Racial or Ethnic Profiling in the USA and UK
Issues and Lessons

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"Law enforcement is the screen onto which we project our fears and fantasies of order and disorder."

Mutuma Rutere
UN Special Rapporteur on Contemporary Forms of Racism and Discrimination

The two most basic principles that underlie criminal justice are that "all people are equal under law" and that all people are presumed innocent until proven guilty. Ethnic or racial profiling describes what happens when police or other law enforcement officers rely on stereotypes rather than objective facts and particularized evidence in targeting persons for attention. Simply put, ethnic profiling occurs when police target people because of who they are or how they worship rather than because of what they have done. In doing so, it violates these two basic principles of non-discrimination and due process in justice.

Profiling can appear in a variety of law enforcement actions; it is frequently not the result of intentional racism on the part of law enforcement officers, but rather a disparate outcome of tactics seeking legitimate objectives. The fact that profiling may reflect societal and structural prejudices does not change the fact that it is unlawful – rather it requires us to understand and measure the dynamics that contribute to "indirect discrimination" as defined by the European Race Directive and elaborated in European case law.[1]

The issue or practice known as racial or ethnic profiling first emerged under this nomenclature in the United States and the United Kingdom, although the existence of bias in policing and disparate treatment of groups of people based on their race, religion, ethnic or national origin, religion, gender and sexual preference or identity extend well beyond this particular timing and geography. Examining the trajectories of discussions of profiling (or "disproportionate stop and search" as it is more commonly described in the UK) may be helpful to identifying issues and lessons that can feed this emerging discussion in Sweden.

Racial Profiling in the USA

There is a long history of racist policing in the United States, rooted in slavery and the enforcement of segregationist "Jim Crow" laws. Important efforts to reform policing followed the civil rights movement and Civil Rights Act of 1964 – although, other than the Federal Bureau of Investigations, American policing is organized and governed at the state and local level. These reforms included recruitment of African-American police officers and informed the development of community

policing approaches in the late 1960s and 1970s.[2] The term racial profiling (which quickly became popularly known as "driving while black") came to the fore in the 1980s as a consequence of the Drug Enforcement Agency's (DEA) development of drug courier profiles that relied to a large degree on race and national origin. The drug courier profile that provoked the first legal action was of black men driving rented cars on the I-95 state highway that runs from Miami North along the East coast. The results of this explicit order to state police officers who patrol the highways were entirely predictable, and started to generate legal action against the police in the early 1990s.[3]

In their rulings, judges started to require that the police gather data on their stops and searches including the race and stop outcomes so that profiling could be monitored. As many of the stops being challenged in this period were on highways, an argument ensued about how to benchmark the police stop data, as the local census data (which includes racial statistics in the USA) gives information on the residential population but this may be quite different to the population driving on the highway. Sophisticated benchmarking methods have since been developed, led by Dr. John Lamberth, including observational studies of the populations using highways and including data on those violating speeding limits (which would justify a stop on a non-racial basis). This benchmark was used to analyze the police data, and the results conclusively showed systematic bias against black and Latino drivers. The data also showed that hit rates – that is when officers detected an infraction – were no higher for black people and significantly lower for Latinos.

The relationship between bias and ineffectiveness is also well illustrated by the experience of the US Customs service, which faced an outcry in 1999 and 2000 about systematic bias against black and Latina women entering the US. Large numbers of women were being selected for highly intrusive cavity and X-Ray searches based on drug mule profiles, yet the data showed far higher hit rates on white women. In response, the Customs service changed its protocols. It introduced a set of behavioral criteria for suspicion and required supervisors to sign off on any search, even a pat down. The results were striking: the number of searches dropped sharply, the racial disparity ended completely, and the hit rate increased from 3.5% to 13%.[4]

These developments generated action at the federal level as well. In 1994, under President Clinton, the Congress passed the Violent Crime Control and Law Enforcement Act which made it unlawful "to engage in a pattern of practice of conduct by law enforcement officers ... that deprives persons of rights, privileges, or immunities ... protected by the Constitution or laws of the United States." While the Supreme Court plays a key role in establishing constitutional standards for police powers, the federal government has very limited authority over America's extraordinarily decentralized policing.[5] This Act empowered the Department of Justice to intervene in local law enforcement to provide injunctive relief, with federally-appointed supervisors will examine a police department's policies and practices and require certain reforms aiming to end the pattern of bias.[6] One of the most common requirements is the collection of data on stop practices, but many further reforms are also been proposed, including new training, the creation of early warning systems and changes in disciplinary systems. In addition, many states (currently 26 of the 50 states) have passed legislation mandating that police gather stop data.

