterwards. WSPD officer-injuries declined after a short period of increase following the introduction of pepper spray; suspect injuries had already been declining before pepper spray was introduced and continued to do so.

The study of in-custody deaths

concluded that pepper spray contributed to death in two of the 63 cases, both involving people with asthma. The 61 other deaths were attributed to drugs; a combination of heart disease and drugs; positional asphyxia; a combination of factors such as drugs, disease, and the confrontational situation; weapons; or health issues. In one of the two cases involving asthma the medical examiner certified the cause of death being asthma precipitated by the use of pepper spray. In the second case the autopsy surgeon listed OC and asthma as the cause of death. Based on these observations, the author noted a number of possible implications, including:

- Pepper spray is a reasonably safe and effective tool for law enforcement officers to use when confronting uncooperative and combative subjects.
- Pepper spray is a fairly mild force option and stands low on the “escalation of force” scale.
- Pepper spray may be less effective on subjects who are on drugs and therefore officers should be prepared to move quickly to another force option if a subject appears to be unaffected by the spray.
- Pepper spray appears to contribute to a reduction in injuries to police officers and suspects and a reduction in excessive force complaints.

Notwithstanding those conclusions, the report noted that the studies do not and cannot prove that pepper spray will never be a contributing factor in the death of a subject resisting arrest.

The full report can be accessed electronically at:
www.ncjrs.org/pdffiles1/nij/195739.pdf
 f.

The Louisville, Kentucky Metro Police

Department implemented a revised use-of-force policy in mid-April. The policy now prohibits shooting at cars unless they are returning fire. Since 1999, two of Louisville’s seven fatal police shootings occurred when officers fired at vehicles. The seven-page police policy was developed with the assistance of the National Organization of Black Law Enforcement Executives, following an evaluation of Kentucky law, the IACP model policy, and policies in Phoenix and other jurisdictions. The new policy includes the following revisions:

- Officers should not administer intentional blows "to the head, neck, throat or clavicle with an impact weapon of any sort, unless deadly force is justified."
- Officers "shall use only that force which is reasonable to gain control of the subject."
- Officers should follow the recently implemented flow chart detailing the appropriate escalation of force leading up to the use of deadly force. *Courier-Journal, April 18, 2003.*

The Oakland City Council voted to conduct an independent inquiry into the police department's use of force that resulted in at least a dozen injuries during an April 7 anti-war protest. The department utilized non-lethal projectiles such as wooden dowels, beanbags, and rubber “sting balls” or “stinger grenades” and tear gas in an effort to break up a crowd. The mayor and the police chief defended the use of force, alleging that protesters threw objects at officers, and ignored orders to disperse. *Tri-Valley Herald, April 27, 2003 and San Jose Mercury News, April 26 & 30, 2003.*

Director's Cut

A column by PARC Director, Merrick Bobb

At the Annual Police Executive Research Forum (“PERF”) Conference in April in Washington DC, Lorie Fridell, PERF’s Director of Research, gave an instructive talk about analyzing the data that police departments around the country have been accumulating in the last few years on racial profiling. She focused in particular on how best to define the pool of individuals with respect to whom traffic stop or search data should be measured – the “denominator” question. In other words, is it fair to say that if 25 percent of the drivers stopped are black in a city that is 15 percent black, racial profiling is taking place? Does it make a difference if the majority of those stops are at night in police precincts where 30 percent of the night-time drivers on the road are African-American? What conclusions can one legitimately draw if three percent of consent searches of black drivers yield contraband as contrasted to “hits” in 10 percent of white drivers consensually searched?

The discussion at PERF led me to think about how very different policing strategies can produce strikingly similar disproportionate impacts on racial and ethnic minorities. The three strategies I consider here are police profiles, police descriptions of suspects, and quality-of-life law enforcement that focuses upon misdemeanor arrests. Let us first consider profiles.

