

RACIAL PROFILING

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RACIAL PROFILING

**Eliminating the Confusion Between Racial and
Criminal Profiling and Clarifying What
Constitutes Unfair Discrimination
and Persecution**

By

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*To my loving wife Maija,
and children Erica, Devon, Max, and Katelyn.
D.D.F.*

*To the precious memories of
Dwaine Raymond, Hannah Perry,
Leo Johnson, and Lyle Goldsmith.
Also to my good friend Djando Jacques Odilon,
and all the traveling people with whom I've shared time.
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*God grant, that not only the love of liberty,
but a thorough knowledge of the Rights of Man,
may pervade all the nations of the Earth,
so that a philosopher may set his foot anywhere
on its surface, and say, "This is my country."*

BENJAMIN FRANKLIN

FOREWORD

In this work, the authors tackle one of the most complex and emotionally charged issues presenting law enforcement—and the communities they serve today, that of racial profiling.

Discrimination in today's society takes different forms. Some of it is obvious, but most is invidious, seeping into the interactions of daily life. As the authors point out, however, not all unfair treatment is illegal discrimination. Only that which has either legislatively or judicially declared to be illegal gives the victims of such actions (or inactions) rights protected by law. And, unfortunately, the protection even in those situations can prove insufficient.

Simply put, racial profiling occurs when law enforcement officials rely on race, skin color and/or ethnicity as an indication of criminality, reasonable suspicion, or probable cause, except when part of the description of a particular suspect.¹ Many law enforcement agencies have policies prohibiting racial profiling as unethical and unacceptable conduct. It can also be illegal discrimination, when, as the authors explore, there is no reasonable cause to connect a protected group with the criminal activity the profiling is meant to address.

Racial profiling has become a topic of much discussion, writing, and reporting in the last few years. Certain law enforcement agencies have come under criticism for their actions in implementing and utilizing this tactic. The authors here differentiate between “criminal profiling” and “racial profiling.” They define “criminal profiling” as “crime detection wherein police officers are perceptive to various indicators suggesting that someone may be engaged in criminal activity,” a practice they defend as legal and necessary in the fight against crime. The authors posit that criminal profiling is often confused with racial profiling, in part because a criminal profile will often include, among other things, race and/or national origin (or some other protected category). While at first blush the two may seem different, in application the line becomes blurred. What a particular individual's “percep-

¹ See: Arizona Law Enforcement Racial Profiling Model Policy, Section II “Definitions,” May 2001.

tions” are that lead to the suspicion of criminal activity cannot be viewed outside the context of that person’s own views of the world. What one police officer thinks is “suspicious” behavior can—and often does—vary from that of another.

The same can be argued with regard to whole communities, as is exemplified by recent headline grabbing stories about racial profiling occurring during “sweeps” of certain geographic areas. Longtime Arizona residents were stopped and asked for documentation (i.e., proof, that they were “legal” residents, not illegal aliens). Many of the stops appeared to have occurred simply because of the person’s color, or where they were located at the time. Some law enforcement officers made stereotypic assumptions about the individuals they stopped, again based simply upon skin color or ethnic origin (i.e., that a person of Hispanic appearing heritage speaks only Spanish).

The community was outraged, and divided between those who felt the stops were racially motivated versus those who supported the law enforcement agencies alleged “goals” in taking the actions. Were the actions of the police justified when juxtaposed against the type of crime they were aimed to correct? Do the ends justify the means? What of the frustration of the police officers who daily are on the “front lines” of law enforcement? How do we, as a society, balance those concerns against the community’s reaction to such law enforcement activity? These are difficult issues with no clear-cut answers. The effort put forth by the authors in examining these topics, and the suggestions they make to address the problems, is admirable. But it is only a beginning for the reader.

This book will leave you with more questions than answers, more issues than resolutions. It is the goal of the authors that such be the outcome. And, while the authors indicate it is not their intent to exonerate or condemn, but to explore pertinent issues, provide insight, and provoke thought, the reader must continue to be cognizant that each of us—reader, author, civil rights attorney, police officer, minority, community member, etc.—brings to this topic his or her own experiences and belief system.

Having practiced civil rights and discrimination law for over twenty years, I am aware of the difficulty of the task undertaken by this work. I admire Mr. Fredrickson and Mr. Siljander for their efforts—and courage—in treading into this sometimes explosive, but always important issue. The reader will not be disappointed.

