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Use of Race in "Stop-and-Frisk": Stereotypical Beliefs Linger, But How Far Can the Police Go?

BY BENNETT L. GERSHMAN

The power of police to detain persons for a brief period to investigate suspected criminal activity – commonly known as "stop-and-frisk" – has always been one of the most contentious issues in law enforcement.[1] Although there is general consensus that street stops are an important weapon in crime prevention, the belief has always existed that stop-and-frisk tactics are often used indiscriminately and abusively against minority groups.[2]

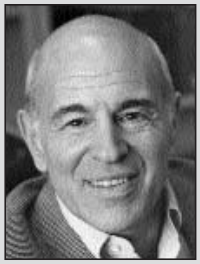
The extent to which race is used by police as a proxy for criminal behavior is difficult to measure. At one extreme, there is little question that a person's race may properly be considered when it is part of a description given by a victim of a suspect.[3] At the other extreme, the stereotypical belief that a person's race makes him more likely to engage in criminal conduct is an entirely different matter. Clearly, as one circuit court of appeals explained: "If law enforcement . . . takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred."[4]

The perception by minority groups that police employ stop-and-frisk in a racially discriminatory manner is widespread. One study found that nearly half of all African-Americans "consider 'police brutality and harassment . . . a serious problem' in their own community."[5] In an informal survey of 100 young black and Hispanic men living in New York City, 81 reported having been stopped and frisked by police at least once; none of these stops resulted in arrests.[6] Even law enforcement officials concede the existence of substantial racial bias by police officers toward minority citizens. A recent survey of 650 officers in the Los Angeles Police Department found that 25% believed that racial bias on the part of officers toward minorities existed and contributed to the negative interaction between police and the community.[7]

This perception of racial bias is grounded in reality. Statistics on street stops in Pittsburgh and Philadelphia, Pennsylvania, and St. Petersburg, Florida, demonstrate a pattern of disproportionate stops of minorities.[8] And a New Jersey state court's 1996 finding of disproportionate traffic stops of minority motorists[9] led the U.S. Department of Justice to appoint a monitor to oversee the actions of the New Jersey State Police.[10] The American Bar Association has recommended mandatory data collection by law enforcement departments for the purpose of investigating the increasing incidence of police officers' "racial profiling."[11]

Most recently, an unprecedented investigation by the New York State attorney general's office documented the racially disparate stop-and-frisk practices of the New York City Police Department.[12] The attorney general's report was based on a quantitative analysis of approximately 175,000 police forms (UF-250s) that police officers are required to complete after "stop" encounters. The forms covered stops that occurred in 1998 and the first three months of 1999. The report found that blacks were more than six times more likely to be stopped than whites, and Hispanics were more than four times more likely to be stopped than whites.[13] Such disparities were most pronounced in precincts where the majority of the population was white.[14] The report also found that in many of these stops, the police lacked a sufficient factual basis to justify the action,[15] and that race apparently affected the decision to make the stop.[16]

The reported demographics of crime necessarily complicates the analysis of differential stop rates based



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on race.[17] It is commonly believed that a disproportionate number of violent crimes (*i.e.*, aggravated assault, robbery, rape, and murder) are committed by persons who are black.[18] It is therefore not surprising, although regrettable, that some law enforcement officials might use race as a statistical predictor of a person's likelihood to engage in criminal activity. Many courts addressing the claim of improper racial stereotyping allow this use of race as a factor in deciding whether to detain and question a person, so long as the officer's decision is reasonably related to efficient law enforcement and not undertaken for purposes of racial harassment.