PROFILES

Profiles are used routinely by law enforcement to narrow the field of possible suspects. A profile consists of specific characteristics that purport to describe known law

breakers and therefore is thought to have predictive value. As such, a profile is akin to a generalization or a stereotype. Even though stereotypes have acquired pejorative nuances because of the misapplication of offensive and erroneous generalities to minority groups in particular, the term can be used more benignly. The value of a profile is a combination of its accuracy as a predictor, the benefit to be derived from its application, and the negative side effects on persons swept within its ambit.

Take, for example, a statement that smoking causes cancer, which science has shown to be true. Assume that the risk of lung cancer increases dramatically after an individual smokes a pack a day for ten years. Next, consider everyone in the population who has smoked a pack a day for 15 years. If there were a magic test for detection of all lung cancers that can be cured, but only limited resources to give the test, it would be sensible, say, to profile persons who have smoked for 15 pack-years for testing on the grounds that the likelihood of finding cancer in that group is higher than in other groups – say, all kindergartners or the adult population at large. The generalization or profile – that people who have smoked for 15 pack-years have cancer – is not true in every case, but it has enough validity, weighing the benefits and detriments, to justify its use to narrow a search for persons with lung cancer who can be cured. A police profile is an attempt to do essentially the same thing by isolating for stops and searches individuals who share specific characteristics with persons linked to law breaking. The problem is that with the exception, perhaps, of rigorously defined profiles for serial killers or perpetrators of certain sex crimes, police generalizations or profiles tend to lack scientific validation.

Let's assume as a hypothetical example that 80 percent of all convicted drug traffickers in Grand Forks, North Dakota in the last ten years were white males with

Scandinavian surnames between the ages of 18 and 25 who drove Volvos or Saabs. If a Grand Forks police officer, looking for possible drug traffickers, notices a Volvo rolling through a stop sign, runs the plates, and sees that the car is registered to Lief Eriksson, age 21, the officer might decide to pull Mr. Eriksson over ostensibly for the traffic offense but more as a pretext for checking out whether he might be dealing drugs. We call this a “pretext” because the deciding factor in pulling Eriksson over is not simply running the stop sign, but rather the desire to check him out as a potential drug trafficker. Pretext stops are not, in and of themselves, illegal – courts simply think it is a too difficult, given limited judicial resources, to figure out a police officer’s subjective motivation in every case where a stop is made. In Mr. Ericksson’s case, he fits the profile even though there is no other reason – except for running the stop sign – to suspect that he has done anything illegal or committed a criminal act.

Whether a police profile is “spot on” or is essentially useless depends on the uniqueness of the characteristics and the absence of other equally plausible or probable explanations. If the profile accurately predicts who is a drug trafficker and 98 percent of those stopped who fit the profile turn out to be traffickers, the two percent of individuals who do not are probably an acceptably small number of people to inconvenience and probably will not cause a lot of controversy. Likewise with the smoking example we gave earlier: Even if only 15 percent of the 15 pack-year smokers turn out to have a curable type of lung cancer when the magic test is administered, it will nonetheless be welcomed by the other 85 percent because the upside benefits of being screened far outweigh the inconvenience. But it is not so with every profile.

Suppose that 60 percent of Volvo and Saab drivers in Grand Forks are white males between 18 and 25 and that 70 percent of residents in the Grand Forks area are

descended from Scandinavian immigrants. Under these assumptions, the profile's predictive value for identifying possible criminals is substantially diminished. Although the profile may fit a description of convicted drug dealers, it nonetheless sweeps into its ambit most driving-age white males in Grand Forks. The profile is overbroad; its use will lead to an unacceptably large number of "false positives." There will be too many young white males with Scandinavian surnames driving Volvos or Saabs in Grand Forks who will be singled out for police attention with no apparent reason other than their age, gender, and ethnicity. Unlike the smoking example, there is no upside benefit to being part of the stereotyped group, and thus there is a risk that the police stops may be seen as oppressive and repetitive by white males of Scandinavian descent in Grand Forks.