By the late 1990s, the issue of profiling was well-known and was rejected by the general public. Under President Bush, the Department of Justice issued guidelines prohibiting reliance on race in federal law enforcement actions – although the guidance exempts both immigration enforcement and counter-terrorism. Any optimism about the chances to end this practice collapsed with the Twin Towers in New York on 9/11. That attack profoundly changed the national debate and profiling was suddenly in vogue again. Counter-terror concerns led to new and increased profiling of travelers, and further checks at borders. As well as the data surveillance by the NSA, the police in New York and Los Angeles in particular have been heavily criticized for policies mapping Muslim

communities purely on the basis of religion, as well as extensive surveillance undertaken of members of those communities.

Counter-terrorism and concerns about border security have combined with increasing anti-immigration sentiment, stemming in part at least from the economic crisis, to add a further driver of profiling. Historically, immigration enforcement in the United States has been a federal authority and, as in the UK, the police do not conduct immigration checks during the course of their ordinary policing duties. Immigration enforcement is conducted by the US Immigration and Customs Enforcement (ICE) in the US and by the UK Border Authority (UKBA) in the UK. In the USA, this distinction is being rapidly eroded as states have taken on these functions through several mechanisms: laws at the state level (Arizona being the best known example); a federal program called the 387g program or "Safer Communities" that devolves immigration powers to state and local police and provides them with training and financial support; and through "fusion centers" that collect state and local police information for both counter-terror and immigration enforcement purposes.

Meanwhile, "ordinary profiling" has not only continued, but increased in some jurisdictions, driven by proactive policing. Innovations in policing such as the introduction of computerized data systems such as Compstat, and theories about disorder and offending such as "broken windows", have led to increased use of discretionary officer-initiated actions such as stop and search as opposed to classic policing using routine patrol and response to calls for service. While arguments continue as to efficacy of this approach in preventing crime, it is very clear that in New York City, as police escalated their pro-active use of stop and search – increasing the number of stops they conducted from about 98,000 stops in 2002 to 685,000 in 2011 – these actions disproportionately affected the city's black and Latino populations, and their hit rates were extremely low. (The number of stops has recently fallen back near the 2002 level, and overall crime levels have not increased.) A campaign against SQF (Stop, Question and Frisk) and another law suit won against the NYPD for profiling played an important role in electing a Democrat mayor promising to stem these practices. (A promise many activists today still feel that he needs to do more on.)

Attention to profiling today increased with the dynamics around the death of Michael Brown in Ferguson and Eric Garner in New York; the failure to indict officers' in either of these cases, but particularly in the Garner case given the video evidence; and an extraordinary groundswell of peaceful and heartfelt public protect across the USA. The initial disorder in the community reaction in Ferguson is symptomatic of the lack of trust in police that results from bias-based policing; and the shockingly militarized reaction of the Ferguson police department vividly illustrate the dynamics and potential consequences of a collapse in trust between communities and the police.

The dynamics described here reflect over three decades of efforts to document, challenge and address profiling – and some of the factors that have so deeply ingrained profiling in US policing practices. Positively, after a first term characterized by extreme caution on race issues, President Obama is now taking some modest steps to engage further with finding good practices to address racial profiling. A National Commission has just been created, and a new Center for Building Community Trust in Justice has been created at the Department of Justice which will develop a national data base of stop data, and will test different policing approaches to rebuilding trust and police-community relations.