LORETTA JACOBS-SCHWARTZ, ESQ.
Scottsdale, Arizona

FOREWORD

The issue of racial profiling is probably one of the most significant and complex issues facing law enforcement today. Most law enforcement and public safety agencies are dealing with the sensitive issue of "driving while Black or Brown" or "DWB."

It has become a controversial topic, one that has and will affect the way law enforcement agencies do business many years into the future. As the authors state, racial profiling is the use of the race of the person viewed as the prime motivator to begin a police action, while criminal profiling is a legitimate method of using race among many other factors in accelerating reasonable suspicion or probable cause. Statistically, more African-Americans will deal in crack cocaine than Whites or Asians. Research also reflects that Whites are more prone to deal in LSD or methamphetamine. The vast majority of serial killers are White.

Herein lies the challenge. What constitutes racial profiling and who makes that determination? How much is the issue of racial profiling going to affect the performance of police agencies throughout the country? In my many years of facilitating discussions with veteran officers about cultural awareness and racial sensitivity, typically the vast majority of attendees to these classes were White, male officers. A typical class would also have only several Black or Hispanic officers in the group. I have always asked this question of the attendees. "Do you think that visible minorities, Black or Brown motorists, are stopped by police for more frivolous reasons than White motorists? In every instance, in both the United States and Canada, the White officers will shake their heads "no" and the minority officers will nod their heads "yes". When I ask the minority officers if they would be willing to describe their experiences, most will comment "It happens all of the time" and go on to explain what happens to them, their wives, husbands, or significant others in interactions with the police. This question and ensuing discussions are very revealing to all of the attendees.

The second question asked is based on the following statement: " I am a White motorist in a Lexus driving in a minority neighborhood known for

prostitutes and drug sales. It is two o'clock in the morning. Are you going to stop me?" Half of the attendees no matter what race will say, "Yes, because I know you are up to no good." Half of the attendees will say and rightfully so, they have no right, yet, to stop me, but they will watch me. Are the ones that will stop me profiling me because I am White? What is going on here? Is this a training issue? Are the ranks of the police in the United States full of racists and prejudicial officers? In my thirty-five years of experience in American policing at the federal, state and local levels, I sincerely don't believe this. Does racial profiling exist? It certainly does, but at what level? Is it pervasive in police culture?

These are some of the challenging questions with no simple answers that the authors have begun to address in this book. In this highly emotionally charged topic, the authors begin that long road of trying to address the issues that exist on both sides of the equation. This book reflects a bold step into the realm of the importance of engaging in responsible dialogue without fear of retribution from the "politically correct police." They are true believers that only if people can dialogue with each other and listen to the concerns of each other, then, and only then can we move forward.

The authors bring to this emotion-laden topic the logic of viewing the issues within the social context of the values and practices of the dominant society and the challenges of minority citizens who live in that society. They emphasize that avoiding common errors of logic and reasoning are very important relative to these discussions, particularly in the areas of profiling and discrimination. There is much to be said on both sides of the issue. They explore issues, provide insights, and offer thought provoking and contrasting views on subjects that have often been simplified into ten-second sound bites on the evening news.

In Chapter Six, the authors spend some time in looking at some fascinating areas of the culture of the Gypsies and the sub-cultures of the Hoboes, Tramps, Bums, and Bikers, ones that rarely receive mention in today's society. One can read this area with extreme interest. Another area of great interest is the Criminal Profiling chapter, which is filled with interesting details of effective police practices. The authors speak to the myriad of practices that are an integral part of police work and challenges to those practices that will, no doubt, change the face of policing in this ever-changing multicultural world.

The authors' journey into this emotionally laden and divisive topic of racial and criminal profiling will challenge the reader to think, evaluate, and question as well as grow in knowledge. When we speak, we must speak with

knowledge. The authors have done an excellent job in providing knowledge stimulating thought.

STEPHEN M. HENNESSY, ED.D.
Phoenix, Arizona
July 2001

Author's note: Dr. Hennessy is the author of numerous law enforcement/criminal justice magazine articles, and the following books:

Hennessy, Stephen M., Douglas F. Warring, Myrna Cornett-DeVito, James Arnott, and Gerald H. Heuett, (2000), *A CULTURAL AWARENESS TRAINER'S MANUAL FOR LAW ENFORCEMENT OFFICERS*, 5th Ed., Leadership Publishing, Scottsdale, Arizona.

Hennessy, Stephen M., (1999), *THINKING COP FEELING COP: A Study in Police Personalities*, 3rd Ed., Center for Applications of Psychological Type, Inc., Gainesville, Florida.

