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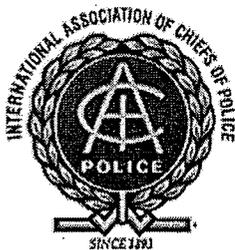
Updating Ethics Training-Policing Privacy Series: Taking Race out of the Perception Equation

By Thomas J. Martinelli, Adjunct Professor, Wayne State University, Detroit, Michigan; and Joseph A. Schafer, Associate Professor, Center for the Study of Crime, Delinquency and Corrections, Southern Illinois University, Carbondale



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Editor's note: This article is the first in a four-part series of privacy-related articles that will appear in subsequent issues of Police Chief magazine.

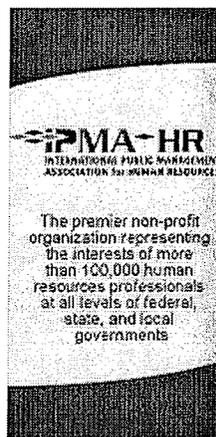


Policing has always been about differing perceptions. In police research, academicians use the perceptions of citizens, officers, and supervisors to measure the successes, or failures, of an organizations' productivity. Whether studying the effects of random patrol in the Kansas City, Missouri, Random Patrol Study in the 1970s, the foot patrol studies of the 1980s, or contemporary research efforts such as Project Safe Neighborhoods Anti-Gang Training, researchers rely on human interpretations to measure police service quality and productivity. Unfortunately, there has been a long history of negative perceptions regarding bias-based police services that continue to be a challenge for police administrators today. Clearly, every police department has the ongoing duty to measure policing perceptions, fashion training curriculums to address those perceptions, and improve its overall policing services. Partnering with academia to gauge productivity perceptions, focused scenario training, and zealous supervision are the keys to maintaining an agency's positive public persona.

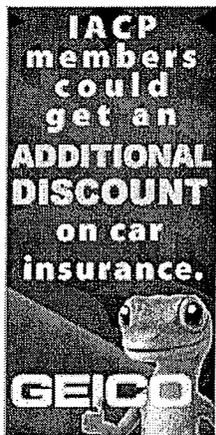
Though a law enforcement organization's image is predicated on the perceptions of its citizens, the onus is continually on the



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agency to maintain a positive public image. Research suggests most citizens seldom come in direct contact with their own police department. Media studies give credence to the idea that citizen perceptions of their police department, crime trends, and their fear of crime are all directly related to electronic and print media coverage.¹ Consequently, citizens may possess a skewed perception of the reality in which their local police departments function. Society is inundated with daily media reports of violent crimes and the occasional police misconduct story; therefore, it is not surprising that a community's perceptions of its local police department may not be as constructive as the police department administrators would like.

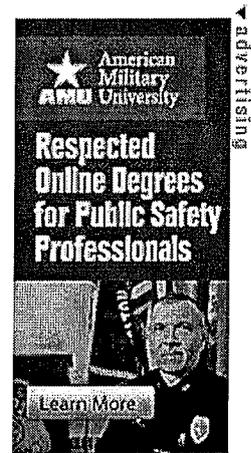
Even in one of the authors' urban university classes, students automatically assume discussions of bias-based policing and discrimination involve Caucasian police officers and African American, Asian, Muslim, or Hispanic citizens.² Interestingly, these students attend a university located in a city that, since 1980, has lost 100,000 Caucasian residents, has gained Hispanic immigrants, and has an African American population of over 80 percent.³ The city also has a police force of a majority of African American officers, yet these young students have a preconceived notion that racial profiling automatically involves a white officer violating the constitutional rights of minority citizens. Clearly, race and ethnicity play active roles in police service perceptions. The difficulties in quantifying bias-based policing through data collections are challenges for police administrators and trainers as they attempt to formulate an updated training curriculum focused on legal and ethical guidelines.

A recent *New York Times* article addressed the notion that its city's police force has aggressively enhanced its investigative practices regarding minority stops. A study reviewing data pertaining to the New York City Police Department practices demonstrated that minorities were almost nine times as likely as whites to be stopped and investigated, but were not arrested any more often than their counterparts. "According to the analysis of the 2009 raw data by the Center for Constitutional Rights, nearly 490,000 blacks and Latinos were stopped by the police on the streets last year, compared with 53,000 whites."⁴ This continues to be a sensitive topic for minority communities and civil liberty groups and has produced more police watchdog organizations monitoring police procedures.