DESCRIPTIONS OF SUSPECTS

A police profile differs from a description of a suspect, yet each may produce similar disparate impact. If a witness in Los Angeles says the bank robber was a male between the ages of 25 and 35, had blonde hair, green eyes, and a prominent scar on his left cheek, the attempts by the police to locate the suspect will likely be narrowed to a search for a specific person with those characteristics. But the search is not an instance of profiling; rather, it is a sufficiently detailed description of a known suspect whom the police are trying to find. The greater the amount of detail, the lesser the chances that a search for the individual will be overbroad. To be sure, there are probably several men among the four million people in LA with the described characteristics. There is thus a chance that innocent men fitting the description of the bank robber will be stopped and questioned – "false positives." And if the description is accurate yet far too general – for example, the bank robber was a black male driving a late-model Toyota – the stops for

questioning may *feel* like racial profiling because many, many persons fitting the description will fall into the dragnet.

QUALITY-OF-LIFE LAW ENFORCEMENT

It is also interesting to consider how certain crime-fighting strategies produce results that are similar to those generated by profiling or overbroad suspect descriptions. One significant way in which policing choices have profoundly disproportionate impact on racial and ethnic minorities has to do with quality-of-life enforcement – misdemeanor and public disorder arrests. As pointed out by Professor Bernard Harcourt of the University of Chicago Law School in an article entitled “Policing Disorder” in the *Boston Review*:

“The fact is that in New York City, and the United States more generally, adults arrested for misdemeanors are disproportionately African-American in relation to their representation in the community. In 2000, for example, slightly over 50 percent of all adults arrested for misdemeanors in New York City were African-American.” 27(2) *Boston Review* ¶ 39 (April/May 2002). Retrieved from <http://bostonreview.net/BR27.2/harcourt.nclk>.

The African-American population is 24.6 percent of New York City’s overall population. Harcourt breaks the misdemeanor arrests down, demonstrating that 50 percent of adults arrested for disorderly conduct, 45.6 percent of adults arrested for loitering, 40.7 percent of prostitution arrests, and 51.7 percent of drug possession arrests were of African Americans. *Id.* Latinos “represented 31.5 percent of all adult misdemeanor arrests, whereas they constituted only 25.1 percent of the city’s population. In contrast, European Americans represented 49.8 percent of the population, and accounted for only 15.5 percent of adults arrested on misdemeanor charges in 2000.” *Id.* The pattern is not

limited to New York City. Professor Harcourt demonstrates similarly disparate results for large cities across the United States. He concludes:

“The point is not that the police are consciously targeting black misdemeanants, but simply that more blacks are arrested for misdemeanors given their proportion in the overall population. In other words, the *decision to arrest misdemeanants* [in contrast to issuing warnings or implementing alternative problem-solving techniques] . . . is a choice with significant distributional consequences for African Americans.” *Id.*

RACE AND ETHNICITY

When race or ethnicity is involved, an additional layer of complexity is added. A sophisticated analysis of what constitutes improper or impermissible use of profiles, overly general suspect descriptions, or crime-fighting strategies like quality-of-life arrests should focus on the untoward, undesirable, and possibly illegal consequences when race or ethnicity are used to either focus suspicion or cause a disproportionate number of stops, searches, or arrests. Returning to the distinction we drew between a description of a suspect and a profile, we would argue that it is not impermissible to focus suspicion on an individual who has been described to the police as having committed a crime when an element of that description is the racial or ethnic identity of the individual *and* there is sufficient additional distinguishing detail to narrow the universe of possible suspects.

Yet, on the other hand, it is impermissible – at least to us – when unproven and offensive stereotypes (black men driving BMW’s must be drug dealers), loose generalizations (a black man does not belong in a white neighborhood at night), or weak statistical correlations are used to focus suspicion on a given individual (more black than

white teenagers are arrested for street drug crimes and therefore *that* black teenager who happens to be over there should be checked out).