FOREWORD

Relationships between government and citizens have often been a source of contention and concern. Nowhere are these relationships more prone to incite different reactions than those between citizens and the police. The police: the arm of government empowered to control its citizen's actions, remove their freedom, and in some cases take their very life. On one hand, encouraged to take steps to insure safety and control crime, on the other criticized when issues arise that give concern to police action and tactics.

One such issue that has reached the forefront in recent times is racial profiling, the action of focusing attention on a person not for their alleged criminal actions but because they are of a certain targeted race. There are many views on this issue. Some feel that the issue is perception only. Others feel that it is a rampant procedure tacitly approved by police administrators.

In their book, *Racial Profiling*, Darin Fredrickson and Raymond Siljander review the issue from numerous directions. The information they cite provides a basis to look at the issue of racial profiling as well as criminal profiling. The material presented here will be useful to police administrators as well as students of criminal justice.

COLONEL DENNIS A. GARRETT
Director, Arizona Department of Public Safety
Retired Chief, Phoenix Police Department

PREFACE

This book was written to eliminate confusion regarding what has come to be called racial profiling by clarifying the legitimate law enforcement practice of criminal profiling, and by clarifying what constitutes unfair discrimination, and persecution.

This book was written to benefit sociology students, law enforcement officers, and anyone else in a position to be concerned with, or affected by, the profiling issue. Police administrators, judges, and legislators, must adequately understand the topics and their many ramifications if they are to make decisions that are based on fact rather than stereotype and myth, and free from the influence of adverse social and political pressures. And, attorneys, when prosecuting or defending cases wherein profiling and discrimination is an issue must have good insight into the many interrelated dynamics of the topics to properly prepare and argue their case.

This writing explores difficult social issues that are often poorly understood, but issues that need to be understood if solutions are to be meaningful. And, a poorly conceived solution is especially likely when the issues are both complex and controversial.

In this book the writers acknowledge that while criminal profiling is a necessary and legitimate law enforcement practice, unchecked bias can pollute the practice. And, while they acknowledge that measures to detect those whose enforcement practices reflect bias can have merit, they emphasize that such efforts must be in addition to the hiring of high caliber officers, providing quality training, providing competent leadership, and on a properly staffed and trained Internal Affairs department. But, the authors also emphasize the unfortunate fact that many efforts intended to prevent bias are to varying degrees ineffectual and create collateral problems. Germane to that discussion is illumination of the difficulties of monitoring fair treatment policies, and the unintended problems that often accompany consent decrees.

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The authors extend their heartfelt appreciation to the following individuals for generously finding the time to read the manuscript and provide professional, and reader perspective, feedback. Such feedback was essential for an undertaking of this nature. However, it must be emphasized that although they critiqued the manuscript, and offered their views, the contents of this book cannot be considered to represent their personal views and no accountability or blame for anything that is considered to be controversial can be assigned to them. The authors also thank their families for enduring the absence of their loved one while they took time out to provide that valuable and essential contribution. The authors thank:

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CONTENTS

	<i>Page</i>
<i>Foreword by Loretta Jacobs-Schwartz, Esquire</i>	ix
<i>Foreword by Stephen M. Hennessey</i>	xi
<i>Foreword by Dennis A. Garrett</i>	xv
<i>Preface</i>	xvii

SECTION I: PROFILING

Chapter

1. Introduction .....	.5
2. Criminal Profiling (Police Profiling Practices) .....	.15
3. Fair Treatment Policies and Equal Protection .....	.51

SECTION II: CULTURAL AWARENESS

Chapter

4. Understanding Social Classes and Cultures .....	.79
5. Deviancy, Outsiders, and Discrimination .....	.91
6. Cultural Awareness .....	.106

Appendix

1. A Hobo King's Perception of Gypsies .....	.135
2. War Chief Joseph's Speech in Washington, D.C. ....	.137

<i>Bibliography</i> .....	.141
<i>Index</i> .....	.143

RACIAL PROFILING

Section I
PROFILING

Chapter 1

INTRODUCTION

In reality there is no such thing as racial profiling! But, there is such a thing as racial discrimination, and racial persecution. And, racial bias can pollute the legitimate law enforcement practice of criminal profiling.

Prologue

American citizens have constitutional rights, rights guaranteed by the United States Constitution, and state constitutions, with judicial interpretation intended to prevent legislative interference of rights. Many of the restrictions imposed upon law enforcement officers, restrictions that many feel impedes their ability to effectively enforce laws, were imposed with the intention of preventing police abuses or, in other words, to prevent police (and government generally) from infringing upon the constitutionally protected rights of citizens.