More disturbing, from an image standpoint, was a report last year regarding allegations of racial profiling and the enforcement of an asset-forfeiture statute. A federal class-action lawsuit has been filed alleging that an agency, policing a major highway in its jurisdiction known for drug smuggling, has "developed an illegal 'stop and seize' practice targeting, stopping, detaining, searching and often seizing property from apparently non-white citizens and those traveling with non-white citizens."⁵ It was reported that an African American grandmother forfeited \$4,000 in cash and an interracial couple lost \$6,000 in cash, though no criminal charges were ever filed in either case.⁶ Such media coverage fans the flames of allegations of police misconduct, increases privacy violations litigation, and makes it that much more challenging for agencies to retain their public's trust.

Defining Racial Profiling Is Problematic

How can police administrators, trainers, and supervisors best educate their officers regarding the pitfalls associated with using race in police procedural decision making when there is a fluid consensus regarding its definition? Some suggest that racial profiling occurs when law enforcement "solely" uses race as an indicator to take police action. "Central to the debate on the most frequently used definitions [of racial profiling] is the word, 'solely.' In the realm of potential discriminatory actions, this definition likely references only a very small portion [of race-biased police investigations]. Even a racially prejudiced officer likely uses more than the single factor of race when conducting biased law



enforcement."⁷ Clearly, using race alone in law enforcement decision making is unconstitutional. Bias-based policing, without consideration of criminal behavioral criteria, is clearly racist policing.

The U.S. Department of Justice has definitively stated that "racial profiling is defined as any police-initiated action that relies on the race, ethnicity, or national origin *rather than the behavior of an individual* or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity." (emphasis added)⁸ Additionally, Amnesty International USA expands its definition by suggesting that racial profiling is "the targeting of individuals and groups by law enforcement officials, *even partially*, on the basis of race, ethnicity, national origin, or *religion*, except where there is trustworthy information, relevant to the locality and timeframe, that links persons belonging to one of the aforementioned groups to an identified criminal incident or scheme." (emphasis added)⁹ In fact, Amnesty International reports that "racial profiling of citizens and visitors of Middle Eastern and South Asian descent, and others who appear to be from these areas or members of the Muslim and Sikh faiths has substantially increased since September 11, 2001."¹⁰

Others offer an even broader Fourteenth Amendment Equal Protection definition of bias-based policing as the "unequal treatment of any person including stopping, questioning, searching, detention, or arrest on the basis of their racial or ethnic characteristics . . . gender or *sexual orientation*." (emphasis added)¹¹ One could argue this mirrors the Hate Crimes legislation passed in many states, wherein the onus is on government to protect the rights of society's minority groups, guaranteeing them equal access to, and protection of, constitutional rights.

For more than a decade, researchers have attempted to quantify racial profiling through the analysis of traffic stop data. In research as well, agreeing on a definition of what racial profiling actually is has proven difficult. Even "if consensus could be reached about the proper conceptualization of a denominator to use in assessing profiling, reaching an agreement on the most valid and reliable operational definition would be equally problematic. These conceptual ambiguities have lead scholars to suggest that it would be premature to make any conclusions about the existence and magnitude of racial profiling"¹² without first having a concrete, universal definition.

Beyond legal, administrative, and academic definitions, it is critical to consider public perceptions of bias-based policing. Citizen perceptions of racial profiling consider it a more widespread practice in police enforcement actions; reinforced through training curriculums; condoned by management (in the very least by looking the other way); and committed by all officers regardless of race. From the perspective of minority citizens, this "looking the other way" perpetuates the "police myth" that minorities are more likely to commit crimes and possess illegal narcotics, thus justifying each stop.¹³ It is this "myth" that must be addressed and debunked in training circles.

An outraged journalist best clarified the civilian perspective. "Such racial profiling is hard to distinguish from—and sometimes involves—plain old racist harassment of groups that have long experienced discrimination at every stage of the criminal justice process. It subjects thousands of people to the kind of humiliation that characterizes police states. It hurts law enforcement in the long run by fomenting fear and distrust among potential witnesses, tipsters, and jurors And it makes a mockery of conservative preachings that the Constitution is colorblind."¹⁴ Innocent minority citizens' expectation of privacy, to be left alone from intrusive and illegal searches by their local police departments, fuels the need for all police administrators to revisit their training curriculums. There is a need to ameliorate the

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negative perceptions society possesses regarding the existence of bias-based policing in this noble profession.

