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The Canadian Experience of "Racial Profiling"

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ROYAL CANADIAN MOUNTED POLICE

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by

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2006

Available on the Internet at: http://www.rcmp-grc.gc.ca/ccaps/research_eval_e.htm
Available on Infoweb at: infoweb.rcmp-grc.gc.ca

Catalogue No.: PS64-31/2006E-PDF
ISBN 0-662-44451-5

Executive Summary

Most people experience contacts with police at some time. Few experience these as a diminishment of their rights to privacy, even when it ultimately is determined that there was no cause for police attention, and the vast majority of such contacts end peacefully without serious consequence. Nonetheless, even benign contacts often leave people wondering for what reasons they were singled out. For individuals who feel visible traits such as skin colour, age, clothing or non-legally relevant behaviours make them more subject to unwanted — and in their minds unwarranted — attention from police, it can be experienced as a violation. This sense of violation in itself can further result in an escalation of response.

What lies at the heart of the “racial profiling” debate is a lack of understanding of the police role. Police themselves bear part of the responsibility for this. Police contacts with the public are often conducted in a way that leaves even sympathetic members of the public puzzled. Accusations made in the name of “anti-racial profiling” advocacy have only intensified this fundamental problem in the quality of police - public interactions.

The neologism “racial profiling” does not describe a new phenomenon. Allegations and findings of biased policing have a long history. Use of excessive force by police, whether as a consequence of bias or as a consequence of factors unrelated to bias or discrimination, is certainly not unknown either. In capturing media and public attention, the expression “racial profiling” has managed to pour old wine into new bottles and reinvigorated these issues.

There is little consensus, nor is there any evidence of a search for consensus, as to what “racial profiling” means. Foremost a political term, it is not intended to provide an operational or empirical definition. It is used in ever-expanding contexts and ways, eluding any evidentiary quality. Racial profiling is a presumption and an “unfalsifiable” claim. There are simply no circumstances in which it can be objectively rejected. Little of what is stated about racial profiling has, nor could have, any empirical basis. Circular and ever-inflating citations of a small number of dubious sources lends only the appearance of substantiation. In fact the only sources that allege racial profiling is an established practice in policing are those advocating against it,

who consequently, having set up an easily defeatable straw man, then go on to point out its folly as an investigative approach.

Notwithstanding its ambiguity, the expression "racial profiling" has found favour in the Canadian courts. Courts have become quick to lay any violation of legal rights at the altar of "racial profiling" whenever such actions involve members of visible minority groups. Lack of "reasonable grounds", the Canadian jurisprudential equivalent of the U.S. term "articulable cause", is often seen as *de jure* evidence of "racial profiling", even in the absence of any specific evidence of racial bias. The consequence is an emerging asymmetry in the treatment of legal rights in the area of police powers, especially in the application of powers of search, seizure and investigative detention under sections 8 and 9 of the Charter of Human Rights and Freedoms and the consequence of any failing in the exercise of these powers as per 24(2). Such an asymmetry threatens to place justice into disrepute, makes the work of ensuring public safety and enforcing the law more difficult when it involves members of visible minority communities and threatens to endanger the security of visible minority communities themselves by empowering criminals and criminal organizations in their midst.

Notwithstanding its growing acceptance in the courts, among the media and with the public, the evidentiary basis for allegations of "racial profiling" is weak, often fabricated, if not entirely absent. The Commission on Systemic Racism in the Ontario Criminal Justice System, the most cited source of claims finding for the existence of "racial profiling" distorted the evidence of its own inquiry so as to make such a finding inevitable, and thus without probative value. The only two Canadian experiences in "racial profiling" data collection, are the one conducted by the *Toronto Star* in 2002 and the one more recently conducted by Scot Wortley for the Kingston Police Service. None of this work has been accepted for peer-reviewed publication, yet it continues to circulate as "grey" literature. These studies suffered from such serious methodological problems that the consensus view of the research community is that they are "junk science".

Human rights advocates, who only a decade ago denounced and successfully lobbied for prohibitions against the collection of racial or ethnic identity information by criminal justice

agencies because of their enabling of offender stereotypes, have since found in allegations of “racial profiling” a productive means to further claims for equality rights on behalf, not only of visible minorities, but of all disadvantaged groups and any member of a protected class defined by legislation. Organizers for extremist causes have also found a powerful tool for promoting outrage against perceived injustice and a sense of alienation, in particular against minority youth.

Provincial human rights commissions have been quick to join the fray over “racial profiling”, although police powers and judicial proceedings do not fall specifically under their jurisdiction. The consequence has been to blur considerably the traditional distinction between legal and equality rights. The conjuring away of legal rights in favour of an equality rights perspective on law enforcement and legal decision-making evident in the consideration of “racial profiling” by several provincial commissions adds to the confusion surrounding the issue of “racial profiling”. It is confusion with consequence. The suggestion was already made by David Tanovitch, acting as Counsel for the plaintiff in R. v. Richards (1999), “that the courts should impose a legal burden on the Crown in any case where criminal charges follow the stopping of a black person to establish that the stop was lawful and not the result of racial profiling … [and] that if the Crown could not rebut this presumption of illegality, this would affect the validity of the criminal charges.” This is already the law of Canada for all citizens under 24(2) of the Charter. To add an asymmetrical interpretation, as is suggested, is to threaten the very principle of equality of rights and freedoms that founds the Charter.

Canadian experiences of racial profiling data collection and reports of human rights advocates and provincial commissions share a legacy of fallacious reasoning and statistical obfuscation. The use of statistics in discrimination cases is less a search for truth than it is for advantage, and statistics are remarkably pliable, easily contrived or distorted, even when there is no intent of deceit but only unconscious subversion. The adversarial use of statistics in discrimination cases has grown to become a sub-discipline in its own right, often not a very distinguished one. Racial profiling data collection is born of this tradition in human rights advocacy research. In general the legal reliability of such evidence is far from assured. Statistical arguments presented in discrimination cases are rife with methodological weaknesses, many of which we have also seen in racial profiling studies. Among these are the almost inevitable absence of any sort of

corroboration, the misuse of statistical significance (probability) as a substitute for size of effect, non-probability or small samples below inference levels, non-contextualised use of second hand data, small effect sizes, inappropriate use of rates or likelihoods to "grow" small numbers into large conclusions, level of aggregation errors, base errors, induction errors, poor model construction in multivariate analysis, absence of elaboration, spuriousness, illogical conclusions, inappropriate combination of conditional probabilities of dependent versus independent events, often done with unknown or implausibly assumed base rates …. Human rights commissions and the courts, rather than objective triers of facts, may have become the wild west of statistical and scientific reasoning and the battleground of competing experts.

What we learn first and foremost from the U.S. experience of efforts to address allegations of "racial profiling" through empirical testing, is their futility. No challenge to "racial profiling" can have salience so long as "racial profiling" is held as an unassailable belief. Allegations of "racial profiling" are not falsifiable, no more than are beliefs of any sort. "Racial profiling" beliefs cannot be disproved through data collection. Furthermore, there simply is no audience for such proof. Not even the most carefully conducted studies have had impact. They add much heat but no light to debates. "Racial profiling" beliefs are a threat to social cohesion and public safety. They drive a wedge between law enforcement officials and those who, for whatever reasons, come to think of themselves as their victims.

Rather than confront racial profiling beliefs on the battlefield of evidence, one should understand them as perceptions. The enforcement of legal rights by the courts, public statements and written policies against racial profiling, irrespective of whether or not the phenomenon can be demonstrated to exist, effective complaints processes, community education, staff training, efforts to engage communities in policing are all tools that may shape public perceptions of policing and fight beliefs in racial profiling. But first and foremost are efforts to ensure transparency and greater accountability of policing, so that the public comes to understand the police role better, as well as the exercise of police powers and the mutual responsibilities of police and the public. This may help ensure that the portion of the public that is least experienced with respect to the work of law enforcement is not so frequently left perplexed when they do experience contact with their police.

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Introduction

Before discussing the issue of alleged "racial profiling", it is helpful to take a step back and examine what we know about actual, rather than alleged, public experience of policing. This will allow us to place anecdotal evidence into context.

Most people experience contacts with police. Few people experience these as threatening or as infringements. The vast majority of police-public contacts do not escalate to any further police action beyond the issuing of a ticket or summons. The 2002 U.S. National Survey of Contacts between the Police and the Public[1], a survey of more than 90,000 Americans conducted by the Bureau of Justice Statistics as a supplement to the U.S. National Criminal Victimisation Survey[2] that year, asked respondents to self-report their experiences with police. According to the survey, about one American in five reported having had a law enforcement contact with a police officer in the previous year, and three-quarters of them had only one contact. The majority of these contacts (58.5 per cent of most recent contacts) were police-initiated, half of these taking the form of vehicle stops, including traffic accidents. Only 5 per cent of contacts resulted in a search, only 11.7 per cent of searches yielded evidence, and fewer than 3 per cent of all contacts resulted in arrest. Force or threat of force was used in 1.5 per cent of all incidents. Among driving stops taken alone, 16.1 per cent did not receive a ticket or warning, 25.3 per cent received some type of warning, either written or verbal, and 58.5 per cent resulted in ticketing. Only 5 per cent of driving stops resulted in searches, 2.8 per cent in handcuffing and 2.7 per cent in arrest, most commonly for inability to legally operate a vehicle due to impairment, with 1.1 per cent of driving stops resulting in use or threat of force by police.

Arrests of drivers occurred for reasons such as: failing a sobriety test; possession of drugs or an illegal weapon; outstanding warrants for arrest; assaulting the police officer. Police use of force or threat thereof often accompanied respondents' self-reported resistance to being handcuffed, searched or arrested (68.3 per cent), trying to get away from police (40.9 per cent), disobeying or

[1] Matthew R. Durose, Erica L. Schmitt, Patrick A. Langan, Ph.D., Contacts between Police and the Public: Findings from the 2002 National Survey, U.S. Department of Justice, Bureau of Justice Statistics, April 2005, NCJ 207845

[2] see http://www.ojp.usdoj.gov/bjs/cvict.htm

interfering with officers (33.3 per cent), pushing, grabbing or hitting officers (29.7 per cent), other physical behaviour directed at police (27.3 per cent) and arguing with, cursing at, insulting, or verbally threatening police (22.3 per cent). Examples of excessive use of force by officers as defined by respondents included:

- Fight was over and officer kept yelling at resident
- Forcing respondent's arms behind his back
- Grabbed and forced resident into back of police car
- Gun pointed at resident
- Handcuffs put on too tight
- Resident was running and police grabbed him by the arm and pushed him against a car
- Officers used insulting words and did not read resident his rights
- Officer pushed resident to the ground
- Verbal threat to slam respondent's head into a wall.[3]

Overall about one in ten persons experiencing a police contact reported feeling that police had acted improperly and about a fifth of these reported having filed a complaint or civil suit. Those involved in use-of-force incidents were understandably most likely to contend that the police acted improperly, almost nine in ten. Those in their teens and twenties, males and blacks were more likely to report that police had, in their opinion, acted improperly. However, even with a sample size as large as 90,000, it is not possible to obtain any more detailed breakdowns for small groups and rare events. The sorts of incidents that are the subject of allegations of abuse or excessive use of force are simply too rare to be captured in inferential surveys.

Canadian information from the 2004 General Social Survey (GSS) on criminal victimization[4] shows similar patterns in public perceptions of police, to the extent these data permit. A majority of Canadians surveyed expressed a belief that police were doing a good job on a number of performance areas, almost two thirds so in the case of their approachability. Fifty-nine per cent thought that police treated people fairly, although fewer than half of Aboriginal and visible minority Canadians thought that police treated people fairly. Those in their teens and twenties, those who had been arrested in the year (1 per cent of respondents) or ever had any contact with police were least likely to think so.

[3] Durose, Schmidt, Langan, op. cit. p. 20
[4] Maire Gannon, General Social Survey on Victimization, Cycle 18: An Overview of Findings, Canadian Centre for Justice Statistics, Statistics Canada, July 2005, Catalogue no. 85-565-XIE

At the heart of the strong emotional response underlying the issue of "racial profiling" is the puzzlement, alarm and even indignation of people stopped by police for reasons that they do not understand, whether asked to answer questions or provide identification, perhaps even to be searched or detained in consequence. The sense of having been inconvenienced, subjected to the suspicion of wrongdoing, even of having had one's rights violated, is one that may be shared by anyone. Certainly anyone so contacted by police feels inappropriately singled out, most so for those with little experience of contact with law enforcement. But it is perhaps experienced more intensely, more remembered and more often recounted by individuals who feel that visible traits such as skin colour, age, and clothing make them more subject to unwanted — and in their minds unwarranted — attention from police. Often, rather than visible personal traits or perhaps in addition to these, it is location of residency or employment, routine displacements or use of public space that are more likely to bring some people into contact with police by virtue of officer deployment at specific times and locations where problems are known to occur. At times simple random chance may lead to people being contacted by police. In such circumstances, contact with a police officer is perhaps more likely yet to be experienced as a violation. More than the high-profile cases that make it to media, to formal complaint procedures or to the courts, it is this everyday experience of apparently unwarranted attention usually resulting in no searches, seizures, arrests or use of force that supports widespread perception of bias in policing.

Every single treatise alleging racial bias in policing begins with a recounting of alarming incidents in which citizens, ultimately shown to be innocent of any wrongdoing, were subjected to police use of force, usually in an excessive and humiliating manner. Only listed are cases in which citizens are from groups with long experiences of bias and discrimination, implying that these groups are alone subjected to such treatment. This approach is a rhetorical device, the intent and impact of which is to frighten, to immediately locate all in the intended audience on the first rung of a ladder upon which every routine police stop they have ever experienced is seen as a potential escalation towards the otherwise unimaginable extreme illustrated by these examples[5]. It causes thoughts of "what might have happened" to take the place of "what did

[5] Psychologists call this the *anchoring and adjustment heuristic*, whereby the first information presented in a longer argument influences how the entire phenomenon is subsequently perceived, either underestimation or overestimation. See inter alia John Ruscio, *Critical Thinking in Psychology: Separating Sense from Nonsense* (2nd edition), Thomson – Wadsworth, 2006, p. 5.

happen" and creates the sense that any contact with police is an infringement of rights. It polarises subsequent discussion, moves its focus away from actual experience into imagined fears and permits only empty exchanges of anecdotes, allegations and denials.

A few things stand out. (1) Police officers do not stop only the guilty. Few contacts lead to formal police charging, other than issuing of traffic tickets. (2) Contact with police is not uncommon, especially for young men, and the vast majority of contacts are without incident or consequence. This is equally true for the general population as for visible minority citizens. Few of those contacted are searched and few searches lead to arrests. (3) Public confidence in police is high, even among visible minorities. Most of those contacted by police feel that police acted reasonably or properly, although those few arrested and most especially those, fewer yet, experiencing police use or threat of force are less likely to feel so, even when they themselves report that evidence or their own behaviour were factors in police actions.

Non-dramatic findings such as these refute the fundamental articles of faith that support the arguments of those alleging widespread bias and discrimination or "racial profiling" in law enforcement: that any police action is injurious and an infringement; that law enforcers routinely abuse their powers and use excessive force. An article of faith is not evidentiary in nature. For responses to allegations of "racial profiling" to be measured and effective in ensuring the respect of legal rights of citizens, the respect of the law, and public safety, it is important to focus on actual experience rather than selected and recycled anecdotes promoting unfounded fears and perceptions. Responses that are merely shadow-boxing with presumptive and unsubstantiated claims threaten legal rights, effectiveness in law enforcement and public safety.

The Origins of "Racial Profiling"

Allegations that police and other investigative and law enforcement authorities single out members of visible minority populations for greater attention and scrutiny, without foundation on the basis of stereotypes alone, are not new. But they have received considerable and growing public attention under the popular expression "racial profiling". U.S. controversy in the 1990s

surrounding the unfounded nature of various drug trade "criminal profiles" submitted in court by police and border control authorities as justification for often dubious stops, searches, seizures and arrests[6] brought the term "profiling" to public attention. The success of the expression in the entertainment industry laid the groundwork for a popularization of the expression and furthered a widespread belief that law enforcement engage in such practices. The term "profiling" was subsequently appropriated by anti-racism advocates, media and entertainers, with the addition of "racial" to describe in a general manner any police attention to blacks and other visible minorities.

The term "racial profiling" now, having dispensed of reference to any explicit investigative profile, rather describes generally and without restriction any form of bias, discrimination or the holding of stereotypes, even unconscious[7]. This formulation has taken solid hold in Canadian jurisprudence notwithstanding its ambiguities and lack of probative value. In the most frequently cited case, Rosenberg J.A. in R. v. Richards, cited *supra*, considers "racial profiling" (or colour profiling) as a sub-category of "criminal profiling", without any effort to substantiate or even define the latter. "Profiling" in this usage took on a very different and broadly inclusive meaning than its usage in describing specific formal investigative practices, a problem resulting in considerable ambiguity and miscommunication.

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[6] See for example discussion of case law and evidence as to profiling in Allan D. Gold, *Expert Evidence in Criminal Law: The Scientific Approach*, Toronto, Irwin Law, 2003; pp. 54ff. For an informative, albeit slanted, history of the U.S. racial profiling debate, see David A. Harris, *Profiles in Injustice: Why Racial Profiling Can't Work, New Press, 2002:* http://www.profilesininjustice.com It is worth noting Harris's admission that these "criminal profiles" did not typically include race. For the return salvo in the American "culture war" over "racial profiling", Harris is critically examined by Heather MacDonald in her book *Are Cops Racist?* Chicago, Ivan R. Dee, 2003. More recently, David Tanovitch, now in the Faculty of Law at the University of Windsor, has attempted to fill in Canada the space that is occupied by Harris in the U.S. with his book *The Colour of Justice: Policing Race in Canada, Irwin Law, 2006.*

[7] The definition admitted by Rosenberg, J.A., in R. v. Richards (1999), 26 C.R. (5th) 286 (Ont. C.A.), also adopted in *R. v. Brown* (2003) O.J. No. 1251 and in most subsequent cases, was that submitted by Counsel for the accused Tanovitch from the African Canadian Legal Clinic:

> "Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group. The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping."

Alan D. Gold's Netletter, Issue 335, April 28, 2003, deals with the problematic evidentiary basis of this "characterization of 'racial profiling' as a 'subconscious' motivation of which the officer apparently may not even be aware." (p. 4) Notwithstanding, the Ontario Human Rights Commission has reaffirmed this characterization in its Report (infra):

> "Because stereotyping may be subtle and unconscious, in many cases the person engaging in it may not even realize that it has occurred." (p. 6)

By the late nineties the expression "racial profiling" had entered common usage in Canada to describe alleged racial bias and discrimination in policing, primarily that directed at "black", "black identity" or "African Canadians" of diverse cultural background and origin[8]. Its success in garnering media and public attention guaranteed its adoption by other groups. Increased scrutiny at borders of travellers from predominantly Islamic regions subsequent to the events of September 11, 2001 heightened public visibility of accusations of "racial (and now ethnic and religious) profiling". Its success at capturing public attention has seen the expression used by more and more groups feeling singled out for attention by law enforcement and by militants seeking to further the belief that these groups are so singled out.

Most recently, the Ontario Human Rights Commission has expanded further yet upon the definition of "racial profiling" to include a broad list of social categories not limited to those necessarily involving visible traits, including race, ethnicity, place of origin, religion, as well as age and gender.[9] The Montreal city police force in policy "politique d'intervention numéro 259-1, *Le profilage racial et illicite*" effective March 22, 2004[10] defines the concept more broadly yet, adding a number of groups without identifying visible characteristics:

> Illicit racial profiling is defined as any action instigated by persons in authority against any individual or group for reasons of public security or protection and solely on the basis of factors such as race, ethnic origin, colour, religion, language, social status, age, sex, disability, sexual orientation, or political convictions, that exposes the individual to differential scrutiny or treatment without actual grounds or reasonable suspicion.

