

SOME CAUTIOUS OPTIMISM ABOUT THE PROBLEM OF RACIAL PROFILING

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The papers in this and the previous issue of the Rutgers Race and the Law Review were drawn from a symposium held at the Rutgers University School of Law—Newark on March 22, 2000. As the papers make clear, racial profiling is widespread, resistant to reform, and deeply corrosive.¹ Nonetheless I will try to identify some grounds for guarded optimism that the situation may improve. I do not want to suggest that racial profiling is less prevalent or less harmful than commonly thought. Still less do I want to encourage complacency; quite to the contrary. Looking toward the future, though, I do see three reasons for measured hope.

The first ground for guarded optimism is the emerging national consensus that racial profiling is wrong. There is no consensus about the *size* of the problem. But there does seem to be growing agreement, among law enforcement officials as well as the public, that the practice is indefensible. What is remarkable about this consensus is that it has emerged without the leadership of the Supreme Court, and against the conventional wisdom of line police officers. The Supreme Court has never clearly condemned the routine use of race in selecting suspects for investigative stops, and the Court has upheld the practice for stops near the border.² Many if not most line police officers think some form of racial profiling is not only acceptable but necessary.³ Yet it is increasingly rare for police executives to voice that opinion, and when they do they tend to lose their jobs. Faced with allegations of racial profiling,

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1. See generally 3 RUTGERS RACE & L. REV. 1 (2000); 3 RUTGERS RACE & L. REV. 117 (2001).

2. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

3. See Kathy Barrett Carter and Ron Marsico, *Whitman Fires Chief of State Police*, THE STAR LEDGER, Mar. 1, 1999, at A1.

police executives almost never admit to the practice and try to defend it. Instead, they deny that their departments engage in the practice, or they promise to stop it. And that reflects a degree of consensus that is both noteworthy and heartening.

It is heartening because it demonstrates that at least sometimes moral dialog about our nation's criminal justice system can advance without the Court's leadership. And it is heartening because it suggests that racial profiling can be attacked even without strong legal sanctions against departments that engage in the practice. I am skeptical that we will get sanctions of this kind anytime soon, so I am therefore mildly encouraged by the indications that less formal sanctions—public disapproval, stigma, political pressure—may do significant good. The emerging consensus that racial profiling is wrong creates opportunities to shame departments into taking action against it. We have some evidence of that in California, where dozens of departments statewide are now collecting statistics on the racial distribution of traffic stops, even though our governor vetoed a bill that would have required them to do just that.⁴

The second slight ray of hope I see is technological advances in policing that make it easier to attack racial profiling. Obviously, videotaping of traffic stops is not a panacea. Neither are automated speeding tickets or fancy data management. None of these developments, alone or in combination, will stop racial profiling. And they all come with significant problems, not the least of which is their potential to erode our sense of privacy. But, like them or not, they are proliferating. So it is heartening that they can assist efforts to document racial profiling, to reduce the opportunities for it, and to shame police departments into stopping it. It is worth recalling that it was videotapes of traffic stops that helped reporters at the *Orlando Sentinel Tribune* in 1992 demonstrate so convincingly the extent of racial profiling on Florida's stretch of Interstate 95.⁵

4. See Armando Acuna, *More Police Agencies Keeping Racial Data*, L.A. TIMES, Sept. 30, 1999, at A3; James Sterngold, *California Racial Profiling Bill is Vetoed*, N.Y. TIMES, Sept. 30, 1999, at A20.

5. See Jeff Brazil and Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL TRIBUNE A1 (Aug. 23, 1992).

The third ground for qualified optimism is a certain link between the issue of racial profiling and broader issues of racial inequity: specifically, the possibility that evidence of racial profiling, because it is so stark, may enlighten and advance our national discussion of the role of race more generally. This is not the only connection between the problem of racial profiling and the broader problem of race in America. Racial profiling grows out of and expresses a more widespread scapegoating of minority group members generally and black males particularly.⁶ And racial profiling can undermine crime control by making it harder for minority communities to trust and to work with the police—a point the Kerner Commission stressed three decades ago.⁷ A 1995 study by the NAACP found that, in part because of racial profiling, black parents across the country “war[n] their children about the police,” and “[a]verage African-American families do not know whether they should call the police, stop for the police, or help the police.”⁸ This phenomenon should frighten everyone, not only because of what it says about racial relations, but also because of what it says about the possibilities for policing that is truly community-based.⁹ The problem of racial profiling thus connects in some disheartening ways with the more general problem of racial inequality.

But there is also a more promising link. It has to do with the tremendous denial of the continuing salience of race in our society, and our difficulty talking honestly and realistically about race. That denial and that difficulty hobble discussion of

6. See, e.g., Katheryn K. Russell, “*Driving While Black*”: Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999).

7. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 143-44, 302-04 (1968).

8. CHARLES J. OGLETREE ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 23 (1995).

9. A recent review of the Los Angeles Police Department commissioned by its civilian oversight board stressed that “[a]ny serious effort at community policing” must take complaints of racial profiling seriously, because “[i]t is difficult to overstate the degree to which such grievances undermine the trust placed in the policy by minority communities, and, in turn, the degree of cooperation the policy can expect from those communities.” REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL 61 (2000).

all sorts of issues, from affirmative action to welfare reform, immigration, bilingual education, and juvenile justice. Racial profiling produces some pretty stark proof, both statistical and anecdotal, of how strongly race still matters. That proof will not open everyone's eyes, but I think it may open the eyes of many well-intentioned Americans who mistakenly believe that racial discrimination and racial disadvantage are problems of the past. And even for those of us who know better, the dismal statistics that continue to accumulate on the extent of racial profiling should remind us of the extraordinary degree to which racial inequity continues to shape and to stunt American life. They should, and perhaps they may, spur reform of far more than policing.