The willingness of the courts to tolerate "reasonable" racially discriminatory conduct by the police is illustrated by *United States v. Martinez-Fuerte*,[19] where the U.S. Supreme Court upheld a vehicle stop, interrogation, and search at a highway checkpoint 30 miles north of the Mexico-U.S. border based in part on the motorist's apparent Mexican ancestry. The Court said that "to the extent that the Border Patrol relies on apparent Mexican ancestry, . . . that reliance clearly is relevant to the law enforcement need to be served."[20] Lower courts also have condoned police stops of persons who appear to be "out of place" given their race and the racial makeup of the neighborhood where they are found. A good example is *State v. Dean*,[21] where the Arizona Supreme Court stated: "[T]he fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an officer and the court in determining whether an investigation and detention is reasonable and therefore lawful."[22]

To be sure, a person's race may appropriately be considered when it is relevant to the investigation. For example, singling out racial minorities for stops based on a victim's description does not suggest impermissible racial targeting, for in such cases a suspect's race is used in the same manner as any other descriptive detail such as height, weight, or distinctive clothing. Thus, in *Brown v. City of Oneonta*,[23] the Second Circuit Court of Appeals affirmed the dismissal of claims by minority residents who alleged that police investigating an attack on an elderly woman unlawfully singled out hundreds of black men for detention and questioning. The court noted that these individuals were not questioned solely on the basis of their race but on the permissible basis of a physical description given by the victim of the crime.[24] As the court stated: "The description is not a suspect classification, but rather a legitimate classification of suspects."[25] The court added that it was not unmindful of the impact of the investigation on police-community relations, nor was the court "blind to the sense of frustration that was doubtlessly felt by those questioned by the police during this investigation."[26]

Remedies When Race Is Used Impermissibly

Assuming, however, that police use race impermissibly as a signal of increased risk of criminality, what legal remedies are available, and how should courts analyze the claim?

Constitutional remedies include the Fourth Amendment's protection against unlawful seizures and searches and the Fourteenth Amendment's guarantee of Equal Protection. Both claims could be asserted in a criminal proceeding, typically by a motion to suppress evidence acquired following a stop that culminates in an arrest and search, or in a Civil Rights Action under 42 U.S.C. § 1983 for an injunction or monetary damages. The issues in both proceedings would be (1) whether the police officer detained the individual without a sufficient level of objective, factual suspicion, and (2) whether the police officer detained the individual, in part, because of his or her race.[27]

Under a Fourth Amendment claim, the petitioner must allege sufficient facts to show that he or she was detained by the police without reasonable suspicion. Detention constitutes a Fourth Amendment seizure when the police restrain someone by means of physical force or show of authority under circumstances that would convey to a reasonable person the belief that he was not free to leave.[28] Under an equal protection theory, the petitioner must allege sufficient facts demonstrating that the police intentionally stopped him because of his race in circumstances where race was not relevant to the investigation.[29]

A Fourth Amendment challenge would be difficult to sustain even in cases where police impermissibly used race as a factor in making the stop. The Supreme Court has held that in cases involving pretextual behavior by the police, such as stopping motorists for minor traffic violations in order to search the vehicle for drugs, the officer's subjective intent is irrelevant; the issue is whether the officer's conduct was objectively reasonable.[30] Thus, even assuming a stop predicated on the officer's subjective use of the suspect's race to indicate an increased risk of criminality, the Fourth Amendment issue would be whether facts existed apart from the suspect's race to demonstrate a reasonable suspicion that criminal activity was afoot.[31] Where, however, the police seek to justify arguably race-conscious conduct by offering race-neutral reasons, a court should be encouraged to take a hard look at the facts to determine whether the officer's justification is credible.[32]

Establishing an equal protection violation based on the selective use of race might prove more successful. A party can demonstrate purposeful racial discrimination by (1) alleging the existence of a law or policy that expressly classifies persons on the basis of race,[33] (2) pointing to a facially neutral law or policy that has been ap-

plied in a discriminatory manner,[34] and (3) showing that a facially neutral law or policy has a disproportionate racial impact, and that it was motivated by racial bias.[35]

Invoking equal protection to challenge racially motivated stops must allege facts reasonably showing that the police officer consciously considered the suspect's race in deciding to order the stop. A petitioner could allege that a law enforcement agency maintained a regular policy of stopping blacks and Hispanics more often than whites when investigating crimes of violence and weapons possession.[36] Such a claim could be based on statistical evidence of police stop rates correlated to the suspect's race, and adjusted for crime rate differentials and population composition.[37] For example, the documentation contained in the New York State attorney general's report might provide the necessary evidence to establish a *prima facie* case that the New York City Police Department maintains a racially discriminatory stop-and-frisk policy.[38] Although the report did not draw such a conclusion expressly, the inference was inescapable.