"Racial profiling" is thus no longer about race alone, but now about any form of infringement of a diversity of rights and all forms of bias and discrimination. There is not only considerable ambiguity surrounding the definition and use of the term "racial profiling" but some also circularity. Definitions in current use all originate with "identity group" advocacy organizations

[8] The language of cultural identity is complex, contested, underlain by cultural politics and bereft of either consensus or equivalency. See for example George Elliott Clarke, (1998). "Contesting a Model Blackness: A Meditation on African-Canadian African Americanism, or The Structures of African Canadianite." Essays in Canadian Writing, 63, 1-51.

[9] Ontario Human Rights Commission Paying the Price: The Human Cost of Racial Profiling, Toronto, OHRC, 2003, http://www.ohrc.on.ca

[10] Cited in Michèle Turenne, "Racial Profiling: Context and Definition", Québec Human Rights Commission (2005), at page 9.

and consanguine cross citation has generated considerable rhetorical inflation of definitions, claims and purported evidence. Even otherwise credible public authorities repeat unverified second-and-third hand allegations and positions culled from unqualified sources largely drawn from advocacy organizations. The Québec Human Rights Commission in its confusion recently went so far as to advance that "The practice [of racial profiling] was introduced into Canada in the 1990s, after members of the Royal Canadian Mounted Police received training in the United States."[11] The same author, on the sole basis of a second hand reference from Tanovitch to a magazine article, writes: "We cannot ignore the fact that some studies and critical surveys still present racial profiling as a rational form of criminal profiling" (p. 5). In fact the only sources that allege "racial profiling" is established practice in policing are those advocating against it, setting up an easily defeatable straw man, then making a show of pointing out its folly as an investigative approach.

There is no foundation for statements describing "racial profiling" as criminal profiling based on race. It is understood instead, most simply and usefully, as a novel formulation describing what has been long known under the rubrics of racial bias and discrimination in law enforcement and infringements of legal and/or equality rights[12] under human rights legislation. Although the phenomenon itself is not novel, advocacy group allegations and media sensationalism have renewed and reframed debate on these issues. It is a remarkably successful example of the political value of novel language. Allegations of bias and discrimination implicate decisions and actions of individuals and call for individual responses: prohibitions, investigations, disciplinary measures. The expression "racial profiling", through its implicit suggestion that bias and discrimination are organizational and "systemic" if not deliberate, has shifted the onus of proof upon law enforcement and increased its burden. "Racial profiling" does not need to be proved, but is now established presumptively upon failure to be disproved as a secret practice. Circular and fugitive definitions go further to make allegations impossible to disprove and the very

[11] Michèle Turenne, *op. cit.*, at page 4 citing Tanovitch "Using the Charter to Stop Racial Profiling: the Development of an Equality Based Conception of Arbitrary Detention, 40 *Osgoode Hall Law Journal* (2002), p. 152.
[12] This is indeed the position taken to establish investigative authority by human rights bodies as advanced by Michèle Turenne, *op. cit.*, at page 2. The issue of the appropriateness of an "equality rights framework" for assessing the exercise of legal powers is one we return to in this paper.

attempt at defence against them is seen as proof of wrongdoing in and of itself, a classic formulation of conspiracy theory.[13]

There is no evidence that this characterisation of various forms of "profiling" is accurate, but rather the contrary, and all of these allegations as to the origins and foundation of "racial profiling" finding its source within "investigative criminal profiling" appear to come from one single Canadian source, repeating similar allegations first made by the American Civil Liberties Union. The purpose of such affirmations is advocacy not accuracy. To equate alleged police practices singling out or targeting people for differential treatment according to skin colour or race with "criminal profiling" demonstrates either confusion or rhetorical excess. There is sufficient evidence to suggest both.

Profiling

Let us examine the practice of "criminal profiling". Public understanding of what profiling entails is rife with confusion. Ainsworth writes:

> There is a great deal of public misunderstanding about what profiling involves. Much of this misunderstanding stems from fictional television series … (which) … may have served to popularize the subject of offender profiling ... but may also have created a misleading impression of what profiling can achieve and the methods that it uses.[14]

Criminal or investigative profiling is a formal police criminal investigative practice that has been adopted in some manner or other by many law enforcement organizations for some types of

[13] For more on the political uses of "conspiracy theory" making see Thomas Gruter "Secret Powers Everywhere" *Scientific American*, December 2004 http://www.sciammind.com/article.cfm?articleID=0005FD7A-1069-1196-906983414B7F0000&pageNumber=1 Gruter writes: "'Experience shows that many conspiracies are made, but few succeed,'" wrote Niccolò Machiavelli, the famous theoretician of power, in his classic 1532 book *The Prince*. Anyone who wants to unleash a conspiracy theory should remember nine rules for success.
1. Doubt that anything in the world happens by chance, especially when it comes to disaster. Dismiss out of hand any existing explanation of an extreme event. 2. Take seemingly unrelated events, omens or statements and give them a new meaning. 3. Name an enemy. 4. Expose evil intentions, the more common the better. 5. Discredit authorities, politicians and officials as stupid or as being paid by the enemy. 6. Establish a club of perpetrators and cite it as proof of your theory. 7. Shield yourself from detractors and declare them to be wrong or in the pay of the enemy. 8. Issue warnings of looming evil acts by the conspiracy and stress the need to take action against them. 9. Call for people to be alert, for more helpers and for financial contributions."

[14] Ainsworth, Peter B., *Offender Profiling and Crime Analysis*, Devon, Willan Publishing, 2001, p. 6

offending, generally serious, personal contact offences. The basis of criminal profiling is the expectation that, for some specific types of offences, characteristics of unidentified offenders may be predicted from evidence gathered in police investigations of unsolved crimes attributed to them or from knowledge of known offenders of similar past crimes. Approaches to profiling may focus on "psychological trace evidence", presumed offender motivations or on linkages between elements. It is a technique for investigation of specific criminal incidents. Criminal profiling does not identify groups of people according to shared characteristics so that they may be singled out for general police attention and no recognized criminal profiles use race as an independent factor. Furthermore, the fruits of criminal profiling have not been admitted generally as evidence in the courts due to predictive insufficiencies[15] relating to reliability. It is considered an investigative tool only and even then one of only dubious value[16].

Although criminal profiling has no relationship to the practices described under the term "racial profiling", race (along with other identifying physical characteristics such as age and sex) does appear on the long list of potential components that may be derived from crime scene evidence or witness statements of the UNSUB (unknown subject) offender profile compiled by the U.S. Federal Bureau of Investigation[17], one of the most influential law enforcement agencies with respect to the promotion of criminal investigative profiling. However, contrary to the affirmation of the African Canadian Legal Clinic cited by Tanovitch, reported in the reasons of Rosenberg J.A. in *R. v. Richards* and referenced by Morden J.A. in *R. v. Brown*, there are no known approaches to criminal profiling that operate on the basis of predictions of offender skin colour or race, nor on any other single characteristic. Nor would such approaches be in any way useful in identifying authors of specific crimes given the large number of people in most populations who might share such characteristics. Such predictions would have false positive rates so high that any effort engaged in singling out people presenting them would hinder rather than further

[15] Gold (2003), *op. cit.* p. 54. See also in Canadian jurisprudence R. v. Clark (2004) O.J. No. 195 in appeal from R. v. Clark (1998) O.J. No. 5590; R. v. Ranger [2003] O.J. No. 3479 In the U.S. such evidence is excluded under Federal Rule of Evidence 404(a).
[16] Craig M. Cooley, "Profiling the Courts How Have Courts Dealt with the Admissibility of Criminal Profiling Evidence", Scientific Evidence Seminar, Northwestern University School of Law, Spring 2004.
[17] "Criminal Investigation Analysis, Criminal Profiling and Consultation Program", Federal Bureau of Investigation, 1991 cited in Hagan, Frank E., *Research Methods in Criminal Justice and Criminology*, (6th edition), Boston, Allyn and Bacon, 2003, p. 142.

criminal investigations[18]. No rationally behaving law enforcer would engage in such profiling as it is commonly alleged by anti-racial profiling advocates.

A few simple illustrations suffice to demonstrate, as is admitted by anti-racial profiling advocates, that most of what we call "profiling" is ill-founded. Consider a hit and run collision involving a taxicab, observed by an eyewitness. The witness describes the cab as green in colour. Only 25 per cent of the 4,000 licensed taxicabs in the city are green, so this narrows the investigation considerably. Any eyewitness account is prone to error. In this case let us say we can set the likelihood of witness error at 20 per cent, a small error rate given what research on the topic has indicated. What is the likelihood that any single green cab pulled over by police in the course of the investigation was the one seen fleeing the scene of the accident? Should police devote their investigative efforts to checking the logs of every green cab in the city?

The answer to the first question is one in 1,250 (4,000÷0.25/.8). There are 1,000 green cabs to be pulled over, but the probability that the cab was actually green is only .8 because of the possibility of witness error. The answer to the second question should be obvious: it would not likely be a good use of police effort to investigate all 1,000 green cabs at 80 per cent reliability. If reliability were less than 50 per cent, as witness reliability often is, such profiling would more often steer police in wrong directions than in right directions.

Furthermore, error rates multiply when additional factors are brought into any prediction, so that multiple predictive factors, each with non-negligible error rates, would be poorer prediction models than simple models. This is not intuitively obvious to most observers, including many investigators. Someone flipping ten coins in sequence would be impressed to flip ten coins all coming up heads; a series of independent events with a likelihood of only 1:1024. Yet a mere 10 per cent error rate due to the observer's poor visual acuity, for example, would result in a false tally two times out of three. Statistical likelihood would be a very poor alternative policing

[18] See for instance Deborah Davis and William C. Follette, "Rethinking the Probative Value of Evidence: Base Rates, Intuitive Profiling, and the '*Post*diction' of Behavior", *Law and Human Behavior*, Vol. 26, No. 2, April 2002 The Ontario Human Rights Commission makes the same rough argument in a straw man attack on purported "racial profiling", though with little demonstration of understanding it, citing only an article by an American antiracism advocate from a radical e-zine. OHRC (2003) footnote 30.

strategy to traditional evidence gathering, as many police investigators have discovered at their expense.

Another problem creeps in when prevalence rates are low, as is the case with most criminal offences. Take another example: assume a very hypothetical (and clearly ludicrous) birth test for delinquency with an accuracy of 95 per cent. However, delinquency is not a frequently occurring phenomenon in a population. Let us say that 3 per cent of a population at birth will become delinquent. If applied a thousand times, the test will correctly identify future delinquents only 29 times (0.03 x 0.95 = 0.029). At the same time, it will fail to identify future delinquents 49 times (0.97 x 0.05 = 0.049) and will furthermore falsely identify two infants as future delinquents (0.03 x 0.05 = 0.002). The total number of incorrect predictions (51:1000) exceeds that of correct predictions of delinquency (29:1000) by nearly two to one. Balanced against its ineffectiveness and potential for harm, the contribution of such a test to early identification of delinquency and to public safety would be questionable at the very least. Yet, the sorts of predictions made by offender profilers have predictably far higher error rates, albeit unknown, and may often involve prevalence rates as low as one to a base of total population in the case of the identification of a single suspect. It is simply implausible that actual *profilin*" policies or practices on any basis, be it psychological or racial, would ever be officially adopted by any rationally behaving organization as an alternative to traditional evidence-gathering investigative practices.

There is indeed little scientific basis for criminal profiling as a whole. Despite the public attention the issue has received, there is a surprising lack of any scientific basis for almost any form of profiling. Ainsworth concludes from his review of scientific assessment of offender profiling "that the early attempts at profiling may have captured the public's imagination but that they may not be based upon a scientific bedrock of data-gathering or empirical research."[19]

Partly as a result of this lack of evidence as to the foundedness of its claims, most police organizations are sceptical of profiling. It is little used by law enforcement organizations and for

[19] Ainsworth, op. cit. p. 114. Richard Kocsis, a well-respected Australian academic criminologist, has made a career of debunking "profilers" concluding "their performance is nothing more than guesswork or what could be gleaned from social stereotype". See *inter alia* Kocsis, Richard N; Hayes, Andrew F. "Believing Is Seeing? Investigating the Perceived Accuracy of Criminal Psychological Profiles*", International Journal of Offender Therapy and Comparative Criminology*. Vol 48(2) Apr 2004, 149-160.

most areas of police work, which are usually more suited to traditional evidence-gathering investigative methods. Furthermore, notwithstanding allegations, there is no evidence that law enforcement agencies formally engage in practices or policies singling out people on the basis of national origin, ethnicity, race or skin colour. Such formal policies, were they to exist, would be proscribed by civil, human rights, criminal and police legislation in most jurisdictions as unlawful discrimination.

The term "racial profiling" is intended to increase the potency on the public imagination of charges of racial bias and discrimination. It has done so successfully by drawing upon the popularization of the term "profiling" by entertainment and news media. It suggests that bias and discrimination are more than individual attitudes and behaviours; more even than systemic in society and its institutions, but rather are formally adopted policies of institutions targeting some individuals and groups. It erodes confidence in public institutions and the law, promoting in its stead fear and mistrust. It is unfortunate that officers of the Court have lent credibility but little precision to the term and further contributed to its popularization and ambiguity.

Racial Profiling in Canadian Courts: inequality before the law

Following similar developments in recent years in the U.S. and the U.K., accusations of "racial profiling" in Canada are now frequently put before the Court by defence counsel, given credence in statements by Crown counsel[20] and supported from the Bench in numerous judgments of the Court[21]. Failure to admit testimony and to allow robust cross examination pertaining to allegations of "racial profiling" has been judged by the Ontario Court of Appeal as reversible error[22].

[20] For example in statements by Crown counsel J. K. Stewart in the widely reported case of a high profile professional athlete against drinking and driving charges laid by Toronto police, reported and affirmed in the reasons of Morden J.A. *R. v. Brown* (2003) O.J. No. 1251

[21] For example, in the cases of *R. v. Parks* and *R. v. Wilson*. Doherty, J.A. in *Parks* stated at p. 342:

> "Racism, and in particular, anti-black racism is part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil."

[22] *R. v. Brown* (2003) O.J. No. 1251

Subsequently, any police actions now alleged to lack sufficient grounds or "articulable cause"[23] are now routinely submitted as cases of "racial profiling" whenever the subject of such actions is a member of a potentially racialized visible minority population[24]. Findings of the Court that police actions were deficient with regard to the test to be applied under the Charter[25] with reference to unlawful detention are now routinely accompanied by statements of the Court supporting the existence of "racial profiling" whenever the person stopped presents physical or other visible traits that might potentially evoke stereotypes. Suggestion is made by anti-racial profiling advocates that all police stops of blacks and other visible minorities, including street stops of pedestrians, be considered presumptively as forms of detention so that a higher standard of "articulable cause" in Canadian jurisprudence be applied[26]. It is argued that such a differential standard is necessary as it "recognizes the reality that blacks and other visible minorities perceive things differently from others, particularly in relation to the police"[27].

Underlying these developments is advocates' intent to drive a wedge between law enforcement and visible minorities furthering the presumption that police officers are unsympathetic and antagonistic to visible minorities, perhaps unknowingly so. Contrary to often disingenuous assertions made alleging unconscious motivation on the part of officers, accusations of any sort of unlawful profiling, biased or discriminatory conduct clearly alleges dissimilated malfeasant

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[23] "Articulable cause exists where the grounds for stopping the motorist are reasonable and can be clearly expressed": *R. v. Wilson* (1990) 56 C.C.C. (3rd) 142 (S.C.C.) at 144.

[24] Allegations of "colours" profiling have even been made on behalf of members of the Hell's Angels. Brown **v.** Durham (Regional Municipality) Police Force [1996] O.J. No. 1271

[25] The Canadian Charter of Rights and Freedoms Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 states: 8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay and to be informed of that right; and

c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The Supreme Court in *R. v. Mann* confirmed that, not every instance of a police officer stopping a person, or even interviewing them, amounts to a detention that engages Charter protections.

[26] David M. Tanovitch, "Litigating Cases of Racial Profiling" paper presented at "Systemic Racism in the Canadian Criminal Justice System" (Faculty of Law, University of Toronto) (November 29, 2002)

[27] Ibidem, p. 29.

intent[28]. Yet, as Gold points out[29], it is worth noting that allegations of malfeasance are not necessary to support an argument of violation of Charter rights and are seldom advanced in arbitrary stops of non-visible minority motorists[30]. These statements are therefore not a little gratuitous and, when supported from the bench, appear to be primarily rhetorical, seeking (albeit with honourable intent) to denounce and condemn bias and discrimination, rather than necessarily to find evidence for them. Yet this is not what most will draw from such statements. Rather they contribute to the erosion both of public trust in authority and of equality before the law. Their consequence, and indeed an intended one in the minds of some, is to introduce asymmetries in rights under criminal law along the lines of more broadly interpretable evidentiary standards under human rights legislation. The leap from one system of evidentiary reasoning to another is considerable as is the confusion which ensues.

An asymmetry emerges, anyone who may lay claim to bias or discrimination and who is unlawfully stopped, questioned, searched, arrested or detained, is presumptively considered victims of racial and other profiling. Meanwhile others are considered victims of unspecified malfeasance, arbitrariness or a simple failure in the fulfilment of duties, with neither presumption or requirement of motive. This happens whether or not there is any evidence of malfeasance rather than simple arbitrariness or more common failure of duty. A formal reversal of onus, such as that submitted before the 38th Parliament in the form of a Private Member's Bill, was argued in 1999 by David Tanovitch acting as counsel for the appellant in *R. v. Richards*, summarized by Rosenberg, J.A.: "that the courts should impose a legal burden on the Crown in any case where criminal charges follow the stopping of a black person to establish that the stop was lawful and

[28] In *R. v. Brown*, (2003) O.J. No. 1251 the evidentiary standard for a consideration of "racial profiling" was defined by the appelate court as follows : "A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven, it must be done by inference drawn from circumstantial evidence. Where the evidence shows that the circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling."

[29] Alan D. Gold's Netletter, Issue 335, April 28, 2003. "In other words, it [racial profiling] involves a conscious self-awareness by the actor of their improper motivation. Thus a denial of 'racial profiling' by a police officer who has in fact considered race in exercising their police powers is a conscious falsehood… A claim of 'racial profiling' does involve an allegation of personal malfeasance against the actor, and that accusation cannot be rendered more palatable by talk about 'subconsciousness'".

[30] See for example *R. v. Kemper* (2005) O.J. No. 5635

not the result of racial profiling … [and] that if the Crown could not rebut this presumption of illegality, this would affect the validity of the criminal charges."[31]

Similarly, potentially racialized traits are argued to justify a requirement for greater police discretionary latitude in decisions to initiate a contact. In *R. c. Campbell*[32], the Québec Superior Court, citing the equality right of all citizens to non discriminatory treatment, wrote "in the context of a minority person, his reflex to move away from the police does not necessarily infer that he had committed an offence."[33] In the trial decision in *R. v. Hamilton*[34] it was argued that accused persons presenting personal traits historically giving rise to discrimination[35] are due special consideration of the Court in sentencing analogous to that which Parliament has directed be given to Aboriginal accused[36]. As was pointed out at appeal, this approach to the evidence at trial was problematic as it described not characteristics of the individual accused persons, but rather of the group to which the accused was presumptively assigned on the basis of inferred racial identity and ancestry irrespective of whether these specific accused shared those characteristics.