Disproportionate Stop and Search in the UK

Profiling – or disproportionate stop and search as it is more commonly termed – also emerged in the UK in the 1980s. In the wake of public anxiety about muggings and stereotypes associating these with black men, British black and minority ethnic (BME) communities were bearing the brunt

of aggressive use of what were called the "SUS laws" – SUS being short for "stop and search". In the wake of an intensive operation in Brixton, in South London in 1981, in which 120 police officers spent four days patrolling under instructions to stop and search anyone that looked ''suspicious'' which resulted in 943 stops and 118 arrests, more than half of whom were black. The Scarman Commission – an official inquiry into the causes of the riots – reported that the disturbances were ''essentially an outburst of anger and resentment by young black people against the police'' and attributed this resentment to the adoption of policing priorities and practices that did not command local support and impacted disproportionately on black and minority ethnic communities.

Stop and search powers were then overhauled by the 1984 Police and Criminal Evidence Act (PACE). This did not in fact restrain police powers to conduct stops and searches – it actually expanded them – but it required greater police accountability for their use of these powers in the form of recording their stops and searches, including ethnic data on those targeted. Thus, unlike the US, the UK has had nationally-mandated data collection in place since that time.

As in the USA, while data has proven essential to monitor profiling and, in some cases support the development of good practices, data alone does not fix the problem. Almost two decades after the publication of the Scarman Report, policing bias was thrust back in to the public spotlight following the racist murder of a black teenager called Stephen Lawrence and the botched police investigation that failed to bring his killers to justice. The 1999 Macpherson Inquiry found that fundamental errors had marred the murder investigation resulting from ''a combination of professional incompetence, institutional racism and a failure of leadership by senior officers''.[7] The report highlighted a general lack of trust and confidence in the police amongst ethnic minorities and noted that ''the experience of black people over the last 30 years has been that we have been over policed and to a large extent under protected''. Macpherson did not recommend curtailing stop and search powers, but emphasized the need to improve monitoring and administrative controls over the use of such powers, including a specific requirement that police officers must record all ''stops'', that is those that do not lead to a subsequent search, as well as ''stops and searches''.

The data officers are required to gather includes: the reason for the stop, the outcome, and the self-defined ethnicity of the person stopped. Officers are also required to give a copy of the form to the person who is subject to the stop. The Lawrence Inquiry recommended that stop and search records should be monitored and analyzed by police services and police authorities and reviewed by Her Majesty's Inspectorate of Constabulary (HMIC) during inspections, and recommended that police authorities be obliged to undertake publicity campaigns to ensure that the public are aware of the stop and search provisions and their right to receive a record.

The Home Office regularly publishes information comparing the number of stop and searches with the ethnic composition of the resident population. These comparisons consistently show that minority ethnic groups are subject to heightened rates of stop and search. The data and its interpretation have been challenged around three points of argument: (1) that police are not reliably recording all stop and searches and may under-record stops of white people; (2) that the right benchmarks are not being used; and (3) that rates of stop and search are affected by differential rates of offending. Each of these issues has been the focus of studies which have not produced any conclusive evidence that would explain the racial disparities on objective grounds.

On the last point above, it is worth noting that in 2004 the London Metropolitan Police Authority stated that there is no clear evidence that minority groups offend at a higher rate than whites. Official justice records are unreliable as an index of offending because they reflect biases in the criminal justice system; self-report studies point to comparable rates of offending among whites

and blacks, with lower rates among Asians. It can reasonably be inferred that different ethnic groups have different offence profiles because opportunities for offending are structured by social circumstances and social circumstances continue to vary quite sharply according to ethnicity. But when specific stop data is analyzed for specific crimes, it fails to demonstrate that higher rates of stops track higher rates of specific categories of offending. Based on information provided by victims, you would expect to see more stop and search of black people for robbery and theft from the person; but the data does not show this in officers' grounds for stops.[8] Some of the highest disproportion appears in stops for drug offences,[9] yet research suggests that white people use drugs more than blacks. The concentration of minority ethnic drug searches is particularly significant because many drug searches are likely to be high-discretion proactive searches initiated by the police rather than low-discretion searches conducted on the basis of information received from other sources.[10] It is precisely under these circumstances that "we might expect that generalizations and negative stereotypes about likely offenders play a role."[11] The same dynamic can be clearly seen in the use of s60 stop powers which do not require reasonable suspicion. The use of this power increased sharply a few years ago in response to concerns about knife crime. These stops and searches also have a disproportionate impact on young black men and an extremely low hit rate.