The looser the generalization or the weaker the correlation, the higher level of “false positives,” leading to socially undesirable results, such as the same black man stopped again and again on his way home from work late at night or every black male driving a Toyota being fair game for a stop to see if he is the bank robber. The looser the generality; the less defensible it is – let’s-pick-up-anything-that-swims-in-the-ocean-in-the-hopes-that-it-will-be-a-tuna will snare porpoises, pearl divers, and lots of other marine life in addition to tuna. Whereas any police decision to detain an individual may stir feelings of indignity and resentment, it is more corrosive (and possibly explosive) when, by virtue of wide sweeps based on loose generalizations or weak correlations, the persons stopped believes it is because of their race or ethnicity alone: hence, the term “driving while black or brown.”

CONCLUSIONS

What, then, should a responsible police department do when a preliminary pass at the data suggests racial or ethnic disparities in persons stopped, or made to step out of their cars, or searched? It is useful, at least as a first step, as was discussed at the PERF conference, to undertake an effort to determine the correct “denominator.” What is the appropriate pool of individuals who are at risk of being subject to a stop, a demand to exit the car, or a search? When measured against that well-defined pool, is there still an over-inclusion of racial or ethnic minorities? If the answer is yes, the inquiry should next consider the degree to which overly-inclusive assumptions or police practices contributed to this result.

The next level of inquiry, therefore, should ask whether there ways in which police practices can be adjusted, without exposing police officers to greater risk of death or injury from suspects, to reduce inherent overbreadth problems. Can the loose generalizations underlying profiles be tightened up a bit? Or should those that lack scientific validation be abandoned? Can open-ended suspect descriptions be made more precise? And can police practices, like quality-of-life policing, be modified in order to reduce racially disparate consequences, intended or not?

Let us assume that the statistics show that a significantly higher percentage of persons required by the XYZ Police Department to exit a stopped car for a pat down or further questioning are black as contrasted to white. Regardless of whether the practice could be rationalized by a statistical demonstration that the police practice was sufficiently proportional to an appropriately defined “denominator,” it will nonetheless be the case that many innocent black drivers will still be subjected to the indignity of a demand to exit and a pat-down – the overbreadth or false positive problem.

Does it not make sense in these circumstances to consider whether it *really* is necessary to ask drivers *in general* to exit the car? Does it make a difference, perhaps, whether there is a single driver and no passengers, or a car full of people? Does it make a difference if it is a solo police officer stopping the car as contrasted to an officer with a partner? Does it matter whether the stop is really only for a traffic violation and is not pretextual? Does it make a difference when and where the stop takes place?

I propose that if it is safe enough to leave a solo driver in the car when approached by two police officers, then it makes sense to carve out that combination of circumstances as an exception, thereby narrowing the overbreadth and the number of possible indignities. Of course, the policy would have to be written so that the exception

could be overridden if there is something about a particular single driver that demands a prophylactic exit and pat-down. XYZ PD would have to track carefully over time to see: 1) Is the exception swallowing the rule? 2) Has the exception resulted in fewer exits and pat downs? 3) Have the demographics changed of who is asked to exit and is patted down in favor of lesser racial disparity? 4) Have officers been hurt or killed as a direct result of the creation of the exception?

It might also make sense to question whether pretextual traffic stops really advance law enforcement goals. Does it really make sense to use routine traffic enforcement as a way to enforce other laws, such as the drug laws, particularly when the enforcement patterns fall more heavily on racial or ethnic minorities? If the main mission of the traffic patrol or the highway patrol is to enforce the traffic laws, there may not be good and sufficient reasons to give these officers discretion to use the traffic laws as a pretext to fish for other law violations. Hence, it might make a great deal of sense to do as the California Highway Patrol has done and generally ban requests for consent searches in pure traffic violation contexts. Similarly, in a big city, it might make a lot of sense to ban pretext stops and requests for consent searches or to test the consequences of such bans by experimenting with them for limited periods of time or in different sections of the city. In other words, tighten things up and add greater rigor, so that there is a clearer and more meaningful nexus between a particular stop, or a particular request for a consent search, based upon narrower assumptions, descriptions, or profiles.

In the end, it is lazy and intellectually slack policing to permit police officers to use loose generalizations, pretext stops, consent searches, and practices like pulling people out of the car for a pat-down, whether or not they engender pernicious racial disparities. Not that safety is less than crucially important. But it cannot simply be

invoked as an all-purpose justification for lazy policing when there are better alternatives that do not reasonably impair safety.