It is possible that *de facto*, potentially *de jure* acceptance of "racial profiling" as presumptive beyond any evidentiary basis has already become part of Canadian law, a significant threat to fair and effective law enforcement and proper legal decision making.

[31] *R. v. Richards* (1999) O.J. No. 1420 at paragraph 25 In Tanovitch (2002) cited infra, he goes further to suggest deeming all street-level investigative stops as detentions under section 9 so that the presumption of illegality might be extended to "ensure equality principles would ensure more sensitive standards which recognize the reality that blacks and other visible minorities perceive things differently from others, particularly in relation to the police."
[32] Campbell, a black man, was approached by officers and arrested for breach of conditions, resulting in the subsequent charge of possession upon discovery of drugs and drug paraphernalia. The Court ruled excluding the evidence for the latter charge.
[33] *R. c. Campbell* (2005) Q.J. 394 at 59
[34] *R. v. Hamilton* [2003] O.J. No. 532 overturned at appeal in *R. v. Hamilton* [2004] O.J. No. 3252
[35] In this case the accused were black women of Jamaican origin arrested at Pearson International Airport in Toronto found to have swallowed pellets carrying cocaine.
[36] C.C.C. s 718.2 (e)

The Consequences of Racial Profiling Beliefs

The Ontario Human Rights Commission eloquently describes the consequences of such inequality before the law:

> The experience of the United States has been that, whether practised or simply a perception in any given community, racial profiling beliefs contribute to minority cynicism and mistrust towards the criminal justice system. The effects of these negative attitudes can be quite varied and wide reaching.
>
> - People are less likely to cooperate with people they mistrust and may develop doubts regarding all aspects of the criminal justice system.
> - Individuals with these perceptions may respond inappropriately to law enforcement officers out of mistrust or may retaliate for past-perceived injustices. Situations may therefore escalate unnecessarily putting both the citizen and officer at risk of injury.
> - Safety concerns for officers and community members may be increased in hostile environments.
> - Left unchecked, mistrust towards the criminal justice system can lead to civil unrest.
> - It has even been suggested that mistrust of police can be the basis for acquittals in jury trials.[37]

A potential "Fagin effect"[38] was further pointed out in *R. v. Hamilton* in which in this case black women may become targets for solicitation as drug couriers, since they might be given greater leniency by the Court. Criminal organizations may see an opportunity and incentive to recruit minorities for the same reason. Communities may be discouraged from reporting or coming forward with information pertaining to crimes committed by those who, because of their race, might benefit from the protection of a greater evidentiary burden. The work of policing racial minority communities would be rendered more difficult by such a burden and the safety of those same communities, already subject to high rates of victimization, in particularly violent victimization[39], would be thereby lessened.

Belief in racial profiling is not necessarily or only born from self-interest. The same sort of circular feedback loop of self-fulfilling prophecy described in the Toronto Star articles by Scott

[37] Ontario Human Rights Commission (2003) op. cit. at p. 12.
[38] Reference is to the character of that name in Dickens' *Oliver Twist.*
[39] Maire Gannon and Karen Milhorean, *Criminal Victimisation in Canada, 2004*, Juristat, Vol. 25, no. 7, Canadian Centre for Justice Statistics, Statistics Canada Catalogue no. 85-002-XPE, p. 8.

Wortley, explaining how police may come to adopt discriminatory beliefs, may explain how beliefs about "racial profiling" emerge and become increasingly held in a cycle of ever heightening apprehension. Let me paraphrase Wortley's illustration to demonstrate an equally plausible, yet opposite, conclusion. Consider a situation in which drivers are indeed stopped randomly. Drivers stopped who are convinced (incorrectly in this hypothetical example), that they will be stopped because of their skin colour, will conclude this has actually happened, further reinforcing their belief that skin colour is the cause. Those not sharing this identity-centred belief will attribute the event to randomness or other causes, perhaps even to their own actions. The latter may view their individual experience as an insignificant aspect of a shared experience or identity and unworthy of recalling or repeating in conversation. On the other hand, the greater simplicity and appeal of the belief that skin colour, or any shared identity trait, is the singular cause of police stops guarantees that it will be repeated and passed on, and when placed in competition with a belief in randomness, will become the dominant shared collective view, a sociological rendering of Gresham's Law "bad currency drives out good". We seem culturally (or perhaps because of widespread innumeracy) indisposed to accept randomness[40]. The popularity of various forms of gambling is evidence of this.

Racial profiling beliefs are a problem in and of themselves which, however they come to be held, serve to further alienate black and other visible minority people from mainstream Canadian society and reinforce perceptions of discrimination and racial injustice. Racial profiling beliefs facilitate a culture of entitlement, disrespect and lawlessness, especially among young men, that places them at greater risk. These beliefs also render visible minority people more vulnerable to crime and disorder by driving a wedge between their communities and law enforcement. While there are those among groups advocating for belief in "racial profiling" who see such developments as politically useful tools for recruitment to their cause or to enlist support for further claims of measures favouring asymmetrical rights, the consequences of such advocacy are pernicious and widespread in their effects and threaten equality before and respect of the law, as well as public safety. Public policy must seek balance in achieving public good and place public order and safety ahead of the claims for compensatory privilege.

[40] See for instance Jeffrey S. Rosenthal, *Struck by Lightning: The Curious World of Probabilities*, Toronto, Harper-Collins, 2005.

Defining racial profiling

Let us look at the currently cited evidentiary basis that points to "racial profiling" in Canada and some of the challenges this evidence presents. From the perspective of valid and reliable measurement and requirements for inference from evidence, "racial profiling" poses great, if not insurmountable, difficulty. Not only is there no agreed-upon definition, but most definitions and even general problem statements put forward about "racial profiling" are fugitive or so insufficiently or even maliciously reasoned as to constitute non-falsifiable propositions[41]. Statements supporting the existence of "racial profiling" are made in such a manner that all evidence will found them and no refutation on the basis of the absence of evidence is possible. Such propositions call upon belief and presumption rather than evidentiary reasoning and no conclusion made about them can thus be weighed or challenged. Most statements about racial profiling may be classified according to their scientific character among statements about creationism, intelligent design, "intelligent falling"[42] or whether Elvis lives. In this context, ever pliable statistics serve, as lampposts do drunkards in Andrew Lang's old saw, as support rather than illumination.

The definition of "racial profiling" that has had the most influence in Canadian jurisprudence is that previously cited and provided by the African Canadian Legal Clinic[43] introduced in the factum of the appellant by Counsel Tanovitch in *R. v. Richards* and cited by Morden, J.A. in *R. v. Brown* at ¶ 7:

> There is no dispute about what racial profiling means. In its factum, the appellant defined it compendiously: "Racial profiling involves the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group" and then quoted a longer definition offered by the African Canadian Legal Clinic in an earlier case, *R. v. Richards* (1999), 26 C.R. (5th) 286 (Ont. C.A.), as set forth in the reasons of Rosenberg J.A. at p. 295:

[41] Karl R. Popper, *The Logic of Scientific Discovery* (1934 transl. 1959)
[42] "Evangelical Scientists Refute Gravity with New 'Intelligent Falling' Theory" *The Onion*, Issue 41•33, August 17, 2005 (*The Onion* is a satirical review.)
[43] The ACLC document "Anti-Black Racism in the Criminal Justice System", from *Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (2002) can be viewed at http://www.aclc.net/antiba_criminaljustsys.htm

> Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.[44]

An additional qualifying statement is then made subsequently at ¶ 8[45]:

> The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping.[46]

Tanovitch, then with the law firm Pinkofskys, describes its client base as three-quarters African Canadian, has perhaps argued the largest number of cases involving allegations of racial profiling and has had great impact on the courts' treatment of the issue. He paraphrases from his proposition in *R. v. Richards*: "Racial profiling is the practice of targeting racial minorities for criminal investigation solely or, in part, on the basis of their skin colour."[47] He goes on "…racial profiling is premised on a conscious or unconscious belief that members of certain minority groups are the usual drug or weapons offenders … most commonly manifested in pretext vehicle stops where the police can rely on their power to regulate traffic and vehicle safety to mask their true intent." He further describes what he calls partial racial profiling: "Racial profiling is implicated in this context because assumptions about race and crime play a role, along with other race-neutral behaviour, in creating a suspicion in the mind of the police officer that the individual has engaged in, or is currently engaging in, criminal activity."

Stopracialprofiling.ca[48], is a Canadian website dedicated to a campaign to stop racial profiling in Canada that, in its own words, brings together community groups, law makers, lawyers, activists, targets of racial profiling and all affected communities. The site defines racial profiling citing

[44] *R. v. Brown* (2003) O.J. No. 1251 at ¶ 7
[45] *R. v. Brown* (2003) O.J. No. 1251 at ¶ 8
[46] This problematic issue of the characterization of "racial profiling" as a "subconscious" motivation of which the holder may not be aware has been discussed in Alan D. Gold's NetLetter – Issue 335, pp. 3-5, *supra*.
[47] David M. Tanovitch, "Litigating Cases of Racial Profiling" paper presented at "Systemic Racism in the Canadian Criminal Justice System" (Faculty of Law, University of Toronto) (November 29, 2002)
[48] http://www.stopracialprofiling.ca

firstly the definition in the aforementioned Private Member's Bill paraphrased from the OHRC document:

> "racial profiling" means any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion or place of origin, or a combination of these, rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment.

It then also adds that of the African Canadian Legal Clinic cited in *R. v. Brown* and *R. v. Richards*:

> Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

The American Civil Liberties Union, which has long led the campaign alleging widespread racial bias in law enforcement in the U.S. and has had considerable influence on Canadian advocates, defines it as follows:

> Racial Profiling is any police or private security practice in which a person is treated as a suspect because of his or her race, ethnicity, nationality or religion. This occurs when police investigate, stop, frisk, search or use force against a person based on such characteristics instead of evidence of a person's criminal behavior. It often involves the stopping and searching of people of color for traffic violations, known as "DWB" or "driving while black or brown." Although normally associated with African Americans and Latinos, racial profiling and "DWB" have also become shorthand phrases for police stops of Asians, Native Americans, and, increasingly after 9/11, Arabs, Muslims and South Asians.
>
> Racial profiling can also involve pedestrian stops, "gang" databases, bicycle stops, use of police attack dogs, suspicion at stores and malls, immigration worksite raids, and in the 2000 presidential election in Florida, harassment on the way to polls, "voting while black or brown". Customs and other airport officials also engage in racial profiling of passengers…
>
> Racial profiling is a new term for an old practice known by other names: institutional racism and discrimination and owes its existence to prejudice that has existed in this country since slavery.[49]

[49] American Civil Liberties Union (ACLU), http://www.aclu.org/racialjustice/racialprofiling/index.html

Evidence submitted to support allegations of racial profiling is invariably anecdotal, selected cases, surveys of beliefs and reports of disparities in numbers between various groups from official records or special studies. Many North American police organizations must now devote considerable resources and effort to address accusations that they engage in racial profiling. The development of data collection and analysis systems to respond to accusations of racial bias in policing has become a growth industry in the U.S.[50]

The Evidentiary Basis for Racial Profiling in Canada: evidence or perception

A series of high profile events has marked the growing acceptance that "racial profiling" is practised by Canadian law enforcers. We will examine each in turn.

1) Statements as to the existence of racial profiling have often drawn their evidentiary basis from the 1995 report of the Commission on Systemic Racism in the Ontario Criminal Justice System[51]. Although this document predates the general adoption of the term "racial profiling" in Canada, its finding "that racialized characteristics, especially those of black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto" (at p. 358 [52]) has been widely cited as evidence of the existence of "racial profiling".[53]

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[50] McMahon, Joyce, Garner, Joel, Davis, Ronald and Kraus, Amanda, (2002) How to Correctly Collect and Analyze Racial Profiling Data: Your Reputation Depends On It, Final Report for: Racial Profiling–Data Collection and Analysis. Washington, DC: Government Printing Office.
http://www.cops.usdoj.gov/default.asp?Open=True&Item=770
Ramirez, D., McDevitt and Farrell, (2000) *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, Washington, D.C., U.S. Department of Justice Monograph NCJ 184768, November.
Fridell, L.R. Lunney, Diamond, D, and Kubu, B., (2001) *Racially Biased Policing: A Principled Response*, Washington, D.C.: Police Executive Forum, 2001:118. http://www.policeforum.org/racial.html,
Engel, R.S., Calnon, J.M. and Bernard, T.J., (2002) "Theory and Racial Profiling: Shortcomings and Future Decisions in Research", 19(2) *Justice Quarterly*, 2002: 250 & 262-263.

[51] Final Report of *The Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto, Queen's Printer for Ontario, 1995) (Co-chairs: D. Cole & M. Gittens)

[52] This is notwithstanding that the commissioned research was essentially limited to opinion surveys and solicited anecdotes. The bail study commissioned for the Report found no evidence of disparities in treatment once all relevant factors were accounted for, although this was not reported as such by the Commission.

[53] In Québec *le Comité d'enquête à la Commission des droits de la personne du Québec, Enquête sur les relations entre les corps policiers et les minorités visibles et ethniques* (Rapport Bellemare) 1988 has been similarly cited by the Court as reported by le Barreau du Québec in Noël Saint-Pierre et Michèle Turenne, *Profilage racial, Tour d'horizon, Actes du Congrès du Barreau du Québec*, 2004; Noël Saint-Pierre, "Le profilage racial devant les

2) In addition to ongoing coverage of the increasing number of various allegations brought before the courts[54], media attention to the issue was heightened on October 19, 2002 when the *Toronto Star* began a series of articles "Race and Crime" based upon its own analysis of police contacts data conducted by newspaper staff making claims that "justice is different for Blacks and Whites", "Blacks arrested by Toronto police are treated more harshly than Whites" and that "Police target black drivers"[55]. The subsequent irascible response of the then Chief of the Toronto Police Service and litigation initiated by the Toronto Police Association assured longevity to media attention to the controversy.

3) Canada's first and thus far only "official" foray into police racial profiling data collection, a type of undertaking now widespread among U.S. police organizations, was that of the Kingston Police Service commenced in 2003 and reported in preliminary form in May 2005[56]. The Police Service turned the data over to University of Toronto professor Scot Wortley, a well known anti-racial profiling advocate, for analysis. Despite serious shortcomings in the data collection, analysis, interpretation and presentation[57], an emotional statement by the Chief accepting the preliminary results at face value as evidence of "racial profiling" by his officers consolidated a perception of the validity of the study's allegations. Further racial profiling data collection is now being called for by advocacy groups and by many public authorities.

4) On February 17, 2003 the Ontario Human Rights Commission, citing "heightened public debate on the issue", solicited testimonials of a wide array of experiences of "racial profiling", or of perceptions that it was occurring, hoping "to raise public awareness of the harmful effects of profiling and in so doing illustrate the social cost of racial profiling".[58] The Commission received over 400 personal testimonials which formed the basis of its final Report. The Commission recommended that "all organizations and institutions entrusted with responsibility for public safety, security and protection should take steps to monitor for and prevent the social phenomenon of racial profiling".

5) On November 18, 2004, Ms. Libby Davies, New Democratic Party Member of Parliament for Vancouver East, using the language of the Ontario Human Rights Commission, put to

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tribunaux", Développements récents en droit criminel, Service de la Formation permanente du Barreau du Québec, 2004, Vol. 211, pages 88 and 89.

[54] Notable among these is the oft-misquoted appellate decision in *R. v. Brown* which, contrary to many reports did not "find racial profiling" but simply supported the right of the defense to conduct a vigorous cross examination of the arresting officer seeking evidence of racial bias. Mr. Brown eventually pled the charge of impaired driving.

[55] The complete series of articles, accompanied by subsequent additional material, commentary and news items can be found on the website of the *Toronto Star*: http://thestar.ca/

[56] Scot Wortley, *Bias Free Policing: The Kingston Data Collection Project – Preliminary Results*, Kingston Police Service http://www.police.kingston.on.ca/Professor%20Wortley%20Report.Kingston.pdf

[57] See my written review of the study presented to a public meeting called by the Kingston Police Association on June 7, 2005, available from the author: rmelcher@uottawa.ca Comments of this review are integrated into this paper.

[58] Ontario Human Rights Commission, *Paying the Price: the Human Cost of Racial Profiling*, (Ontario, October 2, 2003 http://www.ohrc.on.ca/english/consultations/racial-profiling-report.shtml)

> First Reading Private Members' Bill, Bill C-296 *"An Act to eliminate racial profiling"*[59] with purpose to "to prevent individuals from being stopped or otherwise investigated by enforcement officers solely on the basis of the individual's race, colour, ethnicity, ancestry, religion or place of origin." The Bill calls *inter alia* for "the collection of sufficient data on routine investigatory activities to determine if any enforcement officer has engaged in racial profiling" (¶5. (2) (*b*)) and places the onus on enforcement officials in that any "disparate impact (of "the routine investigatory activities of an enforcement officer") on racial, religious or ethnic minorities is, in the absence of evidence to the contrary, proof that the officer has engaged in racial profiling" (¶4. (2)).

The Commission on Systemic Racism in the Ontario Criminal Justice System (1995)

The Government of Ontario established the Commission on Systemic Racism in the Ontario Criminal Justice System in October 1992 following the recommendation of Stephen Lewis in his June 1992 report to the Premier of Ontario. The report was a response to civil disturbances in Toronto during May 1992 following Los Angeles riots related to the acquittal of police officers charged in the Rodney King beating.

Although this report[60] serves as the cornerstone authority for findings of "racial profiling" in Canadian jurisprudence, none citing it as an authority appear to have reviewed the actual evidentiary basis of its findings. Although it attracted little attention from social science researchers since the initial response to its publication in December of 1995, its importance for race advocacy was renewed as a result of attornment to the Commission's findings in the case of *R. v. Brown* (2003) O.J. No. 1251 in statements by Crown counsel J. K. Stewart, reported and affirmed in the reasons of Morden J.A.[61] as evidence of the existence of "racial profiling" in the Toronto Police Service.

> In the opening part of his submission before this court, counsel for the appellant said that he did not challenge the fact that the phenomenon of racial profiling by the police existed.

[59] Bill C-296, 1st Session, 38th Parliament, 53 Elizabeth II, 2004, House of Commons of Canada *"An Act to eliminate racial profiling"*. This initiative mirrored the U.S. "End Racial Profiling Act" (ERPA) of 2004 (S. 2132/H.R. 3847) introduced during the 108th Congress by Senator Feingold (D-WI) in the Senate and by Congressman Conyers (D-MI) in the House.

[60] Final Report of *The Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto, Queen's Printer for Ontario, 1995)

[61] *R. v. Brown* (2003) O.J. No. 1251 at ¶ 9

> This was a responsible position to take because, as counsel said, this conclusion is supported by significant social science research. I quote from the Report of The Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer for Ontario, 1995) (Co-chairs: M. Gittens and D. Cole) at 358:
>
> > The Commission's findings suggest that racialized characteristics, especially those of black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex (male), youth, make and condition of car (if any), location, dress, and perceived lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped on foot or in cars. This explanation is consistent with our findings that, overall, black people are more likely than others to experience the unwelcome intrusion of being stopped by the police, but black people are not equally vulnerable to such stops.