Respect Privacy Expectations while Protecting Officers' Lives

The U.S. Supreme Court has repeatedly carved out exceptions to Fourth Amendment protections against governmental "unreasonable search and seizures." Privacy intrusions, within constitutional parameters, have always been a part of successful, professional policing. The law compels fact finders reviewing police procedures to look at the totality of the circumstances confronting the officer at the time he or she took official investigative actions and not presume subjective ulterior motives. A citizen's racial makeup, in the very least, can be tangentially part of an officer's decision-making process, but using articulable behavioral criteria is constitutionally sound policing. This must be explicitly addressed in training curricula as the organizational expectation, reinforced through vigilant supervision and policy compliance measures.

Police bias-based decisions that violate agency protocol oftentimes are very difficult to substantiate in a labor law hearing for policy noncompliance. The laws of privacy continue to evolve as consent searches and *Terry* stops are two of the grayer exercises of police discretion used during investigative stops. They are necessary good faith exceptions to the Fourth Amendment, but must be highly scrutinized with ardent supervision and meticulous attention to citizen complaints. Policy compliance and accountability will always be the organizational goal, as the influx of in-car cameras and other innovative measures have proven fruitful tools in maintaining organizational expectations and citizen confidence in law enforcement.¹⁵

Racial profiling is not necessarily an isolated "bad apple" issue though. Police administrators must recognize that some research suggests there is an organizationally implied, informal policy that condones bias-based violations across the board by looking the other way or failing to zealously supervise. "[P]olice decision making is not merely a function of the individual officer's discretion but also of the collective culture found within police organizations..."¹⁶ To successfully combat this, organizations need to "support the notion that police decision making is predicated more on various legal and situational factors than on presumably invalid factors."¹⁷ Training in and recognizing behavioral indicators on the street is the key to unbiased policing. Demonstrating that race need not be a part of the situational factors that make up the criteria officers use in the execution of their investigative duties creates a defensive buffer to allegations of bias-based policing.

The Fourth Amendment protects the philosophies on which privacy laws were founded.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

On its face, the Fourth Amendment is clear and unambiguous. Over the years, the Court has clarified the Fourth Amendment's meaning as societal issues have evolved. Exceptions to the mandatory Fourth Amendment guidelines (that is, obtaining a written warrant based on sworn probable cause criteria) have been addressed repeatedly, and analysis here is not necessary. Consent, exigent circumstances, stop and frisks, searches incident to lawful arrest, special needs, and motor vehicle stops cover the majority of procedural exceptions to the amendment. The Court's recent emphasis on "officer safety" issues has

provided criteria allowing officers the peace of mind knowing the law will support searches and seizures that can be justified for both community and officer safety reasons.

Including recent U.S. Supreme Court decisions regarding police-initiated contacts in training curriculums helps provide agencies with protection against allegations of bias-based policing. Judicial guidelines are the key to insulating officers from allegations of bias-based policing. As mentioned earlier, it is the behavior of the officer before and after "the privacy intrusion" or stop that will be adjudicated. The law is blind to the subjective assumptions or motivations that race played in an officer's decision-making process to initiate police action. Officer safety measures and articulated criminal indicators are a successful defense against unsubstantiated allegations of racial profiling and illegal privacy intrusions. Training curriculums must develop and incorporate investigative traffic stop scenarios, using U.S. Supreme Court cases, wherein reasonable suspicion is articulated to the extent it would pass Fourth Amendment judicial scrutiny.

The Court addressed law enforcement's overall duty to investigate in a border patrol case. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an *intermediate response* [emphasis added] ...A brief stop of a suspicious individual, in order to determine his identity or to maintain the *status quo* [italics in original] momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."¹⁸ The conclusion in this case and its progeny rely solely on factual objectivity, or reasonable articulable facts, and not an officer's subjective motivations or biases.

For decades, officer safety has allowed law enforcement to stop a pedestrian on articulable, reasonable suspicion that a crime has been, is being, or is about to be committed and can frisk his outer garments for weapons. It is a brief, but reasonable intrusion of privacy.¹⁹ Likewise, an officer may temporarily detain a motorist upon a probable cause belief that the citizen committed a civil motor vehicle infraction. The law will not delve into an officer's "ulterior motives" to invalidate objectively justified police conduct based on the probable cause a moving violation has been committed.²⁰ Once a motor vehicle has been stopped, the driver may be ordered out of the vehicle based on articulable circumstances confronting the officer (for example, time, date, place, age, number of occupants, occupant demeanor, or dangerous weapons). Though there is a "de minimus intrusion" of freedoms (or privacy expectations), it has been adjudicated as reasonable police action.²¹ Officers can order passengers out of a vehicle under the same justifications. Additionally, there are no Fourth or Fifth Amendment protections at issue when demanding identification from a citizen an officer suspects may be involved in criminal activity.²² Officer safety is the priority here.