Once a party makes a *prima facie* showing that race was a motivating factor in the officer's decision, then under equal protection doctrine the government has the burden of rebutting the claim by showing the existence of neutral, non-racial reasons that motivated the action.[39] As with any equal protection claim supported by evidence that the government's conduct was motivated by racial considerations, a court must scrutinize the claim strictly.[40] Under this strict standard of review, the government faces a heavy burden to show that its conduct served a compelling interest and was narrowly tailored to accomplish that goal.[41]

Conclusion

There is an increasing awareness among courts, commentators, and the public that race plays a critical role in police stop-and-frisk decisions.[42] The report by the New York State attorney general's office presents compelling evidence that race has played a dominant role in the New York City Police Department's stop-and-frisk practices. The report documents what for many years New Yorkers have assumed: that too many police officers equate a person's race with criminal behavior and act on that belief. When presented with such a claim, courts should take a very hard look at the government's justification for its actions. There is no place in constitutional law or criminal justice for a theory of "reasonable" racial discrimination.

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1. In *Terry v. Ohio*, 392 U.S. 1 (1968), the landmark opinion legitimizing the practice, the Supreme Court ruled that the Fourth Amendment does not bar police from stopping a person for questioning, and frisking that person for weapons, when the officer has a reasonable, articulable suspicion that criminal activity is afoot, even though the officer lacks probable cause to make an arrest. New York courts apply a more stringent, multi-level approach to stop-and-frisk. The first, least intrusive level, allows police to request information about a person's identity and reason for being in a particular location where the request is supported by an objective, credible reason. The second level, referred to as the "common-law right to inquire," allows the officer to conduct more intensive questioning, although not detaining the individual, when the officer has a "founded suspicion" that criminal activity is afoot. The third level authorizes a stop and frisk when based on reasonable suspicion that a particular person has committed, is committing, or is about to commit a crime. The fourth level allows the police to make an arrest based on probable cause. *See People v. De Bour*, 40 N.Y.2d 210, 223, 386 N.Y.S.2d 375 (1976).
2. *Terry*, 392 U.S. at 14 n.11 ("'[i]n many communities, field interrogations are a major source of friction between the police and minority groups.'") (quoting President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183-84 (1967), which documents the belief by minority groups that police stops are conducted "indiscriminately" and "abusively").
3. *Brown v. City of Oneonta*, 195 F.3d 111 (2d Cir. 1999).
4. *United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997).
5. Jean Johnson, *American's Views on Crime and Law Enforcement: Survey Findings*, 233 Nat'l Inst. of Just. J. 9, 13 (Sept. 1997) (quoting an April 1996 study by the Joint Center for Political and Economic Studies).
6. Leslie Casimir et al., *Minority Men: We Are Frisk Targets*, N.Y. Daily News, Mar. 26, 1999, at 34.
7. Report of the Independent Commission on the Los Angeles Police Department 69 (1991).
8. Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondent, at 17-19, *Illinois v. Wardlow*, 120 S. Ct. 673 (2000) (No. 98-1036).
9. *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).
10. David Kocieniewski, *U.S. Will Monitor New Jersey Police on Race Profiling*, N.Y. Times, Dec. 23, 1999, at B1.
11. Criminal Law Reporter (BNA), Vol. 65, No. 19, Aug. 18, 1999, at 535.
12. *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* (1999), *available at* <http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html> (visited Feb. 23, 2000).
13. *Id*. at 95.
14. *Id*. at 106 ("[I]n the most strongly white neighborhoods in New York, the disparity between minority and white "stop" rates is most pronounced.").
15. *Id*. at 162 (noting that in more than one out of every seven stops, when the police officer filled out the mandated UF-250 form documenting the stop, the officer's rationale for the stop failed to meet the constitutional requirement of reasonable suspicion).
16. *Id*. at 166 ("race appears to have affected the rate of 'stops' in which the facts, as stated, did not articulate 'reasonable suspicion'").
17. Even when the statistics in the attorney general's report are adjusted to account for crime rates, minorities were still being stopped at a far higher rate than whites. *See id*. at 117-35.