Once entered into Canadian jurisprudence, this attornment to the findings of the Ontario Commission has spread throughout the justice system. The term "racial profiling" only entered general use subsequent to the publication of the report of The Commission cited in ¶9, and so was not used by the Commission itself. Rather the report, at various points in its discussions and often somewhat indiscriminately, refers to terms such as "racial discrimination", "racial bias", "systemic racism", "over-representation", "racial disparity", "racial inequality", "differential treatment", "legally unjustifiable differences", "disadvantaging", "permitting discrimination", "inserts *racialization*", "transmitted bias", "passive toleration", "disregard".

Contrary to some of the conclusions attributed to it, the Commission did not examine or demonstrate the prevalence of racism in the criminal justice system or the extent to which the system was composed of overtly or covertly racist officials. On the contrary, the Commission wrote:

> The Commission assumed that persons with explicitly hostile attitudes towards racial minority people would constitute no more than a tiny minority of professionals within the criminal justice system. (p. 3)

The focus of the Commission's work was rather to inquire into "systemic racism" as defined in the Terms of Reference:

> …throughout society and its institutions, patterns and practices develop which, although they may not be intended to disadvantage any group, can have the effect of disadvantaging or permitting discrimination against some segments of society (such

> patterns and practices as they affect racial minorities being known as systemic racism). (p. 435)

The Commission was directed to focus its attention on systemic racism affecting black residents of urban centres in Ontario. In its effect this directed the Commission to focus attention on Toronto, which is where all of the Commission's original research was conducted. The issue of racism inherent in the law was not within the mandate of the Commission.

Although in almost every offence category whites are proportionately more represented than blacks, since the mid 1980s blacks have led in four charges: drug trafficking/importing; drug possession; obstructing justice; weapons charges. The Commission only considered disparities detrimental to blacks and further considered any such disparities as incontrovertible evidence of systemic racism. In its final report, the Commission explained how it saw its mandate.

> In so far as such patterns and practices cause racial minority people to experience worse treatment than white people a system may be said to reflect systemic racism. Thus the Commission's task involves the identification of such patterns and practices and the development of recommendations to eliminate them." (p. 3)

In the two studies examining sentencing and bail decisions, five types of offences were included: drug charges, sexual assaults, bail violations, serious non-sexual assaults and robbery. Only for drug charges was there a marked and significant difference between blacks and whites that was detrimental to blacks. In other offence categories there were either no significant differences or differences detrimental to whites. The researcher for this study suggests: "Such results could be explained by different patterns of alleged offending." (p. 122) In a related study of sentencing using the same sample of offenders, the researcher there concluded: "within the entire sentenced sample, race did not account for any more of the disparity in sentences than was due to differences in pre-trial detention and employment status" and also "Within the entire incarcerated sample, race had no effect on length of prison term, once pre-trial detention and aspects of criminal record were taken into account." (pp. 277-279) Yet, the Commission concludes from this:

> The conclusion is inescapable: some black accused who were imprisoned before trial would not have been jailed if they had been white, and some white accused who were freed before trial would have been detained had they been black. (p. v)

This conclusion is baseless.

"Racialization"

The foundation of systemic racism in the eyes of the Commission is "racialization", the belief in race as a social category and the making of judgments upon groups so constituted on the basis of their common ascribed trait.

> Racialization … consists of classifications of people into racial groups by reference to signs of origin – such as skin colour, hair texture and place of birth – and judgments based on these signs about their character, skills, talents and capacity to belong in this country. (p. ii)

> Racialization is the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life. It involves:
> - selecting some human characteristics as meaningful signs of racial difference;
> - sorting people into races on the basis of variations in these characteristics;
> - attributing personality traits, behaviours and social characteristics to people classified as members of particular races; and
> - acting as if race indicates socially significant differences among people. (p. 40)

> Racialization is active in any social system in which people act and institutions operate as if race represents real and significant differences among some human beings. (p. 41)

This concept of "racialization", drawn from U.K. and U.S. theorizations, is a theoretical construct for understanding how beliefs in the foundedness of racially biased judgments emerge and are maintained. "Racialization" is not restricted to an understanding of the social construction of disadvantaged groups. Unfounded beliefs about groups formed by shared traits may be positive or negative. Furthermore, the extent to which such beliefs are held and what specific beliefs are held may differ among individuals and groups in society. Such a diffuse concept cannot help to demonstrate bias and discrimination, much less be considered as synonymous to it. The holding of stereotypical views about a group is not the same thing as, nor even a necessary condition for bias or discriminatory practices towards that group.

Nor can disparities between "racialized" groups be held as evidence of legally prohibited bias and discrimination. The same process described here as "racialization" could equally explain how beliefs in astrology are commonly held. It is not unlikely that one could find statistical disparities among groups of offenders formed by the signs of the Zodiac, just as significant disparities should be expected among sufficiently large groups formed by any arbitrary classification scheme[62], moreover so by classification schemes that may garner some degree of belief within a population and thereby tend to fulfil their expectations.

Yet the authors of the Commission's report often appear to accept that the very existence of "racialized" groups sharing any form of disadvantage constitutes sufficient evidence of bias and discrimination:

> These processes of introducing, perpetuating, tolerating and transmitting racialization within social systems constitute systemic racism. (p. iii)

Evidence of systemic racism

The Commission considered three types of evidence in arriving at its findings: descriptive indicators of the relative size of black and other groups at various points in the criminal justice system; public opinion and self-report surveys and anecdotal evidence gathered through public consultations; and two studies of samples of people in the course of processing, at decisions on bail and sentencing. We shall examine each in turn.

i) Over-representation

Much of the Commission's evidence for its finding of systemic racism in the criminal justice system consists of descriptions of over-representation of blacks at various stages in criminal justice processing. The Commission defines systemic racism as the production of racial inequality (p. 39). Then, by logical obversion, the existence of any racial inequality or disparities

[62] As for any non-random groups, various systemic influences should be expected. Only for random groups formed through proper probability sampling could any expectation that variances between groups fall within "standard error" be reasonable. Then with very large groups, all differences no matter how trivial would show up as statistically significant.

is defined by the Commission to constitute evidence of the action of systemic racism. All other explanations of disparities in the numbers of persons before the criminal justice system defined by skin colour are excluded without justification or explanation: "These data cannot be rationalized by racial or cultural propensities to commit offences." (p. iv)

This use of disparities to found the conclusion of systemic racism requires a leap of reasoning and a somewhat unique perspective on the duties of the criminal justice system with regards to fairness and impartiality. The notion of equality rights, viewed in the light of equality of outcomes, provided a cornerstone for the work of the Commission and is seen by it to impose two duties on the criminal justice system. The first of these is to not perpetuate (or transmit) bias. Thus, it is incumbent upon successive actors in the criminal justice system to take action to redress disparities in the racial composition of those appearing before them. The second duty of the criminal justice system is to "adapt to diversity in the community it serves" (p. 3). Thus the Commission concludes: "A system that provides only uniform treatment, in its effect, treats people unequally by ignoring the needs of those who do not fit into its mould" (p. 3). In this manner, the Commission defines any differences in criminal justice outcomes detrimental to blacks as reflecting a lack of equality rights. Thus over-representation is seen, not simply *prima facie* evidence, but sufficient in and of itself evidence of systemic racism. Any failure on the part of the institutions and actors of the criminal justice system to be aware, to assign priority, to redress or to compensate for these disparities is defined as toleration and even facilitation of systemic racism.[63]

> Racialization may be tolerated by the policies, procedures and norms of a system. It may be transmitted within particular systems or among different systems. These processes of introducing, perpetuating, tolerating and transmitting racialization within social systems constitute systemic racism. (p. iii)

This view of the duties of the criminal justice system with regard to equality before the law is not an uncontested position and is, at the very least, one that has received fuller debate in legal scholarship than the Commission acknowledges.

[63] For instance, the Commission argues that systemic racism may be manifest through "passive toleration" and "disregard". Passive toleration is cited in the bail process "because decision-makers and system managers may not know the extent to which practices result in discrimination." The Commission writes of its notion "disregard": "Sometimes disregard results from a system's operating norms not treating racial equality as a priority". (p. 54)

Even the very assertion of over-representation can be questioned, although descriptive statistics at first glance appear convincing. The Commission points to the large number of blacks in admissions to prison, particularly in pre-trial admissions (remand) and in sentenced admissions for drug charges and obstructing, as evidence of over representation. We shall leave aside for the moment that the Commission gives no indication of what standard it uses to define appropriate representation or over-representation. As we have discussed elsewhere[64], this is by no means a simple thing to measure. The Commission makes no mention of the fact that, for the majority of offence types there are either no disparities in the numbers of black and white offenders or disparities that are detrimental to whites. Such exclusions make for a somewhat less than full examination of the issue of race in criminal justice.

The Commission dismisses off-hand any suggestion that disparities in the number of incarcerated blacks and whites might reflect patterns in offending[65], ignoring suggestions in this sense from its own researchers. Such patterns need not be limited to differences as to the likelihood of offending between groups formed by skin colour or self-ascribed racial identity, which the Commission explicitly rejects. Statistics showing over-representation may themselves be artifacts. Criminal justice statistics generally report incidence (events), not prevalence (persons). For example, prison admissions are not discrete individuals. Yet skin colour was only recorded by the Commission for prison admissions and even then neither systematically nor reliably. As this author has pointed out elsewhere:

> One consideration that must be borne in mind when examining these statistics is that they represent *admissions* to custody, not individual offenders admitted to custody. That is, the same person may be admitted to custody more than once in the same year, and this would be recorded as distinct admissions. Most sentences in provincial institutions are short. Almost one-half of all sentenced custodial admissions are for a term of one month or less and almost three-quarters of sentenced admissions in 2000-01 were for periods of three

[64] "Do Toronto Police Engage in "Racial Profiling"?" *Canadian Journal of Criminology and Criminal Justice*, July 2003.

[65] The Commission simply concludes without any further explanation "These data cannot be rationalized by racial or cultural propensities to commit offences." (p. iv) Further in the report, the authors equate recognition of potential differences in patterns of offending that may be present in differences between skin colour or identity groups with what they themselves term as absurd and superficial beliefs in genetically and culturally predetermined criminal offending. Such arguments *in absurdum* only serve to draw attention away from the main argument, that disparities may also reflect legally relevant factors, which cannot be easily dismissed by careful reasoning.

> months or less (Hendrick and Farmer, 2002). (Actual time served may be less yet.) These statistics leave significant opportunity for multiple sentenced admissions of the same individual in any given year.[66] For this reason, it is inappropriate to compare annual admissions to populations.[67]

Repeat offenders are over-represented in admissions statistics. The observation by one of the studies initiated by the Commission does indeed suggest that the group of black offenders had, as a whole, more recent convictions than white offenders. Therefore, a small yet very active number of offenders sharing common traits with a larger population may cause a naïve observer to conclude abusively that their offending could be inferred to the larger population. We know that crime is a highly compact phenomenon, with small numbers of locations and of individuals accounting for a large proportion of reported incidents. For example, a pioneering study reported that 3 per cent of locations in the city of Minneapolis accounted for 50 per cent of police calls for service[68]. Even in cities and neighbourhoods that are characterized by high crime rates, most locations are crime-free. Similarly, among large groups in the population showing purported high rates of offending, most individuals will be law-abiding. This is all the more likely the case when groups are formed by arbitrary criteria with no relation to offending, such as skin colour or racial identity, the effect of which is to belie their true heterogeneity.

It is surprising and suspect that the Commission devoted no effort to gaining any understanding of black offenders themselves, the size of the offender population, their patterns of offending and their specific characteristics and their specific experience. The Commission simply accepts that black offenders are representative of the larger group with which they share skin colour or elected racial identity. Statistics demonstrating over-representation of black offenders in the criminal justice system cannot be used in this way to describe the general experience of the entire black population. To do so is to engage in the same practice of racialization that the Commission denounces.

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[66] Although annual recidivism statistics are not currently available in Canada, a recent Statistics Canada study of recidivism among youth and young adults makes it clear that these rates are relatively high: this study found that 60 per cent of offenders convicted in 1999/2000 had prior convictions. Thomas, M., Hurley, H. and Grimes, C. (2002) "Pilot Analysis of Recidivism among Convicted Youth and Young Adults – 1999/00" *Juristat, Vol. 22 no 9*, Ottawa, Statistics Canada, October 2002).

[67] Melchers, R. and Julian V. Roberts, "The Incarceration of Aboriginal Offenders: Trends from 1978-2001" *Canadian Journal of Criminology and Criminal Justice*, April 2003, pp" 211-242.

[68] Sherman, Gartin and Buerger (1989) cited in Vincent F. Sacco and Leslie W. Kennedy, *The Criminal Event*, Scarborough, Nelson Canada, 1994, p. 133

ii) Opinion and Self-Reported Experience

Most of the Commission's original work was devoted to gathering perceptions: public opinion, the opinions and self-reported experiences of members of racialized groups and of criminal justice actors. For instance, the paragraph cited in the reasons of Morden JA in *R. v. Brown* as evidence of bias in policing is drawn from a chapter devoted to perceptions of policing by black Torontonians. The Commission conducted a survey of Metro Toronto residents gathering their perceptions of inequality in criminal justice and asking them to report their experiences of being stopped by police in the past two years. This information was supplemented with anecdotal testimony submitted to the Commission and a general discussion of issues drawn from other reports, such as Metro Toronto Police Service's July 1994 report on race relations *Moving Forward Together* and the report of the Ontario Race Relations and Policing Task Force chaired by Clare Lewis.

While widely reported perception of bias in criminal justice certainly constitutes a problem in its own right, it cannot be considered evidence of the fact of bias or discrimination. Self-reported experiences as gathered in the Commission survey constitute no more than a large number of randomly-solicited anecdotes and are subject to all the evidentiary precautions that must be given to anecdotal information. The Commission roundly dismisses, without further discussion, any qualification of this evidence:

> These methods, when used to research inequality and discrimination, are often controversial. … They are said to result in over-representation of the views of those most interested in the issues and under-representation of what the average person thinks. Critics frequently dismiss their findings as anecdotal and unscientific. We do not accept this dismissal of personal testimony, but we do recognize that this type of research has limits. (p. 11)

For further information on these limits, the reader is simply referred to a commonly used introductory undergraduate textbook on social research methods. Notwithstanding this off hand dismissal, the issue of perception in criminal justice is characterized by a long-standing and

distinguished line of inquiry[69]. Contrary to the Commission's off-hand assurances, all of this work underscores the wide disparities between perception and reality in criminal justice[70].

In its examination of court practices, also based upon the Commission's solicitation of perceptions, the authors of the final report chide critics in the legal community of this equating of belief and fact:

> Many Ontario trial judges and lawyers do not share the Ontario Court of Appeal's (with reference to the judgment of Rosenberg, J.A. in R. v. Richards previously discussed) respect for and willingness to address perceptions of systemic racism in the courts. Some react instead by insisting the perceptions are groundless, not widely held or insignificant because they are based on anecdotes. Defensive reactions such as these may reflect a view that systemic racism exists only where decisions about white and racialized accused in similar circumstances consistently produce different results, and a belief that no such differences occur in the Ontario criminal justice system. Evidence of such differences is obviously important for identifying discriminatory practice, which is one important form of systemic racism. As we show in other chapters, evidence exists of racial discrimination in the Ontario criminal justice system. (p. 222)

In fact, no such evidence is put forward by the Commission.

iii) Studies of Bail and Sentencing Decisions

The Commission contracted Tony Doob of the Centre for Criminology of the University of Toronto and Julian Roberts then of the Department of Criminology of the University of Ottawa[71] to conduct a study of decision-making with respect to bail and custodial sentencing. Doob and Roberts, both among the leading criminologists in the country, have demonstrated high quality scholarship in their studies for the Sentencing Commission among other work. Their work for the Commission was of no lesser quality. The researchers carefully explained the methodological choices made, the limitations of the research and qualified the results reported, which were

[69] A classic book in the field is Richard L. Hanshel and Robert A. Silverman, editors, *Perception in criminology*, Toronto, Ont., Methuen, 1975. More recently there is also Julian V. Roberts and Loretta J. Stalans, *Public opinion, crime, and criminal justice*, Boulder, Colo., Westview Press, 1997

[70] Thomas Grüter *op. cit.* points out the fallacy of equating belief with fact, especially for groups whose common identity is founded upon a shared experience of oppression and discrimination: "In 1994 Ted Goertzel of Rutgers University conducted a study in which subjects read 10 conspiratorial legends and were then asked which they found credible. A large proportion of African-Americans in the study believed the U.S. government had created the AIDS virus in secret laboratories and had deliberately infected black people."

[71] Roberts is presently assistant director of the Centre for Criminology at Oxford University.

generally mixed as to the impact of race in decision-making. None of this precaution, however, was reflected in the reporting of this work in the final report of the Commission.

The sample used for both these studies, compiled in 1993, was well described in the report:

> To investigate the exercise of discretion in the remand process, the Commission conducted a statistical study of imprisonment decisions for samples of black and white persons charged with any of five offence types: drug charges, sexual assaults, bail violations, serious non-sexual assaults and robbery. (Doob with Roberts) … The sample, 821 adult males described by the police as black and 832 adult males described by the police as white, was drawn from Metro Toronto Police files (which included crown briefs) for 1989/90. … 1989/90 was the mid-point of a period with an astounding and disproportionate rise in the admission of black persons to Ontario prisons, particularly to prisons serving the Metro Toronto area. (p. 120)
>
> This sample was randomly selected from police files using a matching technique that would ensure significant and virtually identical numbers of accused described as black and white charged with each offence type. To supplement the information about charges and race, the Centre collected a great deal of data about personal characteristics of the accused, previous criminal histories and how they were processed through the criminal justice system. (p. 265)

The researcher points out that, because of the sampling technique and the selection of specific offences for examination, the results of the analysis derived from the sample "as a whole" (across all offence types) should not be generalized to all criminal offences or all offenders. For the study of remand decisions, black and white accused persons were compared within each offence type controlling for personal characteristics, ties to the community and criminal histories. Specifically the influence of four characteristics was considered: previous criminal history[72]; employment status; fixed address; and "single" (marital) status.

It is clear that these nine alternative explanatory variables, although all potentially relevant factors in decision to hold or remand, do not exhaust the list of legally relevant considerations for decision-making. These were simply the factors that were available in the records, including Crown briefs. Therefore it would be fallacious to conclude that any remaining disparities after

[72] comprised of -number of previous convictions for any criminal offences, -time since the last conviction, -number of previous convictions for violent offences, -number of previous convictions for the same offence as the current charge offence, -most serious previous conviction, -length of jail sentence(s) for previous conviction(s) (p. 128)

these factors had been considered would be indicators of racial bias alone. At most, bias and discrimination could be among the remaining explanatory factors of decisions taken.

The findings of the study looking at pre-trial detention concluded that:

> For the separate categories of sexual assault, bail violation and robbery charges, race did not make a significant difference to whether the accused was imprisoned before trial. For serious non-sexual assault charges, race made a small but significant difference to likelihood of imprisonment before trial. For drug charges, race made a marked and significant difference to imprisonment before trial. (p. 143)

Despite cautions against making generalizations on the basis of the sample taken as a whole, the Commission nonetheless falsely reports these results:

> across the total sample, race made a small but significant difference to imprisonment before trial. Specifically, black accused were more likely than white accused to be detained. (p. 143)

This conclusion is false and simply reflects by aggregation[73] the influence of the very marked differences for the sole offence category of drug charges beginning in the 1980s and, as the researcher cautioned, inferences cannot be made from it. In discussion of the approach of this research, the author of the study states:

> Such results could be explained by different patterns of alleged offending or differences in police charging practices. Another explanation is that racial bias in the remand process involves a complex and subtle response to combinations of the accused's race and specific offences. (These explanations are obviously not mutually exclusive.)