It is the effort to ensure against police abuses that police today are concerned with, and governed by, such issues as reasonable suspicion, probable cause, search and seizure laws, having to advise suspects of their rights before questioning, and profiling guidelines. In many instances a good balance has been found between the need to ensure the continued protection of constitutionally protected rights of citizens, and the police having the necessary latitude to perform their job effectively, to protect the citizens without violating their constitutional rights in the process. But, in some instances there seems to be too much or too little control, and periodically a new issue will emerge that calls for resolution by the courts, law makers, and policy makers. How quickly and effectively a new issue is resolved often depends

upon its characteristics, and the extent to which it is understood by those who are in policy making positions. That which has come to be called *racial profiling* is one such issue, but the term racial profiling is over used, stigmatized, emotionally charged, clouded with confusion, and frequently applied where there is no relevance.

When the issue of so-called racial profiling emerges, the overriding concern is that of discrimination and persecution, and there is an apparent widespread misunderstanding as to the difference between racial profiling and criminal profiling. And, accepting that racial profiling, as it has come to be understood, is synonymous in many respects with discrimination and persecution, this analysis must of necessity examine the issues of discrimination and persecution. Further, because the very nature of profiling is discriminatory it is also necessary to examine the extent to which discrimination is or is not always wrong.

In this book two forms of so-called “racial profiling” are addressed. One is profiling relative to *Fourth Amendment rights* where police have no legal basis for the enforcement action. The second is profiling relative to *Fourteenth Amendment rights* where police have a legal basis for the enforcement action, but the action is allegedly motivated more by bias than any reasonable suspicion or probable cause that may exist under the circumstances.

The issue called racial profiling has become very problematic for law enforcement. And, unfortunately, for some the term racial profiling also appears to have become a convenient political platform, i.e., if elected I will make racial profiling illegal! How can it be made illegal to do something that does not exist? *In reality there is no such thing as racial profiling! But, there is such a thing as racial discrimination, and racial persecution. And, racial bias can pollute the legitimate law enforcement practice of criminal profiling.* Accepting that it is already illegal to unfairly discriminate against certain classes, and illegal to persecute, intending to enact a law prohibiting “racial profiling” can be argued to be redundant and do little more than create confusion regarding the legitimate law enforcement practice of criminal profiling. The proclaimed intention to make racial profiling illegal tends to suggest either inadequate understanding of the issue and its related dynamics, or an effort to exploit a controversial but badly misunderstood social issue for political reasons. Asserting that one will make racial profiling illegal is reminiscent of the person campaigning for the position of state

Attorney General who emphasized that if elected he would eliminate plea-bargaining. Although as a practical matter that could not be done, and he no doubt knew it, it was intended to appeal to the uninformed for the purpose of capturing votes.

The term racial profiling is invariably used to describe what is felt to be an unfairly discriminatory law enforcement practice that is intrinsically wrong and should never be permitted. But, while it is true that discrimination and persecution is wrong, criminal profiling which may or may not include race among the profiling criteria is not inherently wrong. There is a difference between criminal profiling and that which has come to be called racial profiling although the distinction between the two tends to be misunderstood. And, just because a criminal profile includes race or national origin does not mean it reflects racial bias or will in any way result in discrimination or persecution; it's a question of relevancy.

Criminal profiling has a legitimate and successful history when applied to such criminals as serial killers, rapists, hijackers, child molesters, and arsonists (Turvey, 1999). Those who are familiar with criminal profiling of serial killers, and child molesters, are aware of the fact that there is a correlation with white males and such crimes. That is a significant observation considering that the racial component of criminal profiling appears to be objectionable only when minorities are identified as being disproportionately involved in certain types of crime such as drug trafficking. In both situations arrest and conviction data provide an empirical basis for inclusion of race or ethnicity in a profile, but do police conduct the same number of traffic stops in America to investigate serial killers and child molesters as they do for drug couriers. The facts would reveal they don't. It may be the sheer number of stops highlighting the distinction and causing a political backlash (Turvey, 1999).

This book is not intended to teach police officers how to do that which is referred to as criminal profiling, although in Chapter 2 considerable space is devoted to clarifying the practice. That is done because unless the practice of criminal profiling is clearly understood, it is impossible to examine it relative to what has come to be called racial profiling. And, such an examination also requires a clear understanding of exactly what constitutes "unfair" discrimination, and persecution, with cultural awareness also being an integral part of the equation. As can be seen, it is a complex issue with many facets.