As long as the motor vehicle stop is brief, citizens do not have a legitimate expectation of privacy to the possession of contraband in the car. Use of a narcotic detection dog sniffing the exterior of the car does not violate Fourth Amendment protections.²³ Additionally, with a set of articulable facts and circumstances, an officer can briefly use his or her observations, training, and experience to engage in questioning the vehicles' occupants about their comings and goings, criminal records, and other pertinent issues unrelated to the civil infraction justifying the stop.²⁴

In a recent unanimous ruling, the Court concluded the general precepts of the Fourth Amendment will override stricter state law requirements, if ever there is a conflict between federal and state law. Privacy expectation issues will be adjudicated using the broader application of the federal guidelines of the Fourth Amendment for landmark uniformity. In this case, the officers had

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probable cause to believe the suspect was driving with a suspended license. A search incident to his arrest for the suspension resulted in confiscation of crack cocaine. Even though the arrest was not permitted under the stricter state law guidelines that dictated solely issuing a citation, the Court ruled the arrest was legally permissible under the Fourth Amendment to ensure officer safety and safeguard evidence.

In upholding the arrest and subsequent search, all nine justices agreed that "States, we said, remained free 'to impose higher standards on searches and seizures than required by the Federal Constitution,' but regardless of state rules, police could search a lawfully seized vehicle (or person) as a matter of federal constitutional law."²⁵ The Court used traditional legal search standards to adjudicate whether the officers' actions before and after the arrest were reasonable and within the constitutional parameters of the law. Race was never a consideration and officer reasonableness prevailed.

For the Court, bias-based policing was not an issue in this case despite the fact the defendant was African American. The unanimous ruling focused solely on the objective facts confronting the investigating officers and concluded their actions were reasonable and constitutional. Though some would argue their actions were racially motivated and overstepped the legal mandates for a stop,²⁶ the Court concluded that the nonbiased situational factors confronting the officers during this incident justified their stop and search.

Recommendations

A community's perception of its law enforcement agency is premised on the level of trust it shares with its police department. The expectation of privacy is predicated on perceptions, including those garnered from police-initiated contacts, word of mouth, and media coverage. Police agencies have a duty to document (through research and traffic stop data) their clientele's perceptions and recalibrate their training curriculums and supervisory oversight to demonstrate concerted efforts to address negative community perceptions. There is an old axiom in research stating "you cannot correct that which you do not measure." Measuring the public's trust and perceptions goes a long way toward reinforcing (or rehabilitating) an agency's public image. Annual training must incorporate privacy scenarios, the latest U.S. Supreme Court cases, and the ethical issues regarding bias-based policing.

The evolution of police procedural cases from *Terry v. Ohio* and *Whren v. U.S.* through to *Virginia v. Moore* demonstrates the law will not presume an officer's motivations or cognitive processes in initiating police action. Objective, circumstantial evidence confronting the officer during each street investigation will be the standard for review. This must be emphasized in training curriculums and through media coverage of police procedures for the court of public opinion. Updated training curricula must be revamped so that case law and privacy issues are comprehensively addressed through focused police-initiated scenarios and discussions regarding the ethics of policing. Training in organizational expectations regarding officer use of discretion must recognize bias-based policing allegations and balance it with the officer safety guidelines espoused in the U.S. Supreme Court case law herein.

Partnering with a university or academia for data collection is neither new nor innovative. But it can be cost effective, and it provides an unbiased snapshot of the dilemmas facing law enforcement today. University partnerships provide an inexpensive alternative that benefits the agency, its community, and the researchers themselves. It is a win-win situation that demonstrates an ongoing organizational sensitivity to the acute privacy issues involved in policing today and provides administrators a level of confidence that their agencies have a

balanced approach in their efforts to thwart crime in a constitutional fashion. Police leaders must constantly be aware of the racial undertones involved in everyday law enforcement in their jurisdictions; a failure to do so is a dereliction of their duties. Reaching out to academia and updating training curricula can only better professionalize an agency while benefitting the community it serves. ■

Notes:

¹Nancy E. Marion, *A Primer in The Politics of Criminal Justice* (Monsey, N.Y.: Criminal Justice Press, 1995), 32.