The report notes, for example, the importance that employment status had on detention decisions. In separate discussions, the Commission report also acknowledges the impact of communication barriers and the fact that the accused understand neither of the case against them nor how decisions affecting them are being made (pp. vi, 180). Nonetheless, despite these mixed results and necessary qualifiers, the Commission reports the results of this study without any equivocation:

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[73] This error is known as Simpson's Paradox. See for example, Gary Malinas and John Bigelow, "Simpson's Paradox", *The Stanford Encyclopedia of Philosophy (Spring 2004 Edition)*, Edward N. Zalta (ed.), http://plato.stanford.edu/archives/spr2004/entries/paradox-simpson/

> The data disclose distinct and legally unjustifiable differences in detention decisions about black and white accused across the sample as a whole and for some specific offences. The conclusion is inescapable: some black accused who were imprisoned before trial would not have been jailed if they had been white, and some white accused who were freed before trial would have been detained had they been black.

The introduction of the notion of transmitted bias disqualifies evidence of any competing influences to that ascribed to racial bias and discrimination (p. 51) and makes foregone the Commission's finding of systemic racism. Communication barriers are thus defined as disregard contributing to the transmission of systemic racism.

> …even if charges are managed properly, a failure to explain the process or the reasons for decisions shows a lack of respect. When an affected person is from a racialized community the justice official involved is white, this lack of respect may well be experienced as racist even if discrimination is not intended. That experience may in turn provoke suspicion about why information is being withheld. In short, lack of communication may be experienced as disrespectful and as indicating racialization. (p. 180)

The important influence of unemployment on decision-making is similarly discounted by the Commission and simply defined as transmitted "tolerated racial bias" from the labour market, contributing to systemic racism.

> These findings about employment status are important, given the higher rate of unemployment recorded for black accused in the total sample, and in the drug charge and bail violation samples. They suggest, in particular, that racial inequality in labour markets may be transmitted into the bail process, where it contributes to racial inequality in imprisonment before trial. (p. 143)

> A standard that treats employment status or income as a necessary factor in criminal justice decisions is likely to result in disparate outcomes for white and racialized people. Such a standard has a racist impact even though it is not motivated by racial hostility. (p. 58)

The same arguments disqualifying evidence in favour of presumption are even more apparent in the examination of custodial decisions (decision to sentence to custody and length of custodial decision) after conviction. Inevitably, many of those accused who constituted the original sample were not sentenced to custody and so attrition resulted in small numbers in some offence categories, making unfeasible detailed statistical comparisons of sentences of black and white

persons convicted. Therefore, the analysis was conducted on the entire sentenced sample and also on a sub-sample comprised of those sentenced for drug offences, bail violation and sexual assault. Because of the manner in which the sample was constituted, results from neither the sample nor the sub-sample may be generalized.

There were notable differences between black and white convicted men that could constitute factors in sentencing: although less likely to have a criminal record, blacks sentenced were more likely to have a recent conviction; blacks were more likely to have contested the charge, been detained before trial and been prosecuted by indictment; blacks were more likely to be unemployed. For the entire sample race was not found to account for any more of the disparity in sentences than was due to differences in pre-trial detention and employment status. Within the entire incarcerated sample, race had no effect on length of prison term, once pre-trial detention and aspects of criminal record were taken into account.

Among those convicted of drug offences, bail violation and non-sexual assault[74], race had a small but statistically significant[75] influence on sentencing decisions beyond the effects of other factors. Unemployment, detention before trial, not-guilty pleas, and prosecution by indictment were related to the likelihood of prison sentences. Among those in this group sentenced to custody, race had an effect on sentence length independent of the effect of time served before trial or criminal record: blacks received shorter custodial sentences. The shorter prison terms of black prisoners were mostly due to time spent in custody before trial and less serious criminal records. However, because the incarcerated sample is relatively small, the study did not compare in detail factors such as criminal record or aspects of criminal justice processing that could influence sentence length.

The Commission nonetheless misreports these findings as follows:

> A major study of imprisonment decisions for the same offences indicates that white persons found guilty were less likely than black persons to be sentenced to prison. White

[74] Take note of the afore-mentioned over-representation of Blacks among persons accused and convicted for drug offences. This would have weighed heavily in the analysis of the sub-sample.
[75] In actual fact it is an error to use statistical inference as a proxy for effect size when samples are non-probabilistic and when inference is impossible. The error is complicated further when distributions are skewed.

> people were sentenced more leniently than black people found guilty, even though they were more likely to have a criminal record and to have a more serious record. The differential was most pronounced among those convicted of a drug offence. Within this sub-sample, 55% of black but only 36% of white convicted persons were sentenced to prison. (p. vii)

Such analytical statements are not evidentiary in nature, but rather fly in the face of the careful weighing of evidence. Their cumulative effect is incendiary. The Commission either did not understand the research contracted or deliberately chose to misreport its results.

The mandate, assumptions and operating definitions adopted by the Commission made the finding of systemic racism inevitable and without validity. The Commission could not have failed to find systemic racism. Such "unfalsifiable" statements can lay no claim to status as scientific finding, only as unsubstantiated prior belief. Even in the face of mixed and contradictory evidence, the Commission maintained its foregone conclusion that:

> Systemic racism, the social process that produces racial inequality in how people are treated, exists in the Ontario criminal justice system. Commission findings leave no doubt that racialized people experience the system as unfair and that at key points in the administration of justice, the exercise of discretion has a harsher impact on black than white people… The conclusion is inescapable: the practices of the criminal justice system tolerate racialization. (pp. 409-410)

This simplistic assertion cannot be considered credible on its evidence. Reliance upon the report of the Commission as founding the existence of "racial profiling" is an unfortunate attornment of the Court to unsworn, unexamined and ultimately unreliable evidence.

The *Toronto Star* articles "Race and Crime"[76]

On October 19 2002, the *Toronto Star* began a series of articles entitled "Race and Crime", making claims that "justice is different for blacks and whites", "blacks arrested by Toronto police

[76] The complete series of articles, accompanied by subsequent additional material, commentary and news items can be found on the website of the *Toronto Star*: http://thestar.ca/. The following discussion is excerpted and adapted from my article "Do Toronto Police engage in 'racial profiling'?" *Canadian Journal of Criminology and Criminal Justice*, July 2003, pp. 347-365.

are treated more harshly than whites" and that "Police target black drivers". Subsequent stories suggested Toronto Police were engaging in "racial profiling", defined by the *Star* as "the practice of stopping people for little reason other than their skin colour". Published interviews with black community leaders and advocates added the weight of anecdote and presumption to charges of racial profiling and University of Toronto criminologist Scott Wortley, former researcher for the Ontario Commission on Systemic Racism in the Criminal Justice system and a leading advocate of belief in racial profiling, deemed the *Star* analysis "clear evidence of what, until now, has been based largely on assumption."[77]

Representatives of the police responded angrily, denying accusations of singling out blacks. The Toronto Police Service commissioned an independent review of the *Star*'s analysis by a prominent lawyer, Alan Gold, and a University of Toronto sociologist, Edward Harvey[78]. Their review concluded that the *Star* analysis was "junk science" and the conclusions of the articles "completely unjustified, irresponsible and bogus slurs"[79]. The police union went further and launched a $2.7 billion class action libel suit on behalf of its 7,200 members. The uproar spread throughout the Ontario criminal justice system with judges, attorneys, crown prosecutors and more police officials weighing in to make further controversial statements supporting or refuting claims of racial profiling in the criminal justice system.

The *Toronto Star*'s evidence for claims of "racial profiling"

What evidence is there that Toronto Police engage in what is called "racial profiling"? The claims made by the *Toronto Star* were based on the newspaper's own analysis of arrest data from the Toronto Police's Criminal Information Processing System (CIPS) obtained under an access to

[77] The admission that the findings of the Ontario Commission on Systemic Racism in the Criminal Justice System were "based largely on assumption" is an interesting admission coming as it is from one of the Commission's staff researchers.

[78] Harvey, Edward B. (2003) *An Independent Review of the* Toronto Star *Analysis of Criminal Information Processing system (CIPS) Data Provided by the Toronto Police Services (TPS): A Summary Report*, Toronto, Toronto Police Service, February 20, 2003. http://www.torontopolice.on.ca/
Harvey, Edward B. and Richard Liu (2003) *An Independent Review of the* Toronto Star *Analysis of Criminal Information Processing system (CIPS) Data Provided by the Toronto Police Services (TPS)*, Toronto, Toronto Police Service, March 27, 2003. http://www.torontopolice.on.ca/
Gold, Alan D. and Dr. Edward B. Harvey, (2003) *Executive Summary of Presentation on behalf of the Toronto Police Service*, Toronto, Toronto Police Service, February 20, 2003. http://www.torontopolice.on.ca/

[79] Gold and Harvey (2003) *ibidem*

information request. The data were recorded between late 1996 (when CIPS was first implemented on a trial basis) and early 2002.

The *Toronto Star*'s investigative journalist team, under the supervision of Dr. Michael Friendly, professor of psychology and director of consulting services for York University's Institute for Social Research, worked with a database consisting of 483,614 incidents for which someone had been arrested, charged or ticketed. These incidents resulted in more than 800,000 charges being laid under criminal and other statutes or by-laws. Of these charges, 301,551 were for Criminal Code or drug offences.

No individual identifying information was included in the information obtained by the *Star* under the access to information request, and offences were aggregated into broad categories to protect individual identity. As well as incident, charge and police disposition detail, physical identifying information was also provided for the age, gender, skin colour (white, black, brown, other), immigration and residency status in Canada, employment information and country of birth of those arrested, charged or ticketed. The data also provided some limited information on the criminal histories of individuals arrested if they were listed in Canadian Police Information Centre (CPIC), a national database of criminal records: previous convictions, bail status, probation orders or conditional release status. Complete information, the *Star* reported, was not available in every instance and the analysis excluded those cases where specific information was missing. As with all police-recorded data, more serious offences and known offenders would tend to be over-represented among completed records and the least serious offences under-reported[80].

CPIC does not provide information on all police contacts with the public but only records incidents or police actions in which a person is arrested, charged or ticketed. The purpose of CPIC is to manage information that is likely to be required at subsequent stages in criminal justice processing. Therefore, no information is reported for an incident where there is no subsequent action taken and information is often incomplete, especially in cases where there is

[80] Melchers, R. (2001) *What Can (and Can't) Statistics Tell Us About Crime and Criminal Justice*, Ottawa, Office of the Auditor General for Canada, November 29, 2001: contract no 1469. Police report more diligently t when there is greater likelihood of follow-up.

little expectation of a contested plea or follow-up. Depending on the type of offence, incidents reported would be only a small portion of the total number of instances in which the police intervened. CPIC coverage is furthermore not consistent throughout this period as it was being progressively implemented, initially on a voluntary basis.

The *Star* analysis focused its attention, though not exclusively[81], on two categories of offences: arrests, charges or ticketing for "out-of-sight" driver offences (such as driving without a valid licence or without insurance) arising from vehicle stops; and police dispositions of persons charged with single counts of simple drug possession offences. Both were chosen because they offered among the more commonly suspected, if not also more likely, opportunities to observe racial bias in policing. The belief that police stop black drivers for reasons of skin colour alone (Driving While Black) is widespread. The American Civil Liberties Union has long considered this an issue, sponsoring, conducting and lobbying for more studies. Drug offending is a stereotypical black crime in the minds of many, an idea reinforced by local media portrayals of "Jamaican posses". Even the Ontario Commission on Systemic Racism in the Criminal Justice system itself had pointed out the significant presence of black offenders among those charges with drug-related offences. Both situations further rely on considerable officer discretion in enforcement.

Traffic Stops

Traffic stops were chosen, following the lead of U.S. studies according to the *Star*, because of the high degree of discretion (therefore potential for discrimination) in most police decisions to stop vehicles and, because police would have no *prima facie* indication of these out-of-sight infractions at the time of their decision to stop a vehicle. Furthermore, charging for such offences is often mandatory. The researchers thus assumed, though with no reason given, that the racial distribution of these charges would be representative of the racial distribution of all vehicle stops

[81] The Toronto Star also looked at cocaine possession and violent offences, as well as a number of other issues. However in these cases it is less clear from published reports what precise definitions and procedures were used. It is therefore difficult to review these in any detail. One might also suspect that over-representation of Blacks for these offences might be less simple to attribute to "over-policing" alone due in part to lessened police discretion.

and also that that any differences in this distribution from that of the population would be evidence of bias or "racial profiling".

The *Star* reported that of 4,696 out-of-sight offences reported over the five-year period for which skin colour was recorded for purposes of identification, 33.6 per cent involved drivers described as black. The *Star* wrote: "It's assumed random checks would generate a pattern of charges that mimics the racial distribution of drivers in society as a whole" citing U.S. studies that consider this as a "bellweather for racial profiling". Skin colour is not identified on driver's licences in Ontario, nor is any record of kilometres driven available for registered vehicle owners by skin colour. So the *Star* used as a proxy the proportion (8.1 per cent) of the Toronto population who reported themselves as black on the 1996 Census forms. The difference between these two proportions is considered by the *Star* to be evidence of "racial profiling". There are two problems with the assumption that proportions of drivers stopped by police would be identical to proportions within the population. The first relates to the use of population data and the second to the assumption of randomness in police vehicle stops.

The use of population data in studies of "racial profiling"

Contrary to the assurances of the *Star*, this method is not well supported in the literature, quite the contrary in fact. For example, McMahon *et alia*[82] conclude from their review of racial profiling research that studies of racial bias in traffic stops "too often base their conclusions on comparing preliminary data on traffic stops to aggregate city demographics without establishing credible benchmarks for comparison purposes. These superficial evaluations are dangerous, in that they may foster incorrect conclusions and generate inappropriate corrective measures."[83]

Incidence versus Prevalence

The reference to population data results in two errors. First, data on traffic stops and population data belong to two very different categories of statistics and cannot be combined or compared

[82] McMahon (2002) *op. cit.*
[83] *Ibidem*, at 1

without introducing considerable distortions that compromise the ability to draw accurate conclusions. Counts of traffic stops measure incidence. They are counts of events, not of individuals. Indeed a single individual may be involved in more than one event over any defined period. This is more likely the longer the period covered. Thus, the proportion of stops that involve drivers of any given characteristic (incidence) cannot be assumed to be same thing as the percentage of drivers stopped who present that characteristic, known as prevalence. Population statistics are only an appropriate base for statistics that measure prevalence. By comparing incidence to population, one inevitably creates the false impression that any group with some number of members who are stopped frequently is over-represented as a whole. When the nominator and the base in a rate do not have the same units of count, or when the units of counts are insufficiently interrelated, this is called *base error*.

The impact of repeat offenders (and also repeat victims) on aggregate crime counts receives a great deal of attention from specialists. Crime and victimization are highly concentrated phenomena, more highly concentrated yet among the young. Indeed, much research suggests that a much smaller portion of the population experiences crime than the reported numbers of offences or victimizations divided by the total population would suggest[84]. A much-cited U.S. study found 10 per cent of offenders involved in more than 50 per cent of crimes[85]. Fully one half of incidents reported by the Canadian General Social Survey in 1988 were repeat victimizations[86]. A recent study of recidivism among convicted youth and young adults between the ages of 18 and 25 found that 60 per cent of offenders convicted in 1999/2000 had prior convictions, 43 per cent multiple prior convictions[87]. Carrington *et alia*[88] found that among youth born in 1979/80,

[84] See *inter alia* Robert, Ph. 2001 who reports that 9 per cent of French victims surveyed in 1996 reported two-thirds of assaults and almost the totality of personal thefts.
[85] Eck, J.E., Gersh, J.S. and Taylor, C. (2000) "Finding crime hot spots through repeat address mapping" in V. Woodsworth, P.G. McGuire, J.H. Mollenkopf and T.A. Ross (eds) *Analyzing Crime Patterns: Frontiers of Practice.* Thousand Oaks, CA, Sage.
[86] Sacco, Vincent and Holly Johnson, (1990) *Patterns of Criminal Victimization in Canada*, Ottawa, Statistics Canada, Canadian Centre for Justice Statistics, 11-612E, No 2, March 1990.
[87] Thomas, M., Hurley, H. and Grimes, C. (2002) "Pilot Analysis of Recidivism among Convicted Youth and Young Adults – 1999/00" *Juristat, Vol. 22 no 9*, Ottawa, Statistics Canada, October 2002.
[88] Peter J. Carrington, Anthony Matarazzo and Paul deSousa, *Court Careers of a Canadian Birth Cohort*, Ottawa, Canadian Centre for Justice Statistics, Statistics Canada, 2005, Catalogue no. 85-561-MIE — No. 006; p. 6.

> on average, between the ages of 12 and 21 inclusive, alleged offenders were referred to court in connection with 3.1 criminal incidents — or 2.4, if administrative offences are excluded. Just over half of alleged offenders had only one incident in their court career. Sixteen percent of alleged offenders were classified as chronic offenders, who were responsible for 58 per cent of all alleged criminal incidents.

Failure to take such concentration into account can often result in very large errors in interpretation. These sorts of errors are common when incidence statistics are used to infer to prevalence. It can result in a small but very active group having an inordinate impact on how a more diverse larger group encompassing them is perceived. For example, a single address in a street block to which police are frequently called may result in an otherwise peaceful and law-abiding neighbourhood being branded as crime-ridden. This is called *aggregation error* and is part of what is commonly termed the *ecological fallacy*.

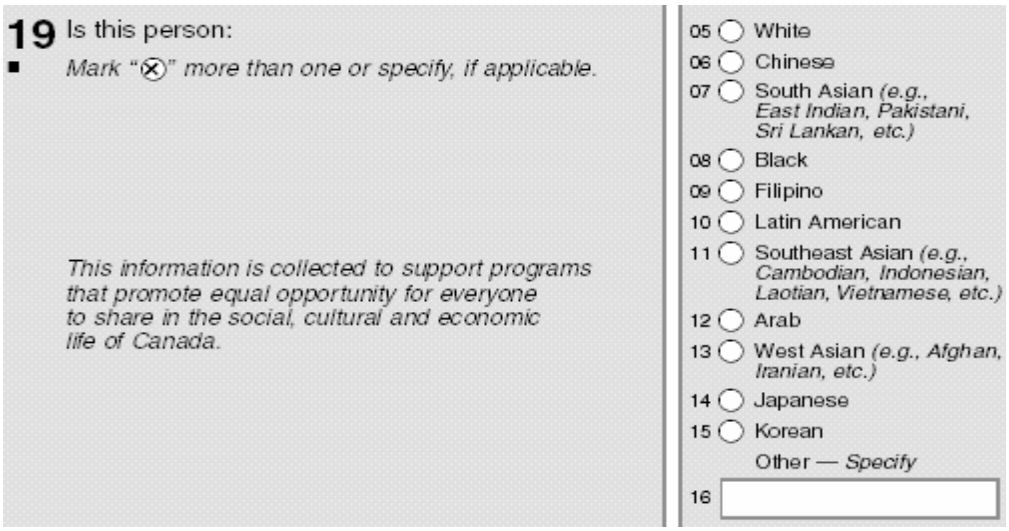
To illustrate how these errors together may skew interpretations, consider an arbitrary group of 10 people. Only one of them commits a crime and is, in this example, charged 10 times for a criminal offence over a set period of time. Ten percent of the group has therefore been charged with a criminal offence (*prevalence*). Yet, simply placing the number 10 *(incidence*) next to the total number of people in the group as a base, without any information about repeats, one could just as easily conclude, just as for any number from one to 10, that all 10 members of the group had committed an offence. One might then be tempted to spuriously conclude that whatever common trait the group shared was in some way related to the fact that such a seemingly large proportion of the group might appear engaged in crime. The nominator in this illustration is not logically connected to the base and produces a false and highly misleading aggregate rate. Comparing the number of incidents in which a charged person’s skin colour is black with the total population sharing this characteristic, even if such a statistic was available and reliable, is an example of such errors of aggregation and base.