In the UK, as in the USA, patterns of disproportionality have evolved over time. In the wake of the 7/7 bombings in London in 2005, use of section 44 counter-terror stops sharply increased. The legality of these powers was challenged in the Gillan case, in which the European Court of Human Rights ruled against the UK, finding that the s44 police powers were excessively broad and not subject to adequate legal safeguards against abuse and thus were not "in accordance with the law."[12] These powers have since been changed to require a stricter basis and higher level authorization for their use.

At this time, stop and search is back in the public spotlight in the UK. This is in the wake of the public disorder that erupted in Tottenham in 2011 following a fatal police shooting. Research into the causes of riots found that disproportionate stop and search practices were again a major factor generating loss of trust in police among young people.[13] The current government, which came into office promising to cut back on police recording requirements, has made an about turn and is now in the midst of a reform of stop and search nationally.[14]

Common dynamics and lessons

What lessons can be drawn from these histories in the USA and the UK? Most critically, in order to address concerns about profiling, it is essential to admit the possibility of a problem and to then generate the data that supports documentation and analysis. But too often, police, policy-makers and activists have bogged down in arguments about the data and its interpretation. The true value of data lies in its ability to inform changes in policy and practice – and support a dialogue that can mend or re-shape police-community relations. This is the prime objective – policing that meets the double demand of being both fair and effective in serving the needs of all communities even handedly and thus enhancing safety across the board.

It is not easy to learn the lessons of other settings. It is easy to focus on what is different – Sweden does not look much like America on many safety issues – but it is important to think about failures that Sweden could avoid and lessons that Sweden can adapt and take forward. In both the USA and the UK, discussions of police profiling have been deeply adversarial; they have often been driven by scandals, riots, official inquiries and litigation; and subsequent debates have centered on race and racism. Many police officers in the UK and the USA feel that they are all being accused of being racists. While policing certainly reflects broader social bias, and some few officers no doubt are

racist, most officers join the police because they believe in the rule of law. It is not the actions of a handful of individuals that produces the persistent patterns of bias we see in both of these and in other countries.

Efforts to address profiling need to step beyond the adversarial stalemate, and engage with issues of what good policing looks like in diverse communities. This conversation needs to engage with strategic and tactical choices, particularly around the use of high-discretion, officer initiated stops. Data is essential, but we need to use that data, not just to argue about how to analyze racial disparities, but to extract value for officers, their line supervisors and mangers' operational assessments, and we need to use the data to engage with communities about their security concerns, ensuring that police tactics are understood and supported by local residents.

While it is important to take the discussion beyond race and racism, the experience of those who have been targeted by profiling cannot be overlooked and left unrecognized. The stigmatization and hurt that has been caused must be admitted before it can be mended. But if that conversation can be taken forward, there are practices and examples of innovation that may be adapted or serve to inspire further developments in policing diversity. I will end here with a plug for a report by the Justice Initiative titled "Reducing Ethnic Profiling; A Handbook of Good Practices" that includes examples from across the EU.[15]