²One coauthor teaches at Wayne State University, Detroit, Michigan.

³The Brookings Institution, "Detroit in Focus: A Profile from Census 2000," http://Brookings.edu/reports/2003/11_livingcities_detroit.aspx (accessed November 17, 2010).

⁴Al Baker, "New York Minorities More Likely to Be Frisked," *New York Times*, May 12, 2010, <http://www.nytimes.com/2010/05/13/nyregion/13frisk.html> (accessed November 17, 2010).

⁵Howard Witt, "Highway Robbery? Texas Police Seize Black Motorists' Cash, Cars," *Chicago Tribune*, March 10, 2009, http://www.chicagotribune.com/news/nationworld/chi-texas-profiling_wittmar10.0.6051682.story (accessed November 17, 2010).

⁶*Ibid.* The Houston couple's money was returned to them once they sought legal counsel.

⁷Lorie Fridell et al., *Racially Biased Policing: A Principled Response* (Washington, D.C.: Police Executive Research Forum, Office of COPS, 2001).

⁸Deborah Ramirez et al., *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, November 2000, NCJ 184768, <http://www.ncjrs.gov/pdffiles1/bja/184768.pdf> (accessed November 17, 2010).

⁹Amnesty International, *Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States* (N.Y.: Amnesty International USA, October 2004), v, http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf (accessed November 17, 2010).

¹⁰*Ibid.*, vi.

¹¹Earl M. Sweeney, "Ohio's Statewide Effort to End Profiling," *The Police Chief* 68 (July 2001): 16.

¹²Joseph A. Schafer et al., "Studying Traffic Stop Encounters," *Journal of Criminal Justice* 32, no. 2 (2004): 159-170, 160.

¹³*Ibid.*, 160.

¹⁴Stuart Taylor Jr., "The Case for Using Racial Profiling at Airports," *National Journal* (Sept. 22, 2001): 2877.

¹⁵Lonnie J. Westphal, "The In-Car Camera: Value and Impact," *The Police Chief* 71 (August 2004): 59-65, http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=358&issue_id=82004 (accessed November 17, 2010).

¹⁶Joseph A. Schafer et al., "Decision Making in Traffic Stop Encounters: A Multivariate Analysis of Police Behavior," *Police Quarterly* 9 (June 2006): 184, 188.

¹⁷*Ibid.*, 188.

¹⁸*U.S. v. Brignoni-Prince*, 422 U.S. 873, 881 (1975), quoting *Adams v. Williams*, 407 U.S. 143, 145-146 (1972). The facts in *Brignoni-Prince* are germane to this discussion. The U.S. Supreme Court ruled there exists an exception to the Fourth Amendment that allows roving border patrol officers to stop vehicles "only if they are aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that the vehicles contain aliens who may be illegally in the country." In this case, reasonable, articulable facts were (a) characteristics of the area; (b) proximity to the border; (c) usual traffic patterns at that locale; (d) previous experience of alien traffic; (e) information of recent illegal border crossings; (f) driver's behavior, erratic/evasive; and (g) vehicular description and appearance: station wagons, heavily loaded vehicles, extraordinary number of passengers, and passengers trying to hide from the officers.

¹⁹*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

²⁰*Whren v. U.S.*, 517 U.S. 806, 116 S. Ct. 1769 (1996).

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²¹*Pennsylvania v. Mims*, 434 U.S. 106, 98 S.Ct. 330 (1977).

²²*Hibel v. Nevada*, 542 U.S. 177, 124 S. Ct.2451 (2004).

²³*Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834 (2005).

²⁴*Arizona v. Johnson*, 555 U. S. _____, 129S. Ct.781 (2009). A gang unit task force officer documented that the backseat passenger wore a blue bandana similar to that worn by Crips gang members. He had a police scanner in his possession in the backseat, freely admitted to the officer that he was from a town known to be the home of the Crips, and he was currently on parole.

²⁵*Virginia v. Moore*, 553 U.S. at 171 (2008).

²⁶Stephen J. Fortunato Jr., "Supreme Court Ok's Racial Profiling," *In These Times*, May 19, 2008, <http://www.inthesetimes.com/article/3685/> (accessed November 18, 2010).

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