The measurement of racial identity

The second error that arises in the use of population data is one of measurement. Black identity as measured in the Census of the population is not the same thing as black skin colour as reported by a police officer for identification purposes. The measurement of collective identity is not as

simple a matter as one might think and it has long been one of the most challenging measurement issues for demographers and census designers. Some countries have historically used blood quantum definitions of racially defined groups, subject to a host of reliability problems. In Canada, skin colour identity was only included in the Census of the population for the first time in 1996 in response to the needs created by equity legislation. Before asking about membership in equity groups, the Census long form, completed by one-fifth of respondents, first of all asks respondents to identify their ancestry, defined by the question as ancestral ethnic or cultural group(s)(Question 17).

Among the list provided for illustration we find examples of groups defined by territorial origin, residence, national citizenship, language, bloodline, faith, ethnicity and culture. "African", for instance, is not included in the illustrative list compiled from the most frequently reported answers. Respondents who do not report Aboriginal ancestry (Question 18) are then asked to complete a further question (question 19).



Only two of the responses refer to skin colour: "white", which is the default for elimination from the count of visible minorities and "black", the only colour among a list of otherwise visible minority groups based on geographical origin. In 1996, 8.1 per cent of respondents for the City

of Toronto were estimated as black. In 2001, inference from respondents to the 20 per cent Census sample identifying themselves as black was made to conclude that there were 204, 075 individuals making up 8.3 per cent of the total population. From definitions for the Census sample, people subjectively reporting black identity could clearly be either a much smaller or a much larger number than the number of people who might be described objectively by a police officer as having black skin colour for purposes of identification. The two definitions are essentially unrelated. McMahon (2002) also indicates concern for the accuracy of Census data itself, especially as regards under-coverage of specific populations such as non-documented immigrants, as well as minority populations in urban areas in general.

Nor can the reliability of officer recording of skin colour for purposes of identification be assumed. This is a problem that the U.S. Department of Justice examined in a study of the reliability of officer-identified race, ethnicity and gender at a California border crossing and a major metropolitan airport[89]. Concurrence rates among individuals in identification of travelers varied by race, ethnicity and gender. At Detroit airport, concurrence rates for white males and females and for black and Asian males approached 100 per cent, but dropped to 93 per cent for black and Asian females. For Hispanic travelers, officers concurred in their identification fewer than half the time for males and only 15 per cent of the time for females. At the California border crossing concurrence rates were lower for all groups other than Hispanic, but followed the same pattern with regard to female identifications. For Hispanics, the rate was slightly higher for males, but significantly so for females.

Not only does concurrence vary, but so do the distributions in error rates. The standard deviation of officer concurrence in racial and ethnic identity of travelers at the Detroit Airport was small for white males, white females, black males and black females, respectively plus or minus 0 per cent, 2, 4 and 1 per cent but higher at 3, 2, 3 and 9 per cent at the California border crossing. But for Hispanic and Asian identifications the range of disagreement in California was 7 and 12 per cent respectively for Hispanic males and females and 10 and 12 per cent for Asian males and females. At Detroit Airport these same ranges for Hispanic travelers were respectively 21 and 61

[89] "Assessing Measurement Techniques for Identifying Race, Ethnicity, and Gender: Observation-Based Data Collection in Airports and at Immigration Checkpoints", Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, January 2003, NCJ 196855

per cent while there was no disagreement for Asian travelers. It is clear that the specific racial and ethnic mix of local populations and officer experience with racial and ethnic minorities is a strong factor in the reliability of identification. It is furthermore apparent that identification rates are much lower for women than for men, likely due to greater variability in clothing, hair colour and other aspects of appearance. Officers' on-the-scene descriptions are not infallible and even small error rates have considerable consequence upon conditional probabilities in prediction. This is a persistent problem in reliance upon eye witnesses in investigations.

Is traffic policing conducted randomly?

Another assumption in the *Star* analysis that bears examination is that of the randomness of reported vehicle stops. Much research into discrimination in policing practices comes from the analysis of searches following highway traffic stops. Unlike urban traffic policing, highway traffic stops of vehicles driving at excess speed sufficient to warrant stopping are essentially random. The distribution of drivers according to visible traits, particularly for a limited-access toll highway, can be observed and most studies have found that stops themselves follow that distribution closely. The results of driving stops from the 2002 U.S. Police-Public Contact Survey show that whites are more likely to be stopped than either blacks or Hispanics[90]. However, ticketing and searches of stopped vehicles have been observed in several U.S. jurisdictions to be systematically more frequent when the driver is young, male and black[91]. Studies are unable to determine whether this is due to biased policing or to factors related to stops themselves, such as impairment, speed, driving patterns, absence of valid insurance or a licence, outstanding warrants, evidence visible in the vehicle or behaviour towards officers.

Unlike highway traffic situations, the likelihood of any driver being stopped in an open urban traffic environment is never random. First of all, it is unreasonable to assume that vehicle ownership, condition or driving patterns are identical among all groups of drivers. If police stops

[90] Smith, E.L. and Durose, M., *Characteristics of Drivers Stopped by Police, 2002*, Bureau of Justice Statistics, U.S. Department of Justice, June 2006.
[91] *Ibidem* One of the earliest and best known traffic stop studies is that of John Lamberth (1994) for the ACLU. Lamberth, John (1994) "A Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers/Travelers on the New Jersey Turnpike Between Exits or Interchanges 1 and 3 From the Years 1988 through 1991", Washington, ACLU, November 11, 1994.

were random, then the number of kilometres driven would be considered the most appropriate measure of the potential of being stopped by police. But urban vehicle stops are not random. Entirely random motorized patrol deployment and stopping of vehicles at random would be contrary to the law[92] and wasteful of police resources. The purpose of traffic policing is to ensure the safe and orderly flow of traffic, and police patrols are primarily preventative. Patrols are most effectively deployed when they focus on when and where problems are most expected. For example, Smith and Petrocelli[93] in their study of traffic stops found that the level of crime, and hence deployment of police resources, in a neighbourhood was a good predictor of police decisions to stop. Obviously, increased vigilance at certain times and places will result in an increased likelihood of those present being stopped and subsequently over-represented in the data[94]. But these are broad systemic biases unrelated in any direct way to skin colour, not evidence of unlawful discrimination. To so consider them is to fall into the trap of false attribution. Therefore, rather than being distributed randomly, the likelihood of any individual driver being stopped by police, even if we exclude for just a moment non-random factors in police decision-making, is a factor of both the number of kilometres driven in the city by any driver and the pattern in space and time of police deployment. Together these define the universe of discrete opportunities for police stops of vehicles.

Even within this universe, police do not stop vehicles randomly. Rather, they stop specific vehicles for a variety of legally-relevant reasons on the basis of observation, information and

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[92] This has been most recently reiterated in S.C.C. *R. v. Clayton*, June 2006

[93] Smith, Michael and Matthew Petrocelli, (2001) "Racial Profiling?: A Multivariate Analysis of Police Traffic Stop Data," *Police Quarterly*, March, 2001, 4–27

[94] This point is raised by most anti-racial profiling groups and is termed by Heather MacDonald as "the circularity argument" in her book *Are Cops Racist?*, Chicago, Ivan Dee 2003. It relies upon the *ecological fallacy* and the *false attribution* problem or *spuriousness*. David Harris *op. cit.* argues facetiously that a drug enforcement sweep of 40 year-old white law professors like him would yield results that would *post facto* justify that effort and thus create or reinforce stereotypes justifying future efforts … and so on. The same circularity argument is also made repeatedly in Canada by advocates such as Wortley, Tanovitch and the black Canadian Legal Clinic in their allegations that police practice "racial profiling". One finds offending wherever one looks for it and they allege that police go looking for it in areas where the Black population concentration is the highest, what is termed "over-policing". Such a portrayal of police deployment for purposes of predation of minority communities is inaccurate. Police concentrate their presence and their surveillance where incidents of victimization or other problems have been reported by the public or are expected on the basis of experience, not on the basis of stereotypes. Those frequenting such areas are thus more likely to come under scrutiny or in contact with police officers although they may not be engaged in illegal activity. The vast majority of people who come into contact with police officers are not detained or charged. Those present in highly policed areas and at highly policed times will be more likely to be hailed, stopped and questioned, but may not be subjected to further police action without cause, in violation of their Charter rights, simply because of their physical presence in a densely-policed location.

reasoned judgment. These may be the consequence of formally-prescribed practices or policies structuring the use of discretion. In less well-ordered police organizations they may be more often the product of *ad hoc* experience. Some stops are low discretion, for example stopping vehicles running a red light, speeding excessively or identified by police as stolen or having been involved in other offences. Other stops are high-discretion stops. Even in these cases however, the age and condition of the vehicle, apparent mechanical deficiencies, the day and time, the location, in some circumstances the age of the driver, not to mention various driving behaviours (for example indication of improper seatbelt use, unusual driving patterns or traffic violations) may all legitimately result in vehicles receiving greater or lesser attention from police officers. This would in turn influence the detection, after the stop has been made, of other out-of-sight infractions.

Nor is the police decision to lay or not lay charges random, and it is unreasonable to assume so in the analysis of data arising from charges. In the case of some of the infractions retained for examination as out-of-sight offences, charging is mandatory. The decision to lay charges, where it is not mandatory to do so, depends on a number of factors, such as previous charges on record as one example. It can also depend upon driver behaviours judged by the officer to be aggressive or otherwise suspicious. In other cases, prompt pleading or an uncontested finding of guilt may result in incomplete records. The *Star* tells us that incomplete records were removed from the analysis. But, the information available from the CPIC data obtained by the *Star* makes it impossible to isolate such factors. Without information on the most significant legally-relevant factors involved, no reliable conclusion can be made about the presence or relative importance of non-legally relevant factors, such as skin colour. While the existence of a variety of non-legally relevant factors, including bias and discrimination, in police decision-making is certainly plausible, the information presented by the *Toronto Star* cannot be taken as either evidence of, or a measure of, the place of such factors.

Finally, in addition to all of these problems in reasoning about the data, there are further limitations arising from potential sample bias in the data used by the *Star* in its analysis. The 4,696 complete records comprise 63 per cent of the total 7,511 incidents reported for the specific infractions retained over a five-year period. For 2,815 of the total number of recorded

infractions, skin colour was not noted. In order to infer the skin colour distribution of incidents for total number of charges for "out-of-sight" infractions from those incidents for which skin colour was recorded, it is assumed that the smaller group is a random subset of the larger, i.e., that no systematic factors intervene in the omission of skin colour from some records.

This assumption cannot be made reasonably. We should expect that vigilance in reporting all details might vary according to the expectation of the officer, who decides what information will subsequently be required for identification purposes. Many legally-relevant factors in evidence at the time of the stop might influence this expectation and the consequent thoroughness of the record, or even whether or not a record is made. We would expect to find systematic differences that would limit the ability to infer from the smaller number to the larger. In a presentation to the Toronto Police Services Board, the *Star* analysts and Prof. Friendly point out that even if all retained cases where skin colour went unreported were assumed to be white, the 34 per cent figure would only be reduced to 21 per cent, which Friendly still considers evidence of "racial profiling".

Notwithstanding this somewhat-less-than-scientific assurance, not even the larger number of 7,511 infractions could be assumed to be the representative or the actual total number of incidents of all these specific types of violations investigated by police. This is still a very small number, a daily average of just four vehicle stops for a city of nearly 2.5 million residents policed by over 7,000 police officers, when compared with the total number, certainly well into the many hundreds of thousands of vehicle stops made by police in a region the size of Toronto over a five-year period. This larger number is unknown, as police are not required to report each and every vehicle stop. Results from the U.S. Police Public Contacts Survey suggest that 8.7 per cent of drivers are stopped at least once each year. [95] One could only infer from this smaller, nested number to the total of all vehicle stops if it were a random subset of the larger whole. This is not a reasonable assumption. At the very least, statements such as "the observed differences suggest police use racial profiling in deciding whom to pull over", or that police are "stopping people for

[95] Information reported by McMahon *et alia op. cit.* (33ff) from urban traffic stops in Baltimore, a less densely policed city than Toronto, suggested that the number of stops in Toronto could be expected to be close to 500,000 annually. The same study suggests that only 1 per cent of vehicles stopped are searched, and highlights the difficulties in drawing conclusions from such nested, multilevel non-random samples.

little reason other than their skin colour" are extremely ambitious interpretations of the evidence examined.

Simple Drug Possession Dispositions

The central argument made with respect to the choice by the *Star* of drug possession as an offence category is not so much (as it is with regard to vehicle stops) that the difference between this number and the proportion of blacks in the population demonstrates differences in police vigilance in enforcing drug laws. Rather it is the use of police discretion both at the scene and at the station that is seen to reflect discriminatory treatment. Officers may decide to release a suspect at the scene, to take a suspect to a station for booking before being released or to hold a suspect for a bail hearing. It was assumed that any differences between the skin colour distribution of arrests and that of subsequent police dispositions would be evidence of bias or "racial profiling".

The *Toronto Star* investigative team examined 10,729 police dispositions of persons charged. Because of the high likelihood of follow-up and thus that identifying information would be subsequently required, 93.8 per cent of records were complete. According to published reports from the newspaper, 23.6 per cent of incidents involved persons whose skin colours was identified as black and 63.8 per cent as white. White suspects were released at the scene in 76.5 per cent of cases, whereas those identified as black only 61.8 per cent of the time. The *Star* also reported that 15.5 per cent of blacks were held for a bail hearing, as compared with 7.3 per cent of whites. This, the *Star* concludes, is evidence that police treat blacks more harshly.

An independent analysis completed for the Toronto Police Service by Harvey and Liu[96] concluded, on the contrary, that:

> In the case of possession of cocaine, release-at-scene (Form 9) rates are 74.3 per cent for whites and 74.0 per cent for Blacks when using the cleaned-up database and controlling for (1) CPIC; (2) Manix; (3) Bail; (4) probation; (5) previous conviction; (6) TAP parole; (7) warrant.

[96] Harvey and Liu (2003), *op. cit.*

The *Star* article nonetheless claims to have taken "into account a number of factors that might influence police decision-making, including a suspect's age, criminal history, employment, immigration status, and whether or not the person had a home address." The authors state that only police history had some impact, but that "the difference in treatment between blacks and whites remained." But neither the manner in which this analysis was conducted nor the detailed results are reported in the newspaper articles so that they might be examined. The articles report only descriptive statistics, for the entire city and also by patrol divisions, and some breakdowns by age, type of drug and police history, though only single variable breakdowns. Descriptive information is provided only for the total number of persons arrested: gender, the proportion with previous criminal convictions (50.3%), out on bail (23.5%) or on probation (17.6%) or "unescorted temporary absence" (parole) from a correctional institution (1.6%) at time of arrest and the percentage subsequently charged with a major violent offence (14.6%). None of these factors is further broken down by race. Only the number of charges laid is broken out by race. It appears from what is reported that only single variable descriptive statistics were examined.

It is impossible to assess this part of the work conducted by the *Star* analysts on the basis of the published accounts. To determine whether and how much of the difference in treatment between black and white suspects might be explained by any single factor, multivariate analysis would be required. In multivariate analysis, each factor is weighed to determine its specific influence, controlling at the same time for the influence of all other factors in a given model.[97] The results of these procedures, expressed as relations among different statistical probabilities are notoriously difficult to interpret and to translate into plain language explanations. There is no evidence this was done in the newspaper accounts of the analysis. Harvey and Liu's analysis, on the other hand, disputes the conclusions of the *Toronto Star* analysts.

However, in his presentation on behalf of the *Star* before the Toronto Police Services Board, Michael Friendly did present such an analysis, though limited to a small number from among available factors and without explanation of model choices. Friendly presented two models: one examining the likelihood of release at the scene and another examining the decision to hold for a

[97] In this case, where information available is binomial, multinomial or expressed as constrained proportions, the most appropriate procedure would be log linear models or logistic regression.

bail hearing by five independent factors: gender (M or F), employment status (employed or not), citizenship (Canadian or not), age (young or not) and across years. Friendly concluded that employment status, bail status, a variable listed as "CPIC" (the national database of criminal records that is not precisely defined in the notes of the presentation), and citizenship are among the variables, with skin colour, that have the most effect on the decision to release at the scene. Controlling for these factors[98], Friendly reported that the likelihood of blacks being taken to the station was still between 1.3 and 1.7 times greater than those of whites. Friendly also reported that blacks are between 1.3 and 1.9 times more likely than whites to be held for a bail hearing. However, it is difficult from the documents of that presentation alone to grasp fully the exact definitions of the variables used and the details of the analyses that were conducted. Were this work to be submitted in complete written form, it could be better assessed. This was never done, a consistent problem with most research on racial bias in policing in Canada. This work does not often seem to survive peer review.

However, even using appropriate statistical procedures it would be impossible to eliminate all possibility of having committed the error of attributing the observed differences to statistically significant yet wrong factors, known as *spuriousness*. To illustrate the idea of spuriousness, consider someone with the firm belief, based on careful observation, that the carrying of umbrellas by transit passengers is the cause of rain. Indeed, even a casual observer would be compelled to admit that rain occurs more frequently on days that umbrellas are most in evidence. The statistics would be irrefutable as long as one's knowledge was limited only to that gained from the observation of rain and umbrellas. The problem here is, of course, that there are other unobserved influences at work that cause both rain and the carrying of umbrellas. Once the influences of these factors are recognized, understood and observed, the original hypothesis may then be re-examined, tested and perhaps understood to have been incorrect, or spurious. Thus even a statistically significant and strong relationship, or model, may ultimately turn out to be spurious as one gains more knowledge of the underlying forces behind a phenomenon and becomes capable of more complex thinking about how these all interrelate. There are many more

[98] Though there is no report of analysis weighing them to determine contributions of individual components. For instance, the Doob and Roberts study previously cited that was conducted for the Ontario Commission, pointed out the very sizeable influence of recentness of previous convictions. Prof. Friendly is not an expert on bail decision-making.

factors than those used, principally as a result of the convenience of being more or less available, by the *Star* analysis of police arrest decisions. Mere availability is always the poorest of reasons for including a factor within an explanatory model.

This limitation is what prompts scientists to make only modest claims of explanations that their observations enable them to exclude. Occasionally stilted and wooden, the language of scientific reasoning requires a modesty that may frustrate many eager to leap to conclusions.

The Kingston Police Data Collection Project "Bias-Free Policing"[99]

Beginning in 2003, on the heels of two high-profile arrests of the same young black man on what subsequently turned out to be unfounded suspicions, Kingston Police Chief Bill Closs instructed his officers to begin recording racial and or ethnic identity on contact cards every time they stopped an individual. The cards also recorded the reasons for the stop and the outcome. The pilot lasted one year and the results were given to Professor Scot Wortley of the University of Toronto Centre for Criminology for analysis. A preliminary public presentation of the analysis was made May 26, 2005[100].