18. Randall Kennedy, Race, Crime, and the Law 13, 15 (1997). It should also be noted that behind the high rates of blacks perpetrating violent crimes are equally high rates of black victimization. Black teenagers are nine times more likely to be murdered than white teenagers. One out of every twenty-one black men can expect to be murdered, a death rate double that of American servicemen in World War II. *See id*. at 19-20.
19. 428 U.S. 543 (1976).
20. *Id*. at 564 n.17. *See* Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. Times, Jan. 26, 2000, at A17 (innocent motorists claim they are pulled over for "driving while Mexican").
21. 543 P.2d 425 (Ariz. 1975).
22. *Id*. at 427. *See United States v. Weaver*, 966 F.2d 391, 394 (8th Cir. 1992) ("[F]acts [showing disparate racial criminal conduct] are not to be ignored simply because they may be unpleasant"). Such stereotypical views can have tragic consequences. *See* Tina Kelley, *Call for Calm After Shooting of Policeman by Colleagues*, N.Y. Times, Jan. 30, 2000, at 14 (reporting the killing of a young black off-duty police officer who was shot to death by two white police officers after coming to their aid when they were threatened by man with a gun and did not recognize their colleague).
23. 195 F.3d 111 (2d Cir. 1999).
24. *See id.* at 119; *see also People v. Hicks*, 68 N.Y.2d 234, 508 N.Y.S.2d 163 (1986); *People v. Castro*, 115 A.D.2d 433, 497 N.Y.S.2d 1 (1st Dep't 1985), *aff'd*, 68 N.Y.2d 850, 508 N.Y.S.2d 407 (1986).
25. *Brown*, 195 F.3d at 119.
26. *Id*. at 120.
27. Interviews by the author with attorneys and administrative officials in New York City's criminal courts indicate that litigation raising the claim of race-based stops, particularly in light of the attorney general's report, has not yet been fully developed.
28. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). *See People v. De Bour*, 40 N.Y.2d 210, 216, 386 N.Y.S.2d 375 (1976) (seizure occurs when police conduct results in "significant interruption [of the] individual's liberty of movement").
29. *National Congress for Puerto Rican Rights v. City of New York*, 1999 U.S. Dist. LEXIS 19244 (S.D.N.Y. Dec. 14, 1999) (reinstating equal protection claim based on allegation that plaintiffs were stopped and frisked by police officers believed to be members of the New York Police Department's Street Crime Unit without reasonable suspicion and on the basis of his race and national origin).
30. *Whren v. United States*, 517 U.S. 806 (1996).
31. Of course, if it could be proved that the police impermissibly used race as a factor in conducting a stop, this could be the basis for departmental disciplinary action against the officer.
32. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("all governmental action based on race . . . should be subjected to detailed judicial inquiry").
33. *See id.* at 213, 227-29.
34. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
35. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 242-44 (1976).
36. *National Congress for Puerto Rican Rights v. The City of New York*, 1999 U.S. Dist. LEXIS 19244 (S.D.N.Y. Dec. 14, 1999).
37. *But see United States v. Armstrong*, 517 U.S. 456 (1996) (statistical evidence that blacks more likely to be charged with drug crimes than whites insufficient to obtain discovery to prove claim of selective prosecution).
38. The statistical survey in the Attorney General's Report contains stop rates citywide, and also breaks down the figures by focusing on certain identifiable precincts, and also with respect to the Street Crimes Unit. *See The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* (1999), at 94-110, *available at* <http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html> (visited Feb. 23, 2000). Thus, for example, a stop by a member of the Street Crime Unit in a precinct where minorities are already subject to far more stops than whites would raise a compelling inference of purposeful racial discrimination.
39. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 97 (1986); *Arlington Heights*, 429 U.S. at 270 n.21.
40. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").
41. *See id*.
42. *Illinois v. Wardlow*, 120 S. Ct. 673 (2000) (Stevens, J., concurring in part, dissenting in part) (discussing justifiable fears of minority citizens "that contact with the police can itself be dangerous" even when the person is entirely innocent of any wrongdoing).