Accordingly, part of the answer to what racial profiling data show is to pull the data apart to see if in truth there really are disparities indicating racial profiling. But that's only half the job. Whether the disparities can be justified or not by using the correct "denominator" to define the pool, best practice demands that the underbrush of loose and lazy generalizations, stereotypes, and suspect police practices be rigorously pruned back so that tools like pretext stops, consent searches, and requests to exit cars are used only when really needed, if at all.

This leaves a thorny issue highlighted by the statistics cited by Bernard Harcourt concerning quality-of-life arrests. The patterns produced there look a lot like those generated from racial profiles or from overly broad suspect descriptions. But there may be an important distinction. It may simply be that there is a correlation in certain jurisdictions for certain periods, because of certain environmental factors, between the commission of certain crimes and race, or at least as regards crimes subject to enforcement by local police. This may mean that quality-of-life enforcement strategies that focus on such street crimes will impact more heavily on particular racial groups for racially neutral reasons. To assess, however, the validity of assumptions that quality-of-life law enforcement strategies are the quickest way to drive down the overall crime rate is a difficult and controversial matter. It is hard, therefore, at this stage to resolve the question whether the benefits of quality-of-life enforcement outweigh the detriments. I would nonetheless hazard a guess that all police strategies that produce strongly disparate racial impacts will ultimately be found to be the equivalent of using a blunderbuss where a scalpel is needed.

Conferences

June 16-18, 2003 – Community Oriented Policing Services (“COPS”) 2nd Annual National Community Policing Conference: Working Together for Safer Communities, to be held in Washington, D.C. For more information, visit www.cops.usdoj.gov/.

June 21-25, 2003 – National Sheriffs’ Association Annual conference and exhibition, to be held in Nashville, Tennessee. More information is available at www.sheriffs.org/defaults/defaults_s_annualconference.html.

July 9-12, 2003 – Commission on Accreditation for Law Enforcement Agencies (“CALEA”) Summer Conference to be held in Detroit, Michigan. More information is available at www.calea.org/newweb/ConferenceInfo/Detroit/conferenceinfo.htm.

July 11-17, 2003 – National Organization of Black Law Enforcement Executives Annual training conference and exhibition, to be held in Tulsa, Oklahoma. More information is available at www.noblenatl.org.

July 28-30, 2003 – National Institute of Justice 10th Annual Conference on Criminal Justice Research and Evaluation, to be held in Washington, D.C. More information is available at www.nijpcs.org/RE/RE2003/index.htm

July 31-August 3, 2003 – National Association of Women in Law Enforcement Executives 8th Annual Conference, to be held in Tempe, Arizona. More information is available

at www.nawlee.com/conference/html.

August 11-16, 2003 – Hispanic American Police Command Officers Association (“HAPCOA”) 30th Annual National Training Conference, to be held in Chicago, Illinois. More information is available at www.hapcoa.org/conference/.

September 21-24, 2003 – National Association for Civilian Oversight of Law Enforcement 9th Annual Conference, to be held in Los Angeles, California. More information is available at www.nacole.org.

September 29-October 1, 2003 – Americans for Effective Law Enforcement Police Civil Liability and the Defense of Citizen Misconduct Complaints seminar, to be held in Las Vegas, Nevada. For more information, visit www.aele.org/wkscivil.html.

October 21-25, 2003 – International Association of Chiefs of Police Annual conference, to be held in Philadelphia, Pennsylvania. More information is available at theiacp02.expoexchange.com/.

October 23, 2003 – Police Executive Research Forum Town Hall Meeting, to be held in conjunction with the 2003 IACP conference in Philadelphia, PA. More information available at www.policeforum.org/conference.html.

November 22-24, 2003 – Police Executive Research Forum Problem-Oriented Policing (POP) Conference, to be held in San Diego, CA. More information available at www.policeforum.org/conference.html.

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