Wortley claimed to find that blacks were three times more likely to be stopped by police than whites. The numbers for young black males between 15 and 24 were even more dramatic—they were reported as five times more likely to be stopped by police. Aboriginals were reported to be 1.4 more times likely to attract police attention than whites, although this subsequently turned out to be due to the influence of one single individual. Although the Kingston pilot study is still the only research of its kind to have been conducted in Canada, Wortley claimed the results to be consistent with research done in other Canadian cities, probably referring to the *Toronto Star* articles or perhaps his own public opinion research for the Ontario Commission on Systemic Racism in the Criminal Justice system. As reported by the *Kingston Whig-Standard*,

[99] This discussion is condensed and adapted from my evaluation of the project and the foundedness of its conclusions conducted at the request of the Kingston Police Association.
[100] Scot Wortley, *Bias-Free Policing: The Kingston Data Collection Project – Preliminary Results*, Kingston Police Service http://www.police.kingston.on.ca/Professor%20Wortley%20Report.Kingston.pdf

> In an emotional appeal, Police Chief Bill Closs apologized to Kingston's black and native communities yesterday, saying he's seen results of the department's groundbreaking data collection project and believes racial profiling exists.

These results have since been cited widely as irrefutable evidence of racial profiling, though with varying accuracy in reporting. For example, the Québec Human Rights Commission reported that the study "concluded that racial profiling existed within the Kingston police force, especially with regard to blacks and natives. For example, according to the initial analysis, a black male aged between 15 and 24 is three times more likely to be stopped by the police than a white male of the same age group, in comparison to the size of each group in the community." Reports of the findings of the study by advocacy organizations were triumphant in tone. On the request of the Kingston Police Association, this author examined the foundedness of the conclusion that the study in question demonstrated that policing in Kingston is racially biased towards those identified as black.

The conclusions of the Kingston Project are based on information collected from 219 police contacts with persons identified by police officers as black, including 175 contacts with 103 Kingston residents who were identified as black. Forty-one (41) of the 103 residents identified as black were aged 18 to 24, accounting for 90 of the 175 contacts[101]. These numbers are drawn from a data set of 10,236 contacts, including 8,455 contacts with 6,180 Kingston residents who had at least one non-casual contact with an officer over the study period.

Despite widespread reports, the study did not find evidence of bias against Aboriginals. One single individual with a history of mental illness accounted for a very large share of the reported 205 stops of Aboriginals. Indeed, once repeat contacts were accounted for, Aboriginals appeared less frequently stopped than white residents. Other visible minorities were similarly under-

[101] This represents 40 per cent of all black contacts, as compared with only 20 per cent of white contacts in the same age range. The youthfulness of the black identity population goes only some of the way to explaining this. The presence of several postsecondary institutions in Kingston with a very large temporarily resident student population, not included in the Census counts is the most plausible explanation. This is confirmed, though never reported as such, by the street observation component of the study which found that the availability of populations was similar to the distribution of police contacts, suggesting no bias. This refuting finding is reported at the end of the data presentation, long after the most dramatic claims were already made.

represented in the police contact data. Only for blacks did the study claim over-representation in the stops data.

Racial bias could only be argued to have been demonstrated if there was any indication that some number from among the 103 individuals identified would not have come into contact with police had they not been black. That is the burden of proof and it was not made in this study.

There are many competing and more plausible explanations of these contacts than widespread racial bias within the Kingston Police. A number of the observations from this study questioned its own reported conclusions. There are three main problems with the conclusions that have been attributed to the study: (1) the internal distribution of observations does not suggest differences in police intervention according to racially defined groups; (2) the numbers of persons identified as black is too small to support any conclusions; (3) the use of Census data for benchmarking is highly misleading.

1) There are few differences between contacts with black and white persons in reasons for contact and in outcomes of contacts, suggesting that these groups are not being contacted on different bases or treated in different ways. Of the total number of 219 police contacts involving individuals identified as black, including repeat contacts with the same individuals and including both residents and non-residents, the largest number (77 contacts) was for contacts reported as "other", unrelated to complaints or suspected criminal or traffic-related infractions[102] and which did not result in arrest or charges. This proportion is equal for both white and black contacts. The second largest number (57) was for traffic contacts, for which only Aboriginal persons had a relatively lower representation in the contacts data[103] than did black persons. This is followed by 33 citizen-generated contacts, in the same proportion as for whites. The remaining 52 contacts, involving an unreported number of individuals were motivated by suspected Criminal Code violations (22), follow-ups on suspect bulletins (18), suspected by-law infractions (9) and suspected drug offences (4). These latter are those types of incidents for which police discretion

[102] Police contacts are also warranted for the purposes of seeking information, providing assistance or protection.
[103] This is probably a consequence of the extreme youthfulness of the black population, the large number of dependent children and youth living at home, and thus the relatively smaller number of drivers and vehicles among them.

to intervene is least, if not absent. Yet it is in these contacts that very small differences coming down to a few individuals in each instance, are being used to support a general conclusion of racially-biased policing.

In one-half of contacts, both those identified as with blacks (111) and those identified as whites, no further action was taken. In a further one-third of contacts with blacks (73) a verbal warning was issued. In the remaining 49 contacts with persons identified as black, 25 were ticketed, a smaller proportion than any group other than Aboriginals[104] , 21 were charged and arrested, a higher proportion than any group other than Aboriginal and one and one half times higher than white contacts; one black contact was searched, one had property seized and one was given time to produce documents.

To claim that these results demonstrate racial bias[105] or even over-representation is at best highly questionable. Any relative over-representation occurs only for contacts with persons suspected of Criminal Code (22) or drug (4) offences, for contacts with persons identified as suspects (18) and/or for contacts leading to charges being laid (21). Even in these cases, the numbers are so small as to make any observed differences essentially trivial.

2) These are very small numbers upon which to form any reliable conclusions. Small numbers are volatile; i.e. their distributions may be altered by small influences, including assumptions made about them. When working with small numbers, small errors or sources of variability are unforgiving and may have dramatic effects upon outcomes. Converting them to proportions, percentages, likelihood ratios or rates per 1,000 (generally not good practice when working with such small numbers) causes them to appear more dramatic. However, this doesn't change the fact that they are very small and volatile numbers lacking necessary analytical robustness required to found reliable conclusions. One would not even think of conducting statistical analysis here. Effect size (in this case the size of observed differences) only appears at the highest level of aggregation, where composition effects[106] and the risk of spuriousness (other factors than race or

[104] See preceding footnote for the likely explanation.
[105] We cannot know from aggregate statistics presented whether any over-representation may occur as a consequence of differences in treatment by police officers or differences in the behaviours of persons contacted.
[106] Simpson's Paradox

ethnicity explain the differences) are greatest. With any breakdown effect, size quickly wanes and observed differences become trivial. The situation lends itself better to a more qualitative case-study approach, such as random retrospective audits.

3) Census benchmarking is universally considered bad practice in this sort of research. That point has been made again and again in every expert examination of how police stops data should be analyzed. For example, Chuck Wexler Executive Director of the Police Executive Research Foundation (PERF) recently denounced what he calls "the simplistic use of census benchmarking for analyzing data and assessing bias: There is a tendency for the media, policy makers and others to compare data on the race and ethnicity of drivers stopped by police with census data, which often leads to unsupported conclusions about the extent and nature of 'racial profiling'"[107].

The use of the estimated number (685) of individuals self-identifying as black to the visible minority question on the 2001 Census long form (20 per cent sample) as a benchmark for police contacts is inappropriate. There are a number of reasons for this.

a) The Census counts people, whether they be sitting on their living room sofas watching TV, gardening, driving in their cars or mingling with busy weekend evening crowds in an urban entertainment district. But not all of these situations expose one equally to the likelihood of coming into contact with a police officer in the line of work. Appropriate benchmarks for examining police contact data must rather reflect the likelihood, excluding any systematic factors (behaviours, bias, etc.), that contact may occur. The public space observation study conducted as part of the Kingston study noted that the number of people identified as black observed (1:49) was more than four and one-half times greater than the proportion of the adult Census respondents self-reporting as black (1:225). It is not surprising then, and certainly not evidence of bias, that the number of contacts with blacks would be three to five times greater than their proportion in the Census population. The observation study furthermore noted that this presence was greatest in the areas of the city where police presence and the likelihood of police contact were highest. If black residents are more likely

[107] Dr. Lorie Fridell, *By the Numbers: A Guide for Analyzing Race Data from Vehicle Stops.* Police Executive Research Forum, Washington, D.C. 2004 www.policeforum.org

to be present where and when police presence is highest, one would expect this to be reflected in police contacts, irrespective of any differences in behaviours attracting police attention or bias in police response.

b) There is a non-negligible non-response rate for the Census long form. Even among respondents, many of those completing the form do not respond to all questions. Furthermore, many people who would be resident during the year are unlikely to be surveyed on the Census long form completed on May 15; for example seasonal residents such as college and university students, would normally be reported as part of their parents' households rather than in their place of residence during the school year. The presence of 20,000 Queen's University students, most between the ages of 18 and 24 and from outside of Kingston, including over 1,000 international students, could be expected to have substantial impact on the population. For large groups, this may not be a major issue. But for small Census groups (with more volatility) it may result in differences between Census estimates and other records.

c) The Census is almost always somewhat out-of-date. The most recent data is reported as of July 1, 2001. Some things change slowly and large numbers are less volatile than small numbers. But estimates can change considerably for very small sized groups even in a short period. People move and they grow older, changing their behaviour as they do. For example, the Census reports that 73 per cent of those self-identifying in 2001 as black had moved in the past five years. Nearly 40 per cent had moved from another CMA (Census Metropolitan Area) (migrants). The Census data further show that in 2001 there were 330 children identified as black under age 15. If less than one third of these children were, by 2004-2005, now in the 15-24 age group, then that group would have doubled in size (from 100 in 2001).

f) The Census long-form question on visible minority group identity is of recent facture. This information has only been collected since the 1996 Bi-Census to support equity programs. Under the *Employment Equity Act*, which is the basis for the Census question, members of visible minorities are persons, other than Aboriginal persons, who are not white.

We have little experience yet to gauge how people respond to these questions. For example, according to 2001 estimates for Kingston CMA (Census Metropolitan Area), there were 130

people who answered only that they were of visible minority status without further specification. Visible minority status is a complex social construction. For instance, it is often difficult to reconcile responses regarding visible minority identity and ethnic ancestry. In part this is due to the diversity of so-called “racial” identities within many ethnic groups, especially those from multi-ethnic geographical regions. Caribbean ancestry, includes Europe, Southern and East Asia and Africa among numerous population sources, which illustrates this amply. This is also made difficult by varying propensities among groups to report multiple responses. For instance, 60 per cent of those reporting Caribbean ethnic ancestry and 80 per cent of those reporting African origins provided multiple responses. Two hundred Kingston respondents reporting black identity also reported white ancestry. Forming groups by racialized traits is a futile task, whether it be by self-identification or the judgments of others. Small and volatile numbers would be most subject to such variations.

From the portrait of Kingston's resident self-identified black population from the Census data, notwithstanding concerns for its reliability at lower levels of aggregation, a few things leap out immediately that were not recognized by the author of this study:

a) The population self-identifying as black is much younger than the total population with many more children (39 per cent compared with 18 per cent under 15), more individuals in the 25 to 34 age young adult category (19 per cent compared with 13 per cent) and far fewer older adults. Almost half of the population (49 per cent) self-identifying as black represents children (including older children and youth) in families, compared with 30 per cent of the entire population.

b) Those identifying as black are one and one-half times more likely to have never been married and 1.8 times more likely to be separated. They are half as likely to be living as spouses. The younger age distribution explains much of this.

c) The incidence of low income among those self-identifying their ethnicity as black is 64.7 per cent, as compared with 12.2 per cent of those responding only Canadian. The low income black identity population is predominantly composed of members of young families.

d) Those responding black to the Census question on visible minority status are more likely in the past five years to have moved (1.6 times more likely than the total population), to be new to Kingston (1.7 times), to have immigrated (2.6 times).

Young people and single people are far more likely than spouses and parents to be out of the home and come into contact with police. Household size and resources have an impact on use of public space. The number of young black Kingston residents in the age category most likely to come into contact with police will increase considerably over the next decade. It is very important for their families to know that they will be treated effectively and without bias. Furthermore, these families are in greater social and economic need and may need additional help and resources in ensuring that their children grow up safely and peacefully. There are more important efforts to be made than conducting more inconclusive, misleading and divisive research. Three main points can be made from the examination of the data presented from the Kingston project:

1. The information collected and presented does not support a case for widespread police bias towards Kingston's black population.

2. Statistical information of this sort is unlikely at any time to be able to support arguments founding or excluding racial bias and there is little to be gained in conducting a separate analysis or future research in this manner.

3. Inconclusive research and questionable findings reinforce stereotypes and inhibit rather than promote dialogue between police and the public. They promote insecurity and a sense of vulnerability among minority populations and makes the work of police in ensuring public safety and public order more difficult.

The Ontario and Québec Human Rights Commission Reports and Private Member's Bill C-296 (38th Parliament –dissolved)

In recent years, Human Rights Commissions in at least two provinces have issued reports examining allegations of "racial profiling". The more substantial and influential of these was that of the Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* released October 21, 2003, conducted by the Race Relations Division of the Commission under a very broad interpretation of its inquiry powers under Section 29, paragraphs

(f), (g) and (h) of the Code[108]. Provincial human rights codes and commissions do not have jurisdiction over police exercise of their legal powers, but are rather charged with ensuring equality and freedom from discrimination in access to goods, services, facilities, housing and employment, in the right to contract, to join a trade union and ensuring freedom from harassment on a range of prohibited grounds. Equality rights do not apply to law enforcement actions. Rather, by intent of the legislator, these are the subject of separate criminal statute and police legislation and are also the domain of constitutionally-defined legal rights under sections 8 through 14 of the *Canadian Charter of Rights and Freedoms*.

Notwithstanding a lack of jurisdiction, the Ontario Commission decided to solicit testimony recounting perceived mistreatment in law enforcement. The charged atmosphere surrounding the Brown case and high public and political visibility of allegations of racial profiling by police at the time were likely factors in this decision. The Commission's claim to jurisdiction was simply based on the assertion that "racial profiling" was contrary to the principles of the Ontario Human Rights Code. The Commission's effort was clearly political rather than analytical in intent and was crafted for this purpose. Rather than examine the evidence or the foundedness of allegations of racial profiling, a foundedness the Commission simply considered as given[109], it obviated the issue of fact, announcing in December 2002 that it would examine only "the effect that racial profiling, or even a perception[110] that it is occurring, has on those directly impacted and on Ontario society as a whole." It would do so by soliciting submissions from advocacy groups and the public and received over 800 submissions from groups and individuals, selecting from these half which, in the commission's judgment, dealt specifically with the issue as defined for the

[108] These read: 29 (f) to inquire into incidents of and conditions leading or tending to lead to tension or conflict based upon identification by a prohibited ground of discrimination and take appropriate action to eliminate the source of tension or conflict; (g) to initiate investigations into problems based upon identification by a prohibited ground of discrimination that may arise in a community, and encourage and co-ordinate plans, programs and activities to reduce or prevent such problems; (h) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination.

[109] Consideration for evidence is limited to the statement "It is the Commission's view that previous inquiries have considered this and have found that it does occur." (p.9) Sources cited by the Commission report are remarkably unbalanced and poor in quality, coming in the main from advocacy literature, media reports and from a few researchers known more for advocacy than scholarship. There is no evidence that Commission staff were at all knowledgeable of constitutional provisions, legislation or policy governing law enforcement or of Charter provisions as to powers of search, seizure, detention and arrest and the jurisprudence arising from those provisions. The report's treatment and the discussion of the issue could be described as "sophomoric" at best.

[110] We will leave aside for now the ontological challenge posed by this equivalency of fact and perception.

exercise. Selected excerpts from these submissions were then used as illustrative material punctuating an affective, essentially rhetorical, advocacy pamphlet alimenting beliefs in "racial profiling" whether real or imagined, and an exercise more designed to generate heat than any illumination.

The exercise conducted by Michèle Turenne for the Québec Human Rights Commission, previously cited, was a much more limited one, focusing only on jurisdiction and definitions. As was the case of the Ontario Commission report, the paper authored for the Commission is political in intent, of remarkably poor scholarship, circularly citing for the most part only advocacy sources and even then often wrongly. Along the same lines as claimed by the Ontario Commission, the Québec Commission cites the general equality rights provisions in the Canada and Québec Charters as the source for purported Commission jurisdiction over law enforcement. "Racial profiling" is defined as infringement of the right to equality similar to other forms of discrimination covered under provincial statute. The paper makes no reference to criminal statute or police legislation or even to the legal rights defined specifically with regard to security, powers of search, seizure, detention and arrest, or to criminal proceeding and penal sanction as defined under sections 7 through 14 "Legal Rights" of the *Canadian Charter of Rights and Freedoms*, which are the jurisdiction of the Courts. It claims jurisdiction for human rights bodies instead under Section 15 "Equality Rights"[111]. The question of what appropriate remedies there may be for purportedly infringing inequalities in criminal justice outcomes is left unasked.

This conjuring away of legal rights in deference to a definitional framework entirely founded upon equality rights has an agenda and is consequential. It is a source of confusion for many and also potentially an error in law[112]. Equality rights, the subject of rights commissions, focus on outcomes, whereas a legal rights focus is essentially procedural, a much higher standard. Given the nature of discrimination in the jurisdictional responsibilities of provincial human rights

[111] 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[112] We have not yet seen in Canada decisions such as in some U.S. jurisdictions invalidating arrests of large classes of defendants consequent to a finding that a pattern of arrests indicates racial profiling, such as the 1999 New Jersey Attorney General's decision to dismiss *en masse* drugs and weapons charges against 128 black defendants (cited in Heather MacDonald, *op. cit.*, p.26). Rather, the Ontario Court of Appeal decision in *R. v. Hamilton* appears to recognize the problem of admitting broad statistical evidence with respect to assessing the circumstances of particular cases.

commissions, this lower standard is understandable and is generally accepted as necessary. A higher standard is, however, required by the courts under legal rights, given the potentially serious restrictions on individual liberties, and impacts upon public safety inherent in law enforcement and criminal justice decision-making.

The recourse to equality rights seeks to replace the individual in any particular case where allegations of "racial profiling" are being made with a member of a protected class. Under legal rights, the issue before the court is whether a deprivation of liberty is founded in the particular circumstances of any case. Under equality rights, mere establishment of membership in a disadvantaged group and simple disparities in aggregate outcomes may be sufficient to establish a preponderance of evidence of discrimination and such evidence in itself may be assumed to indicate malfeasant motive. Rather than the circumstance of a particular case, it is the purported pattern evident in the aggregate that founds a case for discrimination. The onus in discrimination cases is thus upon the decision-maker to demonstrate reasonable motive *in adversarius*. Plaintiffs are usually best served by anecdotal or statistical evidence, which create a presumptive burden upon the defendant. Statistical reliance by the defendant, on the other hand, is often seen as a cold attempt to hide behind numbers. It is further customary in discrimination cases for litigators of the plaintiff to point to "collateral" disparities arising outside of the decision-making scope of the defendant, as corroborating evidence of wilful ignorance[113].