ENDNOTES

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[1] *D.H. and Others v the Czech Republic*, App. No. 57325/00. Eur. Ct. Hum. Rts., Grand Chamber, judgment of November 13, 2007. The Court affirmed that patterns of discriminatory impact resulting from a policy that is not necessarily designed with discriminatory intent are a form of "indirect discrimination" prohibited by Article 14 of the European Convention on Human Rights. In *Timishev v. Russia*, App. Nos. 55762/00, 55974/00, Eur. Ct. Hum. Rts., Judgment of Dec. 13, 2005 the Court ruled prohibiting profiling based solely of to a decisive degree on ethnic or national origin.
[2] An overview of the history of US police reforms can be found in George L. Kelling and Mark H. Moore, "The Evolving Strategy of Policing," National Institute of Justice, U.S. Department of Justice, and the Program in Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University, November 1988.
[3] David A. Harris, Profiles in Injustice; Why Racial Profiling Cannot Work, The New Press, New York, 2002.
[4] Ibid, at p. 214 – 222.
[5] There are as many as 20,000 police departments at state and local level in the US, ranging from the 32,000 officers in the NYPD to single-man sheriff's departments
[6] The Department can also bring criminal charges against officers, but only where explicit racist intent can be proven – an extremely difficult charge to prove.
[7] Macpherson 1999, para 46.1
[8] Phillips and Bowling, 2003; see also Home Office, 2005
[9] Phillips and Bowling, 2003; Sangster et al., 2002
[10] FitzGerald, 1999
[11] Quinton et al., 2000: 17
[12] ECtHR, Application no. 4158/05, Judgment of 12 January 2010
Violation of Article 8
The applicants had been subjected to a stop and search by the UK police under sections 44-47 of the Terrorism Act 2000, which stipulated, *inter alia*, that 1) senior police officers, if they considered it "expedient for the prevention of acts of terrorism," could authorize any uniformed police officer in a given area to conduct stop and searches; 2) authorizations were subject to confirmation by the Secretary of State, had a temporal limit but could be renewed indefinitely; 3) even though the purpose of such searches was to find articles that could be used for acts of terrorism, the stop and searches did not need to be based on a suspicion that the person(s) stopped would carry articles of that kind; 4) persons failing to submit to a search were liable to imprisonment, a fine, or both. The applicants complained that stop and searches violated Articles 5, 8, 10 and 11 of the ECHR, and their complaints focused on the "general compatibility of the stop and search powers" of the police with these provisions.
The Court considered that the search had been an interference with the applicants' private life. It noted that the breadth of the term of "private life" meant that it was not susceptible to "exhaustive definition," but "personal autonomy [was] an important principle underlying the interpretation of its guarantees" (para. 61). However, it repeated its prior finding from *Foka v Turkey* that "any search effected by the authorities on a person interferes with his or her private life" (para. 61). Although the government claimed that the search had been only superficial, and had not involved perusing diaries or documents, the Court held that the police "use of the coercive powers" to stop a person and conduct a search of their person, clothing and belongings had "amount[ed] to a clear interference with the right to respect for private life." Moreover, the seriousness of the interference searches cause may be compounded by their public nature, due to an element of humiliation and embarrassment or the public exposure of personal information should intimate items be revealed during the search (para. 63). This was different from searches of passengers at airports or visitors to public buildings, as passengers might be seen as giving advance consent to searches, whereas in this case the police had the powers to stop people "anywhere and at any time, without notice and without any choice as to whether or not to submit to a search" (para. 64).
The Court then examined whether that interference was "in accordance with law", holding that it was not and therefore constituted a violation of Article 8. This requires that the power to stop both have a basis in domestic law and be compatible with the rule of law, which requires some measure of protection against arbitrary interferences: the law must clearly indicate the scope of the discretion conferred, and powers impacting fundamental rights cannot be unfettered (para. 76-77).

The Court had regard to the fact that a senior police officer was empowered to authorize any uniformed police officer within their jurisdiction to carry out stop and searches if they deemed them to be "expedient" (para. 80); the fact that temporal and geographical restrictions provided by Parliament, as well as the safeguard provided by the Independent Reviewer, failed to act as a real check on the issuance of authorizations (paras. 81-82); the breadth of the discretion of the individual police officer to carry out a stop and search (para. 83); the statistical and other evidence proving the police officers' overreliance on this practice (para. 84); and the difficulty an individual would face trying to challenge the practice by way of judicial review or an action in damages (para. 86). As a result, the Court held that the power to authorize stops under these provisions, as well as the stop and search powers themselves, were not "in accordance with the law," as they were not sufficiently circumscribed or subject to adequate legal safeguards against abuse (para. 87).

[13] The Guardian, Reading the Riots, A data-driven study into the causes and consequences of the August 2011 riots. http://www.theguardian.com/uk/series/reading-the-riots

[14] A commitment made partly in an effort to give police a political gift in the face of huge budget cuts, and an unpopular policy of reintroducing elected police commissioners in the place of local police authorities as part of a policy of devolving greater authority to local communities.

[15] http://www.opensocietyfoundations.org/sites/default/files/reducing-ep-in-EU-12172012_0.pdf This publication draws examples from the European Union and dos not include US practice.