The appeal of the shift from legal to equality rights is obvious from the standpoint of race advocates. The use of statistics in discrimination cases is less a search for truth than it is for advantage, and statistics are remarkably pliable, easily contrived or distorted even when there is no intent of deceit, but only unconscious subversion. The adversarial use of statistics in discrimination cases has grown to become a sub-discipline in its own right, often not a very distinguished one. Racial profiling data collection is born of this tradition in human rights advocacy research. In general the legal reliability of such evidence is far from assured. Statistical arguments presented in discrimination cases are rife with methodological weaknesses, many of

[113] This is the reasoning that led the Ontario Commission on Systemic Racism in the Criminal Justice System to consider absence of corrective actions to redress racial disparities as racist indifference to and transmission of bias and discrimination. There is no burden under police legislation or criminal law to ensure equal representation of various groups defined along the lines of prohibited grounds for discrimination among those arrested, charged, held for trial, convicted or sentenced to custody.

which we have already seen in racial profiling studies. Among these are the almost inevitable absence of any sort of corroboration, the misuse of statistical significance (probability) as a substitute for size of effect, non-probability or small samples below inference levels, uncontextualised use of second-hand data, small effect sizes, inappropriate use of rates or likelihoods to build small numbers into large conclusions, level of aggregation errors, base errors, induction errors, poor model construction in multivariate analysis, spuriousness, illogical conclusions, inappropriate combination of conditional probabilities of dependent versus independent events, often done with unknown or implausibly assumed base rates … Human rights commissions and the courts, rather than objective triers of facts, may have become the wild west of statistical and scientific reasoning and the battleground of competing experts[114], a matter for considerable concern in the American post-Daubert[115] court and to which the Supreme Court of Canada has drawn attention in *R. v. Mohan* [1994] 2 S.C.R. 9.

On November 1, 2004, Libby Davies, NDP Member of Parliament, introduced into First Reading Private Member's Bill C-296 (38th Parliament) "An Act to eliminate racial profiling" which rendered explicit and consolidated into proposed legislation the campaign of "anti-racial profiling" advocates. The Bill defines "racial profiling" in the words of the Ontario Human Rights Commission in its report of October 21, 2003:

> "racial profiling" means any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion or place of origin, or a combination of these, rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment.

The Bill, following the reasoning that police powers should be the subject of the equality rather than legal rights defined under the Charter, proposed a protected class-based burden of proof and a reversal of onus similar to that noted, though not sustained by Justice Rosenberg in *R. v. Williams*, yet admitted in the reasoning of Justice Westmoreland-Troare in *R. c. Campbell*, with the affirmation that mere disparities in criminal justice outcomes shall hence be considered sufficient evidence of racial profiling:

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[114] See for example: Kursch, S.J., *Lies, Damn Lies and Reasonable Doubts*, Centre for Forensic Economic Studies, 1995; Ph. I. Good, *Applying Statistics in the Courtroom*, Chapman and Hall/CRC, 2001; Alan D. Gold, *Expert Evidence in Criminal Law*, op. cit.

[115] *Daubert v. Merrell Dow Pharmaceuticals* (1993), Supreme Court of the United States, No. 92-102

> Proof that the routine investigatory activities of an enforcement officer have had a disparate impact on racial, religious or ethnic minorities is, in the absence of evidence to the contrary, proof that the officer has engaged in racial profiling.

The proposed Bill then mandated the collection of data sufficient to presumptively determine this burden, i.e. data on disparities between groups defined by race, colour, ethnicity, ancestry, religion or place of origin, or a combination of these in the numbers of persons against whom any law enforcement action has been undertaken. By such a definition any law enforcement action involving a member of a racial, religious or ethnic minority is defined as "racial profiling".

It is a challenge to imagine how the provisions of this Bill could be enacted, enforced or interpreted. Yet, despite the absence of reasoned enquiry into the issue, it is becoming increasingly clear that governments may eventually yield to perceived public pressure and enact policy or legislation in this domain, perhaps simply sham policy[116]. Even the latter may have unexpected effects however.

The U.S. Experience of Racial Profiling Data Collection

At last count probably over a thousand U.S. law enforcement agencies have undertaken, or been mandated to undertake, some form of racial profiling data collection. An industry has grown up on the issue. A number of efforts have been made in recent years to assemble some perspective and counsel on practices in the field. In 2001 the Police Executive Research Forum (PERF) published *Racially Biased Policing: a Principled Response* by Lorie Fridell, Robert Lunney, Drew Diamond and Bruce Kubu[117]. In November 2000, the U.S. Department of Justice issued *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons*

[116] A legislated interdiction of "racial profiling" would be such a sham response, though if experience is our guide, such responses, although intended to be meaningless, often have unforeseen consequences. A Québec expression warns of those *"assez fou pour mettre le feu, trop fou pour l'éteindre"* [crazy enough to set a fire, too crazy to extinguish it].

[117] Lorie Fridell, Robert Lunney, Drew Diamond and Bruce Kubu, *Racially Biased Policing: A Principled Response,* Police Executive Research Forum, Washington, D.C. 20036, 2001

Learned[118] by Deborah Ramirez, Jack McDevitt and Amy Farrell of Northeastern University in Boston. The same year, the U.S. Department of Justice Office of Community Oriented Policing Services issued a manual *How to Correctly Collect and Analyze Racial Profiling Data*[119]. More recently, Lori Fridell has published *By the Numbers: A Guide for Analyzing Race Data from Vehicle Stops*[120]. In addition many private consulting firms have published synopses, manuals or guidelines for racial profiling data collection.

Most observers, even among consultants directly profiting from the boom in racial profiling data collection, describe this type of initiative as a last resort response to perceptions and concerns about racially biased policing. Responses targeting supervision and accountability, policy, recruitment and hiring, training and education, and community outreach are almost universally preferred to costly, inconclusive and contentious efforts at data collection. The general sense is that if a law enforcement agency is reduced to or mandated into data collection, its problems run far deeper than can be solved by just accumulating more data.

Almost all data collection has been limited to traffic stops; much of it only to highway traffic stops. These are easier to collect information on than general public order policing, though results have not necessarily been more convincing. Most studies have shown little evidence that stops show any influence of visible racial traits when appropriate baseline or benchmark data is collected. However, differences between racial identity groups, in the main black and non-black, appear as one moves further along the continuum of police intervention – to decisions to search, seize, restrain, detain and arrest. Unlike initial driving stops, where efforts at deriving appropriate benchmarks have shown some fruit, benchmarking for subsequent police decisions is a great challenge as a consequence of the much larger number of interacting factors which come progressively into play. At the same time, the relatively and increasingly smaller numbers of instances in which progressively more force is used, or threatened, makes it much more difficult

[118] Deborah Ramirez, Jack McDevitt and Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned,* U.S. Department of Justice, NCJ 184768, November 2002
[119] McMahon, Joyce, Garner, Joel, Davis, Ronald and Kraus, Amanda, *How to Correctly Collect and Analyze Racial Profiling Data: Your Reputation Depends On It, Final Report for: Racial Profiling–Data Collection and Analysis.*(Washington, DC: Government Printing Office, 2002).
[120] Lorie Fridell, *By the Numbers: A Guide for Analyzing Race Data from Vehicle Stops*, Police Executive Research Forum, Washington, D.C. 20036, 2004. A companion document to this report is provided for non-expert audiences, *Understanding Race Data from Vehicle Stops: A Stakeholder's Guide*

to found any conclusions. Even the 2002 U.S. national survey of contacts between the police and the public[121], a survey of more than 90,000 Americans, could not report reliably on the racial breakdown of characteristics of use-of-force incidents because of small numbers.

Data is often compiled from records or collected with little or no idea in advance of how it is to be used: "we've collected the data; *now what do we do*?" This is most often the case when data collection is imposed, but also frequently occurs when it is freely chosen. The results of improvization have most often been unfortunate, as was the case in Kingston, Ontario. Not in the U.S. and less so yet in Canada is there a cadre of knowledgeable and experienced independent researchers available to supervize collection and conduct proper analysis of such data. A recent assessment of Canada's capacity to conduct this sort of research concluded:

> "however, as a nation we have very little capacity to conduct social policy research, evaluate social programs, or monitor progress towards achieving social aims. ... The most difficult barrier to surmount is that there are simply too few researchers engaged in quantitative research. The problem is especially acute in areas requiring advanced statistical methods. ... Within the universities, training in statistics and research methods has declined severely. There are now very few faculty who teach courses in advanced statistical methods, and in most social science fields, the course requirements for M.A. or Ph.D. degrees no longer include formal training in statistics or quantitative research methods.[122]

It would be beyond the means of this paper, which has already gone on too long for its purpose, to enumerate all the lessons learned from the vast and still growing U.S. experience in racial profiling data collection. This lessons have now been enumerated in a vast and growing array of literature which is easily available, including synoptic manuals, guidelines and resource books. A few lessons are most noteworthy. Most have already been addressed here in earlier discussion.

[121] Matthew R. Durose, Erica L. Schmitt, Patrick A. Langan, Ph.D., *Contacts between Police and the Public: Findings from the 2002 National Survey*, U.S. Department of Justice, Bureau of Justice Statistics, April 2005, NCJ 207845

[122] *Final Report of the Joint Working Group on the Advancement of Research Using Social Statistics*, Social Sciences and Humanities Research Council of Canada and Statistics Canada, December, 1998.

Benchmarking

The most important decisions made in racial profiling studies are those that define, establish and measure the relevant benchmarks for police-public contacts and police actions. Benchmarks refer to measures which define the potential universe for police contacts, i.e. who is available to be contacted and in what respective numbers, for the purpose of establishing appropriate comparisons between groups. Early studies and, according to Fridell, most current studies still incorrectly use census benchmarking.

> … most agencies were and still are conducting "census benchmarking." In census benchmarking agencies compare the demographic profile of the drivers stopped by police to the demographic profile of the residents of the jurisdiction as determined by the U.S. Census. For a variety of reasons, such a comparison is of no scientific value for purposes of trying to measure racial bias in policing and, in fact, has very often resulted in misleading and unsupported findings.[123]

Census benchmarks are simply not measures of likelihood of any individual or group of individuals defined by census recorded traits to come into contact with police. Even adjusted for age, gender, geographical concentration of enforcement activities, etc., they remain essentially irrelevant. The only two Canadian experiences in racial profiling data collection, that conducted by the *Toronto Star* and that by the Kingston Police Service, both used census benchmarking incorrectly. The Kingston study did also conduct a limited "street benchmarking" exercise, the results of which would have invalidated its conclusions, had they been used. It is perplexing that they were not used.

Benchmarking is the most costly component of racial profiling data collection, a factor which perhaps explains why it is still so seldom included. It cannot simply be integrated into ongoing police reporting. Benchmarking must be conducted independently of police activities to be reliable. This means hiring observers, for example posted along roadsides counting the number of speeding vehicles going by and noting the visible characteristics of drivers displaying the behaviours likely to attract police attention. This is not an easy task, since it must closely mirror

[123] Fridell, *By the Numbers*, op. cit., p. viii

police decision-making to be valid. In fact, there may be simply too many variables in a police decision to stop to be modelled accurately for purposes of benchmarking.

Benchmarking must also include precise data on police deployment and on criteria for decision-making in routine interventions, something many police services would find difficult to provide in the absence of clearly-articulated policies, supervision mechanisms and accountability frameworks.

Most well-conducted studies show that there are not substantial differences along visible race or ethnic trait lines in the likelihood of being stopped by police, once all relevant factors have been taken into account. This is confirmed by the U.S. Police Public Contacts Survey data which found that:

> On a per capita basis in 2002, the rate of police-resident contact for whites was about 15% higher than for blacks and about 26% higher than for Hispanics. The rate of contact for males was about 20% higher than for females. (p. iv)

This includes public initiated contacts. Yet for those stopped in their vehicles, "(t)he likelihood of being stopped by police in 2002 did not differ significantly between white (8.7%), black (9.1%), and Hispanic (8.6%) drivers". (ibid.)

In fact, the numbers cited refer not to likelihood but only distribution of stops. The numbers of persons of legal age to drive, possession of a driving license, rates of vehicle ownership and driving patterns all influence the likelihood of experiencing a vehicle stop. But other studies confirm the finding.

The Rand Corporation study conducted for the City of Oakland used an interesting approach to benchmarking which they called "Veil of Darkness". Benefiting from the postulate that officers would not have any way of identifying the visible racial traits of drivers at night, the authors compared distributions of stops shortly before and after sunset. Rand "found that black drivers

composed 50 per cent of stops during the day and 54 per cent of the stops at night. The difference is not statistically significant."[124]

Benchmarking appears easier, though misleadingly so, for actions subsequent to a stop. The same Rand study observed that the citation (ticketing) rate was slightly lower for black than for white drivers, "implying either that police are slightly more hesitant to cite black drivers or that some stops involving black drivers were not severe enough to warrant issuing a citation." Yet, 75 per cent of searches were of black drivers. Nonetheless, 85 per cent of these pat searches were "low discretion", for example as part of arrest, "showing a disparity that is largely the result of factors other than race." This consideration of the scope of discretion in officer decision-making is seldom seen in most studies. Failure to take into account subsequent discovery of evidence upon search or driver behaviours leading to eventual arrest has often resulted in an inflation of the rates of searches and arrests.

The National Survey similarly concluded that blacks (5.8%) and Hispanics (5.2%) stopped by police were more likely than whites (2%) to be arrested (p. 7). Arrests are low-discretion officer decisions and occurred for reasons such as failing a sobriety test; having drugs or an illegal weapon on the driver or in the vehicle; having an outstanding warrant for arrest; assaulting the police officer. Once arrest is factored in, racial differences in post-stop decisions are often found to be spurious.

Contextualization

Racial profiling data collection tends to be very superficial in what information is collected. Organizations collect numbers from their own operations only and even then with little contextualization. Even benchmarking information is seldom collected. Less frequently yet is any information collected on the life circumstances of visible minority populations. In the Kingston study, conclusions were made on the basis of vehicle stop information with no apparent awareness that 40 per cent of the local black population was under age 15 and too young to drive.

[124] Greg Ridgeway, K. Jack Riley, *Assessing Racial Profiling More Credibly*, Rand Corporation, 2004 http://www.rand.org/pubs/research_briefs/RB9070/

At no time in this study was any effort expended in understanding the local black population, its demographics, housing situation and economic circumstances.

In the research of the Ontario Commission on systemic Racism, no effort was ever expended on gaining a better understanding of black accused appearing at bail hearings or of black prisoners held at the Don Jail, the nature of their alleged or convicted offences, their criminal justice histories. The Commission stated that such a focus would serve to demonstrate acceptance that black offenders, rather than systemic racism, were at the root of the problem to which its inquiry was dedicated. It considered such a focus itself as racist. The contrary might just as easily be argued. It was hardly coincidental that a dramatic rise in charges and incarcerations for drugs and drug-related weapons and violent offences occurred after the declaration of the American War on Drugs and the consequently heightened enforcement focus on drug offending and drug-related violence that spilled over our border. The fact that it was only in this offence category that blacks were represented in any large number was scrupulously dodged.

It is astonishing before the seas of black faces of victims and accused of violent crimes in Toronto, seen in newspapers, funerals and in courtrooms that there are still so many who insist that suggestions of racial disparities in offending are evidence of racist attitudes.

The narrow pseudo-scientific, “white lab coat” focus on what are imagined to be “just the facts” does a disservice to our understanding of what lies beneath the fears and accusations of racial profiling and inhibits, rather than permits, dialogue about the things that really matter and what can be done about them.

The Elephant in the Room

The euphemistic phrase “disparity that is largely the result of factors other than race”, that appears over and over in most well-conducted and credible studies of purported racial bias in policing, refers to that which is seldom mentioned directly: disparities in offending behaviours. This is the elephant in the room. One simply cannot dismiss off hand, as is done in various reports of human rights commissions, commissions of inquiry and by anti-racial-profiling

advocacy groups, that such disparities are possible or that to so suggest is racist. The same groups and individuals who once denounced the collection of crime statistics by race for fear that such information would reinforce stereotypes, and who are now clamouring for racial profiling data collection, may find the exercise to be a double-edged sword. One even wonders if it is not their purpose to reinforce stereotypes for purposes of isolation, or creation of a collective identity of grievance and mobilization.

Fighting Racial Profiling

It is clear that this issue of purported widespread and "systemic" racial bias in law enforcement, now known enduringly as "racial profiling", has staying power in public debate and requires a response from police and other investigative authorities as well as other authorities in the criminal justice system. Racial profiling beliefs are a danger to social cohesion and public safety. It is furthermore becoming clear that traditional accountability mechanisms, such as clear policies against bias and discrimination and complaints investigation mechanisms, can no longer be considered sufficient. The calls for more data in order to found claims[125], despite, as we have seen, are the perhaps intractable problems associated with the exercise, may be irresistible in that to desist to do so is interpreted as *de facto* evidence of something to hide[126]. Yet the U.S. experience is that racial profiling data collection has added much heat but no illumination to the debate. Despite legal prohibitions, official statements and the absence of any evidence of widespread bias and discriminatory practice in policing, police denial that "racial profiling" is officially-sanctioned practice has been met with only scoffing from advocates[127].

[125] See for example stopracialprofiling.ca which notes "The problem is that racial profiling is difficult to prove absent the collection of data proving a disparate impact on certain communities or groups. *An Act to eliminate racial profiling in Canada*, if approved by Parliament, would force all enforcement agencies to collect data on who they were subjecting to special scrutiny and why. The data collection provision in the bill is a crucial element to ending systemic racial profiling. Until enforcement agencies begin collecting such data, anecdotal evidence is the only tool that can be used to pressure the government into taking notice and taking action."

[126] See for example Scot Wortley and Julian Tanner, "Data, Denials and Confusion: the Racial Profiling Debate in Toronto", *Canadian Journal of Criminology and Criminal Justice* 45(3): 367-89.

[127] Wortley and Tanner, *ibidem*. Note in particular statements by the authors such as "this pattern of over-representation is consistent with the idea that the Toronto police engage in racial profiling" [in order to falsely persuade the reader that it is in fact evidence]; "police have yet to produce concrete data that can lend support to their 'no racism' argument" [in attempt to reverse the burden of proof, thereby avoiding scrutiny of evidence for the case];

This is very much the sense that emerges from the opening proposition made at the recent Fourth National Symposium on Racial Profiling held at Northwestern University which, rather than examining once again the challenges of gathering and convincing critics with evidence, increasingly judged futile, now focused principally on managing trust and perception.

> They (panelists) had found out the hard way, that even when data collection proved that their agencies were not guilty of racial profiling, anecdotes by citizens held a lot more weight in the media and an ugly public perception often remained.[128]

Daniel Diermeier, Kellogg Management Professor at Northwestern University, recounted the experience of Mercedes Benz in turning a crisis into an opportunity as analogous to that of police services faced with unproved, even disproved, yet persistent accusations of racial profiling.

> When an enterprising reporter conducted a safety test that caused the car to roll-over, the company at first tried to point out that the test was not conducted properly. Mercedes engineers tested and re-tested and maintained that the car was safe. No one seemed to hear them. The story of the bad test spread throughout the media. Despite the fact that the story was not necessarily scientifically accurate, the perception stuck. … Even though there was no evidence that the car was unsafe, Mercedes recalled it, redesigned it and recovered. The recovery involved launching a campaign about how Mercedes "had re-invented safety" with that very same car. The Mercedes executives felt that the expense of creating what was probably an unnecessary fix was well worth it, especially when the Mercedes reputation was at stake.[129]

Public statements and written policies against racial profiling, complaint processes, training, disciplinary policies and task forces involving community leaders, police union representatives and officers on the street are thus seen as effective tools to shape and manage perception by an increasing number of police executives, who yet would not necessarily accept the existence of racial profiling. These statements are certainly less contentious than the costly, difficult and frequently flawed collection of never unambiguous evidence that is inevitably judged either unwanted or unneeded according to whether conclusions drawn contradict or support already hardened and unyielding views.

"police in Canada are not required to record the race of the people they stop or search" [when in Toronto and elsewhere they are in fact prohibited from so doing after intense pressure from race advocacy groups].

[128] 2005 National Symposium on Racial Profiling http://server.traffic.northwestern.edu/events/rps2005.asp

[129] ibidem

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